

Alert

Companies against Covid-19

March 2020

Given the crisis of Covid-19, also known as Coronavirus, companies must be aware of the legal contingencies that this crisis may cause. We refer to employment relations, possible litigation or commercial considerations, among others.

In this article we will analyse these issues to guide companies in the contingency plans they are developing in the face of this scenario.

Employment Law

Prevention of Workplace Risks

- **Obligations:** the employer must ensure the safety and health of the workers in his service. In this sense, the Law on the Prevention of Occupational Risks establishes in its Article 14.2 that the employer must adopt all necessary measures for the protection of the safety and health of his employees.

In this respect, Andersen Tax & Legal has published a Employment Alert - which you can find [here](#) - with practical recommendations from a work and prevention perspective.

- **Medical examinations:** although as a general rule a worker must show his or her consent for a medical examination to be carried out, this is not an absolute right as it gives way in cases where there is a preponderant interest such as the physical integrity or health of other employees. In this sense, article 22.1 of the Law on the Prevention of Occupational Risks provides that the voluntary nature of the monitoring of the employee's state of health will be excepted in those cases in which the performance of medical examinations is essential to verify whether the worker's state of health may constitute a danger to him or herself, to other workers or to other persons related to the company.



Employment regulations

- Unjustified absence / Teleworking: in principle, and in the strict sense, the absence of any worker from his/her job due to fear of contagion must be considered as an unjustified absence and the corresponding disciplinary regime may be applied in accordance with the applicable Collective Agreement and always respecting the principle of proportionality.

One option recommended and adopted by several companies, although not always equally applicable since its feasibility may depend on the type of business activity or the specific job - is to determine that the worker should provide his services at a distance, i.e. telework. For this purpose, the corresponding agreement must be formalised between the employer and the worker - unless there is already an internal company policy that establishes teleworking, in which case this circumstance can be used to facilitate and encourage the use of this teleworking scheme as a preventive measure.

- ERTes: if the current situation is causing a shortage of products for the company to develop its activity, or if the company's activity is paralyzed making it impossible for the workers to provide the services, a procedure of collective suspension of employment contracts (ERTE) can be initiated. In this regard, the Ministry of Employment has stated that it is analysing the application of a measure according to which "the time of unemployment consumed during the temporary suspension of the contract does not count and is replaced by the workers" (replacement of the unemployment benefit consumed during the ERTE).

Social Security

- Preventive Isolation / Temporary Incapacity: the General Directorate for Social Security Planning has issued Criterion 2/2020 (in which it reproduces the response given to the question regarding the situation of workers who, after contact with a case of bird flu, could be affected by this disease).

In said Criterion, it has been established that the period of time of preventive isolation that passes while it is being clarified whether the worker suffers from the illness will be considered a situation of Temporary Incapacity derived from a common illness with all its effects. During that temporary period, the worker cannot be required to render his services (even though he does not have any symptoms of Covid-19).

Guide from the Ministry of Labour

The Ministry of Labour and Social Economics has published a "Guide for action in the employment field in relation to the new coronavirus". In this respect, it should be remembered that this Guide is for guidance only and is for information purposes only. It is not a normal legal document that is directly and imperatively applicable.

Commercial Law

Contracts

- **Obligations:** Companies must assess whether they are meeting their obligations and whether their failure to do so could trigger an early termination of the contract. Likewise, those companies suffering economic-financial difficulties must pay special attention to their obligations to comply with ratios and, if necessary, request the appropriate waiver.
- **Force majeure or material adverse change clauses:** Commercial contracts usually include this clause, which releases the parties from their obligations if circumstances or events beyond their control make the contract impossible to perform. Force majeure clauses usually include a list of examples, usually including illness or the declaration of a state of emergency. In any case, their wording should be examined, as well as their exceptions, if any, since any contract containing a force majeure clause is subject to potential claims.
- **Obligation to mitigate damage or "best efforts":** Notwithstanding the above, it is also usual to include in contracts the obligation of one of the parties to carry out its best efforts to mitigate potential damage. If the obligated party carries out all the actions that are in its power to mitigate the damage, it may be an escape route to save the contractual breach.
- **Working days and market closings:** Many of the contractual obligations are subject to deadlines. In M&A transactions and international contracts, the definition of "working days" should be reviewed and an assessment made as to whether these deadlines can be met. This would apply in cases where the authorities declare the extension of holiday periods or the closure of certain institutions or stock markets. Special consideration should be given to obligations relating to the injection of funds subject to a time limit, which are usually a basic condition precedent for the closure of international operations.

- **Contract Signing:** Travel restrictions and quarantines can make it difficult to appear for contracts. Alternatives such as the granting of powers of attorney, electronic signatures or simultaneous signatures in different notaries' offices should be considered.

M&A Operations

In Due Diligence procedures, it is recommended that the target provides information regarding its mitigation and contingency plans, especially regarding its insurance coverage and potential impacts.

Liability of the parties: In ongoing operations it would be advisable to negotiate the limitation of liability related to Coronavirus. Depending on the sector and the negotiation capacity, the buyer could demand the inclusion of compensation for potential risks derived from it.

Insurance policies: The scope of coverage, force majeure clauses -which are usually excluded- as well as the procedure and deadlines for communication with the insurer must be reviewed.

Telematic company meeting attendance: The Articles of Association of the companies must be reviewed to see whether they include the possibility of attending the Meeting of shareholders by telematic means and if not, the corresponding modification of the Articles of Association must be carried out.

- **Directors' liability:** Directors of companies in financial difficulty must exercise special diligence to act in the best interests of the company and be vigilant in initiating the corresponding bankruptcy proceedings, where appropriate.

Litigation

In the field of Litigation, we cannot fail to analyse the legal consequences that could exist in relation to business relationships.

- If there is a contract between the parties and the terms cannot be fulfilled due to the virus: By way of illustration, on 13 February this year, the GSM Association (hereinafter, GSMA) announced the cancellation of the Mobile World Congress (MWC) 2020, which was scheduled to be held in Barcelona from 24 to 27 February 2020, inclusive.

Let's think about what happens with the contracts that the GSMA had signed with the suppliers of flowers, food products, office furniture, staff, etc., as well as the cost of the tickets that the congress attendees bought. *Is there any non-compliance by the GSMA?* No. In order to do so, we must pay attention to the content of the contracts signed with suppliers, as well as the conditions that regulate their compliance.

It is also worth introducing the reader to the existence of two key figures in Spanish law that are applicable in the event of the cancellation or impossibility of complying with contracts due to the famous coronavirus: force majeure and the *rebus sic stantibus* clause.

The first is defined as the generation of an unforeseeable or unavoidable circumstance that entails an alteration of the conditions of an obligation and, therefore, presupposes the absolute impossibility of its execution.

In this sense, we must ask ourselves whether, in the face of this scenario, breach of contract could be justified. The answer will depend on the case law in which we find ourselves. However, the impossibility of complying with a legal transaction, whether partial or total, for reasons of force majeure, exonerates the obligated parties from liability, since otherwise it would place the contracting parties in a position of disproportionate imbalance if they had to return the situation to the stadium prior to the conclusion of the aforementioned contracts and, consequently, return the amounts paid on account, as well as the payment of the tickets.

However, if in the end the institution of force majeure is not applicable to the specific case, the application of the principle *rebus sic stantibus* ("things being as they are"), which is built up by case law in Spain, could be assessed. This principle allows, in cases of supervening impossibility of fulfilling the contract due to the unpredictability of the change of circumstances, the modification of the terms of the contract or even its termination, exonerating the obliged party from liability.

- Transport of goods: The Covid-19 is also directly affecting contracts for the transport of goods, international sales and construction, among others. As it is known, these contracts set delivery periods that cannot be exceeded, except for taxable circumstances, as this would have important repercussions on the other contracts concluded by the creditor with third parties.

Let us imagine a Spanish developer who places an order for some concrete and specific tiles from an Italian manufacturer, which the latter is unable to deliver because its workers are confined at home in quarantine by the coronavirus. This situation will lead to a first breach of contract, as the Italian manufacturer does not have sufficient labour to produce the requested tiles, but, in addition, it will be causing the Spanish developer to breach another contract as it will not be able to deliver the work on the agreed date; and, surely, in application of some penal clause established in the contract, the Spanish developer will have to pay some kind of compensation to its creditor for this delay.

The transnational component of Covid-19 will mean that many disputes located in Spain will have to be dealt with in other countries. Thus, it will be essential to pay attention to the literal wording of the contracts and to the clauses of express submission of choice of court.

- Package tours: You may also wonder what happens to package tour contracts, where the travel agent contracts the airplane transfer and the cruise, and the chosen destination is affected by the virus.

In these cases, *can the consumer decide not to go on the trip without suffering any financial damage?* In this case, the consumer has the right to cancel and obtain a full refund of any payments made or, if the agency proposes to do so, he can continue the trip by docking at destinations other than those originally contracted which are not affected by the virus.

To do this, we must comply with Article 160 of Royal Decree-Law 23/2018 of December 21, on the transposition of directives on trademarks, rail transport and package tours and related travel services, which states that

"... where unavoidable and extraordinary circumstances arise at the place of destination or in the immediate vicinity which significantly affect the performance of the package or the carriage of passengers to the place of destination, the passenger shall be entitled to terminate the contract before the beginning of the journey without paying any penalty. In this case the passenger shall be entitled to a full refund of any payment made, but not to additional compensation."

- Possible infection of Covid-19 in schools: Finally, another of the points that should be addressed in this situation of global epidemic, is the responsibility of private institutions, such as a school of these characteristics, which ensures the welfare of students and teachers by taking all necessary measures to prevent the spread of the virus in their establishment.
- There is no doubt that we find ourselves in a scenario in which, despite the manifestations related to the control of the virus, the affectations caused by it are not only those suffered by the people who are infected, but they also surpass both existing and future commercial relations at the time when the virus originated, the scope of which is unpredictable.

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