TRAVERS SMITH

Insights for In-house Counsel

October 2020

© Travers Smith 2020

Insights for In-house Counsel

Our regular round-up of recent developments and topics for your radar, news on training and networking events for in-house counsel, and an update on our legal tech initiatives. Highlights from this edition include:

COVID-related finance issues

Recent announcements on the Government's COVID-related finance measures

COVID Test and Trace

Questions for employers and advice on collecting personal data about customers

CIGA

Corporate Insolvency and Governance Act – the new restructuring process, rent mitigation and implications for terminating contracts on insolvency

Leasehold portfolios

Advice on restructuring leasehold portfolios

Force majeure

Case update and details of our Force Majeure app

Brexit

Links to our full suite of guidance on contingency planning, our webinar on future trade arrangements, details of the post-Brexit immigration system and a reminder to check dispute resolution mechanisms in your contracts

Sustainable Business

Links to the collection of resources on our website on Sustainable Business issues

Bribery

Update on anti-bribery measures to take account of heightened risks during the COVID crisis

Cyber-security

News of recent fines

Directors' duties

New guidance on section 172 reporting

Corporate and tax reporting

An update on corporate and tax reporting obligations

Plus

- Legal Tech news
- Events and training for in-house counsel

Contents

COVID-related finance issues – p.3–4

Brexit – p.5

Sustainable Business – p.6

Data protection & cyber-security – p.7–8

Contracts – p.9–10

Dispute resolution – p.11

Intellectual property/technology – p.12

Anti-bribery measures – p.13

Latest issues for employers – p.14–15

Real estate issues – p.16–17

Company meetings – p.18

Corporate governance & reporting – p.19–21

Tax matters – p.22

Finance – p.23–24

Pensions – p.25

Legal tech – p.26

Events and training – p.27

UK Government COVID-related financial support measures – latest

COVID-19 job retention measures

The Government's Coronavirus Job Retention Scheme (CJRS) will close on 31 October 2020. Under the CJRS, employers have been able to place workers on furlough (paid leave) where their work has been affected by the pandemic, provided such workers are paid at least 80% of their normal wages up to a cap of £2,500 per month (prorated for any time worked during furlough). The Government subsidy, originally 80% of wages up to the cap, reduced to 70% in September and will fall to 60% for October.

In its place, the Government has announced a new Job Support Scheme (JSS) to provide financial support for employers who retain staff on reduced hours. Under the JSS, employees must work at least a third of their normal hours and be paid for this by their employer. The Government and the employer will then each pay a third of the equivalent salary for the remaining hours not worked, with the Government contribution capped at £697.92 per employee per month.

The JSS will remain in place for six months from 1 November 2020. All UK employers will be eligible but larger employers will only be able to benefit if they can show a decline in revenue during the COVID-19 crisis and will also be expected not to pay dividends while receiving the subsidy.

As a further incentive to retain staff, the Government has also announced a job retention bonus. A £1,000 bonus will be paid to UK employers for each returning furloughed employee who remains continuously employed until 31 January 2021, provided they are paid an average of £520 per month between 1 November 2020 and 31 January 2021. Some employers have announced that they do not, as a matter of principle, plan to claim the bonus. Others have said that the bonus, and the JSS, will unfortunately not be enough to prevent redundancies.

Read more about the CJRS **here**, the JSS **here** and the job retention bonus **here**.

Key contact:

Ed Mills
Head of Employment
+44 20 7295 3424
ed.mills@traverssmith.com

UK Government COVID-related financial support measures – latest

COVID-19 Government-backed finance packages

In response to the liquidity crisis resulting from COVID 19, the Government introduced a range of loan guarantee schemes to promote lending to companies. Depending on the prospective borrower's annual turnover and needs, it can apply for loans under various schemes, including the:

- Bounce Back Loan Scheme ("BBLS") for businesses of any turnover;
- Coronavirus Business Interruption Loan Scheme ("CBILS") for businesses with an annual turnover of up to £45 million; or
- Coronavirus Large Business Interruption Loan Scheme ("CLBILS") for businesses with an annual turnover of over £45 million.

Many of these loans will start to fall due for payment in 2021 and a recent report by **TheCityUK** warns of the urgent need to take action to tackle the projected £35bn of unsustainable debt deriving from COVID-19 loans. The report sets out solutions for converting, restructuring and repaying this debt (in particular from the BBLS and CBILS) to secure the survival of thousands of unlisted SMEs, to save jobs and to drive Britain's economic recovery and growth.

The Government recently **announced** that, as part of its winter economy plan, applications for the above schemes will now remain open until 30 November 2020. A new guarantee scheme is to be launched in the new year. Furthermore existing BBLS borrowers are set to benefit from a new "Pay as You Grow" flexible repayment system, with the potential for extending the length of a BBLS loan from six years to ten, requesting interest-only periods of up to six months and/or payment holidays. CBILS accredited lenders will now have the ability to extend the length of loans from a maximum of six years to ten years if it will help businesses to repay the loan.

For more details on the Government backed finance packages, see our guidance note **here**.

Key contacts:

Matt Ayre
Head of Finance
+44 20 7295 3304
matt.ayre@traverssmith.com

Edward Smith
Partner, Finance
+44 20 7295 3482
edward.smith@traverssmith.com

Brexit

With all the difficulties caused by the COVID-19 crisis, businesses could be forgiven for having put Brexit to the back of their 'to do' lists.

However, the end of the transition period is fast approaching and it is essential to revisit contingency plans.

For discussion of the latest state of play in negotiations and what you should be doing to prepare for the end of transition, see our webinar **"Are you ready for Brexit?"** featuring leading trade commentator Dmitry Grozoubinski, together with a panel of our own experts.

Here, you can also read our thoughts on whether a deal is still doable with the EU on key outstanding issues such as state aid, given the recent controversy over the provisions of the Internal Market Bill.

In reviewing contingency plans, our **checklist of key Brexit readiness issues** is a good place to start.

For more detailed guidance on your contingency planning, our **Brexit portal** contains a collection of briefings from across the firm on a wide range of issues relevant to Brexit preparation, including:

- Business travel to the EU from 2021
- Immigration
- Data protection
- Stockpiling
- Contracts (including INCOTERMS)
- Product conformity marking
- Jurisdiction and disputes
- Social security issues

Key contacts:

Ben Chivers
Partner, Commercial, IP & Technology
+44 20 7295 3370
ben.chivers@traverssmith.com

Jonathan Rush
Knowledge Counsel, Commercial, IP & Technology
+44 20 7295 3471
jonathan.rush@traverssmith.com

Sustainable Business

Sustainability remains a key imperative for the business community, despite the pressing need to overcome the challenges of the COVID crisis and the upheaval caused by Brexit.

Companies worldwide have publicly committed to work towards achieving at least some of the UN's **Sustainable Development Goals**. The UK Government has **enshrined into law** its commitment to Net-Zero carbon emissions by 2050 and has **embraced the Build Back Better agenda**, recognising that the COVID crisis has highlighted the need to build greater resilience to systemic risk, including climate change, into Government strategy and our business models.

The sustainability agenda is inevitably resulting in a wave of new regulation, a trend which looks set to continue in the coming years.

We are committed to supporting your business in the transition to a more sustainable future. On our **Sustainable Business Hub**, you will find a range of resources, including news, views and guidance, designed to help you and your business to anticipate regulatory change, proactively manage risk, and achieve your sustainable business objectives.

Please contact Doug Bryden, George Weavil, Rachel Woodburn or your usual contact at the firm if you would like to discuss any Sustainable Business issues.

Key contacts:

Douglas Bryden
Partner, Operational Risk & Environment
+44 20 7295 3205
douglas.bryden@traverssmith.com

George Weavil
Partner, Private Equity & Financial Sponsors
+44 20 7295 3392
george.weavil@traverssmith.com

Rachel Woodburn
Head of Knowledge & Learning
+44 20 7295 3221
rachel.woodburn@traverssmith.com

Data protection and cyber-security

Test and Trace: collecting personal data about customers

Much has been made in the press recently of the additional burdens which Government guidance has placed on businesses, particularly in the leisure and hospitality sectors, in terms of the personal data which they will have to collect about their customers and guests as they began to ease out of lockdown.

For more information on this topic, please refer to the following article:

Test and Trace: collecting personal data about customers

***SCHREMS II/FACEBOOK IRELAND*: IMPLICATIONS FOR PERSONAL DATA TRANSFERS OUT OF THE EEA**

The big data protection story of the summer was the European Court (CJEU) judgment in *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems*. In a reprise of the CJEU decision a number of years ago in Chapter I of the saga, which resulted in the demise of the US Safe Harbor Regime, the CJEU found that the EU-US Privacy Shield, which replaced the US Safe Harbor regime, could no longer be relied on either for safely transferring personal data from the EU to the US, in part, again, because it did not prevent US surveillance authorities from accessing such data.

The CJEU also examined the use of standard contractual clauses as a valid mechanism for transferring personal data from the EEA, and following much of the Advocate General's opinion from late 2019, found that although such clauses were still valid for use by organisations to transfer data to non-whitelisted countries outside the EEA, there were important caveats, which are explained in more detail in our **full briefing**, together with the implications of the judgment for EU-UK data flows in light of Brexit and once the transition period ends.

We are awaiting further guidance from the European Data Protection Board on additional measures which organisations can take to supplement the standard contractual clauses, where appropriate, and ensure the safety of personal data in those countries whose data protection regimes are lacking in comparison to the regime in the EEA.

The European Commission has also announced plans for a new set of standard contractual clauses by the end of the year to address the points raised by the CJEU in Schrems II, along with a number of transfer scenarios which the current set of standard contractual clauses do not cover. Talks are also ongoing between the European Commission and the US to address the concerns raised with the EU-US Privacy Shield.

***WM MORRISONS SUPERMARKETS V VARIOUS CLAIMANTS*: DATA CONTROLLERS TAKE HEED**

In April, the Supreme Court finally exonerated Morrisons in the class action lawsuit brought by its own staff in respect of the leak of their personal data. A former employee, in a revenge attack, leaked the personal data of Morrisons staff online, using a USB stick to which he had transferred personal data from a work laptop.

The High Court originally found Morrisons vicariously liable for breach of the Data Protection Act 1998, breach of confidence and misuse of private information. The Supreme Court ultimately decided that Morrisons should be relieved of vicarious liability, as the embittered employee had effectively gone off on a frolic of his own.

However, the Supreme Court judgment made clear that the Data Protection Act did not as a general rule exclude vicarious liability. Therefore, an employer could, where an employee was acting in their capacity as a separate data controller (as in this case), have been liable for the acts of the employee in breaching its obligations as a data controller under data protection law.

The Morrisons case is a timely reminder of the importance of enforcing cybersecurity procedures (all the more important currently given the cybersecurity risks presented by employees working remotely). Even though Morrisons was exonerated, this was at a cost of significant time and resources in defending the claim. For further details please see our **briefing**.

Data protection and cyber-security

Cyber-security fines

The ICO is shortly expected to announce the final penalties levied against Marriott International and BA in respect of data breaches committed soon after the implementation of GDPR in May 2018. Since the ICO announcement, last summer, of plans to fine them £99m and £183m respectively, the companies have been busy making representations to the ICO. The impact of COVID on the travel and leisure sectors may influence the ICO's final decision.

Marriott is now the subject of a class action in respect of the same data breach, brought by a journalist on behalf of individuals whose personal data was exposed as a result of the breach, reflecting the new rights under GDPR and the Data Protection Act 2018 for individuals to mandate organisations to bring claims on their behalf. Similar action was taken against BA last autumn.

The Marriott class action is on an "opt-out" basis, meaning that the claim is brought on behalf of every member of the potential class of claimant unless they opt out (as opposed to claimants having to actively opt in). The opt-out basis increases the pool of claims exponentially, thereby increasing the downside litigation risk for the defendant.

Age appropriate design code (and other ICO guidance)

The Age Appropriate Design Code came into force on 2 September and applies to online services (such as apps, websites, search engines, streaming services, and connected devices and toys), which are accessed by or likely to be accessed by children (defined as anyone under the age of 18), potentially a very wide remit.

The code essentially requires relevant providers (based on the target age range and whether the service is directed at children, or likely to be accessed by children) to ensure that their services are designed with the best interests of the child in mind. This will apply to the use of personal data and privacy settings, following 15 standards linked to GDPR core concepts such as privacy by design and default, transparency and accountability. The ICO has provided comprehensive guidance on the code, which can be found **here**. Organisations which are within scope have 12 months from 2 September 2020 to ensure compliance.

Key contacts:

Dan Reavill
Head of Commercial, IP & Technology
+44 20 7295 3260
dan.reavill@traverssmith.com

Louisa Chambers
Partner, Commercial, IP & Technology
+44 20 7295 3344
louisa.chambers@traverssmith.com

Contracts

The Corporate Insolvency and Governance Act 2020: terminating supply contracts on insolvency

The Corporate Insolvency and Governance Act 2020 (CIGA) received Royal Assent on 25 June 2020. CIGA contains restrictions on termination of contracts which are intended to ensure that suppliers do not undermine rescue efforts for companies in financial difficulty.

The relevant provisions prevent a supplier enforcing contractual rights to terminate or to do "any other thing" as a result of its customer becoming subject to a "relevant insolvency procedure."

CIGA also prevents suppliers from terminating supply contracts based on past breaches which are unconnected with the customer's insolvency, where the right to terminate was not exercised before the start of the relevant insolvency procedure affecting the customer. The impact of these measures is to make it much more difficult for suppliers to terminate contracts once a customer is subject to an insolvency procedure

Please see our **full briefing** or our recent **contract law update webinar**, for further details about CIGA, the implications for suppliers, and limitations to its scope, and for updates more generally on contract law developments related to Covid and Brexit.

Our articles below summarise other measures contained in CIGA to facilitate corporate restructurings and rent mitigation negotiations.

The limitaions of force majeure clasuses – *2 ENTERTAIN VIDEO LTD & ORS V SONY DADC EUROPE LTD*

The High Court's decision in the case of *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* provided an important reminder of the limits of force majeure clauses, highly relevant in current circumstances.

Sony's warehouse provided storage and distribution facilities to 2 Entertain, but the warehouse and its contents were destroyed during an arson attack and 2 Entertain claimed that Sony was in breach of their agreement. Sony claimed that the fire was a trigger event for the force majeure clause. However, this was rejected by the court because although the fire was 'unforeseeable', Sony could have taken preventative steps (such as adequate warehouse security).

The case serves as a timely reminder that those affected by a force majeure event will often also be expected to continue to take reasonable steps to comply with terms of the agreement which they can still perform and to mitigate the effects of any non-performance as far as possible.

Please see our full **briefing** for further details. For a discussion of key issues we are coming across with force majeure clauses in the light of COVID-19, see our recent **contract law update webinar**.

Contracts

Force majeure app

If you would like to access our force majeure app, designed to help you to identify contracts with force majeure provisions which could be triggered by coronavirus, together with related provisions such as associated termination rights, please get in touch with Richard Brown.

Unpicking indemnities: webinar

For a back-to-basics session on indemnity clauses from our Commercial, IP & Technology department, please take a look at our **recent webinar** which considers whether indemnities are really worth including in a contract, and if so, how to make the most of them.

CMA beats the drum on resale price maintenance

In our **briefing**, we examine how the UK Competition and Markets Authority (CMA) has effectively put suppliers and retailers on notice that it will not tolerate efforts to fix or otherwise stabilise resale prices for consumers, having assessed five cases in the past year and awarded fines totalling £13.7 million.

Key contacts:

Richard Brown
Partner, Commercial, IP & Technology
+44 20 7295 3254
richard.brown@traverssmith.com

Vivien Halstead
Knowledge Counsel, Commercial, IP & Technology
+44 20 7295 3241
vivien.halstead@traverssmith.com

Dispute resolution

FCA test case concludes, but the Supreme Court beckons

The English High Court has recently handed down its judgment in its seminal test case brought against eight insurers by the FCA on the question of whether certain non-damage business interruption insurance covers COVID-19 related losses. The 156-page judgment provides guidance on how the "Disease" and "Prevention of Access/Public Authority" clauses in the 21 representative policy wordings before the Court are to be construed in the context of the COVID-19 emergency and the UK Government and public's response to it. Whilst insurers and the affected 370,000 policyholders will still need to look at the judgment in detail to see how the guidance it provides applies to individual policies and claims, the FCA considers the judgment a success as the Court has accepted a number of the FCA's arguments, in particular on the trigger for "Disease" coverage. The FCA and the relevant insurers have agreed that any appeals against the judgment (which may be a "leap-frog" appeal to the Supreme Court) are to be made expeditiously.

For further information on the background to the judgment, please read **this article** prepared by our Dispute Resolution team.

Brexit: a reminder to consider dispute resolution mechanisms in contracts

As the end of the post-Brexit transition period approaches, with no sign as yet of an EU/UK future trade agreement, it is worth bearing in mind that both the way in which the English courts and the courts of EU member states allocate jurisdiction over cross-border disputes, and the way in which EU member states recognise and enforce English court judgments, may well change at the start of next year. This in turn has a bearing on the appropriate dispute resolution mechanism to include in contracts with an EU element.

This **short article** and this **longer briefing** by our Dispute Resolution team contain a timely reminder of the options, and the potential risks and benefits that each one entails.

Key contacts:

Rob Fell
Head of Dispute Resolution
+44 20 7295 3292
rob.fell@traverssmith.com

Hannah Hartley
Knowledge Counsel, Dispute Resolution
+44 20 7295 3103
hannah.hartley@traverssmith.com

Intellectual property/ technology

***SKY V SKYKICK*: broad trademark registrations require justification**

In April 2020, in an important case for trademark owners and applicants, the High Court found that trademarks should only be registered in respect of broad categories of goods and services, if there is a rationale for doing so, and with a genuine intention to use the trademarks in respect of such goods and services.

A wide registration could otherwise be interpreted as bad faith resulting in a partial invalidation of the registration by the courts.

The judgment did at least recognise that there might be cases where trademarks would be registered in respect of broad categories, not because of bad faith, but where it is difficult to define the precise goods and services covered by the registration.

This is helpful for trademark owners in the tech sector, where pinpointing the precise goods and services that a trademark registration should cover can be a challenge. Please see our **briefing** for further details.

Online Intermediation Services Regulations

The Online Intermediation Services Regulations (OIS Regulations) came into force on 12 July 2020, and apply to providers of online intermediation services, such as social media platforms, e-commerce marketplaces, and online search engines.

The OIS Regulations are intended to level the playing field for those business users of such services which are typically asked to agree to unilaterally-imposed terms, and to promote trust, fairness and transparency in the online platform economy.

Key contacts:

Dan Reavill
Head of Commercial, IP & Technology
+44 20 7295 3260
dan.reavill@traverssmith.com

Louisa Chambers
Partner, Commercial, IP & Technology
+44 20 7295 3344
louisa.chambers@traverssmith.com

Anti-bribery measures

Anti-bribery and corruption during COVID-19: key compliance steps

Bribery and corruption risks are often heightened in times of crisis. This is particularly true in the current situation, due to a financially volatile climate, increased cyber-security threats and diverted corporate focus towards other COVID-19 risks. These factors make it all the more important for companies to re-assess bribery and corruption risks and have in place adequate anti-bribery and corruption (ABC) mitigation measures.

Our **article** explores several new bribery and corruption challenges faced by organisations in light of COVID-19, and ways in which internal compliance policies and procedures should be updated to address such challenges.

Our last **ABC newsletter** contained an overview of the rise of fraudulent activity during COVID-19 and other key updates in this area. Look out for our Autumn ABC newsletter, due to be published soon.

Key contact:

Doug Bryden
Partner, Operational Risk & Environment
+44 20 7295 3205
douglas.bryden@traverssmith.com

Latest issues for employers

Latest COVID-19 job retention measures

For the latest news on the Government's COVID-19 job retention measures, including the new Job Support Scheme (JSS) which will replace the current furlough arrangements (the Coronavirus Job Retention Scheme (CJRS)) with effect from 1 November 2020, please see our article **here**.

Test and Trace: ten questions for employers

The Government's Test and Trace scheme raises a number of issues for employers in terms of the impact on the workforce. Read our Q&A guide for employers here:

Test and Trace: ten questions for employers

We have also produced a Q&A document covering key considerations for businesses in relation to their customers under the Test and Trace scheme, which is available **here**.

Post-Brexit immigration system

The Government's new points-based immigration system is expected to take effect from 1 January 2021, following the end of the Brexit transition period.

Under the new system, employers will need to hold an immigration sponsor licence to sponsor the visas of new EU employees who arrive in the UK from January 2021 onwards.

Employers who do not yet hold a sponsor licence should consider applying now. At present, the typical processing time for a licence application is around four weeks for a straightforward licence application, but processing times are likely to expand with an influx of applications towards the end of the year.

Those who already hold a licence should audit their compliance systems and processes, check that the licence is fully up to date and add any relevant linked entities in the EU to facilitate future intragroup secondments.

From January 2021, newly arriving EU and non-EU nationals alike will require work visas to work in the UK – for most, this will take the form of a new employer-sponsored visa available for skilled workers. This will result in significantly increased costs for employers hiring EU nationals who are new entrants to the UK.

Existing EU employees and any EU nationals who arrive in the UK before the Brexit transition period ends on 31 December 2020 will be covered by the EU Settlement Scheme. They will need to apply to be granted either settled or pre-settled status by the deadline of 30 June 2021, which will allow them to continue living and working in the UK beyond that date.

For more information on the new immigration system please see our **briefing note**.

Off-payroll rules

Plans to extend the new off-payroll working rules to the private sector have been delayed until April 2021.

For some time, the Government has been concerned about tax avoidance where workers provide their services through intermediaries (such as their own "personal services company" or "PSC") and can disguise what is essentially an employment relationship as self-employment. Unlike payments to employees, fees paid to PSCs do not generally attract withholding tax obligations and social security contribution liabilities. Further, the owner of the PSC can choose to extract value from their company in a more tax-efficient way such as the payment of dividends.

Latest issues for employers

To combat avoidance in this area, legislation was introduced that made it impossible to avoid UK tax simply by providing services through a personal services company. The rules (known as "IR35" after the press release that originally announced them and as the "off-payroll working rules") deem payments made to a PSC to be employment income if, were it not for the existence of the PSC, the relationship between a business organisation and worker would be treated (for tax purposes) as one of employment. These anti-avoidance rules apply wherever the organisation is incorporated or resident.

Until recently, where IR35 applied, it was the PSC that was responsible for accounting for the income tax and social security contributions due. The Government modified the rules in 2017 with the effect that, in the case of off-payroll workers in the public sector, it is the business (or other person paying the PSC's fee) that has to collect the tax and social security contributions.

The Government perceived this change as having improved compliance with IR35 and, as a result, announced that it would be extended to the private sector from April 2020. However, in light of the Covid-19 pandemic, the changes were delayed for a year and will now take effect from April 2021. Although there have been criticisms of the new rules, the Government is clear that this is a deferral and not a cancellation and that companies engaging workers in this way should prepare for the changes.

Following a review earlier in the year, some modifications have been made to the proposals, however they will still create administrative and financial burdens for the relevant parties.

One important change is that the new rules will not apply to a business engaging workers through PSCs if the business does not have a UK presence. In such circumstances, however, the PSC will have to consider whether it must pay income tax and social security contributions under the existing IR35 rules.

Read more:

The new off-payroll working rules – do they apply to my business?

The new off-payroll working rules – what do you have to do?

Key contacts:

Ed Mills
Head of Employment
+44 20 7295 3424
ed.mills@traverssmith.com

Mahesh Varia
Head of Incentives & Remuneration
+44 20 7295 3382
mahesh.varia@traverssmith.com

Real estate issues

There have been significant changes in the real estate landscape over recent months, mainly as a result of the COVID-19 crisis. The landlord and tenant relationship has shifted to reflect the current financial situation, and the Land Registry has responded to pleas to update its requirements to accommodate the lockdown. There have also been wide-ranging planning changes and proposals.

Landlord and tenant negotiations

During the lockdown, many buildings were closed and businesses forced to stop trading, which had a huge impact on their financial status and their ability to pay rent. The Government introduced measures in the Corporate Insolvency and Governance Act 2020 to provide a breathing space for tenants. These measures were initially intended to last until 30 June but were extended to 30 September and have now been further extended until 31 December.

The Government also published a Code of Practice for commercial property relationships, intended to support landlords and tenants to negotiate affordable rental agreements, building on the discussions that are already taking place by giving parties affected by the crisis the tools to come to a mutually beneficial agreement.

Click **here** to read our guide for landlords and **here** for our advice for tenants.

Restructuring leasehold portfolios

As lockdown in the UK initially eased, many companies began taking stock of lessons learned. This includes reviewing their current exposure to real estate and their anticipated property requirements in the longer term.

For assistance on this, please see our **Q&A for office occupiers** currently considering their property needs, and an accompanying **top tips summary for tenants**.

The return of turnover rents

CVA activity is rising in 2020 to cope with a seismic shift in the retail and casual dining sector. Landlord CVAs have traditionally focused on a company's ability to exit underperforming stores. They have also allowed companies to restructure their rental obligations for the remainder of their portfolio over the longer term.

The use of CVAs in this manner has not been popular with the landlord community, whose investments have in some cases been severely impacted by this trend.

More recently, some CVAs have sought to use turnover rents as an answer to this problem. These function as a mechanism to reflect changes in market rent over time which removes the rent burden when trading is poor, but which allows the landlord some upside when times are better.

Click **here** to read our note on this topic.

Land Registry changes

The Land Registry will now accept a range of deeds and documents that have been signed using the Mercury Protocol or electronic signing platforms such as Docusign and Adobe Sign, including:

- transfers, leases, charges, and easements;
- discharges or releases in form DS1 or form DS3 and equivalent deeds in respect of unregistered land;
- powers of attorney other than lasting powers of attorney; and
- assents of registered or unregistered land.

Click **here** to read more on their requirements.

Real estate issues

Planning changes

There have been various changes to the planning system this year. Two of the most significant are:

- the Government's publication of its long-anticipated planning regulation reform proposals titled **'Planning for the Future'**, which is open for consultation until 29th October 2020. It contains the Government's proposals for a significant overhaul of the planning regime and replacement of the current model with a streamlined, rules-based system. The proposals are split into three concepts:
  - Planning for Development
  - Planning for Beautiful and Sustainable Places and
  - Planning for Infrastructure.

The first pillar is the most controversial in that it would involve a move away from the uncertainties of the 'discretionary' model towards a zonal system in which all land is categorised as one of three zonal categories: growth areas (in which sites would receive automatic, outline approval for development), renewal areas (where there would be a statutory presumption in favour of smaller-scale development), or protected areas (in which development would be restricted). Click **here** to read more.

- Since 1st September we have had a new Use Classes Order ("UCO"). It is significantly different from the previous one, and the changes override much of the tinkering that has gone on with the UCO over the last few years. It appears to have been designed to assist with the economic challenges arising from Covid-19 but also feeds into the Government's current 'build, build, build' philosophy.

In the new UCO, Classes A1 (retail), A2 (professional services), A3 (restaurants) B1 (Business), D1 (non-residential institutions) and D2 (Assembly and Leisure) have been revoked, and there are new classes E (Commercial, Business and Service) incorporating A1, A2, A3 and B1 uses and some D1 (medical, creche and day-care), and D2 (indoor sport, recreation and fitness uses), F1 (Learning and non-residential institutions) and F2 (Local Community shops). Some uses have been removed from the UCO's remit, so that they become sui generis and therefore require planning consent for any change of use. This includes pubs and drinking establishments with expanded floor provision; hot food takeaway for hot food consumed off-premises; live music venues, cinemas, concert, bingo and dance halls. Read more **here**.

Key contacts:

Simon Rutman
Head of Real Estate
+44 20 7295 3379
simon.rutman@traverssmith.com

Emma Pereira
Partner, Real Estate
+44 20 7295 3283
emma.pereira@traverssmith.com

Romola Parish
Head of Planning, Real Estate
+44 20 7295 3440
romola.parish@traverssmith.com

Company meetings

Extension of CIGA temporary provisions affecting company meetings

BEIS has **announced** that the provisions in the Corporate Governance and Insolvency Act 2020 ("CIGA"), which grant flexibility in relation to the holding of general meetings and AGMs, have been extended to apply to all general meetings held on or before 30 December. The extension, made by way of **The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020**, means that companies can hold entirely (or partially) virtual meetings, or limit the number of attendees to the required quorum, irrespective of the wording in their articles of association, until this date. The ability to postpone general meetings under CIGA (which enabled companies whose AGMs were due between 26 March and 30 September to hold them at any time up to 30 September) has not been extended and will expire. For further details please see our **client briefing** on AGMs.

New rules on polls for traded companies

From 3 September 2020, under the **Companies (Shareholders' Rights to Voting Confirmations) Regulations 2020**, which apply to traded companies (including main market companies):

- companies must provide a confirmation of receipt for votes which are cast on an electronic poll; and
- shareholders have the right to request information from companies to enable them to confirm that their vote has been validly recorded and counted on a poll, whether electronic or otherwise.

Traded companies should therefore ensure they have adequate processes in place to comply with these new provisions.

Key contacts:

Neal Watson
Partner, Corporate M&A and ECM
+44 20 7295 3250
neal.watson@traverssmith.com

Aisling Arthur
Senior Associate, Corporate M&A and ECM
+44 20 7295 3091
aisling.arthur@traverssmith.com

Beliz McKenzie
Knowledge Counsel, Corporate M&A and ECM
+44 20 7295 3325
beliz.mckenzie@traverssmith.com

Corporate governance and reporting

New ICSA guidance on section 172 reporting

The Chartered Governance Institute ("ICSA") has published updated guidance on directors' general duties under the Companies Act 2006, which includes an additional section on the section 172 reporting requirement. A "section 172 statement" is now required to be included in the strategic reports, and on the websites, of large private companies and all public companies. Although the ICSA guidance is aimed primarily at quoted public companies, much of the note can also be applied to private companies. The guidance makes suggestions of what could be included in the statement, in relation to each of the factors listed in section 172 of the Companies Act 2006:

- **The longer term:** how the longer-term consequences of board decisions have been taken into account, in areas such as strategy and business plan.
- **The company's employees:** a workforce description; methods of workforce engagement and how views are communicated to the board and considered; how the workforce contributes to the success of the business model and strategy; how workforce contribution is measured; how the company invests in its workforce; risks associated with its workforce; and, corporate culture. ICSA suggests that companies should consider including examples or case studies reflecting the above.
- **Relationships with suppliers, customers and others:** methods to identify and engage with suppliers, customers and others to obtain their views, and the effect on board decisions; information on customer relations, prompt payment to suppliers, supply chain sustainability and resilience; and responsible sourcing.
- **Impact on the community and the environment:** the disclosure may include the environmental impact of the company's operations (including how it is assessed, monitored and mitigated); how the company is, and will be, contributing to environmental concerns relating to its operations; and how the company has engaged with the local community in which it operates and the impact of its operations on that community.
- **Safeguarding the company's reputation:** a discussion of business conduct, values and culture, as well as the monitoring and mitigating of reputational risks.
- **Acting fairly between members of the company:** how the company has achieved a balance between major investors and minority shareholders; engagement with other relevant key stakeholders.

Although companies have been complying with section 172 for several years now, there is a heightened focus on it in the context of the new reporting requirement and it is worth bearing in mind the ICSA guidance, as well as the **FRC Guidance on Strategic Reports** and the **FRC's additional statement**, when drafting a section 172 statement.

New ICSA terms of reference

ICSA has published its revised template terms of reference for **audit**, **remuneration**, **nomination** and **risk** committees, which will be relevant to listed companies. These have been updated to reflect the 2018 Corporate Governance Code and 2018 FRC Guidance on Board Effectiveness, and companies should think about updating their existing terms of reference where appropriate to reflect the new ICSA templates.

Pre-emption Group extends relaxation of thresholds for non-pre-emptive issuances

In light of the continued uncertainties of COVID-19 and the developing pipeline of equity offerings over the third quarter of the year, the Pre-Emption Group ("**PEG**") has issued a **statement recommending the continued relaxation of the usual thresholds for non pre-emptive issuances**. The PEG extends, until 30 November 2020, its April recommendation that, on a case-by-case basis, institutional investors continue to consider supporting non pre-emptive issuances by companies of up to 20% of their issued share capital. This has been extended from the usual threshold of 10% (5% for general corporate purposes with an additional 5% for specified acquisitions or investments). The PEG emphasises that companies should only use this flexibility if they are experiencing "extreme circumstances" and where an issuance is required to fund an immediate concern. The particular circumstances of the company should be fully explained, including how the company is supporting its stakeholders, and effective consultation with the company's shareholders needs to take place. From 30 November 2020, companies are expected to revert to seeking approvals for the usual maximum thresholds (please see above) as set out in the PEG's **Statement of Principles**.

Corporate governance and reporting

Updated FRC Guidance on corporate governance and reporting

In May 2020, the FRC published updated versions of its **guidance for companies on corporate governance and reporting during the COVID-19 pandemic**. The Guidance highlights that, in these difficult times, the need for clear leadership, strong governance and effective decision-making based on reliable information is stronger than ever and it notes that boards should consider the following:

- how the flow of management information can be maintained;
- the impact of COVID-19 on risk management processes and internal controls;
- whether a dividend is appropriate.

In addition, the Guidance covers viability statements, certain matters to be included in the annual accounts (going concern statements, significant judgments, events after the reporting date, exceptional items and alternative performance measures) and the interim accounts.

In July 2020, the FRC also published its **thematic review** of company reporting since the onset of the COVID-19 pandemic and noted that interim reports would have benefited from more extensive disclosures on the impact of COVID-19. The FRC also highlighted the importance of explaining not just how COVID-19 has affected the company's performance, but how it might impact on future prospects. The review identifies areas where COVID-19 disclosures could be improved and provides examples of the level of detail in what the FRC considers to be better disclosures.

Key contacts:

Neal Watson
Partner, Corporate M&A and ECM
+44 20 7295 3250
neal.watson@traverssmith.com

Aisling Arthur
Senior Associate, Corporate M&A and ECM
+44 20 7295 3091
aisling.arthur@traverssmith.com

Beliz McKenzie
Knowledge Counsel, Corporate M&A and ECM
+44 20 7295 3325
beliz.mckenzie@traverssmith.com

Corporate governance and reporting

Energy consumption and emissions reporting under SECR

Quoted and unquoted companies and LLPs within scope of the Streamlined Energy and Carbon Reporting (SECR) framework should be gearing up to produce SECR-compliant reports. SECR is designed to simplify organisations' reporting of energy use and carbon emissions, improving on the now closed Carbon Reduction Commitment (CRC) and the Energy Savings Opportunity Scheme (ESOS), which remains in force, but is limited in scope and does not require public disclosure.

SECR reporting is part of Companies House annual filings. For companies, the information will be contained in their directors' report. LLPs will need to file a separate carbon and energy report. The requirements apply from 1 April 2019, so any entity with a financial year beginning on or after that date must comply with SECR in their next set of reports. For example, an entity with a 31 December year end must file a SECR-compliant report shortly after 31 December 2020.

For more information and to help you determine whether your organisation is in scope, please refer to our full **briefing**.

Modern Slavery – transparency in supply chains

The Government has stated its commitment to "an ambitious package of measures to strengthen and future-proof the Modern Slavery Act's transparency legislation" and has recently published its response to the Transparency in Supply Chains Consultation.

Key proposals include making reporting against the areas contained under Section 54(5) mandatory, introducing a single reporting deadline and considering further enforcement options for non-compliance.

For more on these proposals, please refer to our full **briefing**.

Key contact:

Doug Bryden
Partner, Operational Risk & Environment
+44 20 7295 3205
douglas.bryden@traverssmith.com

Tax matters

Reporting under DAC 6

EU directive 2018/822 (DAC 6) introduces a new tax reporting regime in the UK which came into force on 1 July 2020. These rules apply regardless of the outcome of the Brexit process and catch "cross-border" transactions which satisfy certain "hallmarks".

The rules have some similarities with the UK's existing disclosure of tax avoidance schemes (DOTAS) regime, and aim to ensure that tax authorities across the EU receive information about matters which may involve tax planning at an early stage, to enable swift challenges or changes to the law to counteract aggressive planning. The hallmarks are, however, widely drafted and are likely to capture certain transactions which do not have a tax avoidance motive, and so will need to be carefully considered in all transactions with a "cross-border" element. If disclosure is required, a substantial amount of information must be provided, including the identities of all participants and advisers, and a summary of the arrangement, including explaining why it is caught.

The first disclosures were due to be required this summer (2020) but the UK (along with most, but not all, EU member states) have pushed back the first reporting dates due to the difficulties that businesses are facing as a result of the Covid-19 pandemic. As a result of this delay, the first reports to HMRC will be required towards the end of January 2021. It should be noted that the rules will apply retrospectively to any arrangements put in place on or after 25 June 2018. Taxpayers should take advantage of the extension of time to consider and discuss with their advisers whether disclosures need to be made in relation to historic transactions and structures and to ensure that DAC 6 is properly addressed in relation to ongoing matters.

Failure to prevent – a refresher

It is now three years since the enactment of the Criminal Finances Act 2017 and the "failure to prevent the facilitation of tax evasion" offence (the **FTP Offence**).

In these challenging times, it is important that businesses do not forget their obligation to keep prevention policies and procedures up to date. This includes updates to reflect new working practices for their workforce and any increased risks associated with potentially reduced levels of supervision while employees work from home.

Read more **here**.

Key contact:

Hannah Manning
Partner, Tax
+44 20 7295 3372
hannah.manning@traverssmith.com

Finance

COVID-19 Government-backed finance packages

For the latest news on the COVID-19 Government-backed finance packages, please see our article **here**.

The Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 (the "Act") received Royal Assent on 25 June 2020 following a fast-tracked legislative process, with the majority of provisions taking effect from 26 June 2020. The Act introduces a number of temporary measures in response to the COVID 19 crisis, as well as new permanent reforms of the UK insolvency regime.

The Act introduces a new restructuring tool into the Insolvency Act 1986 in the form of a free-standing moratorium which can be instigated through a relatively simple process by the directors. The aim of the moratorium is to provide a company in financial distress with breathing space to explore its restructuring options free from the majority of creditor action.

The Act also introduces a new restructuring mechanism within the Companies Act 2006 for companies which are in financial difficulty. Such companies (or their creditors, members or appointed insolvency practitioner) will be able to propose a restructuring proposal between the company and its creditors or members. This proposal will involve an arrangement or compromise aimed at eliminating, reducing or preventing, or mitigating the effect of, the company's financial difficulties. The contents of the proposal are flexible and not prescribed.

For full detail and analysis of the above (and other) measures, see our guidance note **here**.

Sustainable finance

Sustainable finance is of rapidly growing importance as increasing regulatory pressures and demand from investors promote the incorporation of environmental, social and governance (ESG) factors in investment portfolios.

Asset owners, as well as intermediaries in the financial services sector, are becoming increasingly proactive in their pursuit of sustainable finance strategies. This is often driven by a genuine desire to move towards more ethical and responsible investment; but increasingly, it is also a necessary commercial response to the demands of clients.

Developing a market for bonds, loans and other forms of credit which incorporate sustainability and ESG factors requires compliance with increasingly sophisticated and onerous ESG-related disclosure requirements, ensuring issuers of credit integrate sustainability and ESG factors in their business and risk decisions, and ensuring contracts address and meet particular ESG standards.

Sustainability, CSR, ESG and other responsible investment considerations are now firmly on the agenda for corporates as well as investors. Keeping abreast of the increasingly broad legal and regulatory framework governing these issues, as well as managing reputational risk, represents an enormous governance challenge for businesses.

For more details, see our Sustainable Business Hub **here**.

Finance

LIBOR discontinuation

As previously reported, LIBOR (a forward-looking reference rate widely used in financial and other commercial contracts) is likely to be discontinued after the end of 2021. During 2020, we have seen more financial products linked to alternative rates, where previously they were linked to LIBOR. For sterling, rates derived from SONIA (the Sterling Overnight Index Average), will be used as a replacement in many cases. For instance, in the context of syndicated loans with a floating rate of interest, a compounded version of SONIA may be used, based on daily SONIA quotations over a reference period (e.g. three months).

In August 2020, the Bank of England began to publish a daily rate for compounded SONIA. In the face of pressure from the regulators, financial institutions are now starting to adopt pricing calculated in this way on new transactions (either as the main rate or as a fallback).

However, there will inevitably be implications for legacy transaction documents in the event that LIBOR ceases to be quoted and the documentation does not provide for a successor rate. Stakeholders with exposure to LIBOR-linked contracts need to work on LIBOR impact assessment and transition plans and map exposure and levels of preparedness. Whilst, in many cases, parties will be able to amend existing contracts to add LIBOR fallback mechanics, it is essential to consider any unintended regulatory, accounting and tax implications when re-pricing exposures.

For more details, see our guidance note **here**. In September 2020 UK Finance Guide published an excellent guide for Business Customers, available **here**.

Key contacts:

Matt Ayre
Head of Finance
+44 20 7295 3304
matt.ayre@traverssmith.com

Jonathan Gilmour
Head of Derivatives & Structured Products
+44 20 7295 3425
jonathan.gilmour@traverssmith.com

Edward Smith
Partner, Finance
+44 20 7295 3482
edward.smith@traverssmith.com

Pensions

Pensions Schemes Bill and defined benefit scheme funding

The Pension Schemes Bill continues to make slow progress through Parliament. It covers, among other things: changes to defined benefit scheme funding legislation to require schemes to have a long-term strategy; new notification duties for certain corporate activities; and new criminal and civil penalties for acts or omissions which put benefits at risk.

Those engaged in corporate activity will need to make notifications to the Pensions Regulator and pension scheme trustees in more circumstances than at present and perhaps at an earlier stage. These circumstances are expected to include the sale of a material part of a business and the granting of security that has priority over debt to the pension scheme. They will also have to consider even more carefully than now whether any proposals could adversely affect the security of defined benefit pension scheme members' benefits and may need to declare how any detriment will be mitigated.

The Pensions Regulator's first of two consultations on a revised approach to defined benefit pension scheme funding has recently closed; the second, on a draft code of practice, is expected in Spring 2021 at the earliest. The focus is on long-term funding objectives, for example buy-out, consolidation or self-sufficiency, with trustees expected to have a journey plan under which the scheme reduces its dependency on the employer as the scheme becomes more mature. Under the code, schemes will have to follow a 'fast track' approach to funding with fixed parameters or (equally acceptable) explain a 'bespoke' approach.

Meanwhile, the Regulator is expected to continue its proactive focus on the level of deficit recovery contributions compared with dividends and other shareholder distributions.

COVID-19 – pensions measures

The Pensions Regulator relaxed some reporting requirements during the early months of the COVID-19 pandemic. These are now generally restored.

Some employers deferred or reduced deficit recovery contributions to defined benefit pension schemes. The Regulator was relaxed about this being done, to allow breathing space for assessment of the employer's covenant and discussion of affordability going forward. Any longer-term reduction or suspension now needs to be explained to the Regulator.

ESG factors and stewardship

New legislation requires greater disclosure by pension scheme trustees, including some public disclosure, about their investment policies and implementation of them. This includes the account taken of ESG (environmental, social and governance) factors, including climate change, and information about stewardship policies and engagement activities. Some requirements came into force last October and more come into force this October. In addition to this, schemes will also be required to incorporate climate change risks and opportunities into their governance systems and make specific additional public disclosures about climate change targets and policies. These requirements are expected to be phased in over time starting with the largest schemes and authorised master trusts, probably from October 2021: a Government consultation on this is open to responses until 7 October 2020.

The growing focus on these matters may have an impact on trustees' investment decisions. Employers might wish to engage with trustees on this topic, especially where ESG and sustainability are also a business priority.

Our **Sustainable Business Hub** includes guidance on ESG considerations for pension schemes.

Key contacts:

Daniel Gerring
Head of Pensions
+44 20 7295 3341
daniel.gerring@traverssmith.com

Andy Lewis
Partner, Pensions
+44 20 7295 3444
andrew.lewis@traverssmith.com

Legal tech

Legal Technology has experienced notable growth during lockdown. Already on everyone's radar, tech products are increasingly supporting our new ways of working. Set out below are a few highlights of recent developments in the way in which we deliver our services.

E-signatures

E-signature platforms have allowed transactions to be executed easily and efficiently with signatories working remotely. Any reticence that may have existed prior to lockdown about the validity and reliability of e-signature platforms (despite leading counsel having confirmed that e-signatures are a valid method of execution of both contracts and deeds) has subsided.

Over the past few months, we have successfully executed a large number of deals using the DocuSign e-signatures platform. The recent Government announcement of new measures encouraging a return to widespread home working suggest that e-signature platforms are likely to become mainstream.

AI and machine learning

Interest in AI and machine learning in the legal sector continues to grow, with more vendors seeking to deploy the technology, particularly in email management, e-disclosure, contract review and subject access requests. While we consider that AI and machine learning are yet to make a momentous change to the average City lawyer's day-to-day activities, in the near future it is likely that these tools will become standardised for the more repetitive or "commoditised" tasks.

Email management

We have also seen an increased appetite in "one-off" products to improve efficiency in areas such as email management and contract review. In Autumn 2019, we open-sourced our in-house email management solution **MatMail** to help busy people gain control over their inboxes.

Contract review

At the start of lockdown in the Spring, in response to our clients' need to review contractual termination rights, we released our **Force Majeure App** to help identify force majeure clauses in contracts and assess whether there are any associated termination rights.

Our Legal Technology Team

Our Legal Technology team, led by **Shawn Curran**, has recently been shortlisted for awards by the Law Society, Law.com and The Lawyer.

The members of our Legal Tech team work closely with our lawyers and most have a legal background which helps to facilitate that collaboration. This integrated approach enables us to identify and develop useful and pragmatic solutions to enhance our service to our clients.

If you would be interested in hearing more about any of the products mentioned above, or our Legal Tech offering more widely, please do contact Shawn.

Key contact:

Shawn Curran
Head of Legal Technology
+44 20 7295 3381
shawn.curran@traverssmith.com

Events and training

Whilst we are unable to run our usual programme of in-person networking events and training sessions at present, we continue to connect with in-house lawyers across a range of seniority levels in a virtual seminar or roundtable format, providing opportunities for you to share insights with your peers in other organisations. Since the start of lockdown, we have run a range of webinars aimed at in-house counsel. Please click on the links below to access our recent webinars.

We add to our programme to reflect developments as they arise. Look out for news on these events throughout the year. If you would like to join our mailing list for future events, **please register your interest here**. We are also delivering online training for clients on a bespoke basis. If you have specific training requests for your team, **please let us know here**, or speak to your usual Travers Smith contact.

Finally, we are also continuing to run our programme of Management Skills Training for in-house counsel on a virtual basis. See below for more details.

Webinars

Homeworking Webinar Series: Homeworking and health and safety

Homeworking Webinar Series: Equipment and Expenses

Are you ready for Brexit?: views from trade commentator Dmitry Grozoubinski and our own experts on future trade

Contract law update: the implications of the Corporate Insolvency and Governance Act and a general update on contract law developments related to Covid and Brexit

Indemnities: are indemnities are really worth including in a contract, and if so, how to make the most of them

Management skills training

Led by Senior L&D Manager, **Rachel Wevill**, we are delighted to be working with our in-house legal clients on a series of professional skills training sessions.

These sessions are designed to appeal to team members at all levels of seniority, developing attendees' wider skills beyond their technical expertise. Our aim is to ensure that the learning environment is an especially collaborative one, stretching and challenging attendees as well as encouraging a deepening of relationships and understanding between team members.

For more information on our Insights for In-house offering, please contact insightsforin-house@traversmith.com or your usual Travers Smith contact.

Key contacts:

Richard Brown
Partner, Commercial, IP & Technology
+44 20 7295 3254
richard.brown@traverssmith.com

Rachel Wevill
Senior Learning & Development Manager
+44 20 7295 3456
rachel.wevill@traverssmith.com

TRAVERS SMITH

© Travers Smith 2020