COVID-19: FLAGGING SIGNIFICANT COMMERCIAL & LEGAL ISSUES

WEBBER WENTZEL

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The recent outbreak of the novel coronavirus (Covid-19) has caused disruption across the world. This is, above all, a human and social crisis, necessitating some significant changes in the way we go about our daily lives. As efforts are underway to manage the spread as it radiates across the world, the impact to businesses and economies has become increasingly significant.

To assist you and your legal teams in tackling the various challenges presented by the Covid-19 outbreak, we have prepared a guide, in collaboration with our Alliance partner, Linklaters. Our guide offers practical tips to consider and highlights some of the main legal and risk issues to organisations, workforces, customers, suppliers and wider stakeholders.

1. CRISIS AND REPUTATION MANAGEMENT

While everyone is in the same boat, in so far as the impact of Covid-19 is concerned, organisations that fail to deal with its implications effectively and that do not maintain public and stakeholder trust, are likely to suffer significant adverse and longer-term consequences to their businesses.

The way the crisis is handled internally and externally will play a key role in maintaining the trust of employees, customers, clients and regulators. A crisis such as this can jeopardise your reputation, financial stability, and key relationships around the world. It can also divert senior management time from the strategic objective of your business.

Being prepared, responding quickly and recovering (and if necessary, taking remedial measures) are essential in managing your reputation in a crisis.

Each organisation should ensure it has in place a crisis management policy that its key employees are aware of, and which addresses:

- What has happened?
- What the organisation's immediate priorities are?
- What steps must be taken to contain the impact of the crisis for the organisation?
- Who the key stakeholders are that must be communicated to (both internal and external)? The communications strategy should be carefully managed and executed. External and/or internal communications teams working with legal communication experts are advisable.
- What expertise/advice is required to address the crisis?
- Who will have the authority to take immediate decisions with respect to the crisis?
- Who the spokesperson of the organisation is?

SOME GENERAL PRINCIPLES TO MANAGING A CRISIS ARE:

Communicate regularly and accurately to staff and stakeholders and manage the challenge of doing so with incomplete facts	**Take decisions advised by a multidisciplinary team**	**Address any damage caused promptly and fully and reserve rights where appropriate**
Protect the culture of the organisation and respect individuals' rights to fair and consistent treatment	**Manage communications to achieve control, credibility and succinctness. This is a quality of good leadership.**	**Don't live in crisis mode – normal business activity must be maintained**

Ensure Business Continuity Policies and Procedures (BCPs) are adequate to prevent material disruption to your operation in the event of travel restrictions, quarantine measures, and/or staff infection. The areas that the BCP should address include:

- **Oversight and monitoring:** a crisis management structure for information sharing, corporate decision making, and revising arrangements in accordance with changing circumstances.

- **Staff arrangement:** establishing appropriate contingency measures with a view to ensuring that at least bare minimum services can continue to be provided to clients in a worst-case scenario, such as: (i) making split team arrangements; (ii) establishing an alternative site office; (iii) enabling staff to work from home; (iv) assessing the impact of high absentee and loss of key staff and setting up a back-up arrangement for all key staff; (v) putting in place a clear emergency contact arrangement to cover all key staff members and ensuring that contact details are kept up to date; (vi) following the guidance issued by the authorities in maintaining a safe and healthy working environment; and (vii) encouraging staff to maintain good personal hygiene.

- **Service providers or other third parties:** (i) for operations outsourced to third parties, ensuring that the service providers have appropriate contingency plans in place; and (ii) checking that your critical suppliers and service providers are equally prepared.

- **Client services:** (i) encouraging clients to use telephone or online facilities in place of physical visits; (ii) ensuring reliability of telephone recording systems; and (iii) establishing client notification procedures upon staff infection and advising clients on the relevant contingency measures.

- **Infrastructure capacity:** (i) reviewing system capacity to cater for potential upsurge in transaction volume in the event of clients massively switching to using electronic channels; (ii) ensuring adequate back-up facilities, mobile computing/communication devices and network bandwidth; (iii) arranging for rehearsal and testing of contingency plans, systems, and equipment; and (iv) implementing back-up plans of your critical business and transaction data and measures to ensure the back-up data can be available for use in your back-up computer system within a reasonable timeframe.

- **Other issues to consider:** (i) assessing the likelihood of any potential claims from clients if the business cannot provide the same level of service to them and assessing the adequacy of existing insurance coverage; (ii) ensuring senior members of staff are in-charge of BCP and that there is a clear command structure to facilitate decision-making and communication to all levels of the business.

Authors – Crisis and reputation management: Dario Milo and Pooja Dela

2. WORKPLACE ISSUES

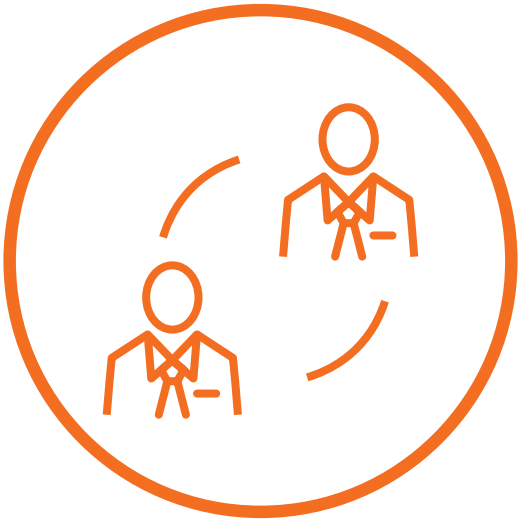
Employer duty

The Occupational Health and Safety Act places an express obligation on the employer to maintain a working environment that is safe and healthy. On the issue of a healthy working environment, the employer must ensure that the workplace is free from any risk to the health of its employees as far as it is reasonably practicable. Within the context of Covid-19, there is a clear obligation on the employer to manage the risk of contamination in the workplace. Failure to comply with such obligations may expose your organisation to a damages claim under the applicable laws. Practically, the employer can implement the below measures to comply with its legal duty.

Maintain a clean and risk-free working environment

Ensure a healthy working environment by ensuring that the workplace is clean and hygienic, promoting regular hand-washing by employees, promoting good respiratory hygiene by employees and keeping employees informed on developments related to Covid-19.

"Maintain a clean and risk-free working environment"



"Set up a risk management committee"

To be proactive in managing Covid-19 in the workplace, employers should set up a Covid-19 risk management committee. The committee should include representatives from the health & safety, human resources and risk and compliance departments of the employer. If the employer employs an occupational medical practitioner, that individual should also sit on the committee. As an initial step, the risk management committee should conduct a comprehensive risk assessment to determine the likelihood of contamination in the workplace. This assessment should include a contingency and business continuity plan should there be an outbreak of the illness. Employers should consider the following proactive steps given the scale of the illness globally -

- Follow health advice and information
- Communicate with employees
- Prevent the spread of infection
- Identify vulnerable workers
- Update emergency contact information

In line with the employer's general duties, you should consider whether to request high-risk employees to work from home to comply with your duty to provide a safe working environment for other employees. As the situation evolves, this may become a legal requirement from local authorities, and this should be monitored. Issues related to work visas, local tax/permanent establishment, licensing, and others arise where employees are working from a location other than their usual workplace; care should be given to how such arrangements interact with employment benefits.

"Quarantine where appropriate"

Within the context of Covid-19, the World Health Organisation (WHO) recommends that any person who is exposed to a Covid-19 patient must be quarantined for at least 14 days from the last time they were exposed to the patient. Such a person could include -

- A person who provides direct care without proper personal protective equipment for a Covid-19 patient
- A person staying in the same close environment of a Covid-19 patient (eg household or workplace)
- A person travelling in close proximity (within 1 meter) with a Covid-19 patient

In order to manage the risk of Covid-19 in the workplace, there are three scenarios where employees will need to take leave away from the workplace:

SCENARIO 1	SCENARIO 2	SCENARIO 3
Employer-imposed precautionary quarantine	**Employee self-quarantine**	**Government imposed quarantine of employee(s) or closure of business**

Depending on the scenario, there are different answers as to the category of leave that the employee can take. Irrespective of the scenario, if it is possible for the employee to obtain a medical certificate, the leave applicable will be sick leave. If the sick leave of the employee is exhausted, the employer's sick leave policy will apply meaning that the employer could award unpaid leave or annual leave or allow the employee to tap into sick leave cycle. If sick leave is not an option, the following options are available to an employer -

- **Scenario 1:** given that this is an employer-imposed period of quarantine, the employer should assess whether it is possible for the employee to work from home. If this is possible, no leave will be applicable as the employee would be working from home. If this is not possible, the employer should consider awarding special paid leave to the employee as it was made compulsory by the employer. Depending on the employer's leave policy, it may impose annual leave.
- **Scenario 2:** depending on the reasons for the request for self-quarantine, the employer may allow the employee to work from home (if this is possible). If not, the employee can be requested to take annual leave. If the employee has no annual leave available, the employee can be placed on unpaid leave for the period of quarantine. Nothing stops the employer from implementing special paid leave should it be practical and affordable.
- **Scenario 3:** given that this is a government-imposed instruction and not at the request of the employer or employee, the employer will need to apply its mind carefully to this circumstance. This may amount to a *force majeure* or supervening impossibility of performance which ultimately means that the employer is unable to fulfil its obligations under the contract of employment and the employer will then be able to implement the no-work-no-pay principle.

"Issue clear travel guidelines"

The employer should issue clear travel guidelines to its employees on international travel, particularly to countries affected by Covid-19. The employer should distinguish between employees travelling for business or personal reasons. Given the scale of the illness and if it is practical, the employer may elect to place a moratorium on business travel until such time as Covid-19 is contained. If this is not possible, a moratorium should be placed on business travel to affected countries. It may be more challenging to regulate personal or holiday travel by employees. Employees should be encouraged not to travel to affected countries. Importantly, employees who nevertheless choose to do so should not be allowed to return to work immediately after such travel. Such employees should be required to self-isolate (compulsory quarantine) for at least 14 days. Employees should be informed that they must take all reasonable steps to avoid exposure to the illness which may mean cancelling or postponing international travel until Covid-19 is contained. The employer should also bear in mind that travel by employees to countries which are currently unaffected by Covid-19 could still pose a risk of infection as such countries may become affected at any time. In any event, at this stage, the risk of infection is high given the nature of travel, exposure to different people of different nationalities particularly on flights with multiple legs.

It is advisable for employers to consider requesting all employees to disclose international travel (to all countries) undertaken by them (or any person who they live with) since 1 February 2020. This may assist the employer with its risk assessment to determine the likelihood of contamination in the workplace.

With a business trip, the costs of cancellation are a company cost. With personal trips, the company can advise on what is appropriate, but it remains the employee's own decision. If an employee decides to cancel a trip to a high risk country it remains his own decision based on his own health and safety and the employer should not carry the cost.

Authors – Workplace issues: Lizle Louw, Johan Olivier and Kate Collier

3. NAVIGATING CONTRACTUAL OBLIGATIONS

There is likely to be significant operational and public disruption caused by the Covid-19 outbreak with many contractual obligations are likely to not be met or partially met. Supply chains may be disrupted and defaults arising from financial distress may arise. We set out below the basics to consider from a contractual perspective.

Partial performance, non-performance, or disruptions: the following contractual and common law principles may be relevant in circumstances where one party to a contract is seeking to avoid its performance obligations.

- **Force majeure:** a *force majeure* clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. The relevant events are often defined as acts, events, or circumstances beyond the reasonable control of the party concerned.

- **Supervening impossibility:** supervening impossibility arises if a party is prevented from performing its contract by irresistible force [*vis major*] or unforeseeable accident [*casus fortuitous*]. If successfully shown, the party is discharged from liability. Between them, ***vis major*** and *casus fortuitous* include any event that is unforeseeable with reasonable foresight, and unavoidable with reasonable care. Given recent developments in the principles applying to contractual interpretation, the standard as to what constitutes impossibility may be impacted by public policy and equity considerations, heightening the need for careful consideration of all relevant factors when assessing this issue.

For both *force majeure* and supervening impossibility, a careful assessment of the facts, the contractual provisions, and the legal principles is required to form a view on whether such arguments might succeed.

Contractual variations/waivers: Care must be taken when interacting with counterparties that are reporting difficulties performing their contractual obligations to ensure that you do not make promises or provide assurances that could later be argued to amount to a variation of contract or a waiver of rights. If a variation or waiver is intended, make sure to follow up in writing. The risk may be mitigated if the contract contains an anti-oral variation clause; however, the enforceability of such clauses is fact-sensitive, and the clause may be susceptible to equitable challenges such as estoppel. If you are the party

"There is likely to be significant operational and public disruption caused by the Covid-19 outbreak..."

struggling to perform, consider whether it is appropriate to negotiate a waiver or variation to the agreement before a default occurs.

Avoidance of contractual obligations: While mechanisms exist to avoid performance of obligations under certain circumstances, the hurdles are high and the requirements are fact-specific; seek advice at an early stage.

Preservation of rights: Take extra care in communications with counterparties seeking relief from performance of their obligations such that no variation or waiver is agreed or offered without being clear as to the intended scope and legal consequences.

Notice requirements: Extra care should be given should you be required to give, or are expecting to receive, a notice under your contract. Many standard form contracts do not envisage a situation in which delay in giving notice may be excused. It is important to check whether the contractual notice period incorporates the concept of business days. If the contract requires physical delivery of the notice (rather than via email or fax), be conscious of the travel and other restrictions in place, eg in relation to mailing delivery arrangements.

Insurance: Disputes might arise as to whether an insurance policy covers losses suffered during the Covid-19 outbreak, such as by reason of border control or transport disruption or even disruption of business due to illness or quarantine of employees. Some insurance policies exclude losses caused directly or indirectly by an epidemic, but a careful analysis is required to check whether and when an exclusionary clause is indeed triggered. For business interruption cover, it is important to consider whether the policy in question requires that there has been underlying material damage or whether the policy wording includes an extension clause for the interruption of business without the need for property damage to have occurred first, such as in the failure of utilities extension clauses. Following the outbreak of SARS in 2003, certain disputes arose as to the interpretation of insurance policies, including eg when the disease became a notifiable event for the purpose of insurance coverage, or how one determines the relevant "loss period".

TIP

Pay close attention to any deadline or notice period under your contracts. If performance is an issue, review whether the contract contains a *force majeure* clause. Some contracts expressly seek to limit the application of such provisions. Make sure you are familiar with what discretions exist under your contracts and whether they apply to your situation.

Authors – Navigating contractual obligations: Peter Grealy, Michael Straeuli and Maria Philippides

4. CORPORATE & EQUITIES

The information in this section of the update applies to companies with a primary listing of their equity securities on the JSE Limited (JSE). Companies which are listed on other exchanges, or which have debt securities listed on the JSE, should note that different provisions may apply than those identified here.

Disclosure of price sensitive information and issue of trading statements: One of the key and continuing obligations of a JSE-listed company include that it must, without delay, unless the information is kept confidential for a limited period of time, release an announcement providing details relating, directly or indirectly, to such company that constitutes unpublished information that is specific or precise, which if it were made public, would have a material effect on the price of the company's securities (price-sensitive information).

While in general the existence and general impact of the Covid-19 outbreak would not itself constitute price-sensitive information, the specific impact of the Covid-19 outbreak or its consequences may amount to price-sensitive information to a particular issuer, for example:

- a company has material operations in, or has a heavy reliance on supply chains situated in areas severely affected by the Covid-19 outbreak, which has resulted in or is likely to result in material disruption to the company's business;
- if the issuer itself, or a material supplier or contact counterpart, is unable to perform or defaults under a contract following the Covid-19 outbreak;
- a material change in the company's strategy or business plan in response to the Covid-19 outbreak;
- if an announced, material pending transaction has been, or is reasonably likely to be, delayed or cancelled as a result of the Covid-19 outbreak; and/or
- a covenant breach (or any breach) of a company's (or a member of its group's) material funding which has occurred or is likely to occur as a result of the impact the Covid-19 outbreak.

It will be a question of judgement for the directors of the company as to whether the relevant development or event amounts to price-sensitive information. There are no fixed thresholds or quantitative criteria to determine the materiality of any price movement, and both qualitative and quantitative effects should be considered. (For further guidance in making this assessment, issuers should have regard to the JSEs Practice Note 2/2015.) Once the directors of the company have determined that the relevant development amounts to price-sensitive information, the company will need to control dissemination of the information internally and externally and to publicly announce it as soon as practicable, unless the company can lawfully delay public disclosure.

Each listed company is reminded to review its price-sensitive information identification and escalation processes to ensure that all parts of its business are actively monitoring and identifying potential price-sensitive information and escalating this to the directors for assessment.

Companies must also publish a trading statement as soon as they are satisfied that a reasonable degree of certainty exists that the financial results (ie headline earnings per share, earnings per share and/or, in some instances, net asset value per share) for the period to be reported upon next will differ by at least 20% (or 15% for property companies under certain circumstances) from the most recent of the financial results for the previous corresponding period or a profit forecast previously provided to the market in relation to such period. Companies may publish a trading statement if the differences are less than the aforesaid percentages, but which are viewed by the company as being important enough to be made the subject of a trading statement. The remainder of the requirements in the JSEs listings requirements regarding trading statements continue to apply, including that, if, after publication of a trading statement but before publication of the relevant periodic financial results, a company becomes reasonably certain that its previously published number, percentage or range in the trading statement is no longer correct, then the company must publish another trading statement providing the revised information.

The determination of "a reasonable degree of certainty" is a judgmental decision which must be taken by the company's directors and is one in which the JSE does not involve itself. This determination may differ from company to company depending on the nature of business and the factors to which they are exposed.

Should the impact of the Covid-19 outbreak be expected to impact on the company's financial results, the board of the company must consider whether the extent of the differentiation will be 20% (or 15%) or more, and whether a trading statement must therefore be made. Companies should also consider whether, given the sensitivity of the market in respect of the Covid-19 outbreak, a differentiation of less than the prescribed percentages do not in any event warrant the issue of a trading statement.

Companies who have a policy of publishing quarterly results are exempt from the requirements regarding trading statements, but must instead include a general commentary in each quarterly results announcement to ensure that shareholders are guided on the expected performance of the company for the next quarter.

Financial reporting: For a company with a primary listing on the JSE, with its financial year end on 31 December 2019, the upcoming deadlines for the publication of its financial results will be 31 March 2020 for the provisional annual financial statements (even if unaudited), unless the full financial results are published by that date and 30 April 2020 for the audited financial statements (together with the annual report). Given the potential difficulty in travelling across the region, listed companies may be concerned about meeting these deadlines. Auditors typically carry out on-site auditing during the two months following the relevant financial year-end which the Covid-19 outbreak would not have impacted on South African companies with operations only in South Africa (for audited purposes) but may impact on companies with operations outside South Africa affected by the Covid-19 outbreak or companies with dual listings, in South Africa and elsewhere.

Ordinarily, the JSE reminds a company after three months of its financial year-end that a month remains for publication of its financial statements. Four months after the financial year-end the JSE annotates a company's listing on the JSE trading system with an "RE" to indicate its failure to submit its annual financial statements timeously, and the JSE releases an announcement on SENS to that effect and cautions securities holders that the listing of the company's securities is under threat of suspension or possible removal. If the company has not issued its results after five months from the financial year-end the listing will be suspended and the JSE will consider the continued suspension or removal of the company's listing. The suspension will be lifted once the JSE receives the company's annual financial statements and the JSE is satisfied that they follow all regulatory requirements.

In response to the abnormal circumstances of the Covid-19 outbreak and in view of travel and other restrictions that have arisen in response to the outbreak, certain global stock exchanges have issued statements which provide guidance to companies listed on their exchanges on the disclosure of their year-end financial information, partial disclosures and provision of information to securities holders. To date the JSE has not issued similar statements. However, the JSEs listings requirements provide that the JSE has discretionary authority to waive the requirement for the suspension of a company's listing where it has not submitted its annual financial statements timeously. Companies would be well advised to consult with the JSE at an early stage if they expect to have difficulties meeting the deadlines, with a request for the JSE to exercise its discretion as aforesaid.

Impact on transactions: The impact of the Covid-19 outbreak on the execution of transactions should be considered. Do the travel and other restrictions impact the ability to carry out physical due diligence? Do travel restrictions prevent physical meetings from taking place? These factors

"Contingency planning should be adopted to address the risks that the meeting may become impossible to hold on the day identified..."

should be considered when devising a transaction timetable; and where a transaction is between signing and closing, being alert to any long-stop dates will be important. Parties should also assess the conditions to any transaction funding (or bridge funding), to determine if there are any risks or implications to the transaction under these agreements.

Although in general one would not expect any additional merger-specific considerations or implications to arise by virtue of the impact of the Covid-19 outbreak, parties should nonetheless consider this and any resultant impact this may have on any merger filings, approvals or approval conditions should any transactions specific issues arise.

The outbreak could also impact on the commerciality of a transaction. In such circumstances, where relevant, consider whether a "material adverse change" condition precedent or termination right can be triggered. Where no such provisions apply, consider whether a "*force majeure*" argument is available to terminate or defer a transaction. Implementation of a transaction may also be impacted if any required action cannot be performed (or performed timeously) due to the direct or indirect effects of the Covid-19 outbreak. Parties would need to consider the impacts of this under the terms of the transaction agreements and under general legal principles, and address any rights and/or liabilities which arise as a result of any such non-performance or delayed performance.

The company should also consider whether disclosure is required to be made by way of a supplementary prospectus or circular as a result of changes in information, in respect of transactions which are ongoing.

Shareholder meetings: The impact of the Covid-19 outbreak on the company's general meetings should also be considered. Companies should consider the venue for the meeting, the notice period provided for the meeting, and the extent to which electronic participation is available and is adequately accommodated given the likely higher utilisation of this facility than in the past. Contingency planning should be adopted to address the risks that the meeting may become impossible to hold on the day identified, or at the venue identified, or may otherwise be adversely impacted procedurally (eg unavailability of the chairperson, voting service providers, etc).

Authors – Corporate and equities: Jesse Watson: Colin du Toit and Madelein Burger

5. CAPITAL MARKETS & LOAN FINANCING CONSIDERATIONS

Issuers or underwriters working on international offerings of securities and agents or lenders on loan financings would benefit from considering certain commercial, practical, and legal issues that may arise from the Covid-19 outbreak. Market volatility, economic outlook, and investor sentiment are no doubt important factors, but the following issues should also be considered by market participants.

Validity of approvals or consents: To the extent that an issuer or borrower has obtained any approval or consent from regulators or third parties for a proposed bond issue or loan financing, it should review any validity period of such approval or consent in case timing of the transaction is delayed in light of the Covid-19 outbreak.

Due diligence and disclosure

- Any logistical issues on the due diligence process should be discussed at the outset of a proposed bond issue – eg practical difficulties with on-site visits, etc. Enhanced due diligence requirements (if any) also need to be addressed – eg to assess the impact on, or the disruption to, a company's business or those of its suppliers and/or customers, etc.

- The outcome of these due diligence issues may in turn impact the disclosure and risk factors included in the offering circular. It is common for offering circulars to include an existing risk factor on outbreaks of health epidemics and contagious diseases – eg SARS. Market participants should consider whether such risk factor needs to be enhanced in light of recent developments.

Timing of results announcements: There has been recent news coverage on the possibility of an extension to the reporting deadline for results announcements by certain listed companies in certain jurisdictions in light of travel and other restrictions that have arisen recently. No blanket extension has been issued and it is possible that an affected issuer may still need to adhere to the reporting deadline (albeit without the agreement of its auditors).

In response to the practical difficulties in performing statutory audits of affected companies, Singapore Exchange Regulation has, for example, announced that it may grant, to any listed company with a principal place of business in mainland China or if it has business with significant operations in mainland China, a time extension of up to two months (ie until 30 June 2020) to hold an annual general meeting to approve its FY Dec 2019 financial results if certain prescribed conditions are met (the annual report must be issued to shareholders at least 14 days before the date of its annual general meeting). An affected issuer contemplating or working on an issue of securities should discuss upfront with its auditors and the underwriters any consequential issues that this may have on the proposed issue of securities – eg on any issuing blackout period (whether imposed by regulations or as a matter of market practice), auditors' comfort letter coverage, and offering circular disclosure of financials.

Termination and *force majeure*: Market participants may also wish to consider the impact of any termination, *force majeure*, material

adverse effect, and market disruption clauses in an underwriting agreement or loan agreement, and whether there is a risk that parties would elect to exercise any termination or walk-away rights. In addition, to the extent that any back-to-back swap or hedging is being put in place in connection with the proposed issue of securities or loan, parties should also consider any termination and *force majeure* clauses in the related swap or hedging for potential mismatches.

Interest payments, etc: Market participants may wish to revisit clauses relating to funding requirements – eg definition of business days in the context of funding an interest payment or relevant grace period before a default scenario kicks in for non-payment, etc, to deal with any ad hoc or extension of public holidays in the relevant jurisdiction.

Roadshows: Any logistical issues with roadshows should be considered and workarounds agreed upfront if possible – eg net roadshows and investor conference calls. In addition, underwriters should re-examine their existing deal roadshow guidelines given the increased interactions with potential investors through net roadshows and investor conference calls.

Settlement and closing: Physical signing and closing are rare these days on issues of securities and loan financings. However, if one is contemplated, then market participants should consider the need for any potential workarounds – eg signing and closing by email or the use of e-signing platforms, etc. Issuers and borrowers may also consider appointing a power of attorney prior to a signing, to ensure availability of an authorised signatory in the relevant jurisdiction. In addition, the logistics for the delivery of originals of any transaction document should also be discussed and agreed upfront before signing and closing. To the extent there is any related swap or hedging as mentioned above, market participants should also consider any business day convention or definition to ensure that there is no mismatch on settlement dates.

Post-issuance/financing obligations: It is common on issues of securities and loan financings to require issuers and borrowers to comply with certain post-settlement obligations – eg registration of security, delivery of financials, etc. Market participants should review such post-settlement obligations in light of recent developments – eg notice period requirements, definition of business days, closure of government registry offices, etc.

"Equity derivatives"

Market participants would have to consider whether the event was a Market Disruption Event, Settlement Disruption Event, or other similar event, for trades referencing equity listed on exchanges in a relevant jurisdiction which had closed for a longer period than expected.

"Commodity derivatives and others"

In general, market participants would have to consider whether market closure would affect payment dates and valuation dates, and whether it triggers a disruption event and what the applicable fall-back is.

"*Force majeure* and other potential default events."

Market participants have been considering how the event has impacted their performance of obligations under documentation such as the International Swaps and Derivatives Association, Inc. (ISDA) or National Association of Financial Market Institutional Investors or other market standard documentation. In order to assess the rights of the parties, typically two levels of inquiries are to be made:

- first, whether such an event (or any consequent non-performance) would constitute an event of default or a termination event under the relevant master agreement; and
- second, whether any disruption event which is already provided for in the transaction has been triggered, and if so, whether those provisions will take precedence over the termination provisions in the applicable master agreement.

"Difference in market terms"

In considering the above, market participants should bear in mind any technical differences in terms for transactions which are done under different documentation. For example, it is possible for uncleared transactions and cleared transactions to have terms which differ, thereby giving rise to different consequences. Similarly, cleared transactions on different clearing services may have different terms. It will be important to consider the detailed provisions of each set of terms in order to analyse the issues above.

Authors – Capital markets and loan financing considerations: Kathy Shephard, Karen Couzyn and Khurshid Fazel

6. DISPUTE RESOLUTION – COURTS AND ARBITRATIONS

No formal communication has been issued by the Department of Justice or any other interested parties which materially alters the ordinary processes followed under South African law. Under present circumstances, affected parties are advised to consult with their legal representatives regularly in order to be timeously updated regarding any developments in relation to their matters. Furthermore, practical measures could potentially be adopted in order to ensure the safety of the parties involved in the relevant proceedings, as elaborated on below.

Existing legal proceedings:
Courts in South Africa are currently operating normally. Matters which are currently enrolled for hearing have not been postponed. However, hearings may be postponed in future as a result of further developments in relation to the Covid-19 outbreak.

Service of documents: The ordinary methods in relation to the service of documents, which specifically includes service by way of Sheriff, have not been impacted at this stage. However, it may be prudent for parties to agree to the exchange of legal documents by electronic means, in order to minimise the potential risks associated with physical service.

Commissioning of affidavits: The ordinary processes in relation to the commissioning of affidavits, which are deposed to in the presence of a commissioner of oaths, have not been affected. If any difficulties arise in future as a result of, for example, travel restrictions, it is of paramount importance to timeously inform your legal representatives, who may be able to make alternative arrangements.

Prescription and time-periods: Prescription and other time-periods, for example, in relation to the filing of subsequent legal documents, is not interrupted by the Covid-19 outbreak. It is essential that records be kept of any potential claims which may prescribe, together with the applicable time periods in relation to present proceedings, so that the necessary action can be taken in respect of such matters, considering the impact that the Covid-19 outbreak may have on the applicable processes.

Arbitrations administrated by centres in South Africa: Arbitration centres in South Africa, such as the Arbitration Foundation of

"Courts in South Africa are currently operating normally. Matters which are currently enrolled for hearing have not been postponed."

Southern Africa (AFSA) and the Association of Arbitrators (Southern Africa), have not announced any alternative operational arrangements in relation to the Covid-19 outbreak. If you have an upcoming hearing at an arbitration centre in South Africa, you should keep in close contact with the relevant centre and assess the relevant risks, for example, in relation to travel arrangements, accordingly. It may be possible for alternative arrangements to be made in order to mitigate the potential risks associated with the hearing of a matter, for instance, by making use of electronic solutions such as video conferencing and similar technologies.

Arbitrations administrated by centres in other countries: Other international arbitration centres, such as the International Chamber of Commerce (ICC), have recently issued communications relating to the possible implications of the Covid-19 outbreak on pending arbitrations. In this regard, the ICC has recently encouraged parties to proceedings, arbitral tribunals and other affected parties to remain appraised of any developments in relation to the Covid-19 outbreak and to consider the potential impact thereof on pending proceedings, to the extent necessary. Specifically, regarding the attendance of scheduled hearings, other meetings in person and related travel by affected parties, it has been communicated that official recommendations and directives should be consulted, as applicable, at (i) the place of departure, (ii) any transit points and (iii) the destination.

As at the time of publishing various arbitral institutions had imposed country-specific travel restrictions – with these changing daily as the virus spreads. You should consult with the relevant centre and your legal representative regularly in order to ensure you are aware of the most recent restrictions.

Authors – Dispute Resolution: Priyesh Daya, Nick Alp and Dylan Cron

7. EMERGENCY PROCUREMENT BY THE STATE OF SUPPLIES

With a shutdown of many global supply chains, supplies to South Africa of many manufactured goods and medicines may be restricted. This may result in emergency procurement measures by the state being followed.

Although the government and other organs of state are generally required to follow a competitive tender process prior to contacting for goods and services, there are, however, recognised exceptions where, for example, there is an emergency or only one potential supplier. If an organ of state seeks to deviate from its normal procurement process, care should be taken to ensure that some form of competitive process, albeit an abridged one, is followed where this is reasonably possible, that the process complies with the organ of state's supply chain management policy, and that the correct authorisations are in place. It might be justifiable, in certain extreme circumstances, for an organ of state to deviate from conducting even an abridged competitive process (and to contract for goods/services directly from a supplier) but we would recommend that advice be sought to ensure the defensibility of the arrangement.

Authors – Emergency procurement: Prelisha Singh and Glenn Penfold

"With a shutdown of many Chinese operations, supplies to South Africa of many manufactured goods and medicines may be restricted."

If you have more specific enquiries relating to any of these matters or how to mitigate the impact of Covid-19 on your business, please speak to any of our Webber Wentzel partners or one of the key contacts below.

KEY CONTACTS

Christo Els
Senior Partner
T: +27 11 530 5628
E: christo.els@webberwentzel.com

Sally Hutton
Managing Partner
T: +27 11 530 5228
E: sally.hutton@webberwentzel.com

Gavin Fitzmaurice
Partner
T: +27 21 431 7279
E: gavin.fitzmaurice@webberwentzel.com

Peter Grealy
Partner
T: +27 11 530 5218
E: peter.grealy@webberwentzel.com

Brian Dennehy
Director
T: +27 11 530 5358
E: brian.dennehy@webberwentzel.com

Priyesh Daya
Partner
T: +27 11 530 5358
E: priyesh.daya@webberwentzel.com

Safiyya Patel
Partner
T: +27 011 530 5853
E: safiyya.patel@webberwentzel.com

WEBBER WENTZEL

in alliance with > Linklaters

Johannesburg
90 Rivonia Road, Sandton, Johannesburg, 2196
t: +27 11 530 5000

Cape Town
15th Floor, Convention Tower, Heerengracht,
Foreshore, Cape Town, 8001
t: +27 21 431 7000

www.webberwentzel.com