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# What US companies with business in Germany, France and Italy should know about the legal environment with COVID-19

Legal tools to cope with the current challenges  
for US Companies with business in  
Germany, France and Italy

5 May 2020

**BEITEN  
BURKHARDT**

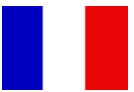


# OUR TOPICS AND SPEAKER

1. Supply Chain and Lease Agreements
2. Short-time Work / Furlough Work – Wage Relief Measures
3. Liability and Fiduciary Duties of General Managers



Tassilo Klesen, Dr Andreas Reuther, Prof Dr Hans-Josef Vogel  
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**Moderator:** Dr Christian von Wistinghausen (BEITEN BURKHARDT)

# QUESTIONS & ANSWERS

- You may ask questions during the webinar using the question function of the webinar system
- Due to the number of registrations, questions can only be asked in text form
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- After all presentations, we are happy to go into the questions as far as they can be answered during the webinar

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**GERMANY**



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# SUPPLY CHAIN & LEASE AGREEMENTS

The fate of contracts  
during the Corona pandemic

**Speaker: Tassilo Klesen**



# I. SUPPLY RELATIONSHIPS

Case: Supplier cannot meet its contractual obligation to supply 100,000 connectors on time due to an officially ordered plant closure related to COVID-19

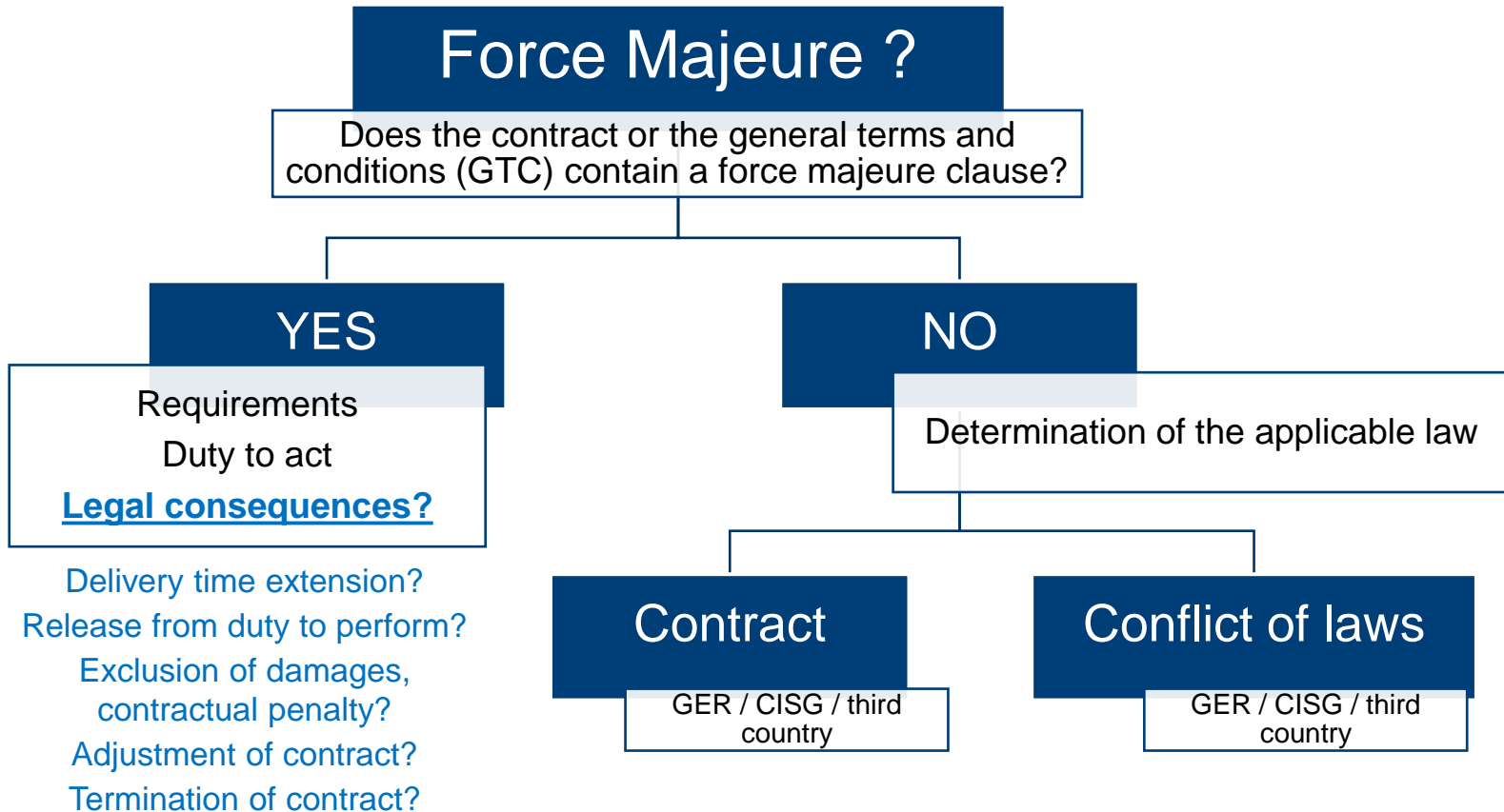
Example 1: The plant closure is limited in time (**Temporary Administrative Order**)

Example 2: The plant closure is unlimited (**Unlimited Administrative Order**)

What can the supplier rely on?

# I. SUPPLY RELATIONSHIPS

## REGULATIONS IN THE CONTRACT OR IN THE TERMS AND CONDITIONS



# I. SUPPLY RELATIONSHIPS

## GERMAN STATUTORY LAW (1/4)

If the lack of contractual provision and IPR (conflict of laws) leads to German law

### **Principle: Contracts are binding and to be respected**

- Changes in external circumstances are usually irrelevant, so **no adjustment**. Contractually agreed termination or rescission rights remain effective and contractual penalties could incur
- However, Corona is so incisive that its effects can lead to a **legal impossibility** (*Unmöglichkeit*) or to a **disruption of the contractual basis** (*Störung der Geschäftsgrundlage*)
- **Individual case consideration** is necessary!



# I. SUPPLY RELATIONSHIPS

## GERMAN STATUTORY LAW (2/4)

### Legal impossibility:

- Normal disruption of performance (delay, possibly right of rescission of the contractual partner), **impossibility** only if a fixed transaction exists
- Case Example 1: **Temporary Administrative Order**
- Legal consequence in case of **impossibility**: Right to refuse performance and right of rescission for the contractual partner

# I. SUPPLY RELATIONSHIPS

## GERMAN STATUTORY LAW (3/4)

### Disruption of the contractual basis (1/2):

- An **event** has occurred,
- that **no contracting party foresaw**,
- and could **not be prevented with the appropriate care**.
- The fulfilment of the contract may **no longer reasonable** for one of the contracting parties.

# I. SUPPLY RELATIONSHIPS

## GERMAN STATUTORY LAW (4/4)

### Disruption of the contractual basis (2/2):

- Case Example 2: Unlimited Administrative Order
- An order for an indefinite period of time would delay the provision of the service for an indefinite period of time so that the contract, once entered into, would no longer **make sense**. Further examples: **State border closures** or **embargoes**
- Consequence:
  - **Adaptation** of the contract, this can also mean that the products owed have to be obtained elsewhere
  - If an **adaption of the contract is not possible** or **unreasonable** for one party, the disadvantaged party can **withdraw** from the contract

## II. REAL PROPERTY LEASE AGREEMENTS - NO TERMINATION

### Exclusion of the termination right of landlords

- Exclusion of the **termination right** of the landlord in case of default of payment **due to corona** in the period 1 April to 30 June 2020, possibly extended to 30 September 2020
- **Obligation to pay** remains (subsequent payments to be made within two years), therefore **interest on arrears**
- **Credible proof of connection** between **pandemic** and non-performance by tenants required

# III. RECOMMENDATIONS

- **Review of the existing contracts**
  - Force Majeure / MAC clause?
- **Arrange for evidence**
  - E-Mail correspondence
- **In new contracts: Record the status quo**
- **Rejection of the performance refusal** by customers/suppliers
- **Check contract adaption** (in case of disruption of the contractual basis)
- **Monitor** suppliers and customers in **difficulties**
- **Seek dialogue** with **customers** and **suppliers**
  - "We are all in this together."
- **Search dialogue** to **landlord**
  - Deferral
  - Reduction of rent
  - Comply with the written form

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# **SHORT-TIME WORK / FURLOUGH WORK – WAGE RELIEF MEASURES**

**Speaker: Dr Andreas Reuther**

# I. INTRODUCTION TO SHORT-TIME WORK

- Good experiences in Germany with short-time work during the financial crisis in 2008/2009
- Main approach: Prevention of dismissals by supporting the employer and the employees in the ongoing employment relationship
- Current legislative reforms have made short-time working even more attractive
- High demand in Corona-crisis: more than 700,000 employers have applied for short-time work and more than 10 million employees are affected

## II. BASIC PRINCIPLE OF SHORT-TIME WORK

- The employee reduces his working time or does not work at all ("short-time work zero")
- The employer has to pay the salary and the social security contributions only to the extent to which the employee actually works
- The loss of earnings of the employee is cushioned by the short-time allowance:
  - Employees with children basically receive 67% of their net loss of income up to the income threshold
  - Employees without children basically receive 60% of their net loss of income up to the income threshold



## II. BASIC PRINCIPLE OF SHORT-TIME WORK

- **Example 1: employee has one child and earns EUR 2,000 net in full-time. Due to "short-time work zero" the employee stops working:**
  - The employee receives short-time allowance in the amount of about EUR 1,340 (tax and duty-free)
  - The employer has no longer any costs for salary and social security contributions during the period of short-time work
  
- **Example 2: employee has one child and earns EUR 2,000 net in full-time. Due to short-time work, the employee now only works 20 hours per week instead of 40 hours:**
  - Besides a salary of EUR 1,000 net, the employee receives short-time allowance in the amount of about EUR 670 (tax and duty-free)
  - The employer only has to pay about 50% of the costs for salary and social security contributions

# III. REQUIREMENTS OF SHORT-TIME WORK

- **Significant lack of work:**
  - Economic reasons or unavoidable event
  - Temporary nature of the lack of work
  - Short-time work is unavoidable
  - At least 10% of the employees have a loss of more than 10% of their gross monthly income
  
- **Fulfillment of the personal requirements by the employee:**
  - Employment relationship is not terminated by dismissal
  - No incapacity to work before the start of short-time work
  - Participation in job placement efforts
  
- **Note:** Short-time work does not have to be introduced for the entire company and not for all employees equally and simultaneously

# IV. PRACTICAL IMPLEMENTATION OF SHORT-TIME WORK

## 1. Legal basis for the introduction of short-time work:

- Agreement with trade union
- Agreement with works council
- Employment contract
- Amendment to the employment contract

**Attention:** Risk of payback claims if introduction of short-time work is invalid!

## 2. Written notification to the Employment Agency:

- Reasons for short-time work
- Anticipated period of short-time work
- Legal basis for the introduction of short-time work
- Number of employees in the company and number of employees who are expected to be put on short-time work

**Attention:** False statements can be criminal offence!

# **IV. PRACTICAL IMPLEMENTATION OF SHORT-TIME WORK**

## **3. Calculation of the amount of short-time allowance by employer:**

- The employer must calculate the exact amount of short-time allowance for each individual employee
- The employer has to pay the short-time allowance and the relevant social security contributions to the employee in a first step

## **4. Application of the employer for reimbursement of the paid short-time allowance and social security contributions at Employment Agency:**

- 3-month cut-off period
- The employer has to demonstrate the calculation of the short-time allowance for each individual employee
- The Employment Agency will reimburse the short-time allowance and relevant social security contributions to the employer within about 15 days

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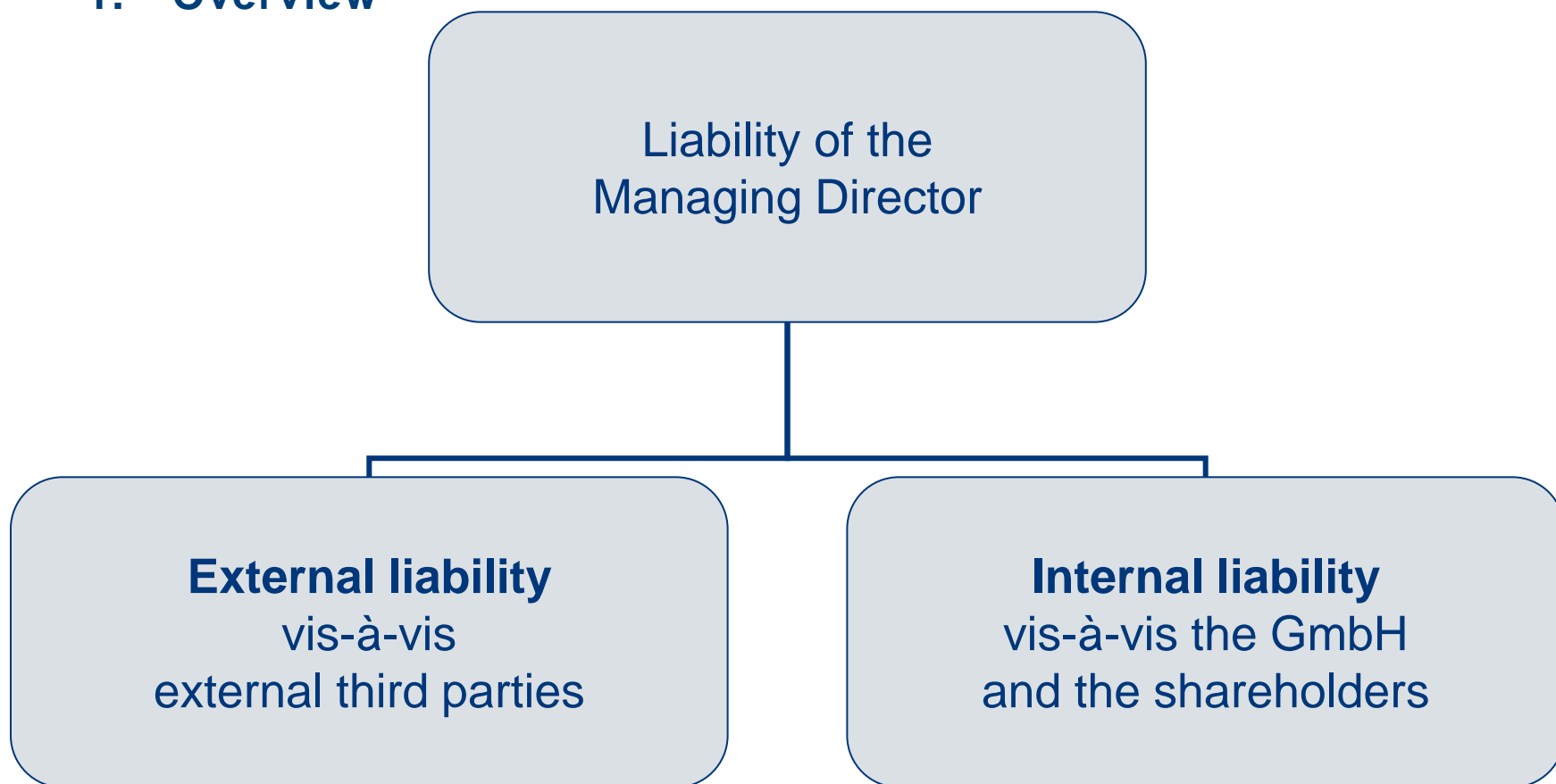
# **LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS**

in the context of Corona crisis

**Speaker: Prof Dr Hans-Josef Vogel**

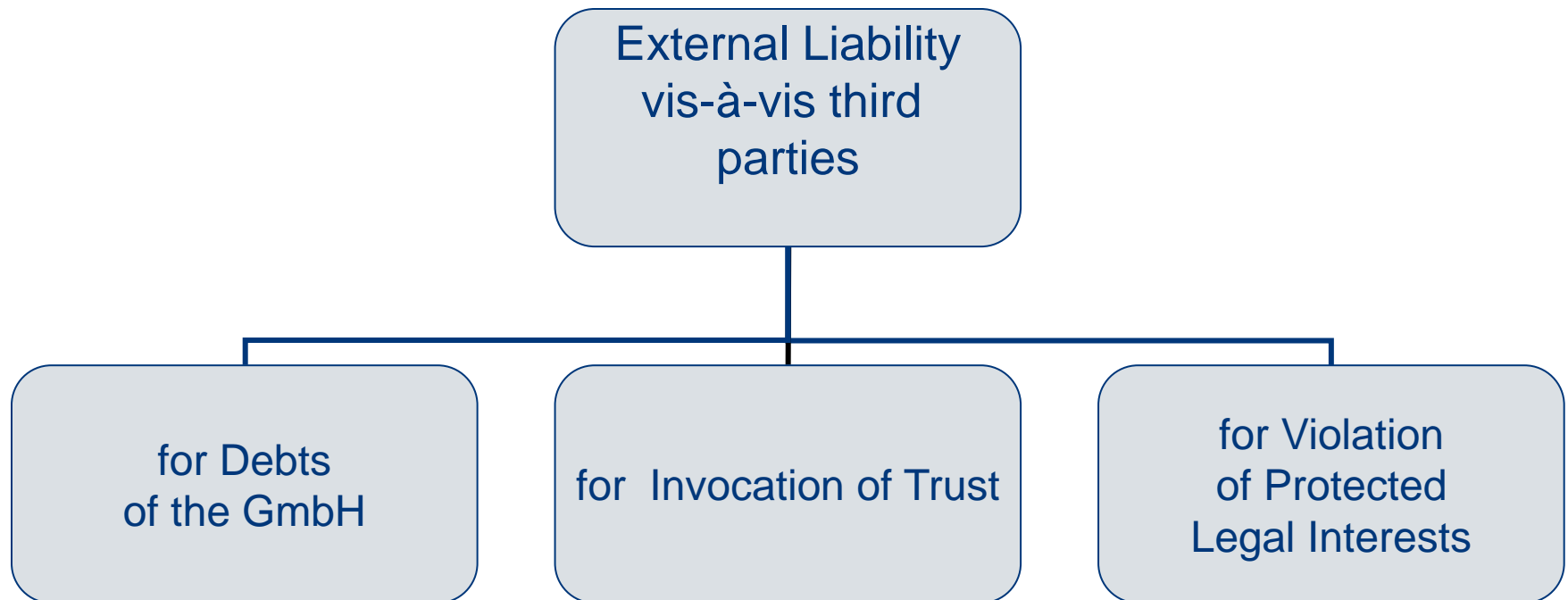
# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 1. Overview



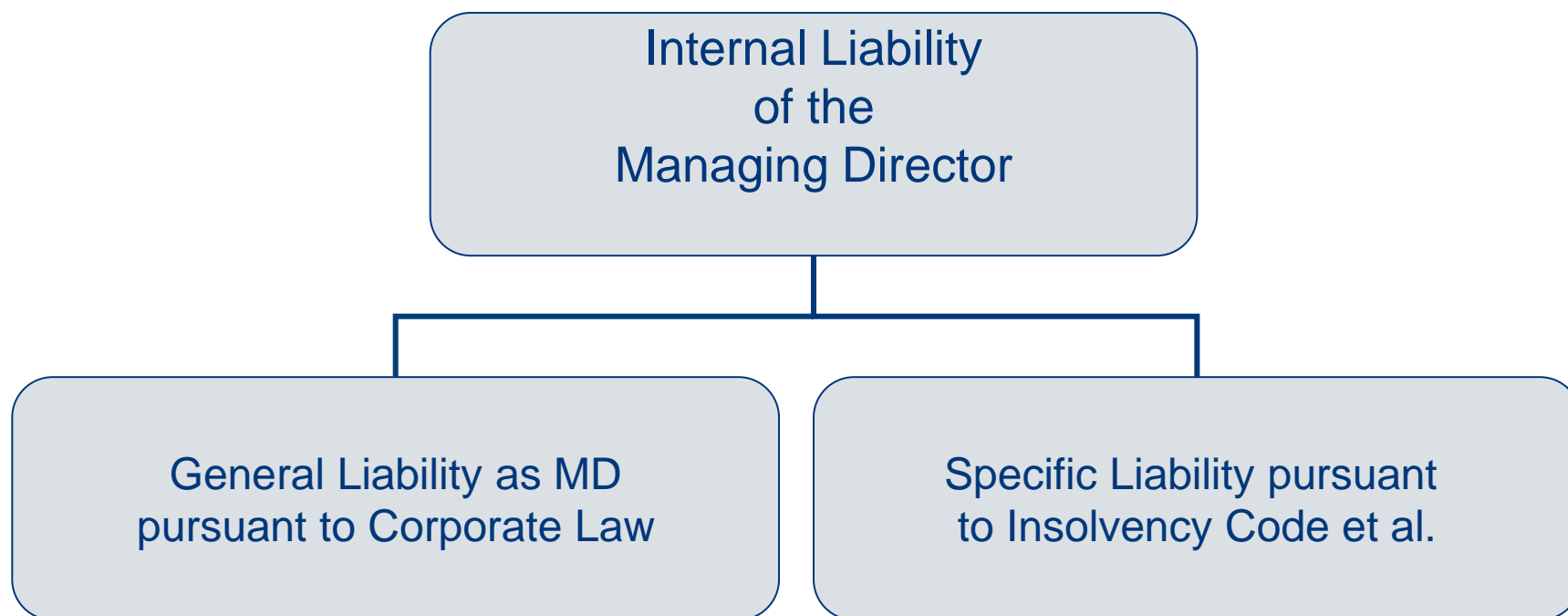
# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 2. External liability



# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 3. Sources of internal liability





# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 4. Internal liability vis-à-vis the company

- Section 43 (2) GmbHG

*"Directors who breach the duties incumbent upon them shall be jointly and severally liable to the company for any damage arising."*

- liable for
  - any breach of duty committed
  - when performing his/her duties as member of the body "management board"

# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 5. Internal liability vis-à-vis the company

- **Prerequisites for the liability pursuant to section 43 (2) GmbHG:**
  - Violation of a managing director's duty as member of an executive body through positive action or omission
  - Fault attributable to managing director
  - Damage caused to the company due to culpable breach of duty of managing director

# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 6. Internal liability vis-à-vis the company

- Breaches of duty by other managing directors are generally not attributed to one managing director
- On account of the principle of overall responsibility, several managing directors are obliged to mutual monitoring, also in case of structuring/division of responsibilities. Breaches of such monitoring duty may trigger a liability pursuant to section 43 (2) GmbHG
- Highly important:
  - Keep abreast of developments in law aimed at alleviating burdens of companies
  - Health and Safety Issues
  - Manage cash flow
  - Reporting systems
  - Information to shareholders

# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 7. Business Judgement Rule and Corona

- **Business decisions** allow for more than one option – neither prescribed by law nor by articles of association
- Liability: in accordance with "**Business Judgment Rule**", adopted from Anglo-American legal practice (section 93 (1) sent. 2 German Stock Corporation Act (*Aktiengesetz, AktG*))

# I. LIABILITY AND FIDUCIARY DUTIES OF GENERAL MANAGERS

## 8. Internal liability vis-à-vis the company

- Prerequisites for diligent acting in accordance with the "**Business Judgement Rule**"
  - Business decision
  - Acting for the benefit of the company (is assumed)
- Acting on the basis of adequate information
  - Documentation and Communication is key!
  - Adequate information: state aid available, furlough/short time work programs/tax credits – only if management is aware of the tool-box can they make informed decisions
- ACTING WITHOUT PARTICULAR INTERESTS AND WITHOUT EXTRANEIOUS INFLUENCES (IS ASSUMED)
  - Acting in good faith (reasonable point of view of a diligent and conscientious manager)

## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

- Duty to apply for insolvency proceedings
- Liability for the reduction of the company's assets prior to insolvency
- Repayment of shareholder loans
- Avoidance in dealing with debtors in crisis

## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

### 1. Insolvency Filing

#### General Rule:

Managing Director must file for insolvency within three weeks after the company is

- illiquid
- over indebted

Sanctions: criminal and civil liability of the managing director

#### New Corona-Rule:

No filing required between March 1 – September 30, 2020 (possibly to be prolonged until March 31, 2021)

Unless:

- insolvency is not caused by Corona-Pandemic
  - no reasonable likelihood of overcoming illiquidity
- > Assumption: crisis was caused by Corona, if company was not illiquid on December 31, 2019

## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

### 2. Payment Prohibitions

#### General Rule:

Managing Directors have to repay any payment (wide definition) made despite being insolvent to creditors, unless payment was made in accordance with the standard of a prudent businessman.

#### New Corona Rule:

Payments made in orderly course of business, especially payments to continue or restart operations or in keeping with a restructuring concept always are considered prudently made.



## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

### 3. Shareholder Loans

#### General Rule:

Repayments of shareholder loans within (1) year before applying for insolvency are to be returned. Loans are subordinated in insolvency proceedings. Security granted from company avoidable if within 10 years of insolvency application

#### New Corona Rule:

Shareholder loans made until September 20, 2020 can be repaid until September 30, 2023 without risk of repayment

Securities for the loans can be granted without detriment in insolvency

## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

### 4. Avoidance

#### General Rule:

Performance of a contract as agreed can be avoided, if recipient knew the illiquidity or knew circumstances that must lead to the conclusion of illiquidity – very strict court decisions

Performance under amended contract always was avoidable, three months retroactively upon applying for insolvency procedures

#### New Corona Rule:

No performance as agreed can be avoided

Certain means of performance (inter alia shortening payment period, assignment instead of cash payment, payment by subsidiary at request of mother company) are not subject to avoidance

## II. CORONA INDUCED DEVELOPMENTS IN LIABILITY OUTSIDE GENERAL DUTY

### 5. Take aways:

Planning liquidity

Document financial health as of December 31, 2019

Document that payments serve to uphold or restart operations, or are in line with restructuring plan

Restructuring plan in writing

Grant shareholder loans and make use of duration until September 30, 2023

Use assets of company to secure shareholder loans

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**FRANCE**



# I. CONTINUATION OF THE COMMERCIAL BUSINESS

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**Marie Hindré, Partner**

# 1. FINANCIAL SUPPORT OF THE FRENCH STATE

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- **French temporary aid scheme:** based on the EC Temporary Framework for state aid measures to support the economy in the current context of the COVID-19 outbreak. As in other EU countries, it provides for aid measures in the form of **bank guarantees** subsidised by the French State, under several conditions (not detailed today).
- Any company registered in a **national register in France**, regardless of its size or sector of activity (with the exception of credit institutions), can apply for its benefit.
- The measures may **not be granted** to recipients found to be **in difficulty** on 31 December 2019.
- Whereas in the initial version of the Act **none** of these measures was applicable to recipients which are in a situation of **safeguard, insolvency or judicial liquidation**, this restriction was **deleted** in its most version amended on 25 April 2020, enlarging the possible recipients of these aid measures.
- **No prior notification** to the EC of the individual aids to be granted on the basis of this temporary scheme is needed (unless eligibility conditions are not met).



# 1. FINANCIAL SUPPORT OF THE FRENCH STATE

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- Illustration (Go): Fnac/Darty

The Fnac Darty group obtained a loan of EUR 500 million from a pool of banks, 70% guaranteed by the State, on the basis of the French Transitional Scheme. It is the **first state-guaranteed loan** (PGE) granted to a large company (turnover > €1.5 billion).

- Illustration (Conditional Go): Air France

Air France obtained (among others) a loan of EUR 4 billion with a State guarantee exceeding the maximum legal threshold of the French Transitional Scheme. **French State had to notify the aid to get the EC's clearance.**

- Illustration (No Go, then Go): Europcar

Europcar obtained aid in the form of a loan of EUR 36 million, 70% guaranteed by the Spanish state, on the basis of the Spanish transitional aid scheme.

In addition, Europcar discussed with the French authorities to benefit from the French Transitional Scheme and **combine various aids in different Member states (permitted)**. After the first reject of a first request due to its excessive amount, the aid was split between Eurazeo, Europcar's shareholder and French State, resulting in an approval of their request for aid.

# 2.1 ADAPTATION OF THE CONTRACTS

## (THROUGH ORDINARY CONTRACTUAL MECHANISMS)

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### Two main mechanisms will have an impact on contractual time-limits during the crisis:

- **Force Majeure:** the event concerned shall be "beyond the debtor's control", "could not reasonably have been foreseen at the time of conclusion of the contract" and its effects cannot be avoided "by appropriate measures";
  - Article 1218 of the Civil Code is **not a matter of public order**. Contractual amendments are possible
  - Unforeseeability of this epidemic not to be discussed, but up to what point in time can the epidemic be considered **unpredictable**? (successive agreements)
  - The effects of the event cannot be avoided entailing the **end** of the contract
- **Hardship (unforeseen circumstances):** Article 1195 of the French Civil Code is **not a matter of public order**.
  - The effect of the events must be **temporary** ( $\neq$  *force majeure*).
  - The parties are allowed to **renegotiate** the term of the time limit or, failing an agreement, to **resolve** the contract by mutual agreement or to request its **adaptation** to courts.



## 2.2 DEROGATION TO CONTRACT LAW

### (THROUGH TEMPORARY REGULATORY AND LEGAL FRAMEWORKS)

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- *An illustration with the adaptation of the enforcement of sanctions for non-compliance with contractual time limits*
  - **Sanctions** for non-compliance with contractual time limits (penalty payment, penalty clauses, termination) are **suspended**.
  - **Two situations are covered:**

Sanctions relating to time limits that expire **after** the date of entry into force of the protected period (*i.e.* 12 March 2020) – **during** the protected period.

Sanctions are **postponed** by a period, beyond the legally protected period, which is no longer a fixed date but a period equal to the date on which the obligation arose until the date on which it should have been performed.

Sanctions related to time limits that expired **before** the entry into force of the protected period (*i.e.* 12 March) and for which sanctions are **already enforceable**.

Sanctions are postponed for a period also **equal** to the time remaining which had been suspended by the occurrence of the legally protected period.

## 2.2 DEROGATION TO CONTRACT LAW (THROUGH TEMPORARY REGULATORY AND LEGAL FRAMEWORKS)

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- **An illustration in the tourism sector:** a legal framework derogating to the **ordinary consequences of the cancellation** of an agreement
- Whereas cancellation of an agreement entails that the parties be **restored** in their respective *ex-ante* situation (*i.e.* recovery of the price paid), the Government has adopted an **alternate** temporary solution, aimed at maintaining tourism groups' **cashflow** at a time where their activity is almost null:

**Large scope of activities concerned:**  
touristic stays; hotels;  
Air BnB, car rental;\*  
touristic services, such as  
concerts; spas; shows.  
\*Airlines companies are  
not concerned by this  
measure

### **Consequence of the cancellation:**

the seller is allowed to replace, at its discretion, the refunding by the issuance of a **credit note** valid for 18 months. After the expiry of this time-period the client can ask for the reimbursement of the corresponding amount.

**Which cancellations ?:** any cancellation made between 1 March and 15 Sept. 2020, whether decided by the client or the provider.

# 3. CONSUMER LAW TEMPORARY FRAMEWORK

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- ❖ **Goal:** facilitating **temporary cooperation** between undertakings to avoid disruption in the production, the supply and the delivery of essential goods, or in the R&D and production of products connected to medical treatments, under conditions that, in **ordinary circumstances**, could be viewed as **anticompetitive** questionable practices (exchange of information; clients or markets allocation, etc.).
- ❖ **Means:** launching by the French Competition Authority (FCA) of a special platform, aimed at providing **prior guidance** to undertakings in the setting of their projects. Same mechanism at the EC level (the EC approved a first project on 28 April 2020 in the medical sector).
- ❖ **Limits:** beyond this specific adaptation for cooperation, the FCA still monitors markets to identify **potential illicit practices**: anticompetitive discussions that would exceed this temporary framework; **excessive pricing practices** unaligned with market prices; **abuse** by **dominant** players of their position, etc.
- ❖ **Extended powers:** **consumers** are invited to inform the FCA of any anticompetitive illicit practice they may have **detected**, whereas in ordinary circumstances individuals have **no right** to refer any case to the regulator.

# 3. CONSUMER LAW TEMPORARY FRAMEWORK

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- ❖ **Goal:** making sure that consumers remain **fully protected** against unfair commercial practices (abusive resale prices; delivery terms; parallel imports; misleading advertising etc.).
- ❖ **Means:** temporary legal framework (**maximum resale price cap** for both hydroalcoholic gels and surgical masks), launching by the national competition, consumer and fraud administration (DGCCRF) of a special platform “Signal Conso” to report any suspected illicit commercial practice, market monitoring and inquiries.
- ❖ **Recommendations: compliance** with consumer law continues **as usual**; transparent and fair information provided to clients (*e.g.* no guaranteed delivery date that could be a decisive factor in the purchase of a product, if the uncertainty of the current delivery conditions do not allow this guarantee).
- ❖ **Investigations and sanctions:** infringements evidenced will be **prosecuted**. No amnesty, despite the current **suspension** of the **limitation period** and **procedural time-limits**. Consequently, all the potential infringements occurring during the present crisis will possibly be **investigated later**.



## **II. EMPLOYMENT LAW ISSUES**

**Mickael d'Allende, Partner**

# 1. SHORT-TIME WORK

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- ❖ Rules governing the short-time work scheme (“*activité partielle*”) in France have been substantially softened to take into account the current exceptional circumstances
- ❖ **A large majority of French employees are now concerned by this scheme**
- ❖ Short-time work may be implemented **to reduce working-time or completely close the company or a part of it**
- ❖ Companies interested must apply on a dedicated website and get the **authorization** of the French Labor administration
- ❖ Companies that have a Works Council may consult it **up to two months after the implementation of the short-time work**
- ❖ The compensation paid by the employer to the employees covers **at least 70% of their normal gross remuneration**: approximately 84% of the net salary
- ❖ A partial activity allowance is paid **by the State to companies to reimburse the 70 % compensation paid to the employees** during the short-time work (this is the applicable concerning March, April and May, to be confirmed for June)
- ❖ Companies may be tempted to fraud and put at the same time employees in short-time work and in teleworking → **French Government has already warned that inspections will be carried out (these have already started) and that penalties will be imposed**

## 2. BREACHES OF EMPLOYMENT CONTRACTS ARE STILL ALLOWED: DISMISSALS FOR ECONOMIC GROUNDS

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- ❖ Companies in this difficult economic context may have to consider redundancies
- ❖ To date **there is no formal government prohibition on dismissals**
- ❖ The French Labor Administration is attentive to any requests for collective redundancies and **may be more severe in approving redundancy plans**
- ❖ On the other hand, companies applying to benefit from the short-time work scheme must in principle **avoid dismissing** their employees since **the aim of this scheme is precisely to maintain employment**
- ❖ Statistics show that companies currently favor the use of short-time scheme
- ❖ The situation will probably change in the coming weeks/months in view of the **potential limitation of the short-time work scheme** announced last Tuesday by the Prime Minister



## 2. BREACHES OF EMPLOYMENT CONTRACTS ARE STILL ALLOWED: OTHER DISMISSALS AND TERMINATIONS BY MUTUAL AGREEMENT

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- ❖ **Dismissals for misconduct or poor performance may be initiated by employers**
- ❖ **Particular vigilance** in the conduct of the procedure, particularly with regard to preliminary meetings and notification of dismissal is required
- ❖ A question arises as to the organization of the preliminary meetings, which in principle must be held “in person” by inviting the employee concerned to the company's premises
- ❖ During the current health crisis the majority of companies have organized these preliminary meetings by **videoconference**
- ❖ This practice **may be invalidated by Courts**, as we will know at the end of the crisis, if disputes on the subject arise
- ❖ In any event, this can only constitute a procedural irregularity which will not affect the validity of the dismissal if it is based on a real and serious ground
- ❖ Regarding the terminations by mutual agreement (“*ruptures conventionnelles*”), these procedures were suspended for a time by the Labor administration, but are **progressing normally since the 25 April Ordinance**



### 3. ISSUES RAISED BY BUSINESS RECOVERY

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- ❖ In accordance with articles L.4121-1 et seq. of the French Labour Code the employer is required to ***"take all necessary measures to ensure the safety and protect the physical and mental health of workers"***
- ❖ In this respect, the employer must carry out an **assessment of the occupational risk** in order to reduce as far as possible the risks of contagion in the workplace or during work
- ❖ **Appropriate measures must be implemented** by the employer including: prevention measures regarding occupational risks, information and training, implementation of appropriate organization and provision of appropriate resources
- ❖ In the current context of the employer must whatever the situation of the company:
  - ❖ Inform employees about the prevention measures to be respected in accordance with official recommendations
  - ❖ Provide employees with the necessary means to prevent the spread of the virus: soap, hydro-alcoholic solution, supply of protective masks, etc
  - ❖ Implement social distancing measures

### 3. ISSUES RAISED BY BUSINESS RECOVERY

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- ❖ **The use of telework is still the rule** whether it is possible for companies to use it
- ❖ **Staggered scheduled can be set up** by companies to avoid the spread of the epidemic
- ❖ If an employer fails to meet his obligation regarding the preservation of health and safety of employees **he could be held civilly or even criminally liable**
- ❖ Employees may also exercise **their right to withdraw from work** if they have reasonable ground to believe that the situation in which they find themselves at work **shows a serious and imminent danger to their life or health**
- ❖ Unions may also be tempted **to block the return to work by implementing emergency procedures before Courts** in an attempt to prove that employers do not respect their safety obligations (cf. Carrefour, Amazon)

# **III. FIDUCIARY DUTIES AND LIABILITIES OF GENERAL MANAGERS IN FRENCH SUBSIDIARIES**

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**Gilles Gaillard, Partner**

# **1. EXCEPTIONAL MEASURES TAKEN BY THE FRENCH GOVERNMENT IN ORDER TO MAINTAIN THE ECONOMY**

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# 1. EXCEPTIONAL MEASURES TAKEN BY THE FRENCH GOVERNMENT IN ORDER TO MAINTAIN THE ECONOMY

- ❖ Postponement of **time limits** to avoid penalties
- ❖ Promotion of **support by banks / Sovereign funds** to give and/or safeguard companies' cash flow
- ❖ Postponement of **payments** (not commercial bills but tax & social security)
- ❖ Limitation of **distribution of dividends** ability by **large companies**
- ❖ **Guarantees** granted by French Government to support bank financing for **small companies**
- ❖ Measures to support **specific sectors** (tourism, culture, catering...)
- ❖ Measures to prevent **insolvency** / liquidation

## **2. GOVERNANCE PRINCIPLES**

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## 2. GOVERNANCE PRINCIPLES

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### ❖ Powers

GMs vested with most extended powers to act in the name and on behalf of the company:

- Subject to powers of shareholders meeting (Law and AoA)
- And subject to compliance with corporate interest and within the limits of its corporate purpose

### ❖ Civil liability

- Towards the company or the shareholders if acts against company's interests
- And towards third parties in exceptional circumstances only (separable fault from corporate duties)

**Criminal liability** for acts committed personally or by employees

**Extension of liability** in case of **liquidation** of the company  
(misconduct which caused the insufficiency of assets)

# **3. RECOMMENDATIONS FOR GMS IN THE CONTEXT OF COVID-19**

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### **3. RECOMMENDATIONS FOR GMS IN THE CONTEXT OF COVID-19**

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In the context of the Covid-19 crisis, GM directors shall conduct their duties with reasonable care and particular attention to:

❖ **Information:**

- **Survey** of the new set of **legal rules**,
- **Risk assessment** (update risk mapping),
- **Robust financial information** in real time and shared in and outside the company to adjust available financial facilities and alternative means of support (government aids...)

❖ **Distribution of dividends**

❖ **Regular Board and Shareholders meetings** with timely and comprehensive information, acute minutes (debates, reason and subject of decisions)

➔ Audio / video conferences or written consultations allowed by Ordinance No. 2020-231 of 25 March 2020 (even if not provided in the by-laws)

❖ **Seek professional advice** (eg: workforce issues, financial aids, directors' duties...)

### **3. RECOMMENDATIONS FOR GMS IN THE CONTEXT OF COVID-19**

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In the context of the Covid-19 crisis, GM directors shall conduct their duties with reasonable care and particular attention to:

- ❖ Maintain **customers and suppliers relationships**: (communication, adaptation, payment...)
- ❖ **Employees' health and safety**: comply with governmental recommendations as adapted locally
- ❖ Finance and **insolvency**
  - Take necessary steps to restore finance and if necessary to acknowledge insolvency despite all the measures granted by the Government to safeguard the business
  - Avoid liability (eg: insufficiency of assets caused by breach of duties; misuse of corporate assets...)



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**ITALY**





Nctm

*The impact of Covid-19 on supply chain  
and lease agreements governed by the  
Italian law*

***Speaker: Paolo Gallarati***



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- ❖ Covid-19 special regulations
- ❖ Other specific remedies





## Remedies in case of force majeure events

COVID-19 is assuming the characteristics of what could be classified as a *force majeure* event. Although, the Italian Civil Code does not provide for a definition of force majeure, it provides for some legal institutions whose application assumes the occurrence of events very close to the concept of force majeure.

- ❖ **supervening impossibility** for reasons not attributable to the debtor (pursuant to Articles 1218, 1256 and 1463 et seq. of the Italian Civil Code) – *e.g. inability to deliver goods due to the production lockdown imposed by the Italian government;*
- ❖ **hardship in performance** (pursuant to Articles 1467 et seq. of the Italian Civil Code) – *e.g. procurement costs that are no longer balanced against sales (reduced due to the economic crisis arising out from the Covid-19 outbreak);*
- ❖ **rescission for harm** (pursuant to Article 1448 of the Italian Civil Code) – *e.g. the increase in the prices of sanitizers taking advantage of the state of need of companies that are forced to buy them in order to carry out their business in full compliance with the Covid-related Italian regulations and sanitary protocols.*



From a practical point of view, it is recommended to collect all the documentation proving (a) that COVID-19 and/or COVID-19-related legislative measures amount to a cause of *force majeure*; (b) any prejudice (e.g. an increase in the cost of the performance) arising, directly or indirectly, from the obligation to comply with the emergency measures adopted by the government; (c) any anomalous imbalance in a commercial relationship.



All the institutions provided for by the Italian Civil Code as well as the good faith principle require a case-by-case evaluation. Considering the emergency situation and in order to simplify the enforcement of the applicable remedies, the Italian legislator intervened also in respect of commercial agreements.



### SPECIAL REGULATIONS

- ❖ Decree-Law No. 9 of 2 March 2020 (“**Decree 9/2020**”);
- ❖ Decree-Law No. 18 of 17 March 2020 (“**Cura Italia Decree**”);
- ❖ Circular note of the Ministry of Economic Development of 25 March 2020 (“**Circular Note**”).



Article 91, paragraph 1, of the *Cura Italia Decree* clarifies that compliance with the containment measures may exclude, in individual cases, the debtor’s liability pursuant to and for the purposes of Articles 1218 and 1223 of the Italian Civil Code, as well as the application of any forfeitures or penalties connected with late or non-performance.





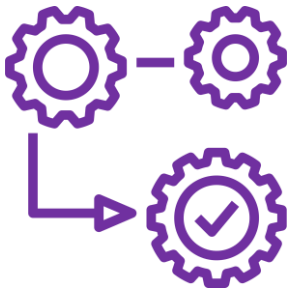
## Covid-19 special regulations (2)

<p><b>Decree 9/2020 and Cura Italia Decree</b></p>	<p>Special right to reimbursement of:</p> <ul style="list-style-type: none"><li>• Transport agreements;</li><li>• Tourist packages;</li><li>• Accommodation agreements and tickets for performances of any kind.</li></ul> <p>Said right to reimbursement may be exercised by those in the situations of impossibility expressly listed in Article 28 of Decree 9/2020 (<i>e.g.</i> people ordered to quarantine with active surveillance, who entered into a relevant agreement to be performed in the same period of quarantine or home stay).</p>
<p><b>Circular Note</b></p>	<p>In case of <u>commercial agreements</u>:</p> <ul style="list-style-type: none"><li>• entered into with a foreign counterparty; and</li><li>• containing a Force Majeure clause whereby the Force Majeure event shall be proven by a certificate issued by the Chamber of Commerce.</li></ul> <p>Upon request of the interested company, the Chamber of Commerce shall issue a certificate, in English, attesting the existence of force majeure for the emergency. In particular, such certification shall (a) summarize the national regulations issued due to the emergency; and (b) certify that the company has reported to the relevant Chamber of Commerce its impossibility to fulfil its obligations due to the extraordinary and urgent measures taken by the government.</p>



### Lease Agreements

- ❖ The tenant could claim the supervening impossibility to benefit from the property. Indeed, due to the lockdown, since access to and use of the property is forbidden, the specific purpose of the lease agreement ceases to exist and the tenant is no longer interested in the performance of such lease agreement. In such circumstance, case law seems to support the possibility to terminate the agreement.
- ❖ Right of withdrawal for “serious reasons” provided by Article 27 of the Italian so-called “Fair Rent Act” (*i.e.* Law 392/1978).
- ❖ Tax credit of 60% of the amount of the rent for the month of March 2020 of buildings falling in cadastral category C/1, pursuant to article 65 Cura Italia Decree.



### Procurement Contracts (e.g. construction, work)

Article 1664 of the Italian Civil Code according to which the contractor and the principal may ask for an adjustment of the originally-agreed price if – due to unforeseeable events – increase or decrease in the cost of raw materials or personnel has occurred such as to cause a variation of at least 10% of the total agreed price. The price adjustment is only allowed to the extent of the difference exceeding one tenth of the total price agreed.



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## *EMPLOYMENT*

*Speaker: Michele Bignami*



Until May 16, 2020:

- suspension of the collective dismissals procedures commenced before 23 February 2020
- prohibition of new collective dismissals
- prohibition of any individual dismissal for justified objective reasons (i.e. economic reasons or organizational reasons): Disciplinary termination, end of fixed term agreements, termination for retirement outside the prohibition
- Announced extension of the above measures



## Furlough work and other wage relief measures

- Use of Holidays, paid leaves, indemnities, collective reduction of working time, support for workers and other tools provided in the the collective bargaining.
- Possible reduction of salary with the consent of the employees; such reduction is possible only in connection with the portion of salary that is above the minimum salary level established by each NCBA.
- Individual part time may never be imposed: consent of the single employee is required.
- Different kinds of furlough work (according to the different industries and NCBA applicable): some are granted at central Government level. Others are granted at regional level.
  - No need to meet the usual conditions to apply: sufficient to use the “Covid - 19” code
  - To be used from 23 February 2020 for a maximum period of 9 weeks and, in any case, not later than end August 31, 2020
  - 80% of the remuneration with a maximum cap of 1,200 euro in case of 100% suspension of the working activity



## Furlough work and other wage relief measures (*continues*)

The role of the Unions is reduced in this emergency phase; in several cases the need to reach an agreement with the Unions is replaced by a duty of consultation (i.e. to duly inform the Unions and the WC of the relief sought)



## LE NOSTRE SEDI



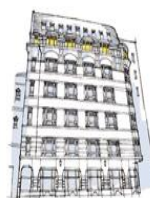
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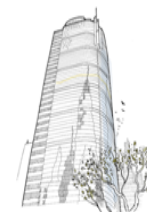
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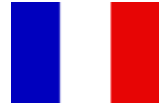
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