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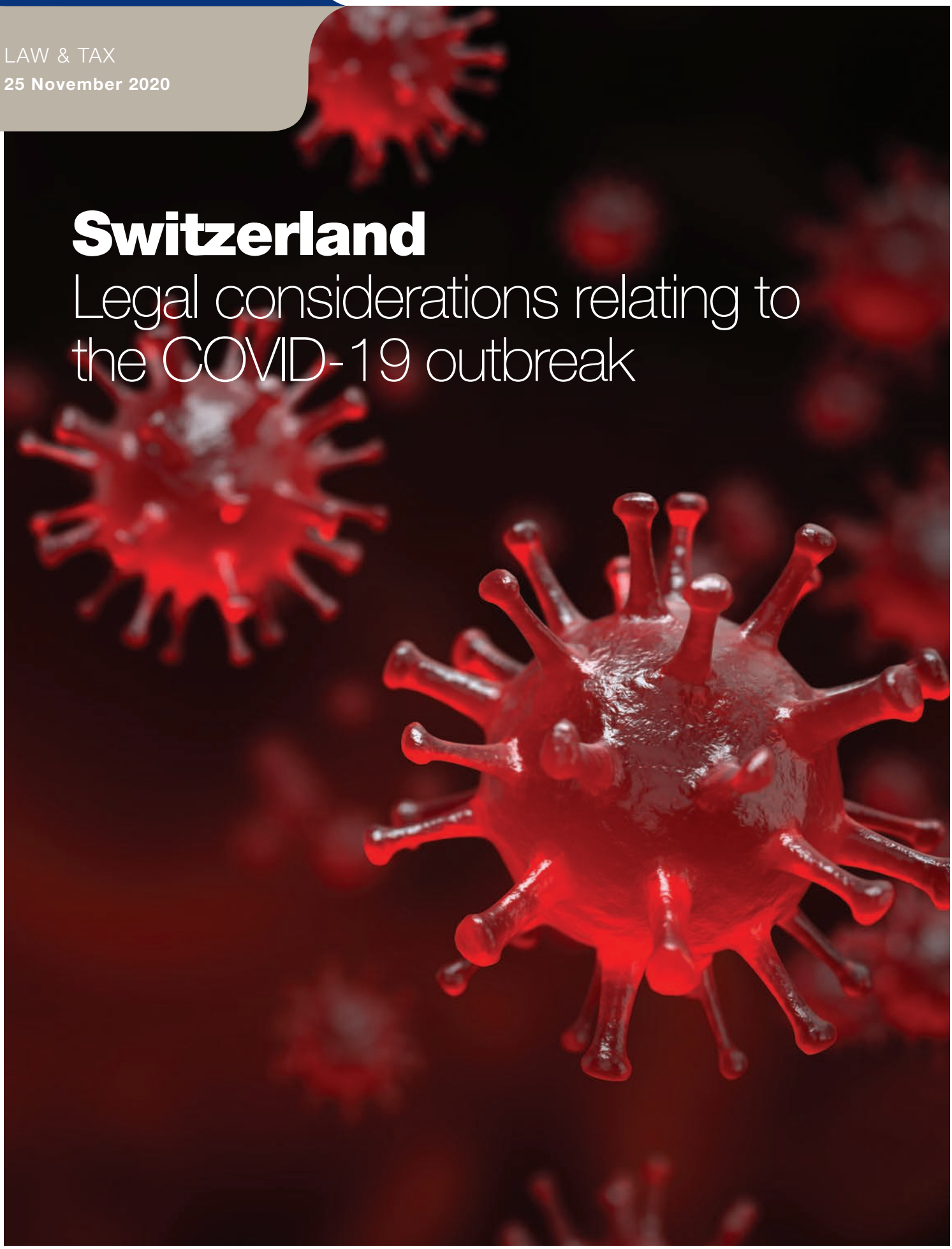
LAW & TAX

25 November 2020

Switzerland

Legal considerations relating to the COVID-19 outbreak



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Dear reader,

The coronavirus (COVID-19) is currently causing legal uncertainty and poses various challenges to companies and individuals alike. In this brochure, we aim to provide you with legal guidance for your commercial contracts, labour law issues, corporate governance matters, restructuring, liquidity and financing measures as well as tax issues.

We are well aware that you will be dealing with much more and this brochure will give you some direction, but it might not provide you the full answer for your particular question. Feel free to reach out to us. You will find the contact details of our experts at the back of this presentation. You can also join one of our free webinars where we hold live Q&A's on the topic.

Stay safe and take care,

Marco Toni
Partner
Corporate / M&A

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1. Commercial contracts

1.1 Contract management

What are the key questions companies face with respect to their contractual relationships in the current situation?

When dealing with the business implications of the COVID-19 crisis, it is essential to maintain an overview of the affected contractual relationships and to have a full and clear understanding of the corresponding contractual rights and obligations. In meeting this challenge, it is helpful to have a functioning contract management in place. At the start of a contract management process, some of the key questions for companies in the current situation have to be evaluated. This could include the following:

- Which contracts are affected by the coronavirus pandemic?
- Which counterparties are affected by the coronavirus pandemic?
- What rights and remedies do the parties have in case of non-performance caused by the coronavirus pandemic?
- What is the most appropriate business approach to address a possible non-performance?
- How should companies manage third party relationships and mitigate impacts of the coronavirus pandemic with regard to their legal rights and remedies?

What are the steps to take during the contract management process?

The goal of the contract management process is to successfully address the above-mentioned key questions and, thus, to know how to tackle the COVID-19 crisis from a legal and business perspective. The following step plan may serve as a guideline:

- ***Step 1: identify the relevant contracts***

  The first step is to collect and identify all relevant contracts. You may designate a person responsible for the organization and retrieval of all contracts and related documents. The contracts and related documents should then be sorted based on counterparty, type of contract and contract value.

- ***Step 2: prioritize the contracts***

  In a second step, when prioritizing the contracts, different factors should be taken into consideration:
  - What is the monetary value of the contract?
  - Which services, products or other obligations of business partners are indispensable for the survival of the company?
  - Which services, products or other obligations of your company are indispensable for the survival of your business partners?
  - Are there business partners on which your company relies most and which form a" cluster risk" for your business?
  - Which contracts are essential for survival during the crisis?
  - Which contracts are essential for long-term survival after the crisis?
  - Considering the current priorities of the business, is it vital to minimize costs, to ensure the functioning of the supply chain, or to develop alternative ways for the delivery of its goods or services?

  It is advisable to systematically prioritize the contracts as quickly as possible based on simple criteria which are applied consistently.

- ***Step 3: understand the key contractual rights and obligations***

  The third step is to understand the key contractual rights and obligations. This is especially important when dealing with non-performance issues and the following discussions with the counterparties. The provisions of the contract will set the framework and the parties' leverage in those discussions and

indicate potential risks. Understanding the key contractual rights and obligations helps avoiding costly legal proceedings at a later stage.
To understand the background and the legal implications of the most relevant provisions in the current situation, please refer to Sections 1.2, 1.3 and 1.4 below. The legal review of the relevant contracts with the highest priority can then be made according to the checklist outlined below in Section 1.5 "Recommended actions".

- ***Step 4: implement a strategy***
  As soon as the relevant contracts which pose the highest risk to the business have been identified, a strategy to manage these contracts and their risks should be implemented. As you develop this strategy, you may consider the following points:
  - Analyse the contracts on a case-by-case basis.
  - Focus on the most material risks and the most important business relationships.
  - When discussing contractual issues, try to find a short-term solution but keep the long-term business relationships in mind.
  - Coordinate the communication with your business partners and look for consistency, also with respect to your legal position.
  - Keep records of any correspondence or communication with your counterparties in chronological order.

1.2 Force majeure

What is the legal situation if a party can no longer meet its contractual obligations due to the coronavirus pandemic?

Most contracts contain so-called "force majeure" clauses. In such clauses, the parties agree that in case of a force majeure event the affected party is temporarily or permanently released from its contractual obligation to perform without becoming liable for damages to the other party. The event may lead to termination of the contract or suspension of contractual obligations.

Swiss law does not provide for a definition of force majeure. However, this concept is recognized by Swiss courts. A force majeure event includes, for example, natural disasters, war, unrest or strikes. In general, such events qualify as unforeseeable, unavoidable and beyond the control of either party.

Pandemics or other outbreaks of diseases may constitute a case of force majeure, as sometimes explicitly provided for in force majeure clauses. It depends on the respective wording in the contract whether the coronavirus pandemic constitutes a case of force majeure or not. In the case of openly drafted clauses, there is a wide scope for interpretation.

Force majeure clauses may contain provisions on additional requirements which must be met by the contracting parties in the event of force majeure. These can range from the obligation to notify the other party to the obligation to mitigate damages.

What is the legal situation if a Swiss law governed contract does not contain a force majeure clause?

If the contract does not contain a force majeure clause or if the provision is unclear, a case of force majeure may nevertheless exist under Swiss law. It is to be assumed that the coronavirus pandemic constitutes a case of force majeure in particular if events are cancelled, shops are closed or quarantines are ordered due to official orders. An official prohibition would make it impossible to perform the contractual obligations.

The question then arises whether the performance of the contract is temporarily or permanently impossible. If the coronavirus pandemic only results in a delay of performance, the counterparty may in its discretion make use of the following available remedies: (i) insist on performance and claim for damages due to the delay; (ii) waive performance and claim damages for non-performance; or (iii) terminate the agreement. The non-performing party has, however, only to pay damages if it cannot prove that it was not at fault.

If the party cannot perform due to official prohibitions by the government in the course of the coronavirus pandemic, it can be argued that the non-performing party was not at fault because this was not foreseeable at the time the contract was formed. If, on the other hand, at the time the contract was formed, the non-performing party could have foreseen the official measures taken by the government as the pandemic was already spreading, the party could be considered to be at fault.

If the performance is permanently impossible and the non-performing party was not at fault – depending on the specific circumstances –, the contract must be rescinded. This means that services already received must be

reimbursed. However, this provision is discretionary and may be amended by contractual agreement. Thus, each contract must be assessed on a case-by-case basis.

What is the legal situation if the contract has been concluded recently and the coronavirus was already spreading? Can force majeure be invoked?

It depends on whether the contract includes a force majeure clause or not. If an epidemic or pandemic is a specifically defined force majeure event, it is more likely to successfully bring forward force majeure claims. If the force majeure clause is drafted in an open or inclusive way in the meaning that the event must not be specifically listed as a force majeure event, the qualification of the coronavirus pandemic as a force majeure event depends on the general formulation of the clause as well as on the hypothetical will of the parties.

Under Swiss statutory law, if the contract does not contain a force majeure clause, it can be argued that the coronavirus pandemic was foreseeable because it was already spreading and, therefore, may not constitute force majeure.

What should a party do if it is unable to perform at present, but will be able to do so at a later date?

If the performance of the contract is temporarily impossible but could be fulfilled at a later stage, the counterparty may, nonetheless, in its discretion make use of the available remedies, that means (i) insist on performance and claim for damages due to the delay, (ii) waive performance and claim damages for non-performance, or (iii) terminate the agreement.

A party which cannot perform its contractual obligations at the moment due to the coronavirus pandemic should inform its counterparty immediately stating the specific force majeure event and offer performance at a later stage if possible. The counterparty could still seek the available remedies, however, should not be able to claim damages if the party is not at fault. The non-performing party should also consider whether there are alternative ways to perform the contract and whether there are ways to mitigate the effects of the current situation.

What is the legal situation if a party can meet its contractual obligations, but the costs are much higher than normal due to the coronavirus pandemic?

The coronavirus pandemic may change the normal business circumstances and, thus, e.g. the production costs or costs of delivery are higher than under normal circumstances, but it is still possible for a party to meet its contractual obligations. In such case, a plea of force majeure fails if performance at higher costs is still possible.

If the higher costs lead to a serious equivalence disruption, the *clausula rebus sic stantibus* may be another way to tackle the challenges posed by the coronavirus pandemic. The *clausula rebus sic stantibus* presupposes changes in external circumstances that affect all contracting parties equally. If the conditions of *clausula rebus sic stantibus* are met, the contract must be adapted to the changed circumstances.

However, note that the *clausula rebus sic stantibus* very rarely leads to a judicial dissolution or adjustment of the contract. Such a solution is only affirmed if the relationship between performance and consideration is disturbed as a result of an extraordinary and unforeseeable change in circumstances in such a way that the creditor's insistence on his contractual claim constitutes a usurious exploitation of the disproportion and thus a clear abuse of rights.

What if a party is not able to pay its outstanding liabilities due to the economic impact of the coronavirus pandemic?

Under Swiss law, the performance of monetary obligations is never impossible. Therefore, the party's obligation to make the payment in question remains.

1.3 Fundamental error

Is there any other possibility under Swiss law if a party cannot meet its contractual obligations?

A contract can be non-binding for a contracting party not only because of contractual or statutory force majeure, but also because of a fundamental error. A fundamental error exists if a contracting party is in error about an essential basis of the contract. In this case, it must be explained and justified to the other contracting party within one year that the contract is no longer recognized as valid due to the fundamental error and any performance already made will be reclaimed.

The error may relate not only to past or present facts at the time of the conclusion of the contract, but also to future facts. However, it is necessary that the error relates to a specific future fact which, at the time of the conclusion of the contract, could objectively be regarded as certain and the other party should have realized in good faith in the course of business that certainty of the occurrence of the future event was a precondition to the conclusion of the contract for the party in error.

1.4 UN Convention on the International Sale of Goods

What if the UN Convention on the International Sale of Goods ("CISG") is applicable?

The CISG is generally applicable to Swiss law governed contracts of sale of goods between parties whose places of business are in different states. If the parties wish to exclude the application of the CISG, they need to expressly mention the exclusion under Swiss law governed contracts.

The CISG contains a provision which is similar to the Swiss statutory provision on force majeure, namely Article 79 CISG:

"*A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*."

Article 79 CISG only gives the impeded party exemption from liability for damages, whereas other remedies remain open to both parties. However, according to the CISG Advisory Council Opinion No. 7, it may be open to a court to adapt the contract in light of such changed circumstances.

1.5 Recommended actions

What legal steps should companies take regarding their commercial contracts?

From a legal perspective, we recommend that companies take the following steps:

1. Analyse the specific contracts in question and the law applicable to them. If there has been non-performance of a contract, make a detailed record of the event, including the time of the event, the parties involved and the facilities affected by the event.
2. Check whether your contracts contain a force majeure clause. If such clause is included, the question arises as to whether epidemics or pandemics are covered, i.e. whether these events are explicitly or generally included in the meaning of the clause. If the coronavirus pandemic is covered, the question arises what possibilities for action exist. If performance becomes impossible for a contracting party due to an official order, it must be assumed that a case of force majeure has occurred.
3. If the contract does not contain a force majeure clause, you should check whether the applicable law contains statutory provisions for the case of force majeure and what the content of these provisions is.
4. Check whether there are any notification obligations. Both contractual and statutory force majeure provisions can stipulate an obligation to notify the other party. The party who is unable to perform must immediately inform the other party about the non-performance due to a specific event of force majeure to be named. This duty to notify must be exercised mandatorily, otherwise force majeure can no longer be invoked.
5. Check your standard force majeure clause regarding possible adjustments for future events.

1.6 Ordinance on the electronic signature

What measures has the government taken to make it easier to sign contracts digitally and legally binding?

On 1 April 2020, the Federal Council passed a temporary amendment to the ordinance on the electronic signature. This amendment provides for a general possibility of video identification when issuing certificates for qualified electronic signatures. The applicants do not have to appear in person at a registration office for identity verification purposes as long as the provision is in force, provisionally during the next six months.

The new provision in the ordinance provides that the identity of a person applying for a regulated certificate can be established in real time by means of audio-visual communication. The prerequisite is that the identification is carried out by a procedure that meets the requirements of the Anti-Money Laundering Act or a procedure that has been assessed in a member state of the European Union in accordance with the corresponding EU Regulation (No. 910/2014).

2. Employment law

2.1 Duty of care

Is there an obligation for employers to take measures in order to protect employees?

According to statutory law, the employer is obliged to protect the employees' health and introduce the necessary and appropriate measures. In case of an outbreak of an epidemic or pandemic, there are increased duties of information, loyalty and care in order to maintain the business going (e.g. information about outbreaks of illness, absence from work).

In case of a pandemic, the employer must provide information on the recommended conduct, such as the rules of conduct and hygiene published by the Federal Office of Public Health (FOPH). There is no definition or regulation on what sufficient protective measures are, as they differ in each case (e.g. for office workers it might be sufficient to have individual office spaces, whereas for sales personnel with close contact to customers further protection must be provided). If one employee is infected with the coronavirus, the employer must make sure the virus does not spread in the office. The employee should be quarantined and not allowed to return to the workplace until the risk of contagion no longer exists.

Measures taken by the employer must be proportionate and protect the employees' personality rights.
For example, travel restrictions should not go further than necessary (e.g. no country limitations for personal holidays).

Are employers allowed to order mandatory temperature measuring and tracking in order to prevent infections?

As far as employers process personal data, it must be carried out in compliance with the Swiss Data Protection Act, even if such processing serves to protect individuals against the pandemic. In particular, health data (such as body temperature or data on flu symptoms) are particularly worthy of protection and may generally not be obtained against the will of data subjects (e.g. employees, customers or visitors). Furthermore, the processing must be necessary and suitable with a view to prevent further infections. It may not go beyond what is necessary to achieve this goal. Finally, employees, customers and visitors have to be sufficiently informed about the processing of their health data, in order for them to understand the purpose and scope of the processing, as well as its content and time frame.

Insofar as you intend to collect body temperature or data on flu symptoms of people entering buildings or workplaces, we recommend to do the following:

1. When collecting these data, the self-determination of the persons concerned must be respected. If possible, the data on flu symptoms should be collected and passed on by the individuals themselves. Extensive questions about the state of health have to be avoided, especially when asked by non-medical staff.
2. Limit the data processing to the minimum necessary to prevent further infections. If possible, erase the data immediately after collection. In case the data is still necessary in connection with operational and organizational measures, delete such data at the latest when the pandemic threat has ceased to exist.
3. Make sure that you sufficiently inform the employees and visitors about the data processed and the purpose, scope and time frame of such processing.

Can employees be assigned with different work and/or different place of work due to the coronavirus?

In case an employee works in a special field or department (e.g. sales), the question could arise whether the employer can order the employee to work in another area (e.g. warehouse) due to the lack or increased need of workforce. The temporary assignment of different work should be permissible based on the employee's duty of loyalty and the employers right to give instructions especially in extraordinary circumstances, such as the spread of the coronavirus. Unreasonable work, however, can be turned down. The same applies to the place of work, i.e. in the event of an urgent interest of the company, based on the employee's duty of loyalty the employee can be assigned a different place of work within the bounds of reasonableness.

Can employees be ordered to work from home?

Employers have to protect the health of their employees. Therefore, the recommendations published by the Federal Office of Public Health should be followed. Special attention has to be paid to employees who are part of the risk group, i.e. people aged 65 years or older as well as people suffering from medical conditions, such as high blood pressure, diabetes, cardiovascular diseases, chronic respiratory diseases, illnesses and therapies that weaken the immune system or cancer. Employees must notify their employer of such medical conditions.

All employees – even those who do not belong to a risk group – should be ordered to work from home if possible.

Such order is permitted by the employer's right to issue instructions, especially if it is a temporary order due to the coronavirus pandemic. Should the work not permit (e.g. medical staff, sales personnel), employers have to make sure their employees do not have to travel by public transportation during rush hour on their way to the office,

According to the Federal Council's recommendation introduced on 18 October 2020, employees shall perform their work from home whenever possible.

Employees, in principle, cannot introduce home office work without the employer's consent. As an exception, if the employer disregards the most elementary health precautions, the employee could refuse to come to work and still be entitled to salary.

Who has to bear the costs of home office work?
Unless agreed otherwise, the employer provides the employees with the necessary equipment (or reimburses the costs).

If home office is introduced, the necessary expenses (e.g. additional telephone costs) must always be reimbursed. These cannot be passed on to the employee. However, this only applies to necessary expenses incurred. Expenses are, for example, not considered necessary if the employee decides for him- or herself to work from home but would have a workplace available where these costs would be covered by the employer.

To what extent may employers monitor employees who work from home?
Generally, the employee's personality rights have to be respected and all measures taken by the employer have to comply with the relevant data protection provisions. In any case, systematic monitoring by the employer is not allowed.

The employee is also obliged to record the working time in the home office. Since direct control in the home office by the employer is difficult or even impossible, the employee must be informed about the mandatory regulations (prohibition of night work and Sunday work) and be contractually obliged to comply with them. For this purpose, it is recommended to summarize the necessary regulations in a set of rules.

What happens if employees fail to comply with introduced measures?
Provided that the employers' instructions are necessary and appropriate, an employee's failure to comply with the instructions can lead to disciplinary measures or in serious cases to the termination of the employment relationship.

2.2 Termination of employment

Can employment contracts be terminated for economic reasons?
In general, the principle of freedom of dismissal applies. Consequently, regular terminations of employment contracts do not require specific reasons and can be based on economic grounds. The termination cannot be given, however, during a blocking period (e.g. if the employee is sick, pregnant, has had an accident or must carry out military service) or in case of fixed-term employment contracts. A termination must not be qualified as abusive. This has to be checked on a case-by-case basis, but could, for example, be the case should the employer attempt to enforce unfair salaries or working conditions by giving a termination with an option of altered conditions of employment (*Änderungskündigung*).

Could the termination of an employment agreement by the employer due to the fact that an employee wants to work from home as a precautionary measure be qualified as an abusive termination?
If an employee who is able to fulfil his work obligations from home decides to start with home office because of the coronavirus pandemic and lack of protective measures taken by the employer, the employer's termination of the employment relationship would likely qualify as an abusive termination, which would give rise to compensation claims.

2.3 Continued obligation to pay salary

Does the employer have to pay salaries if an employee is sick with the coronavirus?
According to a general principle of Swiss labour law, there is "no salary without work". However, if an employee is unable to work due to an infection with the coronavirus, he or she is usually still entitled to continued payment of salary.

As an exception, it could be argued that no salary is owed if the employee has become infected with the coronavirus through his or her own fault by travelling to an affected area despite contrary instructions by the competent government authority or his/her employer. However, in the meantime the coronavirus spread almost all over the world, therefore it is unlikely that the employee is assumed to be at fault.

The employee cannot come to work because daycare centers or schools are closed and he or she has to take care of his or her children.

a. Is the employee entitled to a salary if the children are suffering from coronavirus?

According to Art. 36 para 3 of the Labour Act, the employer is obliged to give the employee the necessary time off to take care of a sick child. This also applies in the case of a coronavirus infected child. However, the above-mentioned statute only requires the employer to give his or her employee three days off in cases where a child is sick. The purpose of that time period is for the employee to find an alternative, e.g. a relative that could take care of the sick child. During that time the employer has to pay the employee his or her full salary. If the employee has already benefitted from the full period of time he or she was entitled to continued salary payments (see below), no salary is owed.

However, regarding the current coronavirus pandemic, it is highly likely that courts would find the above-mentioned statutory time off to be too short. In cases where a sick child needs care, more often than not it is the child's grandparents who look after it. But as these are currently targeted the most by the coronavirus, they cannot be relied upon to take over the task. Employers should therefore consider giving an employee a longer period of time off to arrange for his or her child's care.

b. Is the employee entitled to a salary if the children are not suffering from coronavirus?

During the swine flu epidemic in 2009, the Zurich Labour Court ruled that employees are not entitled to continued payment of wages, if they have to take care of a healthy child because of a closed daycare center. The reason for that was – according to the court's opinion – that it was not the employee's personal circumstances that prevented her from work, but an epidemic-like situation which was out of the employee's control.

There are, however, other opinions. Parents have a legal obligation to look after their children if school or daycare is cancelled. This, in turn, would result in a claim to continued payment of wages for a limited period of time as far as the employee has not already benefitted from the full period of time he or she was entitled to continued salary payments (see below).

Therefore, it cannot be completely ruled out that a court would find that the employer is obliged to continue to pay wages due to the coronavirus situation. There is in any case a time limit on the obligation to continue to pay wages (see below) and only for as long as the inability to work is justified.

Also, if the employee actually works at home (home office) salaries are owed to the full extent, even if the performance of the employees is somewhat limited due to the presence of his or her children.

c. Are there any measures taken by the Federal Council with regard to employees who have to reduce their working hours in order to take care of their children?

Yes, on 20 March 2020, the Federal Council introduced a measure that provides for an entitlement to compensation of parents who have to look after their children because school is closed. They are also entitled to compensations in the event of a quarantine ordered by a doctor (see also below). The compensation is paid as daily allowance in the amount of 80% of the employee's salary up to a maximum of CHF 196 per day. At this point, the detailed modalities of the compensation are still unclear.

The employee is subject to a quarantine ordered by the authorities and therefore cannot appear for work. Is the salary owed?

The employer's obligation to pay salary depends on whether the employee's inability to work is caused by the employee or not. In case an employee is placed in quarantine by Swiss or foreign authorities and cannot work remotely, the employer's obligation to pay the salary continues.

However, if an employee has travelled to an affected area – against the FDA's recommendations and on a voluntary basis – the situation might be different. Then the employee could be held responsible for his or her placement in the quarantine and the employer might refuse to pay the salary for the time spent in quarantine.

The employee cannot return from vacation due to official measures (such as the closing of borders or of the airport). Is the salary owed?
The same applies as for quarantines ordered by authorities (see above). The employer generally has to pay salary, unless the employee has travelled to an affected area against clear recommendations.

The employee is afraid of contagion and therefore does not come to work. Is the salary owed?
As long as there is no official order from the authorities, the employee's refusal to go to work is qualified as unfounded and therefore no salary is owed. If the refusal continues, the employer may terminate the employment contract without notice.

On 18 October 2020, the Federal Council recommended people work from home whenever possible in order to minimize contact to other people. However, there is no obligation to work from home. If employers do not follow the FOPH's recommendation and continue work in their usual office building and employees consequently decide for themselves to work from home following the Federal Council's recommendation, they are entitled to salary payments.

Public transportation is restricted as an official measure. The employee can therefore no longer appear at work. Is the salary owed?
If an employee cannot appear at work on time or not at all due to restrictions of public transportation, he or she is excused. In this case, however, the employer is not obliged to continue to pay salaries. If the work can be carried out by the employee from home, he or she may work from home. In such case, the salary entitlement remains intact. The employee may also have to take an earlier bus or train, if possible, to get to work on time. The restrictions on public transport do not excuse the employee from working less than the contractual working hours. The principle that commuting to work does not count as working time still applies.

How long does the salary payment obligation continue?
In general, employers have a sickness insurance in place and the duration of the payments under the sickness insurance are governed by the insurance contract.
If there is no daily allowance insurance, the duration of the continued payment of salaries is based on statutory law and the scales applied by the courts (Bernese, Basel, Zurich scale). These define the duration of the continued payment of salaries based on the number of years the employee has worked for the employer and usually range from three weeks (in the first year of service) to up to 31 weeks (if the employee has 25 or more years of service).

2.4 Lack of work

Can employers force employees to go on holiday due to the coronavirus?
In principle, the employer determines the time of the holiday, although he has to take the employees' wishes into account, provided that these are compatible with the company's interests. If the employer determines the time of the holiday, he must give advance notice to the employees within a reasonable time frame, which is around three months. However, if the existence of the business is endangered, the employer's interests may prevail. Then, employees might be forced to take holiday without respecting the period of approximately three months. In any case, forcing an employee to go into a negative vacation entitlement is not permissible.

A company reduces employees' working hours or closes down completely. Is the salary owed?
If the reasons for reduced working hours or a business shutdown falls within the risk sphere of the employer, the full salary has to be paid (see art 324 CO). The business risk includes, in principle, economical and technical risks as well as governmental measures. With regard to the coronavirus outbreak, the Swiss State Secretariat for Economic Affairs (SECO) considers that employees are, in principle, entitled to continued payment of their salary since it is the employer that bears the commercial and operational risk. Based on the employees' duty of loyalty the employees may be required to, at least to a certain extent, make up for the "missed" hours without additional remuneration. Furthermore, in order to mitigate the economic consequences, the company may consider applying for short-time work (see below).

2.5 Short-time work

What role do short-time work and short-time work compensation play in the coronairus pandemic?
By introducing short-time work, the normal working hours are temporarily reduced due to economic difficulties or operational disruptions. The employment contracts remain in force even if the work is discontinued. The aim

is to secure the existence of the company and to preserve jobs. Salaries are reduced in proportion to the working hours. To protect the employee, unemployment insurances can cover a percentage of the loss of wages (see below). Since wage reductions are a deviation from the employment contract, the employee can refuse the contract change and demand full pay of salary instead.

The affected companies can apply for short-time work with the cantonal employment office. If the requirements are met, an application for compensation for short-time work can be submitted to the unemployment insurance fund once the cantonal employment office has given its approval. The Federal Council promised CHF 60 billion for short-time work compensation and other emergency economic aid.

The Federal Council further expanded and simplified the application of short-time work. On 28 October 2020 the Federal Council decided to amend the Covid 19 Ordinance on Unemployment Insurance. The amendment grants employees on call in an employment relationship of unlimited duration the right to short-time work compensation. The amendment took retroactive effect from 1 September 2020. Further, employees no longer have to reduce their overtime before they can benefit from short-time work compensation. The simplified procedure for advance notification and the summary procedure for determination of compensation will continue to apply until the end of December 2020.

What are the requirements for the approval of short-time work compensation?

If an employer intends to claim compensation for short-time work on behalf of his employees, he must notify the cantonal employment office in writing at least ten (or as an exception three) days before the start of short-time work. Thus, short-time work normally comes into effect ten (or exceptionally three) days after notification. In addition, employers must usually pay two waiting days during the first six payroll periods (a payroll period is usually one month) and three waiting days from the seventh payroll period. This waiting period has been reduced to one day.

The approval of short-time work compensation is valid for three months and granted if the loss of working hours is either (i) due to unavoidable economic reasons or (ii) due to official measures that the employer cannot avoid and for whose damage he cannot hold a third party (in particular insurance companies) liable. According to SECO, the coronavirus and its effects are not an ordinary business risk. It is to be assumed that absences from work caused by official measures (such as the Federal Council's ban on gatherings) give rise to a claim to compensation for short-time work. Furthermore, economic reasons that lead to loss of working hours (e.g. decrease in demand or production/sales decline due to delivery difficulties) may justify short-time work compensation.

Difficulties are posed by the distinction between work absences, which are part of the employer's ordinary business risk and must be borne by the employer, and the unavoidable economic reasons that justify short-time work compensation. If a company is closed down because the employer can no longer guarantee safety or proper production in the company, there is likely to be an entitlement to compensation for short-time work. However, if a business is closed for precautionary reasons only, the employer might be in default (see above).

What amount of the salary is covered by the short-time work compensation and how long will the compensation be paid?

If the short-time work compensation is granted, the employee receives 80% of the insured salary from the unemployment insurance fund. The insured salary corresponds to the latest received salary before the short-time work (maximum CHF 12,350/month or CHF 148,200/year). There is a grace period of one day, during which the employer has to pay the costs of the short-time work compensation, as the Federal Council announced on 1 September 2020.

Short-time work compensation will normally be paid for a maximum of 12 accounting periods (of usually 1 month) within 2 years aligned. However, the Federal Council prolonged the maximum period up to 18 months due to continuing unemployment. A monthly work loss of more than 85% can only be credited during a maximum of 4 accounting periods.

What other support measures were introduced by the Federal Council?

On 20 March 2020, the Federal Council ordered additional measures to mitigate the consequences of the coronavirus pandemic.

Namely, for example, affected companies can be granted a temporary, interest-free deferral of social security contribution payments.

As for tax payments, the payment period can also be extended. The interest rate for value-added tax, customs duties, special excise taxes and incentive taxes will be lowered to 0.0% for the period from 21 March to 31 December 2020. The same applies to direct federal taxes.

3. Corporate law

3.1 Annual shareholders' meeting

How can annual general meetings be held under the current ban on events?

As per the updated ordinance dated 2 November 2020, it is currently prohibited to hold public or private events of more than 50 people. This also affects the annual general meetings of companies. The ordinary general meeting must take place within six months of the end of the financial year. However, for material reasons, the board of directors may also postpone a planned or already convened general meeting. Even if the period of six months is thereby violated, the company is not threatened with any immediate sanctions.

Furthermore, until 31 December 2021, the companies now have the following two options: They may order, regardless of the expected number of participants and without observing the invitation deadline, that the participants may exclusively exercise their rights (i) in writing or in electronic form, or (ii) by an independent proxy appointed by the company. The order must be communicated in writing or published electronically (e.g. on the company's website) at least four days before the general meeting. The competent body of the company (i.e. the board of directors) must therefore inform the participants about the measures taken, so that they are aware of the changed formalities and can prepare appropriately to exercise their rights.

3.2 Commercial register entries

What are the possible consequences if commercial registry offices are closed due to the spread of the coronavirus?

Because of the coronavirus outbreak, certain commercial registry offices have closed their counters. Consequently, all applications have to be filed by mail. In case a legalization is required (e.g. registration of a new member of the board of directors), a notary should be consulted. Notary's offices have, however, also limited their services and will only handle urgent businesses. If the notary's offices still offer counter services, such as legalizations, should be checked beforehand with the respective notary's office.

Should a commercial register not be able to register applications, the consequences are different depending on whether the entry into the commercial register has constitutive (e.g. incorporations) or declaratory effect (e.g. elections of new members of the board of directors). In the latter case, the election already comes into effect with the respective minutes of the general meeting and declaration of acceptance by the new member.

3.3 Duties of the board of directors

What are the duties of the board of directors in the context of the coronavirus pandemic?

The board of directors is obliged to act in the best interest of the company and to preserve its existence. It is required to assess and revise the company's strategy if business-relevant circumstances change as it is the case for many companies as a result of the developments in connection with the coronavirus.

The board is – similar to the employer – obliged to protect the employees' health and introduce the necessary and appropriate measures. In case of an outbreak of an epidemic or pandemic, there are increased duties of information, loyalty and care in order to maintain the business. If the board of directors does not order and enforce the measures itself, it must at least check that the management does so.

If the pandemic results in an increased number of employees being absent and business cannot be continued as usual, the board must take measures. The board must at all times be aware of the company's economic situation as well as its financial planning and is in charge of financial control and the provision of sufficient liquidity. Hence, the board must whenever necessary take appropriate measures to avoid liquidity shortages. Possible measures may include, inter alia, stopping all investments, not hiring new staff or reducing staff, terminating contracts not essential for business operations, sale of non-essential business assets and improving debtor management.

However, if the financial situation of the company deteriorates significantly and crucial ratios are reached, the board members are obliged to pursue certain actions:

i. If the latest annual balance sheet shows that half of the share capital and the legal reserves are no longer covered, the board of directors must without delay convene a general meeting of shareholders and propose financial restructuring measures.
ii. If there is reason to believe that the company may be over-indebted, an interim balance sheet must be drawn up and submitted to a certified auditor for examination. If the interim balance sheet shows that the company's debt is no longer covered, irrespective of whether the assets are appraised at going concern or liquidation values, the board must notify the court unless creditors subordinate their claims to those of all other creditors to the extent of the capital deficit.

What happens if the board of directors does not carry out its duties?

If the board does not fulfil these duties at all or only inadequately, there is a risk of liability. Members of the board are personally liable for damages arising from a breach of their duties, especially for damages caused by not informing the court of an over-indebtedness of the company in time or if the board does not comprehensively and objectively assess the company's situation or does not pursue appropriate financial restructuring measures. Furthermore, members of the board may be held personally liable for outstanding social insurance contributions.

Potential criminal liability of board members can arise in particular on the grounds of (i) mismanagement (in particular delayed filing for bankruptcy), (ii) reduction of assets to detriment of creditors, or (iii) undue preference of creditors.

It is therefore essential that the board is aware of its responsibilities and carries them out, particularly in crisis situations.

When is the board of directors obliged to file for bankruptcy?

If an (interim) balance sheet shows that the company's debt is not covered by its assets, whether the assets are appraised at going concern or liquidation values, the board must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit. Upon such notification, the court will open bankruptcy proceedings unless there is prospect of a rehabilitation and the board of directors or a creditor of the debtor applies for a deferral of the opening of bankruptcy proceedings.

The debtor may also file for bankruptcy if it declares itself unable to pay its debt (illiquid). The court will in such case open bankruptcy proceedings if there is no prospect of rehabilitation.

3.4 Ad-hoc publicity

Is it required to publish a general ad-hoc announcement regarding the coronavirus pandemic?

In general, a company listed on a Swiss stock exchange ("Issuer") is under the obligation to publish ad-hoc announcement in case of any price-sensitive facts in its sphere of activity. The coronavirus and its effects on the economy are undoubtedly a price-sensitive fact. However, the coronavirus pandemic does not originate within the Issuer's sphere of activity but relates to general macroeconomic developments. Accordingly, in principle no general ad-hoc announcement has to be made regarding the coronavirus pandemic.
Please note that even facts not arising within the Issuer's sphere of activity may trigger the requirement to publish an ad-hoc announcement in case these facts have a direct effect on the Issuer's internal operations (see below).

Is a specific ad-hoc announcement in the following situations required?

- The coronavirus pandemic has led to a significant change in the foreseeable profit or loss
- The coronavirus pandemic has led to supply chain issues, such e.g. the main supplier can no longer comply with its obligations under the respective supply agreements
- Closing of the production sites due to the coronavirus pandemic
- Key members of the management are infected with the coronavirus
- Additional financing needs due to liquidity issues
- Use of governmental support measures

In case of a significant change in the foreseeable profit or loss, a profit warning (*Gewinnwarnung*) must be published if the Issuer has raised certain expectations among market participants' regarding its results and the actual performance is likely to differ from the prior guidance. If no prior expectations were raised by the Issuer but the foreseeable figures are significantly lower (or higher)

than prior years, an ad-hoc publication might be required (so-called profit collapse or profit hike).

In the other cases, the potential price sensitivity, i.e. whether these facts are capable of triggering a significant change in the market price (reasonable investor test), must be individually assessed. Depending on the circumstances, all of the mentioned examples could trigger the requirement to publish an ad-hoc announcement. The assessment to be made will have to include, for example, whether other suppliers are readily available, how large the impact of closing the production sites is, whether the key members of management can still work from home, etc.

Finally, it is unlikely that in these cases the ad-hoc announcement can be postponed since the relevant facts are not based on a plan or decision from the issuer.

4. Restructuring

What options does a company have to get some headspace?

The Federal Council had introduced certain measures to prevent bankruptcies, such as a COVID-19-moratorium, for the time period from 20 April until 19 October 2020. As of 20 October, no special provisions apply anymore.

If a company would like to negotiate a composition agreement with creditors (see below next question) or would like to benefit from additional relief, the company may apply for a regular moratorium (Nachlassstundung). Inter alia, ongoing civil or administrative procedures and limitation periods are stayed and no further interest accrues on outstanding unsecured liabilities. An administrator will be appointed who will supervise the debtor and assess the rehabilitation prospects of the company. If the board is forced to inform the court of an over-indebtedness of the company, it may discharge this duty by applying for a COVID-19 or a regular moratorium. The court may further, upon request, defer the opening of bankruptcy if creditors were not in a worse situation through a deferral than they would be in if bankruptcy proceedings were opened immediately, and if there is reasonable prospect for a financial rehabilitation of the company. Such prospect exists if during the deferral a permanent financial rehabilitation of the company is expected and its profitability can be restored. Such prospect must be shown in a plausible and credible rehabilitation plan.

If a deferral is ordered, the court may provide for measures to preserve the company's assets, such as reporting duties, disposal restrictions or the appointment of an administrator.

What options do I have to urge my creditors into an agreement to avoid bankruptcy?

There is no legal framework to bind creditors to a composition without the cooperation of all creditors outside of insolvency proceedings.

If no amicable agreement allowing the rehabilitation of the debtor can be reached with the creditors during a moratorium (*Nachlassstundung*), Swiss law provides for the possibility to cram down unsecured and non-privileged creditors in a composition proceeding (*Nachlassverfahren*) if (i) the relevant majorities are reached, (ii) the claims of privileged creditors are covered, (iii) shareholders make an appropriate contribution and (iv) the proposal is appropriate to the financial situation of the company.

However, if the request for approval of a composition agreement fails, the court will open bankruptcy proceedings over the debtor.

When can creditors file for bankruptcy?

Creditors may file for bankruptcy either (i) after pursuing a formal debt enforcement proceeding or (ii) upon request of a creditor without preceding debt collection proceedings, in particular, if the debtor is registered with a commercial register in Switzerland and has ceased its payments. Cessation of payment occurs when the debtor does not settle undisputed and due claims, piles up debt collections against it and systematically objects to debt enforcement requests or stops paying even small amounts.

5. Liquidity and Financing

What measures did the government take which may help companies overcome a sudden liquidity shortage caused by the coronavirus pandemic?

Companies the businesses of which are affected by the consequences of the coronavirus pandemic may apply for a temporary interest-free deferral of social security contributions or if applicable for an adjustment of their regular instalments if the total of wages paid decreased.

Taxpayers may request a deferral of the tax payment (notably with respect to corporate income taxes and VAT) or payments in instalments if they face illiquidity.

The interest rate for late payments has been temporarily lowered to 0% for VAT, customs, special tax on consumption and excise duties, incentive taxes from 21 March 2020 to 31 December 2020 and for direct federal taxes from1 March 2020 to 31 December 2020. Most cantons do not include interest for late payment or compensatory interest in a deferral. Taxpayers generally have to file a written request but tax authorities are expected to be less strict given the current circumstances. For VAT purposes, the Swiss Federal Tax Administration has introduced the possibility to file a request for early refund of VAT credits. Separately, taxpayers may also request revised preliminary tax invoices with a lower tax amount or an amount of nil.

See also below under Section 6 for further information in this regard.

What other support can companies receive from the governments?

With support from the Swiss Confederation, recognised guarantee organisations can provide guarantees for bank loans. This option was being extended and facilitated as a measure to mitigate the consequences of the coronavirus from 26 March until 31 July 2020. Thus, the Federal Government made it easier for SME to raise external funds in the amount of maximum CHF 20 mln or 10% of its total revenue per company. The application deadline ended on 31 July 2020, the measures regarding repayment etc. have, however, been extended.

Depending on the residence of your company, there might be further cantonal measures available to your company.

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