

Coronavirus COVID-19: How your business can weather the storm



This leaflet will address some of the growing concerns that have arisen in the business community amidst the outbreak of the coronavirus. In particular, this leaflet will emphasize the risks associated with insolvency during these unsettling times and what stakeholders and officers can do to identify, manage and mitigate these risks.

Impact of the coronavirus outbreak on businesses

The economic impact of the coronavirus has become immediately apparent and it is causing business owners financial stress. Various industries such as aviation, hospitality, retail and manufacturing have already begun to feel the adverse effects. Although there remains a high degree of uncertainty, recent downturns in the market suggest that the economy may experience another recession in the near future. Given that businesses are already experiencing the effects of disruptions to international supply chains, exposure to solvency issues and staffing shortages may exacerbate the risk businesses face. In order to successfully navigate this period of uncertainty; executives need to map out the appropriate course of action.

Managing insolvency risks caused by the coronavirus outbreak

Successfully navigating your company's financial obligations are already a complex endeavour and therefore, we drafted a list of concepts for you to consider that may help you along the way.

- As a general rule, non-performance of a contractual obligation typically results in a culpable failure (*"toerekenbare tekortkoming"*), unless unless the failure was the result of an event sufficient to constitute a force majeure (i.e. act of nature rendering contractual performance impossible) or alternatively the contract incorporates a clause excluding or limiting liability. As a director, you should check whether your contracts - and the applicable terms and conditions - include force majeure provisions, and assess what the impact on your business may be.
- Even if an event is found sufficient to constitute grounds for a force majeure provision, it does not invariably mean that you or the other party are "off the hook". It is therefore advisable to start conferring as quickly as possible, as - in principle - the contract may also be terminated in the event of force majeure.
- Catch any solvency issues by (re)assessing your balance sheets and consult financial and legal advisers to evaluate if early intervention is necessary to address liquidity issues.
- Ensure that your future contracts include clauses that afford your business flexibility in the event that cash reserves are running short, periods of economic uncertainty and/or pandemics such as the coronavirus.
- Stay abreast of market developments and the financial positions of business partners, suppliers, customers and competitors. If possible, we recommend that you strengthen your legal position by incorporating security rights and/or retention of title clauses. Likewise, it is important to be aware of any rights of recourse and set-off options in existing agreements.
- Communicate with your business partners, suppliers and customers if you are having problems performing your obligations. The reality is that most companies in the supply chain as well as most service providers are experiencing the negative impact of COVID-19, which might make them more inclined to come to agreeable terms or grant extensions, as this will also limit their own exposure.
- Companies are facing pressure to publish financial reports, while simultaneously estimating and presenting their risks exposure. These reports require caution as disclosing potential payment problems may cause creditors, debtors and shareholders alike to react adversely, jeopardizing a company's liquidity position. As for the auditor's report, companies are well-advised to be keenly aware of the limits of the going concern.
- If your company needs short-term (emergency) credit to brave the storm, engaging legal and financial experts is crucial. Business owners should note that the Dutch Ministry of Economic Affairs provides a service known as the BMKB scheme (a government-guaranteed scheme for loans to small and medium-sized enterprises (SMEs) to

companies hit by the coronavirus outbreak. Under this scheme, the State guarantees loans to SMEs, making it easier for them to take out loans from lenders, such as banks. Under normal circumstances, the State guarantees up to 50% of loans provided by banks and other lenders. This percentage has been upped to 90%.

- Enterprises active in regulated markets (healthcare, energy, water, the financial sector) are to ensure that they perform their statutory obligations to the extent possible, even in the event of a sudden pandemic.
- Staff may be put on reduced hours, and reorganisation plans may be implemented.
- Other tax-related options, such as deferral of income tax, CIT, turnover tax/VAT, and PAYE taxes can be utilized. The tax inspector may decide to lower provisional assessments to account for a projected decline in profits. On a final note: if you anticipate being unable to pay any tax debts on time, be sure to notify the appropriate tax authorities accordingly.

Steps for companies to consider in relation to the coronavirus

Company officers need to be attentive during turbulent financial conditions. In an effort to avoid personal liability, officers should consider the following matters and ask itself the following questions:

- Boardroom counselling is prudent during times of financial hardship and ever-changing developments. Therefore documenting everything is essential in order to be able to explain the decision-making process. Board resolutions need to be well prepared and thoroughly substantiated throughout that process and if necessary accompanied by additional advice from external experts. Minutes of meetings and adopted resolutions must be kept and recorded fastidiously. A sound risk analysis of the consequences of the outbreak for the company is vital.
- Evaluate if the company is able to meet its contractual obligations and if it has the option of terminating current contracts.
- Evaluate if the business is viable, and if so, how long will its financial reserves last? Officers should monitor liquidity forecasts continuously (as the case may be daily, weekly or monthly), and constantly reappraise their financial policy principles.
- Evaluate if the company fulfilled its obligations to its funders, such as may arise from certain financial covenants.
- Evaluate if restructuring of the company would be necessary.
- Determine if litigation is imminent in the short run, and would it be prudent to seek early legal advice. Whether the company needs to inform its legal expenses and/or D&O liability insurer.
- Does it make sense to increase the frequency of bookkeeping reports? Is the enterprise in need of advice on its solvency? If bankruptcy is reasonably foreseeable or inevitable, the company's officers must also act in the best interests of its joint creditors.
- Are there emergency scenarios in place and have measures been taken to mitigate the effects of the coronavirus outbreak? Companies are well advised to keep proper documentation, making the decision-making process and any measures taken clearly available.
- The uncertainty of the situation might make it easier to settle current and/or imminent legal disputes.
- Officers should be prepared for bankruptcy as soon as they deem bankruptcy likely to occur.
- Only from the moment that bankruptcy is reasonably foreseeable do specific obligations arise for the officers.
- Such obligations vary from one case to the other, making it impossible to set out officers' obligations in any detail. The same applies to specific legal acts or transactions made: assessments are to be made on a case-by-case basis.

How can AKD help? AKD's Corona Taskforce

The impact of the coronavirus outbreak is enormous. The humanitarian aspect, of course, is completely compelling. But the impact on the economy and on your organisation is also quite substantial. At this moment, with everyone feeling the direct impact, mapping the amplitude of the consequences is an impossible task still. You are bound to have many questions. How will the current situation impact international trade? What are the tax and insurance implications? How are contracts affected? Who carries the financial risk in the healthcare sector? What legislation will help tackle liability issues in the aviation or transport sector, to name but a few?

Our experts in the Netherlands, Belgium and Luxembourg will gladly provide you with advice and assistance in these uncertain times. In fact, AKD has set up a taskforce specifically designed to provide swift and efficient answers to any questions you may have in the wake of the uncertainty caused by the coronavirus outbreak. Our experts have written blogs that may help you on your way. With the rapid spread of the virus and the tightening of measures taken to combat it, parts of these blogs may have been overtaken by the events of the day.

That's why you are more than welcome to contact any of the experts named below or simply send an email to coronataskforce@akd.eu. Already a client? Then it's simply a matter of phoning or mailing your AKD contact. We look forward to hearing from you.

We provide many services, including:

- Boardroom counselling
- Reviewing contracts and general terms
- Advising on D&O liability risks
- Advising on restructurings
- Setting out survival strategies
- Assessing and drafting (emergency) financing documents
- Advising on and implementing procedures

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