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## **Covid-19 disputes: what to expect**

The Covid-19 pandemic is already triggering many disputes. For example, in the US, Federal District Court case filings have increased nearly threefold from the same period last year.<sup>1</sup> This article considers the types of disputes arising in each industry sector, and what we might expect to see in courts and arbitral tribunals in the coming months and years.

Dispute forecasting is not an exact science, but there are useful indicators. Countries which emerged early from the first wave of the crisis – such as China, Italy and Spain – reveal the kind of litigation that might be expected for countries at a later stage of the curve. Even countries with a later infection peak can throw light on trends, such as in the US where class actions tend to be filed faster than in other systems.

There are also historical precedents. The SARS outbreak in 2003 generated types of disputes which are likely to re-emerge. More recently, the disputes arising from the financial crisis in 2008 give some idea of what to expect from a global economic downturn. These are discussed below.

However, there are important differences. Litigation that emerges in one legal system may not translate to another. SARS infected only around 8,000 people, and was focused on China, Hong Kong, and a handful of other countries such as Canada. Disputes from the financial crisis have kept lawyers busy for over a decade but that crisis had a different cause and a less direct human impact.

### **Common challenges**

Companies will have different litigation exposures depending on their industry sector, geographic footprint, and other factors. But there are types of claim that companies across all sectors may face. Employers are facing negligence actions from employees and unions for failure to protect them from infection, as seen following the SARS pandemic. However, the relatively long gestation period of Covid-19 may make causation difficult to prove. Employees may also bring privacy claims regarding the handling of Covid-19 diagnoses. We will also see employment litigation around mandated unpaid leave, sick pay and – in the longer term – redundancies and unlawful dismissals.

Companies of all types are bringing or defending contractual claims for non-performance or non-payment, often involving force majeure, frustration, material adverse change, or similar concepts. At the start of the pandemic, these were commonly seen around cancelled events, and are now broadening in scope. In response to the crisis, governments have loosened insolvency laws and reduced creditor rights, making some claims more difficult to enforce.

Many companies have experienced failed transactions due to Covid-19, as proposed acquisitions and partnerships are shelved due to the crisis. Equally, recently-completed deals may be delivering significantly below expectations, leading to post-M&A disputes. This was one of the major types of claim arising from the financial crisis in 2008, and we will see them emerge once more. Publicly-traded companies may also face investor claims due to misleading or inaccurate statements made during the crisis.

The IMF estimates that more than USD 11 trillion in fiscal support has been provided globally by governments to support national economies.<sup>2</sup> In the longer term we will see recovery actions by government agencies against companies in all sectors who have made inaccurate or fraudulent

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<sup>1</sup> Lex Machina COVID-19 Impact Analyzer 2020 — 22 to 28 June 2020, available at <https://law.lexmachina.com/apps/covid> (subscription required).

<sup>2</sup> IMF Blog, Fiscal Policies for a Transformed World, 10 July 2020, available at <https://blogs.imf.org/2020/07/10/fiscal-policies-for-a-transformed-world/>.

applications for bailouts. As an example: after the financial crisis in 2008, the US made USD 700 billion available to support the US economy through the TARP program. Recovery actions are still continuing today, with USD 11 billion repaid and hundreds of successful criminal prosecutions. Unsurprisingly, there have been recent examples of companies quietly returning bailout cash to which they were not entitled.<sup>3</sup>

## **Consumer goods & retail**

Any company which operates premises open to the public may face “failure to protect” claims from customers, as well as employees. Shops in some jurisdictions are already asking customers to sign waivers.<sup>4</sup> Companies’ prevention measures will be scrutinised, but the highest practical risk is likely to be where companies have failed to take swift action following a known infection or outbreak.

We will continue to see claims by retailers against suppliers and manufacturers for interrupted or failed supply chains. Retailers are also likely to bring actions against governments regarding business closure orders. A common issue seen so far is around the definition – however expressed – of an “essential service”.

There have been actions by both consumers and regulators for price gouging, which is illegal in many jurisdictions. Several claims are underway in the US, including a class action lawsuit against Amazon in California.<sup>5</sup> Some national regulators have announced new investigations or special scrutiny of this area, and regulators have already taken action in South Africa and Greece. This is particularly relevant to retailers of food and drink. These are not traditionally high-risk areas for price gouging and companies’ compliance policies may not be robust.

## **Energy, mining and infrastructure**

The oil and gas industry was already facing disruption prior to Covid-19, and then had to cope with the lowest crude oil prices since the 1990s. Although markets are recovering, a growing wave of energy bankruptcies has started to build.<sup>6</sup> D&O insurance premiums in the sector are increasing, partly to reflect the risk of claimants pursuing directors directly.<sup>7</sup>

The construction industry has come through the first months of Covid-19 better than many industries: many governments have excluded construction projects from lockdowns due to lower risks to workers. However, construction is particularly dependent on international supply chains: materials shortages have occurred and costs have increased. Planning and inspection timetables have been delayed. New workforce safety measures have been introduced. We will see disputes around costs and delay. However, these are common in normal times, and the industry’s experience in finding quick, practical solutions to disputes will be useful.

Commercial landlords face particular challenges. For example, only 18% of commercial rents in the UK were collected by landlords for the April to June quarter.<sup>8</sup> Besides the commercial challenges, tenants have felt able to withhold payments due to new legislation temporarily protecting them from eviction. This stores up enforcement actions for the future. This situation is mirrored in many other

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<sup>3</sup> Bloomberg, Shake Shack Will Return Its Entire \$10 Million US Government Loan, 20 April 2020, available at <https://www.bloomberg.com/news/articles/2020-04-20/shake-shack-to-return-entire-10m-u-s-ppp-loan-after-uproar>.

<sup>4</sup> Associated Press, Businesses ask patrons to waive right to sue if they get ill, 16 June 2020, available at <https://apnews.com/article/62c2ed6ebc0dc3528718dd4197478667>.

<sup>5</sup> McQueen and Ballinger v. Amazon.com Inc., Case 4:20-cv-02782.

<sup>6</sup> Visual Capitalist, Tracking the Growing Wave of Oil and Gas Bankruptcies in 2020, available at <https://www.visualcapitalist.com/tracking-the-growing-wave-of-oil-gas-bankruptcies-in-2020/>.

<sup>7</sup> Reuters, Shale companies look to bolster insurance for directors and officers, 9 June 2020, available at <https://www.reuters.com/article/usa-oil-directors-insurance/shale-companies-look-to-bolster-insurance-for-directors-and-officers-idUSL4N2D93VS>.

<sup>8</sup> Re-leased Blog, 18.2% of commercial rents received on UK June quarter day, 26 June 2020, available at <https://blog.released.com/media-release-just-18.2-of-commercial-rents-received-on-uk-june-quarter-day>.

jurisdictions. Landlord and tenant disputes were a common feature in countries affected by SARS in 2003.

## **Financial institutions**

Banks will face claims arising from their lending exposure through non-performing loans and guarantees. As economic conditions worsen, defaults will become more common and disputes are inevitable, for example over drawdown conditions and breach of financial covenants. We can expect a rise in claims over bank guarantees issued to third parties. Banks may also face litigation around their role in providing access to government relief.

Banks must also navigate new procedures introduced since the crisis around loan repayments, debt collection and insolvency. Finance faces one of the most complex compliance regimes of any industry, and Covid-19 will heighten the challenges. Fraud claims tend to rise in times of economic downturn, as dishonest arrangements become harder to hide, and corporate and individual pressures mount. For example, in the first six months of 2008, the number of major financial fraud cases before the UK courts rose by nearly 50%.<sup>9</sup> Much of this increase was driven by frauds against banks.

Many insurance companies learnt the lessons from SARS and introduced epidemic exemptions to policies. Nevertheless, many are already involved in litigation around denied claims, especially for business interruption or event cancellation. We are also seeing health insurance claims for failure to cover Covid-19 treatments. Lloyd's of London has predicted that the current pandemic could be the most expensive insurance event ever because of the range of exposures.<sup>10</sup> Insurance companies must also navigate new regulations on Covid-19 claims handling, and threatened retrospective legislation declaring Covid-19 to be within pre-existing coverage.

## **Healthcare**

Healthcare is at the centre of the current crisis and will be central to many disputes. At least 80 countries introduced export bans or restrictions in response to the crisis,<sup>11</sup> many of which focused on drugs and medical equipment. Export bans of medical equipment have been seen in many major economies including the US, China, South Korea, Russia, France, Germany, and India. We can expect to see claims against governments in due course.

Disputes over intellectual property rights are inevitable: some countries have issued compulsory licences over patented drugs and devices, or taken steps to facilitate this if required. These include Germany, Canada and Israel. Other governments have temporarily nationalised private hospitals, such as Spain and Ireland. Governments have also provided funding to healthcare companies around R&D, testing and production, which may constitute unlawful state aid.

Many of these issues will lead to investor-state disputes and go to arbitration. In turn, these cases will test the boundaries of existing international law defences, such as necessity.<sup>12</sup>

Healthcare and pharmaceutical manufacturers may also see actions by customers or regulators for false advertising. There have already been several cases launched in the US courts against manufacturers of hand sanitiser regarding claims such as "kills 99.99% of germs", which are said to be unsupported by evidence. The US Federal Trade Commission has sent over 250 warning letters

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<sup>9</sup> KPMG Fraud Barometer 2008, not available online.

<sup>10</sup> Reinsurance News, Covid-19 could be biggest ever industry loss, 24 April 2020, available at <https://blog.released.com/media-release-just-18.2-of-commercial-rents-received-on-uk-june-quarter-day>.

<sup>11</sup> WTO Information Note on Export Prohibitions and Restrictions, 23 April 2020, available at [https://www.wto.org/english/tratop\\_e/covid19\\_e/export\\_prohibitions\\_report\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf).

<sup>12</sup> IISD Commentary on Protecting Against Investor-State Claims Amidst COVID-19, April 2020, available at <https://www.iisd.org/system/files/publications/investor-state-claims-covid-19.pdf>.

to date.<sup>13</sup> There are also securities actions against vaccine manufacturers regarding false claims to the market.

Operators of care homes face particular risks. In countries where the virus has caused high numbers of deaths in care facilities there is increasing public anger. This is likely to result in private litigation by victims' families, and public actions by regulators and prosecutors. Examples already exist in the US and Canada. Action may extend to criminal claims: at least one Italian nursing home is under investigation for manslaughter. Press debate centres on who is to blame: operators or the government? This debate will be repeated in the courts.

As with other industry sectors, the issues are complicated by the legal goalposts moving during the pandemic. Several jurisdictions have adopted laws giving some degree of legal immunity to medical professionals and operators of medical facilities for acts or wrongdoing during the crisis, including the UK and several US states. Other jurisdictions have relaxed standard authorisation processes for products, such as in the EU around disinfectants.

### **Industrials, manufacturing and transportation**

Industrial and manufacturing companies are facing many of the same issues as companies in other sectors, particularly around employment disputes, supply chain disruption and force majeure. Manufacturers may also face false advertising claims, or infringement of their intellectual property rights by counterfeiters seeking to exploit increased demand.

Transport companies, where passengers often travel in close proximity, are at particular risk from negligence claims from customers for failure to protect from infection. We can also expect to see companies in this sector bringing claims against governments for financial damage caused by travel bans and quarantine decisions.

There has been much publicity around the alleged failure of transport companies, particularly airlines, to give prompt refunds to customers affected by Covid-19. There is already plenty of litigation on this issue, including class actions in the US and Canada. The Spanish Ministry of Consumer Affairs is bringing action against at least 17 airlines over alleged misinformation regarding refunds and flight vouchers.

However, with airlines globally estimated to be losing close to quarter of a billion dollars per day,<sup>14</sup> this is the least of the industry's concerns. Litigation is likely to result from airlines' urgent attempts to raise cash and shed costs, although the so-called "hell or high water" payment obligations in aircraft lease agreements make force majeure or similar arguments more difficult to run.

### **Technology, media and telecoms**

There has been a global spike in remote working, video communication, online education and online shopping. Increased use of technology platforms will involve increased scrutiny of their capabilities. Video conferencing platforms are in the spotlight, with two major platforms facing legal action in the US for alleged security flaws and for misleading statements on privacy and data sharing.

Increased use of technology, often by inexperienced users, provides new opportunities for cybercriminals. Internet security firms have reported a 600% increase in malicious emails during the current crisis.<sup>15</sup> Litigation arising from data breaches is likely.

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<sup>13</sup> FTC Press Release, 18 June 2020, available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-sends-letters-warning-30-more-marketers-stop-making>.

<sup>14</sup> IATA Press Release, Industry Losses to Top \$84 Billion in 2020, 9 June 2020, available at <https://www.iata.org/en/pressroom/pr/2020-06-09-01/>.

<sup>15</sup> Barracuda blog, Threat Spotlight: Coronavirus-Related Phishing, 26 March 2020, available at <https://blog.barracuda.com/2020/03/26/threat-spotlight-coronavirus-related-phishing/>.

As technology infrastructure has been tested, some existing systems have failed to cope with increased demand. We have also seen high profile failures of new technology targeted at the pandemic, such as contact tracing apps. We are likely to see litigation around these failures.

News outlets also face fallout from the political dynamics of the crisis, with their coverage under scrutiny. Fox News successfully defended an action for allegedly broadcasting inaccurate information about Covid-19 and causing increased risk to the public.<sup>16</sup> However, there will also be outbound litigation over the next few years, particularly around right to information laws, as the world's media scrutinises governments' responses to the crisis. Over 20 jurisdictions are reported to have suspended or altered right to information obligations since the pandemic began.<sup>17</sup>

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<sup>16</sup> Washington League for Increased Transparency & Ethics v. Fox Corp et al, Case 20-2-07428-4.

<sup>17</sup> Global Right to Information Rating Covid-19 Tracker, 25 June 2020, available at <https://www.rti-rating.org/covid-19-tracker/>.