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TRADECAST: LOOKING BEYOND COVID-19

25.3.2020 - 9:00 GMT / 17:00 SGT

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**Legal Perspective:
Testing the limits -
Protecting your business
in the face of COVID-19**

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Legal Perspective – testing the limits – protecting your business in the face of COVID-19

- The coronavirus outbreak is placing huge pressures on FIs and businesses. What are the three most pressing issues your clients are asking you right now?
- For commercial contracts that already exist, how can one assess their obligations on their existing contractual terms?
- When things go wrong, how can two parties amicably resolve a dispute?
- Force majeure, frustration, material adverse change, other...

Ash McDermott, Partner, Mayer Brown

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Three most pressing issues...

- Practical:
 - Human – how do institutions comply with the rules but also continue to perform for their customers and stay connected?
 - IT – confidentiality and security vs working from home
 - Registrations, notary meetings etc.
 - Presenting – inability to deliver documents on time
- Legal:
 - Signings when working from home
 - Contractual interpretation – what flexibility do we have? How do we amend existing provisions?
- Insurance:
 - What do our policies say and what do we need to do to preserve claims?

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Assessing existing contracts

- Contractual interpretation
- Identify contracts likely to be affected
- Review high-priority contracts to assess impact and potential relief
- What avenues are available to you – before force majeure, frustration etc., what about consensual amendments?
- Comply with notice requirements
- Consider what communications to send to your counterparties
- Many jurisdictions have obligation to mitigate damages
- Discuss with lawyers who may be able to come up with other ideas

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Amicably resolving a dispute / inability to perform

- Alternatives to arbitration and courts
- Importance of documenting what is agreed properly:
 - Are the amendments / waivers temporary or permanent?
 - If temporary, how long will the alternative arrangements last exactly?
 - Are you agreeing to substitute performance in full and final settlement of your claims or merely mitigating the impact without prejudice to future claims?
 - Do you need to discuss with your banks, insurers or other interested parties before agreeing anything?
- Legal practicalities – governing law, who needs to sign etc.

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Force majeure, frustration etc.

- There are a number of possible consequences and remedies for those in supply chains affected by COVID-19, giving rise to a number of options for businesses in terms of approach. Ensuring that the correct decisions are made at the outset will greatly assist businesses in mitigating the commercial impact on the supply chain and avoiding disputes in future regarding the steps taken.
- A party whose ability to perform its obligations is affected by COVID-19 may be able to:
 - Rely on a “force majeure” clause;
 - Rely on the doctrine of “frustration”;
 - Rely on other clauses in the contract, such as “MAC” (“material adverse change”) and emergency change control provisions.

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Force majeure

- Force Majeure clauses generally allow a party affected by an event beyond the control of that party to suspend performance of its obligations without penalty.
- However, the wording of these clauses is critical and their impact is a question of contractual construction:
 - Does COVID-19 represent an event that triggers the relevant clause?
 - What is the impact of the party's own actions in contributing to its ability to perform? For instance, if it has imposed a travel ban that has meant it is unable to perform, that may limit its ability to rely on the clause;
 - Whether performance must be "prevented" (essentially impossible) or whether it is sufficient for it to be "delayed" or "hindered" for the clause to bite; and/or
 - The consequences of triggering the clause, in terms of what steps the affected party must take, and whether prolonged inability to perform will lead to a termination right (for either party).
 - The commercial consequences of any legal steps taken, including in terms of the impact on the stability of the supply chain overall.
- Particular challenges may be faced by parties in the middle of

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Other options

- The doctrine of “frustration” allows a party to treat itself as discharged from its obligations and the contract as at an end if it is impossible (not merely more difficult or uneconomic) to perform its obligations or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.
- The application of the doctrine of frustration is highly fact specific and it seems unlikely that it will apply other than in quite limited circumstances. Parties should therefore exercise caution in seeking to rely on it.
- There may be other contractual provisions on which a party can rely to escape consequences from a failure to perform, such as a “MAC” clause (commonly in finance or acquisition related documents), or emergency change control provisions (often in, for instance, outsourcing and IT project contracts).
- Whether these clauses will apply, and the consequences of them, will differ between contracts. The onus will be on the party seeking to rely on the relevant clause to demonstrate that it has met any trigger requirements.

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