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COMMERCIAL ADVISORY DIVISION UPDATE IN THE CONTEXT
OF THE COVID-19 CRISIS

Needless to say, the impact of COVID 19 (“C-19”) has affected all business sectors around the world. With contracts being the core of understandings/arrangements, it is crucial that existing contracts are carefully scrutinized in light of the current situation and new contracts are carefully drafted to survive situations of this nature.

This note briefly outlines the options available to counterparties struggling to meet and discharge their existing contractual obligations and also the manner in which new contracts may be executed.

In the last few weeks, with projects being impacted due to the lockdowns in many countries globally, many of our clients have required us to either review their existing contracts with a view to invoke the “force majeure” clause in various contracts or in general advise on various concerns in relation to same. A significant portion of this note has been dedicated to address this aspect.

1. EXISTING CONTRACTS

A party to a contract may be unable to perform a contract due to the impact of C-19 and the consequences arising therefrom. In such event, the following options are available:

1. Invoke the force majeure clause in the contract
2. Re-negotiate terms of the contract
3. Terminate the contract

1. Invoke the force majeure clause in the contract

What is a force majeure clause?

- A force majeure clause is a standard clause included in most contracts.
- This clause generally lists certain occurrences such as an earthquake, cyclone, tsunami, acts of God, fire, war, riot and other similar events such as strikes, lock outs, etc which

are unforeseeable and beyond the reasonable control of the parties as 'force majeure events'. The list of force majeure events in a force majeure clause is non exhaustive and can differ from contract to contract.

- In an event the occurrence of a force majeure event leaves a party to a contract unable to perform its obligations under the contract, such party may invoke the force majeure clause.
- The effect of a force majeure clause is that it forms an exception to what otherwise would be a breach of contract. It protects the party invoking it from liability for its failure to perform a contractual obligation.

Invoking the force majeure clause

- In the present context of C-19 and a party's inability to perform its contract, the party may invoke the force majeure clause irrespective of whether the said clause specifically lists an epidemic/pandemic/virus attack/plague as a force majeure event.
- The party seeking to invoke the force majeure clause will be required to demonstrate to the other party that the situation that has arisen due to C-19 was unforeseeable and beyond its control. Depending on the wording in the force majeure clause, additionally the party may be required to demonstrate that it exercised reasonable diligence in seeking to mitigate the consequences which gave rise to its inability to perform the contract.
- The manner in which a party may invoke the force majeure clause also depends on the terms of the contract. Most contracts require written notification within a stipulated time period to be provided to the other party by the party seeking to invoke the same.
- Generally, once a force majeure clause has been invoked, the contract stands suspended until the conclusion of the force majeure event.¹ Some contracts provide for limitations in time after which either party may cancel/terminate the agreement with written notice to the other.

Receiving notice of an invocation of the force majeure clause

- It is important for a party receiving notice of the invocation of the force majeure clause not to rush into a defensive or dispute mode.

¹ depending on the wording in the clause

- Firstly it is critical to review the existing force majeure clause in the contract and the notice requirement provided in the contract to understand and assess whether the party giving the notice has complied with it fully.
- A notification should be supported by documentation justifying the invocation of the force majeure clause. The party receiving the notification should scrutinize the said documents to understand whether there is a causal link between the force majeure event relied on (i.e. C-19) and the performance of the contract from which the party invoking is seeking to be excused and whether the force majeure event has an actual impact on the contract.
- The party receiving the notice should also consider the importance of the transaction, the interest of the parties on the long term and the impact on the business if the matter progresses to a dispute between the parties.

In the event there is a dispute of whether C-19 is a force majeure event

- In such an event, the contract's dispute resolution clause will dictate how parties are to resolve same.
- The burden of proving the occurrence of the force majeure event would rest on the party seeking to invoke the force majeure clause. As such, it is important that copies of correspondence and communication between the parties relating to the force majeure event, invocation of the clause, providing written notice and documentation establishing that the company had done all that was reasonably possible to mitigate the losses, are well recorded and maintained.

Absence of a force majeure clause in the contract

- In the event the contract does not have a force majeure clause the party unable to perform the contract may seek redress under the general law principle of the doctrine of frustration.
- In order to claim that the contract is frustrated, it must be shown that performance of the contract is entirely impossible and that it has become fundamentally different from the arrangement contemplated at the time of executing the contract.

- It is to be noted that courts are generally cautious in applying the doctrine of frustration and does so on a case by case basis having strictly considered all the circumstances of the case.

2. Renegotiate terms of the contract

- Certain contracts may provide for renegotiation of the terms of the contract through change request/contract change clauses.
- Depending on the wording of such clause parties may choose to renegotiate price clauses/payment terms, timelines, deliverable milestones, performance guarantees etc.
- Unlike in a force majeure scenario the contract is not suspended or interrupted but will continue to be operative.
- The renegotiated contractual terms, based on the wording in contract, may be included by way of an addendum to the existing contract and will bind the parties.

3. Termination of the contract

- Most contracts provide for premature termination of the contract with prior notice to the other party to the contract.
- Termination of the contract could give rise to the payment of damages by the party seeking to terminate the same.

2. ENTERING INTO NEW CONTRACTS

Given the present scenario of complete lock down to curb the spread of C-19, parties are not in a position to physically meet to execute contracts but parties may execute contracts electronically.

A copy of the contract may be circulated between the parties electronically and parties may enter into the contract with the placing of e-signatures of the person(s) authorized to execute the said contract.

It is important to note that the Electronic Transactions Act² (“Act”) guarantees that a contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form. However, Section 23 of this Act excludes the applicability of the provisions of the Act to wills and any other testamentary disposition, license for a telecommunication system, bills of exchange, powers of attorney, trusts created under the Trust Ordinance and contract for the sale or conveyance of immoveable property.

NOTE:

1. *Any reference to any laws and regulations are as at the date of the issue of this document.*
2. *The contents of this document should not be considered as legal advice and is provided for information purposes only. If you require legal advice on any specific matter for purposes of decision making, do feel free to contact us.*

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² No. 19 of 2006 (as amended)