

TRAINING & DEVELOPMENT PROGRAMME

# Knowledge Network

Webinar Series

## Managing Risk and Protecting your Business where COVID-19 Disputes are on the Horizon

Wednesday 10 June 2020 | 8.30 am to 9.30 am



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# Managing Risk and Protecting your Business where COVID-19 Disputes are on the Horizon

10 June 2020

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# Introduction

- Introduction
- Potential implications of COVID-19 for:
  - Commercial contracts
  - Insurance cover
  - Levels of fraud
- How to resolve disputes during COVID-19
  - The Courts
  - Remote mediation
  - FSPO



# Commercial Contracts

- Early crisis period, focus on:
  - Pragmatic approaches for the short term
  - Maintaining and preserving key commercial relationships
  - Reserving rights
- Current focus:
  - Longer term decision making on contracts and business partners
  - The implications of the gradual easing of Government restrictions
  - Contracts falling for renewal – complex drafting issues



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## Commercial Contracts: General principles

- The starting point:
  - A valid, binding contract will be enforced according to its terms, unless there is a compelling *legal* reason not to do so
  - The onus is on the party that doesn't want to perform to prove why it needn't do so
- Express and implied terms
  - The importance of understanding the provisions your contract contains
  - *Sometimes* a term may be implied into a written contract
  - Some types of term (such as *force majeure*) cannot be implied

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## Commercial Contracts: Non-performance

- Normally, non-performance of a contractual obligation amounts to a breach of contract
- Every breach of contract creates a right to damages (how much, depends on the facts and on the particular contract)
- Not every breach of contract entitles the “innocent” party to terminate
- Duty of the “innocent” party to mitigate losses

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## Commercial Contracts: Provisions to consider

- Provisions which may assist with managing risks
  - Payment terms
  - Termination provisions
  - Material adverse change (MAC) clauses
  - Exclusion / limitation of liability clauses
  - Change of law clauses



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## Commercial Contracts - Force Majeure Clause

- A force majeure clause has the potential to relieve a party from strict compliance with its contractual obligations affected by a force majeure event until the event passes
- What does the clause provide (“epidemics”, “Acts of God”, etc)
- What is the real impediment to performance?
- When is a force “*majeure*” (*i.e.* overwhelming)? Performance must be *impossible*, not merely *more difficult* or *more costly*
- The party relying on a force majeure clause must prove that it applies
- Mitigation steps



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## Commercial Contracts - Force Majeure – Practical Points

- Prior to invoking a force majeure clause, test your commercial objectives
  - The effect of reliance on a force majeure clauses is usually suspensory, but some include termination rights
- Document, document, document
- Follow any and all procedures prescribed in the contract and pay close attention to any deadline or notice period
- Monitor the event giving rise to the performance issues so that performance can be resumed as soon as that impact (and so also the relief) ceases

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## Commercial Contracts - Frustration

- A contract will be frustrated only where performance of the contract:
  - becomes impossible;
  - becomes illegal, or
  - Would be so radically different from what the parties had originally intended when they contracted that to hold the parties to their contract would be unjust
- Granted only in exceptional circumstances
- The application of the doctrine is extremely fact-specific
- The contract is terminated – the parties are released from future obligations but remain liable for existing obligations
- The entirety of the contract comes to a permanent end and it does not ‘re-activate’ when circumstances return to normal

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## Insurance Cover – Business Interruption Insurance

- In general, business interruption insurance covers losses incurred by a business as a result of a disruption caused by an “insured peril”.
- Whether or not an “insured peril” extends to a virus very much depends on the policy wording
- Some policies may include an extension which expressly covers losses caused by communicable or infectious diseases, without a requirement for physical damage to the property.
- Other policies go so far as to specifically exclude business interruption cover for a virus on a global or national scale.

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# Insurance Cover – Business Interruption Insurance

- Litigation in Ireland
  - Being dealt with urgently by the Commercial Court
- Requirements of Consumer Protection Code
- Complaints to the FSPO
- Activity in the UK



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## Insurance Cover – Business Interruption Insurance – Practical tips

- Identify and review in detail the terms of all of your insurance policies
  - What are the insured perils?
  - Does it address infectious diseases?
- Check for liability caps – some policies contain significant caps on liability for disease outbreak
- Check for any other provisions which may limit cover – for example is the policy void where the insured goes into liquidation
- Where exceptions to liability are not clear and unambiguous, the *contra proferentem* rule will fall to be applied
- Follow any procedures prescribed in the contract and pay close attention to any deadline or notice period
- Document any reservation of rights

## Insurance Cover – D&O Insurance

- D&O insurance is intended to provide assurance to present and former D&Os that they have protection in the event of claims or investigations into the affairs of the company.
- Taking decisions in a higher risk environment has the potential to introduce a higher risk of claims by those disgruntled by their effects and so increase the likelihood of a claim against D&Os
- D&Os taking the time now to assess the cover available should give them comfort, security and confidence in their next steps. It will also arm them with the information they need to be able to assess the coverage available for any potential exposures identified.



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## Insurance Cover – D&O Insurance - Potential Risks for Directors in the Crisis

- Directors duties and responsibilities
- Shareholder and investor claims
- Regulatory enforcement and investigations
- Financial difficulty
- Cyber and data protection risks
- Health and safety claims

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## Insurance Cover – D&O Insurance – The Future

- Under Irish law a director cannot exclude his or her liability to the company, nor can the company indemnify a director in respect of his her liability to third parties. Only time will tell the true extent of potential claims against directors emerging from the COVID-19 pandemic.
- It remains unclear whether there will be a significant number of COVID-19 related claims against D&Os.
- A substantial increase in such claims may have the result of rising D&O insurance premiums.
- It might also prompt insurers to look for more detailed information when providing D&O liability cover, in particular to ensure adequate risk controls are in place.



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# The Potential for Fraud in a Crisis

- In times of crisis, incidences of fraud and dishonest behaviour invariably increase.
- Why so?
  - The focus of management may be on dealing with the crisis and immediate issues, rather than fraud threats
  - The switch to remote working and reliance on technology, for many with little or no notice, may have given rise to vulnerabilities
- How to protect against fraud
  - Have robust risk governance systems in place to protect against it
  - Remain vigilant - it is worthwhile given the potential for financial loss as well as reputational damage
  - Ensure fraud risk is a standing item on the agenda for boards

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## Resolving Disputes – The Courts

- A very significant scaling back of the work of the Courts initially, but now seeing an increase in activity.
- Remote and physical hearings taking place
  - Everyone is becoming familiar with the technology use for remote hearings
  - Hygiene and social distancing measures being put in place to facilitate physical hearings
- The Appeal Courts have been operating remotely for several weeks
- The High Court is dealing with urgent matters and regularly expanding the case types being dealt with

# Resolving Disputes – The Benefits of Remote Mediation

- Cost effective
- Speedy
- Flexible commercial solutions
- Confidential
- Potential to salvage key commercial relationships
- Potential to free up management time early so that other issues can be dealt with



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## Resolving Disputes – FSPO

- Continuing to operate remotely and deal with complaints against financial services and pension providers
- Has highlighted complaints arising due to the impact of COVID-19 will be dealt with
  - Informal resolution progress – 12 weeks
  - Formal investigation process – considerably longer
- Potential for a flurry of COVID-19 related complaints by smaller business and organisations

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# Questions



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