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ARBITRATING COVID-19 CONTRACT DISPUTES: 10 TAKEAWAYS

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I recently participated in a Mayer Brown webinar on "Arbitrating COVID-19 Contract Disputes" with Mayer Brown colleagues from London, Singapore, Frankfurt and Rio de Janeiro. In the webinar, we discussed the key issues likely to arise in arbitrations of COVID-19 contract disputes under both common law and civil law principles. As a starting point for the presentation, we described four examples of contractual disputes arising from the pandemic:

1. A U.S. buyer backs out of a contract to buy a global retail chain after the seller closes multiple stores due to COVID-19.

2. A Chinese company purchasing natural gas from a French energy supplier refuses to buy the contractually-required amount following a sharp decline in demand due to COVID-19.

3. A German supplier fails to provide time-sensitive services to a Brazilian purchaser because the supplier's key workers fall ill with COVID-19.

4. A conference organizer terminates a scheduled June event in London after the UK government issues an order prohibiting gatherings of more than 100 people.

In the first two scenarios, the non-performing party seeks to avoid liability based on economic conditions created by the pandemic. For example, in Scenario No. 1, the U.S. buyer no longer wants to purchase the retail chain because the pandemic has greatly reduced the number (and value) of the stores, while in Scenario No. 2, the Chinese company no longer wants to purchase the required amounts of natural gas because the pandemic has reduced the demand for the product.

By contrast, in the third and fourth scenarios, the non-performing party seeks to avoid liability based on circumstances created by the pandemic that *prevent* performance. For example, in Scenario No. 3, the reduced work force caused by widespread infection prevents the German supplier from providing the time-sensitive services, while in Scenario No. 4 a government order prevents the conference organizer from sponsoring gatherings of more than 100 people.

Using these four examples, our presentation identified the following 10 key issues likely to arise in arbitrating COVID-19 contract disputes under both civil law and common law principles:

1. Both civil law and common law principles recognize breach-of-contract defenses based on unforeseeable events that are beyond the non-performing party's control.

2. In common law jurisdictions, the most frequent defense is force majeure, which is a creature of contract. As a result, in disputes governed by the common law, the contractual language is especially important in determining whether an unexpected event excuses non-performance.

4. Under common law, the four issues most likely to arise in COVID-19 arbitrations are (i) the definition of the force majeure event (*i.e.*, the pandemic? a government act? a combination of both?); (ii) causation; (iii) notice and (iv) mitigation.

5. In many arbitrations, the "causation" requirement will be especially important because common law principles typically require a *direct causal link* in which the claimed "triggering event" directly prevents performance. (*See, e.g.*, Scenarios 3 and 4 above). Under this requirement, the mere fact that the pandemic made performance more costly or onerous will generally not be enough to establish causation.

6. As a result, in many arbitrations governed by common law, economic hardship alone will not be enough to justify non-performance.

7. By contrast, under civil law principles, economic hardship can provide a justification for non-performance if the hardship results from an unexpected event beyond the non-performing party's control.

8. Under these principles, a demonstration of economic hardship will require the parties to re-negotiate the key terms of the contract.

9. If the parties are unable to reach agreement, the dispute is referred to an arbitrator or a court which must then revise the contract to accommodate the changed circumstances.

10. The civil law thus provides for an "economic hardship" justification for revising the contract and thereby preserving the parties' contractual relationship.

Thus, in dealing with unexpected events, the common law and civil law share certain key elements, but they also have important differences. In both systems, an unexpected event will not excuse a party from non-performance unless the event is both unforeseeable and beyond the party's control. However, in common law systems, economic hardship alone will generally not constitute an excuse for non-performance, while in civil law it may excuse liability and provide a basis for a renegotiated contract.

The link to the Webinar can be found below:
https://www.mayerbrown.com/en/perspectives-events/events/2020/06/arbitrating-contract-disputes-arising-from-covid19