COVID-19: How To Prepare for Potential Future Disputes

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Dr. Anke Sessler
Partner / Frankfurt
International Litigation and Arbitration
49.69.74220.165
anke.sessler@skadden.com

Max D. Stein
European Counsel / Frankfurt
International Litigation and Arbitration
49.69.74220.144
max.stein@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

TaunusTurm, Taunustor 1
60310 Frankfurt am Main
Germany
49.69.74220.0

Pandemic-Related Uncertainty Means Business Decisions Will Be Highly Scrutinized

As the COVID-19 pandemic continues to develop, guiding a business through this time of immense crisis means making decisions that gravely impact the company and its employees. *Inter alia*, companies need to decide whether they are obliged to perform what is stated in their contracts or whether some actions may be excused, including those:

- under an applicable *force majeure* clause or statutory provision, such as Article 79 of the U.N. Convention on Contracts for the International Sale of Goods (CISG); or
- under statutory or common law principles, such as frustration, impossibility or *clausula rebus sic stantibus*.

Companies faced with counterparties that cannot honor contracts due to the effects of COVID-19 likewise will need to decide how to react, in particular with regard to whether or not to seek an interim injunction for continued performance.

Companies and their directors and officers should bear in mind that their decisions may face legal challenges at any time. Measures that may appear inevitable or unavoidable may be questioned in hindsight by others who did not experience the situation firsthand or who may have considered an alternate approach more prudent. Past arbitration and litigation experiences show that it is not always easy to convey, in subsequent legal proceedings, the sense of urgency and necessity that was perceived at the time.

Disputes Likely Will Be Fact-Driven

Companies may face significant legal challenges as a consequence of decisions to refuse to honor a contract in response to impediments caused by COVID-19. Even though the underlying pandemic-related premise for failure to comply likely will be the same, each case will be considered based on very specific facts. For example, under CISG Article 79, it is not sufficient for a company to simply argue that the failure to perform was due to an impediment beyond a party's control (*i.e.*, an event such as a pandemic) and therefore the company could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. As such, a party invoking CISG Article 79 also must show that it could not reasonably have avoided or overcome the impediment or its consequences. Whether this can be established will depend very specifically on how COVID-19 affected that party and the measures the company undertook to respond. For example, a party rejecting delivering certain goods due to COVID-19 should be able to prove that:

- it did everything reasonably possible to retain its ability to perform;
- it evaluated all possible alternatives to a rejection of performance, including covering purchases; and
- it determined that, if there were alternatives, the associated costs were disproportionate.

Similar considerations are likely to apply under most force *majeure clauses*, which, however, differ greatly in wording. Additionally, their interpretation may depend on the applicable law.

Directors Individually May Face Dispute Claims

It appears likely that not only will disputes arise between companies in relation to their respective performance obligations, but we may also see directors having to address dispute claims. A director whose company is ordered to pay damages as a result of his or her decision may be personally liable — subject to any protection from directors and officers liability insurance — unless he or she can show that the decision was made based on sound business judgement. Establishing this may require proving that all potential options were thoroughly assessed and that, ultimately, a decision was made based on reliable legal advice.

Documentation Is Key

Disputes often pit one witness' word against another. Therefore, contemporaneous documents are key in deciding disputes, as they may be sufficient to substantiate or disprove a claim. In addition, documents are the key source for witnesses in helping to refresh their memories. Judges and arbitrators seldom reject the witness testimony of one party merely because it is disputed by another witness; they more often reject testimony because witness statements end up being disproven or unsupported by contemporaneous documentary evidence. It is not only in the best interest of the company, but also each decision-maker, that decisions and their genesis are properly documented.

Accordingly, companies making decisions that may negatively affect others should document:

- when the decision to take a certain action was taken;
- which alternative options were available;
- why the specific option was chosen;
- what assessment was made regarding the possible impact of the decision on others;
- what measures were taken to avoid having to make the decision;
- who made the ultimate decision; and
- what advice — particularly legal advice — was sought before making the decision.

Decision trees can help not only in finding the right solution, but also in documenting that a decision was taken with due care. When decisions are assessed and made verbally, it is particularly important to document them in writing by preparing detailed protocols.

In particular, companies that are negatively affected by decisions made by their counterparties should document all circumstances that will enable them to prove damages, including why they were specifically caused by a certain decision. In complex scenarios where arbitration or litigation is anticipated, it may be sensible, even at an early stage, to involve damage experts in order to ensure that financial risks and potential damages are properly and thoroughly assessed.

All internal and external correspondence should be stored. As such, when important discussions take place verbally, notes should be taken. With the agreement of everyone involved, it also may be possible to record phone calls.

Some decisions are particularly delicate, including those involving communication with competitors regarding measures to address the crisis. In these situations, it is critically important to document the specific scope and content of such communications in order to withstand potential investigations by cartel authorities. Additionally, decisions to take measures that may lead to the counterparty's insolvency are often very sensitive. Such decisions may occur in the coming weeks and months, as some companies may be even more vulnerable because of the COVID-19 pandemic. In such cases, insolvency administrators usually have less hesitation to initiate a legal action than the management of a company in an ongoing business relationship.

Documentation Should Be Organized and Stored Contemporaneously

Documentation does not stop at simply recording decisions. All relevant documents should be organized and stored in a logical manner and be accessible by others, including in-house legal advisers.

Some disputes may not materialize until months or years in the future. As such, companies should ensure that they maintain sufficient records and are not dependent on individuals who may no longer be employed at the company by the time a dispute arises.

Organizing and storing documents contemporaneously has many advantages:

- all relevant documents will be identified;
- intentional or unintentional deletion or loss of pivotal documents is avoided;
- in-house legal counsel, and potentially external lawyers, are better able to assess the case; and

- if a secure system is in place that prevents any tampering with the documentation, the evidentiary value of the documentation is increased.

Pitfalls of Good Documentation; Preserving Legal Privilege

Good documentation can serve as a weapon in a dispute. However, that arsenal of documentation also may become available to the opponent depending on where the dispute takes place. In international arbitrations and litigation in several jurisdictions, particularly in the U.S., relevant documents may need to be handed over to the opponent, unless they are protected by legal privilege.

Under U.S. federal and state laws, documents referencing or reflecting legal advice may be protected from disclosure on account of attorney-client privilege and/or the attorney work-product doctrine. In contrast to the laws of some countries, in the U.S. attorney-client privilege applies to communications with both in-house and outside counsel.

Attorney-client privilege protects confidential attorney-client communications made for the purpose of requesting, giving or receiving legal advice from being disclosed. To be protected, the communication must have been made in order to seek or provide legal advice. Communications with an attorney for other purposes (*i.e.*, if the attorney is serving as purely a business adviser) are therefore not protected.

The work-product doctrine protects attorneys' impressions, conclusions and/or legal theories developed in anticipation of litigation. However, the doctrine does not offer complete protection from disclosure. To the extent that an attorney's work contains relevant and non-privileged facts, it may be disclosable in cases where the plaintiff can show a substantial need for the information and cannot otherwise obtain equivalent information without undue hardship. An inquiry therefore will be fact-specific.

U.S. courts will usually — though not always — apply privilege rules in situations where the communication took place outside the U.S. and under a different legal regime. Parties outside the U.S. can take a number of steps in order to put themselves in the best possible position to utilize attorney-client privilege and/or the work-product doctrine in the case of U.S.-based litigation or an international arbitration with a U.S. counterparty. These steps include:

- In circumstances where it appears likely that you are headed for litigation or arbitration, it is advisable to involve attorneys as early as possible in the process. Employees also should be made aware of the importance of preserving privilege with regard to communications and documents containing or incorporating legal advice, and should be encouraged to include attorneys in their discussions where appropriate.
- When seeking in-house attorneys' or outside counsel's legal advice, make clear in the body of the communication that you are seeking such advice. Be aware that merely copying an attorney on communication will not make the communication privileged and will not shield that document from disclosure.
- Consider putting the header "Privileged: Attorney-Client Communication" on communications with your in-house attorneys or outside counsel. This header alone does not make a document privileged, but will serve as an indicator that you intended a communication to be privileged. Keep in mind that the overuse of such a header may dilute a legitimate claim of privilege or work-product protection.
- Do not forward emails or other communications from your in-house attorneys or outside counsel to third parties or discuss what you and your attorney talk about with a third party, unless counsel has confirmed that it is appropriate to do so.
- Where possible, limit employee access to privileged documents to only those representatives who are directly involved in the pending legal proceeding or dispute to which the document pertains.
- Control who creates documents. Documents concerning pending litigation or arbitration, or disputes anticipated to possibly result in a legal proceeding, should indicate that they are prepared for litigation purposes (and, where true, at the request of counsel).