Nyon, 10 October 2020

Heads up – Trade and Arbitration
"COVID – 19 and seed trade contracts"

The current COVID-19 context

The world faces an unprecedented crisis with COVID-19. While the pandemic has put many countries under lockdown and brought normal activities to a halt, essential services like health care, infrastructure, finance and public administration continue.

Many countries have taken and are taking public measures classifying the food and agriculture sector as "essential" to allow the continued movement of goods, and to allow the employees to continue their work. In most cases, seed sector activities are considered essential business operations.

It is likely that the coming months, and perhaps years, there will be an impact on trade, which could affect your business performance in various ways:

- The performance of most obligations generally, whether contractual or by operation of law, which has faced a radical increase in difficulties, that range from a simple slight delay in performing, to absolute impossibility to perform;
- The international seed trade in various ways and seed companies face difficulties in receiving, packing, shipping and delivering seeds.

In these uncertain times, this Heads Up provides you some guidance on the importance of the ISF Trade and Arbitration system for you who are the users or potential users. It outlines some points to pay attention to throughout your business relations with regards to contracts and the good use of the ISF Trade and Arbitration System.

The ISF Trade Rules

Seed companies are encouraged to agree to the application to their contract of the ISF Trade Rules and ISF Dispute Settlement Rules by referring to the "ISF Rules" in any contract related to seed business.[1]

These rules can be found here: https://www.worldseed.org/our-work/trade-rules/#trade-rules

N.B: the applicable rules depend on the date of signature of the contract. For prior versions of the ISF Trade Rules and ISF Dispute Settlement Rules, please contact ISF Secretariat

An important note, the ISF Rules are non-mandatory and the parties may amend them as they deem fit with regard to their contract.[2]

The ISF Trade Rules clearly do not replace national laws governing (domestic and international) seed contracts. (Please look at the second, more legal part of this Heads Up)

[1] Art.1.1 The Rules and Usages for the Trade in Seeds for Sowing Purposes -"ISF Rules"- shall apply in national and international seed trade contracts when expressly agreed by the parties.
Art.2.1 When the words "ISF Rules" have been embodied in a contract or in any other agreement, including Terms and Conditions of Sales pertaining to seeds, the present Rules shall apply in full and parties agree to solve any kind of disputes by ISF arbitration as mentioned in Art. 87.

[2] Art.2.3 Any exceptions to these Rules or specific and/or additional provisions agreed by the parties shall prevail over the present Rules.

Nevertheless, ISF Trade Rules assist in the context of the COVID-19 pandemic in two regards:

1. Force Majeure

In ISF contracts (subject to the ISF Trade Rules) the clause of «Force majeure» of the International Chamber of Commerce, in force at the date of conclusion of the contract, applies (ISF Trade Rules, Art.85.1). The debtor is to invoke the clause and give notice of the event(s) without delay.

An updated 2020 note of the ICC is available at:

https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-»«*Hardship*»»-clauses-march2020.pdf

In this scenario, the parties should pay attention in particular to:

- The exact version of the ICC Clause in time (2020 or before, depending on the date the contract is concluded);
- The exact terms and conditions of the ICC Clause, to be met by the debtor, and its effects on the debtor's duty to perform and liability;
- the fact that the ISF Trade Rules give application (in Art.85.1)[3] only to the ICC *«Force majeure»* clause, not also to other ICC (or others) clauses, nor to the *«Hard-ship»* clauses that are often associated, with some approximation, to *«Force majeure»* clauses;
- It follows that under Art.85.1 of the ISF Rules the debtor may rely only on the ICC «Force majeure» clause. The parties should consider early enough whether more clauses are desirable in their contract.
- Self-evidently, the parties may also amend the ISF Trade Rules applicable to their contract and, among others, exclude the application of the ICC «Force majeure» clause, or modify its terms, or add other clauses.

2. ICC Incoterms®

For the shipment of the seed, ISF Trade Rules refer (art.22) to the Incoterms® Rules of the ICC, in force at the date of conclusion of the contract, if the parties referred to them in the contract. Their importance is well-known, in particular as to the passing of risks, generally and in the current context of the COVID-19 pandemic.

3. Few Practical Recommendations

- Consider the ISF Trade Rules and ISF Dispute Settlement Rules (available on the ISF website) and agree to their application by including a reference to "ISF Rules" in your seed contract.
- Insert in all seed contracts two distinct types of clauses: a «Force majeure» clause (dealing with events rendering performance impossible) and a «Hardship» clause (dealing with events rendering performance more onerous than reasonably anticipated at the time of the conclusion of the contract).
- Ensure in both types of clauses clear and precise definitions of the events affecting debtor's performance (criteria defining the category of events, adding a non-exhaustive list of examples) and of the agreed effects of the clause on the debtor's duty to perform and liability, continuance or termination of contract. Clear and precise clauses are key to enhance legal predictability and reduce or prevent disputes on their meaning, conditions and effects on the contract.

[3] The clause of *«Force majeure»* of the International Chamber of Commerce, in force at the date of conclusion of the contract, shall be an integral part of the present Rules.

- In all contracts negotiated since the awareness of COVID-19 the parties should carefully consider inserting and defining in the clauses, among others, epidemics/pandemics/endemics.
- Again, legal advice should be sought, case by case.

4. Dispute Resolution

If a dispute arises in a contract where the parties agreed to the "ISF Rules" these rules apply generally,[4] including to resolving the dispute.[5]

The parties are expected to:

- Try to negotiate between them;
- If negotiation was not successful, to go through the process of ISF mediation and conciliation;
- If no agreement is found and no settlement is reached, start an arbitration under the ISF Procedure Rules for Dispute Settlement[6] , and according to its deadlines[7] and terms.

As reflected above, the importance of law in any contract and in determining the parties' rights and obligations is self-explanatory. It is so even if the dispute is settled, in an ISF arbitration, in principle *ex aequo et bono*, unless the parties agree otherwise.[8]

Legal Aspects of COVID-19 and difficulty to perform

In order to provide you some more legal aspects on contracts and applicable laws, please go through the following part.

1. Distinguishing between the effects of the new situation: impossibility to perform («Force majeure») or more onerous performance («Hardship»)

All contracts that imply duration (sale, supply, loan, etc.), are likely to face new situations, outside the parties' control, in the period between the time of conclusion and performance of all the contractual obligations. The longer this period is the more new situations are likely to arise and concern one or all contracting parties.

What matters in contract law is the effect of such new situations on the debtor's performance of obligations (the debtor is the seller as to the duty to deliver, the buyer as to the duty to pay, etc.)

A key distinction focuses on whether such situation, individually an "event" (traditionally for instance war, flood, earthquake, recently COVID-19 related events) : i) renders the debtor's performance impossible, or ii) maintains performance possible and renders it simply more onerous than the debtor reasonably anticipated at the time of the conclusion of the contract.

In all contracts that imply some duration the parties should not only be informed about what the law of the contract ("governing/applicable law") prescribes with regard to such "new

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[4] Art.1.1 "The Rules and Usages for the Trade in Seeds for Sowing Purposes -"ISF Rules"- shall apply in national and international seed trade contracts when expressly agreed by the parties."

[5] Art.87.1 "Any dispute, controversy or claim arising out of or in connection with transactions started or concluded on the basis of the present Rules, or the breach, termination or invalidity thereof, can be settled amicably or by mediation and conciliation as provided for in the ISF Procedure Rules for Dispute Settlement or by binding arbitration in accordance with the ISF Procedure Rules for Dispute Settlement, with the exclusion of ordinary judicial procedure."

[6] Available on the ISF website.

[7] Art.87.2 "Application for arbitration written in English shall be made in conformity with the provisions of the ISF Procedure Rules for Dispute Settlement and no later than 365 days after the first communication between the parties concerning the dispute, except if arbitrators decide or parties have agreed otherwise."

[8] ISF Arbitration Procedure Rules, Art.2.

situations" (for instance, doctrine of frustration in English law), and also draft and adopt suitable clauses covering these situations and the related effects on the debtor's performance that the parties (i.e. creditor and debtor) agree upon. Two are the main types of clauses dealing with events outside parties' control and occurring after the conclusion of the contract:

- «Force majeure» clause, dealing with such events when they render the debtor's performance impossible;
- «Hardship» clause, dealing with such events when they maintain the debtor's performance possible and render it simply more onerous than the debtor reasonably anticipated at the time of the conclusion of the contract.

Both types of clauses should contain clear and precise definitions of i) the conditions (the events affecting debtor's performance; to be defined by suitable criteria and typical categories of events, adding a non-exhaustive list of examples), and ii) the agreed effects of the clause on the debtor's duty to perform and liability, continuance or termination of contract. Clear and precise clauses are key to enhance legal predictability and prevent disputes on their meaning, conditions and effects.

What regulates difficulty to perform: the governing law and/or the clause?

When the debtor faces a "new", or a "greater", difficulty (than at the time the contract was concluded) to perform one or more of its contractual obligations, the law governing the contract has its own rules on whether the debtor may suspend performance temporarily or not. In principle, it may not as valid contracts are binding upon the parties (*pacta sunt servanda principle*) unless the law grants an exception for specific situations. Several national laws generally leave this matter to the agreement of the parties meaning that they contain either no rules or only non-mandatory rules that apply unless the parties agreed otherwise.

- If the parties did agree otherwise as they entered a «Force majeure» and/or a «Hardship» clause in their contract, the clauses apply between the parties.
- If the parties do not insert any clause, please see below as to the automatic application in ISF contracts (subject to the ISF Trade Rules) of the clause of «Force majeure» of the International Chamber of Commerce, in force at the date of conclusion of the contract.
- If the parties failed to agree upon and insert in the contract a «Force majeure» or a «Hardship» clause the rules of the governing law apply.

2. A cautious position at law for parties in a debtor position

The debtor is entitled to invoke at law, neither more, nor less, than what the governing law prescribes and what the clause in the contract (if any and valid) allows under the agreed conditions (event etc.) and terms. For instance, if under the governing law and/or a clause the debtor may invoke « force majeure » under three conditions, only if all three are met the debtor will successfully invoke it and see its duty to perform suspended for the duration of the event. If a condition requires evidence that the invoked event was unforeseeable by (reasonable) parties at the time of the conclusion of contract and there is no evidence in this direction, then «Force majeure» will not apply. The debtor's liability is then at stake for delayed performance, or non-performance.

The parties in a debtor position should be aware that, if for the specific event (COVID-19-related or other) event the governing law of contract does not assist (i.e. neither suspends the duty to perform nor terminates the contract which is the source of all contractual obligations between the parties) the debtor can count, as just observed, only on what the governing law (in its "ordinary" and non-COVID-19 related rules) prescribes and what the clause in the contract (if any and valid) allows. If the debtor does not meet the conditions under the law or the clause, it faces liability for breach of contract (although it invoked a "new" or "greater" difficulty to perform since conclusion of the contract) because valid and

enforceable contracts are binding upon the parties, the *pacta sunt servanda* principle is the rule in comparative contract law.

3. Agreed clauses ("freedom of contract") v. mandatory rules

While agreeing «Force majeure» and/or «Hardship» clauses is in principle possible (within the "freedom of contract" allowed by the governing law in most national laws), it may happen that the governing law of country X intervenes on this matter (debtor facing a "new", or a "greater", difficulty after conclusion of the contract) by mandatory rules (rules the parties may not contract out) that prevail over the clause. If so, these rules prevail and the terms of contract apply only outside the scope of such rules.

Indeed, depending on policy priorities lawmakers adopt in contract law, either non-mandatory rules (which apply to the contract only if there is no parties' agreement otherwise, no different clause in the contract), or mandatory rules, called also public policy rules (which apply to the contract regardless of any agreement or clause).

4. Distinguishing between ordinary mandatory rules (the norm) and "internationally" or "overriding" mandatory rules (the exception)

Numerous governments have enacted COVID-19 related regulations. If in country X these regulations are mandatory they prevail over the contract and any «Force majeure» or «Hardship» clause, over any contract (whether international or domestic) governed by the law of country X. For clarity, the law of country X is the "applicable/governing law" to an international contract if, either the parties inserted a clause of choice of law ("Party Autonomy") for country X or, failing such a choice, law X is deemed the governing/applicable law by the court or arbitral tribunal.

Lawmakers have an additional option: more rarely in practice and only for crucial and/or governmental interests, they may enact mandatory rules intended to prevail, not only over clauses in a contract (as ordinary mandatory rules prevail), but also prevail as "internationally" or "overriding" mandatory rules over a foreign law which is applicable to an international contract. For instance, such rules of country Y intend or claim to apply to the seed contract subject to the applicable law of country X.

Traditionally, in private international law (or conflict of laws) of contracts, rules of country Y are disregarded and only the rules of country X, because it is the "applicable/governing law", are applied to an international contract and to settle the related disputes.

Nevertheless, an exception is admitted at least in some countries in case of "internationally" or "overriding" mandatory rules, meaning foreign rules reflecting crucial or governmental interests, and a court or arbitral tribunal may (not "shall") apply or give effect to, in principle one or few, of these rules.

5. The importance of seeking early and regularly legal advice

Parties should be regularly informed about the law governing their contract, in order to understand, measure, and possibly anticipate, the effects of both ordinary rules and pandemic-related new rules on their obligations and rights. The parties should seek legal advice more regularly than in ordinary time as pandemic-related regulations change rapidly over time.

In greater detail, legal advice should be sought, case by case, to find out what rules concerning the seed contract (of the governing/applicable law) are mandatory, which are non-mandatory. More exceptionally, should foreign rules reflecting a strong or governmental interest arise and claim a degree of legitimacy with regard to the contact (import, export, etc.), legal advice should be sought also as to whether such rules may qualify as "internationally" or "overriding" mandatory rules and, if so, whether they may be given effect or applied by the court or the arbitral tribunal in settling a dispute.