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The Effect of the COVID-19 Pandemic on Online Marketplace Providers

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COVID-19 and the responses of local, state, federal, and foreign governments have impacted, and will continue to impact, virtually every aspect of global commerce. Companies (marketplace providers) that offer online marketplaces (e.g., websites that allow users to offer, sell, and buy or rent items, services, property or events) (collectively online purchases) face unique challenges, given that their users include both buyers and sellers. In addition, multiple agreements and policies govern transactions made through these marketplaces, including separate agreements between the buyers and sellers themselves (user agreements). In this Alert, we examine some of these challenges and how provisions in the marketplace providers' online marketplace agreements (OMAs) can directly affect their options to cope with circumstances like the COVID-19 pandemic. We have created a checklist of the key provisions in standard OMAs that marketplace providers should review to assess their options, as well as the issues they may present for marketplace providers seeking to react quickly, equitably and transparently in response to crises like the COVID-19 pandemic. We also provide suggestions on changes that marketplace providers may want to make in their OMAs on a going-forward basis in order to provide more flexibility to respond to similar events in the future, while at the same time ensuring greater transparency for users of their marketplaces.

Certain provisions in the online marketplace agreements (OMAs) may provide online purchases are controlled solely by user agreements. Since the marketplace provider is generally not a party to these user agreements, the marketplace provider may have little or no ability to control how individual buyers and sellers will resolve issues related to the COVID-19 pandemic. However, the marketplace provider may have reserved the right to override, or at least influence, the terms of the user agreements, including how the pandemic and issuance of related local, state and federal laws (COVID-19 laws) affect existing transactions entered into through its marketplace.

Even if the marketplace provider has reserved some rights to influence existing user agreements impacted by the COVID-19 pandemic or COVID-19 laws, most marketplace providers will need to consider the interests of participants in their two-sided marketplace. Any responses will need to balance the interests of the buyers and sellers, which will often be conflicting.

Checklist for provisions that may impact a marketplace provider's response to COVID-19

1. Is your OMA likely to be enforced in the event of a dispute?

Since some members of the user community will likely be upset about whatever steps the marketplace provider may take in a situation like the one we currently face, the marketplace provider can expect the enforceability of its OMA to be challenged. The marketplace provider should review the steps it has taken to maximize the enforceability of its OMA to understand the likelihood it will be enforced if challenged. If the marketplace provider is using a browsewrap agreement (an agreement on a website that informs the user that it will be deemed to have "accepted" the agreement by continuing to use the website), the terms of the OMA, including key terms that may protect the marketplace provider from actions taken by its buyers or sellers related to the COVID-19 pandemic (e.g., disclaimers of warranties, limitations of liability, arbitration agreements and cancellation/refund provisions) may not be enforceable. See our alert on creating enforceable online agreements.

2. Does your OMA clearly state that the marketplace provider is not a party to user agreements?

A buyer or a seller who entered into user agreements prior to the date on which authorities took COVID-19 related actions may seek a way to avoid their obligations under these agreements. As such, a clear contractual

statement that the marketplace provider is not a party to the user agreements is an important element to protect a marketplace provider from a claim by the party seeking to enforce the user agreement. Marketplace providers should check to see whether their OMA includes such a provision.

While this type of provision is intended to ensure the marketplace provider will not be liable for user breaches, it also means relevant provisions related to COVID-19 events that are typically included in the OMA (e.g., cancellation and force majeure) do not apply either. Consequently, these provisions will be addressed, if at all, in the user agreements that apply to the online purchases.

3. Does your OMA include a provision that allows you to override certain provisions in user agreements in exceptional circumstances?

Because an OMA almost always includes a provision that the marketplace provider is not a party to the user agreements, the marketplace provider will not be able to make changes to existing user agreements related to the COVID-19 pandemic or COVID-19 laws unless it has reserved rights to do so elsewhere in the OMA (an exceptional circumstances provision). For example, the OMA may require sellers to agree to include certain flow-down terms in their user agreements. These flow-down provisions might provide flexibility for the marketplace provider to address exceptional circumstances like the COVID-19 pandemic. Alternatively, the OMA might include a provision pursuant to which users agree to be bound by policies issued by the marketplace provider, and the provision might also permit the marketplace provider to make future changes to these policies without the users' consent.

4. Does your OMA include a provision that allows you to intervene in disputes between users related to user agreements?

Although OMAs often provide that the marketplace provider will not intervene in disputes between users, some OMAs allow the marketplace provider to intervene in its discretion to help facilitate in the resolution of disputes (a dispute facilitation clause).

A dispute facilitation clause may be particularly helpful for a marketplace provider that did not include an exceptional circumstances provision in an OMA. The marketplace provider may be able to use the dispute facilitation clause to encourage its users to reach reasonable compromises related to the handling of online purchases that are, or will be, affected by COVID-19 or COVID-19 laws. For example, if buyers are claiming they should obtain a full refund as a result of COVID-19 laws that frustrate the purpose of their online agreements, but sellers are resisting a full refund that could leave them without sufficient funds to continue their business operations, the marketplace provider may decide to intervene in these disputes and convince users that it is in their mutual best interests to agree to a partial refund or a credit against future bookings. See our alert on guidance regarding the applicability of force majeure and related doctrines in response to COVID-19.

5. Does your OMA require or recommend users purchase insurance to cover cancellation of the online purchase?

In all cases, but especially where the marketplace provider determines it cannot control if or how user agreements are affected by exceptional circumstances like COVID-19, the marketplace provider should check if the OMA (or any policies issued pursuant to the OMA) warns users of the existence of insurance that may protect them if they cancel their online purchase due to a circumstance like COVID-19. If the marketplace provider has recommended a specific type of insurance policy, the marketplace provider should check to see whether the policy covers buyer's cancellation of the online purchase for COVID-19. If the marketplace provider recommended that the buyer purchase insurance coverage, the marketplace provider should consider including a reminder of this recommendation in any COVID-19 announcements.

6. Determine whether your sellers have included, and intend to invoke, force majeure provisions in their user agreements.

If your OMA includes a force majeure clause, check to see whether it covers a failure by your sellers and/or buyers to perform their obligations under their user agreements due to COVID-19. Recognize, however, that the force majeure provision, if any, is likely to only cover a failure to perform obligations in the OMA and will not cover user agreements (since the marketplace provider is not a party to the user agreements).

As a result, you may want to consult with your sellers to determine whether they have included, and intend to

invoke, a force majeure provision in their user agreements.[1] If the seller has included a force majeure provision, it is likely that it only excuses the seller's performance in the event of a force majeure. If the provision also excuses buyer's performance, the marketplace provider needs to determine whether the buyer will be able to assert the provision as the basis for cancellation of the online purchase.

Many typical force majeure provisions will include a provision that the force majeure will in no circumstances apply to a party's failure to pay money when due. Some courts have held that such a provision will preclude the application of the frustration of purpose doctrine on the basis that the buyer has in this case assumed the risk of payment regardless of such events.[2]

7. Check to see if your OMA includes a right for the marketplace provider to make changes to the agreement, and if so, what requirements are placed on the making of such future changes.

Although a party to a contract does not typically have the right to unilaterally modify the contract, online providers have attempted to change this result through the use of a future changes provision, and courts have generally upheld this type of provision provided it gives users some notice and an opportunity to opt-out of the revised agreement if the user does not agree with the changes.

If there is no future changes provision, check to see if there is a provision in the OMA that allows the marketplace provider to issue new or updated policies that will be binding on users. If there is no future changes provision in the existing OMA, or if you have determined there is a significant risk that the OMA may not be enforceable, any changes you make to the OMA will need to be accepted by way of a new enforceable click-to-accept process.

Keep in mind that, even if your OMA includes a future changes provision, it is unlikely that a retroactive change will be enforced (e.g., adding an exceptional circumstances provision that applies retroactively to user agreements that were concluded prior to the effective date of the modified OMA).

The marketplace provider should also consider the seller's and buyer's rights if the user agreements do not include a force majeure provision or include a force majeure that only excuses the seller's performance. In these cases, the buyer may be able to successfully assert the doctrine of frustration of purpose to cancel the online purchase. The doctrine of frustration of purpose applies where an unforeseeable supervening event (in this case, the COVID-19 pandemic or subsequently issued COVID-19 laws) fundamentally changes the nature of a contract and makes one party's performance worthless to the other. Whether or not something is foreseeable may be influenced by timely warnings and statements that the marketplace provider places in the marketplace.

The doctrine of frustration of purpose focuses on "events which materially affect the consideration received by one party for his performance. Both parties can perform, but as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place."[3] Note that where the event that frustrated a party's purpose in entering into a contract was foreseeable at the time of contracting, the defense is not available.[4] It is also important to note some courts have held the doctrine of frustration of purpose cannot be invoked if the parties to a contract have included a force majeure clause that covers the same ground.[5]

Overall, it is also important to note the analysis may change depending on when the online purchases were made and what was known (or foreseeable) at that time. For example, the decisions made regarding a trip purchased today to a country in lockdown may be very different than a trip purchased months ago to the same location. When making decisions about how to enforce your terms or setting policy, it is important to keep the facts and circumstances in mind.

Suggestions for future changes

Depending on what you uncover when working through the checklist above, and on input from your existing user base, as well as further developments related to COVID-19, marketplace providers may want to consider making some or all of the following future changes to their online agreements and user policies:

1. Modify your contract formation practices to maximize the chances that your OMA will be deemed enforceable in the event of a dispute.

2. If it is not clear that your existing OMA is enforceable, or your OMA does not include a future changes provision, require your existing users to click-through their acceptance of your revised OMA.
3. Consider requiring sellers to agree to minimum terms related to cancellations and refunds, including an exceptional circumstances provision that balances the needs of both sellers and buyers in situations where a supervening event has changed the nature of the contract and made one party's performance of the user agreement worthless to the other party. The exceptional circumstance provision should consider whether and how to address the COVID-19 events and similar circumstances, such as shelter-in-place laws and/or advisories and recommended (but not mandated) travel restrictions. Note that users will not be able to rely on the doctrine of frustration of purpose where the terms of the user agreement, the OMA or an associated policy clearly call out events like pandemics, quarantines and shelter-in-place orders, since such language is likely to be construed to show that these events were foreseeable.
4. Because 100% refunds will be difficult on the marketplace provider as well as sellers, the marketplace provider may want to provide for, or allow sellers to select from, a menu that includes options for remedies on cancellation (including in the event of an exceptional circumstance). For example, these options could include (a) less than a full refund (e.g., it should address whether the marketplace provider is entitled to retain its fees for processing of the user agreement and some compensation to the seller); (b) a credit against future online purchases with the same seller instead of a refund; or (c) a partial refund plus a credit of the remaining amounts (or some remaining amount) against future online purchases with the same seller.
5. The marketplace provider should consider requiring sellers to include a bespoke force majeure provision in their user agreements that specifically deals with the effect of pandemics, quarantines, travel restrictions and similar events on the seller's and buyer's ability to cancel or postpone the online purchase. If included, the provision should explicitly provide that it replaces any rights either party may have under the doctrine of frustration of purchase or the doctrine of impossibility. Failure to include a force majeure provision is likely to result in the application of these two doctrines, which may lead to outcomes that the parties did not intend.
6. The marketplace provider may want to include an informal dispute resolution process within the cancellation policy and/or the exceptional circumstance provision.
7. The cancellation policy should consider and address, the impact of the doctrines of impossibility and frustration of purpose if the marketplace provider determines that COVID-19, or a similar circumstance, does not fall within the exceptional circumstances set forth in the cancellation policy.
8. Buyers should receive a conspicuous disclosure before entering into a user agreement if the marketplace provider and/or the sellers do not intend to provide a full refund in the event of a COVID-19 event or similar circumstance. In addition, the marketplace provider should consider including a provision that the buyer bears the financial risk of cancellation in such circumstances and advising the buyer to purchase an insurance policy that covers cancellation of the online purchase.

Notes

1. The following typical force majeure provision might not provide the buyer with right to cancel the Online Purchase, especially where the buyer has already fulfilled her obligation by paying for the Online Purchase:
   Neither party shall be liable for any delay or failure to perform resulting from causes outside its reasonable control, including, but not limited to, acts of God, war, terrorism, riots, embargos, acts of civil or military authorities, fire, floods, accidents, strikes or shortages of transportation facilities, fuel, energy, labor or materials. If a force majeure event occurs that affects either party's performance of its obligations under the Agreement: (a) the party invoking the force majeure will contact the other party as soon as reasonably possible; and (b) the obligations of the party invoking the force majeure provision under the Agreement will be suspended and the time for such party's performance of its obligations will be extended for the duration of the force majeure event.
   On the other hand, the buyer might be able to cancel a User Agreement pursuant to following force majeure provision that allows either party to invoke it if the fundamental purpose of the User Agreement cannot be realized may allow the buyer to cancel the User Agreement.
   A party shall not be liable for any failure or delay in the performance of this Agreement if the Vacation Property becomes uninhabitable or inaccessible due to causes beyond the party's reasonable control, including but not limited to acts of God, war, strikes or labor disputes, embargoes, government orders, or other force majeure event, whether or not similar in kind to the foregoing evens. If the Vacation Property becomes uninhabitable or inaccessible prior to the start date of the check-in date, [one hundred percent or some lesser percentage] of the deposit will be refunded.
   If the User Agreement includes this provision, a buyer who has purchased a vacation rental from a seller on an online marketplace may be able to cancel and obtain a refund. In this case, the buyer would assert that the COVID-19 pandemic itself, or one or more COVID-19 laws or orders that cover either the buyer's residence or the Vacation Property, makes the Vacation Property inaccessible and triggers the force

majeure provision.
2. *476 Grant, LLC v. Dodge of Englewood, Inc.*, 2012 N.J. Super. Unpub, LEXIS 457 (2012).
3. *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 211 (N.D.N.Y. 2012) (quoting *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1947)).
4. *Warner v. Kaplan*, 892 N.Y.S, 311, 314-15 (2009).
5. *Commonwealth Edison Co. v. Allied-General Nuclear Services,* 731 F. Supp. 850, 855 (N.D. Ill. 1990).

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