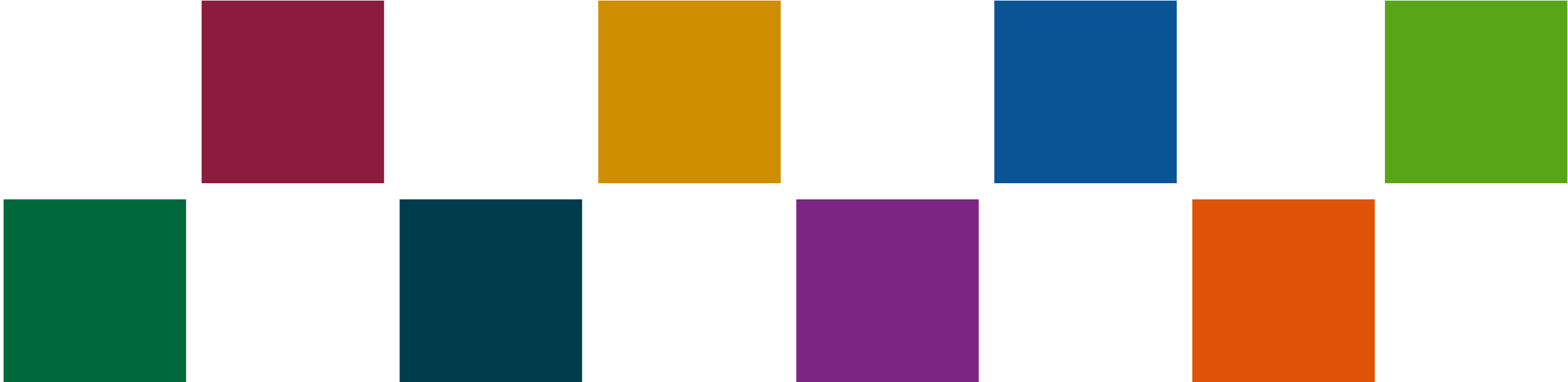


# Contract Management During COVID-19

On-boarding, Managing and Exiting  
Robert McDonagh & John Farrell, Partners  
Technology, Sourcing and Innovation  
Mason Hayes & Curran



# Intro & Housekeeping

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# Topic 1

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**What changes are you seeing from companies that are in the middle of or starting contract negotiations?**

- Greater emphasis on Due Diligence & Risk Mitigation
- Usual contract battlegrounds remain, e.g. liability
- Greater emphasis on particular provisions, e.g.:
  - Payment: timing, milestones, security
  - Delivery: supply chain, prioritisation, exclusivity vs dual supply, mechanics, business continuity, retention of title
  - Relief: force majeure, change in law, MAC, other relief
  - Financial: solvency and projection warranties, financial distress, insurance, PCGs, letters of credit
  - Exit: DR, escalation, termination and exit



# Topic 2

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## Are Force Majeure provisions having an impact yet?

- Creature of Contract, not Common Law
- No one-size fits all
- Important to carefully consider the clause



# Topic 2

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## Sample FM clause

- 1.1 **Force Majeure Event** means any circumstance not within a party's reasonable control including, without *limitation*:
- (a) material shortage; (b) epidemic or pandemic; (c) compliance with governmental order or rule; (d) embargo; (e) ...
- 1.2 Provided it has complied with clause 1.3, if a party is prevented, hindered or delayed in or from performing any of its obligations under this agreement by a Force Majeure Event (Affected Party), the Affected Party shall not be in breach of this agreement or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.
- 1.3 The Affected Party shall:
- (a) as soon as reasonably practicable after the start of the Force Majeure Event, but no later than [NUMBER] days from its start, notify the other party in writing of the Force Majeure Event, the date on which it started, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under the agreement; and
- (b) use all reasonable endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations.
- 1.5 If the Force Majeure Event prevents, hinders or delays the Affected Party's performance of its obligations for a continuous period of more than [NUMBER] [weeks], the party not affected by the Force Majeure Event may terminate this agreement by giving [NUMBER] [weeks'] written notice to the Affected Party.

# Topic 2

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## Are Force Majeure provisions having an impact yet?

- Serve notice and comply with process
- Document impact, measures taken and agreement reached
- Remember mitigation obligation
- Monitor change in circumstances
- Very difficult to rely on Doctrine of Frustration
- Look at other relief clauses, e.g. Change in Law, MAC, others
- Big question mark as to whether FM provisions in contracts signed today will cover COVID-19



# Topic 3

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## What steps are you seeing companies take to manage their existing contracts?

- Analysing their contractual commitments
- Initially a business driven process
- Distinguish between where purchaser and supplier
  - Purchaser: (i) business critical; and (ii) no longer needed
  - Supplier: (i) materially problematic (practically or commercially); and (ii) mainly workable
  - Supplier: also consider triggered obligations
- Once identified, a joint commercial/legal strategy for each contract
- Careful what you wish for



# Topic 3

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## Purchaser: business critical contracts

- Is the contract critical for the business or upstream supply
- Supplier status (solvent / supply issues / credit line)?
- Supplier supply chain status?
- Business / service continuity measures etc?
- Supplier entitled to contractual or legislative relief?
- Purchaser order, step-in rights etc?
- When is next payment and delivery due?
- Is there an exclusive purchase obligation?
- Does the supplier have a prioritisation obligation?
- Are products / materials protected in the event of insolvency?





# Topic 3

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## Supplier: materially problematic contracts

- Is the contract unprofitable or subject to delivery problems
- Prioritise resolution of downstream supply chain issues
- Strategy: terminate, perform/suspend or re-negotiate
- Consider:
  - Triggered obligations
  - Term and termination and suspension rights
  - Entitlement to relief
  - Leverage (practical and legal)
  - Liability exposure
- Prioritise certain customers (legal, commercial and practical considerations)



# Topic 3

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## Supplier: triggered obligations

- Business / service continuity
- FM reporting and plans (and monitor too)
- Early warning
- Remedial plan process
- Prioritisation
- Financial distress reporting / plan
- Warranty breaches

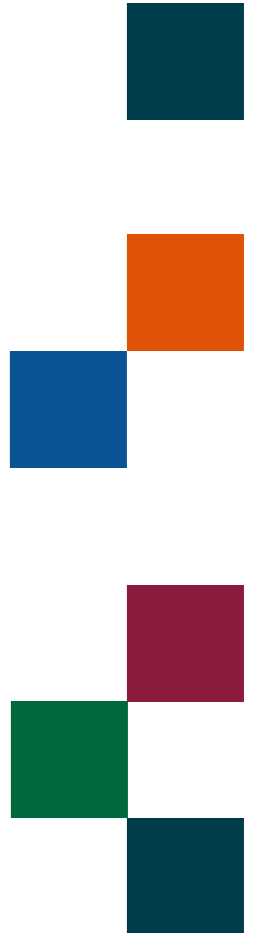


# Topic 4

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## How do you manage contracts?

- Need to decide if you want to terminate, suspend, re-negotiate or maintain
- If re-negotiating, how much leverage do you have (e.g. close to expiry, broad termination rights, payments due, entitlement to relief, dependency)
- If suspending, apply contractual process or document written agreement
- If terminating, then need to consider what the contract says
- If want to maintain, make sure you do not trigger termination right



# Topic 5

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## What are the options and pitfalls when amending the contract?

- Need to make amendments quickly & economically
- Consider variation clause
- Take a long term view – no ability to unilaterally make changes
- Take a mechanical approach
- Treat it like it will be litigated



# Topic 6

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## What do you need to consider when planning to terminate?

- What does the contract say
  - Convenience
  - Insolvency
  - Late payment/poor performance
- What if the contract is silent on term or has expired but is still being performed
- Don't forget the Notices clause – Risk of Repudiatory Breach
- Think about Exit Management, TUPE, etc.



# Question & Answers

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