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CAN WE KEEP THINGS ON THE SIDE?
A REVIEW OF THE SIDE LETTER AND ITS USE IN COMMERCIAL LEASES

Candice Jones-Simmons

The vagaries of these pandemic times have caused commercial tenants and landlords to renegotiate the terms of their leases. Landlords have been forced to weigh the loss of income and terminating the leases of tenants in arrears, against the uncertainty of locating a new tenant and the attendant costs. Some landlords are willing to make temporary concessions by varying the terms of their leases to reduce or suspend the rent. A side letter is a simple way to document the agreed changes to the lease, rather than a Deed of Variation. A Deed of Variation must be prepared by an Attorney-at-Law and is required to be stamped and registered at the land registry, which makes the side letter a more attractive option.

It is tempting to pursue the ease afforded by keeping things 'on the side'. However, parties to side letters should exercise caution, as the letter may not be legally binding, or may expose them to risks that were not present in the lease.

Advantages of a side letter

A side letter is an agreement that is supplemental to the main contract. It is often used in real estate transactions to clarify, add to, or vary the terms of a lease. It is convenient to a landlord who wishes to tailor certain terms to meet the circumstances of each tenant, while preserving identical terms in the lease. In this way, a landlord may also have the benefit of confidentiality, as a side letter is not required to be registered and disclosed to the public, which may not always be the case with the lease.

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Variations to a lease (at the time when the parties have already finalised the document) may result in the redrafting of several clauses, which can delay the completion and increase the costs of the transaction. Therefore, it may be easier, efficient and cost-effective to set out the changes in a side letter. Side letters are useful in real estate matters, as certain aspects of the negotiated terms between the original parties to the lease may not be intended for the successors/ subsequent owners of the property. These temporary arrangements may be appropriately recorded in a side letter.

Issues to keep in mind when pursuing a side letter:

Undoubtedly, there are significant benefits to keeping matters on the side. However, there are certain dangers with proceeding with a side letter.

- If you want a side letter to be enforceable you should ensure that it contains the basic elements of a contract. There must be an (i) offer which has been accepted, (ii) consideration (payment/ benefit), (iii) certainty in the terms expressed and (iv) a clear intention to create legal obligations between the parties. In contracts for the sale of land, (v) the side letter must also be in writing and (vi) signed by or on behalf of all the parties to the contract. Although most of the criteria is straightforward, the elements of consideration and certainty can pose challenges to the enforceability of the letter.

- Consideration is not required to be a monetary payment. It will suffice if a benefit is exchanged, or a party has acted to his/ her detriment in reliance on the terms of the letter. Where the letter is used to amplify terms that are mutually beneficial to the parties, consideration may be established. In the absence of a benefit/ payment, the parties may opt to execute the letter as a deed. The letter must be signed in the presence of a witness and state that it is executed as a deed. In the case of a company, it is effectively signed by one director and a secretary, or two directors of the company in accordance with its by-laws.

- There must be a 'sufficiently complete and certain agreement on all essential terms' so that a court may interpret and give effect to them in the event of a dispute. In instances where the parties are

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IMPORTING PHARMACEUTICALS INTO T&T: THE REGULATORY REGIME

Ajay Maraj

The Covid-19 Pandemic has placed an increased focus on healthcare industries globally with the drive for Covid-19 vaccination resulting in enhanced public scrutiny of the types of drugs being imported into countries for use as a vaccine or otherwise. In the face of heightened interest in available medication Regulators may now be subject to increased scrutiny by the general population when permitting pharmaceuticals for use in their given jurisdictions, Trinidad and Tobago being no different. This begs the question, 'What laws regulate the importation of pharmaceuticals in Trinidad and Tobago?'.

What are Pharmaceuticals?

Pharmaceuticals generally refer to 'drugs' which are used for medicinal purposes, the term 'drug' being defined in the **Food and Drugs Act of Trinidad and Tobago Chap 30:01 as amended** (the '**FDA**') as any substance or mixture of substances for use in:

(a) the diagnosis, treatment, mitigation or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof, in man or animal; or

(b) restoring, correcting or modifying organic functions in man or animal.

While the regulatory framework governing the general importation and regulation of pharmaceuticals in Trinidad and Tobago include multiple Acts of Parliament, the FDA and the Food and Drugs Regulations (created to give effect to the provisions of the FDA) provide a useful starting point in understanding the main regulations.

Requirements to Import Pharmaceuticals

In order to understand the requirements necessary to import pharmaceuticals into Trinidad and Tobago one must first understand the type of drug which is to be imported. The FDA makes provision for several classes of drugs, chief among them being i. New Drugs, ii. Third Schedule Drugs (included in the category of prescription drugs) and iii. Controlled Drugs.

The general requirements for importing each category of drug listed above are set out below.

New Drugs

A 'New Drug' refers to a drug which contains a substance (whether an active or inactive component) that has not yet been imported for use as a drug in Trinidad and Tobago or alternatively a drug which is a combination of two or more drugs in a proportion or manner which has not been previously imported for use as a drug in Trinidad and Tobago.

In order to import a New Drug into Trinidad and Tobago the proposed importer must file a Drug Submission Form in the prescribed format, with the Minister of Health (the '**Minister**'). The Drug Submission Form must contain, among other things:

- a description of the drug (including the name of its manufacturer);
- the proper name of the drug;
- the proposed name under which the drug is to be sold; statement of ingredients;
- route of administration;
- proposed dosage; and
- the contra-indications and side-effects of the new drug if known.

Notably, the details of the tests applied to control the potency and safety of the New Drug as well as a draft of every label proposed to be used in connection with the drug is also to be included in the submission to the Minister.

Following receipt of the Drug Submission Form, the Minister may in his discretion (where applicable) or on the recommendation of the Drug Advisory Committee, notify the person filing the Drug Submission Form whether the information submitted satisfies the requirements of the FDA and in the event said requirements are satisfied (and after consultation with the Drug Advisory Committee) the Minister may, by Notice of Approval, signify his approval in respect of that Drug.

Third Schedule Drugs

Only persons falling within a specified category of persons (as identified in the Food and Drugs Regulations) can import a drug listed in the Third Schedule of the FDA (which are included in the category of prescription drugs). These persons include:

- a practitioner (dentist, physician, or veterinary surgeon);
- a drug manufacturer;
- an importer, wholesaler, jobber, or agent, dealing in drugs;
- a pharmacist; or
- a resident of a foreign country while a visitor in Trinidad and Tobago.

Although the drugs which form part of the Third Schedule are expressly and definitively listed, it is noteworthy that the Minister may, on the advice of the Drug Advisory Committee, add any new drug to the Third Schedule. The addition of a drug to the Third Schedule is required to be published by Notice in the Gazette and becomes effective from the date of publication of the Notice.

Controlled Drugs

'Controlled drug' refer to any drug which has been classified as such under the Food and Drugs Regulations and expressly listed in Division 2 of the said Regulations. Commonly known controlled drugs include: Alprazolam (Xanax), Methamphetamine and Methylphenidate (Ritalin).

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Candice Jones-Simmons

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unable to finalise all the terms, it may be appealing to agree to negotiate in good faith at a later stage. However, it should be noted that an agreement to negotiate is not enforceable where the parties fail to outline the machinery to resolve the dispute. Ambiguous terms may also result in an unenforceable contract.

- Care must be taken in the drafting of the letter, as legal obligations may be created where none were intended. Additionally, where the letter proposes to vary the lease, careful consideration is also required to ensure that parties do not unwittingly release obligations that are intended to survive for the duration of the lease.

- Most side letters are intended to create temporary obligations on the part of the tenant. However, tenants should review the letter to ensure that it is binding on the landlord's successors-in-title, if the landlord sells the property.

- It has been determined by the court that in certain circumstances, a side letter may amount to an unenforceable penalty. This has occurred where a landlord stipulated that the concession to reduce the rent reserved in the lease would end if the tenant breached the terms of the side letter, or the lease. In this case, the tenant was late in making a payment of the instalment of the reduced rent. The landlord sought to terminate the concession and demanded payment of the higher rent reserved in the lease. In arriving at this decision, the court considered whether the sum demanded by the landlord as compensation for the tenant's breach was exorbitant and unconscionable in the circumstances of the case.

Practical suggestions to consider:

- If the side letter is being exchanged at the same time with the lease, the lease should contain a reference to the side letter. If the side letter is finalised after the lease, it should be expressed to be supplemental to the lease.

- The issue of whether a side letter exists should be raised when purchasing an assignment (from a tenant) or a reversion (from a landlord) of a lease. The purchaser may request that the seller provide a warranty that no side letter exists.

- Permanent amendments to the lease should be finalised in a Deed of Variation.

- The duly authorised signatories of both parties should execute the letter to avoid questions regarding the authority of the person binding the landlord or the tenant to the agreement.

Review both documents to determine whether there is consistency in the terms.

Notwithstanding the potential pitfalls associated with relying on a side letter, it is arguably a useful tool for landlords and tenants who wish to vary their leases on a strict deadline and can be worth the risk.

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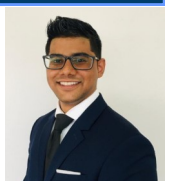

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Controlled drugs can only be imported by persons who:

- are Licensed Dealers (defined to include a medical practitioner, pharmacist or holder of a license); and
- have obtained the requisite permit to import the said controlled drugs from the Chief Chemist and Director of Food and Drugs.

Upon the relevant application being submitted by the Licensed Dealer, the Chief Chemist and Director of Food and Drugs may issue a license to permit to the given dealer to import a controlled drug. Following importation, a licensed dealer may only sell or supply a controlled drug to another licensed dealer, a hospital or any person having the requisite prescription.

Standard of Pharmaceuticals Which Can Be Imported

Regardless of the class of drug being imported, the FDA appears to maintain certain standards which each imported drug must satisfy. Notably, the FDA requires that any drug being imported into Trinidad and Tobago must first be wholly in conformity with the law of the country in which it was manufactured and is accompanied by a certificate evidencing same. Further, the FDA prohibits the importation of adulterated drugs, that is, drugs which fail to meet the legal standard and drugs which have been manufactured, prepared, packed and stored in unsanitary conditions.

The FDA also prescribes certain requirements for the labelling of drugs which must be adhered to if the given drug is to be imported in Trinidad and Tobago. For instance, the label of a drug (both inner and outer label) is required to have, among other things, the proper name and standard under which the drug was manufactured, the name and address of the manufacturer or distributor of the drug (where applicable), adequate directions for use in English, the name of each medical ingredient contained therein and an expiry date, if applicable. These requirements do not apply to drugs sold on a prescription basis within certain parameters.

Administration and Enforcement

The Minister may appoint one or more persons to be analysts or inspectors for the purpose of enforcing the provisions of the FDA, said inspectors are granted certain inspection and seizure powers which allows them to aid in the enforcement of the Act.

By way of example, the appointed inspectors may:

- at any reasonable time enter any place where upon reasonable grounds he believes any article to which the FDA or its regulations apply (e.g. Pharmaceuticals) are being manufactured, prepared, preserved, packaged or stored and take samples thereof;
- examine anything that he reasonably believes is used or capable of being used for said manufacturing, preparation, preservation, packaging or storage;
- open and examine any package which he believes may contain any article to which the FDA may apply;
- examine any books, documents, or other records which he reasonably believes are likely to contain any information relevant to the enforcement of the FDA or Food and Drugs Regulations; and
- seize and detain for such time as may be necessary any article, by any means of or in relation to which, he reasonably believes violates any provision of the FDA.

Any article seized by an inspector may be submitted to any analyst for analysis or examination. The report setting forth the results of the examination or analysis is admissible as evidence in the prosecution of an offence under the FDA.

Infringement of Import Regulations

Every person who commits an offence under the FDA is liable on summary conviction for a first offence to a fine of $1,500.00 and to imprisonment for three (3) months and for a subsequent offence to a fine of $3,000.00 and imprisonment for six (6) months. Persons liable to conviction on indictment under the FDA is liable to a fine of $15,000.00 and to imprisonment for three years.

Conclusion

As outlined above, there are several factors to consider when importing pharmaceuticals into Trinidad and Tobago. Persons or companies desirous of importing pharmaceuticals must first identify the category within which the drug they wish import falls within and ensure that all relevant obligations are satisfied prior to attempting importation.

This article does not consider the regulations regarding the importation of Antibiotics into Trinidad and Tobago as the importation of Antibiotics must be completed in accordance with the Antibiotics Act and any Regulations made thereunder.

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