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Beyond Force Majeure: Preparing Your Business for Contracting and Dispute Resolution Issues During the COVID-19 Era

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Beyond *Force Majeure*: Preparing Your Business for Contracting and Dispute Resolution Issues During the COVID-19 Era

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Navigating COVID-19 Era Trade Challenges

- Ordinary Legal Landscape for Trade
- Initial Risk Assessment
- Concerned About Your Buyer's Ability to Pay?
- Think an Act of God Excuses Your Performance?
- Concerned About Being Late with Shipments?
- Concerned About Exposure for Failing to Deliver?
- Think Performance Is Impossible?
- Considering Spiking Prices?
- Concerned About Dispute Resolution/Arbitration/Litigation?

Ordinary Legal Landscape for Trade

- Freedom of Contract Is the Norm.
- Negotiated Agreements Are the Starting Point.
- Other Binding Documents:
  - Purchase orders
  - Acknowledgements
  - Ecommerce terms and conditions
  - Correspondence, including emails
- Gap Fillers:
  - UCC Article II
  - CISG
  - Foreign law

Initial Risk Assessment

- Identify the exact nature of the potential disruptions.
  - Assess impact on upstream/downstream trade partners.
    - Suppliers able to obtain and timely deliver?
    - Customers' demand and ability to pay timely?
- Keep records of all interruptions.
- Make efforts to overcome disruptions.
- Consider express infectious disease/epidemic wording in new contracts and purchase orders.

UCC § 2-609: Right to Adequate Assurance of Performance

- Contracting party has the right to demand adequate assurance of performance from a distressed counterparty.
  - *E.g.*, If a Seller is concerned about its Buyer's ability to pay for the goods being shipped, a Seller may demand adequate assurance of performance.
    - Must be an objectively reasonable concern.
    - Must explain the concern, preferably in writing.
    - Must give reasonable deadline for response (30 day default).
    - Do not try to extract new concessions.
  - If assurances are not forthcoming, the Seller may treat the contract as repudiated by the Buyer.

Force Majeure Overview

- **What is *Force Majeure*?**
  - Contract clause excusing failure to perform due to circumstances outside of a party's control
    - Concept sometimes referred to as an "act of God" or "exceptional event"
- **Application:**
  - United States
  - China
  - Other countries

Force Majeure Requirements

- To apply, there must be a *force majeure* clause in the relevant contract.
- Courts ordinarily construe *force majeure* clauses narrowly.
  - "Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987).
- If no *force majeure* clause, then must look to doctrines of impossibility or frustration of purpose.
  - High standard
  - State laws vary

Sample *Force Majeure* Clause

	Sample Clauses
Broad Clause	Neither party shall be liable to the other for any delay or failure in performing its obligations under this Agreement, nor be deemed to have defaulted or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement when and to the extent such failure or delay is caused by or results from acts or circumstances beyond its reasonable control including, without limitation, acts of God, flood, fire, earthquake, explosion, governmental actions, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest, national emergency, revolution, insurrection, epidemic, lockouts, strikes or other labor disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials, materials or telecommunication breakdown or power outage.
Limited Clause	Neither party shall be liable to the other for any delay or failure in performing its obligations under this Agreement to the extent that such delay or failure is caused by an event or circumstance that is beyond the reasonable control of that party, without such party's fault or negligence, and which by its nature could not have been foreseen by such party or, if it could have been foreseen, was unavoidable ("*Force Majeure* Event"). *Force Majeure* Events include, but are not limited to, acts of God or the public enemy, government restrictions, floods, fire, earthquakes, explosion, epidemic, war, invasion, hostilities, terrorist acts, riots, strike, embargoes or industrial disturbances. A party's economic hardship or changes in market conditions are not considered *Force Majeure* Events.

Force Majeure in Application

- **Does COVID-19 qualify as a *force majeure* incident?**
  - Specific Language in contract is the key.
    - Is foreseeability an element?
    - Is absence of contingency plans an element?
  - Cause of inability to perform (is it unavoidable).
    - Government action (*e.g.*, quarantine, impoundment, movement restrictions).
    - Private third party (*e.g.*, upstream source can't supply).
  - Listed examples (*e.g.*, pandemic, national emergency).
- **Future use of *force majeure* in contracts:**
  - COVID-19 generally won't qualify in new contracts.
  - Shelter in place orders may be becoming foreseeable.
  - But what about next outbreak? Or if impact of COVID-19 significantly worsens?

Other *Force Majeure* Qualifiers

- **Notice Requirements:**
  - The affected party shall provide prompt written notice of any *Force Majeure Event*.
- **Mitigation Requirements:**
  - The affected party shall use all diligent efforts to end the failure or delay of its performance, ensure that the effects of any *Force Majeure* Event are minimized and resume performance under this Agreement.
- **Termination Rights:**
  - If a *Force Majeure* Event prevents a party from performance for more than [X] business days, the other party may terminate this Agreement immediately by giving written notice.

Common Law Remedies

- If a contract is silent on *force majeure*, companies must rely on common law mechanisms to excuse nonperformance.
  - **Impossibility or impracticability in some jurisdictions:**
    - An unexpected intervening event occurred;
    - Parties' agreement assumed such an event would not occur; and
    - Unexpected event made contractual performance impossible or impracticable.
  - **Frustration of purpose:**
    - A supervening event that substantially frustrates a party's principal purpose occurred;
    - Nonoccurrence of the event was a basic assumption of the contract; and
    - The event was not the fault of the party asserting the defense.

"Time is of the Essence" Clauses

- Some contracts have "time is of the essence" clauses that expressly make timely performance a material term of the contract (*e.g.*, sales, real estate).
  - If the contract also contains a *force majeure* clause, then timely performance may be excused.
  - If the contract does not contain a *force majeure* clause, then may need to look to common law doctrines of impossibility and impracticability.

- Where a contract contains a time for performance, but does not contain a "time is of the essence" clause, the contract is usually interpreted to give a reasonable time for performance.
  - What is a "reasonable" time for performance will likely be impacted by the pandemic.

Delivery Obligations and Liability

- What happens when goods are delivered late?
  - Does contract have “time is of the essence” clause?
  - Buyer has remedies in the event of unexcused late deliveries that sellers may not like.
- Preparing contracts going forward in an environment of potential mass quarantines.
  - Protect Seller’s need for flexibility.
  - Consider the impact of the delivery point to the allocation of responsibility.

Limitation of Liability Provisions

- **Scope:**
  - Cap on damages (such as purchase price for goods).
  - Exclusion of consequential or indirect damages.
- **Buyer perspective:**
  - Cap on damages can substantially impact buyer's remedies and exposure.
  - Exclusion of consequential damages can similarly leave buyer with most of risk.
- **Seller Perspective:**
  - Review exclusions – broad exclusions for indemnification may alter understood allocation of risk.

Indemnification Provisions

- Review contractual indemnification in supply chain contracts.
- A lawsuit against Buyer from its downstream buyers may result in indemnity claim against Seller.
- Review procedures for asserting indemnity.
  - Notification requirements
  - Control of defense and settlement
- Check limitation on liability provision.
  - May exclude indemnity claims from cap on liability.
  - Indemnity claims generally aren’t excluded as consequential damages.

Avoid the Temptation to Price Gouge

- Any gouging is potentially dangerous.
- Gouging for fuel, food, medicine, lodging, building materials, construction tools or another necessities is particularly dangerous.
- Over half the states prohibit price-gouging during times of crises under unfair or deceptive trade practices statutes.
  - Civil penalties
  - Criminal penalties
- Many states, including California, Illinois, New York and Texas, have issued warnings regarding price-gouging relating to COVID-19.

Commercial Disputes During COVID-19 Era: Overview

1. **Commercial Dispute Resolution Landscape**
   - Court System Response to COVID-19
   - Forum Selection Issues
   - Arbitration Proceedings during COVID-19
   - Courts vs. Arbitration
   - Remote Proceedings
2. **Timing Considerations**
   - Statute of Limitations
   - Whether to litigate now or wait
3. **Preservation of Evidence**
   - Documents
   - Witness testimony
4. **Additional Considerations**
   - Mitigation of damages
   - Related non-contract claims

Court System Response to COVID-19

- **Trial Courts:**
  - Most in-person proceedings have been suspended.
  - Access to courthouses across the nation has been restricted, especially for commercial matters.
  - In civil matters, jury trials and bench trials have been continued for months.
  - Courts are transitioning to conducting hearings via video conference
    - But, so far, this has mostly been for status hearings and argument, not trials.
  - Some court systems are not allowing new commercial cases to be filed.
  - Emergency relief in commercial cases is still available in most jurisdictions, but on a much more limited basis—requiring "true" emergency.
- **Appellate Courts:**
  - Federal appellate courts have extended filing deadlines and are conducting oral arguments remotely.
  - U.S. Supreme Court holding remote arguments for the first time.

Forum Selection Issues

- Where the contract contains a "forum selection" or venue clause:
  - Review it carefully – if the language is not mandatory (*i.e.*, "sole" venue or "shall"), some jurisdictions will consider it permissive and not enforce it.
  - Some jurisdictions are not receptive to forum selection clauses.
    - *E.g.*, **Texas** generally does not allow forum selection clauses in contracts that do not involve a "major transaction" (*i.e.,* over $1 mil).
- Even jurisdictions that might normally enforce a venue provision may not do so because of the effects of the pandemic.
  - Some jurisdictions decline to enforce forum selection clauses where the chosen forum is "unavailable or unable to accomplish justice."
  - In March, a Delaware chancery court judge declined to enforce a New York forum selection provision because New York state courts were not considering expedited or injunctive relief for commercial matters.

Arbitration Proceedings During COVID-19

- **Proceedings prior to the Final Hearing:**
  - Proceedings prior to the final hearing are usually conducted remotely.
  - Thus, there's been less disruption to arbitration proceedings.
  - Where some courts are not accepting new commercial cases, arbitral institutions are open for business and taking new cases.

- **Final Hearings:**
  - Like court systems, major arbitral institutions have also eliminated in-person hearings for the foreseeable future.
  - Arbitral institutions are more experienced than courts with videoconferencing technology.
  - American Arbitration Association (AAA) has issued detailed guidance and proposed orders for conducting final hearings remotely.

Courts vs. Arbitration

- Main considerations for courts vs. arbitration :
  1. **Confidentiality:** Arbitrations are generally confidential, which may be more relevant during the pandemic.
  2. **Speed:** With courts delaying and giving less priority to commercial matters, arbitration presents an opportunity for a faster resolution.
  3. **Informality:** Discovery is typically much more limited in arbitration, and the rules of evidence do not apply.
  4. **Expense:** Arbitrations can be less expensive, due to less discovery and remote proceedings, though parties must pay fees for arbitrators' time.
  5. **Specialized neutrals:** Parties can choose Arbitrator(s) who specialize in the subject matter.
  6. **Appellate review:** There is no appellate review in arbitration (unless the parties contract for that), and judicial review of an arbitration award is extremely limited.

- Parties can decide to resolve a dispute in arbitration at any time, including when a case is already pending.
  - **Sample "Submission Agreement"**: *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy shall be submitted to (one) (three) arbitrators. We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by award.*

Remote Proceedings: The New Normal?

- Courts and arbitral tribunals alike are strongly encouraging parties to conduct proceedings via video conference.
  - **Status hearings:**
    - Most courts have moved status hearings and motion argument to phone or video.
    - Arbitrations were already doing these hearings remotely.
  - **Depositions:**
    - Federal rules allow these to proceed remotely, if agreed.
    - Courts and arbitrators encouraging parties to go this route during the pandemic.
  - **Evidentiary Hearings:**
    - These have been less common in court, but are happening.
    - A UK court conducted an international commercial trial ($530M at issue) by video conference in March.
    - A Texas court conducted a bench trial by zoom in late April ($96K at issue).
- What are the pros and cons of remote proceedings?
  - **Pros:** (1) Allows cases to proceed to resolution, rather than wait indefinitely for in person proceedings to resume; and (2) Saves costs/time for travel.
  - **Cons:** (1) Technology may not be reliable or accessible to all; (2) Challenges with assessing witness credibility; (3) May be more difficult to confront evasive witnesses; and (4) Jury trials likely cannot proceed remotely.

Remote Proceedings: The New Normal?

- Additional Considerations for holding remote proceedings:
  1. Maintaining cybersecurity protocols and avoiding “zoombombing.”
     - For arbitrations, maintaining privacy of the proceedings.
  2. Handling exhibits in paper and electronic form.
  3. Addressing witness availability to testify with shelter in place orders still in effect.
  4. Addressing time zone issues with witnesses, counsel and neutrals.
  5. How to conduct side-bars with the judge or arbitrator or with witnesses where necessary.
  6. Allocating costs of video conferencing between the parties.
  7. Protocol for addressing technological failures during the proceedings.
  8. Location of the court reporter.

Statute of Limitations

- **Overview:**
  - Federal and state court systems have taken inconsistent approaches to addressing limitations periods that may expire during the COVID-19 pandemic.
  - Even where a state or federal district court has extended limitations periods in some manner, there is no consistent approach in terms of time period for extension and whether the extension is automatic or requires some level of justification.

- **Bottom line:**
  - Companies and counsel should carefully review all claims for which the statute of limitations may expire soon and carefully review relevant federal and state court orders concerning limitations periods.

Statute of Limitations: Federal Approach

- Federal courts have not taken a uniform approach to tolling the statute of limitations for claims arising under federal law.
  - DOJ drafted legislation that would pause the statute of limitations for criminal and civil proceedings during national emergencies and for one year following the end of a national emergency, but this has not become law.
  - Responses have ranged from district-wide approaches (either tolling the statute or not) to judge specific approaches in some districts.
  - It is unclear what the ramifications are of federal jurisdictions taking different approaches to the statute of limitations.
- Claims filed in federal court pursuant to diversity jurisdiction would be subject to a state statute of limitations.
  - This will be the case for contract claims and business torts.

Statute of Limitations: State Approaches

- State approaches to tolling the limitations period have also varied.
  - On one end of the spectrum—**No Tolling**:
    - **Maine** and **Vermont** have specifically announced that statutes of limitations will not be extended or tolled due to COVID-19.
  - In the middle:
    - **Rhode Island** requires prospective litigants to petition the court for an extension of the limitations period. Not clear what circumstances will justify an extension.
    - **Texas** Supreme Court issued an order giving trial courts discretion to extend the statute of limitations for up to 30 days after the statewide emergency has been lifted.
      - This order is currently being challenged by the plaintiff and defense bar.
  - On the other end of the spectrum—**Tolling**:
    - **New York and Connecticut**: Governors have issued executive orders suspending statutes of limitations state-wide.
    - **California, Delaware, and Massachusetts**: Courts have issued orders tolling the statute of limitations state-wide.
- Many states, including **Florida, Illinois and Wisconsin** have not issued any guidance on statute of limitations.

Statute of Limitations: Key Questions

1. **Is the claim subject to a COVID-19 tolling order?**
   - This depends on what law applies to the claim, which is often a complex analysis, looking at federal and state laws, where the parties are located, where key events relating to the claim occurred, which jurisdiction has a greater interest in the outcome, *etc*.
   - Choice of law provisions do not necessarily resolve the issue because most COL provisions only choose the substantive law that applies, which usually does not include the SOL.
   - **Also note**: it is not clear if courts have authority to universally toll statutes of limitations, without requiring a special showing, so these may be subject to challenge in the future.

2. **Does the doctrine of equitable tolling apply?**
   - Even where a jurisdiction has not issued an order tolling statutes of limitations due to the COVID-19 pandemic, the doctrine of equitable tolling may be available.
   - Generally, litigants must satisfy a stringent set of requirements to invoke the equitable tolling doctrine to revive an otherwise expired claim – (1) the litigant has been "diligently pursuing" its rights, and (2) an "extraordinary circumstance" prevented timely filing.
   - It is not clear that the pandemic would qualify as an "extraordinary circumstance." But even if it did, companies would still need to show diligent pursuit of their rights.

Statute of Limitations: Key Questions (cont'd)

3. Is there a statute of repose that applies to the claim?

- In contrast to statute of limitations, statutes of repose commence when the harm or injury occurred and generally cannot be tolled by the discovery rule, equitable tolling, agreement of the parties, or a court order.
- Thus, those claims would remain unaffected by any state or federal orders tolling the statute of limitations period.

4. What about entering into a Tolling Agreement?

- Tolling Agreements allow the parties to agree to an extension of the limitations period for specific claims.
- Parties can use the additional time to try and resolve the dispute, without feeling compelled to initiate litigation to avoid a limitations defense.
- This can help avoid uncertainties relating to the applicability of state tolling orders and the doctrine of equitable tolling, but not a statute of repose.

Whether to sue now or wait?

- There are many considerations for whether to pursue litigation during the pandemic or wait.
- Some considerations (weight will depend on specific circumstance):

	Commencing Litigation Now	Deferring Litigation
Advantages	(1) Earlier recovery can be obtained. (2) Evidence is fresh and accessible. (3) Avoids uncertainty relating to statues of limitations.	(1) Conserve valuable company resources, including employee time and cash that would be spent on attorneys' fees. (2) Potential for improved access to the court system in the future.
Disadvantages	(1) Attorneys' fees and employee time spent on litigation, when company resources are already stretched due to the pandemic. (2) Limited access to court system and in-person hearings.	(1) Risk of diminished recovery if counterparty becomes insolvent. (2) Material evidence becomes unavailable. (3) Statute of limitations or repose may run. (4) Unclear when court operations will return to "normal."

Preservation of Evidence

- Regardless of when litigation is commenced, preserving key evidence now will better position litigants to prevail in future litigation and reduce cost.

1. **Document Preservation:**
   - Document preservation obligations are triggered when litigation is "reasonably anticipated," which is a case-by-case determination.
   - Identify all employees with documents or information relevant to claims, and defenses – issue a "litigation hold" to these individuals.
   - Consider taking these steps even before formal preservation obligations triggered.

2. **Witness Testimony:**
   - Economic uncertainty from the pandemic is likely to lead to higher employee turnover.
   - Key employees could leave (or be let go) before litigation commences.
   - For higher level employees and executives, consider cooperation agreements, which require the employee or executive to cooperate with future litigation.
   - Consider having counsel interview key witnesses to preserve relevant facts for future claims and defenses.

Commercial Disputes: Additional Considerations

1. Remember the obligation to mitigate damages.
   - Contract law requires the non-breaching party to take reasonable steps to mitigate its damages as a result of the other party's breach of contract.
   - Failure to do so may result in a reduction to the amount of recovery in a future breach of contract lawsuit.
   - It remains unclear to what extent the pandemic would limit or excuse the non-breaching party's responsibility to mitigate its damages.
   - It is a good idea to document efforts to mitigate damages, such as attempts to find substitute products or services.
2. Don't forget about non-contract claims.
   - Economic fallout from the pandemic is likely to also give rise to a host of business torts, including claims of tortious interference, fraud, misappropriation of trade secrets and fiduciary duty claims.
   - These will have different statutes of limitations than contract claims, may not be subject to venue or arbitration provisions, and will have different choice of law considerations.

The safety and well-being of our clients, personnel and families are paramount, and we continue to monitor the overall impact of the COVID-19 coronavirus (COVID-19) outbreak closely. Our preparedness plans have been evaluated and activated to ensure we continue serving our clients with little to no disruption during these unprecedented times.

We've also mobilized across disciplines to create a COVID-19 Task Force that provides a coordinated response to our clients' range of needs. This includes an FAQ section covering a host of issues, as well as links to recent QuickStudies.

We encourage you to regularly visit this page for the most up-to-date information. You will also find access to key contacts at Locke Lord who can put you in touch with appropriate team members.

FAQs: Read our list of Q&As

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Litigation

- Practical Considerations for Commercial Litigation during the COVID-19 Era Location, Location in the Age of COVID-19: Where Can You Get Your Day in Court?
- Location, Location in the Age of COVID-19: Where Can You Get Your Day in Court?
- Federal Appellate Courts' COVID-19 Orders

Contracts

- TriBar Opinion Committee Comment Concerning Use of Electronic Signatures and Third-Party Opinion The Effect of the COVID-19 Pandemic on Contractual Obligations
- As Companies Seek Alternative Ways to Sign Contracts and Other Records During COVID-19 Pandemic, E-Processes Take Center Stage
- Discharge of Contractual Obligations by Prospective Frustration: When is a Frustrating Event Triggered by COVID-19?

Antitrust

- Merchants Beware: Price Increases Caused by the COVID-19 Pandemic May Trigger Aggressive Enforcement of State Price-Gouging Laws

International Arbitration

- How the AAA-ICDR® is Meeting the COVID-19 Challenge
- Conversion of Litigation to Arbitration: An Answer to Judicial Delay in the Time of COVID-19

Questions?

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LOCKE LORD® QUICK Study
Technology, Media & Telecommunications Industry Group
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As Companies Seek Alternative Ways to Sign Contracts and Other Records During COVID-19 Pandemic, E-Processes Take Center Stage

By: Patrick J. Hatfield

Companies are scrambling to complete transactions with customers and suppliers faster and cheaper, and in the current COVID-19 environment, now at a safe distance. E-contracting and e-signatures have been in the marketplace for over 20 years, but organizations which have not adopted the framework may be taking a closer look at e-processes in light of the crisis. Below is a primer to understanding and managing the risks associated with an e-process, along with some practical pointers on using e-signatures/e-contracting.

Authentication Risk

This is the risk that the electronic signature obtained is from a forger, not from the actual person whose name is associated with the electronic signature. The risk is that a company relying on an applicant's electronic signature to be that of a given person seeks to enforce the document bearing the person's signature and the person claims, "That is not my signature!"

There are ways to authenticate the identity of a person. A popular and simple method is to use a "shared secret," such as combination of questions that nobody other than the real person would know: social security number, mother's maiden name, date of birth, employee number, etc. There are firms that can authenticate a person on a real time basis as well, using the shared secret approach.

Repudiation Risk

This is the risk that a document bearing a person's signature is altered after the document is signed electronically and the person repudiates the contents of the document bearing his or her signature. The risk is that a company relying on an applicant's electronic signature seeks to enforce the terms of the signed document bearing the applicant's signature and the applicant claims, "Yes, that is my signature, but the terms and conditions of what I signed are different than that document!"

There are ways to mitigate the repudiation risk considerably; in fact, the repudiation risk can be reduced below the repudiation risk associated with traditional methods. The simplest way to mitigate repudiation risk is to have each document "electronically sealed" immediately after it is signed to prevent any alteration to the document without such change being visible. Storing the documents in secure environments also mitigates the repudiation risk.

Compliance Risk

This is the risk that the rules and regulations governing such a transaction, such as regulation requiring certain consumer disclosures to be provided by a certain stage in the transaction, are not satisfied. The risk is that the company is sanctioned by regulatory authorities or the other party to the transaction avoids its obligations.

There are ways to mitigate this risk as well. Again, as with the repudiation risk, with a little bit of logic embedded in an e-process, compliance can actually be better than in the traditional process. For example, an e-process with logic that requires all the disclosures to be provided and acknowledged by a consumer can prevent completion of the process without all required disclosures being provided to the applicant.

Admissibility Risk

This is the risk that an e-contract is not admissible into evidence when the company seeks to enforce it. In a 2007 landmark case in the U.S. District Court of the District of Maryland, Lorraine v. Markel, the Court's decision put both litigators and litigants on notice that simply offering electronic evidence, without laying the proper foundation, can deem such evidence inadmissible, and thus an e-contracting business process unenforceable.

There are various ways to improve the likelihood of the admissibility of e-contracts, for example, by using an exemplar business process to designing customized systems for the creation, storage and production of electronic information.

Adoption Risk

This is the risk that the e-process takes longer than the traditional process or is not as convenient as the traditional process and consequently, adoption of the process is slow. The risk is that a company invests considerable resources to design an e-process only to find that there is little use of the e-process.

The best way to mitigate this risk is to field test a proposed e-process.

Relative Risk

There are authentication risks, repudiation risks and compliance risks with the traditional process of using wet ink and hard copy paper to complete transactions. Many companies have not examined such risks until they begin developing an e-process. For most electronic signature and e-delivery processes, the goal will be to have the transaction, on the whole, be no riskier than the current processes.

For more information, contact your Locke Lord attorney or visit our Technology, Media & Telecommunications and Digital Media and E-Commerce pages.

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Visit our COVID-19 Resource Center often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

LOCKE LORD® QUICK Study
International Arbitration Practice
April 8, 2020

Conversion of Litigation to Arbitration: An Answer to Judicial Delay in the Time of COVID-19

By: Ann Ryan Robertson FCIArb and David E. Harrell, Jr. FCIArb

Typically arbitration is commenced based on an arbitration clause contained in a contract executed months or years before the parties' dispute arises. In other instances, once a dispute arises, the parties agree that the dispute should be decided by arbitration and enter into a post-dispute agreement known as a submission agreement. One example of a simple submission agreement can be found in the American Arbitration Association's Commercial Arbitration Rules:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy shall be submitted to (one) (three) arbitrators. We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by award.*

The use of a submission agreement, however, is not limited solely to those instances where a dispute has arisen but the parties have not instituted a lawsuit. A carefully crafted and comprehensive submission agreement can also be used to convert a pending lawsuit to arbitration.

The COVID-19 virus has disrupted the courts nationwide. The manner in which the courts are handling the disruption vary widely with some jurisdictions suspending both civil and criminal trials and others encouraging remote appearance by phone or video whenever possible. However, even when the virus has abated and the courts are once again open for "business as usual," there will be a tremendous backlog of cases to be tried. In those jurisdictions where the courts have both criminal and civil jurisdiction, the delay in trying civil cases will be further aggravated due to the precedence given criminal trials.

Those parties for whom "justice delayed is justice denied" may wish to convert their lawsuit to arbitration through the use of a submission agreement. In these tumultuous times, arbitration provides numerous benefits for parties desiring to have a dispute decided without undue delay. Those benefits include:

- Protection of Information: Unlike many courts, arbitral institutions have established protocols for the protection of parties' information and for online filings and business continuity. In 2020, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration was issued. This protocol is intended to provide a framework to determine reasonable information security measures for individual arbitration matters, including procedural and practical guidance to assess security risks and identify available measures that may be implemented. Although designed for international arbitration, the framework is equally applicable to domestic arbitrations and can be adopted by the parties.

- Experience with Videoconferencing: Arbitral institution rules typically provide for the presentation of evidence by alternative means including video conferencing, internet communication and telephonic conferences, the sole restriction being that the alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute. Many arbitrators, especially those who sit on international tribunals, have previous experience in taking evidence through videoconferencing due to the medium's time and cost savings.

- Protocol to protect due process: In furtherance of the precept that all parties should be afforded due process, the Korean Commercial Arbitration Board issued the Seoul Protocol on Videoconferencing in International Arbitration. The protocol is intended to serve as a guide to best practice for planning, testing and conducting video conferences in international arbitration. Among the topics addressed are witness examination, video conferencing venue, documents, and technical standards for the videoconferencing equipment. Its concepts and directives are equally applicable to domestic arbitration and can easily be adopted by the parties to guide a domestic videoconference arbitration.

- Assistance with videoconferencing: Arbitral institutions can assist with alternative hearing arrangements, including the use of video teleconferencing that will allow for remote participation in hearings.

- Adapting Procedures: The parties, with guidance from the tribunal, can design their own procedural schedule based on the status of the dispute at the time of conversion to arbitration. This schedule might necessarily include an agreement that the arbitrator is bound by all prior court rulings.

- Alternative means of adducing evidence: The parties can agree on a system for adducing evidence at the hearing. For example, in international arbitration, it is the norm for all direct testimony to be given via written witness statements with only cross-examination occurring live. This process can be employed in a domestic arbitrations as well, greatly reducing the hearing time which should be a prime consideration for any online hearing. Similarly, the parties can agree to waive oral hearings and have the dispute resolved through document submission. The AAA, JAMS and CPR Rules all recognize that upon agreement of the parties, a dispute may be resolved without an oral hearing.

- Narrowing the scope of the dispute: For parties who may benefit from reducing the range of their dispute to a simple either/or outcome, they may consider "baseball arbitration," epitomized in the AAA Final Offer Arbitration Supplementary Rules. With these rules, the parties submit competing proposed monetary awards to the tribunal, and the tribunal must select between the two proposals. Benefits of these rules include the increased possibility of resolving the dispute before the hearing once the parties see the competing offers, and confirming the range of risk that the parties face.

- Ability to appeal: One of the hallmarks of arbitration is that an award typically is final and cannot be appealed. Recognizing that parties in some instances would like an opportunity for appellate review of an award, both the AAA and JAMS have optional rules to address the appeal of an award.

  The AAA Optional Appellate Arbitration Rules provide that a party may appeal on the grounds (1) that the underlying award is based on an error of law that is material or prejudicial or (2) the determinations of fact are clearly erroneous. The determination is made by an appellate tribunal that may adopt the underlying award, substitute its own award for the underlying award (incorporating those aspects of the underlying award that are not vacated or modified) or request additional information.

JAMS Optional Arbitration Appeal Procedure provides for an appeal conducted by an "Appeal Panel." The Appeal Panel applies "the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from a court decision." The Appeal Panel may affirm, reverse or modify an award. Both the AAA Rules and the JAMS Rules require that all parties agree to the optional appellate procedure. That agreement may be made before or after an award is made.

In short, a properly designed submission agreement coupled with representation by a knowledgeable arbitration advocate can help ensure that a dispute will be heard efficiently, securely and without the COVID-19 disruptions affecting the courts, thereby ensuring justice is neither delayed nor denied.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors.

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LOCKE LORD® QUICK Study

March 13, 2020

Discharge of Contractual Obligations by Prospective Frustration: When is a Frustrating Event Triggered by COVID-19?

By: David Herbert

The effects of a global pandemic, and governmental restrictions imposed as a result of it, may clearly give grounds for contracting parties to claim discharge of their agreements relying on the doctrine of frustration (even in the absence of a relevant *force majeure* clause). The pandemic may render performance of the contract impossible – for example where governmental controls apply to international trade or travel restrictions; impracticable – in the case of a severe shortage of supplies; or strike at the purpose of a contract so that its performance is fundamentally different from what the parties envisaged – a conference without delegates, a sporting fixture without spectators, a charter flight without passengers. There are manifold other scenarios where a pandemic may trigger a frustrating event justifying the discharge of contractual obligations.

However, the full-effects of COVID-19 have yet to unfold, and governmental response to it remains fluid and uncertain. In particular in the UK, the government has yet to follow the lead of other countries by closing schools and work-places, or imposing wide-spread travel bans. In some other jurisdictions, governments have issued advice rather than imposed prohibitions. That may pose difficult questions for businesses where the effects of the pandemic are prospective – and in fact may never transpire. That uncertainty may be more acute when the time for contractual performance is still some time in the future. While the hope would be for counter-parties to engage constructively and consensually in difficult and uncertain times, in the absence of agreement (or an insurance-based solution) executives' decision making processes become more vexed.

Fortunately, English Courts have been sympathetic to the plight of commercial parties. In the leading English case Scrutton J stated: "*Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by the contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.*"[1] That judgment stemmed from a case involving the outbreak of war between Greece and Turkey. In the face of the seizure of Greek ships passing through the Dardanelles by the Turkish authorities, the charterers of the *Andriana* refused to continue to load, claiming the charter-party had been frustrated. Unexpectedly, the Turkish authorities announced a two-week escape period for Greek ships: had the charterers continued to load they could have taken advantage of the escape period and have accomplished the contracted voyage, but as it was the *Andriana* was stuck in the Black Sea for nearly a year. It was held that the contract has been discharged since the charterers had been justified, *at the time they made the decision*, in believing that performance would be impossible.

In a later case, Lord Sumner also said that the question of frustration, "*must be considered at the trial as it had to be considered by the parties [at the time] they came to know of the cause and probabilities of the delay and had to decide what to do … Rights ought not to be left in suspense or to hang on the chances of subsequent events.*"[2]

1 *Embiricos v Sydney Reid & Co* [1914] 3 KB 45

2 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435

The general rules that emerge from those and subsequent cases are:

- The relevant time for determining discharge of a contract is the time of the occurrence of the allegedly frustrating event.
- If at that time a reasonable person would take the view that the event would lead to a sufficiently serious interference with performance, the contract will be discharged.
- It is not necessary to wait to see whether the interference in fact takes place.
- The contract will remain discharged even if subsequent events show that no such interference would have taken place. In other words the assessment need not prove to be correct, so long as it was based on reasonable grounds.

Each situation will turn on its own facts, but recognition by the courts of prospective frustration should give decision makers additional comfort to make proactive decisions in the face of COVID-19 threats, without having to wait for events to fully unfold. What will be key is an objective assessment of the likelihood of those threats emerging, coupled with the likely level of interference with contractual performance. Decision makers do not need a crystal-ball and to be subsequently proved right.

For more information related to the matters discussed in this *Locke Lord QuickStudy*, please contact the author.

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Visit our COVID-19 Resource Center often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

LOCKE LORD® QUICK Study
Appellate Practice
April 8, 2020

Federal Appellate Courts' COVID-19 Orders

By: Cynthia K. Timms and Christopher Dove

If you have a brief due or deadlines running in one of the Federal Appellate Courts, you will want to check the court's website to determine the procedures the court has adopted during the COVID-19 crisis. The courts frequently, but do not always, have their COVID-19 orders prominently displayed on their home pages. Most of the courts have restricted access to their courthouses and suspended the filing of paper copies of electronically-filed briefs and appendices. Many courts have postponed oral arguments or moved them to telephone or video conference. Some courts have extended deadlines. Here is a breakdown:

- *Supreme Court.* The Court has postponed its March and April oral arguments, but will consider rescheduling some cases from those sessions before the end of the Term, if circumstances permit. Order of April 3. The Court stated it will "consider a range of scheduling options and other alternatives if arguments cannot be held in the Courtroom before the end of the Term." It has not identified whether these "other alternatives" include video conferencing for oral arguments, but it did note that "most Court personnel are teleworking." The Court has also extended time for filing petitions for a writ of certiorari due on or after March 19 to 150 days from the date of the judgment or other triggering order. Order of March 19. The Court generally will grant extensions as a matter of course for a reasonable period if the extension is sought because of difficulties relating to COVID-19.

- *First Circuit Court of Appeals.* The Court cancelled its April sitting. The deadlines for briefs, appendices and petitions for rehearing due between March 26 and April 24, 2020 are automatically extended for 30 additional days, so long as the case (1) is not presently calendared for oral argument, (2) has not been argued before a panel, or (3) is otherwise not expedited. Order of March 26. The order does not affect deadlines for notices of appeal and other documents that confer jurisdiction on the Court. Nor does the order affect due dates for stays in immigration cases. The Court will re-evaluate in mid-April 2020 whether the continued automatic extension of scheduling deadlines is necessary.

- *Second Circuit Court of Appeals.* The Court is continuing to hear oral arguments, but by using a teleconferencing platform. On March 16, the Court ordered a 21-day extension of time for all filings and deadlines beginning March 16 and continuing through May 17. For example, deadlines originally occurring March 16 were moved to April 6, 2020. Click here for these and other instructions. The Court warned that further extensions would require extraordinary circumstances, and advised that it does not anticipate issuing an order that further extends all filing dates and other deadlines. The Court has also limited the filing of paper copies. Order of March 26.

- *Third Circuit Court of Appeals.* The Third Circuit "remains open and operational during the COVID-19 pandemic," though the clerk's office is conducting operations remotely. Order of April 1. Counsel may file a motion requesting to appear by audio conference. Notice Regarding Operations. Any document filed within three days of its current deadline will be deemed timely without the need to file a motion unless the parties are advised otherwise. Parties unable to electronically file are directed to an email address for filing in PDF format.

- *Fourth Circuit Court of Appeals.* The Fourth Circuit postponed oral arguments starting with its March 17-20 setting and continuing through its May 5-8 setting. Fourth Circuit Orders. The Court is, however, scheduling cases for remote oral arguments via video or teleconference. The

Court also has suspended the requirement of paper copies of briefs and appendices pending further notice and allows pro se parties to file via email. Order of March 17.

- *Fifth Circuit Court of Appeals.* The Fifth Circuit cancelled its oral argument sitting for April 27-30 and will notify counsel concerning arrangements for those cases. Order of March 25. The Court has no other oral arguments scheduled at this time. The mail operations at the clerk's office are suspended, and pro se filers who are unable to electronically file documents have been granted a 30-day extension of time except with regard to notices of appeal and petitions for review. The filing of paper copies has been suspended until further order. Order of March 18. Pro se litigants are allowed to file PDF documents by email. *See* Fifth Circuit homepage.

- *Sixth Circuit Court of Appeals.* The Sixth Circuit cancelled its oral arguments scheduled for March 17-20. Order of March 16. The requirements that non-prisoner pro se litigants file in paper format is suspended until April 17, 2020 and they may, instead, email documents in PDF format. The Court has not made any announcements yet as to its April 27 – May 1 oral argument calendar.

- *Seventh Circuit Court of Appeals.* All cases scheduled for oral arguments from March 30 through the end of April 2020 will be argued telephonically. *See* Seventh Circuit homepage. Until further notice, paper copy requirements for electronically filed briefs, appendices and petitions for rehearing are suspended. Order of March 31. The suspension does not apply to cases currently scheduled for oral argument and paper copies must still be served on pro se parties.

- *Eighth Circuit Court of Appeals.* The Court's argument calendar for April 13-17 will consist of cases to be submitted without oral argument or to be argued via teleconference. April Calendar Order. Like many of the other courts, the Eighth Circuit has suspended the requirement for paper copies of briefs and addendums. At a later date, the requirement will be reinstituted and parties then will have to file paper copies. Paper copies will have to be filed and served on parties not filing through CM/ECF. *See* Eighth Circuit homepage.

- *Ninth Circuit Court of Appeals.* Each panel will determine whether to submit its cases without argument, postpone argument, or hold argument via telephone or video conference. Order of March 26. The Court is evaluating cases one at a time and will issue orders in each case giving direction to the parties. If a party needs an extension of time to file a brief due to COVID-19, the party must file a notice with the Court stating that it has logistical issues related to COVID-19 and that it requires a 60-day extension. The filing will result in an automatic 60-day extension unless the Court notifies the party otherwise. This automatic extension does not apply to cases previously expedited or to cases already assigned to panels. Parties are not to submit paper copies of electronically filed briefs or record excerpts pending a further order.

- *Tenth Circuit Court of Appeals.* The Court is assessing all cases set for argument in April and May to determine whether those cases will be argued telephonically, submitted on the briefs, or reset for a later date. Oral Argument Announcement. The filing of paper copies of briefs, appendices, and petitions for rehearing en banc has been suspended. Operational Response.

- *Eleventh Circuit Court of Appeals.* Panels are authorized to hear oral arguments by audio or teleconferencing rather than in person. General Order 45. Where feasible, the arguments will be live-streamed at no cost to anyone who wishes to listen. Parties filing through CM/ECF will not be required to file paper copies of briefs and appendices if the party files a notice stating they are unable to comply but will comply at a future date. General Order 44.

- *District of Columbia Circuit Court of Appeals.* All in-person onsite oral arguments are suspended pending further order of the Court. Order of March 17. Each panel scheduled to hear argument will determine whether argument will proceed by teleconference or be postponed, or whether

the case will be decided without oral argument. The filing of paper copies for electronically-filed briefs and appendices is deferred pending further orders, but parties may continue to submit those paper copies in the normal course. Order of April 1. Filing of paper copies for other electronic filings (such as motions, petitions for rehearing, etc.) is suspended pending further order. Pro se parties may email filings to the Court as PDF files. Update Notice of March 23.

- *Federal Circuit Court of Appeals*. Cases set for the Court's April sitting will be conducted by telephonic conference and no in-person hearings will be held. Advisory of March 18. Live audio of the arguments will be available to the public. Announcement. Requirements to file paper copies of electronically-submitted documents are suspended as of March 20. Announcement of March 20. The Court has created special procedures for filings by and service to pro se litigants here and allows counsel to agree to alternative forms of service here. These and other announcements can generally be found on the Federal Circuit's announcements page.

For a list of COVID-19 orders from all the federal appellate, district, and bankruptcy courts, click here.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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LOCKE LORD® QUICK Study
International Arbitration Practice
April 21, 2020

How the AAA-ICDR® is Meeting the COVID-19 Challenge

By: Ann Ryan Robertson, FCIArb and David E. Harrell Jr., FCIArb

As the COVID-19 rampage continues, all segments of society and industry are being affected, with the "new normal" requiring social distancing and online communications. Online platforms such as Skype, Microsoft Teams, BlueJeans, Google Hangouts, and Zoom are gaining popularity, with the installation of Zoom's mobile app increasing explosively.[1] The online platforms' new found popularity brings with it heightened attention to issues regarding cybersecurity, perhaps best represented by "Zoom bombing"[2] that has plagued ZOOM.

One of the business causalities of the coronavirus is in-person arbitration hearings that, for the foreseeable future, are eliminated. To meet this latest challenge, the AAA-ICDR® offers seven publications designed to guide counsel, parties and arbitrators through this new world of online arbitration.

1. COVID-19 Update [Updated April 20, 2020]. Prior to the outbreak of COVID-19, the AAA-ICDR® had incorporated business continuity planning in its operations with the planning being updated on a continuing basis. As a result of that planning, the AAA-ICDR® is active and operational with its case, IT, and finance operations continuing to function. Not surprisingly, no hearings are to take place in AAA-ICDR® hearing facilities until at least June 1, 2020. Nevertheless, the AAA-ICDR® is positioned to assist with alternative hearing arrangements, including the use of videoconferencing. For in-person hearings that might take place outside of the AAA-ICDR® hearing rooms, the AAA-ICDR® provides guidelines to be considered by the parties, advocates, and arbitrators. As an aside, parties in future arbitrations should consider whether they want include within their procedural orders an explicit approval of remote hearings, or an agreement to allow remote hearings when in-person hearings become unfeasible.

2. COVID-19 Update [Simplified Filing and Invoicing]. To ensure receipt of a party's dispute, the AAA-ICDR® requests that parties file online through the AAA-ICDR® website. To simplify that procedure, the AAA-ICDR® online publication provides links to forms for arbitration demands made pursuant to the commercial, construction, employment, international, labor, consumer, and mediation rules. This update also provides a link to "Pay Online," a function that enables a party to pay an invoice or statement via electronic check or credit card. In addition, the AAA-ICDR® maintains the AAA WEBFILE® that allows parties to file a new case, view and pay open invoices, and view all pending tasks and filings made in that case.

3. AAA-ICDR® Best Practices Guide for Maintaining Cybersecurity and Privacy. As has been widely reported, certain precautions are necessary in order to avoid online security breaches. Privacy is one of the hallmarks of arbitration and can be at risk when using an online platform. In February, AAA-ICDR® issued its Best Practices Guide for Maintaining Cybersecurity and Privacy in furtherance of its goal of protecting the security and privacy of parties and case information. While recognizing that the level of cybersecurity to be implemented during an arbitration ultimately rests with the parties and their counsel, the AAA-ICDR® is requiring all arbitrators on its panels to complete a cybersecurity training course by year-end 2020. Moreover, the Best Practices Guide specifically provides "[if] a party objects to the continued service of an arbitrator due to an alleged inability to comply with the required cybersecurity measures either agreed to by the parties or ordered by the arbitrator(s), the issue may be submitted to the AAA's Administrative Review Council." The Best Practices Guide also contains a series

1 As reported by Business Insider, "'Globally, first-time installs of Zoom's mobile app increased 213% last week compared to the preceding week of March 9, and 728% compared to the week of March 2,' Sensor Tower's Head of Mobile Insights Randy Nelson told Business Insider." Ben Gilbert, *All your friends are using Zoom, the video-chat app that is suddenly dominating competition from Google and Microsoft*, BUSINESS INSIDER, https://www.businessinsider.com/zoom-video-everywhere-google-hangouts-skype-2020-3 (last visited Apr. 16, 2020).

2 Charles Curtis, *What is 'Zoom bombing' and how can you prevent it?*, USA TODAY, https://ftw.usatoday.com/2020/03/zoom-bombing-how-to-prevent-it (last visited Apr. 16, 2020).

of questions for the parties and arbitrator(s) to consider when designing the cyber-protocol for the online arbitration.

4. AAA-ICDR® Cybersecurity Checklist. This Cybersecurity Checklist is designed to accompany the Best Practices Guide and has four parts entitled "General Best Practice," "PC/Laptop/Mobile Devices," "Email," and "Password Hygiene." Although many of the items on the list are familiar to all who work in the virtual world, the Checklist is an excellent reminder of core best online practices.

5. AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties: This Virtual Hearing Guide for Arbitrators and Parties ("General Hearing Guide") includes the AAA-ICDR's statement that it "does not endorse anyone platform over another nor does the AAA-ICDR guarantee the suitability or availability of any platform." The AAA-ICDR further cautions that use of a third party online platform is subject to the platform's terms and policies. The General Hearing Guide has four sections entitled "Optimizing the Virtual Hearing Experience," "Virtual Hearing Security Considerations," "Preparing for the Virtual Hearing," and "At the Start of Hearing." Many of the suggestions in the General Hearing Guide focus on the overarching issue of security. Among the suggestions is that the platform utilized should have a unique, automatically generated ID meeting number for each hearing and as an additional layer of security, the hearing should be password-protected with a unique password that should be shared with the participants via a medium other than the virtual hearing invitation email.

6. AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM: Unlike the General Hearing Guide, the AAA-ICDR® Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM ("ZOOM Guide") focuses on using ZOOM as the third-party platform and consist of 13 pages to guide the parties, counsel and the arbitrators through a somewhat complicated process if security is to be maintained. The ZOOM Guide contains links to ZOOM webpages as well as an Appendix entitled "AAA-ICDR Suggested Zoom Default Settings for Virtual Hearings" with sections devoted to a variety of key topics, including configuration, email notification, in-meeting settings, and cloud recording.

7. AAA-ICDR® Order and Procedures for a Virtual Hearing via Videoconference. The AAA-ICDR® Order and Procedures for a Virtual Hearing via Videoconference ("Videoconferencing Order") is a proposed template to be modified by the arbitrator and parties to fit the specific needs of a case and is designed to provide guidance as to the issues the arbitrator and parties should consider. Among the sections in the Videoconferencing Order is suggested language for memorializing the parties' agreement to videoconferencing or the arbitrator's ruling over the objection of the parties that videoconferencing will be utilize. Other issues addressed in the Videoconferencing Order include recording, various technical aspects, managing witnesses and exhibits, the hearing schedule and logistics, potential technical failure, and costs.

While AAA-ICDR® developed each of these seven publications for users of its services, many aspects of these publications are equally applicable to arbitrations administered by other arbitral institutions and *ad hoc* arbitrations. Prudent parties, counsel and arbitrators would be well advised to consult these publications as they face this brave new world of online arbitration.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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LOCKE LORD® QUICK Study
Business Litigation & Dispute Resolution Practice
April 6, 2020

Location, Location in the Age of COVID-19: Where Can You Get Your Day in Court?

By: Scarlett Collings and Neha Dubey

Time waits for no man, and neither does litigation. Even in the age of COVID-19, disputes are inevitable and litigation may be unavoidable. Remaining proactive is critical when facing any dispute, and especially in a crisis situation. Identifying critical paths, reviewing relationships and contracts, and planning for a litany of unknowns, including potential legal threats – individuals and businesses are trying to manage their "new normal," and re-establish control over as many outcomes as possible.

But how? In the realm of legal disputes, a fundamental question is where to take the fight, which can go down in a variety of arenas such as boardrooms, arbiters' officers, and of course, in a courtroom. If a lawsuit becomes inevitable and parties find themselves headed either to a federal or state jurisdiction, one of the first practical determinations is "location, location," otherwise known as venue, or the physical location of the court that will adjudicate the case. While contracts may offer a variety of potential geographic options – such as choice of law – venue selection may not always be driven by the parties' agreement. Many jurisdictions generally disfavor contractual venue-selection clauses; in Texas, for example, only venue selection clauses included within contracts involving a "major transaction" (over $1 million) potentially would be enforceable. Absent a major transaction, generally contracting parties cannot pre-select their preferred venue. *See, e.g., Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983). And even "major-transaction" venue provisions may be rendered unenforceable if they conflict with certain state laws. Tex. Civ. Prac. Rem. Code § 15.020.

That's because legal statutes, informed by applicable case law, and not parties' agreements, usually govern the selection of a geographic location within either a state or federal jurisdiction where a particular legal dispute may be adjudicated. In state court cases, venue usually is located in a county *within* a state, and state law outlines which counties are appropriate locations to litigate a dispute. In Texas, for example, the Civil Practices and Remedies Code ("CPRC") governs venue. Three statutory schemes under the CPRC determine where venue is proper: the mandatory-venue provisions, the permissive-venue provisions, and the general venue rule. If a mandatory-venue provision applies, then the lawsuit must be filed in the county designated by the rule. If venue is not mandatory in a particular county, then a case may proceed under an applicable permissive-venue provision or under the general venue rule. *See generally* Tex. Civ. Prac. Rem. Code Chapter 15. Under the general venue rule, a lawsuit can be filed in one of the following counties: (1) the county where all or a substantial part of the events giving rise to the claim occurred; (2) the county of the defendant's residence when the cause of action accrued, if the defendant is a natural person; (3) the county of the defendant's principal office in Texas, if the defendant is not a natural person; or (4) the county where the plaintiff resided when the action accrued, if none of the other three general venue provisions apply. Tex. Civ. Prac. Rem. Code § 15.002.

While parties may not be completely free to contract for venue, statutory provisions addressing venue generally are flexible and provide options for where a legal dispute will be heard. Consequently, a variety of factors may impact venue selection within the applicable statutory framework, including favorable legal rulings in a particular court, the location of witnesses and other evidence, relative convenience of the parties, docket congestion, and other forum selection considerations.

And in today's COVID-19 climate, additional venue considerations are emerging when considering where to pursue a lawsuit. For example, some courts essentially are closed entirely or for all practical purposes, others are open for business and have adopted a variety of "new normal" procedures to

process effectively and efficiently the resolution of legal disputes. Similarly, some courts have been more proactive in managing their dockets, while others are providing only limited access to the judiciary.

Federal and state courts have taken different approaches to managing the COVID-19 crisis, and it can be difficult to predict how courts will continue to function as the crisis evolves. Generally speaking, courts, even the most sophisticated and experienced, are most disrupted in geographic regions facing the most severe outbreaks of the pandemic. With a view toward containing and mitigating the spread of the virus, many state supreme courts have issued orders providing guidance to lower courts, and many such local courts have issued more- or less-strict orders on the basis of that guidance. But not all state courts have provided comprehensive (or any) procedures for case management. Similarly, federal trial courts have taken a district-by-district approach, with more specific court procedures instituted on a judge-by-judge basis. In short, the lack of uniform, consistent procedures among the various courts in both state and federal jurisdictions has injected some uncertainty, or at least flexibility, in how, whether, and when courts will continue to operate to manage litigation, as well as a concomitant opportunity to consider additional factors when it comes to venue selection.

Below are some examples of recent state and federal court orders that may help inform certain venue choices:

- The Texas Supreme Court is encouraging courts to implement remote appearances by phone or video for all proceedings that can occur remotely, and has called on all state courts to suspend proceedings or schedule them to avoid gatherings of large groups of people, including jury trials and large docket calls. Specifically, the Texas Supreme Court issued an order on April 1, 2020, tolling any deadline for the filing or service of any civil case from March 13, 2020 until at least June 1, 2020. Dallas County has canceled all jury trials through May 8. Harris County has suspended jury service through May 4, and limited the number of courts that can operate on any given day. State courts continue to conduct hearings remotely, either by phone or video conference. In Texas federal courts, the Northern, Eastern, and Western Districts of Texas have postponed all bench and jury trials scheduled to begin before May 1 until further notice; the postponement does not include other deadlines. The Southern District of Texas has deferred all jury trials in the Houston/Galveston division until May 1, 2020; the postponement does not include other deadlines.

- New York state courts have suspended new civil and criminal jury trials beginning March 16 until further notice; jury services are also halted. Gov. Andrew Cuomo issued an executive order tolling all proceeding deadlines through April 19. No nonessential filings, paper or electronic, will be accepted by the courts until further notice. New York City Criminal Court will start holding proceedings through videoconferencing on March 25 and New York City Family Court will start holding remote proceedings on March 26. In New York federal courts, the Southern District of New York postponed all jury trials scheduled to begin before April 27 until further notice. As of March 30, no SDNY matters will be heard at the Thurgood Marshall Courthouse with the exception of grand jury matters; the Daniel Patrick Moynihan Courthouse will remain open, but only to hear urgent criminal matters and matters seeking immediate relief pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. SDNY judges have issued separate orders on the extension of deadlines in civil matters, adjourning conferences, and other matters pertaining to individual cases.

- The California Supreme Court and multiple state courts in the Bay Area and Southern California announced widespread closures. Alameda County courts are not accepting filings, with the exception of urgent filings such as TROs. Contra Costa county courts are not accepting filings, with the exception of emergency criminal and juvenile matters, until April 6. Fresno County courts specify March 17-April 3 will be treated as court holidays for the purpose of computing deadlines. For some cases, Los Angeles County has designated March 17-April 16 as a court holiday for the purpose of calculating deadlines. In California federal courts, the Northern and

Eastern Districts of California suspended jury trials until at least May 1; the Central and Southern Districts suspended jury trials until April 13 and April 16, respectively.

In the age of COVID-19, potential litigation parties should look beyond traditional venue selection considerations and take into account how a particular court will continue to function in light of the crisis. With new orders emerging from state and federal courts on a daily basis, venue selection can become more complicated, volatile, and highly case-specific, but also present greater opportunity for control. And feeling more in control during today's "new normal," is a relief.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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LOCKE LORD® QUICK Study
Antitrust Practice
March 13, 2020

Merchants Beware: Price Increases Caused by the COVID-19 Pandemic Are Now Subject to Aggressive Enforcement Under State Price-Gouging Laws

By: Brad Weber and Taylor Levesque

Updated on March 13, 2020, 2:00 PM CDT

UPDATE: On March 13, 2020, Governor Greg Abbott issued a proclamation certifying that COVID-19 poses an imminent threat of disaster in Texas and declaring a statewide public health disaster for all counties in the state.

Antitrust laws generally are aimed at preserving free and unfettered competition. They rest on the underlying premise that unrestrained competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.[1] Under this fundamental economic theory, prices for goods and services should be determined by normal supply and demand factors in the relevant market.

An exception to this general principle can occur when natural disasters and other crises strike – whether they be hurricanes, uncontrollable wild fires, widespread flooding, or pandemics. In these situations, basic necessities such as drinking water, food, gasoline, and medical supplies may become scarce at the same time the demand for these products is surging. This temporary imbalance in economic bargaining power can lead to "price-gouging," which refers to the practice of raising prices to exorbitant or unconscionable levels on goods and services that are in high demand and limited quantity during natural disasters or other emergencies.

While price-gouging generally is outside the scope of federal antitrust laws, more than half the states prohibit price-gouging during a time of crisis under their unfair or deceptive trade practices statutes. Most of these laws provide for civil penalties, as enforced by the state attorney general, while some states also enforce criminal penalties for price-gouging violations.[2]

Product Shortages and Price Increases Caused by COVID-19

As the infection rates for the novel Coronavirus disease (COVID-19) continue to grow around the world,[3] so too does the possibility of shortages for a wide variety of medical and consumer products, including personal protective equipment, respirators, hand sanitizer, and even toilet paper.[4] These shortages can be caused by supply chain disruptions and an increase in demand, which raises the concern that some merchants will engage in price-gouging.

Examples of price-gouging caused by COVID-19 already have occurred on Amazon and eBay. According to price tracker Keepa.com, Purell hand sanitizing wipes sold on Amazon.com jumped

1 *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 4 (1958).

2 *See* Price Gouging Laws by State, FindLaw, found here.

3 On March 11, 2020, the World Health Organization declared the current outbreak of COVID-19 a "pandemic," which was last used in 2009 when the WHO gave the designation to a new strain of H1N1 influenza.

4 As the virus has spread into the U.S., the outbreak has caused disruptions in supply and shortages of medical products. In response, the Food and Drug Administration is closely monitoring the U.S. market supply for human drugs and medical supplies.

in price from $11.88 in January 2020 to $199.99 on March 4, while prices for Germ-X foaming hand sanitizer surged from $10.00 in mid-January to $49.95 on February 28. On eBay, a 6-ounce container of Purell's hand sanitizer had jumped in price to $55.00 on March 5, 2020, which equates to $9.17 per ounce. Amazon officials have said they are monitoring listings for price-gouging and are blocking or removing those they suspect of it.[5] eBay also announced that it was banning listings for hand sanitizers, masks, and disinfecting wipes, and that it will "quickly remove" listings other than books that mention coronavirus or COVID-19.[6]

Texas Governor and Attorney General Warn Companies Against Price-Gouging in Connection with COVID-19

On March 6, 2020, Texas Governor Greg Abbott and Attorney General Ken Paxton issued a Joint Statement regarding recent reports of price-gouging for medical supplies in Texas. As part of Texas' efforts to combat the potential threat of COVID-19, the Texas officials issued a warning to businesses attempting to exploit the threat for monetary gain: "Price-gouging is un-Texan and will not be tolerated in our state. . . . We will work to combat any attempt to exploit public health and safety for monetary gain." To assist the Office of the Texas Attorney General (OTAG) in identifying cases of price-gouging, the Joint Statement asks Texans to file consumer complaints if they suspect a business is price-gouging in connection with the outbreak of COVID-19.

Liability for Price-Gouging During a State of Disaster

The Joint Statement serves as an important warning for merchants, as it emphasizes the Governor's authority under § 418.014 of the Texas Government Code to "declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." On March 13, 2020, Governor Abbott used this authority to declare a state of disaster for all counties in Texas. This declaration of "disaster" is important because it triggers potential liability for price-gouging under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). Under the statute, "false, misleading, or deceptive acts or practices" subject to action under the DTPA include "taking advantage of a disaster declared by the governor . . . or by the president of the United States by:

(a) selling or leasing fuel, food, medicine, lodging, building materials, construction tools, or another necessity at an exorbitant or excessive price; or
(b) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity."[7]

Now that a state of disaster has been declared by the Governor, the OTAG has broad powers under the DTPA to prosecute these types of price-gouging and may pursue civil penalties of up to $10,000 per violation, plus an additional penalty of $250,000 if the act or practice was calculated to deprive money or property from an elderly victim.[8] The Governor's announcement of the disaster included a specific reference to the OTAG's power to pursue acts of price-gouging that occur during this disaster period.[9]

Merchants also should not assume that they are safe from liability for price-gouging just because they raised prices before the state of disaster was declared. Under § 17.4625 of the DTPA, the "designated disaster period" for liability can actually encompass the period beginning on the "date the disaster occurs," which unlike many natural disasters, is not clear for the outbreak of COVID-19.

Historical Example of Price-Gouging in Texas

The power to prosecute cases under the DTPA during a state of disaster was used most recently by the OTAG in connection with the disaster declaration for Hurricane Harvey. As of May 2019, the

5 https://www.vox.com/recode/2020/3/5/21164622/coronavirus-amazon-hand-sanitizer-price-gouging

6 https://community.ebay.com/t5/Announcements/UPDATE-Important-information-about-listings-associated-with/ba-p/30734312

7 Tex. Bus. & Com. Code § 17.46(b)(27).

8 *Id.* §17.47(c).

9 https://gov.texas.gov/news/post/governor-abbott-holds-press-conference-on-coronavirus-declares-state-of-disaster-for-all-texas-counties

OTAG had finalized 61 Hurricane Harvey-related price-gouging settlements (totaling $307,801) with gas stations across Texas.[10] These included agreed final judgments and permanent injunctions against two gas stations for selling fuel at exorbitant or excessive prices.[11] Both gas stations agreed to pay $17,500 in civil restitution to refund Texans who were charged up to $9.99 per gallon of gasoline.

Price-Gouging Statutes in Other States

In addition to Texas, numerous other states have statutes intended to protect consumers from price-gouging during disaster periods. While there are some consistent elements to these price-gouging statutes, they do vary across the states. In Arkansas and California, for example, the violation is determined in part on whether the person increased its price more than 10% from the price charged before the disaster declaration.[12] Pricing decisions by merchants therefore require a state-by-state analysis to determine if they violate a price-gouging statute.

In at least three states – California, New York, and Washington – the state attorneys general have issued recent warnings similar to the one issued in Texas. Businesses should assume that other states are likely to follow.

For more information on specific state statutes related to price-gouging and the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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Visit our COVID-19 Resource Center often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

10 https://www.texasattorneygeneral.gov/news/releases ag-paxton-6-gas-stations-agree-refund-customers-hurricane-harvey-price-gouging

11 *State of Texas v. Encinal Fuel, LLC d/b/a Encinal Fuel Stop*, No.17-09-00133-CVL, Agreed Final Judgment and Permanent Injunction, *State of Texas v. Lafayette C-Store, LLC d/b/a Tejano Mart 505*, No. 2017CVH002608D1, Amended Agreed Final Judgment and Permanent Injunction,

12 Ark. Code § 4-88-303; Cal. Penal Code § 396.

LOCKE LORD® QUICK Study
Business Litigation & Dispute Resolution Practice
April 9, 2020

Practical Considerations for Commercial Litigation during the COVID-19 Era

By: Bilal Zaheer and Alyssa Falk Gregory

As the COVID-19 pandemic continues to keep most of the country in an unprecedented state of shutdown, including most of the nation's court systems, this Quick Study analyzes practical issues businesses should consider for current and prospective commercial litigation in the era of COVID-19 and beyond.

Contract Performance Disputes:

COVID-19 has forced most businesses to focus on contract performance obligations—both the extent to which a business must continue performing its obligations, as well as the recourse and remedies available in the event a counterparty fails to perform its obligations. The economic fallout from COVID-19 is sure to trigger disputes between contracting parties that will require interpretation and application of contract provisions that are sometimes an afterthought and less frequently interpreted and applied by courts (especially in circumstances like the unique ones presented by this pandemic).

Businesses should consult with counsel on the effect of *force majeure* clauses, as well as provisions relating to "time is of the essence," limitation of liability, indemnification, and price increases in light of price-gouging laws, all of which may impact contractual performance obligations as COVID-19 continues to disrupt commercial activity around the world. In addition to contract provisions, performance by either party may be impacted by common law doctrines such as impossibility, impracticability, and frustration of purpose, as well as statutory provisions in the Uniform Commercial Code.

Businesses should also work with counsel to review all notice provisions and be sure to comply with these provisions to avoid the risk of waiving a breach of contract claim. Remember that notice provisions are often not in the governing contract document but incorporated by reference through terms and conditions found on a website or in a separate document. In addition, all choice of law, forum selection, and arbitration clauses should also be reviewed with counsel to determine how such provisions will impact potential litigation. Businesses should also make all reasonable efforts to mitigate damages caused by a breaching party's actions, and document mitigation efforts, as well as the types and amounts of any damages incurred, in the event the dispute proceeds to litigation.

Preservation of Evidence:

In addition to contract claims, the COVID-19 pandemic is also likely to give rise to business torts, including fraud and fiduciary duty claims, as well as statutory claims. Regardless of whether these claims are asserted during the pandemic or in the future, it is advisable take steps now to preserve all relevant documents, information, data, and witness testimony related to any claims, counterclaims and potential affirmative defenses. Businesses should consider consulting counsel on whether and how to issue litigation holds, as well as interviewing relevant employees to ensure key facts are preserved. Taking these actions will better position the business to prevail in a future litigation, as well as help reduce litigation costs.

Statutes of Limitations:

To date, the federal court system has not taken a unified approach to addressing the statutes of limitations applicable to federal claims in response to the COVID-19 pandemic. State approaches to addressing statutes of limitations have varied. On one end of the spectrum are states like Maine and Vermont, which have specifically announced that statutes of limitations will not be extended or tolled due to the COVID-19 pandemic. In the middle are states like Rhode Island, which requires prospective litigants to petition the court for an extension of the limitations period, and Texas, where the Supreme Court issued an order giving trial courts discretion to extend the statute of limitations for up to 30 days after the statewide emergency has been lifted. On the other end are states like New York and

Connecticut, where the governors issued executive orders suspending statutes of limitations state-wide, and Delaware and Massachusetts, where the Supreme Courts of those states issued orders tolling the statute of limitations. Many states, including Florida, Illinois, and Wisconsin, have yet to issue orders or other guidance regarding the statute of limitations for civil matters.

These divergent and evolving approaches leave many open questions and gray areas concerning how statutes of limitations will be applied during and after the pandemic, especially in complex commercial matters involving parties from different jurisdictions and/or events taking place in more than one state. Businesses with affirmative claims (or facing potential claims), whether under a contract, a statute, or the common law, should consult with litigation counsel on the following issues:

- Whether the statute of limitations for a particular claim is subject to a COVID-19 tolling order. Critical to determining whether a tolling order governs the limitations period for a particular claim is determining what law applies to that claim in the first instance. This is often a complex question that involves a detailed analysis of where the parties are located, where key events relating to the claim occurred, which state has a greater interest in the outcome of the litigation, and where an eventual lawsuit might be filed, among other factors. For contract claims, even choice of law provisions are not determinative as courts sometimes decline to enforce these provisions, such as when the court determines that the chosen state does not have a substantial relationship to the contract.

- Whether the doctrine of "equitable tolling" might apply where a jurisdiction has not issued a tolling order. Even where a jurisdiction has not issued an order tolling statutes of limitations due to the COVID-19 pandemic, the doctrine of equitable tolling may be available to toll the limitations period during the pandemic. Generally, litigants must satisfy a stringent set of requirements to invoke the equitable tolling doctrine to revive an otherwise expired claim, and it is not clear that the pandemic by itself would be sufficient for a court to grant a request for equitable tolling. Businesses should consult litigation counsel regarding whether equitable tolling may be available and what a litigant must show to be able to rely on this doctrine.

- Whether a statute of repose may apply. In contrast to statute of limitations, statutes of repose commence when the harm or injury occurred and generally cannot be tolled by the discovery rule, equitable tolling, agreement of the parties, or a court order. Thus, businesses should consult with counsel to determine whether any potential claims have an applicable statute of repose that is set to expire soon, as those claims would remain unaffected by any state or federal orders tolling the statute of limitations period and would need to be filed prior to expiration of the statute of repose.

- Whether an applicable statute of limitation is jurisdictional. Some state and federal statutes have limitations periods that are considered jurisdictional, and it is unclear whether such limitations periods could be extended by court order or executive action. Similar to the statute of repose, litigation counsel should be consulted to determine if any potential claims have a jurisdictional statute of limitations that is set to expire soon, as those claims would need to be filed prior to expiration of the limitations period to avoid a statute of limitations defense.

- Whether to enter into a Tolling Agreement. Where a statute of repose does not apply and the limitations period at issue is not jurisdictional, businesses may wish to negotiate a Tolling Agreement, whereby the parties can agree to an extension of the limitations period for specific claims. Tolling Agreements offer the parties additional time to resolve the dispute, without either party feeling compelled to initiate litigation just to avoid a statute of limitations issue, and can also help avoid the uncertainties relating to the applicability of state tolling orders and the doctrine of equitable tolling.

Whether to Initiate Litigation Now or Wait:

Apart from the statute of limitations, there are more nuanced considerations regarding whether to pursue litigation during the pandemic or wait. On one hand, claims that arise during the pandemic will typically have years before the applicable statute of limitations or repose expires—for example, the statute of limitations on claims for breach of written contracts in Illinois is ten years. Businesses understandably may not wish to incur the cost of litigation during such uncertain economic times, especially when access to court systems has been significantly restricted (as discussed next). If a decision is made to defer litigation, businesses should still consult with litigation counsel on the

best ways to preserve relevant evidence and mitigate potential damages in the interim, as discussed above.

On the other hand, waiting to assert a claim may mean having to get in line behind other creditors and potentially face a diminished recovery in the event the other party becomes insolvent. Still another consideration is that while there may be years remaining on an applicable statute of limitations, a claim could nevertheless be subject to equitable defenses, such as laches, estoppel, and waiver. Ultimately, whether to pursue litigation now or wait to see what the future brings will depend on the specific facts and circumstances. Litigation counsel can assist businesses with working through these competing considerations.

Court Procedures and Availability:

Courts have responded by simultaneously relaxing and restricting traditional procedures and rules. For instance, courts are embracing technology, such as offering court proceedings via Zoom and YouTube, significantly extending all case deadlines, delaying bench and jury trials, and considering as evidence sworn out of court statements. The Northern District of Illinois, for instance, has set up a specific docket (No. 20-cv-01792) to specifically address motions requesting emergency relief from its COVID-19 general order. Conversely, courts are shuttering courthouses, reducing availability of staff to handle clerical matters, narrowing the definition of what is an "emergency," and reprimanding those parties who proceed with "reckless" emergency designations. *C.W. v. NCL (Bahamas) Ltd.*, No. 1:19-cv-24441-CMA, 2020 WL 1492904 (S.D. Fla. Mar. 21, 2020); Circuit Court of Cook County Gen. Admin. Order No: 2020-01 COVID-10 Emergency Measures ("[Civil] [m]atters *agreed by all parties* to be emergencies will be heard . . . ." (emphasis added)). Many federal appellate courts have suspended the filing of paper copies and either postponed oral arguments or moved them to telephonic or video conference. Businesses should consult with counsel for the latest information on courthouse closures, deadlines and the availability of remote procedures.

The result of closing courthouse doors and moving to only electronic filing and remote appearances is that commercial dispute proceedings, especially trials, will see significant delays and/or likely receive less priority once the court system returns to normal business operations.

In light of the restrictions and corresponding delays in the court system due to the pandemic, businesses should consider whether alternative dispute resolution processes, such as arbitration or mediation, would better serve their needs during this time. The advantages of arbitration and how to move current disputes into arbitration are discussed in more detail in a separate Locke Lord QuickStudy, found here.

We will continue to monitor these issues and will provide future client updates concerning these topics. This QuickStudy is for guidance only and is not intended to be a substitute for specific legal advice. If you would like more information on the matters discussed here, please contact the authors or your Locke Lord attorney.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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LOCKE LORD® QUICK Study
Corporate Practice
March 20, 2020

The Effect of the COVID-19 Pandemic on Contractual Obligations

By: Matthew V. P. McTygue and Timothy A. Roberts

The unprecedented COVID-19 pandemic has many companies and individuals wondering what their or their counter-parties' continuing obligations are under contracts.

When events beyond the control of the parties to a contract prevent or impair performance of contractual obligations, render the parties incapable of performing their contractual obligations, or moot the essential purpose of the contract, legal concepts of force majeure, impossibility, and frustration of purpose may help to mitigate the adverse effects of such events by excusing the parties from their contractual duties.

In determining whether performance under a contract may be excused, one must start with the force majeure[1] provision (or lack thereof) in the applicable contract. If the contract provides for termination or suspension of performance by a party based on force majeure events, then the specific language of the contract will govern. If there is no such provision, statutory and common-law principles may fill in the gaps in the contract to determine the obligations of the parties as discussed below.

Contractual Provisions

If a contract has a force majeure clause, the determination of whether it will apply in the context of COVID-19 will in part be determined by whether the clause has specifically included pandemics, epidemics, viral outbreaks, or similar circumstances.

Where a contract specifically addresses pandemics—whether by exclusion or inclusion in the force majeure definition—courts unsurprisingly will enforce the force majeure provisions as drafted.

If, however, a contract does not expressly provide for pandemics or the like, it must be determined whether it would fall into the "catch-all" provision that many force majeure clauses include. This language may take different forms, such as "any act of God" or "a cause beyond the reasonable control of the parties" (among other possibilities). Although the specific language used will impact the interpretation of the provision, all similar provisions will generally be considered "catch-all" provisions.

In evaluating this type of "catch-all" provision, courts have generally interpreted that an event will *not* qualify as a force majeure event if it was foreseeable when the contract was signed.[2]

The question, then, whether the frustration of a contract due to COVID-19 will be considered within a catch-all force majeure definition will be a largely fact-specific question based on both the language used in the contract, as well as the ever-changing landscape of COVID-19.

Statutory and Common Law Gap-Fillers

If a contract lacks a force majeure provision and therefore fails to provide an agreement on the allocation of risk in such circumstances (i.e., when performance will be excused), statutory and/or common law "gap-fillers" will apply.

1 French for "superior force", this is a common clause in contracts that may free the parties from contractual obligations as a result of an extraordinary event or circumstance beyond the control of the parties.

2 *See* TEC Olmos, LLC v. ConocoPhillps Co., 555 S.W.3d 176, 183 (Tex. App. —Houston 2018) (holding that an economic downturn was a foreseeable event).

Under Uniform Commercial Code ("UCC") Section 2-615 (Excuse by Failure of Presupposed Conditions), performance of the contract will be excused if (1) the nonoccurrence of the event "was a basic assumption on which the contract was made" or (2) the parties must now comply, in good faith, "with any applicable foreign or domestic government regulation."[3] That is, a contract under the UCC may be excused if either (1) if there are unforeseen supervening circumstances that the parties did not contemplate when coming to an agreement or (2) a party cannot perform due to regulatory changes. With the developing effects of the COVID-19 pandemic and increasing government intervention intended to address it, a party may therefore also be able to prove excuse of performance, not just because of the pandemic, but also because of sudden governmental restrictions that impair performance.

In addition to the UCC, nonperforming parties to contracts without a force majeure provision may also turn to the common law doctrines of impossibility, impracticability, and frustration of purpose. Similar to UCC § 2-615, a claim asserting the common law doctrine of frustration of purpose will focus not on whether the performance is possible, but on whether the contract has lost all purpose due to intervening circumstances that were not foreseeable when the contract was signed.[4] Therefore, a party may be able to prove that the purpose of the contract is no longer viable in the face of recent health, economic, or regulatory developments.

We will continue to monitor these issues and will provide future client updates concerning these topics. This QuickStudy is for guidance only and is not intended to be a substitute for specific legal advice. If you would like more information on the matters discussed here or help with understanding your contractual obligations (as well as those of your contract counterparties), please contact the authors or your Locke Lord attorney.

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3 *See, e.g.*, Cal. Com. Code § 2615; Tex. Bus. & Com. Code § 2.615; N.Y. U.C.C. § 2-615(a); Fla. Stat. § 672.615.

4 *See* Restatement (Second) of Contracts § 265; see, e.g., Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co., 118 S.W.3d 60, 64 n.6 (Tex. App. —Houston 2003).

March 24, 2020

TriBar Opinion Committee[1]

Comment concerning use of electronic signatures and third-party opinion letters

Parties to business transactions and their counsel seldom gather in the same location to exchange manually-signed agreements and other documents; virtual closings have been and are the norm. The COVID-19 crisis has resulted in increased focus on the widespread practice of giving opinions on the execution of agreements signed electronically. This Comment explains the legal basis for the conclusion underlying those opinions that the electronic signatures on those agreements have the same legal effect as manual signatures.

The Uniform Electronic Transactions Act (UETA) is the law in all but a few United States jurisdictions, and the Electronic Signature in Global and National Commerce Act, 15 USCA §§ 7001 *et seq.* (E-SIGN), is federal law. E-SIGN provides substantially the same rules as UETA.

The interplay of UETA and E-SIGN is as follows:

- E-SIGN is the law in states that have not adopted UETA or a statute providing alternative procedures for the use of electronic signatures consistent with E-SIGN.
- If a state has adopted UETA, E-SIGN does not preempt UETA in that state, except to the extent the state's version of UETA is inconsistent with E-SIGN.
- If a state has adopted alternative procedures for the use of electronic signatures consistent with E-SIGN, E-SIGN does not preempt those procedures.

The net effect of these rules is that *every* jurisdiction in the United States has substantially the same rules for the use of electronic signatures. (New York has enacted the Electronic Signatures and Records Act, State Technology Law §§ 301-309 (ESRA). ESRA is different from UETA but that should not change the result that an electronic signature will ordinarily be effective because if ESRA is not

[1] The views expressed in this Comment are solely those of the TriBar Opinion Committee and on any particular point are not necessarily those of particular members of the Committee or the law firms and other organizations with which they are associated.

consistent with E-SIGN, it is preempted by E-SIGN.)

Generally, UETA and E-SIGN provide that a signature may not be denied legal effect solely because it is in electronic form. UETA § 7; E-SIGN, 15 USCA § 7001(a). When the parties to a business contract subject to one of these statutes agree to use an electronic signature, the electronic signature ordinarily will have legal effect. The agreement of the parties can be implicit and can be based on all the circumstances broadly construed. UETA § 5(b). An opinion, therefore, that a business agreement has been duly executed can be based on the parties' conduct. Under UETA, the exchange of electronically-signed documents manifests the requisite agreement of the parties to use electronic signatures.[2] Electronic signatures include signatures in emails, PDFs, and faxes and signatures provided by processes offered by commercial firms, such as DocuSign and Adobe Sign, so long as they are affixed to or associated with the relevant agreement with an intent to sign by the persons providing them.

Except for agreements governed by Articles 2 (sales of goods) and 2A (leases of goods) of the Uniform Commercial Code (UCC), UETA and E-SIGN do not apply to agreements to the extent the agreements are governed by the UCC. The UCC governs only certain aspects of transactions within its scope, leaving the remaining issues to be governed by other law. The definition of "sign" in Article 1 and the definition of "authenticate" in Article 9 provide substantially the same rules as UETA and E-SIGN for the use of electronic signatures. Thus, for example, in cases where an agreement that bears an electronic signature does not qualify as a "negotiable instrument" for UCC purposes because it is not a "writing," execution by electronic signature pursuant to UETA or E-SIGN (or other consistent state law) is still sufficient to create an enforceable agreement as a matter of contract law.

Agreements sometimes require that they and any amendments be signed manually. When giving a duly executed opinion, therefore, on an agreement or amendment that has been signed electronically, the opinion giver must confirm that the agreement does not prohibit electronic signatures.

As a matter of customary practice,[3] duly executed opinions can be based on an assumption, which may be unstated, that all signatures are genuine. That

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[2] Although not applicable to the question whether an electronic signature on an agreement is valid, the Committee notes that the Governor of New York issued an Executive Order on March 19, 2020 in connection with the COVID-19 crisis providing for the use of audio-video technology for notarial acts.

[3] *See* TriBar Opinion Comm., *Third-Party "Closing" Opinions*, 53 *BUS. LAW.* 591, § 2.3(a) at 615 (1998).

assumption applies to electronic as well as manual signatures.

The legal effect of the execution of a business agreement by a legal entity could also depend on the statute under which the entity was formed and the provisions in the entity's constituent documents relating to its internal actions. For example, the entity statutes of some states provide rules for the electronic execution of documents needed to create the entity and written consents authorizing the signing of agreements on its behalf. *See, e.g.*, Delaware Limited Liability Company Act § 18–113; Delaware General Corporation Law §§ 141(f) and 228(d)(1).