INTERNATIONAL PRACTICE GROUP

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COVID-19: Overview of Legal Issues and Considerations for Foreign Companies Doing Business in the United States

By Christian Moretti and Beatrice Bottini

The global outbreak of the coronavirus disease (COVID-19) has caused unprecedented disruption for businesses across all regions and industries. Foreign companies doing business in the United States and in multiple jurisdictions face especially complex legal and operational issues. Staying informed, evaluating risks, and weighing appropriate options present exceptional challenges for foreign-based owners, boards of directors and managers, as well as their companies' U.S. subsidiaries and local management.

The scope of this Client Alert is to provide a brief overview of some of the essential legal issues faced by global companies operating in the United States. Although the extraordinary COVID-19 situation presents many unique legal questions, business leaders may want to take care to also remain focused on some of the basic principles that protect against risk under a wide range of circumstances. In other words, standard best practices may often help to ensure a baseline for effective business responses to the coronavirus crisis.

Topics covered below include:

- Cross Border Commercial Transactions
- Employment Considerations
- Disclosure Issues for Public Companies
- Corporate Governance
- M&A Transactions
- Rent Considerations In Commercial Lease Agreements
- Insurance Matters
- Travel Restrictions

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

CROSS BORDER COMMERCIAL TRANSACTIONS

COVID-19 is significantly affecting international commerce and cross border transactions. Many companies are considering delaying or interrupting current deal negotiations due to the uncertainty caused by the coronavirus and its effects on the markets. Manufacturers and distributors are already experiencing delays in procurement of raw materials and/or the replenishment of inventories.

Some relief may be found in contracts executed before the COVID-19 outbreak, which may contain a *force majeure* clause to excuse performance if one of a list of extreme events occurs to prevent or delay performance. *Force majeure* in the U.S. is not automatically considered to excuse performance. It must be contractually agreed upon by the parties and included in a written agreement to be invoked. The

scope of the circumstances that will excuse performance will be limited to the language of the particular *force majeure* clause and the interpretation of those clauses under the applicable state law, with courts generally construing these clauses narrowly. *Force majeure* clauses that excuse performance based on specific, narrow circumstances, such as "order of a government," "disease," "epidemics," or "state of emergency" will generally provide less margin for interpretation than broad-based clauses, such as "any circumstance beyond the control of the parties" or "act of God," as long as the latter does not also refer to climactic or weather conditions. Any party seeking to invoke *force majeure* will have an obligation to give notice as required in the applicable clause and, most likely, be required to show that it attempted to mitigate the delay or non-performance. Sometimes the *force majeure* clause allows the outright termination of a contract.

Unfortunately, some written contracts may lack *force majeure* clauses. In those circumstances, courts will not imply *force majeure* into the contracts and parties may have to turn to the equitable doctrines of "impracticability" or "contractual frustration" for relief. Commercial impracticability excuses performance or delays in performance if a supervening event materially changes the inherent nature of a party's obligations to become substantially more difficult, complex, or challenging, so that the performance costs become excessive. Frustration of purpose is a limited excuse that applies when, due to a supervening event, a party's fundamental purpose in entering into the transaction is destroyed or obviated. Performance is not impossible, but one party's fundamental reason for doing the deal no longer exists. Both impracticability and frustration are difficult to prove, and rarely accepted by the courts, but their attraction is that they allow a court to fully excuse performance when a truly unexpected event renders it physically or commercially impracticable or impossible to fulfill an agreement. Proving impracticability or frustration requires a complicated, fact-intensive analysis of the terms of the contract under the correct state law.

EMPLOYMENT CONSIDERATIONS

Employers are searching for steps they can take to keep their workers safe and productive, while remaining compliant with applicable laws and regulations. U.S. employment law may be drastically different from the employment laws in other countries. For that reason, it is important that foreign companies operating in the U.S. become aware of the federal, state, and local laws and regulations applicable to employer actions in connection with the COVID-19 pandemic.

The "General Duty Clause" under the U.S. Occupational Safety and Health Act ("OSHA") and similar related state laws require employers to provide a workplace "free from recognized hazards…causing or likely to cause death or serious physical harm" and to make reasonable efforts to prevent work-related injuries, including the spread of infectious diseases. This obligation appears to provide sufficient support for employers to consider imposing reasonable steps to prevent the infection of their workers with COVID-19, not only by other employees but also by vendors and others who enter the workplace. In doing so, employers need to be mindful not to violate the anti-discrimination laws in the United States that protect people from discrimination due to national origin, age, disability, and other factors. The U.S. Equal Employment Opportunity Commission ("EEOC") published new guidance for employers in connection with the COVID-19 pandemic, which employers may wish to consult.[1]

The OSHA General Duty Clause and the U.S. Centers for Disease Control and Prevention ("CDC") recommendations endorse the adoption of a range of actions by employers, such as providing information, disinfecting the workplace, and reducing the size of gatherings. Employers may, and should according to the CDC, prohibit employees who are symptomatic for COVID-19 from coming into the workplace, sequester employees who develop symptoms while at work until they can be released to leave the workspace, or

[1] https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

prohibit employees who have traveled to countries coded by the CDC as a travel risk from returning to the workplace for at least fourteen days, or longer if they become symptomatic.

Human Resource directors should monitor COVID-19 updates from OSHA, CDC, and state and local health departments for current suggestions about keeping workers safe.[2] For example, the CDC recommends that employers develop flexible work plans for its workers which may include flextime hours, telework, and extended leaves to care for family members. Telework policies for COVID-19 should be consistently applied to avoid claims of discrimination.

On March 18, 2020, the U.S. Congress passed and the President signed into law the Families First Coronavirus Protection Act. The new federal law, which is effective on April 2, 2020, applies to all businesses employing fewer than 500 employees, although there are numerous exceptions for businesses with fewer than 50 employees. The federal law requires that covered employers provide two weeks of paid sick leave for employees' or their family members' illness due to COVID-19 or care of a child arising from school or day care closure. Generally, the amount paid under the mandatory two weeks of paid sick leave is the full rate of pay. In addition, the law amends the existing Family and Medical Leave Act of 1993 ("FMLA") on an emergency basis to require that paid leaves of absence due to a childcare facility closure or school closure related to COVID-19 after the first two weeks of FMLA leave be paid at two-thirds of the rate of pay up to $200 per day and up to an aggregate amount per employee of $10,000. Employers will receive tax credits to offset the costs of these paid leaves. The Families First Coronavirus Protection Act also provides for free COVID-19 testing for all.

To address perceived gaps in the federal law, New York State also enacted a new law on March 18, 2020. The New York statute, which is effective immediately, covers **all** employers. Employers with fewer than 10 employees and under $1 million in net taxable income are required to grant five *unpaid* sick days due to COVID-19. Those employers with fewer than 10 employees and more than $1 million of net taxable income as well as employers with 11 to 99 employees must grant five days of *paid* sick leave, while employers with 100 or more employees must provide 10 days of *paid* sick leave due to COVID-19. Covered employers may not terminate the employment of an employee who does not come to work because of a government order or recommendation to remain at home as long as the order or recommendation remains in effect. The law does not appear to prohibit employers from closing a business or furloughing employees because of the business' inability to operate or because of financial considerations.

At the time of this Alert, other states and some cities are considering laws to enhance job protection and/or paid leave for employees as a result of COVID-19. The approaches of the states and the scope of the laws may differ. For example, New Jersey is considering legislation that would expand and enhance unemployment coverage, rather than expanding paid leave, in addition to existing New Jersey paid leave requirements. Accordingly, we recommend consulting with counsel as to both federal and applicable state law requirements regarding mandates arising from COVID-19.

DISCLOSURE ISSUES FOR PUBLIC COMPANIES

Many companies across business sectors are currently, or could be, materially impacted by COVID-19. The U.S. Securities and Exchange Commission ("SEC") issued two public statements on January 30 and February 19 addressing disclosure and reporting by public companies relating to the potential effects of COVID-19 as events have been unfolding globally.[3]

[2] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

[3] https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30 and https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19

Further, in light of the ongoing challenges of COVID-19, on March 4, 2020, the SEC issued a press release and an order providing publicly traded companies with an extended time period to file certain disclosure reports that would have been due between March 1 and April 30, subject to certain conditions, including the requirement to furnish a Form 8-K (in the case of U.S. reporting companies) or a Form 6-K (in the case of non-U.S. reporting companies) by the latter of March 16 or the original reporting deadline.[4] At the same time, the SEC reminded reporting companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from COVID-19 to the fullest extent practicable to keep investors and markets informed of material developments.

Reporting companies that already have filed their Annual Reports for 2019 should consider updating risk factors in their quarterly reports or supplementing them in a Form 8-K (or a Form 6-K for non-U.S. reporting companies) if COVID-19 has caused or could potentially cause material changes to their businesses or operations. Companies should include specific rather than generic risks related to their business as the effects of COVID-19 become clearer. This includes risk factors about the existing and potential impacts of COVID-19 on their businesses, such as supply chain disruptions; environmental, social, and governance factors; changes in business operations in the U.S. and internationally; and changes in estimated company growth, revenue, profits, and other financial impacts.

Concurrent with a reporting company's review of its risk factors, reporting companies also should review their forward-looking statements. In order to be meaningful, cautionary statements should be specific rather than generic.

Another item that should be carefully considered is that, in accordance with Exchange Act Rule 13p-1 and item 1.01 of Form SD, collectively referred to as the "Conflict Minerals Rules," public companies must disclose every year the use of certain minerals sourced from a list of certain countries. Such filing is due every year on or before May 31. Assessing if the conflict materials used originated from one of the covered countries usually requires a company to conduct a country of origin inquiry and due diligence engaging its suppliers. This process should be started as soon as possible to meet the May deadline and also to promptly assess the extent to which these diligence efforts will be impacted by COVID-19.

CORPORATE GOVERNANCE

International companies and foreign-based boards of directors should consider the potential impact of COVID-19 on the fiduciary duties and governance responsibilities of corporate leadership.

In the United States, directors are generally subject to two fiduciary duties in carrying out their governance responsibilities – the duty of care and the duty of loyalty. The duty of care requires that directors be fully and adequately informed and act with care when making decisions and acting for the corporation, while the duty of loyalty requires that directors act and make decisions in the best interest of the corporation.

The circumstances surrounding the coronavirus outbreak are rapidly changing and, to fulfill their fiduciary duties, foreign-based directors should keep apprised of those changes and make informed decisions. Careful action may be needed to avoid potential liability from stakeholder claims, for example, that the disease spread within an organization due to inattention or inaction of the board. Directors should meet to discuss the effect of COVID-19 on the company and be actively involved in oversight, planning and support of management, including assessing and monitoring the risks to the company as well as evaluating and monitoring the financial impact through frequent additional meetings. Directors should carefully document their deliberations and consider consulting with counsel and other advisors, as appropriate.

[4] https://www.sec.gov/news/press-release/2020-53 and https://www.sec.gov/rules/other/2020/34-88318.pdf

The logistics of corporate meetings may also be affected by COVID-19. To avoid the spread of the coronavirus, many states have directed most businesses to require their non-essential employees to stay home. This may impact compliance with corporate governance rules applicable to regular or special meetings of directors and annual and special meetings of shareholders that in this climate will likely need to be held remotely.

The majority of state corporate statutes, including those of Delaware and New York, permit actions of the board of directors to be adopted in writing and without a meeting, although that is not the ideal format for directors to exercise their fiduciary duties. Shareholder meeting location and format are dictated by state law in the U.S. The corporate laws of at least 30 states, including Delaware, permit companies to hold virtual-only shareholder meetings, whereas 42 states allow hybrid shareholder meetings. Companies should consider reviewing their governance documents, especially their bylaws, to determine which actions are permitted in writing or virtually. In some instances, a simple bylaw amendment may be needed to permit virtual meetings.

M&A TRANSACTIONS

The coronavirus may slow down or even interrupt merger and acquisition activity and is likely to become an important factor in every phase of the negotiation. The M&A complications caused by COVID-19 may be particularly difficult to resolve for cross border deals.

Deals in industries that will likely struggle to recover from the economic crisis, especially those deals in the early stages, may be interrupted and the parties will reconvene at a later stage to determine if a deal is still possible or desirable and on what terms. In these cases it is worth understanding what the initial agreements of the parties were and if firm commitments were made, for example, in letters of intent or memoranda of understanding, including how best to address a delay or interruption of the negotiations.

With respect to deals that are in the due diligence phase, due diligence efforts may become more challenging as buyers try to assess the impact of COVID-19 on the target company's operations, liabilities, financial condition, access to financing, employees, material contracts, customers, suppliers, and other relevant matters. Business plans and projections should be carefully reviewed and revised to account for how the business anticipates handling the pandemic and related financial crisis, and how such factors could impact the purchase price.

For deals at a more advanced stage, transaction documents should be carefully drafted or amended to reflect, for example, claw backs of the purchase price or deferred payments in case the targets set forth in the business plans and projections are not met.

Close attention should be paid to sections of the transaction documents relating to the representations and warranties that can be tailored to address how the business is equipped to deal with the consequences of COVID-19. Any undisclosed liabilities resulting from the virus should also be carefully evaluated.

Buyers may want to seek special post-closing indemnities concerning the coronavirus, but the magnitude and uncertainty of the underlying risks may make it difficult for parties to adequately quantify such liabilities and reach an agreement on risk-sharing. In addition, representations and warranties insurance policies might not cover losses related to business interruptions or delays due to COVID-19.

Material adverse change (MAC) provisions, which give buyers the right to terminate the agreement upon the occurrence of certain events that are detrimental to the target company, can also be included in the deal documents. The particular wording of a MAC provision will determine whether the coronavirus' impact on the target will ultimately become a MAC or not. Parties should therefore carefully consider how pandemics or epidemics, financial downturns, and stock market losses should be addressed.

Along with a MAC provision, other closing conditions can be used to delay the effectiveness of an M&A

transaction until certain requirements or deliverables affected by the coronavirus have been satisfied or obtained. For example, deals requiring regulatory approval might be subject to abrupt slowdowns, as government agencies address the pandemic and restrict the exportation of key products. Closing conditions related to the buyer's obligation to obtain financing will likely be subject to more scrutiny and review in this environment. Drop-dead dates should also be assessed carefully to avoid the risk of setting unrealistic goals.

Other provisions of an M&A agreement that require careful consideration are pre- and post-closing covenants. Companies generally agree to run the business between signing and closing in the "ordinary course of business." The coronavirus might impact these obligations as the target company may be required to take extraordinary measures prior to closing the deal. The parties may mutually agree on contingency plans and employment-specific policies to ensure business continuity and avoid future liabilities.

In the case of deals that have already been signed but have not yet closed, buyers can assess the possibility of invoking the MAC clauses, if included in the transaction documents, to terminate the agreement due to COVID-19.[5] It must be noted that MAC provisions often provide that buyers shall assume the risk of a MAC if the adverse event does not have a disproportionate effect on the target company compared to other participants in the industry in which the target conducts its business. Thus, the analysis on the efficacy of these clauses will need to be made on a case by case basis.

[5] For example, Morgan Stanley's recent acquisition of E*Trade Financial Corp. specifically carves out the COVID-19 virus from the scope of the definition of "material adverse effect" (MAE). See, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-morgan-stanley-e-trade-merger-excludes-coronavirus?te=1&nl=dealbook&emc=edit_dk_20200303&campaign_id=4&instance_id=16441&segment_id=21815&user_id=2e32b797fe0283e00b61f1d3200cf529&regi_id=8802982620200303.

RENT CONSIDERATIONS IN COMMERCIAL LEASE AGREEMENTS

Government orders related to the COVID-19 pandemic, aimed at containing the spread of the virus, are forcing many businesses to temporarily close. In these situations, issues involving payment of rent can become difficult for both parties to a commercial lease agreement, as they both may face unexpected costs and decreases in revenue.

Lease agreements will often contain provisions allowing landlords to accelerate payment obligations or draw down letters of credit or security deposits in case of non-payment of rent by the tenant. Some leases, however, might contain exceptions or other grounds on which tenants can seek some relief in a time of crisis. Note that some landlords interpret lease provisions to state the obligations under the lease are independent, so that the payment of rent is an independent obligation of the tenant and rent continues to be paid even if the landlord may not fully meet its obligations.

Force majeure clauses are discussed in an earlier section of this Alert, and are frequently included in commercial lease agreements. However, standard *force majeure* clauses generally provide that rent should be paid even while an unforeseeable event beyond the tenant's control is occurring. In addition to this limitation, in most jurisdictions a *force majeure* clause must be expressly included in the agreement and may not be enforceable unless the conditions impairing the parties' obligations are specifically listed or covered by broad wording such as "acts of God."

Some commercial tenants have considered seeking a rent reduction or delay through the equitable doctrines of "impracticability" or "contractual frustration," described in an earlier section of this Alert. These options for relief are often viewed skeptically by courts.

In addition, some commercial tenants have suggested invoking eminent domain, arguing that they are entitled to rent relief due to government orders requiring businesses to close in order to limit the spread of COVID-19. This theory does not have a meaningful track record of success in litigation.

In New York, Pennsylvania, and other states, most eviction proceedings have been suspended due to the COVID-19 pandemic.

In short, commercial landlords and tenants may do best under these difficult circumstances by talking and attempting to negotiate a mutually acceptable arrangement during the current crisis. Businesses may want to consult with counsel and review their lease agreements in light of the laws in their state.

INSURANCE MATTERS

As a consequence of the disruptions caused by COVID-19, companies should assess the scope of coverage provided by insurance policies to mitigate potential losses, identify exclusions, and provide timely notice in accordance with the terms of the policies.

In addition, businesses can evaluate whether any other types of coverage (including event cancellation or other contingency insurance, political risk insurance, business interruption cover, credit insurance, directors & officers insurance, trade disruption cover, etc.) should be purchased. It is also important to assess what actions the company should take to mitigate losses.

Companies are required to be proactive, promptly providing notice in case a covered event occurs and keeping track of the damages. Brokers can be helpful sources to navigate the policy requirements.

TRAVEL RESTRICTIONS

In the past few weeks, governments all over the world have imposed travel restrictions in an effort to contain the spread of the coronavirus. Foreign companies operating in the U.S. often rely on their executives to travel overseas to assist with the management of their U.S. subsidiaries and operations. Companies should keep apprised of all current restrictions and coordinate with local management to minimize, as far as possible under the current circumstances, disruptions to the day-to-day business. Note that even if travel is permitted, individuals will be screened upon arrival and subject to being sequestered or other cautionary measures.

The situation is rapidly changing. The U.S. State Department is posting the latest travel restrictions, including Presidential Proclamations.

See: https://travel.state.gov/content/travel/en/traveladvisories/ea/covid-19-information.html.

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For more information about Schnader's International Practice Group or to speak with a member of the firm, please contact:

Christian Moretti
Co-Chair, International Practice Group
212-973-8111
cmoretti@schnader.com

Beatrice Bottini
Associate
212-973-8095
bbottini@schnader.com

Jo Bennett
Co-Chair, Labor and Employment Practices Group
215-751-2134
jbennett@schnader.com

Kevin S. Blanton
Chair, Real Estate Practice Group
215-751-2419
kblanton@schnader.com

M. Christine Carty
Partner, Litigation Department and Labor and Employment Practices Group
215-751-2134
ccarty@schnader.com

Megan E. Harmon
Co-Chair, Mergers and Acquisitions Practice Group
412-577-5209
mharmon@schnader.com

Sarah Hewitt
Chair, Corporate Practice Group
212-973-8123
shewitt@schnader.com

Jonathan W. Hugg
Co-Chair, Financial Services Litigation Group
215-751-2527
jhugg@schnader.com

Bruce Strikowsky
Chair, Insurance Services Group
212-973-8070
bstrikowsky@schnader.com

Scott J. Wenner
Co-Chair, International Practice Group
212-973-8115
swenner@schnader.com

Michael J. Wietrzychowski
Co-Chair, Labor and Employment Practices Group
856-482-5723
mwietrzychowski@schnader.com

www.schnader.com

** See: www.schnader.com/jakarta*