

The globalization of business, combined with the rapid spread of the coronavirus disease 2019 (COVID-19), commonly referred to as the “coronavirus,” renders multinational corporations highly susceptible to litigation in US courts.

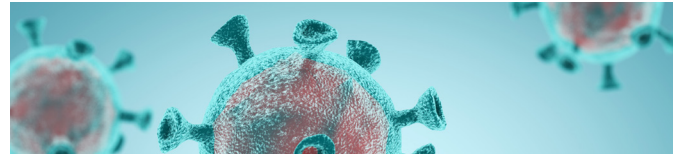
US companies that have been damaged by COVID-19 issues will likely seek redress through litigation, and foreign businesses operating in the US must be prepared to defend themselves against a broad range of potential complaints relating to their business operations. **While there may be no way to completely immunize non-US companies from US litigation, they may be able to raise some jurisdictional defenses and keep their coronavirus-related disputes out of US courts.**

Threat of Coronavirus-Related Litigation Spreading Across the US

The US is already the most litigious country in the world. One of the principal reasons is that there are few limits on the types of cases that may be brought in US courts. Subject to certain jurisdictional rules, a broad range of disputes – e.g., contractual disagreements, labor and employment disputes, negligence and intentional torts, supply chain disputes, privacy invasion and data breaches, and consumer fraud and product liability allegations – may be resolved in US courts.

The pandemic will only exacerbate the situation, exposing foreign companies conducting business in the US to increased threats of litigation. Coronavirus-related litigation in the US could be triggered by:

- Inability to meet contractual obligations or delays in delivery of goods and services to coronavirus
- Switching to different suppliers, or using different products or raw materials due to shortages
- Failure to adequately protect health and safety of employees and failure to take reasonable steps to control spread of coronavirus at sites under the control of the employer
- Requiring non-essential business travel for employees
- Inadequate sick leave or telecommuting policies
- Reduced salaries, temporary layoffs or termination after an employee contracts coronavirus
- Disclosure of employees’ travel, health or personal information
- Concealment of information relevant to coronavirus by businesses



Business-to-Business Force Majeure Issues

COVID-19 issues will undoubtedly precipitate a number of claimed *force majeure* events between businesses. To assess whether a COVID-19 event can cause the excuse or delay of a contractual obligation, the first step is to determine whether the applicable contract contains a *force majeure* clause. Essentially, a *force majeure* clause allows parties (usually suppliers, but sometimes buyer as well) to excuse or delay performance in the event a specified risk materializes. Drafting appropriately tailored *force majeure* clauses requires planning and forethought, and many businesses may not have predicted the impact a global epidemic like the coronavirus could have on business. There is no “standard” *force majeure* clause. But *force majeure* clauses generally share the same structure, in that they typically specify (1) what events excuse performance, (2) the extent to which performance is excused, and (3) what notice is required with the other party.

It is common for contracts to excuse or delay performance for weather and environmental catastrophes. It is less common to specifically include sickness or epidemics as a reason for excusing performance, so it is important to carefully examine the language of any applicable contract provisions. It is also typical for *force majeure* clauses to include a “catchall” phrase at the end – such as for “other acts of God” or “other events beyond the parties’ control.” While ambiguous, depending on the actual impact that the coronavirus is having on a company’s ability to satisfy its contractual obligations, these phrases could excuse performance.

If a US contract for the sale of goods does not contain a *force majeure* clause, UCC 2-615 (adopted in all states except Louisiana) provides default provisions. Under UCC 2-615, unless the parties have agreed otherwise, a supplier’s performance will be excused if it has been made “impracticable” by the “occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.” Comment 4 to UCC 2-615 clarifies that “[i]ncreased cost alone does not excuse performance” absent special circumstances, “because that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.” Again, the specific circumstances of a company’s coronavirus impact would have to be examined to determine applicability (and would likely be contested by the buyer), but one could imagine that having a functioning workforce is a contingency upon which a contract had been made.

Dealing With Litigation in US Courts

Non-US corporations may be concerned about being involved in litigation in US courts relating to the coronavirus outbreak. If a coronavirus-related lawsuit is filed in the US against a multinational corporation, the threshold question is whether the court has the power to resolve the dispute. A US court may exercise what is known as “personal jurisdiction” over a person or company only where that entity has “minimum contacts” with the particular state in which that court sits. These contacts could take on a variety of forms, including the commission of some act within the state, contracting for the provision of goods or services within the state, deriving some benefit from conducting business within the state, owning property or maintaining a bank account within the state, or placing an item in the stream of commerce with the intention that it be distributed within the state. Additionally, each state has what is called a “long-arm statute,” which sets out the circumstances under which a company could be subject to the state court’s jurisdiction, even though it is not physically “present” in that state.

In the modern global economy (which is already showing signs of devastation from the coronavirus), jurisdictional lines are often blurred. In this increasingly interconnected society, it has become increasingly difficult for multinational corporations to avoid jurisdiction under the theory that they lack “minimum contacts” with a US forum. Indeed, minimum contacts can often be established by routine conduct such as using the internet for business purposes, advertising in the US or conducting business through subsidiaries or agents in the US. Ultimately, whether a multinational corporation has sufficient “minimum contacts” is a highly factual determination that will turn on the circumstances of each case. But this “minimum contacts” question is a critical one, insofar as it determines whether a given dispute involving a foreign company will proceed in a US court.

A Potential Jurisdictional Antidote

In recent years, as the US Supreme Court has clarified how this “minimum contacts” analysis plays out, the reach of US courts’ jurisdiction over multinational corporations has been shortened. The US Supreme Court has made clear that in order for a US court to adjudicate a matter involving a foreign company, the company must be subject to at least one form of personal jurisdiction: either “general” (all-claims) jurisdiction or “specific” (suit-related) jurisdiction. Because the US Supreme Court has begun to tighten the requirements for establishing both general and specific jurisdiction, foreign defendants are increasingly able to raise jurisdictional challenges and avoid US courts.

For instance, in 2011, the US Supreme Court struck down a finding of general jurisdiction over foreign companies in *Goodyear Dunlop Tires Operations S.A. v. Brown*, holding that jurisdiction over a foreign corporation requires contacts with the forum state that are so “continuous and systematic” as to render the corporation “at home” in the forum. Of particular interest to foreign companies that manufacture or sell goods in the US, the *Goodyear* court specifically held that the mere flow of a foreign corporation’s products into the forum state, without more, cannot support general jurisdiction over the corporation in that state.

Further, in *Daimler AG v. Bauman* – decided in 2014 – the US Supreme Court unanimously rejected the notion that a foreign corporation was subject to general jurisdiction based on the contacts of a subsidiary, finding that general jurisdiction was improper where neither entity was incorporated or headquartered in the forum state, or maintained its principal place of business there. In other words, the foreign company’s slim contacts to the forum state, relative to its vast international contacts, did not render it “at home” there. To hold otherwise would grant courts global reach as long as a foreign company conducted any business within a state.

In 2017, the US Supreme Court clarified that specific jurisdiction should be narrowly applied to out-of-state corporations as well. In *Bristol-Myers Squibb v. Superior Court of California*, the court held that the mere fact that a foreign defendant’s medication was prescribed and sold in the forum state did not give rise to specific jurisdiction when the plaintiffs’ claims related to the purchase and use of those drugs in another state. In reaching this decision, the court noted that although it must weigh a variety of interests in making jurisdictional determinations, the primary concern is the burden on the defendant. US courts are thus constitutionally limited in their authority to hear claims against foreign corporations.

In sum, while the reach of US courts remains long, it is not unlimited. Foreign companies confronted with coronavirus-related disputes should, therefore, analyze the precise forum contacts alleged by the plaintiff. In a growing number of cases, multinational corporations may be able to challenge the nature and extent of those contacts, and avoid cross-border litigation in the US.

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