

Chemical Industry Update - March 2020

by Troy M. Keller, Daniel J. Brown, Ray Liu Esq., Kent J. Schmidt, and Rachel Benedict

Top COVID-19 Updates for the Chemical Industry

In this issue, we pull together an assortment of recent updates and observations from our firm regarding the legal and economic fallout arising in the wake of COVID-19. We comment on litigation trends, contract law impacts, SEC reporting, travel restrictions and even management of construction projects. Clearly, China has been hard hit by the virus, and we discuss impacts on trade with that country and some of the challenges in managing operations there during the crisis.

Like other crises, we believe this one will pass in due course, but it will leave behind scars that change the way companies do things going forward, particularly in how they manage risk. Practices and policies regarding contractual protections, corporate disclosures, insurance strategies, supply sourcing and inventory levels will evolve as a result. Even Board governance is expected to be influenced as directors look for guidance on how they can best fulfill their fiduciary duties and address expanding expectations for corporate social responsibility in a world where the risk of pandemics has become a top priority.

We hope you find these updates useful. We are also interested in hearing from you. Let us know what you are seeing and most worrying about. We would be glad to organize impromptu peer-group discussions and forums to help companies arrive at best practices.

For more information, contact [Troy Keller](#).

Ten Tips for Safeguarding Against Contract Performance Risks Related to COVID-19

As COVID-19 (coronavirus) continues to exact a significant toll on economies and supply chains globally, how can your business protect its contracts and mitigate risks? Here are the top 10 things your business can do immediately to better guard against contract

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performance risks related to the COVID-19 pandemic.

1. **BEFORE performance is interrupted (right now) assess and document COVID-19's impact on your ability to perform obligations under your contracts.**

As the number of confirmed COVID-19 cases multiplies each day, it is likely that global supply chain disruptions have yet to peak. Thus, it is possible that the interruptions your business is currently experiencing may intensify in the coming weeks. Take time now to institute a policy for evaluating disruptions to your supply chain and the delays/failures of your upstream and downstream partners.

2. **Retain counsel, or ask in-house counsel, to review relevant contracts for force majeure provisions.** Far too often parties agree to boilerplate force majeure language with little negotiation. Do not wait until you or your contract partner invokes force majeure to determine if your business's relevant contracts offer sufficient protection in the event of a COVID-19 performance failure. [Read More >](#)

For more information, contact [Dan Brown](#) and [Shevon Rockett](#).

Product Liability Risks for the Industry from COVID-19

In what is likely the first consumer class action lawsuit relating to the coronavirus, a manufacturer of hand sanitizers was sued on a theory that it is marketing its hand sanitizers in a deceptive manner. Plaintiffs claim the manufacturer is seeking a windfall from the health crisis by falsely claiming that their product is effective against the virus and point to the fact that the FDA issued a [warning letter](#) on this topic in January. The case, filed in federal District Court in the Southern District of California, is likely the first of many such claims.

Due to the number of chemical compounds that are incorporated into personal care and cleaning products, there is risk that these types of claims could proliferate into other product segments and have an impact on downstream markets for the chemical industry. Relatedly, several state attorney generals have announced their intention of punishing price gouging during this time of crisis, including with respect to cleaning products and hand sanitizers. Upstream companies may consider implementing policies to make clear that they do not support price gouging or false claims about end products and to consider including additional liability provisions in their terms and conditions to cover these areas.

For more information, contact [Kent Schmidt](#).

Coronavirus and Contractual Performance Disputes—Does a Pandemic Excuse Performance of Contractual Obligations?

The daily headlines are reminders of the far-reaching economic ripple effects of the 2019 Novel Coronavirus (COVID-19) outbreak. The pandemic is forcing companies to abruptly alter strategies and business plans that seemed certain even at the beginning of the year. These types of changes prompt a question relating to whether this unprecedented health crisis alters existing contractual obligations. Can a company suspend performance of a contract or even terminate the agreement altogether because of the impacts of the coronavirus?

In many instances, the answer to this question is in the affirmative, and unequivocally so. A party to a contract may argue that, as a result of the outbreak, performance of its contractual duties is now impossible, impractical or at least economically infeasible. But applicable law, contractual provisions and the parties' course of dealing before and since the outbreak will in some cases make the answer far from clear, in which case the dispute may escalate to litigation. With the possibility of litigating these sensitive issues on the horizon, it is useful to examine the legal principles that govern contract disputes stemming from the current health crisis. [Read More >](#)

For more information, contact [Kent Schmidt](#).

Three Ways China Trade is Impacted by COVID-19

The Chinese government's announcement that it will reduce tariffs by 50% on about \$75 billion of U.S.-origin products, affecting about 1,700 different customs codes, should be seen in at least three different perspectives. First, it is a sensible and practical move if China is to meet its very ambitious purchasing commitments as set forth in the recently signed Phase One trade agreement with the United States. Since tariffs automatically increase the cost of imported goods (in this case, into China), it would be inherently contradictory public policy to want more Chinese purchasers to buy American products and yet at the same time to make them more expensive than necessary because of such tariffs. However, even with these efforts to reduce tariffs, there are still many skeptics who believe China will have significant difficulty reaching those Phase One goals.

Second, given the current coronavirus epidemic and the unprecedented lock-down and quarantine of some 60 million or more Chinese citizens, especially across Hubei Province and in its capital city Wuhan, the Chinese government especially wants to project a sense of calm, order and strength at this time. It therefore wants to show its own citizens and the world that, in spite of that admittedly grave national health emergency, it can still carry on "business as usual" and is not flustered or distracted.

Third, the coronavirus problem is already widely expected to hurt China's domestic economy. Tens of millions of Chinese workers have been ordered to stay home on an extended Lunar New Year break in an effort to reduce the risk of human-to-human transmission of the disease. Their lost hours of work will be significant in the aggregate and will clearly lower national productivity in 2020 and thus lower corporate revenues and earnings. When all of these adversely affected Chinese companies tally up those losses, that will likely lead to tightened budgets that will lead in turn to lowered purchases, especially of relatively more expensive imported goods.

Thus, if China hopes to have any chance of meeting its Phase One agreement import commitments, it has to adjust for those economic headwinds, and so these efforts to reduce tariffs are probably calculated to reinforce the government's recent injection of more liquidity into the Chinese financial system.

For more information, contact [Nelson Dong](#).

Key Things Employers in China Should Know Regarding Reopening Amid COVID-19

Due to the outbreak and rapid evolvement of the novel coronavirus, the central government and its local counterparts in China have taken a series of actions to contain the spread of the virus, including extending the Spring Festival Holiday, ordering enterprises to put off the schedule of business reopening and encouraging employees to work from home. Now, with the growth of virus infection gradually slowing down, local governments in various locations (including Beijing, Shanghai and Guangdong) have allowed and even encouraged business entities to resume their operations. At the time of this article, a large number of companies and factories have already reopened their businesses with more to follow in the coming weeks.

With massive employees swarming into offices and factories, employers in China now face significant challenges in preventing and controlling the spread of coronavirus at workplace. Several workplace infection cases have been reported recently, under which employers had to suspend their business operations and invest additional funds and resources to cooperate with the disease prevention and control requests from the government. [Read More >](#)

For more information, contact [Ray Liu](#) and [Yan \(Bill\) Huang](#).

President Trump Announces European COVID-19 Travel Ban

In a Wednesday, March 11, 2020 evening address from the Oval Office, President Donald Trump announced a new coronavirus-related travel ban barring entry to the United States for most foreign nationals who have visited various European countries within the past 14 days. The White House subsequently posted the [full text](#) of the proclamation. [Read More >](#)

For more information, contact [Rebecca Bernhard](#) and [Bob Webber](#).

What Construction Contractors and Owners Should Do, Today, to Prepare for the Possible Effects of Novel Coronavirus on their Projects

As novel coronavirus has spread from China to Europe, the United States and around the globe, it has begun to have a debilitating impact on world markets, manufacturing, distribution, supply chains, and the workforce in general. It seems only a matter of time before COVID-19 directly affects U.S. construction projects. What can we, in the U.S. construction industry, do to prepare for its effects and mitigate the potential harm to our people and our projects? The ultimate solutions may be complex, but there are some simple, initial steps, that construction contractors and owners should take to assess and bolster their ability to deal with the potential impact of an outbreak. [Read More >](#)

For more information, contact [Diana Parks](#) and [Ross Eberlein](#).

Additional Resources: Webinars

March 4 – Coronavirus and Employment Law

Employers are scrambling to determine how to respond to the COVID-19 outbreak as it expands in the United States. This webinar discusses employer obligations in response to the coronavirus.

March 26 – Upcoming Webinar: Legal Tools for Managing Cross-Border Risk in a COVID-19 World

Multinational companies and deal-makers need to adjust to the COVID-19 outbreak as it expands across Asia, the United States and rest of the world. Join our three China office heads for a discussion about:

- Which legal issues to prioritize in your management of disruption to your manufacturing, transportation, and cross-border supply chains.
- How and when to use force majeure and other doctrinal provisions to achieve your strategic goals.

The panel will also look at deal trends and business continuity planning, and provide guidance based on their experience helping clients through the coronavirus crisis in China, including Hong Kong.

Corporate Update

SEC Grants Regulatory Relief for Companies Affected by the Coronavirus; Urges Appropriate Disclosures

The SEC is giving publicly traded companies impacted by the coronavirus relief with respect to an assortment of filing obligations. In most cases, they are given an additional 45 days to file certain disclosure reports that otherwise would have been due between March 1 and April 30, 2020. Companies seeking relief must provide a Form 8-K (or 6-K) by the later of March 16 or the original reporting deadline. The SEC may extend the time period for relief or provide additional relief as it deems appropriate. A statement from Chairman Clayton also reminded companies to disclose to investors their assessment of, and plans to address, risks to business and operations resulting from the coronavirus:

"We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements. Companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding coronavirus, can take steps to avail

themselves of the safe harbor in Section 21E of the Exchange Act for forward-looking statements."

Along these lines, we have seen that reporting companies are quickly adding coronavirus risk factor language both in their forward looking statement disclaimers and in their risk factor disclosures (either stand-alone or as supplements to their Natural Disasters risk factors). Let us know if you would like to see some of the examples we have been collecting.

For more information, contact [Rachel Benedict](#).

Impact of Coronavirus on M&A Rep and Warranty Insurance

The spread of coronavirus will likely have a number of effects on the M&A market, but one immediate impact is the increased risk to buyers as it relates to insurance coverage for breaches of representations and warranties. Insurance is becoming an increasingly common way for buyers to protect against potential post-closing liability. However, such insurance policies have exclusions and exclusions related to the impact of COVID-19 may become prevalent. In a recent example, an insurer excluded coverage for any losses arising from the inability to fulfill customer orders based on disruptions in the supply chain as a result of the spread of the coronavirus. This exclusion was added even though the seller's representations and warranties did not specifically address the coronavirus or supply chain disruptions. Buyers should be aware of this potential lack of coverage when performing diligence and negotiating the transaction documents.