



# **AVOIDING LITIGATION WHILE RESOLVING COMMERCIAL CONTRACT DISPUTES DURING COVID-19**

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# Agenda



- Introduction
- The effects of COVID-19 on business operations
- Contract performance issues
- Contract clauses that may allocate financial responsibility
- Provisions that govern resolution of disputes
- Avoiding litigation: strategic and practical considerations

# Introduction



- COVID-19 and the resulting shelter-in-place (whether imposed or voluntary) has disrupted everything
- Devastating effect on many business and associated commercial relationships
- Contracts are particularly at risk
- Some resulting litigation, but not yet much
- Steps that can be taken to anticipate future problems, develop creative solutions and reduce potential risks

# COVID-19's Effects on Business Operations



- Supply chain-Workers, Transport
- Event cancellation-SaaStr Conference, Eden Roc Hotel
- Mergers, acquisitions and business consolidations-SoftBank/WeWork
- Real estate
  - Rental—evictions stopped in many states
  - Purchase and sale—notarization a key issue
- Construction-not permitted in all states except essential



# Covid-19 and Commercial Contracts



- What is “the contract”?
- Covid-19’s effects on performance
  - Delay
  - Complete inability to perform
    - Possibility of partial performance
    - Core purpose of contract
- The extent to which COVID-19 is the cause of non-performance

# Allocation of Financial Responsibility



- Force majeure clause
  - Review carefully as language varies
  - State laws acting as force majeure clause
    - Cal. Civ. Code § 1511
- Limitation of liability provisions
- Insurance
- Indemnity provision in the event of a third party claim

# Implied Covenant of Good Faith and Fair Dealing



- Most states recognize some sort of implied covenant
- Question is how would it come into play
  - California decisions indicate some disfavor of this doctrine
  - Applicability to contracts impacted by COVID-19 (supposed to prevent frustration of purpose)

# Procedures for Resolving Disputes



- Contract termination clause
  - Is it being followed?
  - Effect of bankruptcy or insolvency of one party
- Dispute resolution requirements
  - Requirement that disputes be arbitrated
  - Feasibility in the current circumstances

# Procedures for Resolving Disputes



- Does the law of a particular state govern disputes?
  - Could have a big role in the outcome
- Does the contract contain a forum selection clause?
  - Is it exclusive?
- Is there an attorneys' fees clause?
- The applicability of a severance clause
- The effect on any or all of these provisions of the unique circumstances

# Practical Considerations to Avoid Litigation



“We’ll solve the conflict with a water pistol fight.”



Questions???

# Panelists:



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