What A Year It Has Been

I. Challenges and Potential Solutions
   A. Raw Material Cost Increases
   B. Price Increase Demands
   C. Exiting the Relationship
   D. Force Majeure
   E. Alternatives to Force Majeure

II. Considerations for the Future
   A. Revamping Force Majeure Provisions
   B. Bases for Sourcing Decisions: Resilience v. Cost
Raw Material Cost Increases

• Driven by early-pandemic declines in demand

• Rebound leads to increasing prices

• All in: Volatility, price fluctuations, expect continuing increases

• Impact felt most acutely upstream
Price Increase Demands

- May be driven by raw material cost increases, or not
- Other COVID-19 price drivers
  - Expedited freight
  - Safety equipment/measures
  - Production interruption/downtime
  - Overtime
  - Lower-than-anticipated volumes
Options for Responding to or Making Price Increase Demands

• Novel issue ≠ Novel solution
  • If commercial negotiations fail, legal principles remain the same

• Contract controls → What does it say about price changes?
  • Index?
    – (raw material cost increase driver only)
  • Fixed Price regardless of circumstances/outside events?
  • Pricing changes under certain, articulated, circumstances?
Other Options → Exit Provisions

Type of Contract/Duration Term
- Requirements contract vs. Release-by-release?
  - In the latter, your contract is complete once you have fulfilled your obligations under the most recent release
- Life of Program?
- Fixed Length? If so, is it about to expire?
  - Leverage right to refuse to extend
- Indefinite?
  - Under UCC, you may be able to terminate with reasonable notice

Early Termination Rights
- For convenience, generally reserved for Buyer
- Mutual if specific notice given

Note transition obligations under your contract or the UCC
Final Options

• Utilize alternate suppliers if contract allows

• Payment under protest
  • If no viable exit strategy and if increase is not permissible under contract
  • Full reservation of rights to pursue recovery
  • Continue negotiation

• Preliminary Injunction/TRO?
Force Majeure: Defined

• “An event or effect that can be neither anticipated nor controlled; an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do.”

• BLACK’S LAW DICTIONARY (10th ed. 2014).

• What does it allow?
Force Majeure: Examples

Contract Controls

- Courts will interpret narrowly
- Must be unforeseeable at the time of contracting
- Declaring party must show no alternative means of performance

Typical Inclusions

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hurricane</td>
<td>Strike</td>
<td>Embargo</td>
<td>Power outage</td>
</tr>
<tr>
<td>Flood</td>
<td>Riot</td>
<td>War</td>
<td>Catch-all language</td>
</tr>
<tr>
<td>Fire</td>
<td>Terrorism</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Earthquakes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tsunami</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explosions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Typical Exclusions: Fault, negligence, change in cost of material, price increases, market conditions, supplier actions, etc.
Covid-19 Treatment

Guidance from other jurisdictions:


- The parties' Agreement's force majeure clause was triggered when the auction was “postponed for circumstances beyond our or your reasonable control.” The force majeure clause also provided examples of circumstances beyond the parties' reasonable control, including a “natural disaster.”
- “It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster. One need look no further than the common meaning of the words natural disaster. Black's Law Dictionary defines ‘natural’ as ‘[b]rought about by nature as opposed to artificial means,’ and ‘disaster’ as ‘[a] calamity; a catastrophic emergency.’ Natural, Disaster, Black's Law Dictionary (11th ed. 2019). The Oxford English Dictionary likewise defines a ‘natural disaster’ as ‘[a] natural event that causes great damage or loss of life such as a flood, earthquake, or hurricane.’ By any measure, the COVID-19 pandemic fits those definitions.” **Id. at *7.**

**In re Hitz Rest. Grp., 616 B.R. 374, 376 (Bankr. N.D. Ill. 2020)**

- The parties' lease's force majeure clause provided: “Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government . . .”
- According to the court, the executive order constituted both “governmental action” and issuance of an “order” as contemplated by the language of the lease's force majeure clause and the order “hindered” the debtor's ability to perform by prohibiting the debtor from offering on-premises consumption of food and beverages.
Covid-19 Treatment

**Bottom Line**: Covid-19 is likely within ambit of a force majeure clause that specifically enumerates “calamity,” “natural disaster,” “Act of God,” “circumstances beyond the parties’ reasonable control,” and/or “government action” as triggering force majeure events.

Even if you have the right contract language, a Covid-19 outbreak will not always make a force majeure declaration appropriate.

- Event and impact must be beyond “reasonable control” of declaring party
- Negligence/fault clauses
- Foreseeability considerations
- Obstacle cannot be avoided or overcome
Force Majeure: Is Declaration Necessary?

- Contract Type
- Requirements
- Release-by-release
- Safety Stock
- Multiple Supply Sources
You’ve Declared… Now What?

- **Rights** = Temporary suspension of performance
  - How long?

- **Obligations if you declared**
  - First: Look to your contract
  - Notice
    - Prompt, written, specific, include anticipated length
  - Updates
  - Cost of expedited freight
  - Buffer stock
  - Procure alternative goods
  - Resume performance ASAP
Your Supplier Declared... Now What?

Rights
• First: Look to your contract
• Notice, including anticipated length
  – Details regarding event and impact on supplier
• Termination
• Alternative supply

Implications
• Determine how supplier is allocating remaining stock
• Unexpected costs
• Inappropriate declaration?
  – Gives rise to obligation to mitigate
• Supply to your customers
  – You may have to make your own force majeure declaration
Looking Forward

Force Majeure Contract Provision

- Include one
- Revise existing
  - Supplier-friendly terms to include
    - Think both broad and specific
      - Broad: “without limitation”
      - Specific: pandemic/epidemic/virus, travel bans, quarantine restrictions
  - Buyer-friendly terms to include
    - Will our experience with Covid-19 change what is foreseeable?

Resilience/Reliability vs. Cost

- Reshoring or nearshoring
- JIT vs. Banking
- Multi-source vs. sole source
Thank you!

Laura You | lyou@wnj.com | 248.784.5074
Distressed Suppliers and Customers

Dennis Loughlin
February 3, 2021

OESA Legal Trends 2021

© 2021 Warner Norcross + Judd LLP
These materials are for educational use only. This is not legal advice and does not create an attorney-client relationship.
Pandemic Panic to Smooth Sailing?

• Signs of distress delayed; may resurface

• PPP money masked pre-pandemic problems at many companies experiencing distress
  • PPP did not solve systemic problems; bad management/family transitions, bad plants, unprofitable contracts, or quality issues
    – Disputes over programs and pricing beginning to bubble up
  • Quick band-aid cash combined with relief from banks provided unexpected breathing room and options for distressed suppliers
  • Increased scrutiny of supply base by OEMs flagging financially distressed suppliers – even if no default in supply
Demand rebounded quickly, causing supply shortages, non-Covid shutdowns and resulting low dealer inventory for certain key models (Chips and TP!?)

Lean manufacturing relies upon steady, stable, smooth supply chain; pandemic upended multiple countries’ supply

On-shoring of tooling programs to protect against international disruptions to supply chain. Who wins? Who loses?

Continued pressure to fund EV development, perhaps increasing pressure under Biden Administration
Banks’ Cooperation Limited?

- Unprecedented cooperation from banks during pandemic for payment relief and extensions
- Generous forbearances with few hoops, if any
- How long will banks kick the can down the road?
- Stricter controls on new PPP funds in light of fraud
- Extensions may become exits – already started?
  - Communication remains key
New PPP for Debtors?

- Consolidated Appropriations Act imposes different rules for PPP eligibility for debtors in bankruptcy (or those who may file for BK)
- SBA Administrator carries a big stick
  - Ineligibility or cancellation of PPP application
- Biden Administration could change direction
Options for Distressed Suppliers

• Market is flush with money, creating a variety of options for distressed suppliers
  • Private Equity funding in and out of bankruptcy
    – Bankruptcy sales to private equity have returned; better this time?
    – PE exit strategies are different than strategic buyer
    – Refinancing, out-of-court workouts are options
    – Communication remains key
Bankruptcy Cases Up and Down

- Bankruptcy filings overall are down in 2020 vs. 2019, but corporate cases are up significantly
- Consumer BK cases down due to various forms of governmental relief available
- Commercial cases up nearly 30%
  - BK sales are an attractive option
  - Executory contracts in BK still require attention
...and all the “Normal” Challenges Still Exist

- OEMs and suppliers still tangling over pricing, volumes, resourcing
- Accommodation Agreements still heavily relied upon to address distressed suppliers (even where no accommodation is sought by supplier!)
- Increased labor expenses due to Covid-related cost of doing business
- Tariff uncertainty
- Delays and cancellations in platforms, tooling
Thank you!

Dennis Loughlin | dloughlin@wnj.com | 248.784.5186
The COVID-19 Vaccine – Workforce Implications

- COVID-19 Vaccination Prioritization Update
- Mandate or Recommend?
- The EEOC’s December 2020 Guidance
- Employee Incentives/Employee Relations Issues
- Key Takeaways
COVID-19 Vaccination Update

Vaccine Access – CDC Recommendations

**Phase 1a:** Health Care, Long Term Care Facilities

**Phase 1b:** Frontline Essential Workers, 75 y/o and over

**Phase 1c:** 64-74 y/o, 16-64 y/o with “high risk medical conditions”

**Phase 2:** All other persons 16 y/o and older not already recommended in 1a-1c
Keys Issues Addressed by the EEOC

**Question 1**: Can employers mandate COVID-19 vaccines?

**Question 2**: What to do when an employee refuses?

**Question 3**: How to handle reasonable accommodations?

**Question 4**: In a non-mandatory vaccine workplace, are there other potential EEO issues?
Can employers mandate COVID-19 vaccines?

- COVID-19 is not a medical examination. Employers CAN mandate the vaccine and require proof of vaccination.

- Employers must provide accommodations for disabilities (under the ADA) or religious practices (under Title VII).
Disability Accommodations

• If an employee has a disability that does not permit her to take the vaccine, the employer must show that unvaccinated employees would pose a “direct threat” due to a significant risk of substantial harm to the health or safety of individuals in the workplace that cannot be reduced by a reasonable accommodation.

• Interactive process considering:
  • The employee’s job functions.
  • Whether there is alternative work.
  • How important is it to operations that the employee be vaccinated?
Religious Accommodations

- Title VII requires employers to accommodate employees “sincerely held religious beliefs, practices, or observances” absent and undue burden.

- If there is no reasonable accommodation possible, the employee can be excluded from the workforce.

- Employers must be consistent in its application of this practice.
Religious Accommodations

In *Horvath v. City of Leander*, the U.S. Court of Appeals for the Fifth Circuit recently considered an employer’s proposed accommodations to a firefighter who refused a mandatory tetanus, diphtheria, and pertussis (TDAP) vaccine for religious reasons.

Its analysis now provides timely guidance to employers considering a mandatory Covid vaccine.

Two accommodations offered: (1) reassignment to another position that “offered the same pay and benefits” but did not require a vaccination; or (2) “remain in his current position if he agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature.”

The Fifth Circuit agreed with the district court that the city had satisfied its legal obligation to offer a reasonable accommodation and affirmed dismissal of Horvath’s religious discrimination claim.

The city promptly reviewed the accommodation request, identified reasonable accommodation options, and presented those to Horvath. The law does not require employers to adopt the employee’s requested or preferred accommodation, so long as they offer accommodations that are reasonable and effective.
The Burning Question: To Mandate or Encourage?

Decisions will be guided by:

- Supply, distribution, and administration issues.
- Community considerations.
- Public health policy transitions (state and federal).
- Legal and employee relations impacting a specific workforce.
Encouraging Vaccines and Employee Relations Issues

- Many employers will opt to encourage and incentivize vaccines.
- Acknowledge what employees have experienced.
- Develop internal vaccination education campaigns.
- Make obtaining the vaccine as easy as possible and cover the associated costs.
- Provide incentives to employees who get the vaccine.
- Provide paid time off for employees to get and recover from the vaccine.
Important Takeaways

• Assess how your workforce will fit into the CDC vaccination prioritization.

• Develop written COVID-19 policies and protocols.

• Implement programs making it easy for employees to get the vaccine.

• Reinforce current COVID-19 protocols and remain diligent in responding to new guidance.

• Train managers and supervisors to engaging in positive, specific, and fact-based messaging.
Thank you!

Kiffi Ford | kford@wnj.com | 248.784.5016
M&A Trends for 2021

Linda Paullin-Hebden
February 3, 2021
M&A in 2020; A Look Back

- The impact of the pandemic
- Fourth quarter recovery; the Biden effect
M&A in 2021; A Look Forward

- General Observations:
  - No slow down in deal flow; ample capital and low interest rates
  - Potential increase in taxes
  - Government stimulus
  - Small Business
  - Regulatory impact
  - Cross Border
A New Sheriff in Town

The Biden Administration

- Executive Order: “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”

- Executive Order “Made in America”

- Clean Energy and Electrified Vehicles
  - Possible expansion of federal EV incentives
    - Benefits companies already focused on green and emission free technologies
    - Increase in number of charging stations
  - Continued support for USMCA
  - ESG
M&A Market Reaction

Impact on transactions (mergers, acquisitions, joint ventures and divestitures):

- Technology Driven Transactions
  - Expand current portfolio of technology
  - Divest of Products facing obsolescence

- Transactions to increase production in North America
  - No Change in CIFIUS Reviews

- Regulatory Changes
  - Costs of Compliance
  - Potential increase in capital gains tax
The Pandemic’s Impact on 2021

Lingering impact of the Pandemic

- Suppliers artificially supported through PPP
- Pandemic status in Q4
Supply Chain

Impact on M&A Activity on Supply Chain

• Potential for supply chain savings drives M&A
• Work with transaction team as early as possible to identify savings and increased profitability
• Assignments; planning ahead
Parting Thoughts

The Automotive Industry is Rapidly Changing. Don’t let it leave you in the dust.
Thank you!

Linda Paullin-Hebden | lpaullin-hebden@wnj.com | 248.784.5159
IP Contracting Best Practices

Vito Ciaravino
February 3, 2021
Overview

- IP Ownership
- Collaboration Agreements
  - Private Industry
  - University and Government
- Collaboration w/out an Agreement
- Trade Secret Considerations
- Best Practices
- Case Study
IP Ownership

- Utility Patents
  - 20 Year Term
- Design Patents
  - 15 Year Term
- Trade Secrets
  - Not limited to a specific term
IP Ownership

• Inventor initially assumed to own
• Assignment to employer
• Hired to invent doctrine
• Shop rights
Inventorship equals ownership until, or if, assignment occurs.

In general, an employee who is hired for the purpose of invention, who succeeds in accomplishing the task, is bound to assign all rights in the invention to the employer.
Collaboration Agreements

• Choose a strategic framework
  • Joint Development – building new IP together
  • Joint Venture – pooling resources for a specific task

• Carefully Define the Intellectual Property
  • Background IP
  • Foreground IP
    – Joint IP

• Manage IP based on sharing of risks / rewards
  • Procurement, Maintenance, and Enforcement

• Identify an exit strategy
Collaboration Agreements

- A joint owner can commercialize jointly owned technology without sharing royalties.
- A joint owner can license jointly owned technology without sharing royalties.
- Absent specific agreement or assignment obligations, joint ownership is the default for joint invention.
- This is sometimes contrary to the intent of at least one of the parties to a collaboration agreement.
- Most foreign counties require more accountability to the joint owner, some requiring agreement before exploiting the invention.
Collaboration Agreements

• Universities
  • When working with professors and graduate students, ownership of the invention may rest with the university pursuant to its patent policies
  • Careful identification of the correct inventorship and obtaining written assignments is especially important in the University setting
Collaboration Agreements

• Government
  • Prior to 1980, inventions made with federal funds were owned by the government
  • The Bayh-Dole Act allows recipients of federal funds to elect title to the invention, but conveys to the government an irrevocable nonexclusive license to the invention
  • The funding agency retains “march-in rights” to grant licenses to the technology if strict requirements are not complied with
Collaboration w/out an Agreement

“[I]n the absence of any agreement to the contrary, each owner may make, use, offer to sell, or sell the patented invention within the United States, or import the patented invention into the United States without the consent of and without accounting to the other owners.” 35 U.S.C. 262
Collaborating with Trade Secrets

To protect a trade secret, one must take “efforts that are reasonable under the circumstances to maintain its secrecy” as stated in the Michigan Uniform Trade Secrets Act.

This generally means imposing confidentiality restrictions on contractors (and employees) who have access to those trade secrets and requiring the return of all company materials (having proprietary information) upon termination of collaboration.
Best Practices

- Obtain an NDA to jumpstart discussions
- Carve the inventive contributions into separate patent applications to limit the overlap of claim ownership
  - Joint ownership of one claim will be joint ownership of the entire patent. *Ethicon v. US Surgical Corp.* (Fed. Cir. 1998)
- Determine if the others really are inventors; if not, do not include as inventors
- Assign joint inventions to an entity managed by members of Company A and Company B
Case Study

• Supplier enters into a Collaboration Agreement with an OEM to develop advance composite materials

• Recognizing the pitfalls of joint ownership, ownership of new IP is distinguished by field of use
  • Supplier owns new patents relating to manufacturing method
  • OEM owns new patents relating to automotive applications

• Because the Supplier owns new IP relating to the manufacturing method, isn’t this a good deal?
Case Study (continued)

• If the advanced materials have limited marketability in non-automotive applications, owning new IP relating to manufacturing materials means very little

• Alternative approaches?
  • Licenses, carve-outs, or simply joint ownership
Thank you!

Vito Ciaravino | vciaravino@wnj.com | 248.784.5179
Questions?
Thank you for attending