

March 25, 2020

PRACTICAL SOLUTIONS FOR RESOLVING COMMERCIAL DISPUTES WHEN THE COURTHOUSE IS CLOSED

To Our Clients and Friends:

When negotiating a commercial contract, forum selection is often the least disputed issue. But given the daily expansion of COVID-19 court closures, now is the time to assess forum selection clauses in key contracts, *before* litigating a dispute in the chosen forum becomes indefinitely and prejudicially delayed.

For the first time since the Spanish influenza, Americans are being asked to stay home and non-essential businesses are being shuttered. Even essential businesses are losing staff, suppliers, vendors, and clients, and many of their key commercial relationships and contracts are in danger. In the face of this unprecedented epidemic, courts in a number of jurisdictions, including New York, have taken affirmative steps to restrict access to the courts to try to focus judicial resources on matters they deem “essential.” With COVID-19 still increasing in magnitude and severity, court closures may only increase and, at this point, are indeterminate.

The following are practical solutions that Gibson Dunn attorneys may be able to help you negotiate with contractual counterparties:

- **Tolling Agreement.** Parties with potential legal claims can enter voluntary tolling agreements to avoid claims being time-barred. Some states, including New York, have issued executive orders suspending the statute of limitations under the procedural laws of the state and extending the deadline for the commencement, filing or service of any legal action, notice, or other process or proceeding until April 19, 2020. *See* Executive Order 202.8.
- **Expand Jurisdiction for Certain Remedies.** Where equitable remedies, including immediate injunctive relief, are unavailable due to court closures in the chosen forum, such relief could be sought from any court that has sufficient contacts with the parties for that court to exercise personal jurisdiction over them. However, this option raises a number of other issues that you should discuss with your counsel, including the challenges created by travel restrictions.
- **Add An Arbitration Option.** For certain types of time-sensitive, commercial disputes, consider amending the forum selection provision to allow for resolution by arbitration for so long as the applicable jurisdiction is closed to non-essential disputes. Although not all types of disputes may be right for arbitration, for those that are, this option is designed to allow for the immediate adjudication of urgent disputes. Before you agree to arbitration in lieu of litigation, be sure to consider any specific requirements (e.g., insurance or lender requirements) that may restrict the forums available to resolve disputes.

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The boilerplate template provision below may be helpful to you as you consider whether to provide for an alternative forum during the COVID-19 pandemic, and Gibson Dunn attorneys may be able to assist you in crafting a fallback forum selection provision tailored to your specific needs. Because all contracts are different, you should ensure that you carefully review the components of any forum selection provision to ensure that, among other things, it adequately addresses the scope of the issues to be arbitrated:

In light of the current COVID-19 pandemic, for so long as a state of emergency shall have been declared by, and remain in effect in, the state of the litigation forum, each of the parties irrevocably agrees that any legal action or proceeding [arising out of or relating to this Agreement or arising under this Agreement or involving enumerated items] shall be settled by binding arbitration administered by [insert arbitration institution] under its [insert rules] in effect as of the date [hereof or then-in effect], and judgment on the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. [Insert arbitrator selection mechanism; otherwise default arbitration rules will apply.] Either party may apply to the arbitrator(s) seeking any equitable relief, and the arbitrator(s) is/are empowered to award any and all equitable relief, including preliminary or permanent injunctive relief. Any legal action or proceeding that is initiated pursuant to this provision shall remain in binding arbitration until final resolution.

The following are some non-exhaustive, key points to consider when drafting your fallback forum selection clause:

1. **Scope of Arbitration Clause:** Be clear on your intent. Consider specifying that the scope of the arbitration clause applies to all disputes “relating to” the contract. If that not your intent, however, you may wish to limit arbitrability to disagreements “arising under” the contract or to a range of specific types of disputes. Not all disputes may be right for arbitration, so before you incorporate any fallback arbitration provision in your agreement, you should decide that the nature of your potential dispute is well-suited for resolution by arbitration.
2. **Governing Rules and Procedures:** Select a complete set of arbitral rules and procedures to govern the arbitration. This eliminates the need to spell out procedural matters in the agreement. If you prefer that all arbitrators be located in a specific jurisdiction, that should be noted in the arbitration clause. Consider the rules and procedures you select, including access to discovery and what types of documentary proof (and how much) you need, before agreeing to any set of rules for discovery in connection with an arbitration.
3. **Availability of Mediation:** Consider whether you want to select rules that provide for a mediation option or whether you wish to incorporate mediation as part of a staged dispute resolution process.
4. **Time Limit on Arbitration Option:** If the addition of arbitration is only to address the exigent circumstances of court closures caused by COVID-19, set a time limit on the applicability of the arbitration clause that is tied to the re-opening of court access.

5. **Provision for Equitable Remedies:** Consider including a provision allowing for the provision of equitable relief, like injunctions. Consider whether the arbitration rules selected contain an emergency arbitrator provision that would enable you to seek this relief on an expedited basis. Not all arbitrators will issue injunctive relief.
6. **Enforcement:** Consider including a provision for enforcement of the arbitral award. If you desire for the arbitration determination to be final, binding, and enforceable, consider including an “entry of judgment” provision that will allow the arbitration award to be enforced in any court having jurisdiction, once the courts are open. If timing of confirmation is of concern, the parties may be able to agree that the order will be deemed final and non-appealable and will treat it as deemed confirmed as of the date of entry by the arbitrator/panel.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

*Gibson Dunn regularly counsels clients on issues raised by this pandemic in the commercial context. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Litigation, Real Estate, or Transactional** groups, or the authors:*

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