

Emergency Corporate Governance . . . Continued

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Corporate Governance and Business Transactions

Fourth in a Series

You are crazy busy right now, getting slammed from all directions in this Great Season of COVID-19. So, we'll keep this short and sweet, all in our continuing quest for Good Governance, *i.e.*, making wise, efficient decisions over our limited resources. Here we take a peek at two issues now popping up around the circle.

State Emergency Corporation Law Update. Last time, we summarized how state law and company bylaws can streamline corporation action during a State of Emergency if your company needs to make a swift transactional or existential decision requiring the board of directors to convene and take action. We noted that technology has made “meeting attendance” easier to accomplish through telephone or video conferencing, implying that the corporate emergency laws may not be as necessary as they were before the tech age.

But, on two separate occasions in the last ten days:

- (a) One company president tried to telephone counsel in another state, only to find the mobile networks in one East coast zone overloaded for voice calls. He resorted to texting “please call me.” Fortunately, the text got through and the call was joined.
- (b) Another company’s senior officers assembled a four-way call with counsel, involving VOIP and mobile networks. They experienced severe disruptions throughout the call, difficulty understanding one another, and often asking the speaker to repeat a comment several times, *etc.* Without plenty of patience and perseverance, they easily could have misunderstood one another on some key point.

Take-away? Don't overlook those corporate emergency statutes and bylaws, just because you expect to convene the board or executive committee by electronic device. Catastrophic events feature at least some sporadic degradation of transmission systems. So, you may need to consider using "belt and suspenders," and supplement your electronic meeting plan with the meeting/action streamlining available under the Emergency provisions of your state corporation law and/or bylaws. Why take a chance if the decision is crucial?

Force Majeure. If you have not yet read Ed O'Toole's superbly targeted piece on *force majeure* in contracts during a State of Emergency, do so now at <https://tinyurl.com/ucvd3mf>, then come back. (Pause in the action) OK, ready? By now you're either pounding your fist on a desk or slamming your head against a wall as to why that last contract you worked on either left *force majeure* unaddressed or missed some points you wish were there. Do not despair... yet.

Other theories of contract law may provide important decision points to discuss with your team and then with your counterparty. Examples of these include "Supervening Events," "Impossibility," "Impracticability," and "Frustration of Purpose." Ask your counsel to burn a few *Lexis* research bucks (in Ohio, it always comes back to "the Bucks"): <https://advance.lexis.com>. Just be prepared to discuss those typically exasperating questions you pay your dear counsel to consider, such as:

- (a) Did the event giving rise to your inability to perform occur through no fault of either party? Unless your company is in the food export business based in Wuhan, there should be no problem there.
- (b) Was nonoccurrence of the event a basic assumption of the parties at the time of contracting? Given the number of other pandemic scares over the last twenty years, this one might be a bit dicey. "*Should we have expected or foreseen this?*"
- (c) Was the risk of nonoccurrence not otherwise allocated to one of the parties either by the contract language or by operation of law?
- (d) Does the event render performance either impossible, impractical, or contrary to the purpose of the agreement?

Such analysis may not vaporize the problem, but it might improve the negotiation toolkit. And it could trigger a few moments of sadistic joy as you force your esteemed

counsel to return to those haunted memories of Contracts Class. More importantly, such focused pondering may avoid fracturing your hand on that desk or concussing the noggin to the point you wish you'd pursued tackle football... with or without a helmet.

Yours for Better Governance

(Wash those paws!)

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