

An Introduction to Liability Risks in U.S. Contracts for Eastern European Companies

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Presented by:
Melissa Subjeck & László Bóné

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Today's Speakers

- **Melissa Subjeck**
 - Partner in Litigation Group at Hodgson Russ LLP
 - msubjeck@hodgsonruss.com

- **László Bóné**
 - Managing Partner at Bóné Law Firm
 - bonel@boneiroda.hu



Hodgson Russ

- Almost 200 attorneys in eight offices in U.S. and Canada
- Helped companies and entrepreneurs expand into the U.S. for over two centuries
- Represent Fortune 500 corporations, universities, SMEs, individuals, and emerging companies from around the world (including Hungary, Czech Republic, and many other European countries)



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- Bankruptcy and international creditors' issues
- Business formation, structuring, and expansion
- Capital market transactions
- Contracts, securities, and other corporate matters
- Data privacy and cybersecurity
- Employee benefits
- Estates and trusts
- Executive compensation and relocation
- Export administration regulations
- Financing transactions
- Franchise and distribution
- FTC and fair trade practices compliance
- Government contracts and relations
- Immigration
- Intellectual property
- Labor and employment
- Litigation
- Multinational mergers and acquisitions
- Products liability
- Proposition 65 compliance
- Regulatory approvals
- Structuring for acquisition of U.S. commercial and residential real estate
- Taxation (international, federal, state, and local as well as dispute resolution)
- Technology transfers and joint ventures
- Venture capital and project financing



Bóné Law Firm

- 20 years' experience in various areas of corporate law, especially in mergers and acquisitions (M&A)
- Working on transactions up to €190M including sale of a Hungarian company to a NASDAQ-listed company
- Representing US and European companies and individuals in Hungary
- Providing high level legal services in the Hungarian, English and German languages
- Strong focus on startups

Agenda

- Litigation in the United States
- Drafting a Better Contract
- Pandemic Related Issues with Commercial Contracts

LITIGATION IN THE UNITED STATES

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COURT STRUCTURE

- **Federal Courts: Limited Jurisdiction**
 - United States is a Party
 - Federal Question
 - Diversity Jurisdiction
- **State Courts: Broad Jurisdiction**

INITIAL PLEADING: THE COMPLAINT

- **The Complaint: Initiates the lawsuit**
- **The aggrieved party (the “Plaintiff”) files the Complaint against another party allegedly responsible for the injury (the “Defendant”)**
- **The Complaint must give notice of the underlying factual allegations and claims**
- **The Complaint and a summons must be served on the Defendant**

INITIAL PLEADING: THE ANSWER

- **The Answer: The Defendant's response to the Complaint**
- **The Defendant will admit or deny the factual allegations in the Complaint**
- **The Answer sets forth the Defendant's defenses to the claims and any claims against the Plaintiff**
- **The Defendant may file a motion to dismiss requesting that the court throw out the case**

DISCOVERY

Discovery: The process of exchanging information about a case

Scope of Discovery: Courts in the United States favor broad discovery

DISCOVERY

- **Demands for Production of Documents:**

Includes paper and electronic documents

- Examples: E-mails, agreements, draft documents, personal notes, text messages, voicemails

- **Interrogatories: Written questions**

- **Depositions: Questioning of a witness under oath**

- **Requests for Admissions**

- **Expert Discovery**

MOTION PRACTICE

- **A party may file a motion for summary judgment against any or all claims and defenses**
- **The motion seeks a determination by the court as to whether there is a genuine dispute as to any material fact that requires a trial**

TRIAL

- **Opening statement**
- **Plaintiff's case in chief**
- **Defendant's case in chief**
- **Closing statements**

ALTERNATIVE DISPUTE RESOLUTION

- **Arbitration**
 - **Trial-like proceeding**
 - **Binding Decision**
- **Mediation**
 - **Negotiation facilitated by a neutral third party**
 - **Not binding**

COSTS OF LITIGATION

- **The “American Rule”:** Litigants are generally responsible for their own legal fees
- **Exceptions:** By statute or contract



DRAFTING A BETTER CONTRACT

PROVISIONS TO CONSIDER

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FREEDOM OF CONTRACT

AGREEMENTS ARE GENERALLY ENFORCED ACCORDING TO THEIR PLAIN LANGUAGE PURSUANT TO THE STRONG PUBLIC POLICY FAVORING FREEDOM OF CONTRACT

WHAT TO INCLUDE

- **Limitation on Liability**
- **Choice of Law/Jurisdiction/Venue**
- **Alternative Dispute Resolution**
- **Opportunity to Cure Provisions**
- **Attorneys' Fees Provision**

ENFORCING LIMITATION ON LIABILITY

- Limitation on Liability
 - Limits the conditions under which the disclaiming party may be held liable for loss
 - Limits the damages to which a company is exposed
 - Contractual provisions absolving a party from its own negligence generally are enforced

CHOICE OF LAW & JURISDICTION

Where will you litigate?

- Impact on rights afforded to you
- Costs and complexity
- Timeline of litigation

Alternative Dispute Resolution

- **Consider Alternative Dispute Resolution**
 - Risk of having a jury decide
 - Fewer procedural safeguards
 - Consider distinguishing between fees and liability
- **Consider Cure Provision**
 - Notice of breach
 - Opportunity to cure prior to costly litigation

PANDEMIC RELATED ISSUES WITH COMMERCIAL CONTRACTS

Cancellation, Force Majeure, and Liability Risks

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Introduction

- Efforts to control the spread of COVID-19 have created significant uncertainty for businesses
 - Renders certain agreements and transactions impossible to perform
 - Inability to make payments

Introduction

What happens when companies are facing situations where performance under an agreement has been rendered difficult or not economically reasonable?

- Negotiation as a first step
- Contract defenses if negotiations fail

Do I still have to supply?

- Difficult or economically unreasonable to perform?
- Gating question: do you have a written contract?
 - If yes, the prime consideration are the terms of the contract, not the parties' past practice. In the written contract, consider:
 - Supply obligation?
 - Termination rights (whole or partial)?
 - Suspension rights?
 - Limitations of damages and liability?

Force Majeure Clauses

What is a force majeure clause?

- Force Majeure: A great / superior force
- May excuse a party from fulfilling its contractual obligations where prevented by an ***unforeseeable*** event.

Force Majeure Clauses

When does it apply?

- Narrowly interpreted
- Clause **must** include that specific event that is claimed to have prevented performance
 - “epidemic”
 - “pandemic”
 - “government order”
- Evidence that contract obligations cannot be performed
- Notice Provision

Force Majeure Clauses

What exactly is excused?

- Depends on the Agreement
 - Obligation to Perform
 - Obligation to Pay
- Both parties are excused
 - Otherwise, windfall to one party

Other Contractual Defenses

What if I don't have a force majeure clause?

What happens if my force majeure clause doesn't cover this?

- Doctrine of Impossibility
- Doctrine of Impracticability
- Frustration of Purpose

Impossibility and Impracticability

- Common law doctrines that may excuse a party's failure to perform
- Generally apply if:
 - an unexpected event occurred
 - the agreement did not assume the event would occur
 - event has made the subject matter of the contract or means of performance objectively impossible or impracticable

Impossibility and Impracticability

Governmental Order barring action are normally grounds for an impossibility defense

- But only if no fault by the non-performing party contributing to the order

Fact must be extreme

- General financial inability is generally not enough
 - Including bankruptcy and insolvency

Frustration of Purpose

- Both parties **can** perform, **but** the transaction no longer makes sense
- One party's performance is virtually worthless to the other
- Must be a result of unforeseen events

Isn't there Insurance for this?

- Most businesses have some form of insurance available
- Coverage generically referred to as business interruption insurance – included in commercial property policy
- Coverage for lost income may cover loss resulting from:
 - Damage to the policyholder's own property
 - Damage to the property of a customer or supplier or a supplier's supplier
 - Government action such as evacuation orders
 - Damage to properties that attract customer's to the policyholder's business

Action item: Review your insurance policies immediately to determine if you have coverage – call your broker or attorney with any questions!

Questions?

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