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Ripple Effect: Crisis in Japan creates work for local law firms

By Jim Stickford

Legal News

The recent disasters in Japan have created legal problems for businesses in Detroit.

William Kohler, a member of the Clark Hill law firm, said that one problem faced by companies that depend on parts from Japan is the fact that what happened wasn't just one calamity, but rather a series of events -- an earthquake, a tsunami and a nuclear crisis.

"This is an unfolding story," Kohler said. "We're getting new information every day that changes the situation. The key question is whether a parts shortage will impair vehicle production here in the United States. The Japanese are trying to sort through what remains and what has been eliminated through natural disaster and what industry can be brought back quickly."

Certain legal issues will arise from the parts shortage, Kohler said. As far as Kohler knows, while several Detroit law firms have offices in other countries, none of them have offices in Japan. Rather they work with international partners based in Japan.

The first legal question that law firms will probably have to face is whether force majeure is an excuse under these circumstances for failure to supply parts already under contract. Force majeure literally means "greater force." These clauses excuse a party from liability if some unforeseen event (i.e. an "Act of God") beyond the control of that party prevents it from performing its obligations under the contract, according to Kohler.

"It's whether a supplier who is unable to supply parts is liable," Kohler said of the force majeure principal. "This determination would lead to arguments between suppliers and customers. If they were unable to resolve this question, they might have to go to court or arbitration, depending on what their contracts stated. When that might happen, I can't say; all this has happened so recently."

Radiation from the nuclear reactor leak in Fukushima, Japan, seems to be the biggest concern right now, said Tricia Sherick, a partner in the commercial law, bankruptcies

and reorganization group at Honigman Miller Schwartz and Cohn.

"Clients have their concerns," Sherick said. "They have been asking for statements to confirm that the parts they have purchased are not radioactive. These clients have been receiving requests from other parties to make a representation or warranty about the condition of the products produced with parts from Japan, i.e. that they aren't radioactive."

Sherick said her firm has clients that also are concerned about the possibility of a parts shortage. Part of the problem is that the first tier auto parts suppliers in Japan might not have been directly affected by the earthquake and its aftermath, but their suppliers have been. As a result, even though their facilities are operational, they can't get the components they need to produce the auto parts for the U.S. market.

Sherick said a lot of these manufacturers down the supply chain are located in the region most affected by the quake and the reactor leak.

"Manufacturers in Detroit and the U.S. seeking legal redress will have to look at what their contracts say," Sherick said. "Does the contract have a force majeure clause? If so, what exactly does that clause state? Does it have a choice of law provision stating where the law will apply either in the U.S. or Japan. A lot of these contracts set it up by location of buyer, which means Michigan law. We could have lawsuits heard in Michigan court resulting from a natural disaster that happened halfway around the world."

Sherick said that arbitration clauses are not standard in ordinary course purchase orders, but tend to be more common in commercially complex contracts.

"This is a difficult situation," Sherick said. "What will happen depends on the terms of the contract. The companies that are affected will have to go through a process of looking at the situation. Are there limitations for force majeure -- can it go on forever? How long do manufacturers have, under their contract, before they can look elsewhere for supplies? What is your company's ability to seek alternate suppliers? That's where I see potential sticky legal issues."

Frederick Acomb, a principal and chair of the international dispute resolution section, litigation department at Miller Canfield, said in cases where contracts call for arbitration, the agreements usually specify where the case will be heard and what international body will hear the case.

"If the parties themselves can reach an agreement, it's usually in the best interest of both sides to do so," Acomb said. "It saves lawyer fees, it saves time, and it preserves goodwill. They may want to do business in the future and avoiding arbitration makes that a lot easier. But it's very possible that American lawyers will have to go arbitration for their clients despite any efforts to preserve goodwill."

Bruce Birgbauer, an attorney with Miller Canfield, said he's been in contact with a client based in Japan and was told the client didn't suffer much damage because their facilities are outside the affected region. They also have facilities in China and Vietnam that can help with their production requirements.

Despite the good news, the client was still asking for advice on customer notification and declaring force majeure.

Birgbauer said the disaster in Japan could have all sorts of unforeseen consequences. For example, Japanese companies with production facilities in the United States might ramp up parts production here to fill the supply vacuum in Japan.

Additionally, the problems with the Fukushima nuclear reactor in Japan could result in increased inspections of nuclear plants here. Over the years, Miller Canfield has been involved in nuclear power plant construction litigation.

"And there is the possibility that lawsuits could result from radioactive fallout," Birgbauer said. "We don't know what's going to happen, but we're already beginning to see some of the results. There's a lot going on that will keep a lot of people busy."

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