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### Force majeure provisions in light of COVID-19

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By Karen Kroll

With the COVID-19 pandemic prompting myriad business closures, many suppliers and their customers are reviewing the force majeure provisions within their supply chain contracts. Force majeure, which translates to “superior force,” recognizes that an event that’s outside anyone’s control and unavoidable—such as a natural disaster—can make it impossible for a party to fulfill its obligations under a contract. Perhaps not surprisingly, the clause is sometimes called an “act of God” provision.

According to a recent [article](#) in *The National Law Review*, written by attorneys with Greenberg Traurig LLP,<sup>[1]</sup> “a force majeure clause is a contract provision that excuses a party’s performance of its obligations under a contract when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.”

While not all contracts between suppliers and their customers include these provisions, they “are common enough to warrant the attention of every prudent supplier’s or customer’s lawyer,” said Peter Biagetti, attorney with Mintz in Boston, Massachusetts, USA.

### No single template

The analysis of force majeure provisions will be complicated by the fact that they tend to vary from one contract to another, said Christy Hull Eikhoff, attorney and co-chair of the Industrials & Manufacturing litigation team with Alston & Bird in Atlanta, Georgia, USA. “There are no typical grounds to invoke force majeure, as force majeure provisions—by their very nature—address atypical events and circumstances,” Biagetti said.

“The operation of the force majeure clause is going to depend on the actual language,” Eikhoff added. Some includes a “closed” list of triggers, such as hurricanes, tornadoes and other weather events, as well as civil unrest and riots. Some state an epidemic is one reason to invoke force majeure. These provisions will “go a long way to being applicable under current circumstances,” he noted.

Government orders or acts of authorities are sometimes listed as force majeure triggers, Eikhoff said. These also may be relevant with the coronavirus pandemic, given that government entities across the globe ordered some businesses to stop operations. Affected businesses may credibly argue this made it impossible for them to meet the obligations of their contracts.

Other force majeure provisions are open-ended. They may say something like, “acts of God and other events outside the control of the parties that affect their ability to perform.” The challenge? “When you go to case law, ‘act of God’ isn’t very well defined,” Eikhoff said.

### Adding complexity

Making things more complicated, contract law matters in the U.S. are governed by state law, as this [FAQ](#) from the law firm of McDermott Will & Emery notes:<sup>[2]</sup> “Therefore, the ability to claim force majeure depends upon the

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existence of an express force majeure provision in the contract, and the scope of relief offered under applicable state law.”

Moreover, force majeure provisions aren’t transferable, Eikhoff noted. Say company A relies on a supplier for critical parts. The supplier says it can’t meet the contract because of the pandemic and invokes force majeure. Company A then is unable to provide its goods to company B. However, company A can’t automatically claim force majeure if its contract with company B lacks such a provision. “Pay attention to all downstream contracts so you understand how one can break down the contractual chain,” she advised.

## **Force majeure and insurance**

Insurance and force majeure provisions often are interrelated. “There’s a dynamic between the two,” said Michael Gehrt, partner with Pasich LLP in Manhattan Beach, California, USA. Both are methods for allocating risk. A force majeure provision allocates it between parties to a contract, while insurance allocates it between the insured and the insurer.

For instance, a supplier may identify the COVID-19 pandemic in making a business interruption claim to its insurer; however, the insurer could argue the supplier should instead exercise its force majeure provision.

Companies can purchase insurance that protects them in case a supplier invokes the force majeure clause. While not all that common domestically, this is sometimes seen in political risk policies that identify actions by foreign governments, such as forced factory shutdowns, that would impair companies’ ability to perform, Gehrt said.

The key? Review all insurance policies, along with all supplier contracts, Gehrt said. “Make sure you’re maximizing the value of these assets.”

## **No force majeure provision**

What’s likely to happen if a contract doesn’t include a force majeure provision? “There may still be other relevant provisions that affect the parties’ contractual rights and obligations,” said Biagetti. “State common law and the Uniform Commercial Code (UCC) may also be available to excuse or adjust supply obligations.”

Even without a force majeure provision, a court may excuse nonperformance of a contract if performance has become impossible, said Eikhoff. Some even use the term “act of God.” Of course, this again prompts the question: Does a pandemic qualify as an act of God?

## **Steps to take now**

A first step is to ask legal counsel to review how each contract defines force majeure, and whether and to what extent the definitions would excuse performance, Biagetti said.

Because the pandemic has grown exponentially, all parties will need to be solution-oriented, Eikhoff said. That is, they’ll want to work together to resolve disagreements, rather than immediately turn to legal action. The reason? Along with the limited body of case law interpreting force majeure provisions, the magnitude of the COVID-19 pandemic has forced many courts to limit operations. “The immediate legal relief we tend to take for granted isn’t as readily available,” she noted. “Relying on the courts to resolve this issue is likely to be very time-consuming, expensive and uncertain.”

If a supplier cites force majeure in declaring it can’t fulfill a contract, a company should try to exert its leverage as a customer and work to fulfill even a partial or late order. “Keep pushing to get the supply, because it’s very unlikely you could go to court and get a temporary restraining order to force them to continue to fill the order,”

Eikhoff added.

Another factor in the operation of force majeure provisions is adhering to any conditions that need to be met before a party can invoke it, she said. For instance, the supplier may need to notify its counterparty in writing within a certain number of days and/or provide a plan for correction, among other steps. It's worth checking whether the supplier followed all terms required to invoke the force majeure provision.

## For the future

Along with reviewing current contracts, organizations will want to carefully consider the structure of their supply chain contracts going forward. This includes assessing the force majeure provisions and the potential events that could trigger a force majeure.

## Takeaways

- Some contracts between suppliers and their customers include force majeure—literally, “superior force”—provisions. These can excuse a party’s performance of the contract due to circumstances beyond their control.
- If suppliers invoke force majeure provisions because of the COVID-19 pandemic, companies will want to work with them to capture even partial or late orders. Limited case law and courts operating on shortened schedules because of the pandemic may make it difficult to seek timely legal remedies.

**1** Bryan X. Grimaldi, Michelle D. Gambino, Thomas G. Allen, and Andrew J. Enschedé, “Coronavirus and Force Majeure Contract Clauses,” *The National Law Review*, March 3, 2020, <https://bit.ly/2XrriVe>.

**2** Lisa M. Richman et al., “Force majeure and COVID-19: Frequently asked questions,” March 20, 2020, McDermott Will & Emery, <https://bit.ly/3aXsT9u>.

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