

# PUBLICATION

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## Force Majeure: Evaluating Contractual Supply-Chain Opportunities from a Transactional and Litigation Perspective

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With important developments such as the ongoing COVID-19 pandemic, Russian invasion of Ukraine, and raw material and labor shortages, businesses face a myriad of challenges. Among those challenges are a business's or its supplier's inability to perform contractual obligations in an agreed-upon manner. These challenges may seem purely detrimental, but they present an opportunity for long-term success and cost savings by reassessing contractual obligations. To assess such opportunities appropriately, contractual arrangements should be considered from a transactional as well as litigation perspective.

### 1. Transaction Considerations

Force majeure is a contract law concept intended to temporarily excuse a party's performance for certain unexpected events. Force majeure is generally contract-based, so an agreement will usually identify specific event-excusing performance, e.g., acts of God, war, and governmental orders. If stipulated conditions are ambiguous, such as anything outside the control of a party, disagreements can arise concerning the covered scope of an excuse from performance obligations.

Further, defining remedies are commonly as critical as covered force majeure events. As an example, a party may not be able to terminate an arrangement or unilaterally change terms, such as an extension of delivery times or increase in prices, unless that is set forth in an agreement.

In addition, parties are usually required to mitigate the effects of a force majeure event. No set requirements for such mitigation exist, so outlining this process – such as taking reasonable actions to locate alternative means of performance or coordinating cost-sharing for increased prices – can be instrumental. Stipulating such matters during contract negotiations may reduce the risk of costly disputes upon occurrence of a force majeure event.

In sum, when negotiating an agreement, parties should leverage the opportunity to carefully craft (a) covered force majeure events, (b) corresponding remedies, and (c) mitigation obligations.

### 2. Litigation Considerations

There are arguments on both sides about whether a breach of contract caused by COVID-19–related issues such as disrupted prices, supply chains, and workforce performance triggers the *force majeure* clause in a contract. The analysis to determine whether such events trigger the clause generally hinges on foreseeability and the language within the agreement.

The non-breaching party often will argue that the world has been dealing with COVID-19 for nearly three years, and businesses must contemplate supply chain issues, price fluctuations, and work-force shortages when contracting for goods and services. Arguing that COVID-19 is an act of God is often not enough. The breaching party must show that it gave adequate notice and sought to provide alternative methods of performance where possible.

Notice regarding force majeure is sometimes required to be provided in writing with receipt acknowledged by the opposing party. Alternative methods of performance could include producing similar conforming goods and, if services are the subject of the agreement, subcontracting to another company that can perform the contractual obligations on the breaching party's behalf.

The uncertainty of these questions can be avoided by including the language best suited for the parties at the time the contract is formed. While the ultimate outcome of litigation related to *force majeure* is entirely fact-specific, we highly recommend that the parties have an attorney help draft the proper contract language that considers all the unknowns.

If you have questions about preparing your contracts with appropriate force majeure clauses, please reach out to [Felix Faerber](#) or another member of our Corporate Group. In addition, if you are in a dispute involving an existing force majeure clause, please reach out to [Rodney Dillard](#) or another member of Baker Donelson's Business Litigation Group.