



ALERTS

Force Majeure: Navigating Coronavirus Supply Chain Disruptions

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The recent outbreak of the coronavirus (COVID-19) and the associated safety measures being implemented by governments and companies alike, while necessary, are having a devastating impact on the global economy. Travel bans, lockdowns and quarantines have crippled supply chain operations around the world.

Understanding contractual obligations is essential to navigating supply chain interruptions and mitigating losses. This is where the often-ignored force majeure becomes critically important.

Force majeure clauses, which are frequently regarded as inconsequential boilerplate language, identify circumstances or events beyond the parties' control, the occurrence of which could render performance of a contract impossible. When those unforeseeable events occur, force majeure clauses call for suspending, deferring or releasing a party, without liability, from the duty to perform its obligations under the contract. Circumstances and events frequently defined as a force majeure event include war, riots, famine, "acts of God" (e.g., extreme weather events, floods, etc.), strikes, civil uproar and, less frequently, epidemics and/or quarantine.

Force Majeure Analysis

Whether a force majeure event exists must be determined under the terms of the contract. When analyzing a force majeure clause, as either the buyer or supplier, you must determine: 1) what events constitute a force majeure event under the contract, 2) should a qualifying event occur, does the provision totally relieve a party of an obligation to perform a contractual obligation or merely suspend or delay of performance until

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Tiffany D. Presley

Partner
Indianapolis

P 317-231-7756
F 317-231-7433
Tiffany.Presley@btlaw.com



Mari Yamamoto Regnier

Partner
Chicago

P 312-214-8335
F 312-759-5646
mari.regnier@btlaw.com



Chihiro Maeda

Of Counsel
Chicago

P 312-214-2107
F 312-759-5646
chihiro.maeda@btlaw.com

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the conclusion of the force majeure event? 3) whether either or both parties are required to mitigate losses, and 4) whether counterparty notice is required and the form of such notice.

In addition, when considering whether you, or the buyer or supplier in question, is unable to perform, you must take into account whether other potential sourcing options and/or transport means are available that would permit you to meet your obligations under the agreement. Generally speaking, when an event has not rendered performance under the agreement impossible, but instead, has simply made performance more expensive, a claim of force majeure may not be viable.

Particularly with respect to larger supply chain operations, when an event occurs that does render performance under the agreement impossible and constitutes a force majeure under your contract, protection under a force majeure provision may not apply to all products and/or facilities in your supply chain, as each product and/or facility may not have been equally impacted by the event. Accordingly, an analysis of whether a force majeure claim can be asserted should be made on a product-by-product or facility-by-facility basis.

Practical Tips

If you have commercial contracts that have or may be affected by the spread of coronavirus, you should consider taking the following additional steps, in addition to reviewing any force majeure clauses:

- Identify which of your products and facilities and that of your Tier 1 and Tier 2 suppliers are in locations affected by the coronavirus
- Develop a company-wide approach for making and responding to force majeure claims
- Explore potential alternative sourcing and shipping options that may allow you meet contractual obligations, even if they are more expensive
- Coordinate sourcing efforts among business units
- Schedule regular meetings with your customers and suppliers to discuss rapidly changing circumstances
- To prepare for future risks, update your form contract force majeure clauses to account for modern risks to performance, such as disease outbreaks, if not already included
- Evaluate insurance coverages and whether your company currently carries business interruption or other relevant insurance
- Maintain detailed records tracking the costs and the scope of interruption to your business

It is also paramount to stay abreast of additional U.S. government restrictions and [World Health Organization situation reports](#).

The full economic impact of the coronavirus is likely to be realized over the next several months, but concerned companies should consider undertaking a review with counsel to help determine whether these challenges qualify for protection and, more generally, their rights and obligations under their commercial contracts, insurance policies and applicable law.

For more information, please contact the Barnes & Thornburg attorney with whom you work, or Tiffany Presley at 317-231-7756 or tiffany.presley@btlaw.com, or Jamal Abdulrasheed at 317-229-3175 or jamal.abdulrasheed@btlaw.com.

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