

SUPPLY CHAIN BEST PRACTICES

In an Era of Extreme Disruptions, Here's When and How to Invoke Force Majeure

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In navigating COVID-19-related disruptions, suppliers should carefully assess any [force majeure](#) clauses in their customer contracts. Force majeure provisions may limit suppliers' liability if they cannot meet supply commitments due to events relating to the COVID-19 outbreak and bolster their bargaining position in client negotiations.

Suppliers need to understand the contractual grounds for invoking force majeure, the requirements for providing notice of a force majeure event and the parties' obligations following an effective force majeure declaration.

Beyond Reasonable Control

Generally, to successfully invoke a force majeure provision, the invoking party must establish that a force majeure event, beyond the parties' reasonable control, rendered performance under the contract impossible. Applicable statutory and decisional law may impose further non-contractual requirements or limitations on parties invoking force majeure. For example, courts generally require parties to take steps to mitigate losses resulting from a force majeure event. In addition, certain courts in the United States require the invoking party to establish that the force majeure event was unforeseeable.

Force majeure provisions typically enumerate the types of occurrences constituting a force majeure event and some courts in the United States tend to construe these categories narrowly. As a result, for a force majeure clause to excuse performance due to circumstances resulting from the COVID-19 outbreak, the contract may need to provide that "epidemics," "pandemics" or similar occurrences constitute a force majeure event.

Alternatively, where performance is constrained by government closures or other public health measures instituted to combat the virus, suppliers may be able to rely on provisions defining force majeure events to include "government prohibitions," "government actions" or other analogous events. It is also possible to make an "Act of God" argument based on historical case law that interprets an individual's illness as an "Act of God," although it is unclear if any court will adopt this rationale in the case of a pandemic.

A force majeure event will generally not excuse performance unless the event rendered performance impossible (rather than simply more difficult or costly) and the invoking party is not at fault for its inability to perform. For example, a government action constituting a force majeure event may not excuse performance where the invoking party's conduct either precipitated the government action or contributed to the party's inability to perform following the event.

As a result, suppliers invoking force majeure should fully document the situation as it evolves. Suppliers should keep detailed records regarding the force majeure event, the effect of the event on the supplier's ability to perform, and all efforts to surmount the obstacle to performance.

Scarce Resources

Suppliers unable to perform fully their obligations under contracts with multiple customers must also develop a strategy to allocate scarce resources. Performing under certain contracts at the expense of others may undercut a claim that a force majeure event rendered performance impossible.

In contrast, allocating supplies to customers on a pro-rata basis risks breaching each of the partially performed contracts. Many U.S. states follow a “reasonableness and fairness” test, requiring underperforming suppliers to allocate goods and services in an objectively reasonable and fair manner. Accordingly, suppliers unable to meet all their commitments should develop and document criteria for allocating goods among customers. In such situations, a solution negotiated with all customers is preferable to limit liability and claims later.

When invoking force majeure, parties must carefully comply with any applicable notice requirements under the contract. Deficient notice may not prevent a party from successfully invoking force majeure; however, improper notice will generally constitute a breach of contract. As a result, parties invoking force majeure should document all communications with the counterparty regarding the force majeure event. Evidence of these communications may establish the immateriality of any deficiencies in the force majeure notice.

Suppliers should also closely examine contractual language governing the effect of a successful invocation of force majeure. For example, an effective force majeure declaration may either terminate the agreement or suspend the parties’ obligations for the duration of the force majeure event. Force majeure provisions may also specify the allocation of losses resulting from a force majeure event.

Finally, suppliers that cannot meet contractual obligations due to COVID-19-related disruptions should consider what dispute resolution mechanisms are available. Customer contracts may either require or permit parties to arbitrate or mediate disputes, allowing the parties to seek a confidential resolution.

Suppliers unable to meet obligations to multiple customers may also consider proactively seeking a judicial declaration (if the relevant courts are open) that a force majeure event has occurred and specifying how goods should be allocated among customers.

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