

# PUBLICATION

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## Coronavirus: *Force Majeure* and Managing Your Business Risk, Part 2

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**As discussed in Part I of our commercial contracts series, we addressed the implications of *force majeure* clauses and why the language chosen by the parties and incorporated into their contract is of the utmost importance. The *force majeure* language may be boilerplate in nature and not result in the specificity needed to cover the COVID-19 pandemic, or your contract may have no *force majeure* clause at all, so the limited common law defenses to performance of impracticability or frustration of purpose would likely apply. Given the uncertainties and economic realities businesses are facing, the first step you should take is to reach out to the other party and try to negotiate a path going forward. The other party is likely equally unsettled and concerned about what the future holds. While the language in the contract may or may not be what you would hope had this crisis been predicted, consider how the parties can work together to modify the contract despite its language. Recognizing the challenges faced by all, adopting a voluntary and business-like approach will likely be the most beneficial initial strategy under these unique circumstances.**

Should the parties to the contract agree on how to proceed, seek advice on drafting a modification to the existing contract. Specific issues and assumptions need to be addressed to ensure the modification protects you as much as possible. Managing the risk of moving forward on altered terms is a must, and again, the contractual language is key.

If the parties appear to be at a standstill, each party should consider allowing their outside professional advisors, such as outside counsel, to attempt to negotiate/mediate, since such advisors are typically not as "close" to the dispute. Despite each party's best efforts, if it appears unlikely that the parties can amicably move forward, consider the following questions:

- Does your contract have a requirement to pursue dispute resolution?
- What type of notice requirements may be in play?
- What law governs and where would litigation take place?
- Is there an indemnification provision?
- What is covered?
- Are there liquidated damages set forth in the contract?
- Can the contract be terminated for other reasons that may be applicable?
- Given the current travel restrictions, how will potential litigation and/or arbitration be impacted logistically, and will this impact cost?
- Is there an arbitration provision; is it a sole arbitrator or a panel? This matters as the latter greatly increases the expense.

Additionally, and always important – is there a prevailing party attorney's fee clause? This can make for a wholly different risk analysis. While you may be able to recognize and manage the risk by paying your own attorneys to litigate the issue, what if you lose and must pay the other side's attorney's fees? How would this affect your business going forward? Is the other side collectible should you successfully pursue litigation? We anticipate there will be an increase in the number of bankruptcy filings and reorganizations. Should there be such a filing, there is an automatic stay or halt to all proceedings. Depending on the type of contract, the delay

in resolution could have a significant impact. Instituting litigation can trigger such filings and may be counterproductive.

All of the above are factors that impact a decision on whether litigation is appropriate for a breach of a party's obligations under the contract. There are different approaches and claims that can be made. Baker Donelson has advised clients on all types of business disputes and, where desired by the client, has litigated and tried cases to verdict involving *force majeure* clauses and related contractual issues. We will discuss all options with you, and help you arrive at the best option for your business.

For more information specific to this topic, please visit our [Commercial/Business Litigation page](#) to learn more about our breach of contract experience. Also, please visit the [Coronavirus \(COVID-19\): What you Need to Know information page](#) on our website.

## **Trials**

Trials Baker Donelson has tried a host of *force majeure* cases across a multitude of industries.

- Tried multiple declaratory judgment actions for subcontractors who could not perform work because Hurricane Katrina destroyed/damaged commercial facilities. In some cases, performance was excused and in one, performance was delayed without penalty.
- Tried supply chain and construction cases based on *force majeure* clauses alleging failure to receive goods that were supposed to be delivered and changes in the prices of oil and other products prior to a sale.
- Defended several London Underwriters in regard to claims filed against them when the DB269 capsized during Hurricane Roxanne in the Bay of Campeche. Over 175 claims were filed in Mexico, Houston and New Orleans. The claims necessitated a full trial on the merits wherein Underwriters asserted a *force majeure* defense.

To learn more about Baker Donelson's trial capabilities, visit the Firm's [Trials page](#).

## **Do You Need to Quickly Review Your Commercial Contracts?**

Kira is a market-leading machine learning tool that compliments Baker Donelson's existing skills and services through instantaneous contract review and analysis. Kira quickly and easily finds provisions in contracts – like *force majeure* clauses – which allows our attorneys to spend more time on high value activities and less time on paperwork. Kira users consistently report time savings of 20 – 40 percent for initial implementation and up to 90 percent or more on subsequent uses since it grows smarter over time. For more information on how Kira can help you assist your clients, please contact Jennifer Johnson with the Firm's Client Solutions Group.