

# PUBLICATION

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## Coronavirus: *Force Majeure* and Managing Your Business Risk, Part 3

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Until the recent COVID-19 pandemic, whether you included a *force majeure* clause in a contract, and more specifically, what that language meant, likely drew little attention. You can reference our previous articles on the applicability of *force majeure* amid the COVID-19 pandemic and analyzing your dispute resolution options to provide additional background. For better protection in the future, careful analysis of your specific business, and the types of factors that would cause performance interruption, cancellations or undue delay, must be addressed. A guide is set forth below.

### Guide for Future Contract Negotiation

- Identify the risks involved in your business and negotiate how those risks can be allocated and controlled should they occur. Be specific.
- Are you trying to protect the feasibility of proceeding under the contract? *Force majeure* clauses do not generally cover a situation where it makes the obligation more expensive to perform and nothing else.
- Clearly define your *force majeure* clause, and when identifying specific triggering events make sure they are designated as a non-exhaustive list. Consider if there should be a time limitation on the existence of a *force majeure* event (for example, in a scenario where a government issues a shelter-in-place order, does this shelter-in-place need to be in effect for a certain minimum time frame in order to permit the party(ies) to utilize the *force majeure* clause).
- Make sure your *force majeure* clause includes a catch-all clause to cover other events or circumstances beyond the reasonable control of the party affected. This avoids a dispute over whether an event was "unforeseen" or "foreseeable".
- Identify what happens should one of the triggering events occur, and if they are different, specify the particular remedy for each triggering event. Make sure to consider (i) what will happen to the costs already incurred by either party (including services already provided and/or products already manufactured), and (ii) what will happen to the parties' obligations on a move forward basis.
- Are there alternative methods of performance and do you want to limit those methods?
- Do you want the clause to cover when performance is commercially impracticable, i.e., excessively difficult, expensive, or harmful?
- Describe the types of mitigation that are required in the event of a *force majeure* occurrence.
- What type of notice or condition precedent is needed or desired?
- Where will your venue and jurisdiction be? Specifying your local jurisdiction will likely save the company money and allow counsel of your choice to avoid travel.
- Do you want to include prevailing party attorneys' fees in the event of litigation resulting from the *force majeure* clause?
- Do you want to impose time limitations or other conditions?
- Do you want to require a mediation before litigation can be instituted?

What else would you as the company want to cover under a worst-case scenario? Plan for the worst and hope for the best. Remember, when you are negotiating a contract, no one anticipates it to go poorly. This is the time to be specific and ask for what you want.

### Partnering to Protect Your Business Operations

It is critically important that you become a part of the conversation with your lawyer about the types of unforeseen circumstances that could impact your business, so language can be tailored to address those items unique to your business. Different professions will have different issues, e.g., service and hospitality as compared to construction. Taking the time to analyze the "what ifs" and how those should be addressed in your contracts will have lasting effects.

### Drafting the Contract

When drafting the contract, it is important to recognize that the more specific the language in the *force majeure* clause, the more likely it is that the court will enforce the clause as negotiated between the parties. Courts will narrowly interpret these clauses, which makes the time and effort put into drafting a clause pertinent to your business even more important. One thing is for certain: *force majeure* clauses will likely be forever altered and more heavily negotiated after the world has suffered through the COVID-19 crisis.

For more information specific to this topic, please visit our [Business/Corporate](#) or [Commercial/Business Litigation](#) pages to learn more about our experience in drafting contracts and breach of contracts.

### 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 electronic tool that allows for 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.