



## LEGAL ALERT

April 1, 2020

### Supply Chain Disruptions – Contracts & Creativity

The Covid-19 crisis is taking a toll on supply chains. Evaluating the contractual aspects of your upstream and downstream chain and addressing those aspects creatively are measures you can take now to begin stabilizing your supply chain. Identifying critical contracts with suppliers and customers, understanding provisions in those contracts which may excuse performance, alleviate liability or impose further obligations and then triaging key upstream and downstream relationships are important steps.

First, identify your critical suppliers and customers and locate copies of relevant agreements. Remember that rights and obligations under those contracts are often governed by a handful of standard clauses such as force majeure, representations and warranties and resolution of dispute language. Scanning these provisions in important agreements can give you an overview of exposure.

For example, events beyond a company's control, also known as force majeure events, may prevent performance. Contracts often contain force majeure clauses which address rights and responsibilities in the face of these force majeure events. Look in the "boilerplate" or "Terms and Conditions" sections of the agreement and chances are you'll find the force

majeure clause there. And if it's not there, be aware that force majeure provisions may still apply by statute or court interpretation.

If there is a force majeure clause in your agreements, whether performance is excused depends on the language. The event, "pandemic" or "epidemic" might be specifically listed in the clause or, if not listed, it might be considered an unforeseeable event covered by the clause. The clause may also have limitations such as no excuse for payment obligations and may require formal notice of the force majeure event. It depends on the wording.

Next compare contract terms to your company priorities and triage. Identify your most commercially important relationships and prioritize your efforts and resources to those relationships. And perhaps most importantly, recognize that you've built many relationships over time and engaging with those suppliers and customers without first resorting to legal steps can be critical. During a crisis it can be tough to think long term and of course there are so many immediate issues. But don't lose sight. Consider helping struggling customers by waiving late payment penalties or revising payment terms.

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For suppliers, consider paying ahead to attempt to assure your supplies take priority. Of course, explore alternative suppliers as a backup and prepare to protect your rights in the inevitable insolvency proceedings which may affect your supply chain as we turn to recovery.

Finally, and perhaps most importantly, get creative. Can you leverage your intellectual property by licensing to a company in another region? Perhaps that company could temporarily produce your products while you are unable to do so. Or, if a supplier is down, consider pulling your tooling to your plants and manufacturing your own parts. Or, can you retool to supply emergency materials? Creative solutions are out there. Let us know if we can help from the legal side.

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