

# Force majeure

## Why these contract provisions are drawing new scrutiny

INTERVIEWED BY SUE OSTROWSKI

In the past, force majeure provisions were regularly overlooked in contracts, inserted as a boilerplate without much thought. That all changed with COVID-19, says Kate Cooper, shareholder at Babst Calland.

“With the pandemic, our clients suddenly cared a lot about whether their contracts included a force majeure provision, what it said, what it meant and how it could be interpreted,” says Cooper.

*Smart Business* spoke with Cooper about force majeure provisions and how approaches to them are changing.

### WHAT ARE FORCE MAJEURE PROVISIONS?

Force majeure provisions govern the conduct of both parties if unexpected or unforeseeable events result in a party being unable to deliver on the terms of the contract, with an emphasis on the unforeseeable. They’re designed to cover unexpected events and potentially allow you to delay delivering on a contract. But the provisions are not a get-out-of-jail free card, and in most circumstances, they do not let a party to a contract completely off the hook.

The disruption to the supply chain caused by the pandemic and government shutdowns has drawn renewed attention to these clauses. For example, when suppliers couldn’t deliver to their customers, those disruptions had a knock-on effect down the supply chain. Companies aiming to avoid breaching their contracts were hopeful that their force majeure provisions would provide them with relief. However, many were disappointed to find that what they wanted to do — whether that be delay performance obligations, or even

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**WEBSITE:** For more information about force majeure provisions and how to protect yourself, contact Kate or visit [www.babstcalland.com](http://www.babstcalland.com).

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terminate the contract entirely — wasn’t permitted by the language of the specific provisions set forth in their contracts.

### HOW IS THE CONVERSATION REGARDING FORCE MAJEURE CHANGING?

It will be difficult to argue that the pandemic is an unforeseeable event now that we are a year and a half into COVID-19, meaning that COVID-19 (and pandemics generally) will need to be specifically referenced in the provision in order for it to be enforceable in most jurisdictions. Contracts differ greatly in how they define force majeure, what types of events will trigger the provision and what remedies will be available to the parties, so businesses need to have a clear understanding of the specific language of their provision and its impact if triggered.

Businesses should ensure that they are tailoring their force majeure provisions to their particular circumstances, and they should consider whether it is more appropriate to include specific COVID-19 language outside of the force majeure clause.

When drafting new contracts, make sure you understand the events upon which you, or your counterparty, may wish to delay performance, and define these provisions in a clear way that connects the dots between that triggering event

and the party’s inability to perform its contractual obligations.

Working with an expert legal adviser allows you to draft your contracts on a practical level in order to protect your business interests when these events arise and future disruptions occur. Relevant questions include, ‘How do your operations work? How do you fulfill contracts? What would be an impediment to doing so?’ It may be appropriate to explore options that would permit parties to renegotiate the contract or extend delivery times upon the occurrence of one of these unforeseeable events.

Pre-pandemic, most businesses did not anticipate the importance of force majeure provisions and defining the ‘unforeseeable.’ Now that so many companies have experienced how challenging these issues can be as a result of the COVID-19 pandemic, and how nuanced the interpretation of these force majeure provisions are, business leaders need to focus on crafting the appropriate coverage in their agreements for these risks post-pandemic. Paying close attention to these issues at the time your contract is being negotiated and collaborating with your counterparty on identifying potential issues and how to resolve them can prevent your business from having to absorb the costs of dealing with these issues when they occur, or entering into litigation to resolve them. ●