



Considerations for Aerospace and Defense Companies When Navigating Contractual Rights and Obligations in the Face of COVID-19

As Aerospace and Defense (A&D) companies struggle with the massive disruptions caused by the COVID-19 pandemic and the global efforts to contain and combat it, many companies are facing the question of whether COVID-19 constitutes a force majeure event that allows them or their business partners to stop or suspend contractual performance. We address some of the pandemic-related questions and issues companies are dealing with in the context of agreements with US and foreign government customers, as well as commercial agreements.

- **When do the disruptions caused by COVID-19 rise to the level of a force majeure event?**

In order to determine whether disruptions caused by COVID-19 rise to the level of a force majeure event, companies should first examine the language of the force majeure clauses in their contracts to determine what events are covered, including whether disease/epidemic/pandemic or government actions are listed as qualifying force majeure events and what other "catch-all categories" may be available. It should also be noted that the states vary in their interpretation of force majeure clauses and rights of the parties. New York courts, for example, interpret force majeure clauses narrowly and, even if the contract contains "catch all" language in the force majeure provision, will likely look to see whether the events claimed to constitute force majeure are similar to those listed in the contract clause. Second, the companies should consider whether performance is truly impossible or just impractical, complicated or more costly. Many force majeure provisions in commercial contracts, and many state laws, will require true impossibility before performance is excused.

For US government contracts, an excusable delay clause serves as the equivalent of a force majeure clause. It typically includes quarantine restrictions and epidemics. However, each foreign government will have its own standard force majeure clauses and interpretations. For example, "epidemics" and "supply chain disruption" usually constitute excusable delays in US government contracts, but may or may not be recognized as an excusable delay or force majeure by a particular foreign government customer.

- **What disruptions are A&D companies experiencing as a result of COVID-19?**

A&D companies are currently facing significant disruptions related to travel and transportation, manpower, supply chains, and their commercial operations and relationships generally. With respect to internal operations, A&D companies are instituting remote working procedures for employees not involved in manufacturing operations where remote work is an option. They are also taking measures to protect their workforce involved in manufacturing and other work streams where remote work is not feasible.

Externally, A&D companies are experiencing delays in contract awards because their counterparties are

being cautious about capital expenditures, in addition to being distracted by and focused on the current global health care crisis. They also are experiencing significant supply chain disruptions, with some of their suppliers advising them that they are being shut down or have reduced production. Another complication is the significant escalation of shipping costs. Additionally, some companies are grappling with complications caused by the inability to satisfy some delivery pre-conditions, such as in-person inspection. A&D companies are scrambling to overcome these difficulties; for example, by exploring virtual factory acceptance testing and inspection.

- **What factors go into A&D company's decision to exercise force majeure rights?**

An A&D company's decision to exercise force majeure rights may depend on whether it is the buyer or seller in the transaction, the language of the force majeure clause, and the parties' respective rights and remedies under the contract. Thus far, many A&D companies have been able to work through the challenges caused by COVID-19 with their customers and suppliers. This is due, in part, to concerns about preserving business relationships, and the fact that the situation has not yet reached the point where there is no ability to recover. In the current environment, many A&D companies and their business partners have sought to find practical commercial solutions to resolve issues. As the health crisis deepens, however, and extends in time, some suppliers are beginning to send pre-force majeure warnings to advise A&D companies of the severe difficulties they are experiencing. When a force majeure clause allows for termination of the contract if the force majeure event continues for a defined period of time, such warning letters may become especially significant because a party may argue that the sending of the warning letter commenced that time period.

- **If a supplier sends a force majeure notification, what are a company's rights?**

If an A&D company receives a supplier notification asserting its inability to perform, the company should review carefully the contractual provisions and assess whether performance is truly impossible, as opposed to merely more difficult, delayed, or more expensive. It should be noted that in the absence of contractual force majeure provisions, there may be common law doctrines and alternative theories that a party alleging force majeure can assert, such as the doctrines of impossibility, impracticability, or frustration of purpose. Also, sellers of goods should be mindful of the requirement in Article 2 of the Uniform Commercial Code (UCC Section 2-615) that a seller use a "fair and reasonable" method to allocate scarce resources among its various customers.

- **Are there unique issues faced by defense companies in contracting with the US and foreign governments based on national security or essential services considerations?**

A&D companies and employees are part of the Critical Infrastructure Workforce as defined by the Cybersecurity and Infrastructure Security Agency (CISA) and thus, are encouraged to remain open and operational during the COVID-19 crisis. Their mission is defense and public health and safety. With shelter-in-place orders being issued by many states and municipalities on a daily basis, it may be necessary to issue employee "safe travel" letters certifying their ability to travel for work, and also arm managers with written talking points to provide assurances and guidance to employees in the current emergency. It may be equally important to send letters to suppliers confirming that the A&D company is an essential business and urging the suppliers to stay open to help support the company.

- **If force majeure is unavailable, are there other remedies that companies can seek where their performance has been delayed or made impossible by COVID-19?**

A significant topic of discussion lately is that performance may be painful and difficult and much more expensive, but not truly impossible. Companies may need to build more flexibility into their contracts going forward to escape or modify performance under these circumstances. For example, some A&D companies are now seeking to negotiate clauses that allow them to pass shipping costs onto their customers. Many companies are carefully reviewing the force majeure language in their existing contracts and proposals and updating it whenever possible. When a customer is unable to meet its contractual obligations and seeks relief, A&D companies may use the opportunity to amend the contract to benefit both parties. Thus far, government customers also generally have been cooperative in negotiating potential amendments to contracts where necessary in light of the disruption caused by the pandemic.

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Companies in all industries, including aerospace and defense, are facing severe and ongoing disruptions to their business on a global scale and great uncertainty as to when and how these disruptions will end. Whether these disruptions constitute acts of force majeure requires careful analysis of contractual provisions

in existing agreements and makes the drafting of future proposals and contracts critically important to protect A&D companies both as sellers to the US and foreign governments and commercial customers, as well as buyers dealing with extensive global supply chains. This puts a premium on coordination within companies between the contracts, legal, business development and other departments and on obtaining advice from outside counsel around the world, when needed, to take into consideration the requirements of applicable US and foreign law.

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Coronavirus Resource Center

Baker McKenzie has put together a global resource center for all key insights and upcoming webinars as a central repository to assist our clients understand, prepare and respond quickly to the significant legal and business challenges posed by COVID-19. Please use the following link to visit the [Coronavirus Resource Center](#) for additional resources. Baker McKenzie understands that these times are challenging for all our clients and we want to assure you we are here to assist.

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