



# The Bottom Line

APRIL 2020 | VOL. 32

## UNDERSTANDING FORCE MAJEURE

### Summary

CEVA Logistics is the latest freight operator to declare force majeure, after DHL Global Forwarding did in mid-March. By doing so, these companies have temporarily freed themselves from contractual constraints to realign operations and facilitate pricing flexibility during this time of crisis.

### Background

“Force majeure” means ‘superior force.’ The clause dates back to the late 1800s and acts as a protection when obligations under a contract cannot be met due to forces outside the control of the parties involved. Generally, these clauses include a list of various events or occurrences that may excuse a party’s performance, including acts of God, extreme political or weather events, and labor shortages. These events are often described or defined in contracts as “force majeure events.” They are typically added to contracts to avoid liability for natural and unavoidable catastrophes. With global supply chains rattled by the unforeseen coronavirus pandemic, “force majeure” may become the word du jour among global freight forwarders in the coming weeks as more of these firms seek flexibility with their existing service contracts. The freight transportation industry has invoked temporary force majeure over the years, often during regional incidents of natural disaster or labor disruptions. However, rarely have forwarders taken these measures for their services on a global scale.

### Current Status

Force majeure clauses are very common in a broad range of commercial contracts, including leases, supply and manufacturing contracts, and distribution agreements. Specific force majeure events must be explicitly mentioned in the contract for the clause to be invoked. That creates a gray area for pandemics, epidemics, and quarantines, which are less commonly included.

The coronavirus itself doesn’t have to be the force majeure event—just any demonstrative effects it produces. Instead, it can be the consequences of the pandemic (port shutdowns, delays in various modes of transportation, etc.) that give rise to force majeure claims because they affect a party’s ability to perform its contractual obligations. Even if a party can show COVID-19 or its effects are covered by the clause in question, it still has the task of demonstrating that the risk of non-performance was unforeseeable and could not be mitigated, and that performance is truly impossible rather than merely financially difficult.

The duration of the force majeure generally equals the period in which the disruption occurred. Once the disruption has ceased, the contracted provisions may be restored for the remaining duration of the contract. Contracts typically limit relief for force majeure to an extension of time for performance of non-monetary obligations and/or avoidance of penalties for late performance. Performance is delayed, but not excused, with each party eating its delay costs.

### Impact

The best course of action going forward is for both parties to any contracts be willing to be flexible now and avoid legal proceedings. Before it even gets to that point, compromise is always better than legal action, especially if the parties involved want to do business together again in the future. Open and honest communication with counterparties and their subcontractors will be key to handling the consequences of the pandemic, particularly in complex transactions or supply chains. As parties learn lessons during this crisis, hopefully contracts will get cleaner and clearer for all involved.

### RESOURCES:

[What is ‘Force Majeure?’](#) (Fast Company)

[‘Force Majeure’ Clauses Amid COVID-19](#) (Daily Reporter)

[Big Logistics Firms Invoke ‘Act of God’ Clause](#) (American Shipper)