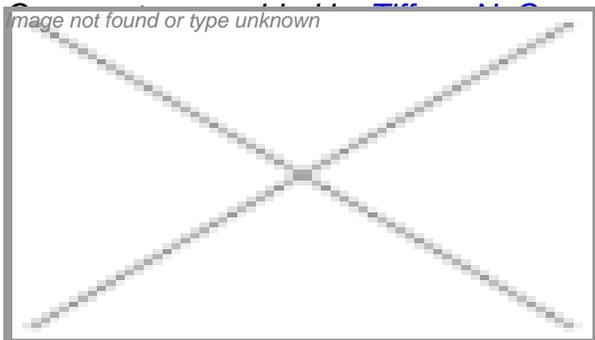


# The Global Supply Chain in the Time of COVID-19

March 19, 2020 04:03 PM



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In 2017, I published an article entitled [“What happens after the unthinkable happens?”](#) — it was about a record-breaking, crop-destroying freeze. Little did we know that COVID-19 would truly bring an unthinkable worldwide crisis to our door.

Many of my clients are struggling with the effects of COVID-19. Sick employees and quarantined/isolated employees mean labor shortages, which is a crisis for packing, picking, and transporting products. Those importing or exporting products are [facing issues getting those items where they need to go](#) in a timely manner. Wholesale orders are down as restaurants, catering companies, and schools close, but up in other areas.

[Consumers are confused about the safety of fresh products](#), although [there is currently no evidence that fresh produce transmits the virus](#). In some places certain products, such as [onions](#), are ten times the normal price. [As fruit prices are soaring in some markets, they are tanking in others](#).

There are [limitations on freight in some countries](#) as well. Companies with workers that travel frequently are also experiencing tumult with country of origin travel bans, delays in adjudication of immigration petitions, and increased scrutiny and entry denials at U.S. ports of entry. [Truckers are having trouble getting reefers](#). They are also being asked where they have been, and to attest that they are not infected. As a result, truckers are wary of going to places that are centers of the outbreak for fear of being denied entry on a later route.

The biggest issues so far are employment concerns and supply chain disruption, with supply chain disruption being an immediate threat to businesses.

Whether your own production is affected due to government shutdown or a reduced workforce, or your suppliers are discontinuing shipments, here are some ways to manage the fallout.

*Force majeure* will likely come into play in the situation, especially in the international supply chain. *Force majeure* means “superior force” in French. The concept is that if there is a challenge that is beyond either party’s control, the affected party will be excused from performing under the contract. For example, if there is a hurricane that destroys all of a supplier’s banana crop, that supplier would be excused from failing to supply its customer. Usually these clauses are found in contracts, but not always. They may limit the challenges to which they apply (for example, labor strikes may not fall under the clause) or the remedies available to the parties, and they may require the party claiming force majeure to jump through several hoops.

If you do not have a contract, some local laws may excuse non-performance if it is impossible to perform. Under international sales law, known as the U.N. Convention on Contracts for the International Sale of Goods (CISG), this is provided in Article 79. In these cases, if there is no contract or if the contract does not include a force majeure clause, the supplier may still be able to invoke this concept.

1. **Identify and document.** The facts are critical both to management for properly managing the situation and for your ability to prove the facts in the event of any legal proceedings, which will be the most significant factor to your success in those proceedings. If your company is directly affected, identify the exact reason you are unable to supply. Are there government-ordered factory shutdowns or quarantines? Are staff sick or staying home out of fear or government-ordered social isolation? Document and obtain as much evidence as you can in real time. This includes, but is not limited to, names of employees out sick and dates for missed work as well as letters or other communications from the government. Before making a force majeure declaration to any buyers, make sure you speak to your attorney first. If your supplier cannot supply you, do not accept a vague invocation of a force majeure clause. Ask for details and do not take a position until you have all the relevant facts and speak to your attorney.
2. **Analyze your contract and the governing law.** Not every contract has a force majeure clause, and not all force majeure clauses are created equal. What is included as a “*force majeure*” will vary from contract to contract and from one legal regime to the next. This is where your attorney will be indispensable – s/he must conduct a careful legal analysis of the language of the clause and governing law, and its application to your exact situation. You should also work with your attorney to develop a risk management strategy.
3. **Notices under force majeure clauses.** Most force majeure provisions require notice to the other party before they can be used as a defense. Sometimes the notice must be given within a specified (typically brief) period. If you are a supplier invoking the force majeure

clause, you may need to give notice before you have had a chance to make the analysis discussed above. Again, your attorney's experience and knowledge will be key in phrasing the notice in a way that will meet the contract requirements to make it effective without boxing you into a situation that could be counter-effective in court. This also extends to any communications that may jeopardize your legal position – whether internal or external. If you are receiving a force majeure notice from your supplier, any response must be carefully worded to protect your legal position. If as a result of your supplier's inability to perform you find you need to send a force majeure notice to your customers, that notice must be phrased in a way that protects your legal position with your supplier in the event of a legal dispute.

4. **Mitigate.** It is imperative that you make every effort to mitigate the damage, whether you are receiving or giving a force majeure notice. This means taking steps to overcome the problem. Many force majeure clauses require the supplier to make such efforts in order to be able to use the force majeure clause. If you are supplying, look for alternative ways to supply your buyer. Document price issues or other difficulties. Most force majeure clauses do not permit suppliers to avoid performance because of a higher cost of supplying alternative goods. Still, you should document your efforts to provide the best alternative. You must also consider how you allocate supplies if you are in a position in which you can only serve some of your customers. This can be challenging and many force majeure clauses and governing laws have requirements on allocation. Supplying your priority customers and declaring force majeure vis-à-vis all other customers may cause unintended legal consequences. If you are receiving a force majeure notice, you must also mitigate the damage as much as possible, even if you consider the notice to be invalid for any reason. Document your efforts to overcome the supply problem even if you are unsuccessful, and document any damages you experience. Also ask your supplier how it is allocating remaining stock.
5. **Manage contract disputes proactively.** This is a two-pronged effort. *First*, engage with your customers and suppliers in a reasonable manner. Cooperate and find solutions together. By doing so, you will increase your chances of resolving the dispute without a drawn-out legal process. *Second*, while you are engaging with your supplier/customer, remember to protect your legal and evidentiary position so that you are prepared if the dispute escalates. Ask your attorney to help you determine what the designated court or tribunal would decide so that you can negotiate based on the likely legal outcome. This will help you decide whether to continue with legal proceedings or settle and, if you decide to settle, what amount reflects your chances of success in legal proceedings.
6. **Ending force majeure.** Force majeure is typically a temporary defense to non-performance, and cannot be used once the challenge is overcome and supplies can be resumed. Most contracts require that the supplier provide regular updates until then. The parties may also be entitled to terminate the contract altogether.
7. **Insurance.** Check on your insurance. You may have a policy or endorsement that allows for business interruption insurance or other kinds of insurance that may be helpful.

Going forward, consider diversifying your suppliers— have several suppliers in different locations. Update your force majeure clauses and your dispute resolution clause. These steps will help you

manage any future disruptions as the world continues to shift.

### **About Tiffany N. Comprés**

[Tiffany N. Comprés](#) is a partner in the Miami office of Shutts & Bowen LLP, where she is a member of the International Arbitration and Litigation practice group. Tiffany is a litigator who represents clients in disputes across multinational borders. She is uniquely qualified to help companies buy and sell goods across borders and resolve international business disputes: she is one of only 34 attorneys in Florida certified as an expert in international law, speaks four languages, and has practiced in Italy, France, and the United States. Tiffany has developed a significant practice in the area of international fresh produce sales and consignment, supply and distribution, and in the oil and gas industry.