



ALERTS

Force Majeure May Not Be Your Only (Or Best) Option

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The COVID-19 pandemic has parties to contracts scrambling to determine their contractual rights and duties. Buyers of goods and services are concerned that sellers will not perform. Sellers and manufacturers are struggling to produce and ship goods contemplated by their agreements, and are concerned with whether buyers will pay for these goods when they are delivered.

[Much has been written concerning force majeure](#). It is important to understand your force majeure clause, but consider the following principle from the Uniform Commercial Code (UCC) Section 2-615, as an alternative to contractual force majeure:

Delay in delivery or non-delivery is not a breach of contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable governmental regulation or order.

While that section may apply in addition to your contract's force majeure provision (or even if you do not have a force majeure provision), there are contract principles upon which you can rely in addition to force majeure.

Article 2 of the Uniform Commercial Code

The UCC has been adopted throughout the United States. Each state tweaks the provisions, though usually not in any material respect. Some version of the UCC will be applicable to almost every contract for the sale of goods. The written agreement or contract between the parties controls

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the terms of the agreement. Frequently, however, the contract does not address every situation, the contract is the result of an exchange of forms, or there is little or no written contract. Various UCC provisions address issues that arise in these situations, and also supplement contract provisions.

Determining the Actual Terms of the Contract

Perhaps the most important provision in [Article 2 of the UCC is Section 2-207](#). This section addresses the common situation when the parties exchange forms in order to form a contract. For instance, the seller submits a form proposal, the buyer submits a form purchase order, and the seller submits a form acknowledgment of the purchase order. Each of these forms include standard terms of sale or purchase. In most cases, the parties ignore these standard terms, and only focus on the terms they deem “material.” These may be the quantity, the price, the date of delivery, the place of delivery, and similar matters.

In general (and simplified), UCC Section 2-207 provides that, under such circumstances, the contract consists of the matters on which the parties agree plus the matters included in one party’s form but not the other, minus matters upon which the forms conflict. You must review the forms submitted by both parties to determine the terms of the relevant contract.

Also, the UCC supplements contracts with terms that are provided within the UCC. For instance, if the date of delivery is not specified, [Section 2-309](#) provides that delivery is due within a “reasonable time.” Therefore, even though the parties discussed delivery on a specific date, if that date is not specified in the agreement, the actual contractual delivery date is one which is reasonable under the circumstances.

Today’s “circumstances” may allow a different date than the date the parties discussed. There are similar UCC provisions about which both parties must be aware. The bottom line is that the terms of your contract may be different than you thought.

Determining Performance

Contractual performance can be measured in a number of ways. The UCC includes provisions that supplement those set forth in the written contract. Importantly, be aware of your rights if you think the other party cannot perform. [UCC Section 2-609](#) allows a party to demand adequate assurances of future performance if the party has a reasonable basis for insecurity. Therefore, a purchaser would have the right to demand that the seller provide the purchaser assurances that the seller will perform if the purchaser has a reasonable basis to suspect that the seller cannot perform.

Similarly, the seller has the right to demand that the purchaser provide assurances of the ability to pay the contract price if the seller has reason to believe that the purchaser cannot pay the contract price. This provision may be particularly useful if one party is unable to perform, and that party has reason to believe that the other party also cannot perform. It is an alternative to simply admitting that you are unable to perform.

Don’t Forget About Damages

Also, consider provisions relating to damages. It may be that breaching the contract will not cost as much as you think. Does your contract exclude consequential damages? If so, you may be able to breach the contract without incurring a substantial loss, as provided for in [UCC Section 2-719](#). On the other hand, there may be an indemnification provision pursuant to which you are responsible for damages third parties suffer that the third-party charges to the other party to your contract. In this case, your losses may be greater than you had anticipated.

It is also worth noting that there is an implied duty of good faith in every contract, as noted in [UCC Section 1-304](#). The duty of good faith and fair dealing is breached when a party to an agreement acts in a manner that, although not expressly forbidden by the contract, deprives the other party of the right to receive its reasonably expected benefits under the agreement. The implied covenant does not provide a party with contractual protections that they failed to secure for themselves. To the contrary, a party asserting breach of the implied duty must demonstrate that the other party acted in an arbitrary, capricious, or unreasonable manner, frustrating the first party's reasonable expected expectations.

This is not a panacea, but it might be something to consider beyond the force majeure provision.

To obtain more information, contact the Barnes & Thornburg attorney with whom you work or Stephen L. Fink at 260-425-4664 or stephen.fink@btlaw.com.

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