



# Hindsight is 2020: Supply Chain Lessons & Solutions

**MANUFACTURING LAW GROUP  
Q2 – 2021 ROUNDTABLE**

Taylor Shea – Moderator  
Kate McGinnes Collins – Panelist  
Jenya Stumacher – Panelist  
Alex Toribio – Panelist

May 26, 2021

## Please Note

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This roundtable is designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

# Preliminary Considerations

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- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

# Panelists

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MB Aerospace

**Jenya Stumacher**  
Commercial Contracts Counsel  
First Quality Enterprises, Inc.

**Alex Toribio**  
Senior Corporate Counsel,  
Global Operations  
Stanley Black & Decker, Inc.

# Moderator

**Taylor Shea**  
Partner  
Robinson+Cole

# Hindsight is 2020: COVID-19 Lessons

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- **Supply Chain Failures**
  - Shortages / Delays / Closures
  - Undiversified Supply Chain
  - Insufficient Contractual Protections
  - “Fair Weather Friend” Suppliers
- Supply chains across the globe and across many sectors were tested by the pandemic “pressure cooker.” What did we learn, and what will we do different going forward?

# Hindsight is 2020: Supply Chain Resilience

- Due Diligence
  - Business & Legal
  - Legal Diligence
- Forecasting
  - Internal Forecasting
  - Contractual Protections
  - Inventory & Capacity Buffers



# Anonymous Zoom Polls

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1. Have you changed your due diligence process for suppliers since COVID-19?
  - (a) Yes
  - (b) No
  - (c) Not applicable
  
2. Have you implemented new forecasting procedures since COVID-19?
  - (a) Yes
  - (b) No
  - (c) Not applicable

# Hindsight is 2020: Supply Chain Resilience

- **Diversification / Multisourcing**
  - Analyze based on revenue impact if a disruptive event occurs, and not just by spend
  - Identify backup suppliers, not just additional suppliers
  - Manufacturers and 3PLs (third-party logistics providers)
- **Reshoring**
  - Reduce geographic dependence
  - Price vs. Risk



# Anonymous Zoom Poll

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Have you considered moving manufacturing operations to the US?

- (a) Yes, and we decided to reshore.
- (b) Yes, but decided against it.
- (c) No.
- (d) Not applicable.

# Hindsight is 2020: Resilience

- Strategic Sourcing
  - Cost vs. Resilience
  - Relationship Based Sourcing
    - Procurement Level
    - Supplier Level
  - Product and/or Plant Harmonization
  - Avoiding “Fair Weather Friend” Suppliers

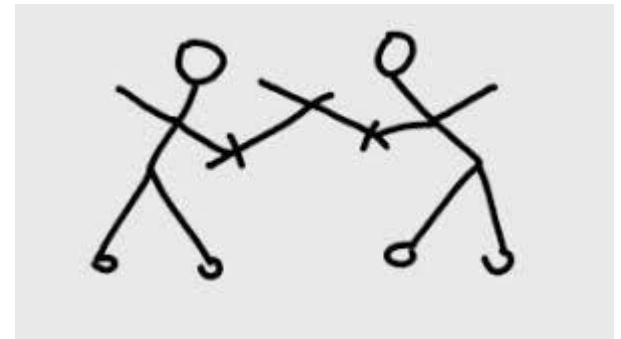


# Hindsight is 2020: Recovery / Mitigation

- POs vs. LTAs
  - Battle of the Forms (UCC §2-207)

**Anonymous Zoom Poll:** Approximately what percentage of your supply agreements (based on spend) are documented with PO terms and Conditions?

- (a) 0-25%
- (b) 26-50%
- (c) 51-75%
- (d) 76%-100%



- Flow Down Provisions

# Hindsight is 2020: Recovery / Mitigation

- Termination Rights & Exclusivity

- Easy to get in, but can you get out?
- Double-edged Sword
- Termination Fees/Damages



- Time is of the Essence

- Enforceability of an express “time is of the essence” clause depends on: (a) whether the parties intended for time of performance to be an essential obligation of the agreement; and (b) equitable factors and the circumstances surrounding the breach. *See Arnhold v. Ocean Atlantic Woodland Corp.*, 284 F.3d 693, 699-701 (7th Cir. 2002) (applying Illinois law).

# Hindsight is 2020: Recovery / Mitigation

- Force Majeure

- *JN Contemporary LLC v. Phillips Auctioners LLC*, 20-cv-4370 (SDNY 2020) (under New York law) (finding that a pandemic is a “natural disaster” within the meaning of a force majeure clause).
- *Ergon-West Va., Inc. v. Dynegy Mktg. & Trade*, 706 F.3d 419 (5th Cir. 2013) (finding that in the natural gas industry it is reasonable for a seller to pass on force majeure in the event its own upstream suppliers have declared force majeure).
- *Rembrandt Enters. v. Dahmes Stainless, Inc.*, 2017 U.S. Dist. LEXIS 144636 (D. Iowa 2017) (finding that a force majeure event did not occur where the party unilaterally decided to terminate performance for market-based reasons).



**Supporting Materials:** R+C Handout on Force Majeure

# Hindsight is 2020: Recovery / Mitigation

- Impracticability

- UCC § 2-615
- Common Law
- Statutory Law (Depending on Jurisdiction)



- Impossibility

- Strict impossibility, as opposed to impracticability, generally requires “objective impossibility” in the form of destruction of the contract’s subject matter or means of performance. (See *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987); see generally *H. Hackfeld & Co. v. Castle*, 186 Cal. 53, 57-58 (1921) (gathering cases).)

- Frustration of Purpose

- Changed circumstances eliminate the purpose of performance under the contract for one of the parties (although performance is still possible), and the anticipated value of the contractual consideration for the party’s performance no longer exists. *Chicago, M., St. P. & P. R. Co. v. Chicago & N. W. Transp. Co.*, 82 Wis. 2d 514, 522-23 (1978) and *Lloyd v. Murphy*, 25 Cal. 2d 48, 53 (1944).

# Hindsight is 2020: Risk Management

- Contract Management

- Templates

- Preferred Provisions & Pre-Approved Alternatives

Contract Provisions and Company Policies			
Item	Provision Explanation	Company Preferred Policy	Pre-Approved Alternatives
17	<b>Limitation of Liability:</b> It is critical that our contracts contain a limitation of liability provision that limits our aggregate liability, including with respect to indemnification and product warranties. Without contractual limitations, we may become subject to significant liabilities, including losses in excess of the value of the underlying contract.	<ul style="list-style-type: none"> <li>• There must always be a provision that limits our aggregate liability to [the value of the underlying <u>contract</u>][_____].</li> <li>• There should always be a provision that specifically states we are not liable for consequential, indirect, incidental, special, exemplary, punitive or enhanced damages, regardless of whether such damages were foreseeable.</li> </ul>	[The only permissible exceptions are for damages or liabilities arising from: [_____].]
18	<b>Most Favored Customer Pricing:</b> The most favored customer clause (MFC), sometimes referred to as a most favored nations provision (MFN), ensures that one party to an agreement receives no worse treatment than that given to a third party.	[Avoid][Never permit] MFC provisions.	[If the customer relationship merits a MFC provision, make sure that the provision is only applicable with respect to similarly situated customers (i.e. customers that purchase similar quantities or similar goods based on similar terms and conditions).]

# Hindsight is 2020: Risk Management

- Company Playbook / Risk Escalation Protocols

Risk Management Checklist				
Item	Description	Yes	No	N/A
6	<b>Consequential/Special Damages:</b> Is there a prohibition on our liability for consequential and special damages?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
7	<b>Cost Savings:</b> Are we required to share cost savings?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
8	<b>Critical Business Process/Product:</b> Does the contract involve a critical business process or product?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
9	<b>Delivery Terms:</b> Does the other party have to affirmatively "accept delivery"?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
	(a) If yes, is there a time after which the product is deemed accepted?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
10	<b>Delivery Delays:</b> Do late deliveries entitle the other party to terminate and/or impose penalties?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
	(a) If yes, do we have an opportunity to cure?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
	(b) If yes, are there exceptions for force majeure events?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
	(c) If yes, are there liquidated damages?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>
11	<b>Dispute Resolution:</b> If there is a dispute, is the prevailing party entitled to attorneys' fees?	Yes: <input type="checkbox"/>	No: <input type="checkbox"/>	N/A: <input type="checkbox"/>

# Hindsight is 2020: Risk Management

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- Identifying Risk / Forecasting
- Training
  - Legal
  - Procurement
- Crisis Management Framework
  - Risk Monitoring & Reporting
  - Operational Procedures for Disruptive Events

# Hindsight is 2020: Questions / Discussion

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