

International Franchise Association
53rd Annual Legal Symposium
May 4-6, 2021
Virtual

Supply Chain Disruption in the COVID-19 Era: Planning for Today and Tomorrow

Andraya Frith

Osler, Hoskin & Harcourt LLP[†]
Toronto, Ontario

Daniel Janssen

Quarles & Brady LLP
Milwaukee, WI

Steve Pattison

Auxilior Capital Partners Inc.
Plymouth Meeting, Pennsylvania

[†] The authors wish to thank Madison Black, Articling Student-at-Law at Osler, Hoskin & Harcourt LLP, for her invaluable contribution to this paper.

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I Introduction

A consistent customer experience is key to any successful franchise system, and a robust, high-quality supply chain is integral in ensuring this consistency.¹ The ability to get the right products and services to customers in an efficient and cost-effective manner, one of the hallmarks and benefits of a well-run franchise system, is largely dependent on high-functioning supply chains, a point that was boldly underlined in 2020 and continues to be an issue as suppliers and consumer adjust to the realities of operating during the COVID-19 pandemic. While the COVID-19 pandemic forced many franchisors to evaluate and reorganize their supply chains and approved supplier programs in the short-term, the lessons learned from the last 15 months can be applied going forward to build resilient supply chains to ensure the future success of franchise systems and indeed could become a competitive advantage for franchise systems. With widespread vaccination programs underway and the promise of a “return to normal” in the very near future, franchise systems should continue to reassess their intermediate and long-term supply chain strategies.

Informed by the lessons learned as a result the COVID-19 pandemic, this paper will focus on responding to and proactively addressing supply chain disruption, including analyzing the terms of supply agreements to determine when a supply disruption has occurred, and considerations when drafting franchise agreements and negotiating supply agreements going forward. To begin, we will discuss the application of supply chains to the franchise system generally, followed by an analysis of how the COVID-19 pandemic affected franchisees and franchisors, including the applicability of force majeure clauses. We will then discuss how to manage supply chain disruptions, allocation of liability, and the importance of business continuity planning to minimize business interruptions. Finally, we will provide practical insight into how franchisors can draft franchise agreements and negotiate supply agreements to ensure consistent and reliable delivery of goods and services. Throughout this paper, references to “suppliers or “supply agreements” include distributors and distribution agreements, as applicable given the context.

(A) The Importance of Approved Suppliers in a Franchise System

A franchise system’s supply chain consists of the various operational and logistical processes and partners used to source, produce, distribute and market the products and services delivered to consumers by the franchise.² The establishment of approved supplier programs are ubiquitous in franchise systems, as they allow franchisors to establish carefully designed supply chains and control the quality and consistency of products and services essential to the operation of the franchise.³ Through specific provisions in the franchise agreement and supply agreements, franchisors are able to set

¹ Gina Romo, R. James Straus and Suzanne Trigg, “Building an Effective Supply Chain and Distribution System” (Paper, delivered at the American Bar Association 35th Annual Forum on Franchising, October 3-5, 2012) at 1; Joyce G. Mazer and Leonard H. MacPhee, “Setting the Stage for a “Best in Class” Supply Chain” (2016) 36: 2 J Franchise L 219 at 219.

² Steve Pattison, Suzie Trigg and Sarah Walters, “Supply Chain “Links” and Its Implication on Franchise Systems” (Paper, delivered at the International Franchise Association 51st Annual Legal Symposium, May 6-8, 2018).

³ Andraya Frith, Dominic Mochrie, Gillian Scott, Canadian Franchise Guide, 2nd ed (Toronto: Carswell, 2020) at c 35 at §35.1.

standards and specifications for particular products or services, and designate specific manufacturers and distributors for such products and services. In addition to being an essential means of quality control, approved supplier programs allow franchisors to leverage the buying power of the franchise system to improve economies of scale,⁴ and may also provide franchisors and their affiliates with an additional revenue stream through negotiated volume rebates with designated suppliers or through the direct supply of products and/or services to the franchisees.⁵ As more clearly described in section II(B) below, when an approved supplier is unable to perform its obligations under the supply agreement, this may disrupt the entire supply chain, resulting in interruption to the franchise, the delivery of products and services of an inferior quality, and diminished financial returns for both franchisors and franchisees. When a franchisor is establishing and structuring an approved supplier program, a renewed focus on quality, flexibility and diversification will help ensure a more resilient supply chain and minimize downstream impact in the event of a supply chain disruption.

(i) *The essential elements of a franchisor's approved supplier program*

When establishing an approved supplier program, there are several key elements for a franchisor to consider.⁶ First and foremost, the rights and obligations of the franchisors and franchisees should be expressly set out in the franchise agreement, including the standards and specifications of the products and/or services subject to the approved suppliers program, and the process for the franchisor's approval of additional and alternative suppliers. Franchisors should consider the particular standards and specifications of the products and services that are subject to approved supplier programs, which must be clearly set out and communicated to franchisees and suppliers in their respective agreements. The franchisor's evaluation and enforcement of such standards through key performance indicators⁷ is an integral part of quality control and ensuring the approved supplier program is functioning optimally, which may also include a joint franchisor/franchisee advisory committee to administer the program and communicate with franchisees and suppliers.

(ii) *The types of products subject to approved supplier programs*

The structure and nature of an approved supplier program will vary based on the types of products subject to the program, including (i) custom products; (ii) proprietary products; (iii) available essential products; and (iv) available non-essential products.⁸ Establishing different approved supplier programs for different types of products allows for greater flexibility and creates a more adaptable, resilient supply chain. Custom products and proprietary products will be subject to more rigid and structured programs, whereas

⁴ Chelsey K. Culp III and Rochelle B Spandorf, "Sourcing Products and Services for the System: Efficiencies and Traps in Supply Chain Management" (Paper, delivered at the American Bar Association, 32nd Annual Forum on Franchising, October 14-16, 2009) at 1.

⁵ See *1250264 Ontario Inc. v Pet Valu Canada Inc.*, 2016 ONCA 24.

⁶ *Supra* note 3 at §35.3.

⁷ See Mazer, *supra* note 1 at 233 for a discussion on how key performance indicators can be effectively implemented to evaluate supplier performance.

⁸ *Supra* note 3 at §35.2.

programs for available essential products and available non-essential products may be less rigidly applied and enforced.

Custom products are specifically designed for the franchise system and therefore, must meet unique specifications and standards. These products must be subject to a detailed approved supplier program with less flexibility, as reliable manufacturing and distribution are essential to maintain the goodwill of the franchise. However, diversifying the designated suppliers for each link in the supply chain for these products will help ensure continuous supply and minimize business impact in the event of a disruption.

Proprietary products are those which the franchisor owns or is exclusively licensed to use all intellectual property,⁹ and may incorporate trade secrets. Approved supplier programs should be structured so as to restrict the manufacture and distribution of such products in order to respect intellectual property rights and maintain any trade secrets. The confidential nature and specialized skill, experience and equipment that may be required for the production and distribution of proprietary products may justify the imposition of a single source or supplier of such products.¹⁰

Available essential products are those that are essential to the franchise, but are not developed specifically for the franchise system, and as such procurement and distribution of these products can occur through a more diversified supply chain. To ensure quality and consistency, product standards and specifications should still be clearly established for franchisees and suppliers. However, to the extent such consistency can be achieved through the approval and designation of specific brands of the products, setting standards, specifications and a detailed approved supplier chain may not be required.¹¹ Available non-essential products are those that do not bear on the goodwill of the franchise, and as such, there is no need to set standards and specifications for these products, nor is there a need to designate approved suppliers. Quality control with respect to these products can be achieved by imposing standards and specification requirements on the franchisees, including the establishment of business continuity plans.

II Supply Chain Disruption and Performance Obligations

(A) The Fundamental “Links” in a Supply Chain

The development of a high-functioning supply chain and approved supplier program allows franchise systems to ensure the reliable delivery of consistent products and services. This section provides a high-level overview of the various “links” in a typical supply chain for a franchise system, and discusses how the COVID-19 pandemic impacted the normal operation of supply chains around the world, followed by a discussion of how governing force majeure clauses may apply to such disruptions.

⁹ Romo, *supra* note 1 at 30.

¹⁰ *Supra* note 3 at §35.2.

¹¹ *Ibid.*

A simple supply chain can be broken down into the following basic components: (i) producers; (ii) manufacturers; (iii) distributors and (iv) retailers.¹² Many franchisors use third party logistics providers to manage the coordination of the various links in the supply chain. Producers provide the raw materials to manufacturers, who ultimately create the finished good or service.¹³ Manufactured goods are then provided to a distributor, who is responsible for ensuring goods and services reach the retailer (typically, the franchisee). Depending on size and sophistication, distributors may operate warehouses and distribution centres for stocking inventory before transporting the products to the retailer. While the four general components of a supply chain may be distinct, they are often combined into a single link, as is the case with producers/manufacturers and manufacturer/distributors. Further, the franchisor itself may take on any of these roles, depending on the nature of the products and services; for example, a franchisor will typically manufacture and distribute proprietary products.¹⁴

A supply chain may be controlled, to varying degrees, by the franchisor, franchisees, or third parties.¹⁵ When controlled by the franchisor, the arrangement can be one of “captive supply” – where the franchisor is the manufacturer and distributor of the products – or “direct control” – where the franchisor does not manufacture or distribute the products, but otherwise controls all aspects of managing the supply chain, including selecting the products, negotiating supply agreements and managing logistics.¹⁶ A franchisor may also exercise control by engaging a third party supply chain manager that will plan, coordinate and implement the supply chain as directed by the franchisor.¹⁷ In terms of franchisee participation, franchisees may form cooperatives with one another to leverage buying power and negotiate agreements with suppliers, or each franchisee may be responsible for sourcing and establishing their own links in the supply chain based on specifications and the approved supplier program implemented by the franchisor.¹⁸ The degree of control a franchisor exercises over the supply chain may impact their potential liability in the face of supply chain disruption, with greater control resulting in increased liability. As outlined in section III(B) below, franchisors should ensure their franchise agreements take this into account.

Supply chains were significantly disrupted in the initial months following the onset of COVID-19, and more than a year later, businesses continue to struggle regaining and normalizing supply. The COVID-19 pandemic sparked major changes in consumer demand, created labour shortages, resulted in export restrictions, and imposed new operational requirements for sanitation and physical distancing, differentially affecting

¹² Andrew P Beilfuss, Jess Dance and Jason C. Williams, “Running on Empty: Dealing with Supply Chain Issues” (Paper, delivered at the American Bar Association 43rd Annual Forum on Franchising, October 27-30, 2020) at 2; David B. Ramsey, Curtis S. Gimson and Robert G. Huelin, “Supply and Demand: How to Negotiate Supplier and Distributor Agreements and Work with Franchisees Regarding their Implementation” (Paper, delivered at the International Franchise Association 52nd Legal Symposium, May 5-7, 2019) at 1-2.

¹³ Beilfuss, *ibid*.

¹⁴ Romo, *supra* note 1 at 21.

¹⁵ Beilfuss, *supra* note 12 at 3-5.

¹⁶ *Ibid* at 3.

¹⁷ *Ibid* at 4.

¹⁸ *Ibid* at 5.

suppliers and distributors. As a result, performance obligations under supply agreements were temporarily adjusted or failed altogether, creating challenges for franchisors and franchisees around the world. While toilet paper shortages initially grabbed headlines, less obvious demand-related issues continue to plague businesses around the world. For example, Ford was recently forced to cut production at seven Canadian and U.S. plants owing to a semiconductor chip shortage as a result of increased competition with the consumer electronics industry for certain chips necessary to produce their vehicles.¹⁹ Auto-sales fell nearly 10% in February 2021, which is attributed to such supply chain disruptions and pandemic-related lockdowns.²⁰

The impact of supply chain disruptions on franchise systems is far reaching and is not just limited to an inability to meet consumer demand.²¹ For example, the expense and increase in operating costs created by supply chain disruptions puts pressure on franchisee operating margins, which may have a negative impact on the ability of franchisees to make investments in capital expenditures going forward, including those updates and upgrades which are routinely required under franchise agreements. Franchisors may need to consider deferring large renovation requirements on their franchisees even once we're on the other side of the pandemic.²² During the past 12 months, franchisors have deferred these types of spending requirements as a form of "relief" for franchisees. The operating margin impact suggests the relief may need to be longer than perhaps originally anticipated. Longer term, this may impact on the goodwill and success of the franchise system's brand if premises are getting tired looking or if certain franchisees haven't implemented certain equipment and other upgrades to keep pace with the rest of the franchise network. With this in mind, franchisors should update their franchise disclosure documents to take into account the increased costs associated with establishing a franchise and modify any financial performance projections accordingly. Similarly, any temporary relief from renovation or upgrade requirements should also be properly documented.

(B) Supply Chain Disruption and Performance Obligations

When a major supply chain disruption occurs, both franchise agreements and supply and distribution agreements are implicated. The most commonly affected provisions include timing of delivery commitments; commitments relating to volume of goods delivered or

¹⁹ Ben Klayman, "Ford Cuts Production At Oakville And Six U.S. Plants Amid Semiconductor Shortage", *The Globe and Mail* (1 April 2021), online: <<https://www.theglobeandmail.com/business/international-business/article-ford-cutting-production-at-oakville-ont-plant-and-six-us-facilities>>

²⁰ Anita Balakrishnan, "February auto sales fall nearly 10% due to lockdowns and supply-chain disruptions", *The Globe and Mail* (3 March 2021), online: <<https://www.theglobeandmail.com/business/economy/article-february-auto-sales-fall-nearly-10-due-to-lockdowns-and-supply-chain>>.

²¹ Jonathan Cable and Leika Kihara, "Global Manufacturing Recovery Picks Up, But Supply-Chain Challenges Weigh on Margins", *The Globe and Mail* (1 April 2020), online: <<https://www.theglobeandmail.com/business/economy/article-global-manufacturing-recovery-picks-up-but-supply-chain-challenges/>>.

²² Consider also how the cost of lumber and materials for renovations have drastically increased as a result of a shift in consumer behavior, which may also make renovations and establishing new franchise locations no longer feasible. See Peter Armstrong, "Record-high Lumber Prices Add as Much as \$30K to the Cost of Building a House", *CBC News* (2 April 2021), online: <<https://www.cbc.ca/news/business/lumber-prices-covid-19-cost-of-housing-1.5973416>>.

available; staffing commitments; designations related to location of service delivery; payment provisions (i.e., disruption of the ability to pay); and provisions sensitive to changes in law (e.g., emergency legislation or regional restrictions prohibiting certain activities essential to contract performance).²³ Whether a supplier's or franchisee's failure to perform is excused under a governing force majeure class is discussed below.

(i) *Application of a force majeure clause with respect to supply chain disruption.*

A force majeure contract clause allocates the risk from losses where "performance becomes impossible or impractical" as a result of events beyond the control of the parties to that contract.²⁴ With few exceptions, force majeure, as a defense against claims for non-performance,²⁵ may only be relied upon where such a clause is included in the franchisor's agreements. While similar common law doctrines have developed to address exigent circumstances, it is safe to assume that the affirmative defense of force majeure may be available only if the clause is enumerated.²⁶

Where a force majeure clause is specifically included in a contract, in many instances the events of force majeure will be defined only generally, and include occasions such as "events beyond the reasonable control" of a party or "acts of God." Even under these circumstances, where a force majeure clause does not more specifically call out conditions of the kind caused by COVID-19, it is quite possible that COVID-19 will be deemed to be a force majeure event.²⁷ By way of contrast, other force majeure clauses will, in fact, read much more specifically in enumerating conditions that mirror COVID-19, employing terms such as "pandemic," "epidemic" or "quarantine." Perhaps stating the

²³ Andraya Frith, Simon Hodgett, Alan Kenigsberg, Paul Morasutti, Richard Borins, Kelly O'Ferrall, Natalie Munroe and Peter Glossop, "Supply chain disruption: Planning for the long-term impacts of the COVID-19 crisis" (11 May 2020), *Osler, Hoskin & Harcourt LLP* (blog), online: < <https://www.osler.com/en/resources/regulations/2020/supply-chain-disruption-planning-for-the-long-term-impact-of-the-covid-19-crisis>>.

²⁴ See *Ricoh USA, Inc. v Innovative Software Solution, Inc.*, 2020 WL 7024290 at 8 (ED Pa 2020), quoting Black's Law Dictionary (11th ed. 2019).

²⁵ It is clear that force majeure is a defense plead in response to a claim for breach of contract. There is no affirmative claim (e.g., for damages or specific performance) that may be alleged against a party who wrongly insists upon performance in spite of the existence of a force majeure clause and event.

²⁶ While courts have the ability to imply certain *duties* into an agreement, such as the duty of good faith and fair dealing, they will not readily imply *defenses to nonperformance*. See, e.g., *Denbury Onshore, LLC v APMTC Helium LLC*, 476 P.3d 1098 at 1108 (Wyo 2020) [*Denbury*]. That said, even where contract documentation does not contain a force majeure clause, similar common law defenses, such as frustration of purpose or impossibility, may still be alleged where supported by the facts. See *CAI Rail, Inc. v. Badger Mining Corp*, 2021 WL 705880 at 8 (SDNY 2021).

²⁷ United States courts have generally reached a consensus that COVID-19 is a "natural disaster" as "human beings were not responsible for starting or consciously spreading the virus.", see *Easom v US Well Services, Inc.*, 2021 WL 1092344 at 8 (SD Tex 2021). See also, *JN Contemporary Art LLC v. Phillips Auctioneers, Inc.*, 2020 WL 7405262 at 7 (SDNY 2020); *AB Stable VIII LLC v Maps & Hotels One LLC*, 2020 WL 7024929 (Del Ch. 2020); and *Pa. Democratic Party v Boockvar*, 238 A.3d 345 at 370 (Pa 2020). From a Canadian perspective, whether a court or tribunal will consider COVID-19 to qualify as a force majeure event excusing performance is heavily fact-dependent: see *Appelt v C.P.M. Farms Ltd*, 2020 BCCRT 1378 at paras 15-21, *Durham Sports Barn Inc. Bankruptcy Proposal*, 2020 ONSC 5938 at paras 53-57; and *Telecom Decision CRTC 2020-368*, 2020 LNCRTCE 38 at para 23.

obvious, the party seeking to excuse performance by way of force majeure will more likely benefit from a clause that requires little judicial construction: one that contains a detailed description of the real life events making performance difficult. This follows from the proposition that courts typically do not "give expansive meaning to the events included in [force majeure] clauses."²⁸ Moreover, insofar as franchise agreements are concerned, they almost certainly have been prepared by the franchisor and, as such, any ambiguity arising from the force majeure clause will be construed in favor of the franchisee.²⁹

The ability to exercise a force majeure clause may be lost if the party seeking to be excused from performance fails to provide correct and timely notice as the agreement may require. By way of example, in *Denbury Onshore, LLC v APMTG Helium LLC*, the parties' agreement required the party "whose performance under the Agreement is affected by Force Majeure [to] promptly notify the other party of the occurrence, and the effect and likely duration of the Force Majeure event."³⁰ In an e-mail message, the party seeking force majeure complained of delays and unforeseen expenses, but failed to: identify the contract sub-section containing force majeure, specifically include the phrase "force majeure," or otherwise declare an event of force majeure, among other omissions.³¹ The court held that the failure to provide notice, when and as required by the clause, deprived the aggrieved party of the opportunity to excuse its performance.³²

When considering supply chain disruptions caused by the COVID-19 pandemic, the disruption must not simply arise because of the *existence* of the disease, but rather, the inability to staff and operate businesses as a *result* of the disease. A force majeure event is not just about the occurrence of an event, but rather is about the effect of that event on the party claiming to be excused from their performance obligations. Stated differently, the party claiming force majeure needs to prove that the event both caused and proximately caused the non-performance.³³ Notably the force majeure clause itself may state more specifically the degree to which performance must be affected by the event.³⁴

When invoking the force majeure clause, the franchisor must show that, acting reasonably, it was unable to mitigate the consequences of the interruption in supply. That is, the courts will give consideration to actions - or inaction - that might have been taken by the affected party to reduce or ameliorate the impact of what would otherwise be deemed a force majeure event. In *Burger King v. Berry*³⁵ for example, the failure to take reasonable measures to mitigate caused the franchisee to lose what might otherwise

²⁸ *Drummond Coal Sales Inc. v Kinder Morgan Operations LP "C"*, 836 F Appx 857 at 866 (11th Cir 2021). See also, *MRC Permian Co. v Point Energy Partners Permian LLC*, 2021 WL 960927 at 6 (Tex App 2021) [*MRC Permian*] ("we strictly construe a force majeure clause according to its terms").

²⁹ *Rudolph v United Airlines Holdings, Inc.*, 2021 WL 534669 at 7 (ND Ill 2021) [*Rudolph*] (force majeure clause will interpreted against the drafter where the boundary between events within and outside the force majeure clause is unclear).

³⁰ *Denbury*, *supra* note 26 at 1110.

³¹ *Ibid.*

³² *Ibid* at 1112.

³³ *Rudolph*, *supra* note 29.

³⁴ *MRC Permian*, *supra* note 28 (interpreting clause to determine whether performance could be excused where merely delayed or whether conditions were required to make performance impossible).

³⁵ *Burger King v Berry*, 2020 WL 8254494 (SD Fla 2020).

have been a successful force majeure defense. More specifically, Burger King's franchisee closed its Charleston, South Carolina, unit, ostensibly as result of the forces of Hurricane Irma.³⁶ Following an exchange of correspondence, Burger King determined its franchisee had *voluntary* closed the restaurant, thereby resulting in an abandonment of the same.³⁷ In resolving cross motions for summary judgment in Burger King's favor, the District Court determined that the hurricane had inflicted "only temporary damage," reimbursed by the franchisee's insurer, thus positioning the franchisee to reopen in a matter of weeks following the event.³⁸ Ultimately, the District Court held, the franchisee's election to forego repairs, and permanently close the restaurant, was within its reasonable control.³⁹

(ii) *Considerations when drafting a force majeure clause.*

A franchisor may face both sides of the same coin with respect to force majeure clauses in the context of supply chains: the franchisor may wish to rely on such a clause to excuse its performance, particularly in situations where the franchisor may not be able to meet minimum purchase obligations or payment deadlines; alternatively, suppliers and franchisees may rely on force majeure clauses to excuse their performance obligations owed to the franchisor when supply chains are disrupted. In either context, certainty in contract formation is critical to ensure the appropriate bargain is struck between the parties and to avoid potential litigation; as such, franchisors should pay careful attention to the drafting of force majeure clauses.

As outlined above, whether a force majeure clause will excuse performance is dependent on the express language used in the provision. Defining a force majeure event, outlining the notice requirements for invoking the force majeure clause, and indicating the consequences of invoking the clause and remedies available to the invoking party⁴⁰ are all key components of a force majeure clause that should be carefully drafted or negotiated by the franchisor.⁴¹

(a) *Defining the force majeure event*

Franchisors should include express and specific language in the force majeure clause to ensure the risk of a specified event is clearly contemplated and allocated to the appropriate party. The Supreme Court of Canada ("SCC") has indicated that where an event is not expressly included in the force majeure clause, the parties have allocated the risk of the event to the impacted party.⁴² As such, the parties should include a detailed

³⁶ *Ibid* at 2.

³⁷ *Ibid*.

³⁸ *Ibid* at 5.

³⁹ *Ibid*, citing *Florida Department of Financial Services v Freeman*, 921 So (2d) 598 at 608 (Fla 2006).

⁴⁰ *Atcor Ltd. v Continental Energy Marketing Ltd*, [1996] Carswell Alta 642 (Alta CA) at para 12.

⁴¹ Beilfuss, *supra* note 12 at 46; Stephanie Zosak and Tao Xu, "COVID-19 Isn't the Only Thing Under the Microscope: Force Majeure Clauses as Applied to Global Pandemics" (2020) 23:02 *The Franchise Lawyer* 6 at 7.

⁴² *Atlantic Paper Stock Ltd. v St. Anne Nackawic Pulp & Paper Co.*, (1976) 1 SCR 580 (SCC).

list of all force majeure events and should expressly exclude those specific events that the parties do not intend to qualify under the clause.

In light of the COVID-19 outbreak, suppliers may be inclined to expressly include “pandemic”, “epidemic” and “disease outbreak” as specified force majeure events, in addition to general references to “acts of God” or events “beyond the reasonable foreseeability of the Parties”. Reliance on a reference to “acts of God” alone may not excuse performance of obligations impacted by COVID-19, especially when considering the impact of subsequent waves of the virus. The SCC has interpreted such reference to cover something “beyond reasonable human foresight and skill”⁴³; however, in light of our experience with COVID-19, a global disease outbreak may be considered foreseeable and as such, relying on “acts of God” or provisions which hinge on foreseeability of the event could, arguably, preclude relief.

However, franchisors may wish to expressly exclude pandemics, epidemics and health outbreaks from qualifying as a force majeure event to prevent suppliers from avoiding performance obligations as the COVID-19 pandemic evolves. Alternatively, franchisors may wish to include changes in laws or regulations as a qualifying force majeure event, in both franchise agreements and supply agreements, as this may effectively excuse the franchisor, franchisees and suppliers from their obligations in appropriate circumstances.⁴⁴ Varying degrees of lockdown and public health measures may similarly impact a franchisor’s and franchisee’s ability to operate fully; by including changes in laws or regulations as a force majeure event, franchisors and franchisees may be excused from meeting minimum purchase requirements or payment deadlines. Further, suppliers may also be able to alter their performance obligations if affected by such changes in law or regulations, but would not be excused from performance simply due to the existence of the COVID-19 pandemic.

(b) Invoking the force majeure clause

After experiencing a force majeure event, the parties must determine whether the force majeure event prevents performance of the contractual obligation, and the invoking party must follow the steps outlined in the force majeure clause with respect to notifying the other party. Failure to provide notice to the other party within a specific timeframe may result in an exclusion of such event from force majeure relief. Franchisors may consider including the following requirements in their force majeure clauses:⁴⁵

Demonstrating that the force majeure event caused a sufficient impact to an actual contractual obligation. The occurrence of a particular event may not necessarily impact a party’s ability to perform their contractual obligations; for example, the mere existence of COVID-19 did not disrupt supply chains, but rather, the resulting labour disruptions and changes in consumer demand. As such, force majeure

⁴³ *Ibid* at para 4.

⁴⁴ Mark Gelowitz, Laura Fric, Simon Hodgett, Geoffrey Hunnisett and Adam Schoenborn, “Contractual rights and obligations in the context of COVID-19” (17 March 2020) *Osler, Hoskin & Harcourt LLP* (blog), online: <<https://www.osler.com/en/blogs/risk/march-2020/contractual-rights-and-obligations-in-the-context-of-covid-19>>.

⁴⁵ *Ibid*.

clauses should specify the level of impact on a party's ability to perform its contractual obligations that is required in order to invoke the clause, taking care to exclude a difficult business environment or changes to profitability as not being sufficient.⁴⁶

Providing adequate notice. The force majeure clause should specify the timeframe in which written notice must be provided following the occurrence of a qualifying force majeure event, and to whom notice should be provided.

Obligation to mitigate. Generally speaking, the force majeure clause should require the parties to mitigate the impact of the qualifying force majeure event. The mitigation obligations must be specific to the circumstances of the agreement at issue. For example, if a franchisor's approved supplier program for custom or proprietary products does not permit alternative supply, a franchisee and supplier may be similarly constrained in their ability to mitigate. As such, specific, reasonable mitigation measures should be clearly outlined in the force majeure clause to ensure supply is re-established efficiently and disputes are avoided.

(c) Consequences of invoking the force majeure clause

The exact consequence of invoking the force majeure clause should be clearly set out within the clause. Typically, a force majeure clause operates to suspend the obligation to perform for as long as the force majeure event lasts. However, franchisors should turn their minds to the subject matter of the agreement and the particular business relationship at issue, when considering possible consequences. For supply agreements, franchisors should consider what framework will ensure timely re-establishment of supply; depending on the type of goods and services subject to the agreement, the franchisor may negotiate a right to find temporary alternative supply, or to terminate the agreement altogether if supply is not re-established within a particular timeframe. For franchise agreements, franchisors will likely want to constrain the consequence of a force majeure event to provide franchisees with the opportunity to find alternative supply and ensure franchisees are not able to easily terminate their franchise agreements in the face of a supply chain disruption.

III Managing Supply Chain Disruptions

(A) Re-establishing Supply

When the COVID-19 pandemic began, the interdependence of the global supply chain was readily apparent. At the beginning of 2020, components and materials sourced from

⁴⁶ *Ibid.* See also *Domtar Inc. v Univar Canada Ltd*, 2011 BCSC 1776 (barring any express statement in the agreement to the contrary, an increase in the costs to the distributor to supply a product is not a force majeure event).

China began to run in short supply.⁴⁷ As the scope of the pandemic grew, spreading throughout Asia, Europe and North America, COVID-19 exposed franchisors' supply chain weaknesses and vulnerabilities that previously had not been tested. Many franchisors were forced into a reactive posture, needing to act quickly in attempts to preserve sources of raw materials and finished products.⁴⁸

Franchisors now face the need, and have the opportunity, to create supply chains that are stronger, more reliable and with greater flexibility than ever before. It is no longer safe to rely entirely on limited sources for supply. While one-stop-shopping has historically been a tool to reduce price, and pricing is always a paramount factor, flexibility is also important. To that end, franchisors should be encouraged to engage in the process of supply-chain-mapping, to identify the supply trail all the way back through suppliers of suppliers.⁴⁹ Once the mapping process is complete, the franchisor should be able to investigate and ideally locate multiple and "Plan B" sources for the supply of components and materials.⁵⁰ In selecting new supply partners, historically the process has been skewed toward the lowest cost provider. In the post-pandemic context, supply continuity should play a much larger role in determining awarded contracts.

When this process is completed, an examination of the franchisor's own supply agreements, and related terms and conditions, should be undertaken to identify opportunities to negotiate for greater protection in times of shortage. Discussions should be opened with existing suppliers to revise or amend agreements in ways to soften future shortages. Talking points could include, for example, requirements that a supplier warehouse additional stock, above and beyond what might ordinarily be required in a non-pandemic environment. The process may also involve discussions with respect to the franchisor's position among other customers, to the extent allocations of limited stock are warranted. Some additional cost may be inevitable, and potentially shared, to achieve supply chain diversity and redundancy.

Internally, the franchisor should examine processes to expedite the approval and selection of alternative suppliers. If new relationships are formed, the franchisor should proactively audit the processes of new partners to protect confidential information, recipes, trade secrets and proprietary processes. Supply contracts should include terms that maintain and enhance confidentiality. At the same time, the franchise must have

⁴⁷ A recent survey determined that COVID disrupted 78% of supply chains. See Sara Silver, "From the filings: Supply chain lessons from the pandemic" (2021) *Journal of Accountancy*, online: <<https://www.journalofaccountancy.com/news/2021/feb/supply-chain-lessons-from-coronavirus-pandemic.html>>.

⁴⁸ Michael Sturm, "Franchise System Responses to the Coronavirus", *International Franchise Association FranBlog* (blog), online: <<https://www.franchise.org/blog/franchise-system-responses-to-the-coronavirus>>.

⁴⁹ *Supra* note 2.

⁵⁰ Notably, approved supply and supplier provisions in agreements with franchisees should also be carefully reviewed and evaluated. Joyce Mazero and Emily Doan, "How Franchise Brands are Dealing with their Disrupted Supply Chains" *Franchise Update Magazine* 2 (May 26, 2020), online: <https://www.franchising.com/articles/how_franchise_brands_are_dealing_with_their_disrupted_supply_chains.html>.

plans in place to address improper use or inadvertent disclosure of competitive information.

Ultimately, good communication is critical to surviving and prospering following supply chain disruptions. Success turns in part on the quality of the relationships the franchisor has established. While contract terms are important, and will always be important, the identity of the franchisor's contracting partners also matters. Frequent and candid communications on both sides of the supply chain, with suppliers and franchisees, will allow the franchisor to proactively anticipate issues and engage in the kind of cooperation that will allow all parties to survive shortages with least reasonably possible business disruption.

(B) Allocation of Costs and Liability

While re-establishing supply is typically the immediate priority following a supply chain disruption, the cost consequences of re-establishing supply are usually an equally important consideration for any business facing a disruption. Although commercial agreements will nearly always include negotiated indemnification and limitation of liability provisions, the global, wide-spread nature of the COVID-19 pandemic meant the typical contractual remedies and enforcement mechanisms contemplated in commercial agreements and under common law were simply not available due to the widespread economic devastation caused by the COVID-19 pandemic. In the franchise industry, some suppliers are so integral to the success of a franchise system that the franchisor and their suppliers may be viewed as partners in delivering products and services to consumers. In these cases, franchisors may be better served by supporting and facilitating the financial and operational recovery of their suppliers, as opposed to enforcing their legal rights.

While franchisors may be incentivized to prioritize their relationships and the business realities over legal remedies, franchisees may not share the same values in this regard, and as such, franchisor's should consider their potential liability to franchisees when facing a supply chain disruption. Under Canadian law, without privity of contract, it is unlikely a supplier would be liable to a franchisee for the economic losses that may arise as a result of a supply chain disruption. In the recent decision, *1688782 Ontario Inc. v Maple Leaf Foods Inc.* in a 5-4 majority, the SCC held that an approved supplier contracting with the franchisor did not owe a duty of care to franchisees and was not liable for purely economic losses that arose as a result of the supplier providing contaminated meat products to the franchisees.⁵¹ The decision suggests an absence of direct liability on the part of the supplier to the franchisees for purely economic losses. However, the dissenting judgement in *Maple Leaf* may provide guidance for future claims by franchisees against members of the supply chain or the franchisor for damages that arise

⁵¹ *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf*]; Craig Lockwood, Lindsay Rauccio, Jennifer Dolman and Amanda Arella, "Franchisees cannot beef with manufacturer over contaminated meat" (11 November 2020), *Osler, Hoskin & Harcourt LLP* (blog), online: <<https://www.osler.com/en/resources/critical-situations/2020/franchisees-cannot-beef-with-manufacturer-over-contaminated-meat>>.

as a result of a supply chain disruption, including as a result of delay in delivery and inaccurate or incomplete shipments of products subject to approved supplier programs.⁵²

The SCC majority decision in *Maple Leaf* turned largely on the view that a finding of proximity to create the necessary duty of care owing to the franchisees would undermine the contractual framework (i.e., the franchise model) the parties willingly negotiated; as such, the majority found that a duty of care did not exist and accordingly, the supplier was not liable to the franchisees. However, in the dissenting decision, Justice Karakatsanis found a new duty of care to exist where the franchisee is bound to an exclusive supply and where the product is central to the franchisee's brand. This decision reflects two different conceptualizations of the franchise business model: the majority interpreted the relationship between franchisor and franchisee as one where both parties enter into an agreement fully aware of the benefits and constraints imposed upon each of them, whereas the dissenting decision viewed the franchise agreement as a contract of adhesion.⁵³

In light of the majority and dissenting judgements in *Maple Leaf*, and that these contrasting views could be revisited in the next franchise case that comes before the SCC, it is prudent for franchisors to ensure their franchise agreements contain a limitation of liability clause limiting their exposure for any direct or indirect loss or damage relating to disruption of a designated supply chain or products or services that franchisees are contractually obligated to purchase pursuant to approved supplier programs.⁵⁴ Further, franchisors should expect suppliers to address their risk of liability to the franchisee through express limitation of liability or indemnity from the franchisor.

IV Preventing and Minimizing the Effect of Supply Chain Disruptions

(A) Business Continuity Planning

Understanding how to effectively respond to a supply chain disruption and setting up franchise agreements and supply agreements to allocate risk of loss when such disruptions arise is important for franchisors to minimize financial loss and erosion of goodwill. However, franchisors should also implement proactive strategies to minimize supply chain disruptions or, ideally, prevent them from occurring altogether. While the last 15 months have challenged franchisors and franchisees with continuous disruptions to varying degrees, franchisors can use this opportunity to apply and formalize the lessons learned to date to ensure preparedness going forward in the face of further disruptions arising from the COVID-19 pandemic, and beyond.

Business continuity planning has long been implemented by sophisticated enterprises, such as financial and healthcare institutions and utilities providers to ensure appropriate and adequate response to various disaster scenarios.⁵⁵ Business continuity plans ("BCPs") can be more widely applied and implemented in the franchise context to proactively address the various types of widespread disruption that may arise in response

⁵² Lockwood, *supra* note 51.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 23.

to the COVID-19 pandemic, including anticipating and addressing potential supply chain disruptions. While the franchisor should prepare a BCP for its corporate locations and for the franchise system as a whole, BCPs can also be leveraged in both franchise agreements and supply agreements to decrease the risk of loss and minimize business interruption.

(i) *Franchise agreements.*

Going forward, franchisors may consider requiring their franchisees to establish a BCP to ensure uninterrupted service to customers in the face of defined business interruptions. Franchisees may be required to prepare and provide to the franchisor a BCP tailored to the capabilities and circumstances of the franchisee, but that meets specified minimum requirements as set out by the franchisor in the franchise agreement or through the operations manual. The franchise agreement should require BCPs to be continually updated to ensure franchisees are poised to effectively respond to changing circumstances and potential business interruptions. In the context of the COVID-19 pandemic, franchisees may be required to set out how they will efficiently respond to governmental declarations and regulations regarding sanitation, physical distancing and limitations on business operations. When a BCP is implemented by a franchisee following a business interruption, franchisees should provide the franchisor with ongoing, regular status reports on how the interruption is being managed in accordance with the BCP.

To avoid the risk of a franchisor being found as a joint employer with the franchisee, a franchisor should not exercise significant control over how the BCP is implemented. While the franchise agreement should clearly outline what the franchisee needs to cover in the BCP, the responsibility of hiring, training and paying any employees or contractors in connection with the BCP should fall on the franchisee (and such responsibility should be expressly stated in the franchise agreement).

Details on the specific provisions regarding BCPs that should be included in a franchise agreement can be found in section V(A)(ii) below.

(ii) *Supply agreements.*

A supplier's obligations with respect to business continuity planning is an important consideration when negotiating supply agreements. First, franchisors should review their existing agreements with suppliers to understand which agreements already contain BCP obligations and if so, whether there are any concerning gaps that can be addressed through amendment or at the time of renegotiation.⁵⁶ Franchisors should consider how a supplier's BCP addresses and responds to prolonged, widespread disruptions, not just isolated events (i.e., natural disasters).

Ideally, suppliers should be required to notify the franchisor when a BCP has been invoked. However, it is a good idea for franchisors to check in regularly with suppliers to determine whether they are operating under a BCP, or if there is reason to believe a BCP will be invoked in the near future. While still under the shadow of the COVID-19

⁵⁶ *Ibid.*

pandemic, franchisors should check-in regularly with their suppliers or build in notice requirements in their existing or future agreements with respect to the supplier's resources and personnel required to perform and maintain the supply of goods and services.⁵⁷

Going forward, franchisors may consider reviewing supplier BCPs closely as part of the vendor selection process and negotiations may centre on requesting improvements or modifications to supplier BCPs. Franchisors should focus on ensuring supplier BCPs take into account the anticipated effects of the COVID-19 pandemic and create a general preparedness for future waves of COVID-19, other outbreaks or similar disruptions.⁵⁸

(B) Leveraging Data and Digital Supply Networks

Incorporating data analytics and digital capabilities into supply chains allows businesses to proactively address and respond to changes in the supply chain that could, if not addressed, result in disruptions.⁵⁹ Geographic information systems ("GIS") and digital supply networks ("DNS") may allow businesses to monitor their supply chains in real-time, providing them with the ability to plan for and respond to changes accordingly, in addition to predicting and modelling the impact of a potential disruption.⁶⁰

A DNS transforms the concept of a sequential, linear supply chain into an interconnected supply network, where information from many sources and many locations is integrated, allowing supply chain managers and stakeholders to have visibility into the various links in the chain.⁶¹ This continuous flow of readily available information removes latency by analyzing and communicating changes to members of the DNS in real-time, allowing each member to respond more quickly (or in some cases, automatically) and has proven useful in the retail grocery setting.⁶²

For years, General Motors has been using data and GIS to manage supply chain risk by mapping the interconnections among their suppliers, which allows them to respond and recover quickly when disruptive events occur.⁶³ Following the widespread supply chain

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Stephen Laaper, Glenn Yauch, Paul Wellener and Ryan Robinson, "Embracing a Digital Future: How Manufacturers Can Unlock the Transformative Benefits of Digital Supply Networks", *Deloitte Insights* (21 March 2018), online:

<<https://www2.deloitte.com/us/en/insights/focus/industry-4-0/digital-supply-network-transformation-study.html?id=us:2pm:3ad:delprvtfy20:awa:dpvt:em:na:cn:dsnttransform:1x1:bsj:070919:59375605>>; Accenture, "Supply Chain Disruptions" *Accenture Insights* (2020), online:

<<https://www.accenture.com/ca-en/insights/consulting/coronavirus-supply-chain-disruption.>>

⁶⁰ Beifuss, *supra* note 12 at 44; Yasaman Kazemi, "How Maps and Data are Helping Businesses Respond to COVID-19 Supply Chain Disruptions" *Forbes* (30 April 2020), online:

<<https://www.forbes.com/sites/yasamankazemi/2020/04/30/how-maps-and-data-are-helping-businesses-respond-to-covid-19-supply-chain-disruptions/?sh=58ea57692586>>;

⁶¹ Adam Mussomeli, Doug Gish and Stephen Laaper, "The Rise of the Digital Supply Network", *Deloitte University Press* (2016) at 6, online:

<https://www2.deloitte.com/content/dam/insights/us/articles/3465_Digital-supply-network/DUP_Digital-supply-network.pdf>.

⁶² *Ibid* at 8.

⁶³ Yasaman Kazemi, "How GM Maps and Manages Supply Chain Risk", *ESRI* (15 November 2018), online: <<https://www.esri.com/about/newsroom/publications/wherenext/gm-maps-supply-chain-risk/>>.

disruption arising from the COVID-19 pandemic, it is expected that digitization of supply chains will be accelerated as businesses assess their shortcomings and try to build resilient supply chains for the future.⁶⁴

V Practical Considerations: Long-range Strategy for Sourcing Suppliers and Delivering Goods and Services

While the challenges arising from the COVID-19 pandemic have been plentiful, so have the lessons and opportunities for change. In general, a focus on establishing and maintaining a reliable and resilient supply chain with diverse suppliers, fewer links, and comprehensive contractual obligations will help ensure the overall resilience of the franchise system, regardless of the particular threat to the supply chain. When drafting franchise agreements and negotiating supply agreements going forward, franchisors should turn their minds to how the COVID-19 pandemic affected their business and consider the contractual obligations that can be included in these agreements to avoid or minimize such disruptions going forward.

(A) Franchise Agreements

The following should be considered to deal with the respective rights and obligations of the franchisor and franchisee as outlined in the franchise agreement.

(i) Flexible approved supplier programs.

When establishing an approved supplier program, franchisors should try to have multiple approved suppliers for similar goods and afford franchisees with flexible processes with respect to approving alternative supply, particularly to address immediate and short-term shortages and disruptions. This is especially important following the decision in *Maple Leaf*, where the dissenting opinion found a duty of care to exist between supplier and franchisee where the franchisee was bound to an exclusive supply. The franchise agreement should contain provisions with respect to the following:⁶⁵

- A requirement for franchisees to purchase goods and services from approved sources or suppliers. This provision should specify and describe the types of products and services whose suppliers or sources are subject to approval by the franchisor.
- A flexible procedure for the franchisee to request and obtain copies of the standards and specifications for particular products and services, as well as a current list of approved suppliers and sources. Franchisors should include an obligation of confidentiality with respect to such information, and an express exclusion for products and services subject to trade secrets.

⁶⁴ Stephanie Trefcer, "COVID-19 Accelerates Supply Chain Digital Transformation", *KPMG* (2020), online: <<https://info.kpmg.us/news-perspectives/technology-innovation/covid-19-accelerates-supply-chain-digital-transformation.html>>.

⁶⁵ *Supra* note 3 at §35:4.

- A right in favour of the franchisee to request the franchisor approve additional suppliers or sources of the goods and services subject to the approved supplier program. A detailed process with respect to the procedures for approving alternative suppliers and sources, including a procedure and expense allocation for product testing and evaluation of the alternative supplier's qualifications. Franchisors should include specific timelines for notifying franchisees and alternative suppliers on the results of the tests and evaluations. Franchisors may wish to include a mechanism for franchisees to challenge the franchisor's approval or rejection of a supplier. To address short-term shortages, the franchisor should consider including an accelerated process for approving alternative suppliers on a temporary basis.⁶⁶ While the process to assess and approve short-term suppliers should be more flexible and respond to the urgent need to restore supply, franchisors must still ensure that these alternative suppliers can meet the quality and quantity standards necessary for continued operations.⁶⁷
- The right of franchisors to monitor the performance of all approved suppliers and to suspend or revoke approval if the alternative supplier's performance is not in accordance with the supplier's obligations pursuant to the franchisor's standard form approved supplier agreement.

(ii) *Business continuity plans.*

When drafting provisions related to the establishment of a BCP (as discussed above in section IV(A)), the franchise agreement should include the following:

- An obligation for the franchisee to prepare and provide the franchisor with a business continuity plan, in writing, that meets the following minimum requirements:
 - a description of the persons, roles, responsibilities, procedures, and processes required to operate the franchised business in a manner to ensure uninterrupted service to the customers in the event of a business interruption;
 - a description of the steps to be taken to ensure that the principal continues to devote the necessary time and attention to the management of the franchised business and maintains direct on-premises supervision thereof in order to ensure the proper, efficient and effective operation of the franchised business;
 - a description of the steps to be taken to ensure the proper, efficient and effective management, operation and direct on-premises supervision of the franchised business in the event the principal is temporarily incapacitated;

⁶⁶ Beilfuss, *supra* note 12 at 48.

⁶⁷ *Ibid.*

- measures for minimizing the duration of the business interruption; and
 - a process for restoring service to the customers in accordance with the agreement within a reasonable time frame.
- An obligation for the franchisee to comply with the business continuity plan upon the occurrence of a defined business interruption, to ensure uninterrupted service to customers. The term “Business Interruption” should be clearly defined and include any event, whether anticipated or unanticipated, including a force majeure event (as defined in the franchise agreement), that is reasonably likely to have a material impact on the franchisee’s ability to provide uninterrupted service to customers;
 - An express requirement for the franchisee to continuously review and update the BCP and provide the franchisor with such updates;
 - An obligation for the franchisee to immediately notify the franchisor upon implementation of the BCP and to provide regular, ongoing (i.e., daily) status reports to the franchisor until the business interruption has been resolved; and
 - An express acknowledgement by the franchisee that it is solely responsible for hiring, training and paying any employees or independent contractors engaged by it in connection with the BCP.

(iii) *Force majeure.*

As outlined in section II(B)(ii) above, a force majeure clause should define the force majeure event, provide precise processes for invoking the force majeure clause, including the obligation to demonstrate the contractual obligation cannot be performed, a specified notice period, and the obligation to mitigate, and outline the specific consequences of invoking the clause. Franchisors should take care to expressly state the franchisee’s obligation to provide continuity of service to ensure uninterrupted services to customers to the extent such continuity can be reasonably addressed by the implementation of a business continuity plan.

(iv) *Limitation of liability.*

As outlined in section III(B), above, the greater control a franchisor has over a supply chain, the greater their risk of being found liable to the franchisee for any losses that may arise because of a supply chain disruption, particularly in instances of captive supply. While franchise agreements may often be silent with respect to the franchisor’s limitation of liability, following the SCC’s recent decision in *Maple Leaf*, Canadian franchisors should consider including a specific limitation of liability clause, limiting or excluding franchisor liability for any loss or damage caused by the disruption of a designated supply chain or the franchisee’s inability to procure products or services pursuant to approved supplier programs. This clause should expressly limit liability for specific types of economic losses, including direct or indirect losses, including lost profits, sales, goodwill

and capital value, as well as clean up and disposal costs, for product recalls, supply chain disruptions, product defects, health and safety recalls.

(B) Supply Agreements

Typically, there is some degree of fault associated with a supplier's inability to meet its contractual obligations; however, the widespread and uncontrollable impact of the COVID-19 pandemic may remove or minimize any fault that would typically be attributed to the supplier.⁶⁸ Instead of focusing on the strictly legal consequences of a supplier's inability to perform its contractual obligations, franchisors should focus on preserving as much business value as possible in the existing relationship and under the existing agreements. In the event of a supply chain disruption, franchisors should establish "without prejudice" discussions with suppliers, focusing on adjusting existing agreements and re-establishing supply. It is worth noting that if an existing agreement is amended, the supplier's non-compliance may be repaired, and the supplier will likely not be liable for any damage or loss that arose from the initial non-compliance.⁶⁹ However, franchisors should turn their minds to the possibility that the business context has been altered so significantly that the terms of the original contract no longer fit the needs of the franchise system or supplier. In those circumstances, franchisors and suppliers may need to terminate existing agreements and renegotiate an entirely new arrangement that is better able to address the needs and expectations of both parties.

When negotiating and establishing supply agreements going forward, franchisors should consider the following:

The right to find temporary alternative supply. Even in an exclusive appointment with a supplier, franchisors should ensure the franchisor or franchisee has the right to find alternative supply in the event the supplier is unable to perform their contractual obligations. Typically, this will include an express carve out in the force majeure clause of the supply agreement.⁷⁰

Amendment and/or termination upon supply chain disruption. To more effectively and efficiently address supply chain disruptions going forward, franchisors may wish to negotiate an ability to amend or terminate the existing agreement upon the occurrence of certain supply chain disruptions. The express right to renegotiate or amend the agreement upon the occurrence of certain events will help ensure a timely resolution and minimize loss.

Limitation of liability in the event of supply chain disruptions. In light of the dissenting judgement in *Maple Leaf* (discussed above in section III(B)), suppliers may be inclined to seek an express limitation of liability for any losses suffered by franchisees as a result of a supply chain disruption, and/or request an indemnity from the franchisor for any claims from franchisees for supply-chain related losses. When considering whether to agree to such terms, the franchisor will want to

⁶⁸ *Supra* note 23.

⁶⁹ *Ibid.*

⁷⁰ Beilfuss, *supra* note 12 at 48.

ensure their franchise agreements expressly limits such liability, directly or indirectly, with the franchisee.

Confirm the supplier has an adequate BCP. Franchisor's should request information on the supplier's BCP at the time of negotiation and build into the agreement a right to be notified when a supplier is operating under a BCP. Depending on the franchisor's negotiating power and how well the supplier's BCP addresses the franchisor's concerns, the franchisors may request the supplier modify their existing BCP to better take into account the anticipated effects of the COVID-19 pandemic or other similar disruptions.⁷¹

Ongoing financial disclosure. Given the widespread economic impact of the COVID-19 pandemic and the solvency issues faced by many members of the supply chain, franchisors may consider seeking ongoing financial disclosure from their suppliers. By keeping a pulse on the financial health of their suppliers, franchisors will be better positioned to assess risk going forward.

VI Conclusion

Over a year into the COVID-19 pandemic, franchise systems continue to face the consequences and challenges stemming from supply chain disruptions. However, franchisors are now armed with a year's worth of experience navigating this new era of business operations and are equipped with the knowledge and strategy necessary to survive and thrive in 2021 and beyond.

Generally speaking, prioritizing the preservation of business relationships will prevail in the face of widespread supply disruptions; however, franchisors should still ensure their agreements and arrangements with suppliers and franchisees mitigate financial and operational risk to the greatest extent possible. In the short-term, franchisors should review their supply agreements to ensure they are aware of their reciprocal obligations with suppliers and whether, in the event of a supply chain disruption, force majeure clauses will apply. Further, franchisors should review their current approved supplier programs and consider implementing a quicker, more flexible route for approving temporary alternative suppliers. Mid-range strategies include reviewing supply agreements for amendment and renegotiation, and updating franchise disclosure documents, franchise agreements and operations manuals to reflect the realities of operating during the COVID-19 pandemic and immediately following. This includes offering multiple approved suppliers, incorporating clear and specific force majeure criteria, and limiting franchisor liability for any losses incurred by franchisees. Looking even further ahead, franchisors should establish franchisee and supplier obligations with respect to business continuity planning, and consider how data can be leveraged and applied to create a resilient, sustainable supply chain. Franchisors should focus on creating agile and flexible systems that maintain quality and consistency, but allow the franchisor and franchisees to respond quickly and effectively to changing business environments to ensure the success of the franchise system.

⁷¹ *Supra* note 23.