



Navigating Current Supply Chain Challenges and Future Outlook

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Global Transport and Logistics

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The Future of the Supply Chain- *Navigating Forward with Lessons Learned*

September 20, 2022



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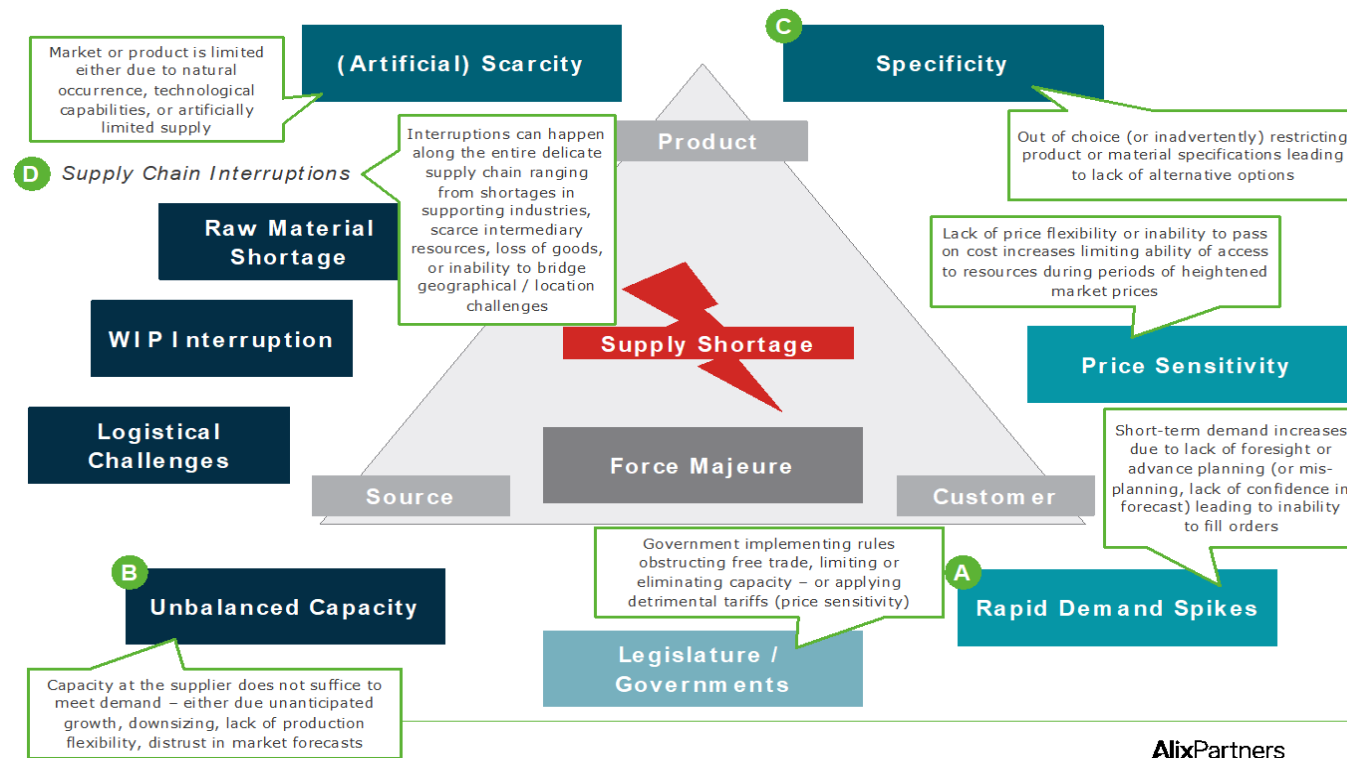


Background of Supply Chain Issues and Delays

Supply Shortages

SUPPLY CHAIN

Supply shortages are like traffic jams – not intrinsic to the system but the result of compounding small disruptions along the chain



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Outlook: It is going to get worse before it gets better

- More disruptions inevitable
 - COVID-19 was the perfect “stress test”
 - Globalization of supply chains
 - Electrification of everything
 - Connectedness of everything
 - Contrasted against JIT, lean manufacturing, sole sourcing



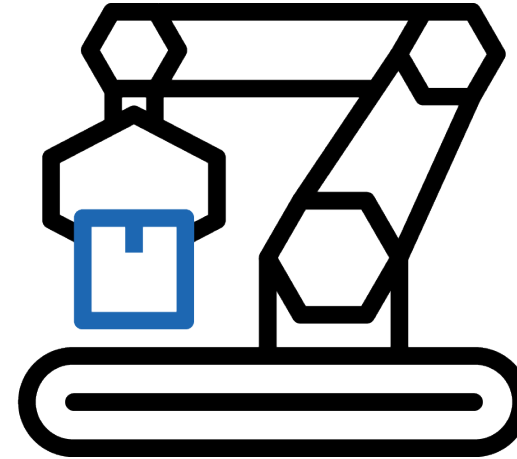
Pricing Disputes

- Pressures are boiling over in the supply chain
- Unprecedented pricing disputes even under fixed price “requirements contracts”
- Everyone gets in line...
- How can these escalate?
 - Stop-Ship Threats
 - Breach of Contract Notices
 - Payment Under Protest with Reservation of Rights
 - Breach of Contract Claims or Setoffs
 - Emergency Temporary Restraining Orders/Preliminary Injunctions



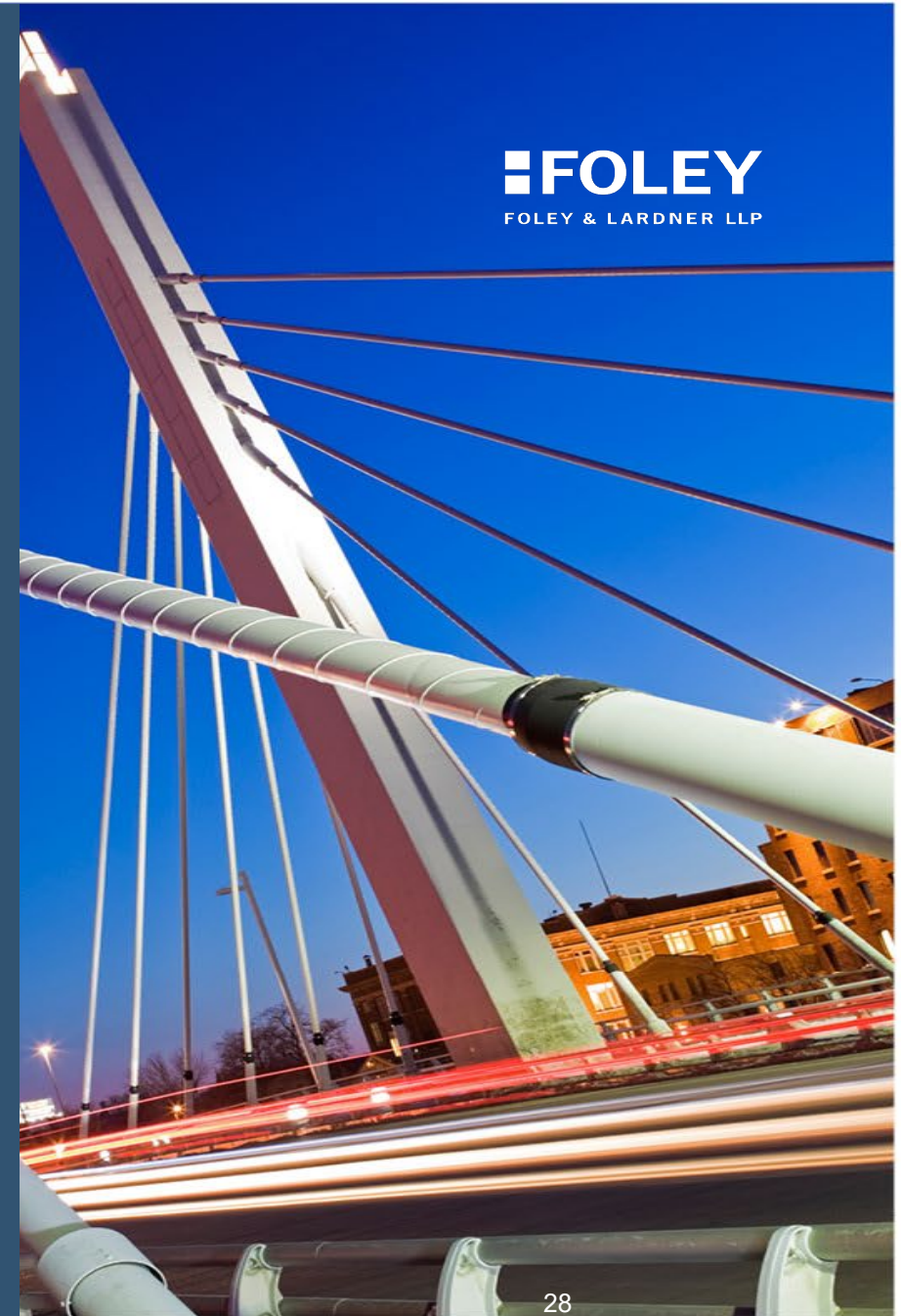
Outlook

- Opportunity for manufacturers to reexamine their commercial contracts
 - Increased focus on supply chains and related planning
 - Never waste a good crisis
 - Monitor litigation trends around supply chain disputes
 - Look at shifting risk by reexamining contracts and making changes going forward
 - Look at long-term strategies for reducing risk in the global supply chain
 - The supply chain may be “broken” but your contracts are entirely fixable!



SUPPLY CHAIN DISRUPTIONS

Lessons Learned



Lessons Learned

- Rules
- Suggestions
 - Not one-size fits all



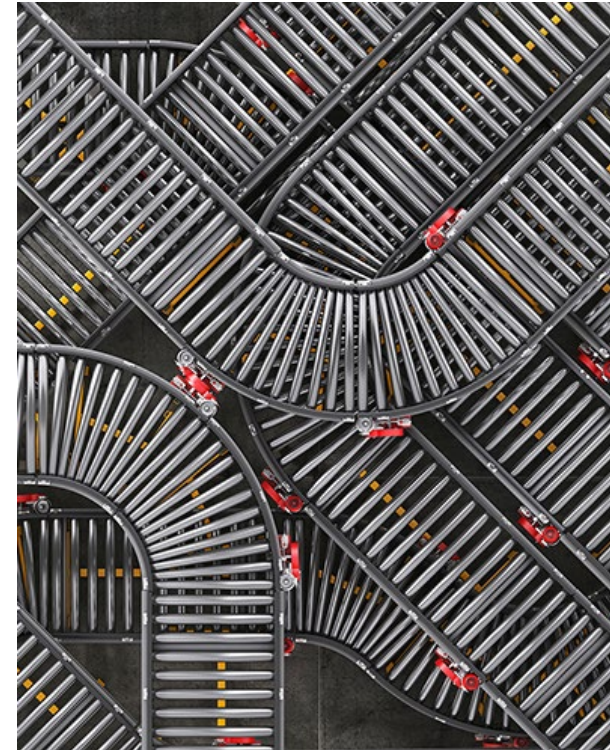
Suggestion #1

- Engage in a supply-chain mapping exercise and identify past issues



“Those that fail to learn from history are doomed to repeat it.” – Winston Churchill

- Know your company’s supply chain and pain points
 - The who, what, where and how far away
 - Labor force
 - Freight & logistics
 - 3PL
 - Tracking technology and transparency
- Look beyond one tier below
 - Ex. What if both of your suppliers have the same raw material supplier?
- Important for both short- and long-term precautions



Suggestion #2

- Revisit T&Cs and rewrite the *force majeure* provisions (plural!)



Force Majeure



KEY CONSIDERATIONS

For Buyers

- List specific events, as narrowly as possible
- Exclude labor strikes
- Build-in prompt notice requirement and expected duration
- Shorten time to resume performance
- Need an “out” (escape hatch provision): right to terminate after certain time period



KEY CONSIDERATIONS

For Sellers

- Negotiate as broad of a list as possible
- Catch-all: “. . . or any other circumstance beyond the control of the parties” (very broad)
- Suspend performance until the force majeure event is over

Suggestion #3

- Consider allocating certain risks and fluctuations through the contract (whether an amendment or at time of renegotiation)
 - Indexing or price shifting provisions for raw material increases
 - Volume targets
 - Provisions addressing expedited freight costs



Fresh Look at Commercial Contracts

- Can and should consider how to allocate risk under the contract
- Consider risk assessment for existing LTAs and strategic suppliers
- Involve supplier/contract managers in all aspects
- Consider past issues, disputes, stop-ship threats, line downs, etc.
- Expect to see more indexing, hedging, thresholds, etc.



Suggestion #4

- Consider fundamental changes to Just-In-Time (JIT), lean manufacturing model with sole-sourced supplier



Try to Avoid Some of the Problems with JIT

- Not possible across all components, raw materials and operations
- But are there some parts and raw materials that can be:
 - Dual-sourced (and from different locations)
 - Warehoused or stockpiled in some quantity
 - Request safety stock to be held by suppliers
 - At least have a prequalified alternate source ready



Suggestion #5

- Consider fundamental changes to the length/distance of the supply chain



Reshoring/Nearshoring/Regionalization

- Easier said than done
- Long-term strategy
- Many companies are taking steps to:
 - Source certain supplies and operations “closer”
 - In-house certain parts and functions
 - Acquire production facilities or enter into JVs
 - Ex. microchips and batteries

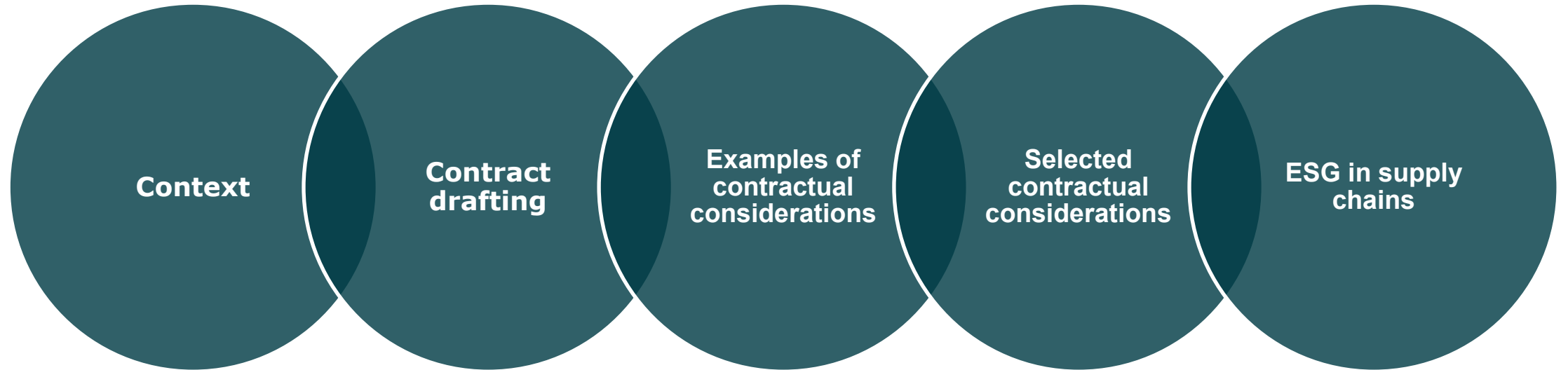


Thanks for joining us!

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Agenda



The structure of the world's supply chains is changing

The pandemic and war in Ukraine have speeded up the transformation

The Economist, 16 June 2022

Strike at UK's biggest port threatens supply chain disruption

Financial Times, 21 August 2022

Børsen, 15 September 2022

Mærsk-rivaler fastfryser priserne på hårdt presset transportmarked: "Vi tror, at spotraterne har toppet"

Flere transportaktører ser tegn på en prisopbremsning på spotmarkedet, der er mangedoblet det seneste år

Navigating Current Supply Chain Challenges and Future Outlook

Tyge Rasmussen
Attorney and partner
Kromann Reumert
20 September 2022



Good contracts are key to mitigate and allocate risks

- If nothing is agreed, then background law will apply > often strict liability, narrow force majeure definition, no cap on liability.
- Thus, be as proactive as possible when drafting the contract in order to avoid the uncertainty and unpredictability related to arbitrary decisions.
- Changes in market will create new standards for agreements.

In or out of the 'drivers seat'?

Contract drafting is within the control of the party in opposite to failed contractual assumptions, which eventually are decided on by a court decision.



Overview: Examples of contractual considerations (1/2)

No.	Risk/purpose	Potential clauses
1	Dual-sourcing	<ul style="list-style-type: none"> • Non-exclusive agreements • Priority/MFN in terms of capacity • <i>(Commercially standardise components)</i>
2	Inventory increase	<ul style="list-style-type: none"> • If with third party (e.g. supplier) ensure property rights are enforceable • Purchase obligation if/when contract is terminated? <i>(supplier, distributor)</i>
3	Price increases	<ul style="list-style-type: none"> • Open book, wholly or partly • Regulation against certain relevant indexes <i>(measured against components of products (e.g. labour costs, steel, copper, energy prices)?)</i> • Cap on change of price > both relevant if no regulation or if regulation • Cost improvement clauses > split on gain / obligation to invest
4	Sanctions	<ul style="list-style-type: none"> • Broaden FM definition so that war is included if materially affects <i>your</i> current supply chain setup • Remedy of such FM > suspension of performance for e.g. 180 days (who bears extra costs), termination of order in question or agreement as a whole.

Overview: Examples of contractual considerations (2/2)

No.	Risk/purpose	Potential clauses
5	Transportation constraints	Still the correct INCOTERMS clause (transportation costs, customs etc.)
6	Delay / other breach of contract	<ul style="list-style-type: none">• FM wording broadened (also include FM in your supply chain)• Variable delivery time clause (recognise that market is what it is and focus on what is controllable) The "usual" is even more important (cap, remedies, right to cure etc.)• Price increase as FM ?
7	Insolvency in the supply chain	<ul style="list-style-type: none">• Ensure that you property rights are enforceable• Security for payments ? (remember local legal opinions and same venue clauses)

Navigating Current Supply Chain Challenges and Future Outlook: Price increases



Contract drafting tools:

- Pricing
 - Being aware of the minimum contract period in relation to unforeseen changes in circumstances.
 - Being proactive by carefully choosing the pricing method (lumpsum contract, index-linked contract price etc.).
 - Considering back-to-back-price terms.
- "Most favoured nation/most favoured customer" -clause
- Force majeure
 - Defining raw material price increases above e.g. 20 % compared to certain indexes as Force Majeure.
 - Including specific events in the definition of Force Majeure.

Navigating Current Supply Chain Challenges and Future Outlook: Open book



Contract drafting tools:

- Describing a structured process for the sharing and management of charges & cost between the supplier and the client.
- Requires assessment of the needs of the contract in order to determine the type and level of open book to be used in a proportionate way depending on the risk level and complexity of the contract.
- Ensures transparency of supplier cost and price.
- Adds to a collaborative culture as well as mutual control and trust in the process.

ESG in supply chains: Examples of clauses (key word is transparency and sustainability)

No.	Risk/purpose	Potential clauses
1	Access to DD	Audit clauses continuously screenings) – both digital and site visits
2	Access to relevant information	Normally part of audit clauses
3	CO2 Footprint etc.	Particular reports / calculations to be available (maybe over time)
4	Internal policies	If relevant, consider to refer to these in the agreements
5	Other parties	Remember the relevant part of the supply chain and not only the contract party

Legal regulation related to supply chain sustainability

Proposal

As of 23 February 2022, the commission has adopted a proposal for a directive regarding corporate sustainability due diligence. The proposal aims to...

“foster sustainable and responsible corporate behaviour throughout global value chains”.

(Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937)

Aims (amongst others)

- Businesses and stakeholders:
To create legal certainty to the required level of due diligence in supply chains.
- Consumers and investors:
To create more transparency to the supply chains.



Legal regulation related to supply chain sustainability

The proposal applies to the company's operations, their eventual subsidiaries and their value chains.
Requirements to company's within the scope:

EU limited liability companies (A/S, ApS)

- 500+ employees
- more than EUR 150 million in net turnover worldwide

Other limited liability companies

- operating in defined high impact sectors
- 250+ employees
- more than EUR 40 million (Art. 2(b) to the proposal)
- The directive will apply 2 years later than for group 1-companies

SME's

Small and medium-sized enterprises are excluded.



Legal regulation related to supply chain sustainability

Selected measures to be taken (excerpts from Art. 4(1)):

- integrating due diligence into their policies
- identifying actual or potential adverse impacts
- preventing and mitigating potential adverse impacts, and bringing actual adverse
- impacts to an end and minimising their extent
- establishing and maintaining a complaints procedure
- monitoring the effectiveness of their due diligence policy and measures
- publicly communicating on due diligence

- ✓ National administrative authorities will monitor and impose fines if non-compliance is observed.
- ✓ Art. 20 to the proposal (sanctions) states the fines shall be "effective, proportionate and dissuasive" and based on the company's turnover.



Art. 20

AmChamDenmark

Panel Speakers

- Vanessa L. Miller, *Partner, Foley & Lardner*
- Tyge Rasmussen, *Partner, Kromann Reumert*
- Patrick J. Figiel-Kibsgaard, *V-P, Group General Counsel, DSV*
- Jakob Rosing, *Partner, Kromann Reumert*

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