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Tips for Negotiating New Technology Agreements in the Time of COVID-19



In the midst of the COVID-19 pandemic, many buyers and sellers of tech services and goods are in the process of (1) examining their existing tech agreements to determine whether the pandemic constitutes a force majeure event under the governing law of the agreement and excuses related failures or delays in performance, and (2) assessing how to negotiate new tech agreements within the uncertainty of the pandemic. The former has been addressed by [recent client updates](#). This update focuses on the latter—how contract provisions other than force majeure can help anticipate and mitigate the risks of new tech agreements in these uncertain times.

Limitations of Force Majeure Clauses

While a force majeure clause may be useful in helping parties to agreements that pre date the pandemic address and allocate responsibility for certain delays or performance failures caused by the pandemic, it is generally not the ideal way to manage pandemic risks in *new* agreements. First, while state laws vary in their interpretation of force majeure provisions, events that were known or foreseeable to the parties at the time of contracting generally do not excuse non-performance. Because the pandemic is well established as a global phenomenon, the risks of it are now likely too foreseeable and known for any new contract's force majeure clause to excuse non-performance. Second, even if a force majeure clause in a new agreement is enforceable, it would be of limited utility because presumably one party could invoke it shortly after execution of the agreement, which undermines the intent of entering into a new contract during the pandemic. Finally, as a more practical matter, a force majeure clause can be a very blunt instrument to deal with the risks of a pandemic—essentially excusing the non-performance of one or both parties altogether—when a more pragmatic and precise approach throughout the agreement could be taken.

Accordingly, we would suggest examining the following provisions typically found in technology agreements as places where parties can anticipate and mitigate the risks of negotiating new contracts during the pandemic.

- **An Addendum for Terms That Apply During the Pandemic:** Parties entering into a new agreement that could last longer than the pandemic (e.g., any contract for more than a few months) should try to anticipate the business and legal terms that they would want to apply both during and after the pandemic. To this end, the main body of the agreement could be drafted with standard commercial terms that would apply in "normal" circumstances, while an addendum contains the terms and conditions that apply during the pandemic, with the understanding that the pandemic-specific provisions would preempt the terms and conditions in the main body of their agreement during the pandemic. This approach would provide a rational structure for the parties to enter into a longer-term agreement, while addressing potential risks and issues related to the pandemic in the short term. Because it may be difficult for the parties to define the term during which such an addendum should be in effect, the parties could include a provision in their agreement that sets forth certain criteria that must be satisfied before the addendum can expire or that requires the parties to mutually agree to the expiration of the addendum.
- **Payment Terms:** Given the potential of the pandemic to affect both a provider's ability to perform its obligations and a customer's ability to obtain [credit as markets tighten](#), parties should carefully consider how payment obligations are drafted. For example, the parties could consider closely tying when a payment obligation becomes due with the other party's ability to meet their performance obligations and establishing mechanisms that allow for flexibility in the event a payment is late (e.g., waiving or reducing interest rates on late payments).
- **Acceptance of Goods, Risk of Loss, Transfer of Title:** Recently we have seen how player trades and free agent signings in the National Football League were conditioned on players traveling to their new teams and having physicals after the pandemic subsides before such transactions could become final. Similarly, the travel restrictions and "[stay-at home](#)" orders of the pandemic may similarly impair buyers of goods from inspecting and accepting pursuant to standard commercial terms, which will consequently affect risk of loss, transfer of title, and payment provisions. Parties could consider alternative ways to inspect and accept goods, such as relying on remote video or data measurements, permitting partial payment upon delivery regardless of acceptance, or the use of buyer-funded escrows that could be released as soon as inspection and acceptance takes place. There may be other ways the parties could devise to hedge the risks involved depending on the nature of the contract and other circumstances, provided that the parties anticipate and plan for how they can realistically work around the likely impediments to customary commercial practices during the pandemic.
- **Alternative Dispute Resolution:** As parties may face difficulties accessing courts and other forums for dispute resolution during the pandemic, alternative dispute resolution that permits remote video hearings and conferences may be more expeditious and practical for the parties. For example, the special terms could include a mechanism whereby a dispute is first escalated to designated business representatives with authority, who can then meet by phone or video conference and exchange documents digitally. The timing of such proceedings, the length of submissions, whether counsel will be permitted to participate, and what happens should such efforts fail to achieve a resolution should be considered.
- **Limitations of Liability/Liability Caps/Liquidated Damages:** Given the potential difficulty in calculating the harm caused by a breach under the unusual circumstances of the pandemic, parties may find it advantageous to memorialize their best estimate of the value of certain breaches in the form of liquidated damages (provided that such estimate is not punitive). Similarly, the parties may wish to exclude certain types of liability altogether in the limitations of liability clause. Additionally, a liability cap is another device for the parties to anticipate maximum exposure under a contemplated contract and further hedge the risks of entering into an agreement during a pandemic.
- **Suspension:** The remedy of an excused suspension of performance obligations may be appropriate under certain agreed circumstances during the pandemic. Without such a remedy, parties seeking to create a

long-term agreement may find themselves bound to a contract too inflexible to realistically navigate the pandemic. Such a right should anticipate when it could be triggered, its duration, and how the parties would determine the permitted suspension must expire.

- **Delivery Terms:** A party with the obligation to deliver goods or services may want to address the heightened uncertainty regarding their ability to deliver in a timely and reliable manner or at all during the pandemic. To address these concerns, the parties could provide for more flexible delivery windows or non-binding delivery estimates, an agreed process for substituting goods and services, and a procedure to allow the seller or service provider to prioritize orders and/or reassign personnel among customers.
- **Milestones:** Any provisions entitling a party to a payment or other right if a certain milestone event is achieved before a specified date should be evaluated to see if the pandemic is likely to affect a party's ability to achieve those goals. If so, it may be appropriate to extend or alter milestone-based triggers under certain agreed circumstances during the pandemic. A carefully drafted provision should anticipate when it could be triggered, how it would alter milestone-based triggers, and how the parties would determine when to return to the agreement's normal milestones or timeframes.
- **Change Orders:** Given the fluid nature of pandemic-related developments and their consequences on global supply chains, workforces, and customer demand, it is likely that the parties will need to rely on change orders as circumstances warrant. The parties could consider including an expedited change order process, together with governance procedures, to facilitate their review and approval of requested changes and minimize disruptions to their business relationship.
- **Disclaimers:** During the pandemic, the parties could bolster their disclaimers to memorialize their mutual assumption of key risks related to the pandemic and how those risks might affect performance. Such disclaimers could effectively make performance on an "as is/with all faults" basis during the pandemic. While not a perfect solution for all risks, disclaimers could mitigate the risk of lawsuits between the parties over performance failures attributable to the pandemic. Where parties are not housing their pandemic-specific terms in an addendum, the parties should be careful to narrowly tailor the pandemic-related disclaimer to avoid inadvertently expanding the scope of the disclaimer beyond the pandemic.
- **Termination:** The parties' rights to terminate an agreement for cause may also need to be adjusted due to COVID-19 to allow the parties more realistic periods of time to cure breaches or fulfill obligations. Conversely, some parties may prefer to have a clean right to terminate without cause to hedge pandemic-related risks. However, given that the nonbreaching party's alternative suppliers or customers will likely be experiencing similar pandemic-related difficulties, a strict termination without cause right would be an impractical remedy.
- **Health and Safety:** In tech agreements, there are numerous instances in which a seller, licensor, or service provider must have its employees, subcontractors, suppliers, or agents visit the customer's facilities. The customer may want to include contractual assurances that the seller will employ specified best practices for health and safety while on site. These may include requiring the use of personal protection equipment such as respirators and gloves, the immediate removal of any person on seller's on-site team experiencing COVID-19 symptoms, and seller's cooperation in conducting contact tracing concerning any seller-related person on site who becomes infected, etc.
- **Transition Services:** During the term of a new service agreement while the pandemic remains active, a customer may wish to have the provider's help to transition services in-house or to an alternate service provider. While there may be limitations on a provider's ability to assist depending on the circumstances, it may be useful to have a contractual commitment to mitigate operational impact.
- **Service Levels:** In response to recent stay-at-home orders, many workforce sectors have transitioned to working remotely, which has placed greater demands on broadband internet access service and various cloud-based services. For such agreements, service providers may need to push for more flexible service levels to accommodate increased demand. Having the specific right to temporarily eliminate non-critical service features, throttle bandwidth, limit hours of operation, or otherwise regulate service usage would help the provider manage network operations. Establishing service credits as the sole remedy for service

interruption or degradation would also reduce risks for the service provider during a pandemic.

- **Governing Law:** As the number of confirmed COVID-19 cases rises, governmental laws, orders, and regulations are being issued and updated frequently. To anticipate further material changes in law, the parties could include provisions that require contracting parties to discuss whether the changes trigger the need for a contract amendment or modification. Providing an express structure that anticipates material changes may allow the parties to respond to such developments more rapidly and rationally.
- **Business Continuity Plan:** The parties should require implementation of a business continuity plan that specifically addresses the foreseeable risks of COVID-19 to the extent possible. For example, the business continuity plan should account for a reduction in personnel, resources in view of business disruptions, and fundamental adverse changes to the relevant market caused by COVID-19. The agreement should call for the parties' plans to be periodically updated as circumstances warrant.
- **Confidentiality and Reporting Obligations:** Parties to a contract may consider requiring the sharing of up-to-date information on how a pandemic is affecting performance obligations. Additionally, the parties should discuss in advance how and whether information should be disclosed to the public about how the pandemic is affecting their business relationship. The parties should carefully review the confidentiality and reporting provisions to appropriately capture the agreed-upon terms and conditions around each party's public disclosures and the reports each party needs to provide to the other during the pandemic.
- **Representations and Warranties:** Under the unusual circumstances of the pandemic, representations and warranties should be carefully evaluated. For example, a party committing to perform services on site should consider the impact that [closing borders](#) could have on a representation and warranty that the party has obtained all authorizations and permits required to provide the services.
- **Insurance:** While it may not be realistic for parties to expect to be able to purchase coverage for related losses in the midst of the pandemic, the parties can seek assurances in the agreement that each side is adequately insured for commercial general liability, errors and omissions, property, and other coverage, particularly when near- and long-term economic conditions remain uncertain. Separately, each party should carefully review their own insurance policies and work with insurance counsel to ensure adequate coverage during the pandemic.

We offer separate guidance in a [related update](#) on how to address the special circumstances of the coronavirus in key provisions already-negotiated contracts.

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