



Negotiating a Pandemic-Proof Contract

It's been almost 100 years since a pandemic last hit the civilized world, so it's no wonder that today's governments, businesses, and legal systems are not fully prepared to defend against the economic and legal onslaught of COVID 19. The world is more uncertain than ever before, and businesses of all scales, models, and industries are shaken.

In these perilous times, **commercial contracts** that are meant to safeguard the interest of signing parties have to take on the additional role of provisioning security beyond conventional threats. Government ordered lock-downs and social distancing programs have thrown open challenges beyond signed contracts simply because parties and contract attorneys could not have considered something like this happening to the world at large.

As we continue to rise above and learn from the situation, businesses inevitably think of newer ways of coping, since even Force Majeure (as we know it) does not provide adequate protection to parties. Contract attorneys and businesses have to start thinking about commercial hardship over and above as it is or was accepted and understood to be in the pre-COVID 19 era. It is only fair that all provisions and clauses that touch upon or influence parties' positions in the event of COVID 19 be renegotiated to give both parties an equal standing in business activity and before the court of law. Here are four key provisions of commercial contracts to consider, discuss, and redraft while grappling with the after-effects of the pandemic.

Force Majeure and Termination

If Force Majeure events (often defined in contracts) occur for a sustained period, these give the unaffected party the right to terminate the contract. The current thinking assumes that parties to the contract have no way out other than termination. While one party is affected, the party on the receiving end may have no way out.

In the present situation, it isn't uncommon for both or all parties to a contract to have their business impacted, and performance of the contract becomes increasingly onerous. The question that then remains is – should an extended period of business disruption be considered and applied for all parties in the contract in addition to just the affected parties?

Challenges beyond Force Majeure

Force Majeure is not defined in English law. Some civil codes provide an exemption for non-performance due to 'irresistible forces' or 'fortuitous events' if the event in question is inevitable, extraordinary, or unforeseeable. It is not uncommon to find a situation in which a person finds it extremely difficult, but not impossible, to perform an obligation that would not qualify as Force Majeure.

Parties define Force Majeure events in contracts based on experience, assumptions, and common industry practices. Ideally, Force Majeure should cover unforeseen events beyond a party's control and outside their knowledge at the time of contracting. COVID-19 could potentially cause situations where it is extremely difficult and challenging, if not impossible, to fulfill a contractual obligation where Force Majeure does not apply.

For instance, consider low to a limited spread of COVID 19 in a jurisdiction that has regardless been closed as a precautionary measure. This could impact everyday operations such as onboarding new employees, delivery delays, supply chain disruptions, etc. Do the applicable contracts cover such situations for the organization and third parties?

Building fail-safe options

Changes in economic or market circumstances that affect contract profitability (commonly known as **commercial hardship**), or the ease with which obligations can be met, are not by themselves grounds for exclusion of liability. Parties focused on business performance (rather than litigation) need to ideate new ways to handle commercial hardship contractually.

Frustration of purpose, meaning if the underlying principle or purpose of a contract is so frustrated by an unforeseen event that it renders the contract effectively worthless to a party, such that the party may be able to avoid performance based upon the agreement. This clause should expressly feature in all commercial contracts.

Financial clauses in contracts should include additional provisions to practically address situations like COVID-19. Some ideas worth exploring include provisions for staggered payments, payment deferrals, the extension of a payment time period, additional discounts on timely payments, and relaxation of performance on certain counts with heightened performance obligations applicable after return to normalcy.

The prevailing conditions ignite the thought process required to look at certain provisions of commercial contracts from an angle that rarely seemed critical before. Organizations must take deliberate measures to hedge future actions to the extent possible.

The team of contract management specialists at Nexdigm (SKP) are well-positioned to help evaluate, negotiate, revise, and manage contracts to help build resilient customer and vendor relationships.

Happy Contracting!

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Give yourself right to renegotiate

Parties to a service contract should strive to envision and consider situations where a change in underlying factors could lead to pricing in the contract becoming less profitable. Commercial contracts should include provisions and clauses permitting one or more parties to **renegotiate a particular bargain** in the event of any change to applicable laws (as a response to a COVID 19 like situation) or market/ macroeconomic factors that make it impracticable or impossible for a party to discharge its contractual obligations.

By including express provisions, both parties are granted the right to renegotiate pricing under challenging situations. Exercising Force Majeure, leading to termination of the contract, is not a 'one size fits all' solution. In a world disrupted by COVID-19, where business losses are mounting, renegotiating the contract to suit both parties should be a preferred solution that is prioritized over the termination of service contracts with vendors.

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Our cross-functional teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

We provide an array of solutions encompassing Consulting, Business Services, and Professional Services. Our solutions help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in USA, India, and UAE, we serve a diverse range of clients, spanning multinationals, listed companies, privately owned companies, and family-owned businesses from over 50 countries.

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