

Q&A – COVID 19 Pandemic Contract Issues and Concerns: Part I

The COVID-19 pandemic and the measures being taken to contain its spread are creating a myriad of issues for companies, including issues relating to their contracts and relationships with suppliers. The following Q&A may help with concerns and issues you will be facing regarding your contracts with suppliers.

Question: *I am concerned about entering into contracts during these uncertain times, should I insist on termination for convenience?*

Answer: Yes. Termination for convenience without penalty is a great term to have in your contracts right now if you want the flexibility to exit. However, it is a term that is always difficult to achieve (especially without any early termination penalty). If you are unable to get termination for convenience, you may consider entering into shorter term contracts instead of long term deals. You may ultimately end up paying a higher rate, but at least you have increased flexibility. Also, pay close attention to the order forms and work orders you are entering into to ensure you fully understand the pricing structure.

Question: *I need to provide notices with respect to my contracts, such as notice of termination, renewal, or non-renewal, but I am required work from home and am unable to provide the notice via the required means, e.g., U.S. mail or overnight courier. What should I do?*

Answer: First of all, read your notice provision carefully to ensure you understand what your options are. You may be in the habit of providing notice in one particular manner because most notice provisions allow it, but it is possible that the contract could include email as an option.

If you are truly unable to provide notice as required, and you don't have a colleague who can either, then we would recommend drafting the notice as you would and sending it via email to the contact listed in the contract to receive notices (if you have an email for that person or try to get one from your contact at the supplier) and your contact at the supplier asking them to forward the notice to the person the contract listed to receive notices. In addition, you should ask for acknowledgement of receipt of the notice and if you are not sending it to the listed contact for notices, confirmation that it was forwarded to that person, to ensure that notice was received by the appropriate person. While some courts have found that you must comply with the specific requirements of the contract's notice provision, other courts have taken a more nuanced approach and determined that notice was sufficient even though the notice requirements of the contract were not followed where actual notice was received. Therefore, when you cannot follow the contracts notice requirements, the goal is to ensure actual notice is received by the supplier. Remember, however, that the most prudent course of action is to always strictly adhere to the notice requirements in the contract.

Question: I am able to send notice via the proper means, but I am concerned that my overnight courier will be unable to deliver the notice the next day (or within the proper time frame), what should I do?

Answer: First, if you send the notice via overnight delivery, and that is what is required by the notice provision, you have complied with the terms of the notice provision even if the carrier does not deliver it the next day. The issue becomes when notice or receipt is specified to occur in the contract. Notice provisions vary in this regard, so be sure to read the provision carefully. Some provisions specify that notice is deemed to occur upon actual receipt or a specific number of days after you send it. Given the uncertainties presented by the coronavirus pandemic, the most prudent course of action is to send the notice as early as possible to plan for unanticipated delays in delivery. Don't wait until the last possible day! You should also send a copy of the notice via email to the notice contact as well as your contact at the company to ensure that actual notice is timely received.

Question: My company executed an agreement to roll out an enterprise wide technology platform. We purchased the license through the technology provider, but contracted with a third party for installation services. We have halted the installation services, but still have the license agreement that requires us to begin paying the SaaS vendor. We don't want to pay for a service we are not using, can we use force majeure to either not pay or terminate the agreement?

Answer: Force majeure scenarios are very fact specific. If your contract contains a force majeure provision, carefully review the provision. Generally speaking, force majeure excuses a party if based on changed circumstances it is unable to perform, in each case to the extent the circumstances are beyond that party's reasonable control. Additionally, many force majeure clauses contain a provision that payment of fees is not performance that may be excused by force majeure. In this scenario, there does not appear to be any circumstance outside of your control that is preventing you from paying your SaaS vendor. Although likely an uphill battle, the circumstances could possibly support a commercial impracticability argument, which would be a fact based analysis.

The COVID-19 pandemic is and will continue to impact commercial parties and their existing contracts, as well as raise concerns about contracts being negotiated. Please contact any member of **Bodman's Enterprise Procurement Group** if you need assistance. We will be providing frequent updates and additional FAQs as the situation develops.

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