

### Q&A – COVID-19 Pandemic Contract Issues and Concerns: Part III (Other Defenses and Dealing with Vendors)

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. From a legal perspective the measures being taken, including lockdown and stay home orders, may make it difficult or impossible for suppliers to perform. Previously, we have provided a Q&A on force majeure. In this Q&A we will address other avenues for relief as well as some tips on how to deal with requests from vendors.

**Question:** *The agreement with my vendor doesn't contain a force majeure clause, are there other ways that my vendor can be excused from performance?*

**Answer:** Yes, absent a force majeure clause a vendor may have other statutory or common law defenses to performance. These include commercial impracticability under the Uniform Commercial Code (UCC) and the common law doctrines of impossibility and frustration of purpose. The application of these will vary on a jurisdictional basis and will depend heavily on the facts. While the requirements differ slightly, there are three common requirements for each of these: 1) performance must be completely prevented (impossible) or significantly hindered; 2) the event affecting performance must be unforeseeable; and 3) the party seeking relief cannot be at fault. In all instances, the bar is very high and courts will likely not provide relief just because a party sustains a loss or performance becomes more difficult.

**Question:** *My vendor sent me a change request seeking the ability to have their employees work from home in support of the services they are providing. These services involve very sensitive information, but are also critical to my company, how should I respond?*

**Answer:** First, you should look at your contract and determine what rights the vendor has, what the change process is, and if there is anything addressing or restricting work from home in the contract itself. Given the critical nature of the services, it is likely that your best course of action will be to work with the vendor to define appropriate controls and parameters around working from home. The next option may be for the vendor to assert force majeure or another defense to performance, especially if there is a stay at home order preventing the vendor's employees from going to work. It will be important to be responsive to the vendor and stay in communication in order to avoid a complete work stoppage.

**Question: Is my vendor excused from complying with a service level agreement?**

**Answer:** As with any question related to a contractual agreement, first look to the language of your contract with the vendor to determine the vendor’s service level obligations. Your contract may include an exception excusing service level failures if the failure is caused by events outside the vendor’s reasonable control, or if the failure is due to a force majeure event. In the absence of express language excusing performance, your vendor may be excused from performance through the defenses of commercial impracticability or impossibility. If your vendor has informed you that it cannot meet service levels due to COVID-19, you will need to conduct a fact-based analysis to determine if performance is excused.

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 now or in the future. Bodman’s attorneys are available to assist you as businesses adjust to this difficult time, 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. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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