Holland & Hart

Drafting Commercial Contracts: Eight Important Provisions During a Pandemic

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Companies have been navigating how to adjust "standard" business contracts to mitigate the ongoing uncertainties and risks resulting from the COVID-19 pandemic for several months now. Parties should consider the following checklist of recurring issues as they enter into new commercial contracts and acquisition agreements.

1) Force Majeure Clauses
Before the pandemic, force majeure provisions were often vague, exempting performance based on "disasters" or "acts of God." As disputes emerged during the spring and summer of 2020, it became clear that force majeure provisions should carefully address whether, and to what extent, COVID-19 impacts will exempt a party's performance under a contract.

2) Payments Based on Commissions or Profits
Providers, agents, and sellers who have traditionally priced their services or goods on a strict commissions or profits-only basis have learned there can be severe compensation and cash flow effects during a pandemic. Where payment is based on future profits, parties may regret not allocating the risk of pandemic effects more evenly. Providers may be wise to negotiate certain baseline or guaranteed payments, or at least payment advances, to account for future payment disruptions. Similarly, parties to mergers and acquisitions must give substantially more thought to earn out provisions and their potential outcomes during crisis conditions.

3) Business Interruption Insurance
During the spring of 2020, many businesses learned their business interruption policies did not cover the impacts of COVID-19. As the pandemic persisted, the insurance industry started to respond by offering new endorsements and coverage options. Businesses should revisit their policies and work with their insurance companies to determine whether, and to what extent, they can purchase policies to protect COVID-19-related losses. Contract provisions, particularly indemnification clauses, should be drafted consistently with available coverage.

4) Effect of 'Shelter in Place' Orders and Workforce Quarantines
If an event is canceled due to a governmental 'Stay at Home' or 'Shelter in Place' order, businesses will wish they had negotiated in advance for contingencies caused by sunk costs and lost profits. A related issue is how the parties will allocate the risk of an outbreak of COVID-19 in a workforce, assuming an employer will elect or be obligated to suspend or limit

operations during periods of quarantine and recovery.

5) Supply Chain Challenges
Absent an appropriately detailed force majeure clause, a supply chain challenge will not typically excuse one party from performance. A party may not wish to completely excuse another from the entire contract due to certain delays in the supply chain. Parties can work to anticipate the supply chain challenges that may impact performance, and they can draft accommodations, discounts, and exemptions accordingly.

6) Notice Provisions
Contract terms by which one party can properly give notice to the other used to be a relatively minor detail. For businesses where nearly all of the workforce continues to work from home, sending and receiving notices via overnight or registered mail can take much more effort during a pandemic. On the flipside, notices that are only transmitted via email can be easily missed or end up in unchecked spam filters. Businesses should consider what type of notice is acceptable to them, both in terms of what is convenient to provide and what is reliable to receive, along with appropriate response periods.

7) Exclusivity
Contracts sometimes state that one party will be the exclusive provider of a product or service. Given the pandemic-related supply chain and labor force uncertainties, it may be wise to negotiate for exceptions to an exclusivity clause. For example, if the supplier experiences delays for any COVID-related reason, the purchaser may want the ability to source its goods or services elsewhere.

8) Training Provisions
If a contract requires training in connection with a service or product (particularly software), the parties should be clear about what will happen if there are travel restrictions in place that prevent in-person training from occurring. If video conferencing will be acceptable, parties concerned about security and quality may want to specify which conferencing platforms are permitted. Additionally, virtual training may justify a lower pricing model than in-person training.

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seek the advice of your legal counsel.