

COVID-19 and IT service provider contracts: A checklist for *force majeure* events

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The COVID-19, and the various restrictions that have been implemented in response to it, are causing extraordinary business disruptions. Many organizations have had to modify their operational controls and accommodate a shift to remote working (among other adjustments).

One key impact of COVID-19 involves an organization's relationships with its IT service providers, which often play important roles in securing their data and systems. Under current conditions, some service providers may face challenges in performing this work, especially for engagements that require significant personnel resources or that require personnel to be on-site. Potential non-performance has significant consequences for service providers and their clients alike.

A couple examples highlight this issue:

- A service provider might be contracted to provide cybersecurity monitoring services for a company. Due to the impact of COVID-19, however, the service provider might not have sufficient personnel available to provide these services at the contracted level or frequency. That could mean reduced monitoring and thus potentially slower responses to cyber events.
- A company that uses a service provider's co-location space to house its servers may rely on the on-site security provided by the service provider to protect information maintained on the servers. But because of COVID-19, the service provider may have to scale back its on-site security controls, which could impact the company's regulatory compliance and litigation exposure.

To prepare for these challenges, entities that have contracts with service providers (and service providers themselves) should carefully review their existing agreements and any *force majeure*-type provisions in particular. Although *force majeure* provisions in existing contracts may not specifically contemplate a global pandemic such as COVID-19, these provisions are often broadly-worded and based on events beyond a party's control and may excuse non-performance under the contract or allocate risks and costs differently when such an event occurs.

Here's our COVID-19 service provider risk mitigation checklist:

Step 1: Determine whether contractual commitments remain in full force

- Check the contract's governing law, as some jurisdictions recognize common law doctrines like impossibility that may excuse non-performance without written *force majeure* provisions.
- Determine whether there is a *force majeure* clause and, if so, whether COVID-19 is arguably covered.
- Understand what happens if one of the parties invokes a *force majeure* provision and who bears what risk.
- Review and follow contractual notice and response requirements for *force majeure* events and document all evidence that would support your claim.

Step 2: Understand your risk

- Evaluate the risks to your business of service provider non-performance due to COVID-19.
- In particular, review legal and regulatory obligations that may be impacted by service provider non-performance.
- Contact to your service providers to determine what challenges they are facing in light of COVID-19.
- Assess the likelihood of service provider non-performance and invocation of *force majeure* provisions.

Step 3: Mitigate risk

- Communicate with your service providers to identify and evaluate the potential scope of non-performance.
- Develop a strategy to fill in any performance gaps.
- Work with service providers to identify and implement potential alternatives – for example, if a service provider is unable to meet certain security requirements, require that service provider to adopt specific compensating controls and/or cybersecurity hygiene practices, such as utilizing VPNs and using secure WiFi/router configurations and document the new arrangement.
- When a service provider is unable to handle even modified procedures, consider all options, including the development of controls and processes in-house.
- Review your disaster recovery plan and resources.

Hogan Lovells can help you respond to these challenges and evaluate risk. Get in touch with one of us or send a note to COVID19@hoganlovells.com. And if you would like additional information on topics related to COVID-19, please click [here](#) to access our webpage.

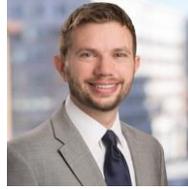
The above represents our latest thinking in "real time" and will likely evolve over the coming weeks and months. Our teams of lawyers across the globe are continuing to compile the latest thinking and legal guidance on the coronavirus outbreak. To track our latest updates, which will include more specific discussions of particular contractual concepts, we encourage you to

check the *Hogan Lovells COVID-19 Topic Center*, which covers a wide variety of practice areas across the globe.

Contacts



Peter M. Marta
Partner, New York
T +1 212 918 3528
peter.marta@hoganlovells.com



Scott T. Loughlin
Partner, Washington, D.C.
T +1 202 637 5565
scott.loughlin@hoganlovells.com



Michelle A. Kisloff
Partner, Washington, D.C.
T +1 202 637 6631
michelle.kisloff@hoganlovells.com



Paul Otto
Partner, Washington, D.C.
T +1 202 637 5887
paul.otto@hoganlovells.com



Adam A. Cooke
Counsel, Washington, D.C.
T +1 202 637 5479
adam.a.cooke@hoganlovells.com



Vassi Iliadis
Senior Associate, Los Angeles
T +1 310 785 4640
vassi.iliadis@hoganlovells.com

www.hoganlovells.com

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