



Forensic Focus on COVID-19

Contract review and evaluation

This is the fifth part in a Deloitte Forensic series around COVID-19 business impacts and steps you can proactively take to help respond to and recover from the outbreak and mitigate potential fraud and financial crime risks.

The coronavirus pandemic has disrupted business transactions and relationships in virtually all industries and across most geographies. The specific obligations related to those transactions and relationships are typically detailed in contracts with customers, suppliers, service providers, lessors and lessees, supply chain and sales channel partners, creditors, borrowers, and other parties.

Given this, organizations—and their chief legal officers, chief procurement officers, and other concerned executives—are working to identify and address the operational, economic, and legal risks related to performance of contractual obligations during the coronavirus outbreak. This installment of Forensic Focus on COVID-19 highlights considerations arising around clauses in contracts and the

associated risks on both the buy side and sell side and suggests ways to identify those risks.

Getting a grip on the details—and the risks

For some organizations, the risks they are currently facing are potentially quite significant and may give rise to operational, financial, legal, compliance, and reputational risks during and after the pandemic.

A prudent way to understand these risks is to start by identifying which contracts contain clauses that could trigger an event that poses such risks. For example, many contracts contain notice provisions. In our current environment, it can be particularly important to know what could trigger a requirement to provide notice to a counterparty. While it may ordinarily be

considered boilerplate language, notice provisions have suddenly become more important.

Many contracts also contain clauses related to force majeure—which may excuse breaches in certain limited circumstances which were unforeseen.

Example clauses and provisions to consider at this time—and examples of their general nature and purpose—include, but are not limited to¹:

- **Notice provisions**, which designate when a triggering event should be communicated to counterparties
- **Force majeure clauses**, which may offer protection from an inability of a party to the contract to fulfill its obligations due to certain unforeseen or unavoidable events outside the party's reasonable control

- **Disaster recovery and business continuity provisions**, which may designate disaster recovery and business continuity requirements to be maintained by the contracting parties; for example, provisions may mandate necessary steps for a supplier to take to mitigate potential disruptions
- **Limitation of liability provisions**, which, in the absence of a force majeure clause or to the extent that the force majeure clause does not cover the specific disruption, may identify the maximum potential obligation or liability of each party
- **Liquidated damages clause**, which may specify a predetermined sum of money that would be paid if a party were to fail to meet certain obligations under the contract
- **Governing law and jurisdiction clause**, which specifies the governing law and jurisdiction applicable to the contract
- **Supplier or subcontractor location and supply chain path clause**, which helps to identify geographic locations of customers, suppliers, and subcontractors and the potential risks associated with certain regions or supply chain paths

Given the pandemic's current and potential impact on operations, workforces, supply chains, and finances, the chief legal officer and legal staff should identify relevant clauses and provisions. This may involve hundreds or perhaps thousands of contracts on both the buy side and sell side.

However, identifying relevant clauses can help enable chief legal officers and the rest of the executive team to develop a risk mitigation plan. For example, in the case of notice provisions, a risk mitigation plan might:

- Identify contractual requirements and protections for nonperformance of

obligations to suppliers and customers in light of the COVID-19 outbreak

- Prioritize suppliers and customers for notification in this situation under the provisions of the contracts
- Specify when to notify counterparties of nonperformance or delays in performing contractual obligations

Automated contract review

Deloitte provides contract review and evaluation services to support organizations through its AI-driven scanning, extraction, and analytical platform, dTRAX. This platform can identify contractual clauses that may offer relief to the organization in either buy-side or sell-side contracting, based on agreed-upon parameters. The organization can enhance the extracted contractual data with elements from its procurement, finance, and enterprise resource planning systems to help prioritize contracts and counterparties for risk mitigation. The goal, of course, is not to avoid obligations, but to understand them and prepare to address them while positioning the organization for improved resilience going forward.

Working at the direction of your organization's legal counsel, Deloitte can apply analytics designed to help your organization in identifying:

- Potential economic exposure arising from nonperformance of contractual obligations
- Protection available in existing contracts for nonperformance of obligations
- Geographical risks associated with specific supplier, customer, or subcontractor relationships
- Notice requirements for asserting force majeure, if applicable

dTRAX can be applied to clauses in contracts, purchase orders, statements of work, and service-level agreements to identify favorable or unfavorable provisions. It can also incorporate key customer attributes, such as location and sales volume, as well as supplier attributes, such as mission criticality. These capabilities can enable tiering and risk-ranking, and thus prioritization, of counterparties.

Focusing on the future

Understanding key clauses and provisions in contracts could be critical to the organization's resiliency. Automated contract review and evaluation not only provide information that general counsel and other senior executives may need in the current situation, but the results can also position the organization to anticipate and mitigate risks that may arise as the crisis continues and to improve ongoing or future negotiations of key clauses in contracts.

Endnote

1. Examples and descriptions provided are not exhaustive and may vary with the circumstances. Client's legal counsel is responsible for identifying clauses of interest or providing definitions to help identify relevant clauses. Deloitte does not provide legal services or advice, including advice on the application or relevance of clauses. Deloitte provides analytics support and assistance designed to identify potentially relevant clauses based on criteria and parameters determined by client's legal counsel.

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