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TECHNOLOGY MAY-RATHON

Contract Corner – The Year in Review

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Morgan Lewis and Global Technology

Check back to our Technology May-rathon page frequently for updates and events covering the following timely topics this month:

COVID-19	**Cybersecurity, Privacy and Big Data**	**Medtech, Digital Health and Science**
Artificial Intelligence and Automation	**Fintech**	**Mobile Tech**
21st Century Workplace	**Global Commerce**	**Regulating Tech**

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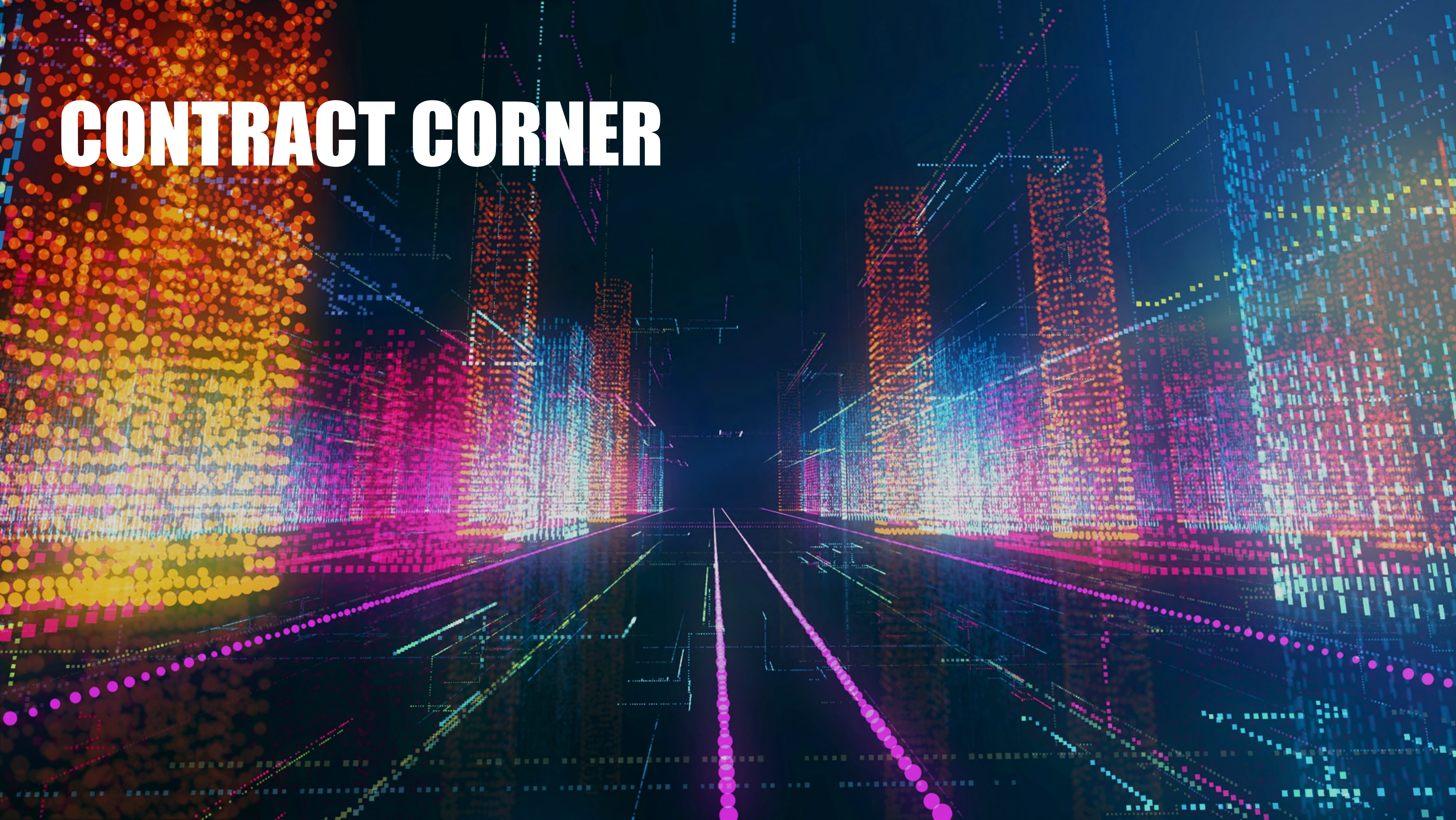

CONTRACT CORNER

Contract Corner

CONTRACT CORNER:

THIRD-PARTY CONTRACT DUE DILIGENCE

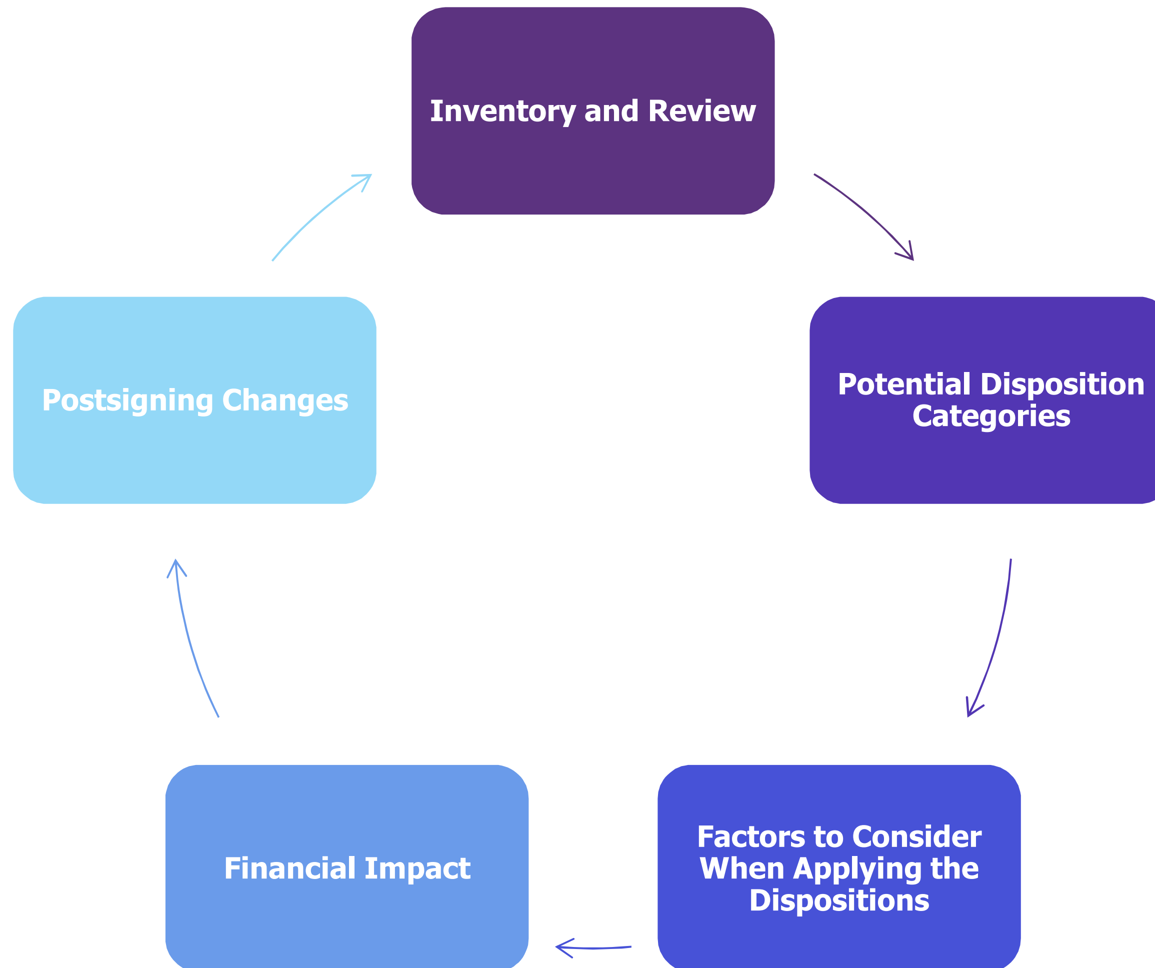
Introduction

An important part of analyzing impact of a proposed outsourcing is reviewing existing third-party contracts for certain key terms.

The terms to be reviewed will be based on the impact of the potential outsourcing, e.g., will contracts be terminated, modified or assigned to an outsourcing provider.

Due diligence can only be completed once the essential terms are identified and the possible deal outcomes are established.

Review – Decision making Process



Inventory and Review

- A well-organized collection and review process is key to the efficient disposition of third-party contracts.
- The terms of the underlying contracts inform and often determine the disposition of such contracts.
- An Excel chart can be used as a useful reference guide for the key provisions and provide an overview and comparison between the third-party contracts.

Potential Disposition Categories

Category	Description
Terminate	• The contract is no longer required for the proposed outsourcing, as the relevant assets or services are not required under the new outsourcing agreement.
Terminate and Replace	• The legacy contract may need to be modified or a new service provider will replace the services offered under the terminated contract with its own services or a direct agreement with the existing third party.
Managed/ Support Contracts	• A new service provider will access or use the underlying assets or services in connection with the services for which it will be responsible. • The new service provider will manage the contract or act as the customer's agent under the contract, but the customer will retain the contract in its name.
Assign	• The contract is to be assigned to the new service provider. • Key to the determination of this category is whether the contract is assignable without consent, and if not, if the third party is likely to consent to the assignment.

Basic terms to initially focus on when reviewing the Third-Party Contracts

1

- **Termination Rights/Fees** – What termination rights are granted under the contract (including the right of termination for convenience) and what amount of termination fees would be owed upon termination (i.e., early termination fees for terminating the contract before it expires)?

2

- **Contract Expiration Date/Auto Renewal Provisions** – When will each contract will expire and is there is an automatic renewal provision? The length of the remaining term for a contract may determine the costs of termination or whether should be transferred to the service provider or retained by the company

3

- **Pre-Paid Expenses/Annual Fees** – The amount of resources that a company has already pre-paid for in a third-party contract can often determine how the company chooses to handle the contract.

4

- **Assignment Provision** – The ability to assign agreements to the service provider is often considered if the company wants to exit agreements and remove itself from the contractual relationship.

5

- **Third-Party Use Rights and Restrictions** – Does the contract allows for third-party use? This will inform whether specific consents are required. Other restrictions on use, such as geographical restrictions, should also be flagged in the review process.

Additional Terms - Licence Agreements

Are the required access and use rights included in, or are specifically excluded from, the license grant?

- If not, you may need consent from the licensor.

Does the license grant state that the customer's rights are "**non-transferable"** or "**non-sublicensable"?**

- If so you will need to consider whether the structure of your mitigation strategies or potential outsourcing deal poses an issue or risk.

Does the service provider come on site to use the software and the definition of **Authorized User** includes contractors or third-party users?

- If so your risk assessment and analysis may be that the license right has not been "transferred."

Is the definition of **Authorized User** limited to Company "**Personnel**" or "**Customers**"?

- If so you may well conclude that there may be a transfer under the same circumstances.

Does the license grant restrict the required access and use by the service provider to a specified piece of hardware, a specified location, or be subject to another type of restriction, or alternatively does not clearly authorize it?

- If so consent will most likely be required if the risk of being wrong is too great, depending on the applicable technology.

Definitions

First Place to Check

Check the license agreement definitions.

Generally, how the agreement defines "**Authorized User**," "**Use**," or "**Affiliate**" is a good indicator as to where the analysis might come out.

In best-case scenarios, "**Users**" will include employees, consultants, clients, external users, *contractors and agents*.

Fees and Limitations

Be aware, the company may be subject to increased fees in order to increase the number of users or allow the use by the service provider.

Additionally, the "**User**" definition may limit permitted users (including contractors) to use the software on a particular piece of hardware or at location or in connection with a certain function.

Other Definitions

Other relevant definitions need to be read to see if they present any issues based on the structure of your deal.

Outsourcing Language

Does the agreement allows the company's service providers, vendors, and contractors to access and use the software for the purposes of providing services to your company? Or is there explicit permission for the company to enter into technology outsourcing arrangements?

- There should be no need to obtain any consent from the licensor.

The service provider's obligations under the services agreement with the company (including those relating to confidentiality and data security) should be structured to mirror or cover the company's corresponding obligations under the license agreement.

- This is because the company is responsible for any breach of the license agreement by the service provider.

A proper due diligence analysis must take a look at all of the controlling documents between licensor and licensee in order to accurately determine whether consent, notice, or something in between is required.

- Focus on what is occurring in your technology solution, what software and other technology is involved, and what third-party agreements are in play.

Your due diligence team should not only be looking for anticipated issues, but should be on alert for any unexpected issues as well.

Financial Impact

- The termination or disposition of legacy contracts can have a significant impact on the costs of a customer's and the service provider's business case for outsourcing.
- If an existing third-party contract is terminated, the associated costs may be offset by savings if the contract can be replaced by a new outsourcing provider (the new vendor may also be willing to pick up the termination fees).
- In other cases, if the third-party contract must be maintained, modifications can be explored to reduce costs and for a new outsourcing, the ongoing fees are part of the proposed business case as "retained costs."

Post-signing Changes

- After the parties have executed the outsourcing agreement, additional third-party contracts may be identified.
- The parties should prepare for this possibility by agreeing on a procedure for dealing with “new” third-party contracts ahead of time.
- This enables the parties to handle these contracts in an organized manner with a prior agreed-upon plan, including whether there will be financial implications.
- This process also can be used if one of the parties believes that a change in the existing disposition of a third-party contract is warranted.

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DRAFTING FORCE MAJEURE CLAUSES IN THE COVID-19 ERA

Introduction

- Boilerplate? Not any more.
- A force majeure clause is "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." *Black's Law Dictionary*, 718 (9th ed. 2009).
- There is no "one size fits all" force majeure clause and the precise language of the clause can significantly impact its application.

Review

What Do Your Current Clauses Provide?

- Contracts that do not contain Force Majeure provisions
- Force Majeure provisions do not specifically mention pandemic or government restrictions as force majeure events
- Force Majeure provisions contains broad terms:
  - “Including but not limited to”
  - “Acts of God”
  - “Beyond reasonable control”

Review Force Impact of COVID

- Varying impact of the pandemic - may hinder but not make performance impossible
  - Was the event the spread of the COVID-19 virus, causing personnel shortages?
  - Was the event an Order of a Governmental Authority to shut down all non-essential places of work or to stay at home?
  - Are there work-around steps (remote work) to mitigate impact

- Varying State Laws
  - Does contact language or state court interpretation require standard of impossibility.
  - Does state require specific provision or allow general "catch-all' language
  - New York, "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified." *In re Cablevision Consumer Lit.,* 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012).

Typical Provisions

- Notice requirements
- Requirement that the affected party make commercially reasonable efforts to perform notwithstanding the cause, including through the use of alternate sources, workaround plans or other means
- Implementation of DR/BCP plan – obligation to do so not excused except to the extent ability to do so is also excused
- Termination rights (e.g., the right to terminate the if the force majeure event continues for specific length of time, and if termination were to occur what financial obligations, if any, are the parties required to fulfil)

Additional Contract Provisions

- Require the unaffected party to continue to perform when the affected party has ceased performance due to a force majeure event (e.g., “a force majeure event will not excuse a party’s payment obligation hereunder”).
- When a force majeure event causes a Supplier to allocate limited resources, agreement that Supplier will shall not provide to any other customers of Supplier priority or reassign personnel to another account.
- Other provisions in a contract can greatly impact the application of the force majeure clause. Business Continuity and Disaster Recovery Plan requirements, Step-In Rights and emergency IP licenses, and scheduling and cancellation provisions can provide the unaffected party with protections even if the force majeure clause is broad enough to cover the situation.

No Force Majeure Clause

- Common Law Excuses for Nonperformance
  - Impossibility
  - Impracticability
  - Frustration of Purpose
- Requirements under State Governing Law
  - Cause or Event not expected or foreseeable
  - Performance rendered impossible or impracticable
  - No fault by non-performing party

Final Thoughts

Recognition

- If performance of the contract will take place during the pendency of pandemic, specifically document the impact of the pandemic rather than rely on general Force Majeure provision.

Contractual Obligations

- Specifically establish what steps parties will take as result of pandemic (Agreed policies for return to work)
- Further document back-up protections
- Consider impact on liability and insurance

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CONSIDERATIONS FOR A TERMINATION FOR CONVENIENCE PROVISION

Termination for Convenience

In typical agreements, the customer will typically push for a termination right relating to the service provider's breach.

However, as COVID demonstrates, the customer may also need to consider adding to contracts the right to terminate for its convenience (without cause), which could cover any of the following situations:

1

- In addition to COVID economic fall-out, a customer may no longer want the contract as a result of, among other things, having been acquired since the contract signing or seeing changes in the market that the service provider is not keeping pace with but having no contractual requirement to enforce in that regard.

2

- The customer is not satisfied with the service provider's performance under the contract even though the provider is meeting its service level and other performance requirements under the contract

3

- Many alleged breaches by the service provider are initially "black and white" in the view of the customer, but they turn "gray" when the service provider pushes back and alleges nonperformance, non-responsiveness, lack of cooperation, and the like on the part of the customer. Adding the customer's right to termination for convenience can avoid the potential dispute over whether the customer has the right to terminate on other grounds.

Termination Fee

If the customer requests the right to terminate the contract for its convenience, that right typically carries with it a **termination fee.**

The service provider invested money to enter into the deal, and is expecting to have those costs "**amortized**" over the expected term of the contract.

If the term is cut short due to termination for convenience, the amortization period is cut short and the service provider is **not** getting the expected benefits of the deal.

For this reason, termination fees are often defined in a **downward-sliding scale** over the term of the contract, with the highest termination fees seen early in the term.

Other termination fee components that service providers may try to include are the costs of breaking any **third-party contracts** the service provider entered into in order to perform the contract, costs associated with the service **provider's re-deployment of personnel and assets**, and some part of its **anticipated profits** from the unfulfilled portion of the contract term.

Other Considerations

- Other points to consider in the termination for convenience provision include:
  - the amount of time between the customer's notice of termination and the effective date of the termination;
  - whether there is a period of time following the signing of the contract where the customer is not allowed to exercise its right to terminate for convenience; and
  - what, if any, termination assistance the customer is entitled to receive following its exercise of its termination right.

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TERMINATION IN THE EVENT OF BANKRUPTCY CLAUSES ARE GENERALLY UNENFORCEABLE

Standard Ipso Facto Provision

- Termination in the event of bankruptcy or insolvency clauses (commonly called "ipso facto" clauses) are often included in contracts and are rarely a point of contention in contract negotiations. A sample of a typical ipso facto clause you might see in a contract is as follows:

  This Agreement shall terminate, without notice, (i) upon the institution by or against either party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of either party's debts, (ii) upon either party making an assignment for the benefit of creditors, or (iii) upon either party's dissolution or ceasing to do business.

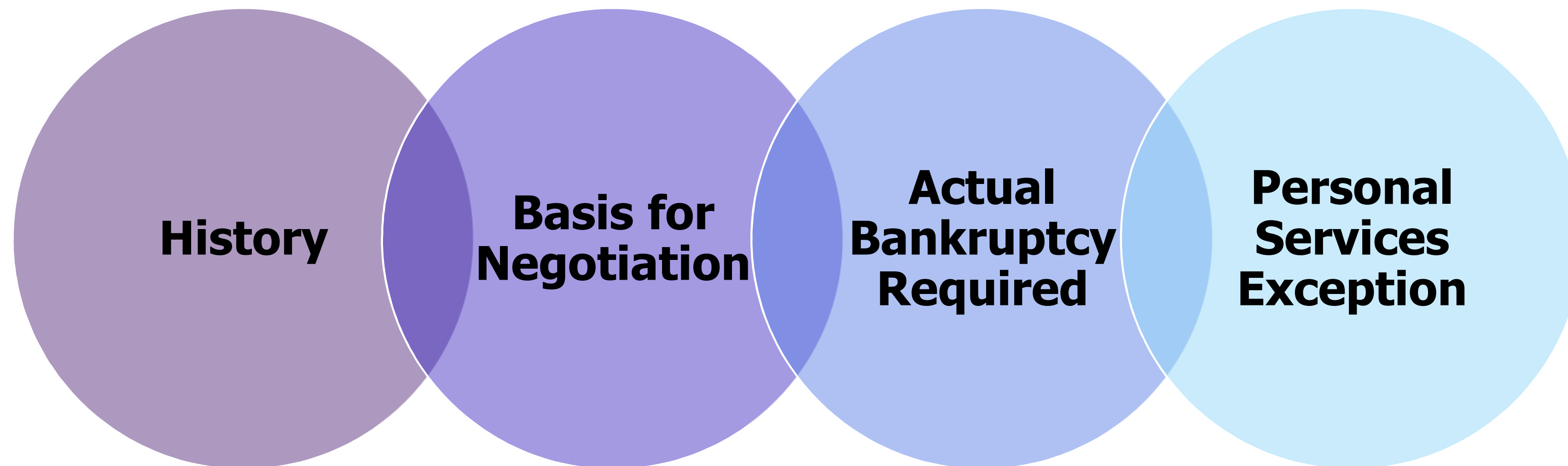
- These clauses provide a mechanism for a party to terminate an agreement whenever insolvency becomes a risk in that the insolvent party would not be able to perform their contractual obligations. However, surprisingly, these types of clauses are generally not enforceable in a bankruptcy proceeding.

Bankruptcy Code Restrictions

- Once a bankruptcy is filed, the court has broad authority over a debtor's property. As such, the Bankruptcy Code supersedes contracted ipso facto clauses, rendering them generally unenforceable based on two code provisions.
- First, **Sections 541(a) and (c)** of the Bankruptcy Code provide that an interest of the debtor in property becomes property of the bankruptcy estate. This means that the court controls all property and contracts of the debtor and only the court can decide whether a contract can be assumed, rejected, or otherwise terminated despite what is stated in the contract.
- Second, **Section 365(e)(1)** addresses ipso facto clauses in executory contracts, which are contracts that have not yet been fully performed or fully executed. **Section 365(e)(1)** specifically states that notwithstanding a provision in an executory contract, a debtor's executory contract cannot be terminated or modified after the bankruptcy case has been filed solely because a term of the contract is conditioned on insolvency or financial condition of the debtor prior to the filing of bankruptcy. This provision of the Bankruptcy Code generally makes ipso facto clauses for executory contracts unenforceable.
- When read in combination, these bankruptcy statutes invalidate ipso facto clauses unless a bankruptcy court approves the contract termination or until the bankruptcy proceedings are finalized.

Why Do Ipso Facto Clauses Remain in Most Contracts?

- If ipso facto clauses are generally not enforceable, then why do practically all commercial agreements continue to include them? There are several reasons.



History / Negotiation

- Up until the Bankruptcy Code was codified in 1979, ipso facto clauses were enforceable without question.
- It became habit for businesses and attorneys to expect ipso facto clauses in their commercial agreement templates and this practice has continued.
- Some believe that in the future the Bankruptcy Code could be changed to reinstate the enforceability of ipso facto clauses so lawyers often see little reason to cease the practice of including them in their agreements.
- Bankrupt estate may want to terminate or negotiate modifications to agreement
- Notice of exercise of right to terminate may bring bankrupt estate to table to negotiate

Actual Bankruptcy Required

- The Bankruptcy Code's rules against enforceability of an ipso facto clause would only apply if a bankruptcy case is actually filed.
- If an ipso facto provision provides that the agreement terminates upon a party's insolvency, (as stated in the sample ipso facto clause in Part 1) and no bankruptcy case is ever filed (or if it is filed and then dismissed under section 1112 of the Bankruptcy Code, for instance), then a party would be able to rely on the ipso facto clause to terminate the agreement.
- It must be noted, however, that if the terminated party later files a bankruptcy, then the bankruptcy court could potentially invalidate the pre-bankruptcy filing termination.

Personal Services Exception

Section **365(e)(2)** of the Bankruptcy Code, in conjunction with Section **365(c)(1),** provides that ipso facto clauses ***are*** enforceable if applicable law excuses a party from accepting performance from, or rendering performance to, the trustee or to an assignee of such contract or lease unless the party agrees otherwise.

The most common type of contract falling into this exception is a contract for unique personal services by a person with special knowledge, judgment, taste, skill, or ability (commonly referred to as the "personal services" exception) where the promised performance by debtor is so distinctive that it would not be reasonable to expect another to perform. For example, if the debtor were a noted singer.

Ipso Facto Provisions

- Parties continue to include ipso facto provisions in contracts, even though bankruptcy courts have generally made them unenforceable.
- The fact is, many businesses include these provisions, thinking that they are protecting themselves in case of an insolvency event of the other party without realizing that these provisions may be ineffective.
- If enforcing an ipso facto clause arises, one may need to explore alternative approaches to mitigate risks.

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10 PERFORMANCE ‘INCENTIVES’ TO CONSIDER WHEN STRUCTURING YOUR SYSTEM DEVELOPMENT OR IMPLEMENTATION CONTRACT

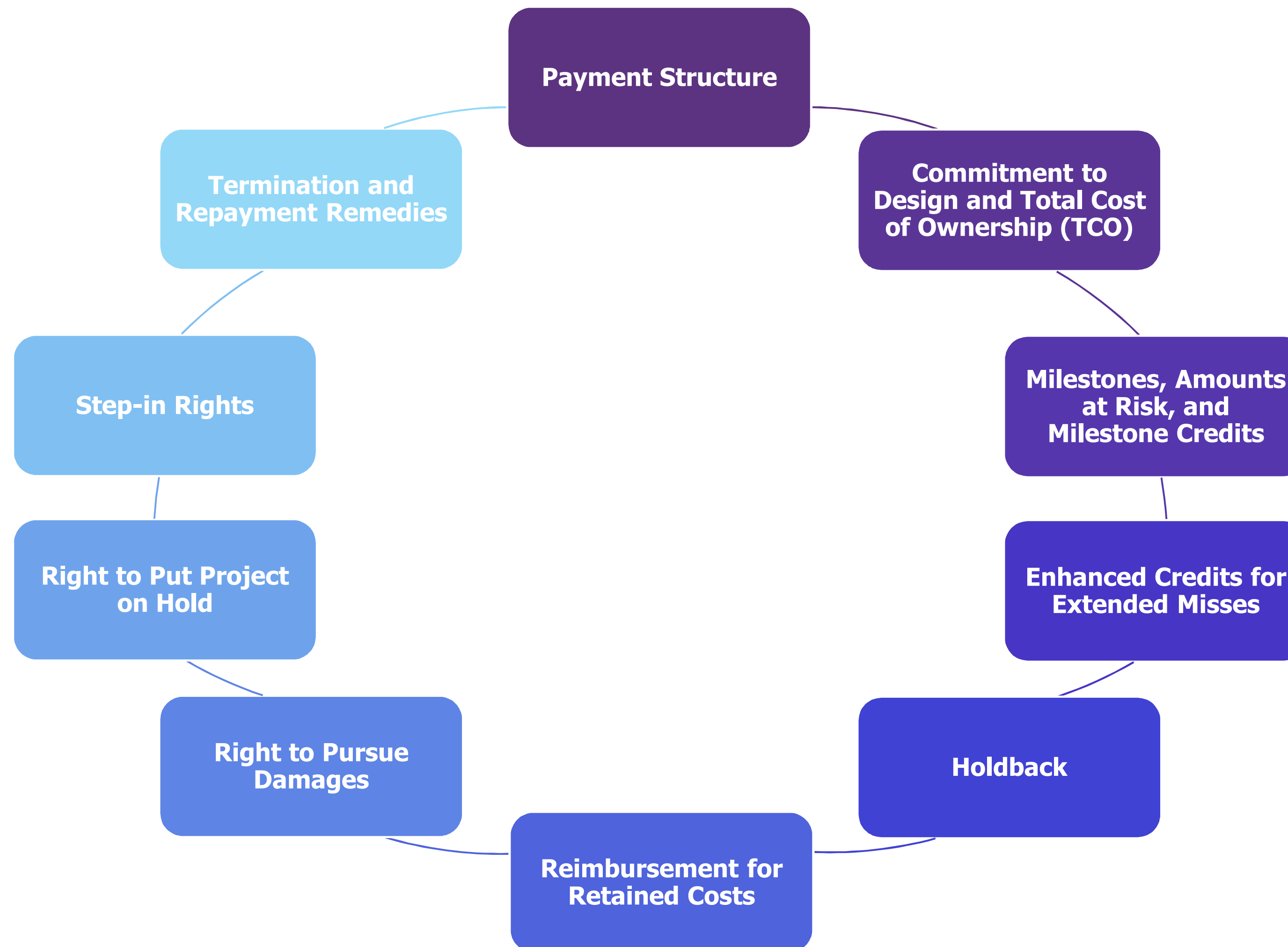
Introduction

What can we do in the contract to incent timely, on-budget performance by the vendor?

1. There is no substitute for a detailed and well-thought-out requirements document. This provides the roadmap that shapes the design, build, and deployment.

2. While there is no magic bullet, there are numerous contractual mechanisms to be considered that are designed to provide guideposts and checkpoints to enable success.

10 Contractual Mechanisms



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Payment Structure

- The release of money can be used to incent timely performance.
- There are a variety of options for how to structure payment, all of which can be tied to the completion of milestones, such as fixed fee, not-to-exceed, and time and materials with a band.

Commitment to Design and Total Cost of Ownership (TCO)

- We have seen development activities come in at or about budget, but then the TCO ends up being far greater than anticipated.
- It is helpful to consider the all-in cost—hardware, capacity, third-party software, and ongoing upkeep—when establishing the overall budget for a project.
- You may want to think about building a requirement into the design phase that the TCO be assessed and calculated, and if the TCO ends up being over what was anticipated (maybe by a range) then the vendor should have skin in the game with respect to (or at least a share in) the over spend.

Milestones, Amounts at Risk, and Milestone Credits

- Creating project plans and timelines based on milestones can help provide structure to what can otherwise be an unwieldy process.
- For the naysayers, even agile deals can have milestones and deliverables tied to milestones.
- Once milestones are established, an effective "incentive" is to apply credits payable to the customer if a milestone is not achieved on time.
- In most cases, there is an agreement to the total amount at risk for milestone credits (often a percent of the total transaction, with the greatest credits tied to final go-live and stabilization).

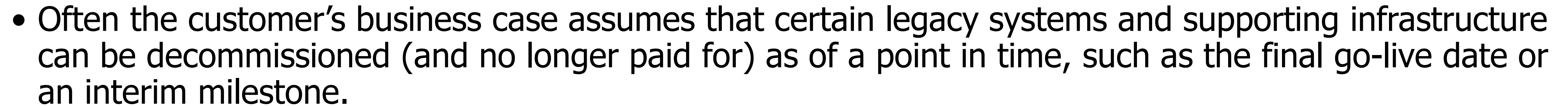
Enhanced Credits for Extended Misses

- Another tool in the toolbox for creating incentives is to have a mechanism for increasing milestone credits if a milestone is missed for excessive periods, for example:
  - if the date is missed then the credit is applicable; if it is still not achieved in 30 days, then another credit equal to 1.XXX% of the applicable credit is due; and so on.
- This structure addresses the concern that once a milestone credit is applied, there will be no urgency in completing the milestone.

Holdback

- Sometimes in addition to, and sometimes in lieu of, milestone credits, a percentage of the fees can be held back, to be paid upon the completion of the project.
- If the project is late, you may want to consider decreasing the amount of the holdback fees actually paid.

Reimbursement for Retained Costs



- Often the customer's business case assumes that certain legacy systems and supporting infrastructure can be decommissioned (and no longer paid for) as of a point in time, such as the final go-live date or an interim milestone.

- If the go-live date is delayed, then the customer will continue to incur these costs.

- A provision requiring the vendor to reimburse the customer for such costs is another incentive mechanism that can be considered.

- While these costs are arguably direct damages that are recoverable in any event, calling them out specifically may highlight the potential liability of the vendor if go-live is not achieved on time.

Right to Pursue Damages

- Unless there is an excusing event, failing to achieve milestones on time is likely a breach of the agreement.
- Damages (at least direct damages) incurred in connection with a breach should be recoverable under the liability clauses of the agreement.
- It will be important to assess whether any caps are sufficient to allow for recovery of the likely damages that the customer could incur.

Right to Put Project on Hold

- If activities and deliverables are not progressing well or in accordance with the agreed timeline, then the customer may want to consider the right to put the project on hold—and without penalty—until the vendor provides the appropriate assurances (such as more qualified staffing) that the project is back on track.

Step-in Rights

- If the vendor is not performing in accordance with the agreement, another option may be for the customer or its designated third party to step in and take over the project or a portion of the project.
- Step-in rights may allow for a temporary boost to the project to ensure.

Termination and Repayment Remedies

- The ultimate stick in a development contract may be the right to get out of the deal.
- Termination rights to consider include termination for convenience, for material breach, for repetitive breaches, for missed milestones, and for changes beyond the customer’s control.
- If termination is invoked, the customer may want to consider under what circumstances the vendor should be required to pay back any amounts paid by the customer.
- The repayment requirement may depend on whether there is any reuse value in any of the deliverables provided as of the termination.

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ARE YOU WITHIN MARKET? A LOOK AT KEY COMPONENTS OF A GOOD BENCHMARKING CLAUSE

Introduction

- You signed a long-term deal. It would be embarrassing if, in a few years after signing, the pricing is significantly higher or your service levels are significantly lower than market.
- Benchmarking provisions are intended to provide a mechanism for ensuring that your pricing and/or service levels are within market (taking into consideration the unique factors applicable to your deal).
- The next slides outline some of the key components of a meaningful benchmarking provision.

Benchmark Basics

Who Can Benchmark?

- Parties can include a pre-approved list of companies in the agreement that may be used to perform a benchmark. Typically, there is also a mechanism for adding new benchmarkers over the term.
- Service providers may want to be able to agree to the benchmarker or at least get comfort that the benchmarker will not be a competitor.

Who Pays for the Benchmarker?

- Some deals require that the service provider pay or that the parties split the costs of an annual benchmarking.
- Other deals may require the customer to pay, but that the service provider reimburse the customer if the benchmarking reveals that the fees or service levels are not within an agreed market range.

What Can Be Benchmarked?

- Customers generally benchmark the fees (including rate card rates) and the related services, and typically although not always the contract anticipates some form of partial benchmarking e.g.:
  - any of the services;
  - services by function or category; or
  - all of the services in the aggregate.

Benchmark Basics (cont'd)

What Is Market?

- This is a nuanced question, and each benchmarker will have its own method for determining this. However, the parties can agree on certain considerations the benchmarker must use in making its determination. These considerations often include agreeing on:
  - what market percentage or quartile that the benchmarking results must be within (e.g., top quartile);
  - the number of comparative points that the benchmarker must use in its study; and
  - normalizing factors to ensure that the services being compared are of a similar nature.

How Are the Services Normalized?

- Benchmarkers typically have their own methodology for normalizing services and transactions. Often, the agreement may include certain factors that the benchmarker should consider in such normalization methodology.
- For example, if service provider A is providing services from a certain region with lower labor costs than the region from which service provider B is providing services, one would expect service provider A's price would be lower than service provider B's.

Benchmark Basics (cont'd)

When Can a Benchmarking Occur?

- Again all deals vary, but many service providers request that the first benchmark does not occur for some period of time (e.g., during the 12 months after contract signing).
- After that period, and usually on some agreed interval thereafter, benchmarking is either required or permitted.

What Are the Consequences If the Benchmark Reveals That the Pricing or Service Levels Are Not Within Market?

- The service provider may either be required to (through an automatic adjustment requirement) or be given an opportunity to bring its pricing or service levels in line with the market requirements.
- In some cases, if the service provider is not able or is unwilling to bring its pricing or services level within the market requirements, the customer has the right to terminate the agreement in whole or in the affected part.

What If There is a Dispute?

- Given the consequences, it is no surprise that disputes can arise during a benchmarking.
- It is not uncommon to see the benchmarker, as an independent third party, be given the right to make final decisions with respect to disputes during the benchmarking process.
- Benchmarking provisions can be helpful provisions for customers looking to assess whether the pricing and/or service levels that they receive are within market.
- They can also be used as tools for service providers who want to validate for customers that they are being treated fairly.

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Morgan Lewis Coronavirus/COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to subscribe using the purple "Stay Up to Date" button.

Biography

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Mike Pierides' practice encompasses a wide breadth of commercial and technology transactions. Mike advises on major outsourcings, strategic restructurings following divestments or acquisitions, and technology-specific transactions such as licensing and "as a service" arrangements. He is also active advising on new technologies such as blockchain and artificial intelligence.

Biography

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Peter M. Watt-Morse, one of the founding partners of the firm's Pittsburgh office, has worked on all forms of commercial and technology transactions for more than 30 years. Peter works on business and intellectual property (IP) matters for a broad range of clients, including software, hardware, networking, and other technology clients, pharmaceutical companies, healthcare providers and payors, and other clients in the life science industry. He also represents banks, investment advisers, and other financial services institutions.

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