

Expecting the Unexpected:
Contract Drafting Lessons Learned from the Pandemic

By Lisa Johnson of Smith Amundsen



If we have learned any lesson from 2020, it is to be prepared to meet the unexpected. As we learn from mistakes, new and unanticipated challenges should teach us to adapt and improve future performance. In contract review and negotiation, that includes intentionally having a broader perspective and a more open mind about how contractual terms may be applied and interpreted in a world different than the one in which they are written and under circumstances that we tend to take for granted.

Repercussions of COVID-19 have reminded us to consider situations where parties may unexpectedly be unable to perform as planned and how to protect against consequences of such changes. An inability to enforce contract obligations by one party against another could in turn result the first party's inability to perform its obligations under another agreement. During a widespread crisis, breaks in the supply chain for materials or unavailability of services necessary to ongoing business operations may cause a chain reaction in non-performance of contractual obligations, even when some of the businesses in that chain are not otherwise directly affected by the situation. Being aware of specific contract terms that might be affected in a widespread crisis might help those businesses to meet and enforce their obligations.

The most obvious and discussed contract provision that has been revised due to COVID-19 has been the force majeure clause. This is because the very purpose of force majeure is to provide for the occurrence of unexpected events that should rightfully and fairly create exceptions to the usual terms of an agreement. Force majeure terms have recently been revised to add triggering circumstances such as epidemic, pandemic, and widespread outbreak of disease. Secondary or other events effecting performance as usual including quarantine, material or labor supply disruptions caused by other triggering events, and widespread or general unavailability of electronic communication and delivery should also be considered. The procedural details for enforcement of the force majeure clause under these circumstances must also be present and clear to fulfill the purpose of these provisions and avoid further uncertainty.

The COVID-19 pandemic and its effects have not only directly affected performance of contractual obligations; arguably positive ways that businesses have dealt with the crisis have also made necessary a review of seemingly unrelated provisions. The vastly increased number of employees working remotely on a temporary, or possibly permanent, basis requires a fresh

look at confidentiality provisions. Many companies have already or will continue to permit remote work options for employees at varying levels of involvement in contract negotiation and performance. For the above reasons, the risk that confidential information could be used in ways that jeopardize the protection of that information has increased, and contracts should be evaluated to ensure necessary protection.

The following additional terms and conditions should be considered where a confidentiality provision is needed in a given transaction or agreement. One might consider prohibiting access to such confidential information by the parties, and their owners, employees, or contractors who work remotely; however, less restrictive options are available. Conditions may be imposed upon any persons working remotely who have access to the information. Those conditions might include requiring use of only company issued computers or requiring a specified security process for access to information on portable computers or data storage or when used outside of the company's facility. Confidentiality provisions should require that no unauthorized or unidentified persons be present during any on-line or telephone meetings, discussions, or negotiations including confidential information and that no such meetings, computer access, or calls take place in a public or unprotected location. Personal storage or remote printing of any confidential information and materials should be prohibited. The contractual party provided with access to such confidential information should be made responsible for the protection of that information and responsible for any remote working environment that could potentially disclose the confidential information. Remedies in the event of any such disclosure should be considered and expressly provided for in the agreement.

Business closures and disruptions related to the crisis in 2020 have also served as a reminder that those institutions which we take for granted may not always be open for business as expected. A future event resulting in closures could affect current contract terms as to due dates and deadlines for performance by extending such dates longer than intended by the parties at the time of entering into the contract. In addition to the effect of such closures upon supply of labor and materials required for performance under various types of agreements, date-related references themselves should be evaluated to make sure that they are not dependent upon any uncertain facts. Tying any obligations to dates that exclude bank or other institutional closures and extending time for performance of obligations during such periods should not be used unless such institutions must be open for the given event to occur. For example, if a bank or financial institution must be open to make payment or close a financial transaction, tying the event to such institution being available to provide a service is acceptable, but if those terms are provided simply for convenience of reference or for setting a date or deadline on a typical business day, then they should be revised to be independent of such uncertain variables.

Nearly universal availability of electronic delivery and communication is now taken for granted as a means of doing business. For that reason, contracts are increasingly being drafted

in a manner which assumes that availability. As we have learned, circumstances may change in unexpected ways; therefore, provisions regarding notice or the manner of providing documents or other materials should not be entirely dependent upon the availability of electronic delivery. It is important to differentiate between providing for the acceptance of such delivery or service as an alternative means of transacting business and failing to provide for situations in which such delivery or service is not possible, or might not be possible for all parties. Contract language should provide for alternative and more traditional delivery upon the request of either party. Notice and delivery deadlines should not be overly reliant upon or assume the availability of electronic delivery for both parties.

Signature of documents have in large part been unaffected by the inability to meet with others due to the already prevalent use of electronic means of sharing signed documents with a later delivery of counterpart original copies. One exception is for documents which required notarization during periods of mandated social distancing. Inability to meet with others in person prevented notarization of documents when required and resulted in authorization of remote notary procedures on a state by state basis, some of which were temporary and have since expired.

In the context of lease agreements, integral to a wide variety of businesses, the consequences of unanticipated circumstances give rise to special considerations, especially where landlord construction is required prior to delivery or rent commencement. As previously addressed, clearly providing for such performance variables in the force majeure clause is necessary to preserve the transaction and allow it to move forward for the benefit of both parties. The ability of a landlord to build out and deliver a premises as required by the terms of a lease, upon which delivery for opening the business and commencement of rent, may under unusual circumstances such as those resulting from COVID-19, be hampered by shortages or delays of labor or materials. Failure to provide clear rules for when such delays apply and providing definite time frames by which such delays are limited, create uncertainties and opportunities for termination by one or both parties.

In multi-tenant commercial lease agreements, some common provisions should be evaluated in the light of crisis circumstances that could cause ongoing unusual business operations or the closure of a higher percentage of tenants within the tenant group. Use of outdoor space, including parking areas and sidewalks and outdoor sales are typically restricted in such lease agreements. Adding an exception to such a restriction permitting the use of outdoor space to continue business due to a health crisis or governmental mandate that effectively prohibits indoor sales or service may be prudent. Time and space limitations in the event that the situation arises should also be considered. Multi-tenant commercial leases also typically provide for the continuous operation of business in the leased premises, often requiring the presence of a number of employees in the premises during a number of business hours, and prohibiting vacancy of the premises for a stated period of time. An exception might

be considered during situations that make working in the premises unsafe or when prohibited due to government mandate. Such an exception could specify relief from continuous operations or business hours provisions if temporary closures or remote work becomes a necessity for the foregoing reasons. The implementation of this type of provision would benefit both parties because it allows for the ongoing business to continue and for eventual performance by the tenant.

In addition to the above considerations, landlords and tenants in a multi-tenant building or complex should consider providing for events that might create an excessive loss of occupancy resulting from force majeure type triggers. Such events could cause a significant decrease in contribution to common area charges, making continuance of such benefits or maintenance unfeasible for the landlord to provide. In general, and especially in light of recent events, tenants may be cautious that their contribution be based upon an area of the rented space compared with that of the entire premises, and not with occupied portions of the premises. Similarly, options for expansion and renewal provisions should be reviewed to make sure that the parties are not bound to a future agreement when circumstances have considerably changed.

In the event of casualty or destruction of the leased premises, landlord repair provisions typically preserve the lease agreement and require the landlord to repair the premises to its condition prior to damage. Both parties to a lease might want to consider specific language to provide for such damage if caused by civil unrest, possibly allowing termination by either party under certain conditions. The right of either party to terminate might be triggered when such damage is caused on more than one occasion within a certain period of time, provide for shared costs of repair, or allow for repair after a certain period of time or upon the occurrence of events. The assumption related to these terms is that damage due to such events may likely recur after the repair is made, or might recur within a short period of time, disadvantaging both the landlord, who incurs the cost of repair and the tenant who may not wish to continue business in the location. These assumptions might or might not be correct under widely varying circumstances; however, these considerations are reasonable.

In agreements with vendors, suppliers, subcontractors, or other non-customer or client parties, special considerations regarding those persons entering a business or work site have recently arisen, and various terms may be added to standard contracts to handle those situations in the future. Such terms include requiring compliance by the contractor party with reasonable or government mandated health or safety related requests of the contracting party, indemnification against claims by employees or subcontractors, and requiring the contractor's employees to sign waivers or agree to health screening forms before entering the location.

It is not possible to predict all possible outcomes of an unexpected situation such as those we have experienced in 2020, but it would be wise at the time of drafting or negotiating an

agreement to consider what we are taking for granted or assuming will be true in the future. Given what we have learned, minimizing assumptions and being more open to what might change during the term of an agreement will help to guide the course of business transactions as we encounter new and unexpected challenges.