



Contracting Best Practices:

Indemnification, Force Majeure and Other Remedies in a Post-COVID World



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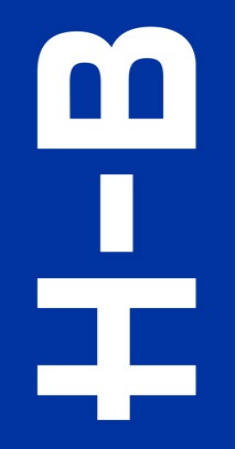
**“Early”
COVID
vs.
“Post”
COVID**

“Early” COVID – 2020 and 2021

- Immediate unpredictability
- Financial monitoring and cost-cutting opportunities
- Compliance with health-related government mandated obligations
- Port congestion/factory closures
- Reduced staff
- Evaluation of existing contracts

“Post” COVID – 2022 and 2023

- Inflation and price uncertainty
- Tariffs/current events affecting cross-border shipments
- Financial monitoring and increased financial flexibility
- Labor shortages
- Increased operating expenses (labor costs, commercial real estate, etc.)
- Negotiate new contracts

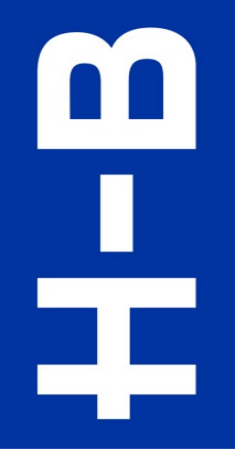


Managing Contractual Obligations Post-COVID

Key provisions for review:

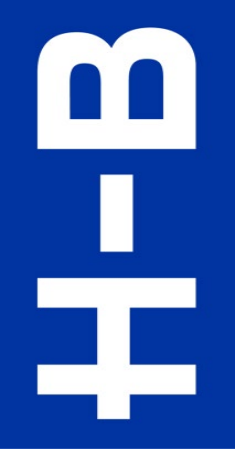
1. Indemnification
2. Termination
3. Pricing
4. Guaranteed Delivery Terms
5. Force Majeure





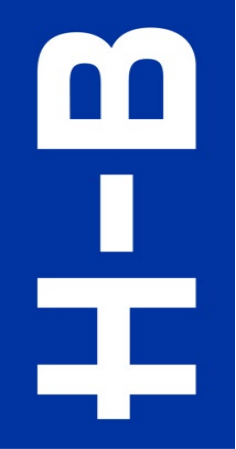
Managing Contractual Obligations Post-COVID – Indemnification

- Risk aversion and financial flexibility for unforeseen circumstances
- Narrow vs. broad indemnification
- Indemnification may show up throughout the agreement
 - Reimbursements in the event of force majeure events or termination
- Broad Coverage for Data Breach



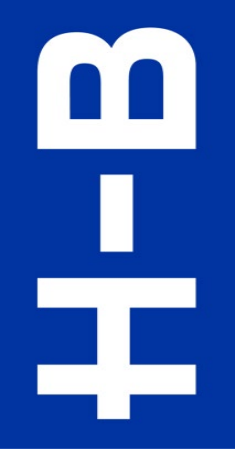
Managing Contractual Obligations Post-COVID – Termination

- Typically, should specify:
 - Each party's termination rights
 - Events triggering termination
 - Notice of termination
 - Whether termination is preceded by an option to cure, and
 - Each party's required performance upon termination
- Aspects to Consider:
 - Termination for convenience or short notice period
 - If early termination is permitted, require termination fees or expense reimbursement
 - Clear process for serving notice of termination
 - Option to cure default before termination permitted



Managing Contractual Obligations Post-COVID – Pricing

- Inflation
- Pricing of Finished Goods and Raw Materials
 - Consider use of industrial index or commodity index
- Price Adjustment clauses
 - Context: Defining circumstances within the contract that allows for the contract price(s) to vary (i.e., pandemic, delivery delays, inflation, etc.)
 - Mechanics: Identifying the direction of the price adjustment, price cap, frequency of review, and if/when the price will be readjusted to normal price terms
 - Does the price have an added fee component for services? Consider index-based fee adjustment (CPI, PPI, etc.), frequency of review and adjustment, percentage cap etc.



Managing Contractual Obligations Post-COVID – Guaranteed Delivery Terms

- On-time deliveries
 - Who pays if goods aren't delivered on time?
- Back stocking
- Some creative solutions have emerged:
 - Flexible delivery windows
 - Non-binding delivery estimates
 - Partial payment upon delivery, buyer-funded escrows
 - Alternate means for inspection and acceptance (e.g. remote video or data)
 - Process for substituting/expedite delivery of goods and services
 - Procedure to allow seller/provider to prioritize orders among buyers



Managing Contractual Obligations

Post-COVID – Force Majeure Clauses

“Pandemic,” “epidemic,”
“COVID-19 or its variants,”
etc.

“Government orders”

Risk of loss/guaranteed
delivery

- Post-COVID, force majeure has become one of the primary battle grounds for this issue

Impact of force majeure
event - termination, ability to
seek an alternative supplier,
etc.

Require the unaffected party
to continue to perform when
the affected party has ceased
performance due to a force
majeure event



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