



May 08, 2020

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Technology Agreement Lessons from COVID: Delivery and Acceptance

COVID-19 has left many with the feeling that the whole world has been turned upside down. While in many ways this is true, a closer inspection may reveal that the pandemic merely heightened the focus on existing, but often overlooked, aspects. In the realm of technology contracts (and contracts generally) provisions that may have been given relatively short shrift are now subject to higher scrutiny. While the immediacy of the pandemic will decline over time, it is generally acknowledged that businesses will face greater uncertainty for a long time to come. Even after the world has fought and won against the virus, the lessons from this time will serve businesses well in the future.

One contract area that likely deserves additional scrutiny is delivery and acceptance terms, including how these terms intersect with milestones and payment. There's nothing new about the push and pull of payment and delivery. The seller wants to receive payment before it delivers, while the buyer doesn't want to pay for something it doesn't yet have or hasn't had a chance to test out. Parties may have quickly resolved this in the past. A buyer may concede because the seller has more leverage and/or because the seller is well-established, and the buyer perceives a low risk of nondelivery. If the tables are turned, such that the buyer has more leverage and/or is perceived by the seller as trust-worthy, payment may come after delivery. Other times, the parties would, in effect, split the difference with payment due half upon signing and half upon delivery and acceptance, or work out some other payment plan. When delivery will be made in pieces or the seller will perform substantial work before delivery, such as custom software development or complicated integrations, a Statement of Work providing for a series of payments tied to certain milestones is common.

These considerations by both sellers and buyers have changed. The COVID-19 virus doesn't play favorites between buyers and sellers or between big companies and small. A well-established seller may

suddenly find that it no longer has the workforce to deliver the technology as promised or can't do so in a safe manner. Even the most trustworthy buyer may no longer require the technology that it desired just a few weeks ago due to a sudden drop in customers, supply lines or workforce. Simply saying to the other side, "trust us to deliver" or "trust us to pay," may no longer cut the mustard. Instead, the parties will need to engage in a different form of trust – that of early and frank discussions about what could go wrong and documenting how the parties will handle it if it does.

What does this mean from a practical sense? It might take the form of more tightly defined and more granular milestones in a Statement of Work, along with better defined acceptance criteria and timing. It might take the form of early termination provisions that would allow either side to retreat, subject to payment of an agreed early termination penalty. It probably means quicker exit ramps in the form of shorter contract terms. While more standard force majeure clauses will still be used, the parties might carve out certain events for more robust treatment, such as defining specific triggering events, setting out specific obligations of the nonperforming party, and describing precisely how the contract will be unwound if performance continues to be thwarted. Certainly, it means clients and counsel working more closely than ever to achieve the business's goals and mitigate the risks.

For more information, please contact [Connie Lindman](#) or any attorney in Frost Brown Todd's [Intellectual Property](#) practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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