

## Payment Processing Contracts and COVID-19

The commercial slowdown wrought by the global pandemic COVID-19 has left many in the payments industry wondering how the virus will affect their existing processing agreements. Depending on which side of an agreement you are on, you may be worried about breaching your contractual obligations or about the other party not being able to perform its end of the agreement. Likewise, you may be looking for a way to get out of the contract without being in breach, or, alternatively, nervous that COVID-19 will present an opportunity for the other side to legally terminate.

We have identified several important provisions in contracts for payment services that may be impacted by COVID-19 and its downstream effects. If you are concerned about either party's ability to continue to perform under an agreement, an evaluation of these provisions may be warranted to determine the impact of the virus on each party's rights and obligations.

First, contracts often include a force majeure clause that excuses nonperformance when caused by unforeseen events beyond the control of the parties. Often, a force majeure provision will contain a list of exemplary events that constitute force majeure. Epidemics and pandemics are not commonly found in such lists explicitly. An evaluation of whether the current circumstances qualify should be conducted. If the contract does not contain such a provision, there may be other remedies if you are unable to perform.

Furthermore, some agreements grant one or both parties the right to terminate without penalty if circumstances change such that it becomes financially infeasible for the party to continue or if there will be a risk of harm to the party. These circumstances sometimes include negative changes to the other party's business or finances, or changes in applicable law or regulation. If your agreement includes such a provision, then an evaluation of whether the current circumstances may trigger such a termination right is warranted.

In addition, many payment processing contracts contain minimum processing and/or service level requirements that companies are now unable to satisfy as a result of changing market conditions. Failure to satisfy these requirements may trigger specific remedies, from charging the ISO for the shortfall to termination of the contract. In some cases, such a failure could also constitute a breach of the contract. Contract terms and SLAs such as these, and the options that may be available to mitigate damages and liability in the event minimums cannot be met, should be analyzed and investigated.

If you are currently negotiating or drafting an agreement for the first time, rather than analyzing a previously executed agreement, it goes without saying that these issues should be considered. It is almost certain that the experiences of businesses under this pandemic will lead to a permanent rethinking of many standard clauses found in a variety of contracts, such as the ones mentioned above.

For questions, please reach out to:

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