Disaster Planning and Recovery: Dealing with Vendors and Suppliers

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In this context, I define a "disaster" as any unexpected and disruptive event that materially impacts the cost or difficulty of performance on the part of either or both the vendor or the customer. By nature and definition, disasters are unplanned and often unavoidable to an extent. However, there are contractual means to avoid having the disaster event have an unnecessarily large disruptive impact after the event is over.

If an event is disruptive enough, even without explicit contractual treatment, there are common law doctrines that may relieve one or both parties of their contractual obligations. Examples include the doctrine of frustration of purpose (*see, e.g.*, *U.S. v. Moulder*, 141 F.3d 568 (5th Cir. 1998) (*supra*) (examining doctrine of impossibility of performance) impossibility (*see, e.g.*, *Harvey v. Lake Buena Vista Resort, LLC*, 306 Fed.Appx. 471 (11th Cir. 2009) (holding that the doctrine of impossibility exists "where the purposes, for which the contract was made, have, on one side, become impossible to perform"), or mutual mistake (*see, e.g., Masco Corp. v. Zurich American*

Ins. Co., 382 F.3d 624 (6th Cir. 2004) (holding that the doctrine of mutual mistake requires that the mistake [as to law or fact] exist at the time the contract is negotiated.")

Despite their potential availability as a source of relief, application of these doctrines in litigation tends to be fact specific, uncertain and uneven, however. The better practice is to provide more clarity as to those circumstances that the parties intend should relieve one or both from their contractual obligations, or at least suspend them.

One common method of achieving this result is by way of a *force majeure*, or "Act of God"
provision. This type of provision usually enumerates a number of types of disruptions, such as natural disasters, labor stoppages and other occurrences that the parties agree in advance will suspend the affected party's obligations. In other situations it may be appropriate to specify adjustments in the vendor's compensation if cost conditions vary by more than some prescribed amount. In all such situations there is a benefit to advance contractual treatment, so that the customer can better plan and prepare for these contingencies.

Further, depending on the nature of the contemplated relationship, it may be appropriate and well-advised to negotiate

in advance with the vendor the nature and intensity of the assistance, if any, that the vendor will provide. This assistance could be in the form of personnel dispatched to the customer's site to render assistance, providing the customer with access to agreed upon resources, or other items. Regardless of the exact nature of the assistance involved, the customer will typically find it advantageous to not have to negotiate these matters with a vendor in the middle of the disaster and its aftermath.

Exit Strategies and Transition Plans

Parties involved in contract negotiations are usually focused on what will happen during the duration of the contractual relationship, and this focus is certainly reasonable. However, customers should not allow this focus to distract from planning for the termination of the contract, whether this occurs as planned or otherwise.

Contractual relationships can end of their own accord, that is when the originally contemplated term expires, or they can end prematurely. Under the common law of contracts, one party's material breach of its obligations typically allows the non-breaching party to terminate the contract. *Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987). As noted above,

catastrophically disruptive events may also act to terminate the contract by operation of law. In addition, one or both parties may seek to have the right to terminate the contract for their convenience, even in the absence of a breach or *force majeure* event.

All of these instances, whether planned or unplanned, carry with them the potential for unnecessary disruption to the customer. Depending on the nature of the relationship, the vendor may be in possession of the customer's proprietary operational data or trade secret information. The customer should make sure that the contract expressly addresses treatment, handling and return of this data and information.

In addition, the vendor may be in the position of being the most appropriate entity to educate the customer's employees or a successor vendor with respect to the transition. The customer is better off negotiating the terms of these transition services in advance, rather than at a time when the vendor has little incentive to be accommodating with terms because the relationship is ending.

For all of these reasons, customers would be wise to carefully evaluate vendor requests for the right to terminate for convenience prior to the end of the originally contemplated term.

At a minimum, customers should require vendors to provide a sufficient number of days' prior notice so as to give the customer enough time to transition to another vendor.

Conversely, if the customer anticipates the need to or desirability of having the right to terminate early for convenience, the customer should negotiate the terms of such a termination at the outset of the relationship. If the customer does not, the vendor will likely extract a larger fee for the privilege when the customer's need arises mid-relationship.

Finally, as noted above, the occurrence of a disaster or other catastrophic event may cause the contractual relationship to terminate. As noted above, the customer's disaster contingency planning should of course contemplate that eventuality as well.