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Technology Systems and Services: Lessons from Contract Corner for the Vaccine Rollout

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Contract Corner

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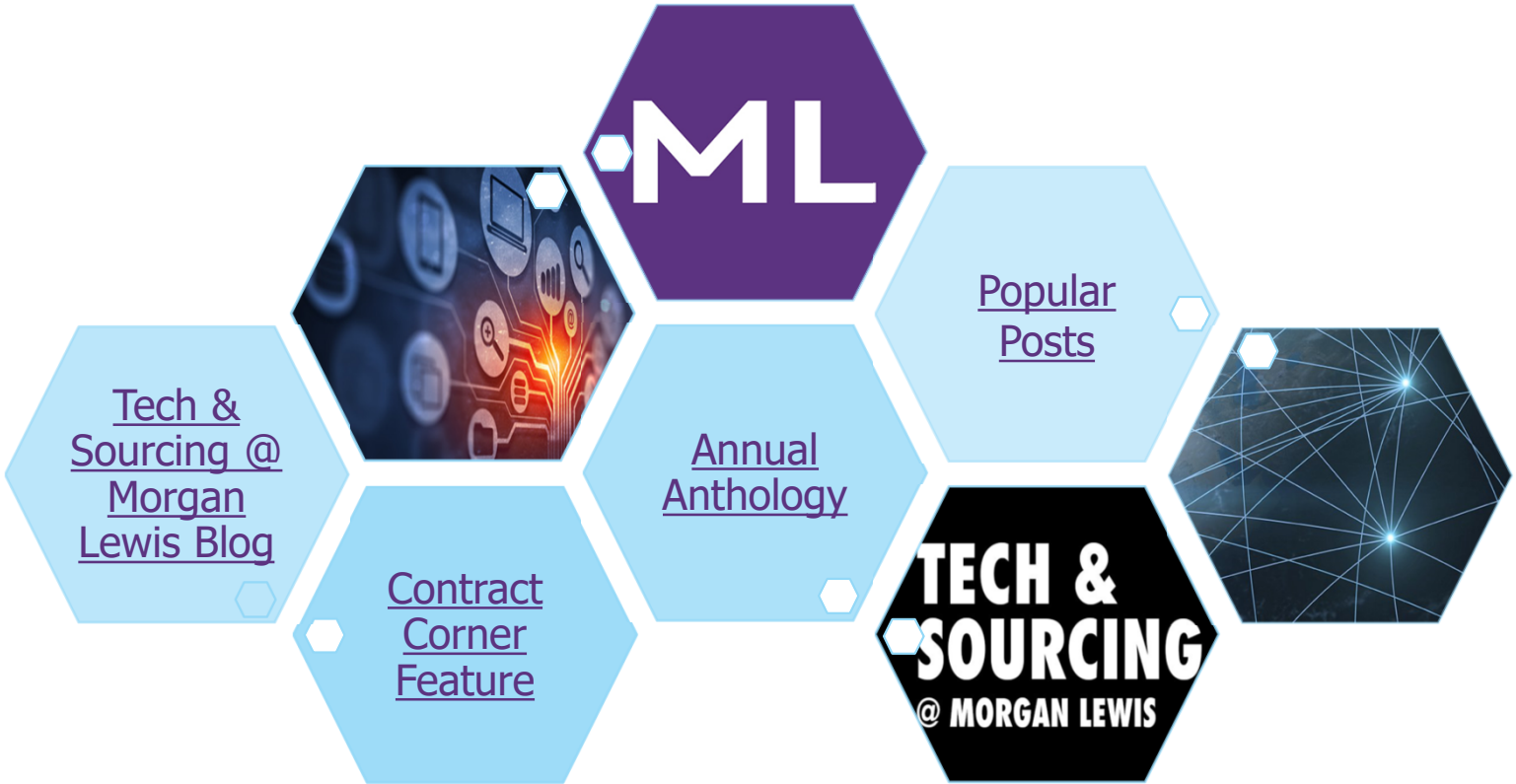
Contract Corner



Contract Corner:

COVID-19's Impact on Outsourcing and Managed Services – Key Issues

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Remote Working

Requirements regarding location	•Many outsourcing and managed services agreements include strict requirements on the location of personnel. •These restrictions are often coupled with requirements on the type of technology that can be used when connecting to or accessing the customer's systems or interacting with end users, security requirements, and detailed connectivity and bandwidth requirements.
Work set-up	•COVID-19 lockdowns and prohibitions on working onsite have meant that many working location requirements could not be complied with. •Rules and provisions regarding reopening and shifting back to the on-premise working models is a major issue that is being discussed within both customer and service provider organizations.
Requests for waivers	•Companies should review these waivers carefully and consider whether the terms are appropriate and have short-term and long-term applicability. •A waiver may be necessary to enable continued work, but the changed working methods may in turn trigger a business-affecting breach, in respect of which the customer's rights may be unclear.
Long-term models	•An emerging trend is for service providers to indicate that remote working will be in place for the long term. •Customers may want to require that all personnel work at a delivery center for security/collaboration reasons or, variations permitting, consider whether there should be a reduction in fees to reflect lower overheads.

Change in Demand

COVID-19 has tested the effectiveness of provisions drafted to allow for flexibility and shifts in demand and business direction, including in light of a material, market-wide change.

The ability to ramp up and ramp down resources and skill-sets to address changing demand and types of demand has become a key point in governance discussions.

These changes have been sector specific and also dependent on point in time, relating to lock-downs or easing of restrictions. They have also been geography specific.

Travel Restrictions

- COVID-19 travel restrictions, together with new company policies and guidelines, have led to a significant decrease in travel.
- Many outsourcing and managed services contracts assume a good amount of international travel and the use of "landed resources" (referred to as out-of-country personnel working in-country through work visas).
- While short-term travel restrictions generally seem to be tolerated, the long-term consequences on outsourcing and managed service solutions are still being assessed, including with respect to resource and skill demand, costs, and flexibility.
- The ability to leverage offshore resources physically onshore will continue to evolve.

Vaccine Rollout Considerations

- Number of countries have rushed to create unified vaccine production capability in-country, partly to address challenges with fragmented manufacture being affected by COVID-19 itself, and partly to address perceived supply shortfalls and vaccine "nationalism".
- Vaccine nationalism (restricting or controlling medical trade for the benefit of the local population) has been driven by a number of factors – including a desire to reduce reliance on international supply chains.
- Concerns are not limited solely to vaccine production capability; they extend to, e.g., syringe and vial availability.


Contract Corner:
Drafting Force Majeure Clauses
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Force Majeure Clauses

The impact of COVID-19 has garnered greater attention on force majeure clauses.

Force majeure clause

"a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled"

Excuses a party's performance under certain unforeseen circumstances.

There is no "one size fits all" force majeure clause, and the precise language of the clause can significantly impact its application.

Therefore, it is incumbent during the contract drafting process to identify which circumstances will and will not excuse performance and tailor the language to fit the parties' intent.

COVID Impact

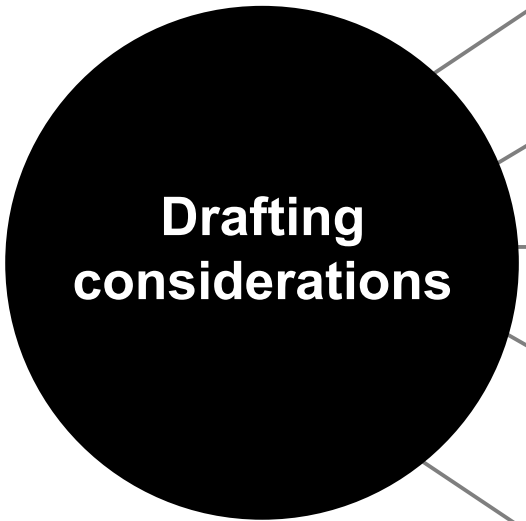
- Prior to the pandemic, parties may have felt comfortable using generalized, catch-all provisions such as "events beyond a party's reasonable control," or "acts of God".
- The pandemic has shown that certain catch-all provisions may be insufficient to enable a party's nonperformance.

- States vary in their interpretations of both force majeure clauses and if there is no clause or the existing clause does not cover the event, the legal doctrines of impossibility and frustration of purpose also vary between states.
- E.g., New York "will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified".

- The ability to perform services remotely may negate the ability to enforce a force majeure provision even if "pandemic" is specifically included in the existing provision.
- The inclusion or the exclusion of "pandemic" from the clause may not be dispositive– governmental actions in response to the pandemic may be the events that prevent performance.

Drafting

In addition to documenting whether a force majeure clause covers a pandemic or government-imposed shutdown, there are other common provisions in a force majeure provision that should be carefully reviewed.



- Does clause require the force majeure event to prevent performance for a specific length of time before protections thereunder can be triggered?
- Does the clause give rise to other rights over time, including right to terminate the agreement (or service) by either (or both) parties?
- Does the clause require the unaffected party to continue to perform when the affected party has ceased performance due to a force majeure event (rent payments)?
- Other contractual provisions such as Business Continuity and Disaster Recovery Plan requirements and Step-In Rights can provide the unaffected party with protections even if the force majeure clause is broad enough to cover the situation.
- The parties should also review the impact of the governing law provision on the force majeure clause.

Current Considerations

If the performance of the contract will take place during the pendency of this pandemic, it may make sense to specifically document the impact of the pandemic, including the vaccine roll-out.

Buyer:
"Seller expressly acknowledges and agrees that as of the Effective Date, Seller continues to be able to fully perform the Services under this Agreement despite the existence and spread of the SARS-CoV-2 virus and has taken all steps reasonably necessary to continue to provide such services during the duration of the pandemic."

Supplier:
"Buyer expressly acknowledges and agrees that it was and will not be possible for Seller to foresee, plan for, or mitigate all the consequences that the existence and spread of the SARS-CoV-2 virus may have or cause, including without limitation, the actions or recommendations by authorities."


Contract Corner:
Vendor Financial Viability Provisions
Morgan Lewis

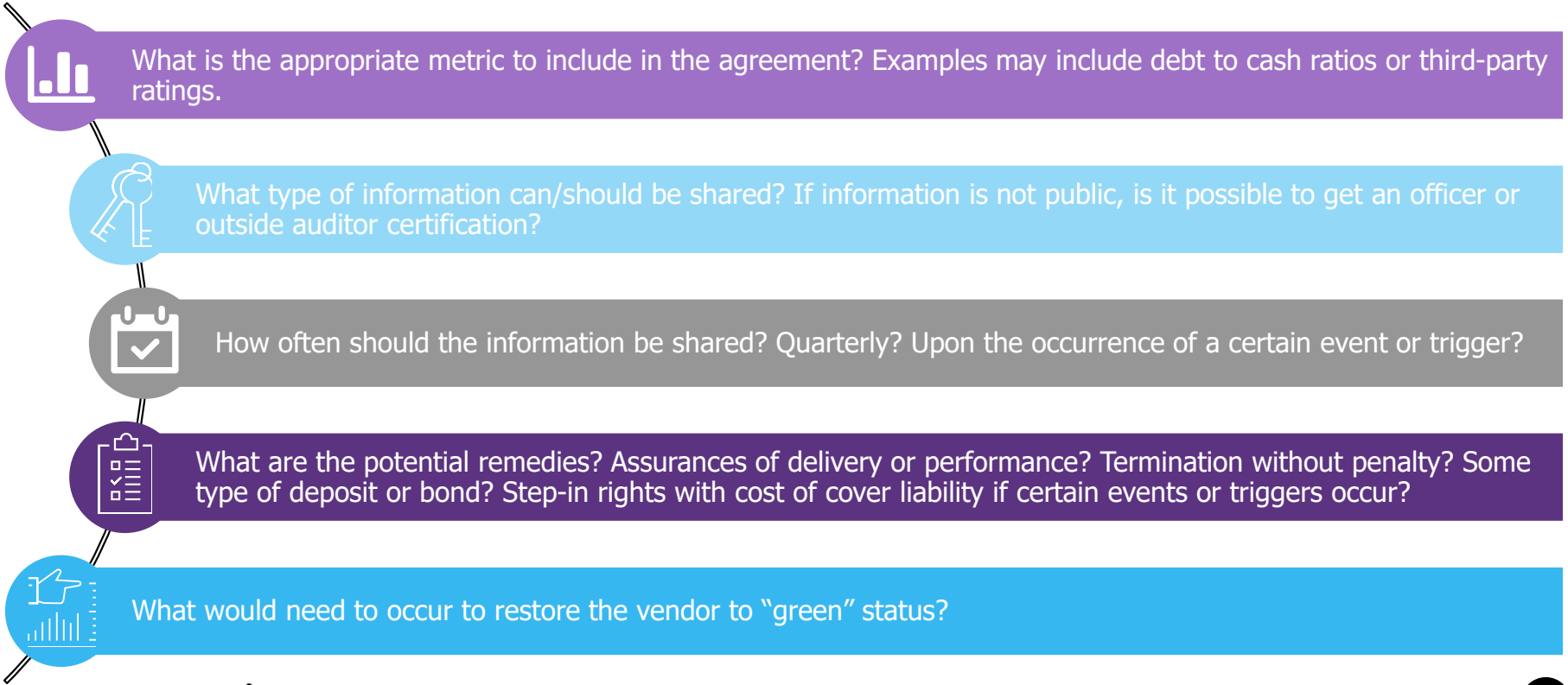
Background

As part of third-party vendor management or sourcing procedures, it is common practice for many companies to vet their vendors prior to contract signing for financial viability and wherewithal.

The impact of COVID-19 on the supply and demand for certain products and services has led to this sort of vetting becoming more commonplace.

Financial viability provisions are being seen by companies as key to allowing for early warning of a potential problem and early action, if necessary, to avoid disruption.

Factors to Consider



Market Approaches to Financial Distress

- Consideration of definition of "Financial Distress Events":
  - Credit ratings dropping below a set threshold
  - Public investigation into improper financial accounting
  - Qualified opinion from an external auditor
- Consequences of Financial Distress Events:
  - Discussions between parties
  - Put in place remediation plan(s)
  - Provide necessary information to give greater detail of distress
- Incorporation of financial indicators (e.g., operating margin, cash flow to debt ratio, net asset value) into financial distress terms.


Contract Corner:
Technology Transformation
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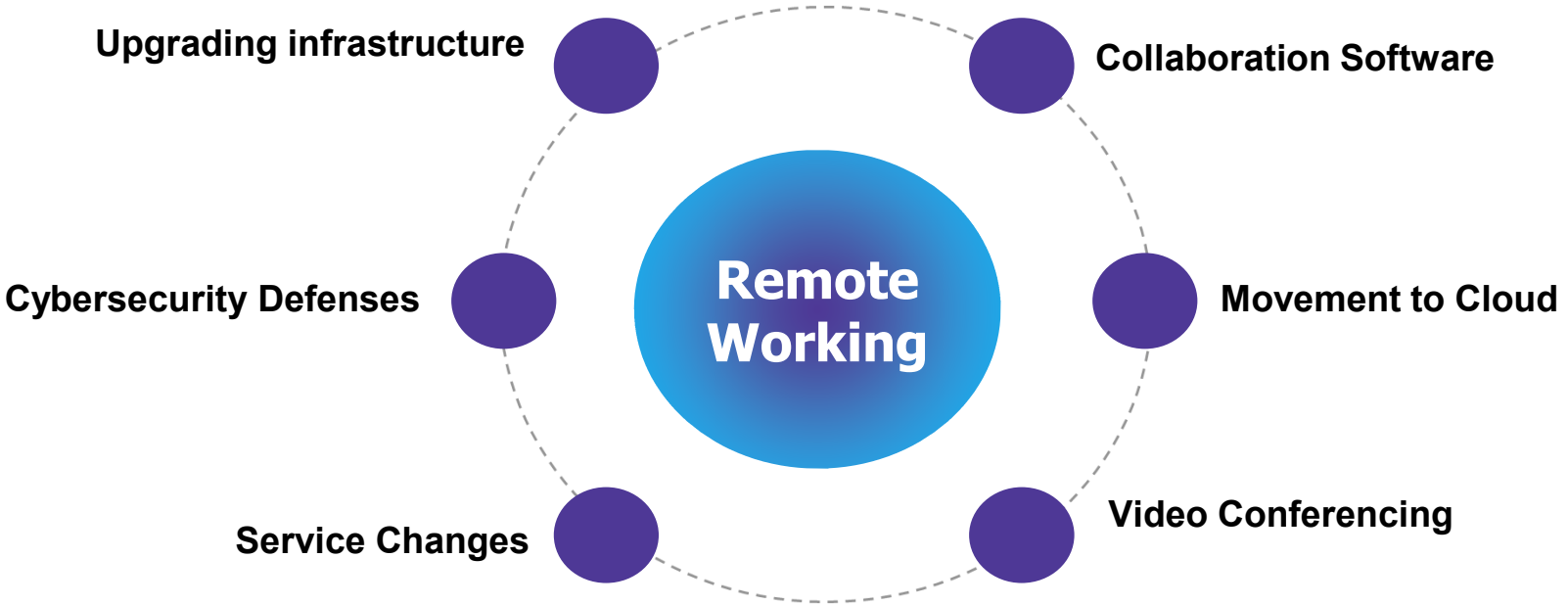
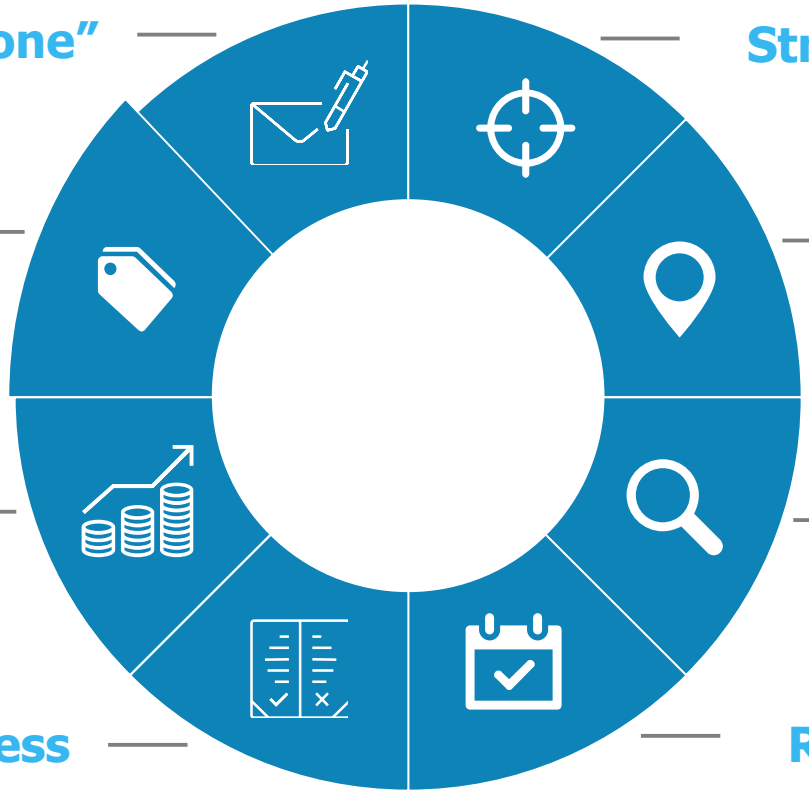
The Need for Transformation

Even with vaccine roll-out, COVID has permanently changed the workplace or accelerated ongoing changes:



Transformation Plan – Development

Considerations when drafting the overall transformation methodology:



- The definition of "done"
- Structure and objectives
- Other rights
- Overall planning
- Milestones and payment
- Governance
- Acceptance process
- Reporting

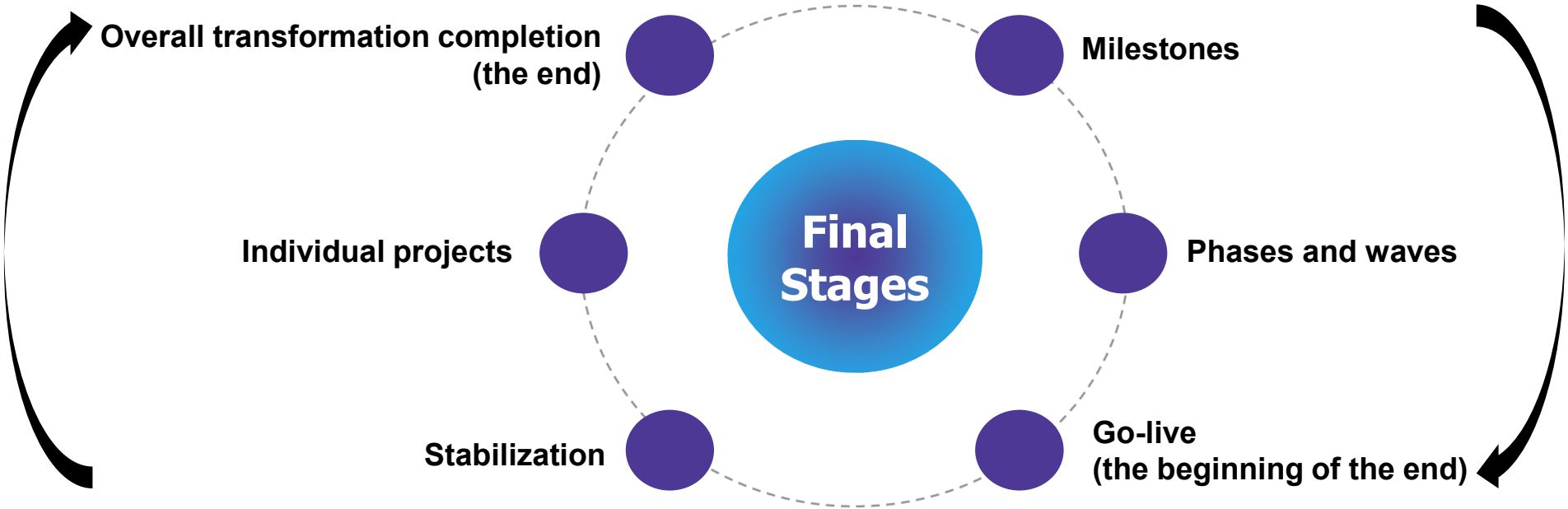
Transformation Plan – Implementation

Considerations when documenting individual transformation projects:

- Internal and external change management and communication
- Scope and objectives
- Reports
- High-level plan
- Staffing and subcontractors
- Milestones, deliverables, and acceptance criteria
- Sites, environments, and connectivity
- Compensation

Acceptance Testing and Completion

Defining the end of the stages of the transformation projects and the overall program:



Testing/Acceptance Requirements

Should the Acceptance Criteria Be in the Master Agreement or Statement of Work?

- Consider whether the time frames and acceptance criteria for services and deliverables are general enough that they can be included in the master agreement and govern all services/deliverables?
- Should project-specific time frames, criteria and processes should be spelled out for each service deliverable, including non-acceptance review/testing?

What Should Be in the Acceptance Criteria?

- Consider the amount of days the customer will have to review or test the services or deliverables following delivery by the vendor.
- Can the customer reject the services or deliverables in its sole discretion? How many days does the vendor have to re-perform or cure?
- After the vendor re-performs or cures, does the initial acceptance process begin again or are there separate standards?
- If the customer begins using the services or deliverables in a production environment during the testing phase, does that use constitute acceptance?
- Is "deemed acceptance" appropriate or should affirmative acceptance be required?

Acceptance as a Requirement for Payment and Other Triggers

- Payment obligations may only come into effect upon the acceptance of certain or all services or deliverables.
- Warranty obligations, and whether the clock on any warranty should begin when services or deliverables are delivered or when they are accepted by the customer.
- Termination rights and/or refund of prior payment resulting from nonperformance may be tied to the actual rejection of a service or deliverable.

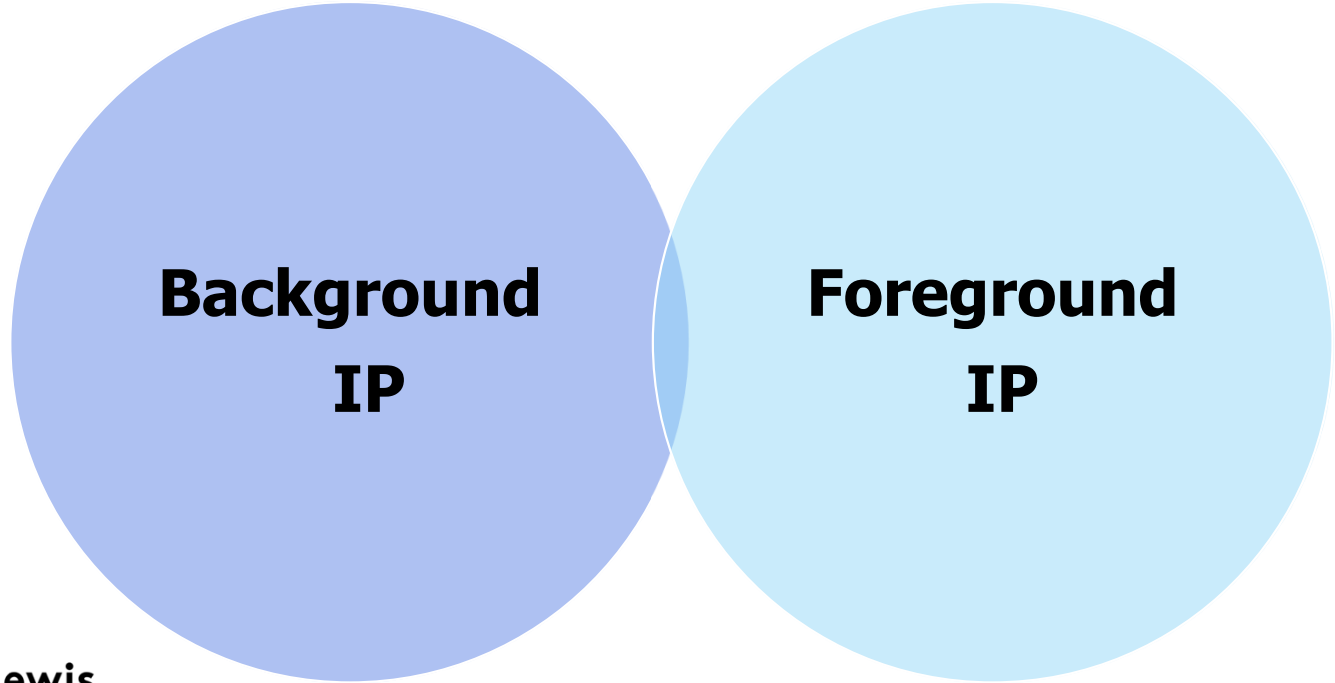
Contract Corner:

Allocating IP Rights In Development Agreements

Morgan Lewis

Background/Foreground Technology

The first step in allocating intellectual property ownership in a development agreement is to identity the IP "buckets"…



Derivative/Custom Works

The key issue in any development agreement is the allocation of rights in foreground IP.

Foreground IP may consist of new technologies created by a party, or it may be a derivative of technology owned by a party.

Regardless of whether or not the developed IP is new IP or derivative IP, if the intellectual property is developed solely by a party without provisions addressing who owns the IP and a present assignment of IP rights from the developer to the company, the IP is owned by the developer.

If the intellectual property is created jointly by the parties and there is no IP allocation for foreground IP in the development agreement, then the default rule is joint ownership.

Assignments/Licenses

- Consideration needs to be given to any requirement for a license from the developer for any developer background IP incorporated in the technology it has developed, or IP which is necessary for the company to use the developed technology.
- Without a license to the developer's relevant background IP, the company might not be free to practice its rights in the developed technology without a potential infringement claim from the developer.
- However, these issues are very solution and fact specific, and appropriate approaches will vary.

Joint Ownership

Although joint ownership may sound fair in theory, it creates a number of complexities:

- Under US law, each joint owner may fully exploit and license the technology to third parties without accounting for patent rights, but having to account for copyrights.
- This means that, at least for patents, joint owners may license each other's technology without royalty fees to the other owner.
- In order to enforce jointly owned IP, both joint owners must join the suit, which may result in an inability for one joint owner to bring the suit.
- Generally when a company is paying a third party to develop IP for it, it desires to own such IP, and joint ownership should be an option only in specific circumstances or for IP that is immaterial to the company.

In order to avoid joint ownership issues, the parties should clearly define foreground IP in development agreements and allocate ownership accordingly.


Contract Corner:
Aggregated Data in AI Solutions
Morgan Lewis

Identification

Providers and customers of AI solutions should carefully consider the proper scope of aggregated data use in the design and implementation of the AI solutions.

Key steps

- Identifying the types of data that may be aggregated.
- Describing in detail the manner of de-identification and aggregation.
- Specifying the limited permitted use cases for the aggregated data.
- Ensuring that the party authorizing the aggregation and use has sufficient rights in the underlying data to do so.
- Contractually allocating ownership of the aggregated data.

Other considerations

- The benefits provided on account of aggregated data are often relatively distinct from the service providers' core offerings.
- For example, customers of consulting service providers may gain added utility from the consultants specifically leveraging datasets collected and aggregated from prior customers, but the primary value add for the consulting services is the provider's expertise and human capital.
- Likewise, users of cloud services may realize indirect benefits from the cloud provider's use of aggregated input data and usage statistics, but that is not always intertwined with the core functionality of the services.

Use of Aggregated Data

Use cases should reflect the reality of AI solutions without using that as a way to justify unfettered use of aggregated data.

Permitted use for purposes of improving the output and results of the provider's machine learning technology as additional data from a wide range of sources is collected, analyzed, and integrated therein in order to develop, maintain, and improve the provider's solution as it may be provided to the customer and other customers of the provider is typically a good, reasonable starting point here.

De-identification and Aggregation

Typical requirements/restrictions

Typical requirement is that the aggregation and de-identification be done in a manner such that the data does not identify, or permit identification of, the customer or any of its users.

Sometimes additional/different restrictions are necessary to protect the customer's commercial or privacy interests (such as number of contributors to aggregation and general identification of customers).

Another common restriction relates to ensuring that the data is de-identified and used in a manner such that the customer is treated the same or substantially similar to all other customers of the provider, and that the aggregated data collected from the customer is not used in a manner based on or specific to the customer's business or industry.

- The driver is usually commercial in nature (the customer doesn't want the provider to gain an advantage through aggregated data as a result of the customer's unique standing in the industry).
- If the provider offers one standardized solution across its customer base, these types of restrictions may be easy to agree to, but if there are multiple products or solutions that utilize different datasets or the same datasets in different ways, the provider should be mindful of that when considering any such restrictions.

Bias Considerations

- Bias issues in AI decision-making have become increasingly problematic in recent years.
- Terms intended to ensure data is collected and used by the provider and its technology in a nondiscriminatory manner are one avenue through which customers could start looking for contractual protections relating to bias issues.
- Providers should only take responsibility for the design and implementation of their technology, and not be held responsible for any issues resulting from biases or other problems in customers' input data (i.e., "bad data in, bad data out") or issues resulting from the decision-making made by customers rather than the data presented to them through the AI solution.

Morgan Lewis and Global Technology

Check back to our Technology May-rathon page frequently for updates and events covering the following timely topics this month:

COVID-19	**Cybersecurity, Privacy, and Big Data**	**Medtech, Digital Health, and Science**
Artificial Intelligence and Automation	**Fintech**	**Mobile Tech**
Regulating Tech **Biden Administration and Tech**	**21st Century Workplace** **Diversity, Environment, and Social Justice**	**Global Commerce**

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Check out our AI Strategy post: **National Artificial Intelligence Strategy Announced in United Kingdom focusing on:**

- Growth of the economy through widespread use of AI technologies
- Ethical, safe, and trustworthy development of responsible AI
- Resilience in the face of change through an emphasis on skills, talent, and research and development

https://www.morganlewis.com/blogs/sourcingatmorganlewis/2021/03/national-artificial-intelligence-strategy-announced-in-united-kingdom

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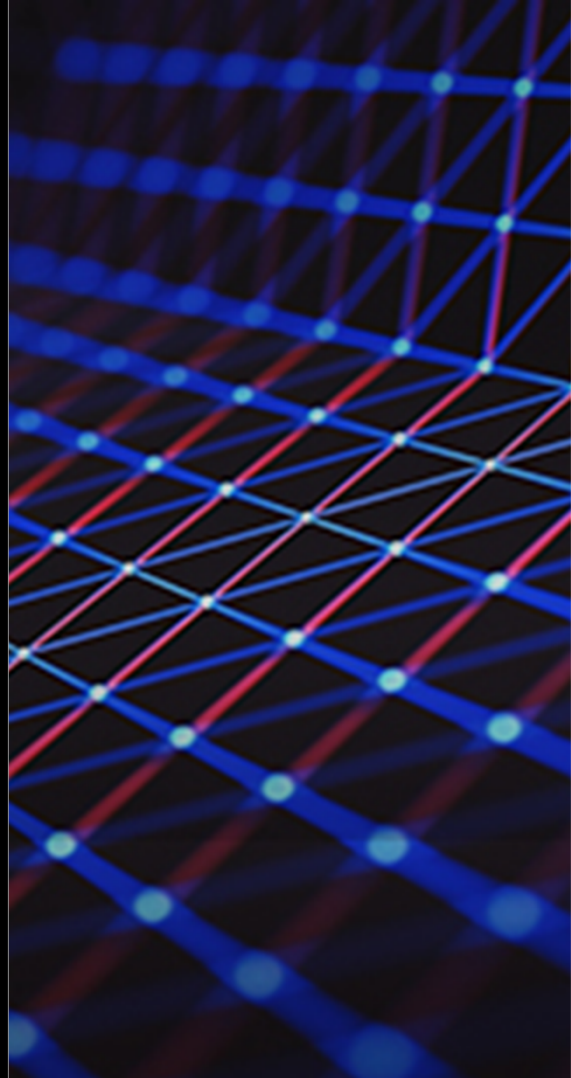
Coronavirus/ COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



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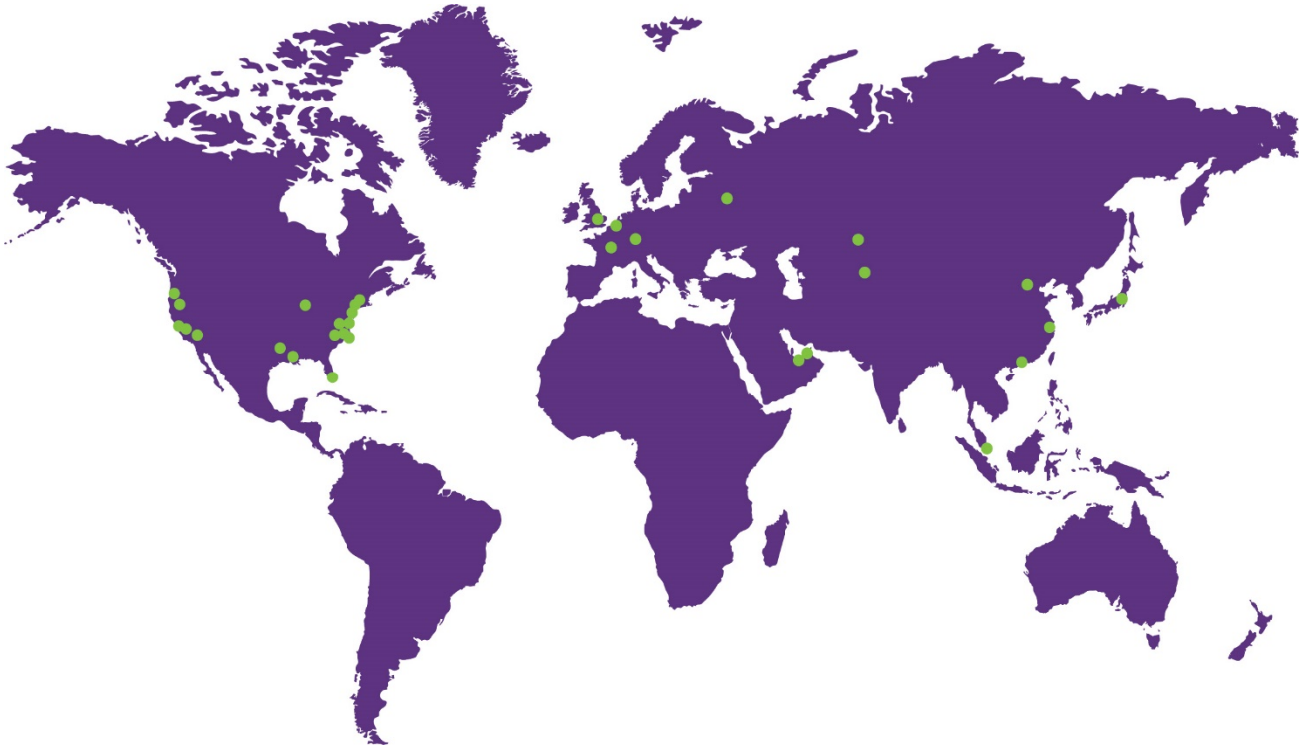

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