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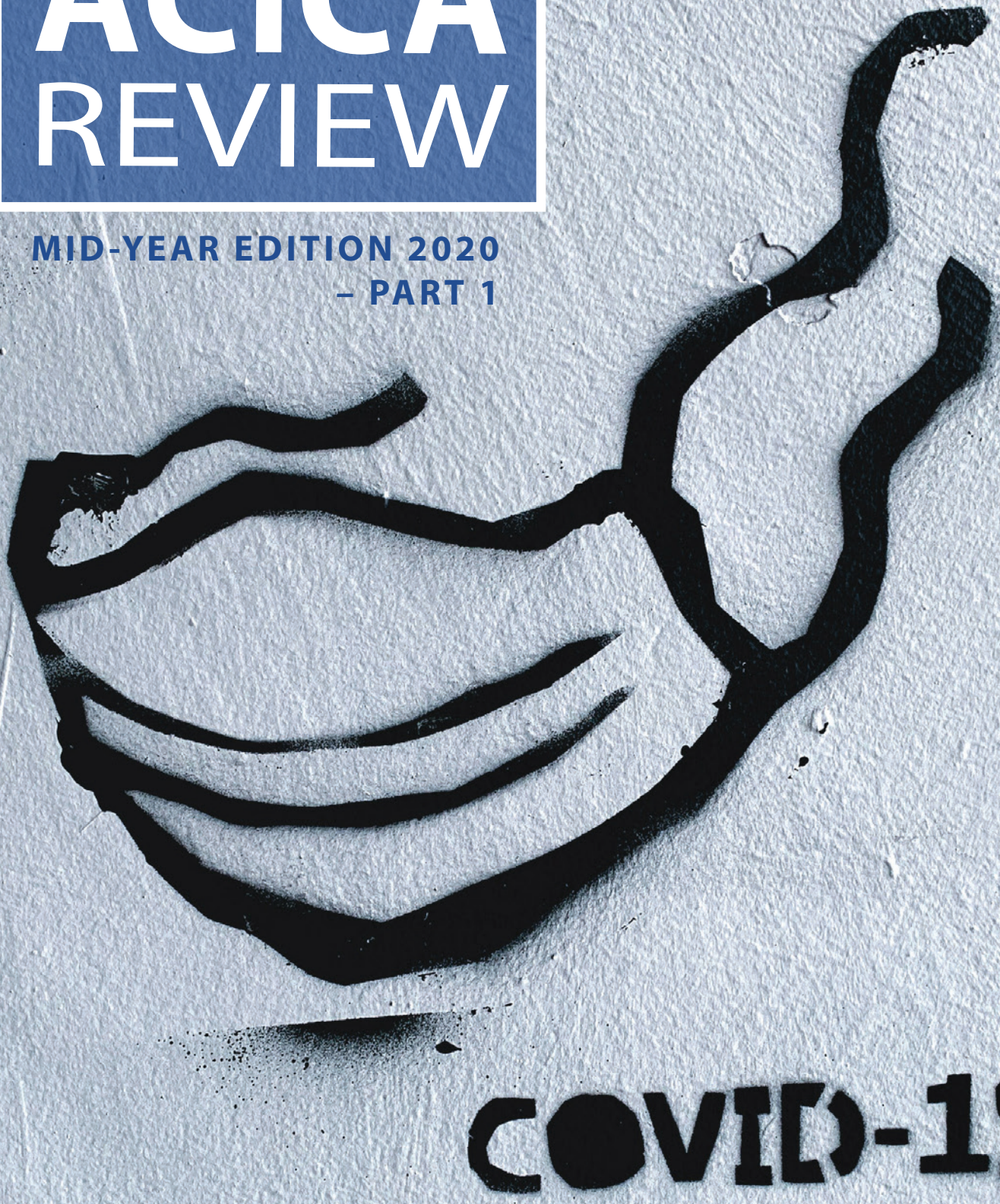

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Your BPO Supplier is WFH: BPO Disputes in a Post-COVID-19 Era

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With the worldwide outbreak and continuous socioeconomic evolution of COVID-19, its profound impact on businesses across the globe are far-reaching. Most notably, some sectors are able to transition to a working from home ("**WFH**") model to ensure that 'business as usual' continues. However, unlike those sectors that are able to smoothly transition to a WFH business model, business process outsourcing ("**BPO**") service suppliers ("**Supplier**") face challenges, given their core business is to serve client companies ("**Client**") from a fixed and secured Delivery Centre ("**Delivery Centre**"). A Client may not be able to sleep well at night if its BPO Supplier is to switch to a WFH model given the obvious potential data/security concerns (including but not limited to *GDPR*).[2] Accordingly, this may result in disputes unique to this sector taking place. BPO contracts usually have arbitration and mediation clauses as a means of dispute resolution. This article will seek to convey certain considerations in such dispute resolution.

Two Sides of the Same Coin

Before looking into the representative issues WFH may cause, it is helpful to understand the concerns from each party's perspective.

On one side, the special business model that BPOs must adopt creates a legitimate concern for a Client in today's age of transitioning into WFH models: when a Supplier's employee is WFH rather than from a Delivery Centre, is that secure? How are the Supplier's contractual obligations and agreed best practices being upheld by the Supplier in adopting a WFH model? If something untoward transpires, should a Client be made to just accept that fact in a COVID-19 world or can a Supplier be held accountable? If an amendment is required for BPO contracts (usually with a term longer than five years), what clauses may have to be considered? These are some pertinent questions this article seeks to address.

On the other side, one must also recognise the difficulties faced by a Supplier in the new world we are faced with today. Switching the workforce servicing a Client to WFH requires significant technology upgrades or changes to an existing BPO contract. Some WFH technologies could be innovative but may not be stable enough to service a Client of a Supplier. The bottlenecks may also come from something Suppliers cannot control; one example is internet bandwidth, which has a direct relationship with a country's telecom infrastructure. While the existing BPO business continuity plans or disaster recovery plans in contracts may have considered the scenario of moving service from one Delivery Centre to another, it may not have foreseen a worldwide and long-lasting pandemic, meaning WFH may become necessary until a cure and vaccine are readily and affordably available.

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2 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC* [2016] OJ L 119/1.

Bearing the above perspectives from a Client and a Supplier in mind, we may now dive deeper into several hot issues the WFH model may trigger. Those issues may not necessarily be related to each other, but they come out of the same root cause: WFH.

Working Location

In a BPO contract, the working location clause or schedule sets forth where the BPO services are to be delivered by the Supplier to the Client. Seldom or almost never would you find such contracts having covered a situation of WFH.

Given the highly sensitive and confidential nature of certain BPO services, e.g., those for finance, credit cards, procurement, human resources, and IT technical support, a Client usually requires that BPO services can only be delivered from a specific Delivery Centre, which should meet certain physical and cyber security standards. Prior notice to and consent from a Client is required even to move delivery from one Delivery Centre to another.

However, when Delivery Centre employees have to start WFH, how should this be initiated? Without prior consent from a Client, this could be a straightforward breach of contract. To cure this breach, a non-monetary service credit, which is usually offered by a Supplier to a Client to off-set future due service fees, may not be sufficient, because service credit is usually for curable under-performance under the service level agreement ("**SLA**"). Apart from this non-monetary cure, liquidated damages or other damages for breach of contract may be available. Therefore, a BPO Supplier should not underestimate the consequences of this situation. An advance arrangement should be made by both parties prior to any sudden change to a WFH model. This arrangement could be in the form of an amendment or a change order to an existing BPO contract, with other main considerations discussed below.

Data Integrity, Privacy and Cybersecurity

The essence of insisting on a specific working location (Delivery Centre) is to provide a Client with peace of mind on three key issues: data integrity, privacy and cybersecurity. An agreed Delivery Centre meets applicable standards on data, privacy and cybersecurity set down by the laws in both a Client's home jurisdiction and that of a Supplier. Any violation may trigger significant punishment by the authorities and result in loss of reputation of both parties. Therefore, a Client has reasonable concerns regarding, and legitimate interests in, having a proper Delivery Centre.

Without proper technological adaption, WFH may compromise encryption and other secured processing. As a result, data being processed by a Supplier may become vulnerable to both internal breaches and attacks from the exterior. To cope with this, some Suppliers may offer to procure and implement extra security equipment such as VDI (Virtual Desktop Infrastructure) and a VPN (Virtual Private Network) to facilitate WFH, and examine if its employees' office computer or personal computer under a BYOD (Bring Your Own Device) model would meet security standards set forth in a BPO contract.

Despite such proactive measures, some things may remain out of the parties' control, e.g., the bandwidth at an employees' home may be variable (if the number of online users surge in a 'home network' then the internet speed may significantly slow down). In such cases, service efficiency may drop and consequently an SLA may be breached. If this breach cannot be cured within a prior agreed period, then the Client would naturally be entitled to a monetary claim.

Client's Step-in Right

If people have to live with the coronavirus for a while, then rather than passively relying on its BPO Supplier a Client may have to think about mitigating data processing risk themselves. For instance, a Client may ask, 'is it better if I send a supervisory or assistance team over or have someone else step in?'

Some BPO Suppliers oppose agreement to step-in rights, no matter whether by the Client or a third-party entity engaged by the Client. A step-in rights clause usually provides very limited rights for a Client. However, for WFH, a real hurdle is the compatibility.

BPO Suppliers have reasons to be proud of their system and their own way of doing things, which is the essence of the BPO services industry and the reason a Client

selects and trusts them in the first place. A Supplier's existing system may not be compatible with what Clients try to introduce into the system. On the other hand, a Client may be understandably concerned that WFH would negatively impact the seamlessness of business processes, reduce efficiency and compromise the Client's data and proprietary information, unlike a conventional Delivery Centre. Therefore, a Client would always be nervous about the off-track event, which would compel them to step in.

As a result, a battle on step-in rights may become inevitable. Usually such fights would only occur after repetitive SLA failure and a Supplier's inability to cure it. However, given a foreseeable longer term of the COVID-19 pandemic (which may be far more than what most realise), some Clients may choose to look into this immediately and think about 'helping out'.

Client's Technology

To facilitate WFH, some capable Clients may want to extend certain technology tools to a Supplier, under the guise of exercising a step-in right. This generous gesture may necessitate incorporation of another common clause regarding "**Client's Technology**" into existing BPO contracts.

The first thing is whether a Client has a contractual basis to introduce its technology into a Supplier's services in a "given situation". In many cases, a Supplier may have a say on the introduction of Client's Technology. The reason is simple: a Supplier is accountable for delivering results. For anything introduced into a Supplier's technology environment, they should have the final say. Unfortunately, a qualifying "given situation" may not have been given significant thought during the BPO contract negotiation and finalisation stages.

Normally, a schedule on the Client's Technology would have been heavily negotiated. The underlining theory is straightforward: a Supplier should not be held accountable nor liable if the technology introduced by a Client began to malfunction and/or losses were incurred during the utilisation of a Client's Technology. Such utilisation sometimes interfaces or interplays poorly with a Supplier's existing technology or environment, causing the root reason of a breach to become more difficult to attribute. In a WFH scenario, arguably a Client acts in good faith by offering another layer of comfort, and helps a Supplier avoid breach. If using the Client's Technology means the Supplier would be exempted from its accountability in relation to that particular Client's Technology, would that defeat a Client's purpose?

Conclusion: How to Help

This article just lightly touched certain issues in a BPO contract mediation. It is obvious that no simple solution exists. Mindful arbitrators and mediators may find themselves restrained from considering extreme scenarios such as early termination pursuant to force majeure or impossibility of performance situations. As a matter of fact, execution of a BPO contract means that parties have invested a lot of time and capital (human and otherwise) to tailor-make the agreement work within a given matrix. If a BPO contract is adjudicated to termination, the transition-out efforts should not be overlooked. If some clauses therein could be used to navigate the ship out, it may not be in the interest of both parties to abandon the ship right away.

Australian Centre for International Commercial Arbitration

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