

COVID-19 Contract Management Playbook

Working Towards the 'New Business As Usual'

Introduction

In the wake of COVID-19, many companies abruptly find themselves having to adapt their business models to cope with everything from supply chain backlogs and human resourcing challenges to funding shortfalls and dwindling revenues. Against this backdrop, companies find themselves unable to meet their contractual obligations or struggling internally to navigate the risks associated with the continuously changing circumstances.

This Playbook aims to assist such companies by providing practical guidance on working towards the 'new business as usual' and mapping out a path of Resilience, Recovery and Renewal. In particular, we comment on:



If you would like more detailed information on any of the points raised in this Playbook, please get in touch with your usual Baker McKenzie contact, or our dedicated COVID-19 team [here](#).

1

Resilience: Crisis Response



The first phase is Resilience. This phase is about addressing the most pressing issues in response to COVID-19 and ensuring proper internal plans are in place to stabilise your business. Getting your house in order and putting in place clear governance structures at the outset will allow for a smoother transition towards the Recovery phase. To assist, consider the following points:



Prepare an internal ramp-out plan for working towards the new business as usual. It is clear that any return to the previous 'business as usual' is unlikely. Therefore, businesses should, instead, aim to work towards a new business as usual. We consider what this new BAU will look like in the 'Renewal' section of this Playbook. In any event, the approach will be informed by the gradual nature of the lifting of government restrictions and the need to maintain distancing and health and safety measures for, in all likelihood, some time to come. Accordingly, an internal 'ramp-out plan' should be prepared as soon as possible. For example:



Consider the impact on revenue. Many, if not all, companies are experiencing noticeable shifts in revenue during COVID-19. Has your business made any contingency plans for any situations that foresaw similar implications? Are short-term concessions necessary to sustain your business long term?



Address any supply chain or service delivery backlogs as a result of COVID-19 and form a plan with the relevant parties as to how to address this. In particular, consider the order of priority and any urgent requests in addressing backlog and communicate with the involved groups to ensure that your expectations are met.



Consider what resources will be required and at what stage of the return to 'business as usual'. For example, will additional resources or skills be required throughout various stages of removing government restrictions? There may be competition for additional resources so it will assist to plan any additions required in advance.



It may be optimistic to assume that, as soon as major restrictions are lifted, your team will all be able to immediately return to prior arrangements that were in place. Accordingly, you should factor in both the risk of staged release of restrictions and the risk of a second wave of COVID-19 and the return of tighter restrictions.



Prepare an internal mitigation plan. Identify key aspects of your business that are affected by COVID-19 and what steps you can take in mitigation. For example:



Can you reallocate resources and/or upskill staff on areas requiring more immediate attention? Such steps can help not only to increase productivity but also to boost staff morale.



- » If a supplier or service provider is struggling to meet its obligations to deliver goods or services to you (for example, in volume or by the requisite date), consider what steps you can take to mitigate this impact. For example, can you negotiate with your supplier or service provider to ensure the maximum amount of product or services are still delivered and search for an alternative supplier in parallel? Legal advice should be sought on all such concerns.

» **Assess safety concerns.**

- » Consider whether your company has communicated the current safety mechanisms in place to the team and ask for feedback on how to improve. This may assist in both reassuring and reengaging staff. Often, communications largely focus on the economic challenges the business is facing so it is important to revisit the safety and welfare concerns of your team members.
- » Consider whether it is possible to form any teaming solutions within the organisation for those required to work on site. For example, splitting the employees into two teams (each with essential people to run the business) and working on a rotation system to ensure that the number of staff on the premises at any one time is reduced.
- » One crucial point is that, even more so in the current climate, safety (or other welfare) concerns may need to override your contractual obligations. For example, risks to your employees' safety from operating "as normal" are likely to outweigh the commercial risks of not doing so.

» **Engage your legal team.** It may not always be necessary to seek legal advice, but it is helpful to have your legal team aware of and alert to any issues early on. This will also enable legal to work with you to protect the company's position and ensure that nothing is said to compromise any points that may need to, at a later time, be taken in formal legal correspondence or proceedings. It is crucial to engage your legal team for advice where:

- » There is any dispute or risk of dispute.
- » You are seeking to invoke specific terms under a contract (including force majeure).
- » There is a risk that any of your contracts cannot be performed as agreed (in particular, where the supplier has informed you that it is unable to meet its contractual obligations).

When asking for legal advice, you should mark relevant communications 'confidential and legally privileged'. Also ensure that you follow internal guidance and escalation processes as well as reviewing any dispute resolution procedures set out in the contract.



Remain informed on UK Government guidance and Employment law. In particular, it is important to seek Employment law advice early on to ensure that your business is compliant and that government measures are being fully and properly utilised where possible. The following resources may also be useful:



[Business Support.](#)



[UK: COVID-19 Government Backed Initiatives - Will They Help Your Business?](#)



[COVID-19: Global Employer Guide.](#)



Consider any reputational damage that might be suffered if customers, the public, any local authority or media outlets were to take the view that your business should not remain open in the current circumstances.



Consider amongst your business leads and align within yourselves how you want your brand and reputation as a business to be considered during and after COVID-19. For example, is protecting your people and those of your service providers or suppliers most important to you? Is continuing to achieve profits the bottom line? Or is it a combination of both and/or other factors that are ultimately important to your business and reflect its value proposition?



Do short term concessions need to be made for long-term survival and success? Or are short term concessions not possible because survival is paramount?



Legal crisis management and PR advice can assist your team to pre-emptively prepare a response to any such publicity.



Keep records of key decision-making processes and internal meetings (as minutes or an ad hoc meeting note). These should be captured in sufficient detail to understand decisions taken and the reasons why.



Ensure that any internal discussions about contentious legal issues (such as whether or not you are entitled to invoke contractual provisions or terminate a contract or the risks of breaching a contract) are kept separate from general commercial discussions and are carried out under the guidance of your legal team. This will also ensure records of these internal discussions retain legal privilege to the fullest extent possible.

2

Recovery: Mid-Term Survival



Once you have responded to the immediate concerns arising from the pandemic, the business needs to look to mid-term survival and Recovery. The COVID-19 situation continues to evolve in different parts of the world on a daily basis, so all businesses should anticipate, stay alert to, and monitor changes; as well as putting practical measures in place to recover from the storm. We have divided our practical suggestions into three categories:



General Management



Reviewing Your Contracts



Renegotiating Business Terms

General Management



Practical management measures to ensure optimal business recovery include:



Consider your existing internal governance mechanisms and, if there is room for improvement, whether you can implement additional measures. For example:



Consider whether there are regular meetings in place or reporting requirements to address team welfare, external or third party communications, performance expectations, resourcing and operational bandwidth, productivity, security measures, and general COVID-19 consequences. If necessary, introduce a new meeting with an agenda that is tailored to your business and lists the particular topics you need to address.



Check if there is a frequent line of communication between management and the wider team. Do you need to put in place a mechanism to facilitate this? Can you leverage pre-existing channels as the main routes for communication?



Consider how you will manage business resources. For example:



Will certain resources be suspended and reinstated and, if so, at what time and will there be cost implications?



How will different working arrangements (such as working from home or reduced hours of operation) impact the company or your service providers? For example, consider how these changes might affect delivery obligations, require increased or adjusted security measures, or a need to manage logistics and operations differently to deal with pinch points (i.e. a reduction in volume and scope of products or services).



Assess any steps you can take to assist other parties.



This includes considering any steps you can take to provide some leeway to or achieve a temporary workaround with service providers and suppliers where they are currently unable to meet their contractual obligations due to COVID-19. See *Reviewing Your Contracts below*.



Ensure you communicate the relevant steps taken to the service provider or supplier in writing to highlight the value-add or goodwill you are contributing. It is also important that you have a paper trail in place for auditing (or other relevant) purposes down the track, particularly so that you are not inadvertently waiving any of your rights under your various commercial contracts. We recommend consulting legal so they can assist you with this.



Review your tax position and check with your legal team on this. For example, it may be possible to restructure financial arrangements, request refunds for previously paid tax instalments, or apply for deferral of tax payments.



Tidy up any outstanding pre-COVID-19 contract and/or commercial issues. If in doubt, check with your legal team on this.



Keep records of key decision-making processes and meetings with service providers or suppliers and other third parties (as minutes or an ad hoc meeting note). These should be captured in sufficient detail to understand the decision taken and the reasons why.

Reviewing Your Contracts



Most companies are currently facing uncertainty. In the Recovery phase, it is necessary to take stock of your business obligations and the obligations owed to you. From there, consider whether you need to negotiate with your service providers and suppliers if your agreements require adjustment. This will ensure business relationships can continue (to the extent possible), that your operations can continue at the optimum level, and you can maintain a positive reputation in the market.



Assess what your contracts require you and your service providers or suppliers to do.

Consider the current performance obligations under the contract and identify which obligations the parties can and cannot achieve in the short term, whether in part or in full.



Ensure you keep records in support of this assessment process.




Discuss these matters with your leadership and legal teams.






Consider whether there is a workaround if you, your service providers or suppliers cannot meet your obligations.


In particular, review the contract with your legal team and check for any contractual provisions that may apply if you are unable to perform your obligations. For example, are you able to meet your payment obligations to your service providers and suppliers, or your on-selling or service provision obligations under any consumer contracts? If not, there may be express options in your contract that allow you to vary, suspend, renegotiate or terminate the contract, or to trigger a force majeure clause to achieve the same outcome.





 Your service provider or supplier may be unable to meet certain contractual obligations and may try to rely on the provisions of your contract to excuse its inability to meet its obligations. For instance, you may receive a force majeure notification from a service provider or supplier, expressing that the force majeure provision under your contract excuses it from performing its obligation. In such case, it is important to check that the specific reason for invoking the force majeure clause is clearly explained and, most importantly, that the reason cited constitutes a force majeure event under your contract. You should discuss this with your legal team to help you decide whether to:


-  accept the service provider's or supplier's reliance on the force majeure clause (mindful of the legal consequences of doing so);
-  seek to enforce the service provider's or supplier's obligations under the contract; or
-  pursue a separately negotiated outcome.


See [here](#) for high-level guidance on the options to terminate a contract, though in this instance it is highly advisable to discuss with your legal team.


 It is also important to consider governing law clauses, time bar provisions, and general procedural requirements.

 There may also be options which are not expressly set out in your contract i.e. non-contractual remedies, such as an ability to argue that the contract has been frustrated if it cannot be performed.

 **Consider the best means to communicate with any service providers or suppliers.** While navigating the challenges of COVID-19 is time consuming and requires significant resource, it is important to ensure that all communications are and remain as seamless and clear as possible. To assist with this process, consider the following points:

 Review your contract to assess whether there are any specific requirements regarding how you should communicate with your service providers or suppliers (including notification provisions). This is essential where you intend to rely on the terms of your contract to vary, suspend, renegotiate or terminate the contract.

 Consider how frequently to request updates from your service providers or suppliers. Given the fast moving nature of the COVID-19 issues and governmental responses, it may be sensible to require an increase in the frequency of updates you receive. Best practice is for the parties to be in communication on a regular basis (perhaps weekly or fortnightly) and to ensure all significant communications are in writing.

 If in doubt, discuss the best approach with your legal team and double check your service providers and suppliers are comfortable with the means and frequency of communication.



Be clear and factual in communications with the service provider or supplier, particularly around any potential risks and issues relating to your ability to pay for or receive products or services during COVID-19. This will ensure you can work with the service provider or supplier to anticipate and address issues as early as possible. Revisit and report on the evolution of risks regularly, as these are likely to change week to week.



Assess whether the contract envisions a particular process and form for **how any subsequent agreement should be reached**. For example, are there:



Specific provisions in your contract about how it should be varied (e.g. by mutual written agreement)?



Any risks of inadvertently waiving a right or rights under your contract when seeking to agree short-term changes?



Provisions around how, when and with whom the negotiations should take place (e.g. with an authorised representative of each party)?



New bands/pricing mechanisms that need to be taken into account or concessions that may need to be made based on prescribed commercial mechanisms, changes made in good faith etc.?

Renegotiating Business Terms



The COVID-19 crisis may result in service providers and suppliers asking to renegotiate their contracts with you (especially where suppliers or service providers are unable to meet their delivery obligations). When renegotiating business terms it is important to consider:



How best to amend the contract as it is crucial to ensure that the agreement on foot is legally enforceable. Check this with your legal team. For example, consider whether:



There is a **variation** (or similar) **clause** in the contract that requires any variation to be carried out in a particular manner.



A **suspension of the contract term** is required. From a commercial standpoint, it may be better to suspend the contract in order to keep the business relationship on foot and aim to secure the provision of goods or services at a later date.



An **extension of the contract** term is required. For example, by adding the period of delay to the overall contract term.



Whether, from a practical or commercial perspective, **termination of the contract** is in fact a feasible and more pragmatic option in the circumstances. For example, where the service provider or supplier is unable to meet its contractual obligations for the remainder of the contract term and you can adapt your business in the short term to account for the product or service that was being provided by the service provider or supplier.



Any adjustments to (or reliance on) limitation of **liability clauses** are required.



What the service provider or supplier is looking for. For example, consider whether the service provider or supplier is likely to face any financial (or other) distress and how this might impact any of its or your contractual obligations. If this is the case, assess whether it is possible to shift the terms of the relationship ahead of any collapse of the bargain. While a party may have contractual relief in theory, renegotiating terms in order to assist the service provider or supplier may be a better commercial and reputational option for both parties in the long term.



Finances including:



Interim price adjustments and revenue. Consider whether it is possible to extend payment terms or offer discounts, or whether you can negotiate decreased volume in return for reduced price. Seek guidance from leadership and legal.



Other cost **implications.** In particular, whether additional costs will arise as a result of the negotiations. If so, what will the resulting procedure for payment be? For example, the costs may be divided equally, fronted by one party, or paid on a percentage basis.



The risk of the service provider or supplier becoming **insolvent.** Review the contract to see whether there is any capability to protect the business in the event that the service provider or supplier enters administration (as there is a risk that goods or assets delivered to your business may be 'clawed back' in the administration process).



- Any checkpoints or **defined time limits** that need to be put in place or amended. Consider whether the changes should be temporary (i.e. defined as running during the crisis period only) or permanent. For example, if renegotiating any delivery dates, ensuring any extensions of time are in accordance with your ability to receive and pay for the goods or services.
- Any **particular provisions for post-COVID-19**. In particular, if certain restrictions currently in place are lifted, consider how this will impact the contract. For example, whether there is room to negotiate increased provision of goods or services once restrictions lift to mitigate any losses due to a lower volume of goods or provision of services in the interim period.
- **Third parties**. Consider whether the negotiations will affect any third parties. For example, where there are a number of parties who form part of the supply chain, consider how the amended terms may impact on others' abilities to perform obligations (whether contractual or otherwise).
- **Insurance arrangements**. Specifically, consider the impact that negotiating may have on insurance arrangements and whether there a need to notify your insurer of any proposed alterations.



Once these practical details have been ironed out, ensure that:

- The necessary approvals have been sought, including from management and legal.
- The agreement is executed in an appropriate legally binding agreement. This may include signing a waiver, signing a variation to the agreement, or terminating the existing agreement and entering a new agreement.

3

Renewal: The New Business as Usual



Following the recovery phase, businesses should consider what the 'new business as usual' might look like. It is only possible to speculate around any new normal at this stage, however it is important to plan for a changed commercial landscape ahead of time. This will ensure your business is best placed to operate, with appropriate measures in place, as soon as the most significant waves of the pandemic are behind us. Likewise, it is important to learn from COVID-19 and adapt to ensure strengthened ongoing practices going forward. In particular:



Contingency plan. Consider the processes you have carried out in dealing with COVID-19, and consider plans for future crisis management. This will enable your business to be nimble and ready to deal with a similar situation (including future waves of the current pandemic).



For example, it may be necessary to purchase larger inventories and stockpile materials on site for contingency purposes (especially where service providers, suppliers or subcontractors have to shut down in a future crisis).



Reimagine your workplace, operations, and resourcing requirements.



Consider which staff members can continue to work from home. How will you ensure they remain engaged and productive, especially in less transparent circumstances? Is there additional office (or other) equipment that would increase their productivity or inclusion?



In terms of physical property that the business owns, consider whether your operations can progress on a revolving basis (i.e. different groups of staff on site at alternate times) to reduce space requirements. Is it possible to fundamentally restructure your space to meet social distancing requirements?



From a safety perspective, do you need to order PPE for your team including masks, sanitiser and cleaning equipment, and separation screens or fences?



COVID-19 has confirmed the necessity of the internet and IT systems. Consider whether it is possible to enhance your IT systems (including virtual meetings with service providers or suppliers on Zoom or Slack) or to introduce options to on sell the goods or services you have purchased or intent to provide to a wider pool of consumers online. Improving and maintaining your internal and external communications and general accessibility to your business is key.



Ensure your IT systems are robust to avoid compromising data or security breaches.



Review your standard terms and contracts. Liaise with management and legal to ensure that your standard terms and conditions, employment contracts, and contracts with suppliers are updated and reissued. For example, you may need to update the health and safety provisions in employment contracts to reflect the fact that employees are increasingly working from home, or your supply contracts may need to be updated (particularly with regards to force majeure, termination, and waiver clauses).



Brainstorm, explore and identify new business opportunities. Ask yourself:



Is it possible to purchase increased volumes of a good or service following COVID-19 in line with potential increased demand? Or is there an opportunity to purchase an altered or new product which may be at a heightened demand following the pandemic? Getting ahead of the game may provide you with a competitive advantage.



Instead of continuing to purchase certain products or services, is it possible to bring this requirement or function in-house? Or is continued outsourcing necessary? Rethinking your reliance on external service providers or suppliers may have additional benefits by enabling you to reallocate resources, reduce expenditure, or by securing a new revenue stream (especially where you already have the skills and infrastructure to hand; or you can establish these without too much difficulty).



What are your fellow consumers likely to demand in the 'new normal'? For example, if you are reselling products or services, could the sales process involve social distancing options (for example, self-checkouts, contactless services, remote ordering and pickup or delivery)? It is possible that there will be a trend away from 'brick and mortar' towards e-commerce and online interaction.



Given the likely rebalance of global supply chains away from China in particular, are there new goods or service providers, customers, and business opportunities available?



Can you connect with a similar or complimentary business and consider a combined approach to strengthen your offering or purchase capabilities?



www.bakermckenzie.com

©2020 Baker McKenzie. All rights reserved. Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.