



Practical Tips for Contracts in Uncertain Times

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Continuing impacts of the COVID-19 pandemic leave organizations across the globe facing uncertain forecasts. The unpredictability of economic recovery makes managing current and contemplated contractual commitments challenging. Drawing on my experiences as a corporate executive, director and transactional lawyer, here are practical tips for contracting in these times.

- **Expand the view of value.** One's own organization needs to benefit from the transaction, and so does the other party. Now more than ever, economic viability of all participants in a supply chain is critical. Business leaders¹, strategists² and legal experts³ alike call for delivering value to all stakeholders, including community and employees. Data demonstrates that successful negotiators "cared as much about the other party's success as their own."⁴
- **Plan for uncertainty with dispute prevention processes.** Shifting circumstances—the status quo for the foreseeable future—increase the risk of disputes due to differential impacts. Mitigate that risk with dispute prevention arrangements that commit to open communication, regular and meaningful review of performance and relationship, early identification of situations that may lead to dispute, and avoiding litigation or arbitration.
- **Utilize tailored dispute resolution solutions.** Supplement traditional escalation clauses with a pre-selected neutral to preserve good will and save valuable time.
 - Appoint a **standing neutral** or **relationship facilitator**. The relationship facilitator is selected for industry familiarity, mutual respect and confidence as a facilitator and mediator. The facilitator participates in regular meetings of the parties and may, only if requested, facilitate escalating management discussions of conflicts. Alternatively, designate a **standby mediator** preselected on the same basis, to be briefed only when mediation is required.
 - If impasse arises after escalated management discussions, the relationship facilitator or standby mediator can quickly step into the classic role of mediator. If the parties still can't agree an outcome, the mediator may offer a non-binding recommendation that the parties may accept or reject.
 - Submit discrete issues to binding arbitration on an expedited basis, with a pre-selected arbitrator empowered to decide the issue. Resolving disputes promptly returns the parties to focusing on successful performance and shared value.
- **Tailor solutions for classes of contracts.** For companies with many existing contracts upended, efficiently managing restructuring and amendments is essential. Develop bands of solutions for categories of agreements, tailoring the dispute prevention and resolution techniques according for each category.

¹Business Roundtable, "Statement on the Purpose of a Corporation," August 19, 2019.

²Porter, Michael E. and Mark R. Kramer. "Creating Shared Value." *Harvard Business Review* 89, nos. 1-2 (January-February 2011), 62-77.

³Eccles, Robert G, Leo E. Strine, Jr. and Timothy Youmans, "3 Ways to Put Your Corporate Purpose into Action."

<https://hbr.org/2020/05/3-ways-to-put-your-corporate-purpose-into-action>

⁴Grant, Adam. "In Negotiations, Givers are Smarter Than Takers." *New York Times* (2020, March 27).