



## **Addressing the key issues**

### Outsourcing: contract and fulfilment considerations during COVID-19

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The coronavirus pandemic has forced many businesses to move their workforces to working from home (WFH) or remotely. This requirement has had a profound effect, notably on outsourcing providers.

There are two principal themes we are seeing: firstly customer volatility in relation to demand and issues around payment terms / default; and secondly supplier challenges regarding fulfilment due to disruption in their operations and cash-flow issues.

Key considerations for service continuity and remote working:



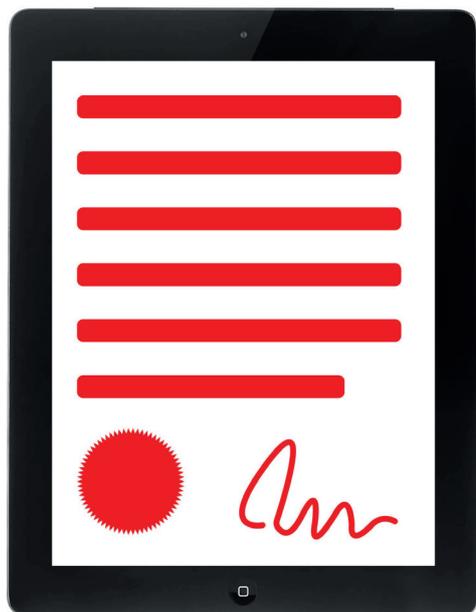
### Identify risk in your supply chain

'Essential services' have been identified by many governments around the world, and under these provisions, 'workers' in these sectors are exempted from restrictions on accessing their places of work.

But for most businesses, their operations fall under the restrictions, and even those that are exempted, have many aspects of their supply chains and suppliers, now working remotely or subject to new methods of working. This creates a significant security risk.

It is essential that measures are put in place to ensure remote working meets current contractual requirements, or (more realistically), the security and other obligations in the contract are varied to reflect what:

- is technically achievable in a WFH set-up
- meets customer revised requirements (perhaps taking into account what customers have put in place for their own employees)



### Countering service disruption

In most cases, WFH operations will mean that not all services can be performed and not all service levels can be met.

Customers need to focus on:

- identifying their business and operational priorities
- identifying outsourcing contracts likely to be subject to service disruption – and consider which are considered critical to operations
- which services are required for regulatory purposes
- working with providers to address these issues

We recommend customers with global operations to request that their service provider perform a location by location analysis and to note local laws and requirements in each jurisdiction. Likewise service providers should be proactively doing this and providing an explanation as to the approach taken.

Government requirements in each jurisdiction relating to "essential" services are a key consideration and will identify any areas of your supply chain that can be/are exempted from the restrictions placed on businesses due to this pandemic.

Service providers should strive to address customers' most pressing needs and communicate what is achievable. Service levels and KPIs should be examined in contracts and pragmatic views taken on their temporary suspension to enable delivery of critical services.

If you are experiencing issues with service delivery within the supply chain, there may be capacity to help alleviate some issues by greater cooperation. For example, if digital connectivity is an issue due to remote working, one of the parties in the service agreement may have network capacity to support the other party and help provide the required service contracted to be delivered.

Finally, pricing mechanisms designed for 'business as usual' may need to be reassessed and renegotiated to address the current volatility.

## Solutions

### Collaboration is key

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- service providers and customers should work collaboratively and quickly to arrive at actionable decisions
- while there are circumstances where delivery may become impossible, in most cases, ongoing dialogue and a flexible approach is likely to be the key
- parties should fully understand their contractual rights, obligations and remedies, while accepting they may need to temporarily deviate from contract norms
- usually a mutually agreeable alternative arrangement will be more beneficial to both parties. However, it's a shared risk and whilst it's important to reserve contractual rights, pointing fingers or threatening to terminate may cause more harm than good in the short term

### Internal constituents should all participate

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- stakeholders should assess the impact of the crisis on their business, to triage activities and functions by criticality and agree what mitigating measures can be implemented to lessen the impact – in some cases this may result in the customer resuming control of certain activities until the service provider has implemented appropriate measures to ensure continuity of services
- customers should encourage all relevant groups within their organization, including representation from information security, legal, compliance, audit and business operations, to play an active role in determining and documenting WFH arrangements with service providers
- service providers will be required to have an enhanced level of internal coordination within their organizations to support swift and good quality decision-making

### No undue delay

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- parties must balance reasoned consideration with the need for action
- customers should recognize that service provider resources are likely to be limited – including bandwidth, laptops and other physical resources, as well as personnel, such as account management, legal and contract administration resources and, of course, service delivery personnel
- service providers should recognize that customers will have legitimate concerns and questions with WFH arrangements, and will need prompt engagement with them to understand and assess the implications
- both parties should work together to minimize delays in making decisions, including by negotiating reasonably with each other. It is critical to work with a proper sense of priorities. As circumstances evolve, both parties must monitor the situation, stay in close communication, and plan for additional changes, including a return to more normal operations

### Documentation is critical

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- if a service provider is seeking a change, waiver or relaxation of contractual requirements (whether it be related to security, performance or otherwise), or if a customer seeks to re-prioritize services or expand the service provider's liability due to increased security risk, it is important that: (a) these changes be discussed and understood by both parties, and (b) any contractual deviations, and their extent, are documented clearly in writing in a manner that is contractually binding on both parties. Ideally, follow the formal contract process and be unambiguous vis-à-vis the pre-existing contract terms
- if your contract includes a change control procedure, where practicable, use it. If the process is overly cumbersome (many will mandate steps that are measured in weeks not days) then agree a more streamlined approach but be sure to document those outcomes
- follow governance and escalation procedures where appropriate

### Address the external issues

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- customers and service providers should try to determine and then mitigate any impacts that WFH might have outside of the actual contract and outsourced services. For example, customers and service providers should determine if WFH jeopardizes any liability insurance coverage on which its organization may rely; or whether and how WFH will impact corporate controls that are subject to audit and reporting, such as for compliance with the Sarbanes-Oxley Act in the United States
- understand the downstream (or upstream) impacts on any agreements with third parties and what permissions, notifications or other actions may be required as a result of the WFH arrangement
- businesses need to be alive to what their regulators are saying and respond to their requirements – e.g. under the UK's 2020 Coronavirus Act or guidance from regulators such as the Financial Conduct Authority

### Review the Business continuity plan

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- review the adequacy of existing business continuity and disaster recovery arrangements – e.g. the ability of the organization and its critical service providers, to respond to and recover from crisis events
- identify potential single points of failure and what information/material is needed to resolve it
- identify key vendors and other third parties and evaluate their availability
- implement a team of BCP experts who can think strategically and implement business continuity plans, challenging conventional views of what is probable, take time to consider and then review all operational aspects of your plan and carry out post-mortem reviews





## Work-from-home authorization addendum

Many businesses will understandably struggle with the overly complicated process of amending their contracting terms, whilst at the same time focusing on keeping their operations going.

To assist with this challenge, we have devised a work-from-home authorization addendum document that provides a temporary framework to ensure that all the outputs from oral discussions between clients and suppliers, about their new working arrangements, are set out and written up to ensure they are formalized and accurate. This is not designed to catch all the usual specifics, but instead act as a means for clients and suppliers to be able to continue with their contract obligations, in an efficient way during these unprecedented times.

The work-from-home authorization addendum sets out that due to the impact of COVID-19 and the efforts to control it, the parties have agreed that vendor personnel may perform work remotely from their residences, subject to the restrictions and obligations described within the agreement. The parties then have a selection of agreements covering general working practice, term and termination and security requirements.

We believe that building a positive, collaborative work-from-home agreement could be an inflection point for the outsource market and create more flexible models for service delivery moving forward, plus further speed up the move to automation in the future.

To discuss any of the issues, please do contact our global Outsourcing team:



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