

# Protocol for Facilitated Contract Renegotiations

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Achieving fast, innovative and cost-effective dispute resolution for businesses.

## Introduction

The Covid pandemic has produced disputes that all business sectors are struggling with. Disputes are arising where, contrary to the normal model, sometimes nobody is at fault. The tenant unable to pay its rent may not be choosing to default but could be being forced to do so by the new economic environment. Similarly, the purchaser or supplier of goods and services may not be choosing to default on its obligations, instead markets have collapsed, and they have no customers, so they are unable to meet their contractual obligations.

And so, it is throughout commerce. All parties to contractual arrangements are suffering these circumstances and traditional fault-based dispute resolution mechanisms may no longer be useful, and they may result in remedies, as in eviction, that are no longer available or don't suit either party. For example, it makes no sense to evict a tenant if there is no market for a relet. It also makes no sense to bankrupt a debtor who is a source of future business when the economy recovers. Right now, both parties need to reach a fair and flexible solution to maintain their businesses and their relationship for the future.

This necessarily involves difficult conversations requiring open and frank disclosure of highly confidential issues such as the parties' financial position, details of their customers and suppliers, their sources of support and their plans for recovery. Additionally, practical and workable mechanisms will need to be hammered out for updating progress against agreed plans and adjusting terms as the economics of the businesses change. This is often possible business-to-business, without the intervention of a third party, but where the level of trust between the parties interferes with the exchange of sensitive information, the intervention of an experienced and independent third party can facilitate the discussions necessary to help the parties find their own solution.

This Protocol has been prepared to help parties who wish to conduct a Facilitated Contract Renegotiation (FCR) to prepare for and conduct that negotiation in good faith and in a spirit of cooperation.

## **What is Facilitation**

1. Facilitation is a process whereby parties work together, with the assistance of an independent third party acting as a Facilitator, to achieve a common goal.

## **What is the role of the Facilitator?**

2. A Facilitator is an independent third party selected by the parties to assist them, in an impartial manner, achieve their common goal.

## **What is Facilitated Contract Renegotiation (FCR)?**

3. This is a facilitation where the common goal is to maintain an existing contractual relationship which, for whatever reason, is no longer working as the parties originally intended. To achieve this, the parties recognise and accept that it will be necessary to renegotiate the terms of their contract.

## **What matters are suitable for FCR?**

4. Where the parties to a contract wish to continue that relationship, but not in its current form, and they are unable to reach an agreement between themselves how to amend their contract, then it is a matter suitable for FCR.

## **How does FCR differ from Mediation?**

5. Mediation, like arbitration and litigation, starts from an allocation of fault; and usually seeks a solution that assumes that the parties' business relationship has ended. In contrast, facilitation does not ascribe fault, and seeks a solution based on the premise that the parties want to continue their business relationship. Of course, just like mediation, there will be disputes which are unsuitable for facilitation. In particular, if either party is seeking to enforce its contractual rights and has no interest in renegotiating the contract then the dispute is not suitable for FCR.

## **Are the communications confidential?**

6. Parties wishing to conduct a Facilitation must accept and agree that it will require an open and frank exchange of information with the counterparty. To encourage the level of openness required it is a fundamental principle that all aspects of the Facilitation are confidential. Information disclosed to the Facilitator by a party during private conversations with the Facilitator will be confidential to that party unless that party agrees to waive confidentiality in whole or in part.

### **What other safeguards are there for the parties?**

7. All Facilitations are conducted without prejudice to the parties' legal rights. This means that if the Facilitation is unsuccessful, a party can still pursue its legal rights. Further, to avoid the risk of misunderstandings as to what has been agreed descending into disputes, the Facilitation is also conducted subject to contract so that nothing 'agreed' in the Facilitation is legally binding until it is recorded in a formal amendment to the contract.

### **Do the parties need to prepare briefing papers for the Facilitator?**

8. The Facilitator will require Briefing Papers from each party. The parties will need to liaise over documentation to be provided to the Facilitator to avoid duplication. All documentation should be provided electronically.

### **How will FCR be conducted?**

9. There is no fixed process for the conduct of a Facilitation. Rather, the process for each Facilitation will be determined by the Facilitator according to the particular requirements of the matter, after consultation with the parties. On being appointed, the Facilitator will contact the parties separately to discuss the issues and the most suitable process to be adopted in the particular case, including the proposed timings for any meetings. The Facilitator will then advise the parties of the process to be adopted, which will have been designed to meet their requirements including the timetable.

### **Do Facilitators follow a model process?**

10. While there is no model process, facilitations typically involve a series of:
  - 10.1. Separate, confidential briefing meetings by the Facilitator with the key executives of each party.
  - 10.2. Joint confidential information sharing meetings conducted remotely or in person by the Facilitator with the key executives of both parties.
  - 10.3. Joint negotiation meetings considering specific proposals to amend the agreement to be recorded in non-binding heads of terms by the Facilitator with the key executives of both parties.
  - 10.4. Drafting meetings in person between representatives of each party, and the Facilitator if necessary, considering detailed proposals to amend the contractual documentation to implement the non-binding heads of terms.
  - 10.5. Exchange of executed copies of the amended contractual documents

### **Can Facilitations be conducted remotely?**

11. None of the meetings required during the course of a Facilitation have to be conducted in person. Conversely, all or some of the meetings may be conducted remotely as required, provided always that a secure IT platform is used for any remote meetings.

### **Documentation**

12. During discussion with the parties detailed in paragraph 8 above the Facilitator will discuss what documentation should be sent to the Facilitator in good time to enable the Facilitator to prepare for the first joint meeting.

### **How to start an FCR?**

13. One party to a contract may invite the other party or parties in writing to participate in an FCR, to be conducted in accordance with the terms of this agreement. If the invited party accepts the invitation then an Agreement in this form will be signed by authorised representatives of each party, LCAM and the Facilitator.

### **How much will it cost?**

14. The parties will be jointly responsible for the fees and expenses of LCAM and the Facilitator. LCAM will provide a fee proposal on enquiry.

### **Contact LCAM**

For further information, please contact the London Chamber of Arbitration and Mediation.

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