

COVID-19: PRESSURE POINTS: FIVE STEPS TOWARD BUSINESS CONTINUITY (GLOBAL)

28 February 2020 | Global
Legal Briefings

The World Health Organization declared the COVID-19 a global emergency on 30 January. As the human cost escalates, the economic cost is becoming ever more evident, and ever more significant.

As businesses and countries take steps to prevent the virus spreading by curtailing travel and movement of people, many manufacturers, retailers, transport providers, hotels and restaurants have already experienced significant financial strain.

Supply chain disruption is being felt worldwide, especially in the electronics sector and motor industry, given China's major role in parts manufacturing and assembly. Commodity prices have also come under pressure, from oil and gas through metals, to raw materials and foodstuffs.

While the situation continues to evolve, we set out below some initial issues that companies may take into consideration when taking steps to ensure business continuity and assessing the potential impacts on their business.

The ultimate progress of the COVID-19 and its impact on the world's economy is very uncertain. However, there are lessons that we can learn from other crises. The companies who are best able to protect their employees, their brand and their business will be those who actively consider these issues, develop a plan to address these points and keep detailed records to show what was done and why. There are likely to be contractual and legal solutions to many of the problems now being faced – such as using a force majeure clause to excuse non-performance – but companies may have to act now to ensure that these protections are available to them.

EMPLOYEES

Many companies will be giving priority to repatriating members of staff located in areas that are impacted by the COVID-19 outbreak; but different governments are giving differing guidance to their citizens, and the guidance which is given is updated and amended frequently. Employers need to ensure the fair treatment of staff, whatever passport they may hold. Other considerations may include:

- Health and safety – considering the duty to protect the health and safety of employees and ensuring a safe place of work. This may include policies in relation to foreign travel, restricting visitors (particularly from overseas) to offices, and people self-isolating if they feel unwell. It is important to regularly check Government updates, guidance and restrictions on international travel.
- Relocation plan – planning how to cope with relocation of staff and potentially significant levels of employee absenteeism of those working in affected regions.
- Policies – particularly for employees in affected regions, considering if it is appropriate to permit homeworking, remote working or a period of unpaid leave in the circumstances or to implement other measures. Employers might also consider whether their emergency notification systems are up to date and effective. Companies and financial institutions must ensure that their homeworking arrangements are compliant with local regulatory and governance standards for their industry.

IMPLICATIONS FOR CONTRACTS

Companies should consider reviewing their contracts to see what contractual rights and obligations they have in respect of the following issues, in particular if providers or organisations within the supply chain may not be able to provide their usual services or if suppliers cannot deliver in light of disruptions caused by the COVID-19 epidemic:

- Failure to perform obligations – companies should consider whether any failure to perform an obligation under the contract by providers or suppliers will be considered an event of default (and what remedies may be available as a result). Similarly, companies

should consider contracts with clients that may be affected as a result of supply chain disturbance, and any notification requirements required in respect of force majeure-related defaults.

- Force majeure – if a party cannot perform, then consider whether relevant contracts include force majeure provisions that may excuse performance. Will this global health emergency fall within the definition of force majeure under the relevant contract? Typically, contractual provisions require, as a minimum, that the event is beyond a party's reasonable control and prevents or delays the party from performing its obligations under the contract. Force majeure is a question of contractual construction and contracts often list force majeure events to avoid the possibility of being void for uncertainty. For further analysis, please read our article on force majeure in the context of the COVID-19 outbreak [here](#).
- Notification and mitigation requirements – in order to manage claims and preserve rights, it will be important to check and comply with notification and information requirements generally, as well as in respect of force majeure provisions. Are there obligations to use "best endeavours" to mitigate the effects of a force majeure event? Can a workaround be found to commercial problems to avoid the need for legal redress?
- Material adverse change – is there a material adverse change provision in the contract? What are the consequences if these events trigger that provision?
- Suspension of performance and potential termination – is a party prevented from performing the contract as a whole? What are the long-term effects? Is there a right to terminate for prolonged force majeure? Is there a right to relief under the governing law if one or more parties are unable to perform the obligations?
- Guarantees – review and consider whether guarantees, indemnities or performance bonds might be called or be at risk of being called if obligations secured cannot be performed and respond accordingly. Prompt communication with counterparties may be critical.
- Keep records – maintain copies of critical correspondence and other communications to justify actions if disputes arise later. This can be particularly important in establishing that you have done all that was reasonably possible to mitigate the impact of events on your performance.
- Approach to potential dispute resolution – review contracts for provisions which may require certain matters to be discussed with executive officers prior to pursuing other dispute resolution methods such as arbitration or court proceedings.

CORPORATE GOVERNANCE AND OPERATIONAL IMPLICATIONS

Businesses operating in affected areas, particularly through joint ventures, should consider the impact on their businesses. Of immediate concern will be the impact of travel restrictions and the repatriation of staff on:

- Physical meetings – do your agreements allow for board meetings and senior management meetings to be held through video or telephone conference?
- Signatures – will documents, particularly banking documents, require the signature of people who will no longer be physically present to sign? Is an e-signature an acceptable alternative?
- Tests, inspections and witnessing – do your agreements call for a representative from your company to be physically present to witness a test or inspection? If the test is not witnessed, is it deemed to have been passed?

BANKING AND FINANCE

Both financiers and borrowers will be reviewing existing finance documents to assess the potential consequences of the current situation. Some key considerations will be:

- Representations – have any representations become untrue, or do any disclosures need to be made?
- Undertakings – is continuing compliance with undertakings possible? Practical issues may arise, for example, if an annual presentation is required, and the relevant personnel are unable to travel to the set location or if a construction schedule cannot be adhered to because of difficulties in obtaining equipment and materials.
- Material adverse effect – check the drafting of this definition, and the associated operative provisions, to determine if they could be triggered.

- Economic risk – if such an event of default is included in the finance documents, is it triggered by the current situation and its potential impact on the borrower’s business?
- Trade finance – logistical difficulties may affect trade finance transactions due to the closure of land borders. There might also be practical considerations relating to letters of credit and bank guarantees depending on where they need to be presented for payment.

INSURANCE

Any entity impacted by the crisis will be considering, as a priority, whether adverse financial consequences of business interruption resulting from COVID-19 can be claimed on insurance. Relevant actions will include:

- Responsiveness – identifying any insurance policies which could be responsive to these events, making sure that notifications are made to those insurers and that (so far as possible) all requirements under the policies are met. For example, there may be coverage for business interruption losses arising from the closure of borders (depending on the wording of the policy).
- Bespoke cover – considering any bespoke cover; for example evacuation cover for individuals/employees.
- Loss mitigation – reviewing standard policies for steps to avoid losses.
- Insurer consent – checking the requirements for insurer's consent to any steps taken to extract property or personnel or minimise losses. Most policies will have quite strict due diligence clauses, and it will be difficult to establish what may or may not have been possible by way of securing and protecting assets at a later date. Contemporaneous evidence will be very persuasive, so good record keeping is vital.

GENERAL RISK MANAGEMENT

In order to help manage the issues above, companies may consider adopting the following practices to help mitigate the effects of such instability on their business operations and dealings:

- Business continuity – reviewing the company’s business continuity plan and establishing a centralised team to deal exclusively with the issues. Companies may consider including a representative from all relevant business functions (e.g. HR, finance, legal etc.) in the centralised team.
- Communications plan – clearly assigning communication responsibilities to manage the flow of information. Spokespeople might observe the fundamental rule of ‘do no harm’ and be mindful of potential future litigation.
- Documentation protocol – to provide a defence to any claims raised by contractual counterparties, companies should consider putting into place a document protocol to evidence due diligence in relation to corporate decision-making. It is also important to keep an accurate and thorough record of any losses incurred as a result of these events to ensure that any future claims against counterparties for those losses are fully particularised.

For further guidance on how the COVID-19 might affect your business, and how you can best prepare, please contact a member of [Herbert Smith Freehills’ Global Crisis Management Team](#).

[Please click here to return to Navigating the COVID-19 outbreak Hub](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



NANDA LAUPARTNER, MAINLAND
CHINA+86 21 23222117
Nanda.Lau@hsf.com**ALEXANDER
AITKEN**PARTNER, HONG
KONG+852 21014019
Alexander.Aitken@hsf.com**TOM CHAU**PARTNER, MAINLAND
CHINA+86 10 65355136
Tom.Chou@hsf.com**MERRYN QUAYLE**PARTNER,
MELBOURNE+61 3 9288 1499
merryn.quayle@hsf.com**MATTHEW EMSLEY**MANAGING PARTNER,
CHINA, HONG KONG+852 21014101
Matt.Emsley@hsf.com**KATHRYN SANGER**PARTNER, HONG
KONG+852 21014029
kathryn.sanger@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2020