

COVID-19 MANAGING RISK: TRADE AND SUPPLY CHAIN

Most companies in Bangladesh are overly reliant on a single geography or a single supplier for key products. They do not have enough visibility across the extended supply network to see their risks. They do not have flexible logistics networks to ensure the flow of goods in a profitable manner. Besides, what started as a disruption in supply has now evolved into a disruption in demand resulting in cancellation, halting, shifting of order from one place to another at end customers' level and affecting various levels of the supply chain. Few buyers in garments sector promised that they would take delivery of the garments already produced and the goods in production without asking for any discount and pay for the orders, however, already as on last month \$ 1.8 billion orders have been put on hold and another \$ 1.4 billion have been cancelled. With significant port congestion, a significant decrease in airfreight capacity, and truck shortages, there is a significant backlog in logistics. In repose to the crisis, govt. relaxed lockdown conditions for few sectors and also allowed unstuffing /delivery from outside the port area, namely CFSs & ICDs. Banks may start to consider the novel coronavirus as an event that is beyond the control of Banks, as is referenced in the force majeure provisions of UCP, URC etc. In such situation, some companies may choose to keep running and build inventory, absorbing fixed costs and preparing for the rebound, while others are better off reducing production. Companies as a result are not only exposed to several business risk but also several legal risks demanding immediately attention as follows:

THE RISK FACTORS

- **Review your contracts:** identify which contracts are likely to be most vulnerable to the impact of COVID-19; and determine what rights and remedies are available
- **Preserve your rights:** a court or tribunal may ultimately scrutinize any communications sent. The following contractual issues may arise:
 - **Event of Default** – will a failure to fulfil obligations result in an Event of Default?
 - **Force Majeure and frustration** – (a) Will the effects of Covid-19, or any response to it, be caught by a Force Majeure provision or frustrate your contract? (b) Whether the COVID-19 pandemic could be considered a force majeure event under ICC rules allowing bank to delay in payment under LC or demand guarantee or documentary collection for failure to collect or deliver documents.
 - **Change in law/illegality** – will any relevant Government response trigger change in law provisions or render performance illegal?
 - **Material Adverse Change** – will the effects of Covid-19, or any response to it, fall within a MAC clause?
 - **Suspension of performance/termination** – are either of these possible and/or likely?
 - **Notification obligations** – are there notification obligations in relation to possible delays/suspension/termination/frustration?
 - **Mitigation** – are there express provisions requiring parties to mitigate their losses.
 - **Title and risk:** Consider when title to and risk in the goods transfers. A retention of title clause in place?
 - **Exclusivity:** Consider what steps may need to be taken to facilitate an alternative source of supply without breaching the terms of an exclusive supply agreement.
- **Insolvency:** Any concerns about the solvency position of any counterparties?
- **Guarantees/indemnities/performance bonds/liquidated damages** – is there a risk of these being called on if obligations are not performed?

- **Time / shipment periods:** Timing is important under sale contracts as delay in shipment or delivery could have a significant bearing on the price of the goods and may entitle a party to terminate for breach. Have you thoroughly reviewed time clause and considered all possible legal options?
- **Renegotiation and variation:** If the contract is no longer commercially viable or practicable, it may be possible to renegotiate terms or agree a temporary suspension. Have you put it in writing? Care should be taken to ensure the variation is valid and binding, and appropriate dispute resolution clauses are inserted and rights are not waived accidentally.
- **Information Technology:** Are you in a position to alter agreements to incorporate ICC eRules i.e., eUCP Version 2.0 & eURC Version 1.0, URBPO, and the UNCITRAL Model Laws on Electronic Commerce, Electronic Transferable Records, and Electronic Signatures to comply with documentary presentation, collection and delivery requirements.

MANAGING RISK

- **Conduct Due Diligence** and Identify the company's key direct suppliers and understand their ability to meet supply requirements and potential risks and also:
 - Work to get visibility to supplier inventory, production, and purchase order fulfilment status.
 - Work with key suppliers to understand the flexibility that they have to shift production and purchase order fulfilment to other locations.
 - Also, understand how you will be treated from an allocation perspective in the event of inventory and capacity shortages, as you are not likely their only customer.
 - Active communication and formulating alternative plans will be critical to minimizing the supply chain impact on the company.
 - Consider possible increase of cost and also possible trade barriers due to change in supply chain.
- **Conduct Due Diligence:** on your demand side. If necessary, change business model and products. Review all operations, equipment, processes, quality assurance, workforce training, and safety controls due to changes in the operating model. Undertake robust supply-chain mapping. If needed change business model and go online for delivery.
- **Conduct legal due diligence:** on (a) your legal obligations, (b) bank's obligation under LC/demand guarantee/documentary collection, (c) contractual obligation of your opponent (d) assess the legal consequence of any possible breach, failure, rejection, cancellation, delay etc.
- **Settlement:** settle and revise contract by adding all IT clauses for supply and online sale and payment and to adopt with the changed world's requirements etc.
- **Dispute resolution:** Remain persuasive. Know your strength and strongest legal point and effectively settle disputes by negotiation mediation or arbitration and avoid litigation.

BENEFITS

- Manage your business efficiently and skilfully.
- Avoid exposure to unknown legal and business risks arising from supply chain at this crisis time and so on.



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