



## Addressing the contractual impact of COVID-19

### Claims and dispute resolution

As the effects of the COVID-19 are felt around the world, governments' and businesses' primary focus is the safety of their people. While this focus will continue, we are seeing several of our corporate clients now facing weeks, if not months, of uncertain trading conditions. Whether it is your business, your supplier's business or your customer's business, there is potential to suffer disruption along the supply chain, putting strain on commercial relationships and increasing the risk of failing to meet contractual obligations. Whatever the circumstance, it is important that businesses are thinking ahead to be in a state of readiness to resolve those contractual challenges or navigate contentious scenarios to protect the future of the business and preserve important commercial relationships.

### Identifying, assessing and managing the risks of disruption

Whether your priority is preserving a commercial relationship, achieving an advantageous commercial outcome or just limiting financial damage to your business, our experience shows that businesses are most successful when they put in place a structured mechanism:

- Establish a team to identify critical issues, plan and assess potential outcomes, and allocate appropriate resources
- Decide how to preserve and store both current and subsequently generated contractual information and communications
- Establish a clear communication protocol across the business so that a 'loosely' worded email does not create a disadvantage

A carefully considered approach at the outset will enable the business to proactively address challenges and to put its 'best foot' forward.

### Practical questions businesses should be asking

#### Under-performing contracts

- ✓ Has the impact of COVID-19 created or exacerbated a contractual under-performance (or might it in the future)?
- ✓ Does the contract set out specific performance metrics that a party is already breaching or at risk of breaching?
- ✓ Might you or the contractual counter-party seek to vary, renegotiate, terminate the contract?
- ✓ Is COVID-19 being used as a justification for a counter-party wishing to exit a contract for disguised commercial reasons?
- ✓ Is it possible to pre-emptively assess the direct and indirect financial implications of termination?
- ✓ Are you able to take mitigating actions and to accurately identify and capture the associated internal and external costs?

- ✓ Is the under-performance a short term issue that may be swiftly resolved or is it a pervasive problem that will require careful investigation and negotiation with the contractual counter-party?
- ✓ What plans/procedures are in place to identify, preserve, collate and analyze the evidence and data (including, for example, email correspondence) that is relevant to assessing the actual and counter-factual performance of the contract?

### Failing to meet contractual supply obligations

- ✓ What is the financial impact on your business, as well as the rest of the supply chain, of failing to meet obligations to supply particular quantities of goods or levels of service within defined timeframes?
- ✓ Can the failure be resolved, or at least mitigated, by incurring additional costs or changing supplier, or is there a longer and more complex impact on the operation and performance of the business or the environment in which the business operates?
- ✓ Might there be damage to the business reputation or a particular brand? If so, how will you respond to this and quantify any loss?
- ✓ Does your business have insurance coverage to take account of business interruption arising from, for example, the loss of a key supplier? Are you able to isolate the operational and financial impact of losing that supplier and formulate a persuasive claim?

### Changed context for a transactional contract

- ✓ Does the financial impact of the disruption caused by COVID-19 have potential to disrupt a merger, acquisition or disposal?
- ✓ Are you able to isolate the financial impact and assess whether it has a short or long term consequence?
- ✓ Does the transaction agreement allow for the impact of the COVID-19 to be taken into account? Would that be beneficial to your business or potentially damaging?
- ✓ Does the impact of COVID-19 change the financial performance of the business during an earn-out period? If that earn-out period has not yet elapsed then can actions be taken that will be to your advantage?
- ✓ Have any transaction warranties been provided which may be claimed upon as a consequence of the changed circumstances or financial performance?

## For more information on how to respond, recover and thrive:

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