

Insights

RECOVERY AND TRANSFORMATION - A CHECKLIST FOR BUSINESS

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BUSINESS AS (UN)-USUAL AFTER COVID-19?

As we emerge from the pandemic, it is becoming increasingly clear that planning and working for a return to business as usual will not be enough. To survive in the marketplace, careful introspection and planned transformation is needed to mitigate against emerging or enhanced corporate risks.

In this article we outline three key areas which, as risk and litigation specialists in the UK, we are already seeing in practice. Corporates which adopt now an analytical approach to what has happened in the business during the pandemic may be able to identify areas for focus, averting urgent problems and potentially mitigating the additional risk and expense of litigation in the future.

CONTRACTUAL RELATIONSHIPS

At the outset of the pandemic and its resultant restrictions, contracting parties came under pressure to offer “breathing space” in contractual relationships. Anecdotally, we know many businesses took pragmatic steps, including acquiescing in delays to payment or supply, overlooking incidents which might ordinarily constitute contractual breaches, or even agreeing to suspend performance. Emphasis was on goodwill, and survival of relationships and the wider supply chain/ stakeholder relationships.

We saw other businesses take a different approach, focusing on self-preservation and adherence to strict legal rights. Some suppliers exercised any possible contractual right to raise prices, enforced obligations, or made attempts to invoke force majeure. Many of those instances are now reaching the point of court action.

In essence the pandemic has put contractual relationships under immense pressure. That pressure may have exposed existing cracks or defects, or may have shown that the structure was not fit for the pandemic landscape. Now is the time to survey what happened to those contracts: have those urgent and pragmatic steps taken quickly - and perhaps case by case - caused lasting damage which may have future consequences? A full review of key contracts in the business is prudent, asking questions such as:

- Where strict legal rights were not enforced, what is the risk they have permanently been waived? Have the parties effectively agreed to a state of affairs which does not reflect the reality? If so has any estoppel arisen? How will this affect future rights to complain of breaches?
- Have contracts been varied, intentionally or otherwise? If intentionally, was prescribed procedure followed? Are the variations adequate to take parties through the whole Covid period, including erratic tightening and loosening of restrictions, and when normal business resumes?
- Is there scope and need to renegotiate the whole contract? The changed business environment and the exposure of fragile global supply chains has caused some businesses to rethink and refocus relationships where there is leverage to do so.
- Businesses may also need to consider their standard terms across existing and new contracts. As previously unforeseen risks become a part of life, we have seen efforts to re-draft force majeure events, re-frame the nature of material adverse change or breach clauses, and re-allocate risks in liability clauses. As well as mitigating against risk, we are actively advising businesses on how contracting norms may change over time to reflect the challenges of a post-pandemic economy. Shorter terms and flexibility seem top of the agenda.
- Likewise there may be a new appreciation of the power of negotiated alternatives to full-force litigation. Dispute resolution clauses may benefit more than ever from a tiered approach. Where contracts have a European cross-border element, businesses should assess the additional jurisdictional and enforcement risks posed post-Brexit and adjust clauses.

EMERGING FRAUD RISKS

Vulnerability to fraud and dishonest activity has undoubtedly grown during the pandemic. The risks to business are potentially huge. An active assessment of the changing business environment and how that has created additional exposures is imperative.

- Confidentiality and data breaches: working remotely and a wider use of personal devices for work communications have increased the chances of inadvertent or intentional breaches. Do employee policies and targeted training sufficiently and fairly address these additional risks, or are changes to systems required?
- Cyber vulnerability: most cyber-attacks exploit human error. Working remotely increases the incidence of and exacerbates the risk of succumbing to phishing fraud and hacking.
- Less day to day oversight may increase the incidence of internal fraud. The temptation to shortcut systems or share access more widely than usual in order to get business done in difficult circumstances may provide more opportunity. Is this happening in any parts of the

business? We are actively working on cases where internal financial fraud has caused significant loss to the business, and where the route to tracing and recovering funds moved globally is problematic, time-consuming and expensive.

- At board level the pressure of the pandemic may have increased the incidence of wrongful trading by directors, misstatements of financials, and dishonesty. We expect to see a rise in distressed and insolvent acquisitions. Meticulous due diligence of targets by buyers will be crucial. We anticipate a rise in claims in misrepresentation and breach of warranty.
- Businesses suspecting fraud or dishonesty may need to move swiftly to relief to preserve or trace assets. The English courts are adapting to the emerging trends in fraud, and have shown flexibility and a pragmatic approach in the procedures needed to assist with fraud type claims, including during the pandemic. For example, there is increasing willingness to grant injunctions over crypto-assets and against “persons unknown”, and we have experienced more latitude in allowing alternative service – often using novel methods like social media- against uncooperative defendants. Nevertheless, making meaningful recovery after a complex fraud is difficult and time consuming. Emphasis should be on systems and controls to detect vulnerabilities and prevent breaches.

CORPORATE RESPONSIBILITY AND GOOD GOVERNANCE

From employees’ or suppliers’ working conditions, behaviour around furlough, use or misuse of business financial support and more, many corporates found themselves in an uncomfortable spotlight during the pandemic. The ability of the end-consumer and the general public to target perceived unfairness and force change has been magnified. Reputations take time and investment to recover; some may be lost forever.

The direct relationship between reputation and the bottom line has been clearly demonstrated in the pandemic. Some exposed corporates have suffered withdrawal or refusal of investments and an overnight drop in value. Investor-led change seems to have stepped up a gear during the pandemic.

The need for businesses to commit to meaningfully addressing ESG issues has never been stronger. Whilst ESG focus was already growing prior to the pandemic, it has provided a backdrop against which there has clearly been more and deeper questioning of economic and social priorities, and the role business should have in local and global communities. We have started to see stakeholders using the courts, or the threat of court action, to force change upon corporates in terms of environmental targets, board diversity and more. Boards are placing increasing importance on ESG, and enhanced legislative and regulatory requirements will continue to push businesses to address it. However in order to thrive in the post- pandemic environment businesses need to aim beyond statutory or regulatory requirements and actively engage with stakeholders to effect positive change.

CONCLUSION

The challenge for businesses is to take steps both to restore order after a period of reactive management of risk but also to re-structure relationships and processes to take account of the changing commercial, economic and social factors which will undoubtedly have a long-term impact. This article touches the surface of just a few of the key topics, but we will be writing more about them, and introducing other areas, in the coming weeks.

If you have any questions, or would like to discuss any points raised in this blog in further detail, please get in touch with [Graham Shear](#).

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