

Navigating COVID-19: Supply Chain Considerations

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Management of procurement and purchasing has become increasingly strategic for companies in recent years due in large part to developments in technology and traceability. The COVID-19 pandemic has brought a new level of complexity to these issues, however, as supply chain disruptions have created significant operational challenges for global organizations. Companies with geographically-dispersed and multi-tiered supply chains are among the most affected by the current outbreak, facing issues relating to payment or delivery failures, price gouging, supplier solvency and potential disputes.

These operational challenges are taking place against the backdrop of sharp swings in commodity prices as well as evolving policies on international trade and tariffs. Moreover, increased shareholder activism on environmental, health and safety (ESG) issues, as well as calls to place sustainability considerations at the heart of the COVID-19 recovery, have introduced more uncertainty into the global business model that many multinationals had previously adopted.

This memorandum presents certain legal and compliance considerations with respect to supply chains that multinationals may be facing at the moment, including with respect to day-to-day operations, corporate governance and liability management as well as an overview of the evolving legal and regulatory framework applicable to supply chain due diligence.

Cleary Gottlieb associates Clara Cibrario Assereto, Ariel Giunarelli, Davy Nguyen and Brinkley T. Rowe contributed to this alert memo.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

NEW YORK

Steven L. Wilner
+1 212 225 2672
swilner@cgsh.com

Francesca L. Odell
+1 212 225 2530
flodell@cgsh.com

Jennifer Kennedy Park
+1 212 225 2357
jkpark@cgsh.com

Helena Grannis
+1 212 225 2376
hgrannis@cgsh.com

WASHINGTON

Bruce Hoffman
+1 202 974 1784
bhoffman@cgsh.com

PARIS

Frédéric de Bure
+33 1 40 74 69 22
fdebure@cgsh.com

Caroline Petruzzi McHale
+33 1 40 74 68 58
cmchale@cgsh.com

LONDON

Michael J. Preston
+44 20 7614 2255
mpreston@cgsh.com

ABU DHABI

Chris Macbeth
+971 2 412 1730
cmacbeth@cgsh.com



I. Managing COVID-19 Legal and Compliance Risks for Supply Chains

In the wake of the COVID-19 outbreak, the following considerations may be relevant to managing supply chain risk from a legal and compliance perspective.

- *Supplier Default.* Some larger manufacturers may be negatively affected by disruptions to their supply chains, whether relating to unavailability of raw materials, logistics or personnel. Moreover, due to the economic climate, suppliers may be unable to deliver (or obtain delivery and/or payment from sub-suppliers).
- One strategy for suppliers and purchasers alike in the current climate is to compare terms of material contracts to see where there may be room to defer delivery or payment, or otherwise renegotiate terms. Key terms include (i) whether a *force majeure*, hardship or material adverse change / material adverse effect clause can be invoked;¹ (ii) whether defenses are available under applicable law (i.e., doctrines of frustration, distress or impossibility of performance); (iii) what requirements may exist for effective notice to delay performance or payment (and any notice periods for service of process in the context of a dispute); (iv) what constitutes an event of default; and (v) what remedies or cure periods may be invoked.
- Once these terms have been reviewed and compared, companies will have a better sense of the strategy for approaching contract termination or renegotiation, as well as any possibility to delay performance or payment or adjust volumes or prices.
- *Price-Gouging.* The pandemic is leading to extreme demand and price volatility for certain products, such as personal protective equipment

¹ See Cleary Gottlieb, *Coronavirus – Force Majeure or Frustration?* (February 20, 2020), available [here](#). For a full discussion of these considerations, see Cleary Gottlieb M&A and Corporate Governance Watch, *Return of the*

and cleaning supplies, as well as fluctuations in firms' costs. As firms struggle to manage these changes, government agencies are aggressively seeking to show they are preventing consumer exploitation—for example, as a result of “excessive” prices—during the crisis.

Governments are already investigating based on a variety of different instruments, including competition rules, consumer protection laws, and “price gouging” prohibitions. Commissioner Vestager, for example, has stated that the EU Commission “will stay even more vigilant than in normal times if there is a risk of virus-profiteering.”

- In the United States, where there is no federal price gouging prohibition, all 50 states and the District of Columbia have their own laws against certain price increases (many by way of a declaration of a state of emergency) and numerous state attorneys general have announced investigations into alleged unlawful pricing.
- The White House, the Federal Trade Commission (FTC), and the Department of Justice (DOJ) have also made announcements about potential price gouging concerns. Based on agencies' statements and action to date, the focus is currently on protective equipment and medical supplies deemed essential to consumer health (broadly consistent with the pre-crisis focus on excessive pricing for pharmaceutical products with inelastic demand), but this could expand as conditions evolve.
- Firms in sectors under pressure due to the pandemic should be alert to the risk of agency interest in their pricing policies, particularly significant changes to pre-crisis prices in response to increased demand for particular goods or sudden changes in their costs.²

MAC? – Protecting Buyers During a Pandemic (March 30, 2020), available [here](#).

² See Cleary Gottlieb, “*Exploitative Abuse of Dominance and “Price Gouging” in Times of Crisis* (March 31, 2020), available [here](#).

- *Maintaining Oversight Over Multi-Tiered Supply Chains.* Companies with geographically-dispersed operations may struggle in the current context to maintain oversight over multi-tiered supply chains with limited visibility over sub-suppliers. Companies should consider reviewing contract terms relating to audit and inspection rights to see whether and the extent to which these can be modified to take into account remote working conditions. Moreover, compliance, legal and procurement teams should evaluate whether third-party suppliers have contingency plans in place, how quickly they can adjust to new circumstances and how dependent they are on human capital versus automation. It is also worthwhile to request back-up documentation from critical suppliers to see how they are managing their own risks with respect to COVID-19, including with respect to sub-contractors, as well as the extent to which they have suspended or modified their policies and procedures to account for new challenges.
- *Replacement or Interim Suppliers.* Companies may find themselves in the position of making time-pressured decisions as to their supply chains, including whether to work with replacement or interim suppliers. This can be particularly challenging given current circumstances, which may afford limited ability to conduct technical, financial and other due diligence (particularly for companies that require extensive pre-qualification evaluations before awarding contracts). To the extent that these issues arise, contractual protections can be put in place to limit exposure (for example, limiting terms, providing more extensive termination rights or providing for periodic review and adjustment of volumes and/or pricing). From a compliance perspective, companies will want to ensure that a due diligence review is conducted and documented, and that decisions to award are made on a collective basis and based on objective, transparent criteria.
- *Addressing Health, Safety and Environmental (HSE) Issues.* Some industries are required to undergo regular site inspections for HSE issues in order to maintain their licenses to operate. This is incredibly challenging given the impacts of COVID-19 and stay-at-home orders. The consequences of HSE issues and site inspections will vary based on the jurisdiction and industry, but companies should generally keep up-to-date on any guidance for handling these requirements and prepare for the potential impacts these requirements may have on business operations.³
- *Delays in Freight Forwarding and Customs Clearance.* Significant delays in shipping, freight forwarding and customs clearance are currently impacting companies across the world. This has impacted global trade and production, resulting in serious financial tolls for business operations. From a compliance perspective, this increases the risks surrounding facilitation payments. Companies may need to make considerable changes to their logistics frameworks, depending on their business models, and should consider providing additional guidance to employees on their anti-corruption policies, including with respect to facilitation payments.
- *Implications for Compliance Programs.* In light of these challenges, legal and compliance personnel may wish to issue guidance on conducting due diligence in the current context, where procurement decisions may need to be made quickly and without opportunity for extensive compliance due diligence. Companies might also consider additional training for those responsible for overseeing and implementing these internal policies. This is especially important in light of the challenges of implementing and overseeing compliance while working remotely and through

³ For further information, see Cleary Gottlieb, *COVID-19: State Reopening Status and Requirements* (June 3, 2020), available [here](#).

new forms of technology. Companies may also consider updating compliance policies and procedures to take COVID-19 into account with respect to supply chains (including specific health and safety obligations, issuing a supplier code of conduct and updating compliance representations and warranties in model contracts with suppliers).

II. Supply Chain Considerations in Corporate Transactions

COVID-19 will continue to have wide-ranging effects on the corporate transactional landscape. While deals are still underway, some have been delayed after signing and are working their way through litigation while other deals have ended in a mutual agreement to terminate due to COVID-19.

— *Transaction Risk Allocation.* Particularly in asset acquisitions, terms such as the scope of assets for purchase, contracts assumed (including supply, vendor, service and customer contracts) and liabilities assumed are high priority for negotiation. In the context of COVID-19, liabilities that may not have previously been significant (for example, product liability or worker safety issues) may now take center stage. Following appropriate diligence and engagement with key managers and stakeholders at the target company, acquirers should consider the degree to which the seller should retain some of these risks through special indemnities, purchase price adjustments or similar mechanisms.

Focus on Governance, Disclosure and ESG

Supply chain considerations are also being taken into account in the corporate governance context. On one hand, manufacturing firms may be scrutinized by shareholders based on the ESG effects of their products on the broader economy. Equally, firms in the financial sector are also increasingly expected to ensure that

their investment and financing decisions take ESG criteria into account. A firm's "supply chain footprint" is an important aspect of ESG analysis and may be increasingly scrutinized by investors.

The COVID-19 pandemic has led to increased focus on ESG criteria in several ways: (i) annual meetings and shareholder proposals driven by ESG concerns, including supply chains, (ii) increased engagement between shareholders and investees on ESG matters and (iii) broader "exclusion lists" limiting investment in certain industries or categories. Certain institutional investors have been criticized, however, for not taking meaningful steps to follow through with ESG matters during annual meetings and when engaging with investees, such as prohibiting investments in weapons banned by international arms treaties or purchasing sovereign bonds from countries subject to sanctions for human rights abuses. European banks are under particular pressure in this respect, as European institutions work to finalize a regulatory taxonomy on sustainable loans and other financial products.

Market authorities in the U.S. and Europe have also highlighted the importance of disclosing risks resulting from COVID-19, highlighting supply chain and manufacturing disruption among issues that companies should consider in preparing disclosure.⁴ Proxy advisors such as ISS and Glass Lewis have also echoed the need to consider COVID-related disruptions in voting strategies for annual shareholder meetings.

— *Successor Liability.* While an analysis of a target company's supply, vendor, service and customer contracts is typical, instability resulting from COVID-19 underscores the need to take a closer look at how these contracts work individually and

⁴ See U.S. Securities and Exchange Commission, Division of Corporation Finance, *Coronavirus (COVID-19) CF Disclosure Guidance: Topic No. 9* (March 25, 2020),

available at: <https://www.sec.gov/corpfin/coronavirus-covid-19>.

then assess whether those contracts, when viewed together, work as an effective and cohesive supply chain.⁵ Often, an acquirer can assess a potential risk from a target's supply chain early on and build mitigation efforts (such as engaging additional sources of inputs rather than relying on a single source) into their negotiation and forward-looking plans. As a result, diligence efforts to identify these provisions is critical regardless of whether a target company is a supplier or a customer. Thought should be given to analysing not only the risk to a target company's immediate suppliers, vendors and customers, but also the implications for global supply chains to which those actors are themselves exposed (the generic pharmaceutical industry's exposure to COVID-19 disruptions in China provides a good example).

- *Financing Exposure.* While diligence of a target's existing credit facilities, debt profile, capital structure and other sources of financing is a key focal point, COVID-19 and the resulting policy changes have triggered a flurry of new financings, loan modifications and issuances of corporate debt worldwide. In addition to understanding and assessing traditional sources of financing, an understanding of recent emergency measures (for example, the U.S. paycheck protection program, or "PPP,"⁶ an emergency injury disaster loan, or "EIDL"⁷ and COVID bonds⁸) used by certain qualified companies is critical as these programs often contain particular requirements and restrictions on the applicant's activities that may affect how a company operates within a supply chain.

- *Interim Operating Covenants.* Core transaction agreements will typically include interim operating covenants requiring the target business to continue operating in a specified manner, including operation within applicable supply chains (usually in the ordinary course of business or applicable industry), beginning at signing and continuing through close of the transaction. COVID-19 highlights these provisions as a key focal point in negotiations given that unpredictable supply chain disruptions by the pandemic make compliance with these provisions potentially problematic. As parties negotiate during the pandemic, they should seek to balance flexibility for a seller/target to respond to new COVID-19 disruptions against an acquirer's comfort that the target company will be operated as effectively as possible prior to closing.
- *Material Adverse Effect Clauses.* Within core transaction documents, certain representations, warranties and covenants are often qualified by a "material adverse effect" provision. This provision defines the level of disruption (including potential supply chain disruptions) at which a deviation from the applicable terms of the agreement would be considered material, constituting a breach. Under Delaware law, enforcement of such a provision to exit or delay a transaction is typically difficult (with only one recent example⁹ finding that a material adverse effect had occurred). While MAE provisions are typically constructed to exclude events that affect economy or the target company's industry as a whole, the question of whether COVID-19 can manifest as a valid material adverse effect remains open to

⁵ For example, if a target company is subject to a contract requiring it to supply a customer with a certain amount of a product annually, it is imperative to determine the inputs that go into that product and assess any risk of failure from the suppliers of those inputs.

⁶ See Small Business Administration, Paycheck Protection Program, available [here](#).

⁷ See Small Business Administration, Economic Injury Disaster Loan Emergency Advance, available [here](#).

⁸ See Barron's, *Future Returns: COVID-19 Bonds Emerge as a Financing Tool* (April 14, 2020), available [here](#).

⁹ For a full discussion of this case, see Cleary Gottlieb M&A and Corporate Governance Watch, *Akorn v. Fresenius: A MAC in Delaware* (October 11, 2018), available [here](#).

interpretation by the courts and should be closely considered by negotiating parties.¹⁰

III. Supply Chain Due Diligence

A. International Guidance and Best Practice

Increasing attention has been given recently to supply chain due diligence. The concept has taken on additional significance following the United Nations' Guiding Principles on Business and Human Rights (UNGPs),¹¹ which were unanimously endorsed by the U.N. Human Rights Council and the European Union in 2011. Since then, various regimes have been developed further.

The OECD has also issued guidance on preventing or mitigating adverse impacts to human rights directly linked to corporate operations and business relationships, even if they have not contributed to the impact directly.¹² Additional sector-specific guidance for due diligence can be found from the OECD for the minerals, agriculture and garment and footwear sectors,¹³ as well as the International Labor Organization.¹⁴ In addition, a revised draft United Nations treaty on business and human rights was proposed in July 2019.¹⁵ As a general matter, these regimes provide guidance on the criteria used to

evaluate suppliers and recommendations for lowering the risk that a company's supply chain contributes to human rights abuses.

According to OECD guidance,¹⁶ companies should identify potential human rights and environmental impacts as criteria for evaluating suppliers. To identify potential impacts, companies should gather information related to their specific sector, geography and enterprise-specific risk factors by consulting reports from various sources including, governments, international organizations, civil society organizations, trade unions and national human rights institutions. Companies may also want to create supply chain mapping and assess higher risk activities, regions, products and business relationship to closely monitor. An important step in this assessment may include engaging with potentially impacted communities to gather information on adverse impacts prior and during projects. Companies should prioritize risks and obtain information on sub-suppliers when appropriate and feasible. With this information, impacts can be evaluated through the companies' human rights and environmental impact assessments. The position of the company in the supply chain will also determine the scope and focus of their assessments.

¹⁰ For a full discussion of these considerations, see Cleary Gottlieb M&A and Corporate Governance Watch, *Return of the MAC? – Protecting Buyers During a Pandemic* (March 30, 2020), available [here](#).

¹¹ The UNGPs state that businesses should take actions to respect human rights, which includes avoiding contributions to adverse human rights impacts. Businesses should also seek to prevent or mitigate impacts directly linked to their operations, products or services by any of their business relations (even if they have not directly contributed to those impacts). The UNGPs encourage companies to put policies and processes in place that are appropriate for their size and circumstances to commit to a human rights due diligence process. This process should identify and mitigate adverse human rights impacts, and create avenues for remediation.

¹² See OECD Guidelines for Multinational Enterprises 2011 Edition, General Policy 12 and 13 (2011), available [here](#).

¹³ See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-

Affected and High-Risk Areas (2016), available [here](#); OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), available [here](#); and OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2017), available [here](#).

¹⁴ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017), available [here](#).

¹⁵ Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (Draft July 16, 2019), available [here](#). Due to the COVID-19 pandemic, the first informal stakeholder consultation with the open-ended intergovernmental working group on transnational corporation and other business enterprises with respect to human rights (OEIGWG) was postponed and took place online in May 2020. Updates are expected to be provided at the sixth session scheduled in October 2020, as required by the mandate of HRC resolution 26/9.

¹⁶ See OECD Due Diligence Guidance for Responsible Business Conduct (2018), available [here](#).

Additionally, OECD guidance outlines comprehensive steps for due diligence that can lower risks that a company's supply chain contributes to human rights abuses. This includes taking steps to cease, prevent and mitigate these impacts. Impacts that can be immediately addressed may result in updated contract terms with suppliers, while other risks may require long term assessments and action plans. A larger enterprise should identify control points in its supply chains where information can be gathered on traceability and actions can be taken for auditing. Companies should also use their leverage with their business relationships and suppliers to mitigate and prevent risk, such as preparing policies, codes of conduct, contracts, written agreements and corrective actions plans. Companies can support suppliers in preventing adverse impacts by offering training, upgrading facilities or strengthening oversight and management. If attempts to prevent or mitigate impacts fail, companies should consider disengaging from supplier or other business relationships.

NGOs and civil society organizations have led various campaigns encouraging multinationals to implement human rights due diligence practices.¹⁷ In 2019, Oxfam released a report analyzing 16 supermarkets' food supply chains, creating benchmarks for scoring their policies. Eight of the companies reviewed voluntarily committed to the UNGPs and independently took action to identify and prevent risks of human rights abuses. Four companies additionally committed to implementing human rights impact assessments and engaging with unions, civil society organizations and affected communities. Two companies took steps to publish their first-tier

suppliers for private label products, and Oxfam has urged other supermarkets to follow this practice to enhance supply chain transparency. Studies such as these help demonstrate that human rights due diligence and supply chain transparency is possible with commitment from the private sector and these companies may serve as models for additional efforts that can be made throughout various industries.

The pandemic has demonstrated that some organisations did not enjoy sufficient traceability along their supply chains or even visibility of the chain as a whole. While most large companies could impose their own policies and best practices on the first tier supplier, to ensure full upstream compliance it is also necessary to (i) require counterparties to impose the same policies along the whole supply chain and/or (ii) insist on full visibility of the full chain and impose control, audit and information rights at appropriate points in the chain. Without full upfront visibility of each link in the chain, it is impossible to know where such control/information points should be fixed and audit rights triggered. The nature of the supply chain, the source of the raw materials and the parties' respective bargaining strengths will determine the extent to which it is sufficient to rely on the first tier supplier to police the rest of the chain or necessary to have rights to step in at various points upstream.

B. Sustainability and the Evolving Legal Framework on Supply Chain Due Diligence

In parallel to the UNGPs and OECD guidance, certain countries have developed their own regimes for environmental and human rights diligence, many of which are issue-specific, covering matters such as the use of conflict minerals,¹⁸ practices that can be deemed

¹⁷ See Oxfam, *What are supermarkets doing to tackle human suffering in their supply chains?* (July 3, 2019), available [here](#).

¹⁸ See Securities and Exchange Commission, 17 CFR Parts 240 and 249b, Release No. 34-67716, Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), available [here](#). Section 1502 of the Dodd-Frank Act requires issuers to determine whether their products contain any conflict minerals originating from the Democratic Republic of the

Congo (DRC) or adjoining countries on an annual basis. If, after conducting a "reasonable country of origin inquiry," an issuer has reason to believe that its minerals may originate from these countries, it is required to conduct due diligence on the source and supply chain custody of such minerals. This includes preparing a conflict minerals report, which must be subject to an independent private sector audit. See also The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (the "Chinese Guidelines"), available [here](#), which apply to all Chinese companies and

to constitute modern slavery or trafficking,¹⁹ child labor²⁰ as well as corporate transparency more generally.²¹

These regimes are generally disclosure-based, requiring listed companies to provide annual statements describing their due diligence practices and action plans to mitigate environmental and human rights impacts. In some cases, the regimes also provide for rights of action.

The EU has indicated that sustainability considerations, including those that form part of the Green Deal, are expected to play a major role in recovery efforts. In February 2020, the European Commission published a final report prepared by the British Institute of International and Comparative Law, Civic Consulting, and LSE Consulting on its ongoing “Study on due diligence requirements through the supply chain.” The Report – which falls more broadly within the implementation of the European Commission’s 2018 “Action Plan on Financing Sustainable Growth” – focuses on corporate supply chain due diligence requirements necessary to identify,

seek to bring their due diligence in line with international standards by outlining risk categories, basic steps and frameworks of risk-based due diligence and a model supply chain policy. *See also* Regulation (EU) 2017/821 of the European Parliament and the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (the “EU Conflicts Minerals Regulation”), available [here](#). This new regulation will apply across the EU starting January 2021 and will require due diligence on mineral supply chains to ensure that funds do not support armed groups and security forces in areas of conflict.

¹⁹ *See* UK Modern Slavery Act (2015), available [here](#), which requires entities with business in the UK and worldwide revenue of at least £36 million to publish an annual transparency statement on efforts they have taken to ensure that their business operations and supply chains do not contribute to modern slavery and human trafficking. *See also* Australia Modern Slavery Act (2018), available [here](#), which requires entities operating in Australia with a minimum annual consolidated revenue of AU \$100 million to annually report on the risks of modern slavery in their operations and supply chains and the efforts they have taken to address these risks.

prevent, mitigate, and account for sustainability risks across a range of ESG factors (including social and human rights abuses, environmental risks, and climate change).

According to the Report, the introduction of mandatory supply chain due diligence as a new legal standard of care received the most support by stakeholders. In the wake of this momentum, the Commission has committed to introduce legislation for mandatory human rights and environmental due diligence on global supply chains by 2021.

The Duty of Care of a Parent Company

In most jurisdictions, companies can face vicarious liability for the actions of third-parties (including potentially sub-suppliers and sub-contractors) based on a “duty of care” theory of liability.

One recent development worth noting is the UK Supreme Court’s decision in *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants)*

²⁰ *See* Dutch Child Labor Due Diligence Act, available [here](#), which requires companies selling within the Dutch market to determine whether there is child labor in their supplies chains, create a plan of action to address any risks and issue a due diligence statement.

²¹ *See* LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (the “French “duty of care” law”), available [here](#). The French “duty of care” law requires French companies (based on the size of staff employed) to show a duty of care for human and environmental rights by implementing a diligence plan to identify and prevent adverse impacts from their activities. This includes the activities they directly control and those of their sub-contractors and suppliers where they have significant influence. *See also* the proposed Swiss Responsible Business Initiative, available [here](#), which would require companies to incorporate human rights and environmental respect into business activities with mandatory due diligence for Swiss companies acting abroad. It would additionally create the ability for victims of human rights violations and environmental damages to seek redress in Switzerland. A public referendum on the initiative is expected as early as November 2020.

v Lungowe and Ors. The court decided that the English courts had jurisdiction in respect of a claim brought by *Zambian* claimants against a UK-based parent company and its *Zambian* subsidiary and that therefore the case could proceed to a trial of the substantive issues in the English courts, including the question of whether a parent company can be liable for the operations of its subsidiaries. The Supreme Court found that a parent company could in principle assume a duty of care in respect of the activities of its subsidiaries where group-wide policies and guidelines are implemented and administered by the parent.

Although the burden of proof and the ultimate viability of these claims varies across jurisdictions and the substantive area of law (including knowledge and control at the corporate level), it is generally good practice for companies to mitigate exposure to liability by taking due diligence efforts and setting up contractual protections with suppliers and contractors, such as robust audit, inspection and termination rights.

IV. Future Directions

The challenges of the COVID-19 crisis are particularly difficult for companies because of their global reach, indefinite timelines and unpredictable scale.

Politicians and business leaders have raised the possibility of re-patriating supply chains that currently operate internationally, arguing that more localized supply chain “clusters” would be less susceptible to disruptions felt in other countries or regions. While macro-economic models have long backed such approaches as capitalizing on the varying efficiencies with which different countries produce and distribute different goods and services, COVID-19 has exposed

the potential fragility of such an inter-connected system in which even an isolated disruption can trigger broad and lasting effects to supply chain stability.

One thing that is clear is that COVID-19’s disruptions will bring new approaches to supply chain challenges, including potential areas of new collaboration across industries. One example is the recently announced partnership between Microsoft and FedEx, which leverages data to provide near-real time analytics in shipment tracking.²² It is important for companies to consider new legal and compliance challenges that may arise from changing business models, work environments and economic conditions.

Compliance, Technology and Supply Chains

Although difficult to predict exactly how technology will evolve within the context of supply chains, it is clear that automation is likely to play a greater role.

Various technologies are on the rise, such as using real-time analytics and visualization mapping to create digital supply chain models that can help predict risks, trends and strategic initiatives. Technology can also be used to increase efficiency through automatic re-stocking using just-in-time inventory management systems.

Blockchain technology is particularly helpful in enhancing supply chain traceability (and hence regulatory compliance) by allowing companies to trace the origin of supplies (including their components) through the use of digital ledgers.

With respect to economic sanctions and export controls, for example, blockchain technology can confirm shipments are not coming from countries subject to economic sanctions and track the source of minerals potentially subject

²² See *FedEx and Microsoft Join Forces to Transform Commerce* (May 18, 2020), available at: <https://news.microsoft.com/2020/05/18/fedex-and-microsoft-join-forces-to-transform-commerce/>; see also PYMNTS, *FedEx, Microsoft Team on Shipping Initiative*

(May 18, 2020), available at: <https://www.pymnts.com/news/delivery/2020/fedex-microsoft-team-up-for-shipping-initiative/>.

to disclosure requirements under Section 1502 of the Dodd-Frank Act.

In addition, manufacturers (particularly in the luxury sector) may choose to implement blockchain technology to increase supply chain transparency, allowing consumers to track the source of raw materials such as leather and metals and thus adding provenance to the brand's heritage to ensure that it is deemed trusted and sustainable by their customer base.

In addition to monitoring developments in technology, manufacturing models and partnerships, senior management and legal and compliance professionals should continue to take a proactive approach to managing supply chain risks given the unprecedented challenges of the COVID-19 pandemic.

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Supply chain liability is particularly important, as COVID-19 has adversely impacted various sectors and existing supply chain structures may be disrupted. Additionally, capacity to undertake usual compliance and diligence efforts may also be hindered because of these factors.

While various organizations and stakeholders have advocated for more transparency in decision-making and operations affecting global supply chains, companies may struggle to navigate competing or overlapping audit and reporting models. If one positive outcome of the pandemic is a renewed focus on ESG issues generally, it is to be hoped that a by-product of this might be an acceleration of recent moves towards a more coherent approach to sustainability reporting, which would help address some of the many challenges of measuring and auditing ESG compliance along the supply chain.

New technological systems and training should be considered, as well as proactive measures on due diligence in general business operations. This includes recognizing the importance of building supply chain due diligence into general operations and considering how a counterparty's supply chain affects business operations. This is particularly true in M&A transactions where companies can face potential successor risk liability for supply chains. When possible, companies should look to domestic and international guidance on best practices for managing their supply chain risks. Thoughtful disclosure should be formulated from a corporate governance perspective.