



**WORLD***ecr*

**TRADE COMPLIANCE  
IN A TIME OF CRISIS**



# LAWYERING AND THE NEW NORMAL

Covid-19 has changed the compliance world in almost every respect. It has led to the promulgation of new laws, generated compliance concerns attendant on altered working conditions, and impacted supply chains in ways that surpass ‘significant’. By hook, crook and Zoom, trade lawyers have both adapted and advised...

**I**t sometimes seems that whoever wished upon the world’s population that they should live in interesting times is chuckling somewhere. For interesting, they certainly are (along with ‘unprecedented’, ‘surreal’ and ‘challenging’).

In time, they’ll also be considered to have been instructive.

In fairness, coronavirus wasn’t entirely unprecedented, and nor was it wholly unexpected. But the timing and nature of the outbreak that continues to shake global

trade, politics and, of course, health around the world was something no one could prepare for.

When the initial wave of cases of Covid-19 began to crash on the shores of international business, trade compliance

lawyers were amongst the first to receive calls from companies seeking advice on the possible consequences for supply chains and business arrangements. The fact that the virus first appeared in China at a time when concerns and scepticism regarding the country were gathering speed was a

clauses, but now that we're moving away from the immediate crisis and companies are planning for the future, the focus is on looking for "win-win" outcomes.'

Hedwall points out that whereas much commentary has focused on 'supply' side challenges, "The "demand" side is the

from 3M Corporation, and ventilators, so important to the early response to the emergency, from General Motors. Crucial to the DPA is the use of 'rated' orders for production, which must take priority over non-rated, or lower-rated contracts, with potential penalties for non-compliance including imprisonment or fines. However, according to Giovanna Cinelli, leader of the international trade and national security practice at Morgan Lewis, the exercise of the DPA, and its scope to allow the president 'broad authorities to reallocate distribution and production which, in today's global environment', generates new uncertainties.

'For example,' she says, 'companies may ask whether the DPA extends to foreign suppliers working on rated orders, or, what notice needs to be provided to extend that jurisdiction? These situations implicate a range of issues such as enforcement, *force majeure* clauses and whether blocking statutes can interpose limitations on foreign suppliers' performance.'

Despite the apparently domestic focus of the DPA, attempting to address such questions has lain firmly in the remit of the international trade lawyer.

### Keeping an eye on compliance

Later in April, the US Treasury's Office of Foreign Assets Control ('OFAC') issued guidance informing companies that it supported 'a risk-based approach to sanctions compliance' and that, accordingly, 'if a business facing technical and resource challenges caused by the Covid-19 pandemic chooses to



## 'Organisations wanted answers to fundamental questions: "How do we keep our people safe? Will our business survive this?"'

Dj Wolff, Crowell & Moring

'kind of weird coincidence' one lawyer told *WorldEcr*. 'It added a new angle to the perception of threat already in focus.'

Dj Wolff, a partner in the DC office of Crowell & Moring, sets the scene: 'To begin with, everyone was scrambling to figure it out. Companies were looking for quick fixes to roll out, asking, "How do we handle this new paradigm?" Much of the time, the issues were "prudential" as much as or more than they were legal or regulatory. Organisations wanted answers to fundamental questions: "How do we keep our people safe? Will our business survive this?" Sometimes our role was as much to give holistic business advice as trusted advisor as much as to be a trade lawyer.' Many companies, Wolff says, were hungry for information with which they could 'benchmark' their own responses.

An example of the new atypical, says Wolff, was that of a manufacturer of air-conditioning equipment, which, so as to keep functioning, 'found itself importing large quantities of hazmat and PPE [personal protective equipment]. People have had to pivot to adjust to the new regulations.'

Mattias Hedwall, head of the International Commercial & Trade Group at Baker McKenzie, echoes Wolff's experience of being on call for 'prudential' advice, though the relationship with clients is always dynamic. 'We've moved on from the crisis-management phase of Covid,' he says, 'and are now working on finding supply chain solutions for clients, such as exploring alternative ways of obtaining products, finding producers, and sourcing materials to keep the supply chain moving. There's always a legal angle but sometimes you have to be a little more pragmatic in the way that you advise.'

The 'legal angle', Hedwall says, continues to develop. 'At the outset, everyone was talking about *force majeure* and hardship

forgotten angle. There have been huge changes in people's behaviour and needs; consumers are asking for new goods and services and making more online purchases.' These changes, too, are profoundly altering the contours of trading patterns.

### Wartime measures

While companies around the world began to cut orders and shifts, furlough or lay off staff, international trade lawyers continued to be busy. The wheels of the distributors' vehicles might have slowed, but the wheels of government had not. In April, President Trump invoked the Defense Production Act ('DPA') – which dates back to 1950 and the Korean War – to, *inter alia*, limit exports of PPE. This was done so as to be able to order production of critical supplies, including, for example, respirator masks

## No rest for compliance

It's fair to say that Covid-19 has affected all areas of trade compliance, with little being put 'on hold'. Miller & Chevalier member Timothy O'Toole says that the shape of his practice, which in the pre-'new normal' era was mostly spent on the road, conducting internal investigations on behalf of clients around the world, is very much the same but different.

'The absence of travel is really unusual. I spent the first two months on the road but haven't been anywhere outside my neighbourhood since!' says O'Toole. This hasn't choked off his investigations practice but it has changed it: 'The "hidden cost" of trying to conduct investigations remotely is that the process becomes really spread out. In normal times, you prepare, you go to a location, you meet with relevant company personnel, and you identify and begin to collect relevant documents. You can usually do that in two or three very intense days. You go back for interviews one more time when you have a better understanding of the facts and you have detailed interviews with key witnesses. When an investigation is done remotely, you do it in little bits at a time, working around everyone's schedules. It's hard to prepare for separate interviews spread out over weeks and even months. It's hard to identify relevant documents. Getting up to speed each time requires a lot of duplicative preparation and even then the previous interviews won't be fresh in your mind...if remote investigations become standard practice in the future, I'd say they're poor substitutes.'



Tim O'Toole

[temporarily reallocate] sanctions compliance resources consistent with that approach, OFAC will evaluate this as a factor in determining the appropriate administrative response to an apparent violation that occurs during this period.'

For a moment, it seemed that business had been given some breathing space. Kerry Contini, a partner in the DC office of



**'We know from 2008 that enforcement doesn't stop during a recession.'**

**Kerry Contini, Baker McKenzie**

Baker McKenzie, notes, however, that the pandemic and resulting decrease in flow of goods resulted in 'pressure on compliance to focus on the cost-saving aspects of trade.' This she says, is 'understandable – it's a very important aspect of the compliance function, but not at the risk of broader compliance, especially given the number of

developments in this space. We know from 2008 that enforcement doesn't stop during a recession' (despite what OFAC's 'comforting' guidance might imply).

Contini is not the only lawyer to note there has been no let-up for compliance as the regulating agencies everywhere are proving the current truism that working from home or with reduced access to office

facilities doesn't necessarily hamper – and can even improve – efficiency. A brief glance at the websites of the Bureau of Industry and Security, OFAC, and the UK's Office of Financial Sanctions Implementation ('OFSI') tell clearly that it's business as usual, albeit that we live in unusual times.

### More to come

As at mid-July writing time, while the Covid crisis has been with us for what seems like a lifetime (and has claimed many), it has yet to be beaten back into the past tense. Indeed, as Anthony Fauci, one of the lead members of the Trump administration's White House Coronavirus Task Force, pointed out, '[The United States] is still knee-deep in the first wave.' Parts of the world enjoying some respite have no guarantee that it won't be brief.

The virus's potential for stoking geopolitical embers remains undimmed and with that international trade lawyers and their clients can expect further challenges.

Ryan Fayhee, a partner at law firm Hughes Hubbard's DC office, points out that in many respects responses to Covid-19 reinforce existing trends – such as the move, in the United States, toward encouraging home-grown industry. 'What will happen when someone finds a vaccine? How will governments use the authorities? Of course that depends on who finds it first, and where the competition might come from. But it'll be interesting to see how that works out!' ■

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