



## KEEPING CALM AND CARRYING ON: **HOW CAN COMMODITIES TRADERS PREPARE FOR THE IMPACT OF COVID-19?**

The spread of COVID-19 has evolved from a regional issue in China into a global public health emergency. In addition to the human tragedy, the virus is having severe economic consequences. There is considerable uncertainty, both commercial and personal. In this briefing, we look at how commodities traders can prepare for and try to minimise the impact of the virus on their business.

**Identify** which of your contracts are likely to be most vulnerable to the impact of the virus so that you know where to focus your attention.

**Review** those key contracts, with a particular eye to the following clauses: delivery, force majeure (FM), insolvency, event of default, material adverse change, further assurance and price review clauses. Understand where you, and your counterparty, are most at risk and what contractual protections you both may have.

**Negotiate** - in our view, in light of the probable extent of disruption and the fact that the situation is continuously evolving, commercial renegotiation is likely to be a sensible way forward where possible. If you negotiate any changes, these should be carefully recorded in writing. You should also ensure that you have checked other terms of the contract which may be relevant to renegotiation, including no waiver, entire agreement and no oral modification clauses.

**Force majeure (FM)** - FM issues have had a high profile in relation to the COVID-19 virus. Consider whether you (or your counterparty) might be able, or likely, to trigger the FM clause in your contract, if it has one. See our briefing on FM here.<sup>1</sup>

**Insolvency** - the virus is creating a lot of immediate cash flow issues. If you believe a counterparty to be at risk of insolvency, what are your options – and what would be the best outcome for you? Does your contract contain an early termination clause which could be triggered by an insolvency? Do you have security that can be called upon, or the right to require that security be provided?

**Event of default** - if your contract contains an event of default clause, consider the impact of triggering it, particularly if you have other contracts with the same counterparty, or if you are in a contractual chain. Is it the best option? Would continuing to perform be preferable? If so, how can you minimise the risk of continuing with

performance, for example by requiring security?

**Notification** - check the notice provisions in your contracts. Failure to comply with notice provisions can jeopardise the success of claims or defences to non-performance.

**Mitigation/Documentation** - it is likely that there will be claims arising from the impact of the virus. Have in mind the need to be able to evidence your loss, or the circumstances of your claim (or a counterparty's claim against you) and keep good contemporaneous records. If you are impacted by government action or advice, for example closing a port or placing workers in quarantine, keep contemporaneous documentary records of this. With official advice changing daily, you may find it difficult to track back to what was happening after the event.

You may have an express obligation to mitigate your loss in some circumstances (relying on FM to suspend or terminate performance will require the affected party to exercise reasonable endeavours to mitigate the impact of the event). Document decisions and steps taken to mitigate the impact of the outbreak on your business or contract.

**New contracts** - when you are negotiating new contracts, consider what key clauses should be included, removed or amended to allocate risk and responsibility in the context of the COVID-19 outbreak. At present, many parties are attempting to rely on clauses which do not obviously or comfortably address the virus. Bespoke clauses may provide some certainty and comfort.

**Supply chains** - identify where the weaknesses in your supply chain may lie so that you can focus your attention on managing these. Do you need to source an alternative supplier and if so, at what stage can you do so, without defaulting on your current supply contract?

**Hedging** - is your hedging strategy robust to protect you against the risk of price fluctuations?

**Delays and LOIs** - there are likely to be delays in loading and discharging cargo because of lack of personnel, port restrictions, or a delay in the arrival of the relevant documents. Will you need a letter of indemnity (LOI) and what should it contain to protect your position? Does your usual standard wording provide you with sufficient protection, or do you need to amend it to cover this situation? See our briefing on this here.<sup>2</sup>

**Related contracts** - check your related contracts, for example voyage charterparties. If you are likely to incur demurrage liabilities arising out of any delay, what does your sale contract say about allocating the risk of these? See our briefing on demurrage in sale contracts here.<sup>3</sup>

**Insurance** - check your business interruption insurance cover to see whether you may have cover available and what are your obligations in relation to documentation, notice and mitigation. See our recent briefing here.<sup>4</sup>

HFW is able to advise in more detail on any of the issues raised in this briefing. For further information, please contact:



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1 <https://www.hfw.com/Coronavirus-Can-it-be-a-Force-Majeure-event-Feb-2020>

2 <https://www.hfw.com/Coronavirus-and-documentary-delays-Feb-2020>

3 <https://www.hfw.com/Commodities-Common-Issues-in-oil-trading-contracts-Demurrage-in-sales-contracts>

4 <https://www.hfw.com/COVID-19-Business-Interruption-and-Event-Cancellation-Mar-20>

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