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# Early Lessons Learned

## COVID-19's Impact on Global Transportation

by Jonathan Todd of Benesch, Friedlander, Coplan & Aronoff LLP



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We will see articles analyzing the COVID-19 pandemic for years to come. Our collective experience throughout this global event was unparalleled in its speed of interruption and depth of uncertainty. It has impacted every aspect of our personal and professional lives. Not a single economic sector or specialty was immune from the effects of the virus – transportation and logistics were no exception.

**The Experience.** The transportation and logistics community can now begin to take a step forward in developing lessons learned by examining the course of events and how to best prepare and respond for the next global interruption. Initial outbreaks of COVID-19 were localized in Hubei Province, PRC. Their impact was largely limited to shippers who relied upon industrial production capacity in Wuhan. Next, trucking capacity constricted in China followed by Chinese ports of call closure. Ocean responded with blank sailings. What began as an inventory management problem became a transportation and logistics challenge. The COVID-19 outbreak is an extreme Sales & Operations Planning (S&OP) exercise. Professionals were tasked with balancing available services for inbound and outbound logistics with real cost and market demand. The playbook was constantly evolving. The grand theme that emerged was the need to closely manage expectations for service and price.

At the time of this writing, it is widely reported that air cargo rates on some trans-Pacific lanes have spiked 60%. The air cargo market was particularly impacted because inventory shock forced the movement of cargoes that may otherwise constituted ocean traffic. Available air cargo capacity was impacted by restrictions in passenger flights. The virus has impacted ocean rates, which in response to infrastructure closure and blank sailings caused rates for some lanes to increase as much as 35%. Some are predicting particular impact on the 2020 ocean bid season including extension of the relative speed of negotiation and intense focus on the precise terms under negotiations.

Transportation and logistics challenges began at production points and constrained inbound logistics. The interruption has and will continue to extend through the entire supply chain ending at outbound logistics operations, distribution, fulfillment, and the final mile. For example, the

S&OP challenge facing many enterprise shippers looking to balance the changes in consumer retail demand. The “bullwhip effect” inefficiency is evident in times of extreme demand disruption. Movement constraint of goods remain challenging even after supply becomes available. At the consumption level, the intervention of government authority to shutter operations and the health of professionals in warehousing and delivery may yield the final bottleneck tightening available supply and driving service cost.

**Early Lessons.** One benefit is the gift to examine and improve our operations based on a clear, indisputable data. What was previously hypothetical is now a comprehensive global case study to move cargoes around the world, stronger and more efficient than before. We know all too well that disruption will be highly fact specific yet, in a globalized world, will spread throughout the entire supply chain impacting everything from supply, service, price, and demand. From that point of understanding we can begin to learn more about tactical response and strategic preparedness.

**Managing Expectations.** Customer relationship management and vendor management has grown into a specialty and in some regards a subindustry. The principles and best practices for those endeavors were called to task amid the COVID-19 impact. As early as the new year, it became critically important for many organizations to communicate thoughtfully with producers, providers, and customers in order to effectively manage expectations. If there was potential for delay or increased charges then written communications and notices were necessary to align expectations. Those communications were in part broadcast to entire supplier, provider, or customer groups and in other cases issued tactically. This activity was both a service to production planning as well as a means to gain assent, if required, to any necessary increase in costs.

**Exercising Force Majeure.** Nearly every organization found itself collecting in-force contracts and closely reviewing force majeure clauses. Force majeure is the contract principle and equitable doctrine under common law that excuses non-performance due to the occurrence of certain events outside of the performing party's control. Specific references to “Pandemic” and “Act of Government Authority” and others could now be applied to real-world facts. The World Health Organization declared coronavirus a global pandemic on March 11. Governments around the world shuttered operations in many communities. It is not outside of reason that certain delays and non-performance may constitute force majeure. However, this analysis is always fact specific. It depends on the applicable language or law,

whether the intervening event actually caused the breach, whether alternate measures were available, and the procedural requirements such as notice, cure, and termination rights. All providers and participants were well served to have meaningful force majeure provisions and thoughtful approaches to their consideration and exercise.

**Triggering Contract Mechanisms.** Additional mechanisms available under contract or service terms provided the pathway to navigating the range of possibilities as the coronavirus spread. For example, even where interruption did not constitute force majeure, well-drafted contracts permitted relief through the reduction of service, adjustment of performance schedules, and recouping of increases in the cost of service delivery. Many organizations built contract tools for surcharges, price fluctuations, the right to decline orders or tender, and options for calling breach or default as well as available cure periods. The exercise of these tools was in many instances essential to short term performance. In all events, the crafting of these mechanisms and consideration of their applicability as facts developed assisted all contract parties to gain visibility to those eventualities.

**Ensuring Safety.** Interruption is not just a matter of production and service since it can impact personnel. Health officials and advisors have published guidelines to help stop the spread of coronavirus. Certain unique concerns arose in transportation and logistics sectors. One was the health consideration of equipment movement, containers and documents (such as original bills of lading) throughout the supply chain, and, whether the coronavirus could live on those surfaces. This was a thoughtful recognition of the materials and cargo that pass through the hands of service providers. Fortunately, indications were the virus did not survive for appreciable time periods on those surfaces.

**Understanding Responsibilities.** The all-encompassing nature of the coronavirus pandemic has obscured the true legal responsibilities for each and every aspect of business. State and local governments have issued “essential business” orders that fortunately have typically permitted transportation related activities. Even the federal government has issued certain emergency declarations permitting otherwise unlawful behavior. However, these challenging times extend beyond core business operations to labor and employment, data and privacy rights, and general commercial contracts obligations. Swift adaptation has become paramount. Some operations responded by requiring voluntary home working. Others required employees to take temperatures prior to work. Still others issued carefully drafted notices to vendors and customers who may have been exposed. These and other steps attempt to strike the balance between legally required behavior to manage risk and activities that are mere best practices. Care is essential to ensure that actions are deliberate, well-reasoned, and appropriately risk-based.

**Resolving Disputes.** It is inevitable to encounter disputes with provider, customers, and even employees. Every dispute is unique and those arising during a pandemic are no different. The specific facts and

circumstances, contract language, and applicable law in the jurisdiction will all drive the path toward resolution. Still, in uncertain times such as these a few basic strategies tend to hold true. Home jurisdiction is generally preferred for its cost efficiency and predictability depending upon the location of the parties and nature of dispute. It tends to be valuable to raise concerns swiftly with strong, pragmatic, business-to-business communication. Those early expressions of position may resolve disputes amicably and, if not, will be valuable memorialization down the line. In all events it is important to consider relative bargaining power and the strength of relationships. A high-dollar relationship will bear reasoned communications much more than an occasional commodity service or customer.

**When to Obtain Counsel and Representation.** The speed of this experience has led to frequent involvement of legal counsel early on in the pandemic and throughout the daily evolution of risk and best practice. Fortunately, the practice of law has grown dramatically more specialized with certain providers offering deep subject matter expertise just as the business of transportation and logistics has become increasingly consultative in nature. Early counsel has proven invaluable to operators looking for knowledge-based decisions for well-reasoned action. As the pandemic grew that counsel quickly expanded beyond savvy strategic advice and took on a tactical nature with cross-functional teams offering employment, privacy, healthcare, and commercial guidance to manage all aspects of daily impact. The value of this broad-based guidance is helps to manage enterprise risk and therefore cost, but nonetheless, retaining representation is ultimately unavoidable when one is named defendant or must pursue a potential defendant to in order be made whole.

Early lessons such as these are actionable right now even as the COVID-19 interruption continues to sweep through global supply chains. As the day-to-day urgency subsides these will serve as a near-term checklist for consideration of immediate improvements to contractual relationships and standard operating procedures. The totality of lessons learned from the global impact of COVID-19 will require years to understand and implement. However, if the transportation and logistics experience during the spread of COVID-19 has taught us anything it is that speed of implementation is everything.

#### About the Author

Jonathan Todd is a Partner with the Transportation & Logistics Practice at the law firm Benesch, Friedlander, Coplan & Aronoff LLP. The Benesch Transportation & Logistics Practice stands ready to counsel and represent clients throughout the resolution of the pandemic and the rebuilding that will follow.



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