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Battlefield Triage: Five Practical Steps to Vaccinate Your Business Against COVID-19

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Both the speed of business disruption and depth of uncertainty created by COVID-19 have been unparalleled in our experience. Developments over the past week alone have emerged at an exponential rate and have impacted every aspect of our personal and professional lives. Not a single economic sector or specialty has proven immune from the effects of the virus, and the transportation and logistics sector is obviously no exception.

The Transportation and Logistics Sector

Providers and commercial users of international transportation services were among the very first businesses to begin experiencing the implications of COVID-19, well before the virus struck the public consciousness. Initial outbreaks of COVID-19 were of course localized in Hubei Province, PRC. The impact from these outbreaks was largely limited to those shippers who relied upon industrial production capacity in Wuhan. Next, trucking capacity constricted in China followed by closure of Chinese ports of call. The liner industry then responded with blank sailings. What began as an inventory management problem for global shippers became a significant transportation and logistics challenge.

Like many tactical supply chain issues, the COVID-19 outbreak is essentially an extreme Sales & Operations Planning (S&OP) exercise for both the providers and the commercial users of transportation and logistics services. Professionals have been tasked with balancing available services for both inbound and outbound logistics with real cost and market demand. In this fast-changing reality, the playbook is constantly evolving across transportation mode, lanes, customer base, and even commodity. The grand theme that emerged is 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 as much as 60%. The air cargo market is particularly impacted because the inventory shock forced the air movement of critical cargo that would otherwise constitute ocean traffic. The available capacity of air cargo was simultaneously impacted by restrictions in passenger flights on a global basis greater than those immediately following the attacks of 9/11, on the order of 40-50% reductions. The virus has similarly impacted ocean rates, which in response to infrastructure closure and blank sailings has caused rates for some lanes to reportedly increase as much as 35%. Some are even predicting a particular impact on the 2020 ocean bid season that is underway, including the extension of the relative speed of negotiation and intense focus on the precise terms under negotiations.

The transportation and logistics challenges began at points of production and constrained inbound logistics. As can be expected, the interruption has and will continue to extend to outbound logistics operations, distribution, fulfillment, and the final mile. Consider for example the S&OP challenge facing many enterprise shippers looking to balance the lightning-fast changes in consumer retail demand for certain products with the already constricted supply chain. The textbook "bullwhip effect" inefficiency that is evident in these times of extreme demand disruption directly impacts not only the supply chain but also key transportation and logistics elements. At the level of consumption, 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.

Five Practical Tips

One benefit of once-in-a-lifetime events is the gift to examine and improve our operations based on a clear and indisputable data. What was previously hypothetical is now a comprehensive global case study to make transportation and logistics providers, and the shippers who rely on those systems to move their cargo around the world, stronger and more efficient than ever before. To kick off this exercise, consider the following suggestions.

1. **Manage 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 have been 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. Those needs continue each day in light of unprecedented changes to business and social life. Providers should continue to alert shippers to the potential for delay or increased charges. In some instances, such communications should be broadcast to entire supplier, provider, or customer groups and in other cases issued tactically. This activity is both a service to production planning as well as a means to gain assent, if required, to any necessary increase in costs.
2. **Evaluate force majeure.** Nearly every organization in the supply chain is collecting current contracts and closely reviewing force majeure clauses. Force majeure is the contract principle and equitable doctrine under common law that excuses nonperformance due to the occurrence of certain events outside of the performing party's control. Specific references to "epidemics," "pandemics," "acts of the government," and similar language can now be applied to real-world facts. The World Health Organization declared coronavirus as a global pandemic on March 11, 2020, and government authorities around the world swiftly shuttered operations in many communities. Courts may ultimately agree that specific delays and nonperformances are excused due to a force majeure. However, this analysis is always fact specific. The viability of claiming a force majeure depends on the applicable language or law, whether the intervening event actually caused the breach, whether alternate measures or other mitigation efforts were available, and the procedural requirements such as notice, cure, and termination rights. All providers and participants are well served to have meaningful force majeure provisions and thoughtful approaches to their consideration and exercise.

3. **Explore price and volume mechanisms.** Additional mechanisms available under contract or service terms provide a pathway to navigating the range of possibilities as COVID-19 spreads. For example, even where interruption does not necessarily constitute force majeure, well-drafted contracts permitted relief through the reduction of service, adjustment of performance schedules or volume commitments, and recouping of increases in the cost of service delivery. Many organizations had built out 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 can be essential to short-term performance, depending on the commercial relationship that had been negotiated and the efficacy of expectation setting. In all events, the crafting of these mechanisms and consideration of their applicability as facts developed can assist all contract parties to gain visibility into those eventualities.
4. **Track regulatory relief and guidance**. Both shippers and providers must remain attuned to regulatory relief and guidance emerging from various federal and state agencies. For instance, on March 13, 2020, the Federal Motor Carrier Safety Administration issued an Emergency Declaration for motor carriers and drivers providing direct assistance in support of relief efforts related to COVID-19, waiving certain hours-of-service requirements. [Insert link to bulletin] Certain states have granted similar relief to intrastate transportation. Likewise, on March 16, 2020, a coalition of shippers, transportation intermediaries, and motor carriers urged the Federal Maritime Commission to adopt an "interpretive rule" related to demurrage and detention charges at United States ports. The immediate concern and renewed urgency is driven by reduced gate hours that flow from COVID-19 and the associated dislocation of equipment. All involved in the supply change benefit from better understanding the regulatory landscape and, in particular, where regulators are willing to be flexible in a time of crisis.
5. **Evaluate insurance policies**. Proactive parties are examining their existing insurance policies to understand what coverage, if any, they may have for business disruption of this nature, for cargo claims that may arise as a result of COVID-19, and for other possible losses. For instance, certain policies may provide coverage for disruption caused by a communicable disease but exclude coverage if the disease is officially declared to be a global pandemic. Having further clarity about insurance coverage permits a party to make a more informed business decision when contending with the many forms of economic injury that are related in one form or another to COVID-19.

These steps are actionable right now even as the COVID-19 interruption continues to sweep rapidly through global supply chains. As the day-to-day urgency subsides, these suggestions can also serve as a near-term checklist for consideration of immediate improvements to contractual relationships and standard operating procedures. In other words, the transportation and logistics community should soberly examine the recent course of events and consider how to best prepare for the next global interruption. 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 industry has taught us anything during the spread of COVID-19, it is that speed of implementation is everything.

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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Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

