



Legal agility and risk resilience: How to enhance your organisation's readiness to withstand the next crisis

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What can in-house legal, risk and compliance leaders learn from the Covid-19 pandemic and other notable crises of the past 20 years to strengthen the legal resilience of their organisations?

More than any other crisis in recent memory, Covid-19 has revealed the strengths and weaknesses in every organisation's approach to crisis management. Now might not be the obvious time to make significant changes (unless interim arrangements fall short of minimum regulatory expectations). But, given the number of crises we have seen over the last two decades, those with strategic responsibility in in-house legal, risk and compliance departments must continue to look ahead and consider the long-term lessons, even during the current upheaval.

What, then, can these leaders glean, both from the response so far to the Covid-19 pandemic and – equally importantly – from other notable crises of the recent past, to enhance the legal risk resilience of their organisations?

Over the past two decades, businesses have had to contend with several macroeconomic and geopolitical shocks, including 9/11, the global financial crisis, the Brexit vote in the UK, precarious sovereign debt and now the Covid-19 pandemic. Many of these crises were unforeseeable. Others were foreseeable yet not in fact foreseen, or at least not acted upon.



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Having faced SARS, swine flu, MERS, Zika and Ebola in recent times, a global pandemic should not, perhaps, have come as a great surprise; and yet, to most of the world, it did. When the World Economic Forum published its 2020 Global Risk Report at the start of this year (an analysis of the views of 750 global experts and decision-makers on the major risks the world would face over the next ten years), ‘infectious diseases’ did not feature in the top 10 in terms of ‘likelihood’ and was ranked 10th in terms of potential severity of impact.

Although not necessarily obvious at the time, an examination of previous crises through a legal risk lens reveals several common themes. This is interesting in itself, given the large variance between the crises. But it also has real practical importance.

Managing contractual exposures

We have seen over and over again that, whatever the trigger, a crisis will inevitably put stress on contractual relationships, typically because one party is struggling to perform obligations that ordinarily would not have presented problems, or because the bargain no longer makes economic sense. At that point, those on both sides of the contractual relationship will need to ascertain what legal rights and obligations arise and whether there is room to avoid or enforce those obligations, or to renegotiate them. To do this properly requires a commitment to:

Understand your contractual landscape –

Having a bird’s-eye view of contractual exposures enables decisions to be made quickly. It also ensures that there is better drafting for new contracts, that consideration is given to possible areas for renegotiation of existing contracts, or simply that red flags can be put in place to highlight where attention should go first when a crisis hits. Doing this may require investment in smart ways of interrogating and reporting on legacy contracts and, where necessary, renegotiating existing arrangements. Clever use of legal technology can assist significantly in ensuring contract analysis can be carried out efficiently. We have seen this technology deployed very effectively in response to the challenges arising from Brexit and the pandemic.

Review crisis clauses – Force majeure and other crisis clauses are no longer going to be viewed as part of the contract boilerplate. You will want to know what terms the business currently has

in place, whether they are likely to provide an adequate level of protection when a crisis arises and, if not, what can be done to improve the position. For new contracts, think about more specific and tailored risk allocation arrangements. This is harder than it sounds. Even if there is commercial agreement on risk allocation, the drafting may not be straightforward.

If you can recognise the legal risks that are common to many crises, you can focus on preparing for those risks and mitigating their impact before the next crisis hits. It may be difficult to act now, while still grappling with Covid-19, but carving out time to improve legal and regulatory preparedness will rarely be a wasted investment. By taking stock today, resilience to tomorrow’s crises can be enhanced.

When looking at common themes and what they say about how to strengthen legal risk resilience, we have focused here on contractual relationships and regulatory compliance. Both areas have repeatedly come to the fore in our analysis of crises to date.

Reassess the choice of law and forum for disputes – The governing law of the agreement and the court or tribunal where the dispute will be heard really do both matter. Making the right choices can significantly reduce litigation risk, providing effective insulation from the application of potentially unhelpful laws and reducing the risk of disputes (or, failing that, increasing the chances of success in any dispute). In some jurisdictions there is a tendency towards a greater degree of state intervention in private contracts and disputes than others, and some courts and tribunals fare better than others in a crisis. Covid-19 has led to an unprecedented level of state intrusion (much welcome, some less so). In the Greek and Cypriot sovereign debt crises, a key factor for organisations seeking to assess their exposure to legal risk was whether their contractual relationships were insulated from potential changes to local laws. In-house legal teams must ask themselves whether their preferred choice of law and forum has proved to be the right one in previous crises and, if not, consider changing their approach. The importance of these clauses is easy to overlook. To do so is unwise.

Revisit (and where necessary recalibrate) clauses dealing with unforeseen events –

Sometimes a crisis can result in a change to what is adjudged foreseeable, meaning that clauses historically triggered by particular events will be harder to trigger if similar events occur in the future. Parties may want to revisit and adjust standard wording and deploy wording in a more considered manner when negotiating future contracts.

Build in contractual flexibility – Contractual flexibility allows more room for manoeuvre in the event of a crisis of any sort. The ability to mandate changes in roles, service provision or location can be desirable, as can the ability to terminate contracts or revisit costs. The benefits of this flexibility must, however, be weighed against the potential downsides of the loss of certainty that inevitably comes with such an approach,

particularly where any contractual flexibility is mutual.

Mirror demand and supply – One area that we have seen causing tension in a number of prior crises, including the global financial crisis and the Covid-19 pandemic, is where a party's obligations under a chain of contracts (for example a contract to buy products from a supplier and a separate contract to on-sell those products to a customer) get out of kilter with one another (so, to use the same example, the party finds itself having to buy products that it can no longer sell). To the extent possible, you want your contractual obligations to mirror one another: if your customer is contractually entitled to stop ordering widgets, ideally you want to ensure that you do not have a contractual obligation to buy them from your supplier.

Managing regulatory and legislative change and maintaining good compliance

When thinking about compliance in the midst of a crisis, there are two broad and potentially conflicting drivers: the need to ensure that systems, processes and procedures remain robust for business-as-usual activity and the need for agility, so that an organisation can respond quickly and effectively to atypical situations when

they present themselves. Historic crises teach us that the main areas that deserve attention are: managing legislative change; adapting compliance mechanisms to respond to new challenges created by the crisis; and managing relationships with regulators.



Manage legislative change

In times of crisis, there is often a deluge of legislative and regulatory change. New laws and governmental or regulatory guidance may need to be understood and acted upon quickly to identify opportunities (for example, new avenues of support or funding) and mitigate risks. This can significantly increase the pressure on legal and compliance teams at a time when they are struggling to handle the immediate impacts of the crisis.

We have seen periods, including during the Greek and Cypriot sovereign debt crises as well as the Covid-19 crisis, where new laws and guidance have been published on an almost daily basis. In the United Kingdom, for example, guidance on the response to the pandemic has often come out ahead of the legislation and the two have rarely been synchronised. Simply staying on top of the changes can be hugely challenging, particularly where the laws and guidance documents need to be translated before they can be reviewed and where it may be necessary to take legal advice on precisely what new rules mean in practice.

On the back of that experience, in-house legal teams may have to reassess their approach to monitoring, reporting and, where relevant, escalating new legal developments and formal guidance within the organisation. After all, it is impossible to respond to a crisis in an agile way if you cannot get to grips with what has changed and what risks and opportunities those changes might create.

Establish agile and responsive compliance procedures

The fact that a crisis commonly gives rise to a tidal wave of legislation and guidance (and also potentially a forced change in activity) means that in-house legal, business and compliance teams must have robust systems in place that allow them to develop, implement, communicate and, where necessary, enforce changes to internal compliance policies, processes and controls quickly and accurately so as to mitigate legal risks.

One aspect of building preparedness may be to invest in understanding which behavioural nudges are the most effective in supporting compliance within your organisation. What kinds of action are going to make it easy for staff to comply and harder for them to bury their heads?¹

Maintain open relationships with regulators

In addition to an increase in legislative activity during a crisis, we commonly see significant regulatory action and legislative reform in the aftermath. Governments and regulators look back on the crisis and seek to address wrongdoing and legislate to fill perceived gaps in the legal and regulatory

regime to mitigate the risk of a similar crisis in the future. The regulatory response to the global financial crisis is perhaps the best example of this. It is therefore critically important to keep close to regulators and policymakers during a crisis and in the gaps between crises. You should revisit protocols and mechanisms for maintaining open, agile and effective relationships with regulators, and shore up interactions with trade associations or industry groups that may be well placed to represent the industry position. Communications need to be accurate and on point in these interactions – opportunities to engage may well be limited so it is important to make the most of them. You will improve your position if you prioritise the issues that matter to you.

Compliance challenges of remote working

One new compliance challenge faced in the pandemic but probably not in previous crises is large-scale remote working. The response to the pandemic has meant taking on the complexities of managing a widely distributed workforce. Organisations have had to revisit and rework compliance monitoring and reporting mechanisms and adapt policies and procedures to stay on top of risks related to employee conduct as well as employee health and wellbeing.

Yet although most of us have never had to think about whether the organisation we work in can be physically agile until now, the ability to up sticks and relocate your workforce in short order without precipitating a compliance disaster is likely to be useful in crises beyond those caused by a global pandemic (and even outside the crisis context if, as looks likely, remote working becomes more the norm for many of us). It will therefore be important, once the dust has settled, to look back on what worked and what did not so that compliance risks are mitigated quickly and effectively whenever staff are located off-site.

Among other things, compliance and risk teams may want to put in place more formal systems for managing potential new exposures arising from remote working (in particular where staff are working in jurisdictions where the organisation may not have a formal presence), and for managing remote data risk and conduct risk. We have seen from the global financial crisis that misconduct is easier to commit and harder to spot at times when companies are facing existential challenges, and this is often compounded by remote working.

Firms must be particularly alive to these changing risks whilst at the same time not dropping their guard in relation to day-to-day compliance. Apart from anything else, this may require a rethink of compliance and risk mitigation training to ensure that programmes are appropriately targeted and are accessible to (and accessed by) all relevant staff.

¹See [The Ostrich Paradox](#) by Robert Meyer and Howard Kunreuther

Choosing the right path

This article focuses on some key legal lessons from previous crises and on how we can all be better prepared for the next crisis if we take those lessons on board. One thing that is clear, however, is that legal lessons must be overlaid by a consideration of whether acting strictly in accordance with legal rights is impractical or, indeed, inappropriate.

There may be a desire and indeed an expectation – from shareholders, customers or the wider court of public opinion – that parties are treated ‘fairly’, or that companies act to absorb some of the negative consequences of a crisis to minimise the impact on others (for example, by managing without government support packages).

Of course, this is not an entirely new phenomenon, but the focus on ‘doing the right thing’ has been particularly prevalent in the Covid-19 crisis and it is likely to continue to be an important consideration in any future crisis response, sitting alongside the strict legal (or commercial) analysis in informing your approach.

Legal teams will want to build these wider considerations into their thought process the next time a crisis hits.

An overarching theme that appears from previous crises is that expert crisis management requires agility within legal teams – an ability to identify and respond quickly to significant legal risk exposures. Sometimes in a crisis you will be forced to make decisions quickly based on imperfect and changing information. You may have to improvise. The more prepared you can be in advance of the crisis, and the better you understand your risks and exposures, the more likely it is that you will be able to prioritise the right things and make the right decisions when it matters.

As businesses look to emerge stronger and more resilient in the wake of the Covid-19 crisis, now is the time for risk, compliance and legal leaders to take stock, learn and apply lessons, and ensure their functions play their part in company-wide efforts to build resilience for next time.



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