

Assessing Your Business Viability and Director Risk Guide – Italy

September 2022



Contents

Directors' Duties	3
Summary of Government Financial Support to Businesses.....	6
Assessing Viability and Business Risk	11
Managing Supply Chain Issues and Risk.....	14
Changes to Insolvency and Restructuring Laws	19
Our Team.....	20

This note is not intended to, and does not in fact, constitute legal advice. Should you require legal advice in relation to your specific circumstances, please do not hesitate to contact one of our Restructuring & Insolvency team members, whose contact details are at the end of this note, who would be happy to assist you. Squire Patton Boggs (UK) LLP and Squire Patton Boggs (US) LLP accept no liability for any losses occasioned to any person by reason of any action or inaction as a result of the contents of this note.

Directors' Duties

Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in Italy are subject to, and how those duties change when the company is insolvent or at risk of being insolvent.

It also gives an overview of the personal risk to directors when the company is in financial difficulty.

Directors' Duties When Solvent

- Directors must fulfil duties imposed by law and company bylaws, with the diligence required by the nature of their duties and their specific competences.
- These duties include the duty to monitor and ascertain the occurrence of an event that would result in the insolvency of the company.
- Since 2019, all companies have been obliged to set up and maintain organisational, accounting and administrative measures adequate to the nature and size of their businesses, to promptly detect any signs of an impending crisis.
- As soon as signs of a crisis are detected, the company's directors should adopt all appropriate remedies to address it and (if appropriate) a voluntary reorganisation, i.e. entering into a composition with creditors, restructuring agreements or extraordinary administration.
- A new Italian Code for Distress and Insolvency which, inter alia, creates new directors' duties and liabilities in respect of distressed situations (see Financial Distress box below), is scheduled to come into force on 16 May 2022. However, new rules introducing alert procedures for companies with financial difficulties are not scheduled to come into force until 31 December 2023.



Financial Distress

Directors' Duties When Insolvent, or at Risk of Being Insolvent

- Directors have a duty to try to overcome the financial difficulties of the company either in the form of continued operations, such as out-of-court or court supervised restructuring arrangements, or by filing insolvency procedures.
- If signs of financial distress that may have a negative impact on share capital are detected, directors must immediately convene a shareholders' meeting for the adoption of appropriate measures in respect to the financial situation of the company. During such meeting, the directors must share a report on the financial situation.
- When a company is insolvent, its directors must preserve the asset value of the company; avoid making preferential payments; not continue trading in a way that would be detrimental to the financial position of the company; and if the statutory minimum share capital is lost, not enter into new transactions.
- Directors must file a petition for insolvency without undue delay, to avoid further worsening the company's financial position.
- If the company is in crisis, the duties of the directors do not shift to the creditors of the company; however, they can be held liable to them.
- The board must avoid carrying out transactions that may cause the dissipation of the company's assets.

The new Italian Code for Distress and Insolvency, due to come into force on 16 May 2022, provides that, during the implementation of restructuring agreements with creditors, insolvency regulation proceedings and the preceding negotiations, directors must ensure that the company:

- Explains the company's situation in a complete, truthful and transparent manner, providing creditors with all the necessary information appropriate for the crisis or insolvency regulation instrument chosen.
- Takes appropriate initiatives for the rapid settlement of the procedure in due time, in order to safeguard the rights of creditors.
- Manages its assets during the crisis or insolvency regulation proceedings in the priority interest of creditors.

It is important for directors to understand their directors' duties, as well as how their actions and the decisions the board makes when the company is in financial distress could expose them to personal liability, criminal sanction and risk.

Below is an overview of the potential claims and potential exposure for directors if the company is insolvent or at risk of insolvency.

Liability to the Company

If a director negligently failing to fulfil duties imposed by law or the company's bylaws fails to supervise the general conduct of the company or fails to take appropriate action upon becoming aware of their prejudicial acts, it could result in a civil action for damages.

Liability to Creditors

A director may be liable to a company's creditors if the company's assets are insufficient to satisfy creditor claims as a result of failure by the directors to preserve the company's assets, e.g. unduly preferring certain creditors to others in breach of the statutory order of priority or continuing to trade in the absence of a reasonable prospect of continuing activities as a going concern.

Liability to Third Parties

A director could face a claim for damages by a shareholder or a third party if they suffer damage as a consequence of the director's conduct.

Criminal Liabilities

A director could face criminal sanctions if the director:

- Hides the company's crisis and insolvency or continues to obtain loans from credit institutions
- Attributes non-existent assets to themselves, for the sole purpose of being admitted to a composition with creditors or obtaining approval of a restructuring agreement with financial intermediaries
- Simulates claims that are wholly or partially non-existent, in order to influence the formation of necessary majorities to obtain approval of a restructuring agreement



Fraudulent Bankruptcy

A director may be criminally liable if the director:

- Disposes of or transfers all or part of the company's assets with the intent to defraud creditors of the company
- Destroys or falsifies all or part of the corporate books or other accounting records
- Before or during judicial liquidation proceedings, makes payments with the intent to prefer one or more creditors

Simple Bankruptcy

A director could be criminally liable if the director:

- Carries out high-risk transactions with the intent of delaying the commencement of bankruptcy proceedings
- Increases the company's liabilities by failing to file a petition for the commencement of the insolvency proceedings when the company was insolvent or over-indebted
- During the three years preceding the declaration of insolvency, did not keep the corporate books and the other accounting records prescribed by law

Directors' Disqualification

If a company facing a situation of financial distress is admitted to insolvency proceedings, directors remain in office but are no longer allowed to exercise their powers to the full extent. Breaching such prohibition may lead to disqualification from managing a commercial enterprise or even imprisonment.

Practical Tips to Mitigate Liability

- Directors should exercise extreme caution when selecting payments if there are any signs of insolvency or prospective insolvency.
- Directors should consider how creditors are ranked under the statutory provisions of Italian law and the role that creditors may play in ensuring the continuity of the business.
- Directors should convene board meetings on a more regular basis (possibly as often as weekly) when they can no longer be confident that the company will remain solvent.
- The board should closely monitor the company's financial performance and, in particular, whether that performance is in line with its business plan, KPIs and cash-flow forecasts.
- The board should take even greater care to document its decisions, including the rationale for those decisions, and the information and advice relied upon in order to reach them.
- During board meetings, directors should make sure that any dissenting opinion given in the best interest of the company is reported in the minutes of that meeting, in the record book of the meetings and resolutions of the board of directors.
- The board must avoid carrying out transactions that may cause the dissipation of the company's assets.
- Great caution should be taken before making any redundancy plans or taking serious structural decisions for the company



Summary of Government Financial Support to Businesses

This guide summarises the financial support measures that are available to Italian businesses.

Financing Facility Support

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Additional Guarantee Fund for Portfolios of Medium – Long-term Financing for Research and Development Projects and Investment Programmes	<ul style="list-style-type: none"> • €1 billion fund to guarantee medium/ long-term loans made by financial institutions aimed at supporting research and development and innovation projects and/or investment programmes. • The guaranteed loans must have a duration of no less than six years and no more than 15 years. 	<ul style="list-style-type: none"> • Companies with a maximum number of 499 employees. 	<ul style="list-style-type: none"> • The guaranteed loans must finance research, development and innovation projects and/or investment programmes. 	<ul style="list-style-type: none"> • Application should be made directly to financial institutions, which must submit an application to the Guarantee Fund. 	<ul style="list-style-type: none"> • Available now.
Direct Financial Support by Means of CDP	<ul style="list-style-type: none"> • CDP is allowed to grant direct loans to companies, with the state's counter-guarantee of CDP's exposures at market rates. • Such direct lending is reserved to companies having an annual turnover greater than €50 million. • Funding will preferably be granted in co-financing with the banking system with a CDP share of between €5 and €50 million and a duration of up to 18 months. 	<ul style="list-style-type: none"> • Companies that satisfy the following two requirements: <ul style="list-style-type: none"> – Annual turnover more than €50 million. – 10% reduction of the company's turnover, compared to the corresponding period of the previous year, because of the COVID-19 emergency. 	<ul style="list-style-type: none"> • The guarantee supported by the financing must be functional to: <ul style="list-style-type: none"> – Investments aimed at research and development, innovation, protection and enhancement of cultural heritage, promotion of tourism, environment, energy efficiency, and promotion of sustainable development and a green economy. – Initiatives for the growth, also by aggregation, of companies in Italy and abroad. • Construction of works, installations, networks and equipment, intended for public utility initiatives. 	<ul style="list-style-type: none"> • Applications should be made directly to CDP. 	<ul style="list-style-type: none"> • Available now.

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Measures Aimed at Supporting Innovative Startups and Innovative SMEs	<ul style="list-style-type: none"> • A fund of €10 million is established to grant innovative startups non-repayable contributions to be used for the purchase of services provided by incubators, accelerators, innovation hubs and business angels. • A fund aimed at sustaining venture capital, established by law no. 145/2018, is provided to support investments in innovative startups' and innovative SMEs' share capital. This fund may invest up to €1 million in each target company. 	<ul style="list-style-type: none"> • Innovative startups, as defined by law decree no. 179/2012, and innovative SMEs, as defined by law decree no. 3/2015. 	<ul style="list-style-type: none"> • The venture capital initiative fund may invest in companies that have already been the object of investment by regulated/qualified investors on a date no earlier than 19 November 2019; or that are the object of investment by regulated/qualified investors who are performing a round of investment together with the fund. 	<ul style="list-style-type: none"> • For the loan refinancing initiative, applications should be made to Invitalia. • For the €10 million fund initiative, applications should be made to Invitalia. • CDP Venture Capital SGR S.p.A. will select target companies for the venture capital initiative. Investments will be made mainly through mandatory convertible bonds. Regulated/qualified investors can recommend innovative startups and innovative SMEs they invested into. 	<ul style="list-style-type: none"> • Available now.
Fund for Technology Transfer	<ul style="list-style-type: none"> • The Ministry of Economic Development is authorised to set up a fund for technology transfer aimed at promoting initiatives and investments useful for the exploitation and use of research results for Italian companies, including the development and industrial reconversion of the biomedical sector towards the production of new drugs and vaccines to combat emerging, as well as widespread, diseases, also with reference to innovative startups and innovative SMEs. • The resources of the fund will be used to purchase indirect participations in companies' risk and debt capital. 	<ul style="list-style-type: none"> • Companies operating in the field of research, innovative startups and innovative SMEs, defined as referred to above, and having been incorporated for no more than 60 months. 	<ul style="list-style-type: none"> • Companies must operate in fields of national strategic interest, with priority for technologies related to healthcare, information, green economy and deep tech. 	<ul style="list-style-type: none"> • The fund will be managed by Enea Tech and Biomedical Foundation. Investments shall be carried out by the Foundation either autonomously or in coordination with institutional or private investors. • How to apply has not been defined yet. Terms and conditions must be defined by Enea Tech and Biomedical Foundation. 	<ul style="list-style-type: none"> • The facility is not yet available.

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Fund to Safeguard Employment Levels	<ul style="list-style-type: none"> The Ministry of Economic Development is authorised to set up a fund to maintain companies' employment levels and the continuation of their business activities, aimed at rescuing and restructuring companies in economic and financial difficulty. The facility must not exceed a total amount of €10 million per company. 	<ul style="list-style-type: none"> Companies with historical brands of national interest and joint-stock companies with at least 250 employees. Companies holding strategic assets of national interest. 	<ul style="list-style-type: none"> In order to apply, a company must propose a restructuring programme aimed at safeguarding employment levels and the continuation of the activities of the business. 	<ul style="list-style-type: none"> Applications must be made to Invitalia and to the Ministry of Economic Development. 	<ul style="list-style-type: none"> Available now.
Measures Aimed at Supporting the Italian Production System's Internationalisation	<ul style="list-style-type: none"> In order to promote the internationalisation of the Italian production sector and favouring Italian companies' commitments in strategic sectors for the Italian economy, SACE S.p.A. assumes the commitments arising from the insurance and guarantees business for non-market risks, as defined by European legislation, to the extent of 10% of the principal and interest of each commitment. The remaining 90% of the same commitments is assumed by the state, without any solidarity constraint. 	<ul style="list-style-type: none"> All enterprises acting in strategic sectors for the Italian economy. 	<ul style="list-style-type: none"> Companies involved in strategic sectors and with an international focus. 	<ul style="list-style-type: none"> Applications can be submitted through CDP's website. 	<ul style="list-style-type: none"> The facility is now available.
Revaluation of Company's Assets	<ul style="list-style-type: none"> Revaluation of business assets and equity investments, with the exclusion of essential buildings related to the business activities. The revaluation may be carried out in one or both of the financial statements related to financial years 2020 and 2021 and must cover all assets belonging to the same category. No tax is due on the higher values of the revalued assets and equity investments. The measure also applies to leased properties for hotel use, and to properties under construction, renovation or completion. 	<ul style="list-style-type: none"> Companies operating in hospitality and spa sectors. 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> The measure applies automatically. 	<ul style="list-style-type: none"> Available now.

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
Tax Credit for Research and Development for Vaccines and Pharmaceuticals	<ul style="list-style-type: none"> Companies carrying out research and development of innovative drugs, including vaccines, are entitled to a tax credit of 20% of the costs incurred from 1 June 2021 to 31 December 2030, provided that the beneficiary of the aid undertakes to grant non-exclusive licences under non-discriminatory market conditions to third parties in the European Economic Area. The tax credit is available up to a maximum amount of €20 million per year for each beneficiary and may be used for offsetting purposes in three equal annual instalments, starting from the year following that in which it accrues. 	<ul style="list-style-type: none"> Companies carrying out research and development for innovative drugs, including vaccines. 	<ul style="list-style-type: none"> All costs incurred for fundamental research, industrial research, experimental development and feasibility studies necessary for the research and development of the project, as referred to by Article 25 of Commission Regulation (EU) No 651/2014, are eligible. 	<ul style="list-style-type: none"> The tax credit is reportable in the tax return. To benefit from this facility, the company could also submit a specific request to the Italian Revenue Agency. 	<ul style="list-style-type: none"> Available now.
Circular Economy Flagship Projects (progetti “Faro”) to Promote the Use of Highly Innovative Technologies and Processes	<ul style="list-style-type: none"> €600 million has been allocated to finance the project included in the National Recovery and Resilience Plan, to improve waste disposal and recycling facilities. 	<ul style="list-style-type: none"> Companies mainly engaged in the production of goods or provision of services. Companies mainly engaged in transport activities (by land, air or water). Companies engaged in ancillary activities to those mentioned above. 	<ul style="list-style-type: none"> Eligible companies must: <ul style="list-style-type: none"> – Be regularly registered in the Companies Register. – Not be subject to bankruptcy, compulsory liquidation or an arrangement with creditors. – Must be adopting the ordinary accounting regime for Italian tax purposes and have at least two deposited and approved balance sheets. – Not have received and, subsequently, not reimbursed either aid identified as illegal or incompatible by the EU Commission. 	<ul style="list-style-type: none"> Applications will be subject to evaluation from a special commission, which is yet to be nominated by a decree of the Ministry of Ecological Transition. 	<ul style="list-style-type: none"> The facility is now available.

What Help Is Available?	What Does the Help Entail?	Which Companies Are Eligible?	What Is the Criteria (If Any) for Applying?	How to Apply	Availability?
			<ul style="list-style-type: none"> - Be in good standing with amounts due to the Ministry of Ecological Transition related to revocation measures. - Not qualify as a company in difficulty under the EU regulation on state aid (EU regulation no. 561/2014 ("GBER")). 		



Assessing Viability and Business Risk

Key Points for Italian Businesses to Consider

The purpose of this quick guide is to help organisations focus on key issues that impact viability and sustainability



Cash Flow and Financing

Directors should prepare new cash flow forecasts for best and worst case scenarios (i.e. further restrictions impacting the business and economy), considering any expected changes to supply and demand, any changes to operational costs and factoring in any deferrals of historic liabilities, and any new debt which has been taken on. Forecasts and projections should be continually reviewed and updated to reflect changes in the market, and lessons learnt.

Repayment of borrowing

- Aggressive debt recovery
- Use of government financial support
- Other additional borrowing from existing lenders
- When and how will payments be met?
- Is there a need to restructure debt?

Deferred payments

- Paying deferred payments/rent/suppliers/tax (if applicable)

Forbearance

- Repaying existing lenders – forbearance may end and payments need to resume
- Availability of financial support

Employees

- Is a redundancy programme going to be necessary? If so, how should this be managed?

Rent

- Rent holiday/reduction agreed?
- Ability to meet future (and missed) rent payments
- Restructure future rent
- Dealing with rent arrears

Restrictions

- Impact of remaining worldwide COVID-19 restrictions on supply chain and demand

Suppliers

- Catching up on payments to suppliers
- Agreeing and abiding by new terms
- Ability to meet future obligations – increased costs
- Aggressive debt recovery action

Cash Flow Pressures

Debtors

- Have debtor days slipped?
- What action can/should be taken to address any potential bad debt issues?
- Reduced credit terms/payment on delivery/increased prices/credit insurance



Supply and Demand

Operational

- Identify key suppliers: business critical and projected spend
- Able to meet demand
- Changes to delivery timescales
- Alternative sourcing? Costs consequences?
- Material/staffing shortages
- Impact of COVID-19 restrictions on suppliers

Pricing and payment

- Changes to payment terms/cost (e.g. cash on delivery)
- Financial health of suppliers
- Ability to obtain credit

Stock

- What stock is available?
- Are goods stranded at port or elsewhere in distribution network?
- Right to reject
- Import/export tariffs and taxes

Termination of existing contracts

- *Force majeure*
- Material adverse change
- Termination rights

De-risking the supply chain for the future

- Enhanced IT due diligence
- Business continuity measures
- Review of whole supply chain
- Look to achieve greater diversity in supply chain
- Potential investments in technology



Shape of demand

- Has demand returned? Increased?

End-user/customer

- Decrease in consumer confidence
- Cash-strapped customers

Changes to product and offering

- Changes to consumer habits (e.g. e-commerce and importance of home delivery)
- Increase in appetite for online suppliers and delivery services

Pricing and payment terms

- Review pricing structure, are pre-COVID-19 margins still achievable?
- Consider credit terms and customer insolvency risk
- Is credit insurance still available?
- Is invoice discounting an option to improve working capital?

Government/Other Restrictions

- Impact of restrictions in the UK or countries where end users/customers are based e.g. self-isolation and reduced operating capacity

Employee Considerations

Business requirement/need

- Does the business need the same number of employees in light of any changes to supply/demand/business model? Are redundancies necessary?
- Re-allocation of resource according to business plan

Availability/costs

- Impact on employees (fear of infection, childcare responsibilities or self-isolation etc.)
- Will there be any permanent changes to working patterns/habits that impact operational costs? (i.e. increase in homeworking and decrease in office space)
- Psychological support – assisting employees to adapt

Long-term changes to contracts and remuneration

- Flexible remuneration plans
- Agree reductions in salary and bonuses

Macro Economics

- Expected interest rate rises
- Rising inflationary costs (energy, food, etc.)
- Fuel inflation/rationing
- Impact of sanctions on Russia
- Shortage of or increased costs of major commodity supplies
- Cautious end users/customers
- Supply chain cost increases (shipping, re-routing)

Operational Costs

Licences

- Inability and capacity of named individuals/licence holders/trained individuals to carry out role (e.g. long-term absences, sickness, self isolation)
- Licence amendments to reflect changed trading arrangements (e.g. changes to hours or activities)

Increased health and safety costs

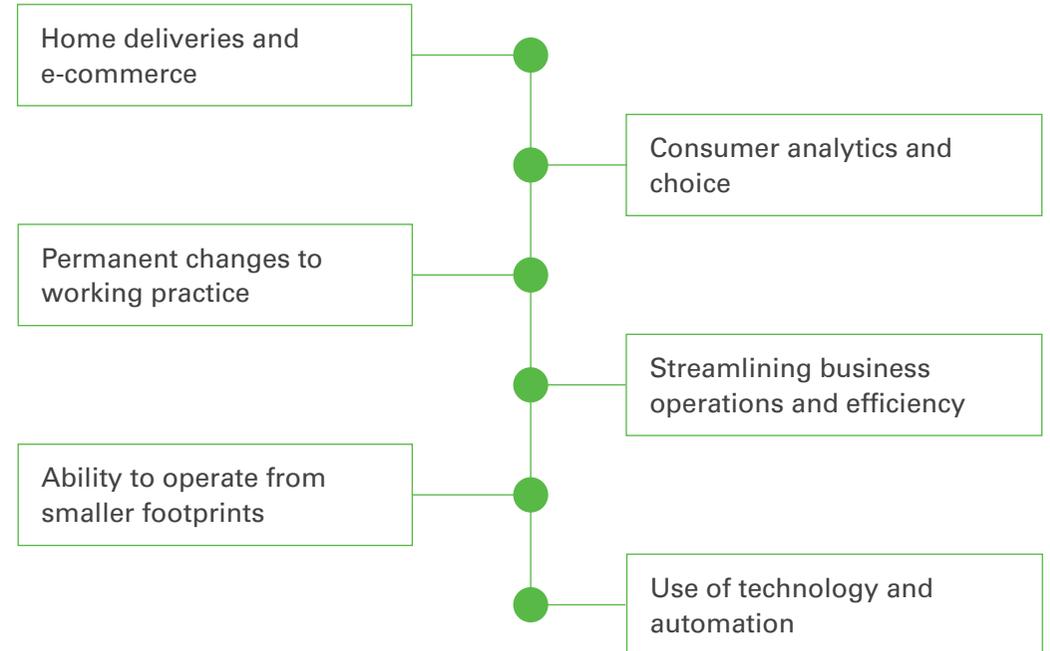
- Strategies for managing COVID-19 risk in the workplace
- Sanitisation and cleaning programmes

Changes in operational practices and procedure

- Changes to real estate footprint to accommodate changes to employee and working practices (e.g. reduced office space or larger warehouses)
- Investment in technological capabilities to accommodate changes
- Greater automation of processes (or parts of processes)

Opportunities

Many businesses have already made changes to their day-to-day operations, many changes will be permanent or will require further adaption to meet new government guidelines but all will impact on future cash requirements.



Managing Supply Chain Issues and Risk

There is an almost infinite variety of issues that can arise within the supply chain, from minor irritants that make business just that bit more difficult to transact than is necessary, to catastrophic failures. We have selected a few of the more high-profile current issues for consideration.

COVID-19 and Resulting Supply Chain Challenges

The effects of the COVID-19 pandemic on the supply chain continue to be felt by businesses, driving product/service shortages, transport problems and unpredictable cost increases. In particular, parties should carefully consider (among other things):

- Supply chain mapping (if not already completed)- to identify risk areas, particularly further down the supply chain.
- COVID-19 managing related provisions in contracts- whether as general terms or to address specific identified issues (e.g. delays, materials/staffing shortages, travel restrictions and costs).
- Increased risk of significant changes in inflation rates (and variations in these between countries) and the extent to which these may be passed down the supply chain.
- Compliance with provisions that require staff to visit sites in particular territories.
- Increased risk of supply chain insolvencies, cost increases, skills and asset shortages (including warehouse space, access to certifying bodies and specialist service providers).

Reducing the Risk of Insolvency in the Supply Chain

The current volatile financial and political landscape, combined with extensive reliance on outsourced supplies of critical systems and lean manufacturing processes, means that managing the risk of suppliers (and any of their suppliers) becoming insolvent has become even more important. Points to consider when seeking to reduce this risk include:

- Dual source wherever possible. Identify and monitor particularly carefully any areas where dual sourcing is not possible and plan how you would deal with the loss of any single-source supplier.
- Identify practical issues that could make it difficult to move to a new supplier (e.g. tooling held at the supplier's premises, certifications tied to a particular production line, reliance on proprietary supplier intellectual property) and put in place contractual protections or contingencies to deal with these.
- Ensure that exit plans have all been agreed and tested well before any potential contract termination event occurs.
- Ensure contracts are signed with the group company against whom financial due diligence has been performed and seek parent company guarantees where appropriate.
- Monitor and audit the supplier's financial health throughout the life of the contract. Include rights to obtain necessary information/access from the supplier, as well as obligations on the supplier to do the same with their suppliers and to report to you (and check that they do this). Be vigilant for any early warning signs, such as late or missed deliveries or requests for money on account (where that is not usual practice).
- Consider including rights to terminate (to the extent legally permissible) and/or increased monitoring for material adverse change in the supplier's finances.
- Consider the use of escrow for key software programmes and risk assess any hosted or cloud-based solutions where escrow may not provide effective protection.
- Ensure that the insolvency provisions in contracts are up to date, appropriate for the jurisdiction and take effect early enough in the insolvency process.
- Review the contract, be aware of any retention of title provisions and assess their likely effectiveness.



Mitigating the Impact of Global Trade Disputes

Trade tensions between global superpowers, notably the ongoing tensions between the US and China, as well as the impact of sanctions on Russia, have the potential to disrupt supply chains globally. Different companies will be affected by the imposition of/increases in tariffs, blacklisting of companies and other trade restrictions in different ways, but it is possible to take steps to mitigate risks, including:

- Mapping the whole of the supply chain to identify high-risk areas and put in place measures to address any identified risks and develop contingency plans for worst-case scenarios (including dual/multi-sourcing).
- Actively monitoring potential future trade policy developments in key territories. The last few years have seen tariff threats between trade blocks, including on steel and aluminium. Proactive monitoring enables you to:
 - Lobby for changes before the scope of tariffs has been determined, either directly or through industry bodies
 - Assess likely consequences for the supply chain and plan accordingly, including amending long-term contracts and making alternative sourcing arrangements, where appropriate
- Identify any levels of the supply chain that may suffer from trade blacklists and plan how each element could be removed in short order if required. In recent times, the US has added dozens of companies to its trade blacklist, including many Chinese chipmakers, Huawei, and Israeli NSO Group whose Pegasus spyware made headlines in 2021. Accordingly, businesses need to have a clear understanding of the sources of all components and plans to address their loss where appropriate.
- Reviewing existing agreements to assess risks and scope for passing these down the supply chain or terminating arrangements that are/become uneconomical or unlawful.
- Identifying and applying for available exemptions. For example, by the end of 2018, the US had granted almost 1,000 waivers from tariffs on Chinese goods. More recently, China has extended existing tariff exemptions from on a list of 81 US products ranging from electric vehicle batteries to timber to shrimp.
- Looking for opportunities that may be presented by trade being diverted to third countries as a result of tariff impositions (while remembering that these opportunities may be temporary). For example, it has been estimated that the EU will be able to attract up to US\$90 billion of trade related to value chains as a result of US-China tariffs.



Ensure Compliance With Data Protection Laws

The introduction of the General Data Protection Regulation (GDPR) brought new obligations for businesses, with significant fines for non-compliance being levied (e.g. Amazon- €746 million, H&M- €35 million). It has been followed by the California Consumer Privacy Act (CCPA), China's Personal Information Protection Law, the Brazilian Data Protection Law and the likelihood is that more countries will follow suit. With this in mind, in relation to the supply chain, companies should (if they have not already done so):

- Identify key territories in which the company's group is obliged to comply with local data protection laws, monitor changing requirements in those territories and ensure that compliance programmes take account of differing approaches between these key territories, in particular any data localisation requirements (e.g. in Russia and China).
- Review existing records of processing to ensure there is a clear understanding of what data is processed by the supply chain on the group's behalf, where it is processed and the procedures in place to ensure compliant processing by the supply chain.
- Reassess whether suppliers act as controllers or processors of company group data and update contracts as necessary to address this and to ensure all contracts include mandatory data protection clauses.
- Ensure that suppliers with access to company group data are regularly audited and monitored.
- Continue to monitor the effect of cases (notably the Schrems II decision on data transfers to the US) and enforcement action, and be ready to make changes to data hosting and transfer processes with suppliers and customers if required.
- Maintain and test breach response plans, to include dealing with breaches by suppliers, and ensure that supplier agreements contain appropriate breach notification and support commitments.

Consider the Impact of Ransomware and Other IT Security Issues

Internal IT security has been a key risk area for businesses for some considerable time. However, we are now seeing an increased focus on the risks posed as a result of attacks on suppliers leading to loss of or interruption to critical supplies. Accordingly, in addition to addressing security of their own systems and of systems that connect to/interact with, parties should consider:

- Enhanced due diligence on IT security, disaster recovery and business continuity measures taken by critical suppliers.
- Including IT security, disaster recovery and business continuity commitments in contracts with all major suppliers and not just those who are providing IT services.



Compliance With Anticorruption and Anti-bribery Laws

Anticorruption and anti-bribery laws gained heightened publicity following new legislation extending potential liability up and down the supply chain. Parties should:

- Establish, implement and enforce appropriate anti-bribery and anticorruption policies throughout their organisations and ensure that their contracts flow these requirements up and down the supply chain.
- Identify key risk areas (both in terms of geography and business function) and provide increased training, monitoring and audits for them.
- Draft and use appropriate anti-bribery/anticorruption provisions for contracts that provide a reasonable level of protection, but that procurement/marketing teams are realistically likely to be able to negotiate and police.
- Consider implementing whistleblowing policies across the supply chain, but take care to respect local restrictions (e.g. in France). Be aware of the EU Whistleblowing Directive 2021, which is likely to affect many EU-based businesses.
- Stay alive to advancements or changes in relevant anticorruption and anti-bribery laws, particularly failure to prevent tax avoidance and failure to prevent bribery. Where appropriate, seek external advice on these advancements, as violation could lead to significant reputational and financial damage.

Environmental, Social and Governance

Environmental, Social and Governance (ESG) issues have come to the fore in recent months. Media and social activists are increasingly adept at identifying environmental and ethical issues arising within companies' supply chains and then tracing these back to the source.

We are also seeing more and more ESG-centred legislation targeted both at companies and their supply chains across Europe. This is only likely to increase, particularly following the conclusion of COP26. Legal teams can help support businesses' compliance efforts by:

- Designing ESG policies so that they have a particular focus on ESG issues most relevant to a businesses' industry or sector.
- Updating ESG policies regularly so they extend to cover key legislative changes promptly, and take account of policy and legislative changes that are on the horizon where appropriate.
- Help businesses stay on top of advances in the environmental law and policy (waste, water, air pollution, net zero targets, etc.) of countries in which they operate and possible implications.
- Incorporating into supply agreements a commitment from suppliers to comply with (and ensure that their own key suppliers comply with) the business' ESG policies and/or targets, or equivalent policies or targets approved by the business. It may also be prudent to include obligations to comply with (and provide the business with evidence to demonstrate compliance with) specific legislative requirements.
- Including ESG audit and reporting requirements in contracts and ensuring that these are exercised by the business and that the business has the right, if necessary, to terminate the contract for non-compliance (particularly where there has been some reputational damage).
- Checking that the business maintains adequate records to enable it to demonstrate compliance and the steps that it has taken to seek to achieve this.
- Utilising the data gathered internally and within a business' supply chain on ESG to inform future goal-setting.
- Ensuring that ESG commitments made by the business are not overly ambitious. Consumer and shareholder groups have already started to investigate the possibility of pursuing companies for failure to comply with published ESG statements.

Ensuring Product Quality and Avoiding Expensive Product Recalls

Consumer protection and product safety legislation are becoming increasingly prescriptive. Suppliers must not only ensure their products are safe, but also provide certificates of compliance with a plethora of different industry standards. Failure by the supplier or its supply chain to do this can lead to expensive and very public product recalls. Supply contracts will generally include standard product quality and compliance warranties. However, consideration should also be given to:

- Agreeing a product recall process with key members of the supply chain in advance. This reduces the supply chain's exposure to the negative impact of a recall (i.e. the knock-on effects either up or down the supply chain) and ensures that there is an agreed plan of action when a recall occurs.
- Including express recall provisions in supplier contracts that give a business the ability to initiate recalls (and recover costs of this where appropriate) where requested by regulators or the business reasonably considers appropriate, to avoid arguments about whether a recall is/is not legally required.
- Ensuring traceability of individual batches of products/components to assist in root cause analysis and minimise the scope of any recall.
- Clearly identifying territory-specific certification and other requirements and allocating responsibility for compliance with this appropriately. While it may be tempting to seek to pass responsibility for this back up the supply chain, if the supplier is not familiar with requirements in the relevant consumer market, this may cause more problems than it solves.
- Including contractual rights to reject entire shipments/batches if a particular percentage of samples prove to be faulty. It is not uncommon to see contracts that only allow for return of products that are actually faulty, which would technically require testing of every single item before it is sent back.



Considerations for Supply Chain Disputes

Despite best intentions (and well-worded contracts and contractual protections), some supply chain disputes cannot be avoided. Supply chain partners may find themselves in a formal legal dispute due to a supply chain failure. For example, previously harmonious relationships may have broken down, with positions having become entrenched; one or both supply chain partners may be behaving unreasonably; product supplies may be late and/or not of sufficient quality, quantity, correspond to specification, etc.; a project may suffer unexpected losses, or margins may suddenly narrow and contracts become unprofitable/unworkable; and/or as a result of management and other stakeholders demanding that action be taken. Resultant litigation can be time consuming, inherently uncertain (in terms of outcome) and costly.

When disputes unavoidably arise, then a business/its advisers will (among other things) need to:

- Establish the applicable law.
- Consider geographic locations and jurisdictional issues, including enforcement.
- Confirm the contractually applicable dispute resolution mechanism (e.g. litigation, arbitration or other).
- Assess whether the appropriate contractual procedures have been followed, including any pre-dispute/pre-action requirements.
- Ascertain whether the contract provides for a particular or exclusive remedy.
- Consider whether you have sufficient resources internally to deal with the dispute.
- Consider whether external lawyers and experts need to be engaged.
- Undertake prompt documentary and information gathering and, thereafter, manage and collate documents. This should include suspending any routine document destruction policies, and ensuring both paper and electronic records are investigated and preserved.
- Assess the operative terms and conditions- is there a battle of the forms argument?
- Investigate whether any other parties are potentially involved/culpable.
- Assess whether there are helpful/unhelpful warranties and indemnities, any caps on liability, the nature of the losses (direct or indirect) and the extent to which loss and damage have been excluded (if at all).
- Understand who your key people/witnesses of fact are and what they are saying. This may extend to interviewing and drafting witness statements- preferably by lawyers and preferably before memories dim.
- Carefully and accurately assess the merits of the case and what your overall objectives are for the dispute/litigation- what are your best, most likely and worst-case outcomes?
- Ascertain your optimum resolution strategy.
- Establish the likely overall cost of the litigation.
- Make a prompt assessment of whether any time limits apply that could bar a claim (and, indeed, if the claim is already time barred).
- Investigate whether there is insurance cover. If there is, then a timely notification to insurers will likely need to be made.
- Understand whether the opposing party is/parties are likely to be good for the money.
- Assess whether the nature of the dispute will also expose the business to reputational damage.
- Ensure communications with your lawyers/third parties remain privileged (as far as possible).
- Take stock of whether it is a business-critical dispute and/or whether an emergency remedy needs to be invoked (e.g. an injunction).
- Assess the scope for an early resolution before trial (e.g. negotiation), including the appropriate use of settlement offers.
- Consider any enforceability issues should you obtain a judgment against the opposing party, particularly if that party is located in another country.



Changes to Insolvency and Restructuring Laws

Italy made a number of changes to its insolvency and related laws as a result of COVID-19; some of these have now expired while others still apply.

Measures Concerning Arrangements With Creditors and Restructuring Agreements	<p>The implementation of procedures aimed at obtaining an agreement among creditors or agreements on debt restructuring (<i>concordati preventivi and accordi di ristrutturazione omologati</i>) scheduled between 23 February 2020 and 31 December 2021 has been given a six-month extension.</p> <p>For ongoing proceedings aimed at obtaining an agreement among creditors or an agreement on debt restructuring, in which the court approval hearing has not yet been held, the company may request the granting of a period of up to 90 days to file a new plan and a new proposal of arrangement or a different restructuring agreement, in addition to the normal extension periods granted by the existing insolvency laws. For these proceedings, until 31 December 2022, debtors that have requested admission to an arrangement with creditors without a defined plan, or agreements on debt restructuring, can withdraw their request provided that they have filed a debt recovery plan with the Companies Register, subject to court approval. The withdrawal request can be submitted within a deadline set by the court, ranging from 60 to 120 days from the beginning of the proceedings and extendable by 60 days.</p>
New Insolvency Code and Insolvency Directive	<p>On 15 July 2022, the new Insolvency Code entered into force after its publication in the Official Gazette of the Italian State.</p> <p>Please note that the new Insolvency Code already transposes the provisions of the EU Directive 2019/1023 (the so-called Insolvency Directive), concerning preventive restructuring frameworks, exoneration and disqualifications, and measures to increase the effectiveness of restructuring, insolvency and exoneration proceedings.</p>
Register of persons entrusted by the judicial authority	<p>On 21 June 2022, the Decree of the Ministry of Justice No. 75 of 3 March 2022, on “Regulations on the functioning of the register of persons entrusted by the judicial authority with the functions of management and control in the procedures referred to in Article 356 of Legislative Decree No. 14 of 12 January 2019, on the Insolvency Code” was published in the Official Gazette of the Italian State.</p> <p>This regulation provides the opportunity of registration by individuals who provide evidence that they meet the professional and honorability requirements set forth in Article 356, paragraphs 2 and 3, of the Insolvency Code, who are intended to perform, on behalf of the Court, the functions of receiver, judicial commissioner or liquidator, in the procedures set forth in the Insolvency Code.</p>



Our Team



Ian Tully
Partner, Milan
T +39 02 12 7274 2007
E ian.tully@squirepb.com



Fabrizio Vismara
Partner, Milan
T +39 02 7274 2033
E fabrizio.vismara@squirepb.com



Daniela Sabelli
Partner, Milan
T +39 0272742031
E daniela.sabelli@squirepb.com

Global HR Audit Tool

For any business, ensuring that the correct paperwork and human resource (HR) policies are in place is important, pandemic or no pandemic. [Global HR Audit](#) is our new, free, simple-to-use, innovative tool that helps employers determine the HR documents and policies they should have in 29 countries around the world, as well as any they should consider having on a global basis. It enables businesses to pinpoint quickly the documents and policies they need in each jurisdiction of operation, as well as those they may wish to consider if they are aiming to go beyond just compliance. The list of mandatory, strongly recommended and “nice to have” HR documents and policies contains further links to [Global Edge](#), where further information on the topics can be found.

Blogs

For the latest updates on legal issues and business risk, subscribe to [Restructuring GlobalView](#).

For the latest unique global insight into practical and legal HR issues relevant to employers everywhere, subscribe to our [Employment Law Worldview](#)

For the latest discussion on legal issues that arise in the supply chain, both those that cut across industries and those that are industry specific, subscribe to [Global Supply Chain Law](#)

