

5 Legal Tips to Cure the Supply Chain Blues

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It is the Christmas season which in e-commerce is the time that can make or break a business. There is plenty of interested customers.

There are children that are looking for their toys under the Christmas trees, husbands and wives looking for their new kitchen contraption, employee gift sharing, the yarn basket for the neighbor gift. The economy is relatively sound. So shouldn't this be a really good time for an e-commerce entrepreneur? Not if they cannot get goods to sell.

Why is There a Supply Chain Issue?

The supply chain is complex, but here is my explanation:

For goods to get to consumers, many things need to align. First, the entrepreneur needs to have a reason to sell the goods, which generally means that they can either get the raw materials and create goods (or buy finished goods and brand them), build in cost for selling and marketing those goods, and still make a profit.

While nothing is easy, even smaller entrepreneurs were able to do that for years. In part, this was because countries with cheap labor (e.g. China) would manufacture goods at a low price point and then ship them efficiently to North America and Europe.

I have been practicing e-commerce law for 8 years. Since then, the US has encountered trade wars with China, COVID factory closures, inflationary pressures, port closures, growth of alternative to US markets (like Latin America), shipping lane clogs, stress on antiquated American ports, hikes in gasoline pricing, deepening political fissures, and an unbelievably tight hiring market.

Small and medium-sized e-commerce businesses generally do not have the market or political power to control the supply chain like large conglomerates do. For example, Amazon is buying up warehoused Chinese cargo planes to ship their goods and may be tightening their margins as they can afford short-term losses. In fact, the supply chain issue puts these large conglomerates in an excellent position to squeeze out competitors.

An e-commerce entrepreneur's #1 goal is to sell products and make a profit. Supply chain issues make that goal really hard.

Tip #1 Acknowledge, Hang in and Adjust

Of course, no e-commerce entrepreneur should ignore severe issues like the rising costs of raw materials and shortages of packaging materials and ingredients. Therefore, it would be very wise to adjust pricing models and address customer expectations accordingly.

However, on the flip side, e-commerce has evolved to the point of no turning back. Consumers are used to getting goods online, much like we were used to going to the indoor shopping mall department store (and then hanging out at the video game arcade) when I was growing up.

But like any systemic shift, history establishes that at some point, the new paradigm is going to face issues based on factors outside any entrepreneur's control. Now is that time in e-commerce. It is the time to adjust your business to adjust and excel based on these factors. Those who can not only weather storms but improve their business models during them will be richly rewarded.

There are some concrete measures e-commerce entrepreneurs can take to address supply chain issues. Freaking out is not one of them.

Tip #2 Terms of Use/Terms of Service Which Mitigate Risk

So many e-commerce sellers rely on generic Terms of Use/Terms of Service they pulled off the web. Courts enforce Terms of Use/Terms of Service as legally binding contracts strictly construed against to the e-commerce seller. The law is relatively clear that e-commerce sellers have superior bargaining power because they wrote/posted the Terms of Use/Terms of Service, and the consumer merely acquiesced.

Most generic Terms of Use/Terms of Service were posted long before the supply chain issue occurred and thus do not exempt seller liability for supply chain issue such as non-fulfilment due to shipping issues. A good Terms of Use/Terms of Service even limits the maximum liability to the cost of the product being shipped and controls the jurisdiction of any dispute.

As all of this relates to the supply chain, not only is it a good idea to acknowledge that there may be a supply chain issue this Christmas, but a legal must to set out any potential delays and limit your liability relating to those issues. Your current Terms of Use/Terms of Service may be generally ok and just require edits. Regardless, it is essential to review your Terms of Use/Terms of Service to make sure they address and indemnify you related to issues of supply chain.

Tip #3 Improve Your Supply Chain Contracts/Relationships

Now is an excellent time to improve your supply chain contractual relationships.

The slowdown in international shipping means that Asian suppliers are hurting just as much or more than US e-commerce entrepreneurs.

Many times there are no written terms or contract and/or the terms are written to be incoherent in e.g. both under Chinese and American law. Clarifying the terms and negotiating them in favor of the e-entrepreneur with the help of our Chinese legal counterparts was not difficult nor expensive.

Some things to ask yourself/consider/speak with counsel:

- 1. Do you have written terms with the supplier?*
- 2. Do you understand them?*
- 3. Can you get out of the contract if there is a supply chain issue?*
- 4. Is there a minimum/maximum order requirement, and is it reasonable in this economy?*
- 5. Are you assuming too much risk?*
- 6. Do circumstances warrant a different arrangement or even supplier?*

Tip #4 Insurance

According to supplychainbrain.com, most standard insurance policies, such as a business owners policy, do not cover common supply chain issues, including supply chain disruption.

However, some policies include “contingent business interruption” which generally cover when a manufacturer the e-commerce seller relies on a supply chain issue severe enough to affect their shipping. There are also specialized supply chain riders that DO cover, e.g., labor issues, production issues, and disruption to nautical traffic flow.

The insurance issue is that it can either be too expensive or too limiting to meet an entrepreneurial business’ needs. If you are thinking about insurance, be sure to work with an established broker and do a risk analysis. For example, could you mitigate the risk through a different supplier, a more robust software platform, a different vendor, and or a different vending company? Is the cost of any of those solutions cheaper than such specialized and potentially costly insurance? An informed and sophisticated insurance broker should be able to help. Next month, our blog will feature Tom Burns, an expert in e-commerce insurance, who will explain more.

Tip #5 Good Time to Get Acquired?

As my friend and noted e-commerce acquisition expert Joe Valley puts it in his new book, *The Exitpreneurs Playbook*, there is a game plan for e-commerce entrepreneurs: bootstrap, grow, sell, repeat.

If your company's historical financials are solid, this may be an excellent time to package your company for sale. There is a lot of e-commerce rollup companies (acquisition companies buying a number of smaller companies to operate at scale-usually in a certain aspect of the market like health, toys, etc. that have money and are looking for targets.

These are uncertain times, and if you feel the supply chain may negatively affect your P&L (which generally then affects your M&A marketability, the time to sell may be now for you.

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About the Author

After years of corporate counsel experience with a Fortune 100 company, Steven Weigler built and managed a startup where he was able to create and institute a protective intellectual property strategy, commercialize the resulting products and protect the intellectual property, build and manage a sales, marketing and operations team under a "lean startup" budget, and secure both angel and A round financing, and finally negotiated an exit.

Steven's combination of legal, entrepreneurial, governmental and corporate experience gives him a unique, focused perspective on what entrepreneurs who are starting up or emerging their businesses need but rarely have: a) someone who zealously protects their interest and b) someone who has the empathy to understand each entrepreneur's vision and motivation as well as their business plan. Steven has a passion for e-commerce and advises many clients on all aspects of the industry.

About EmERGEcounsel

EmERGEcounsel has experience in all areas of e-commerce, from inception/branding to international distribution law and handling supply chain issues.