



## Restructuring

*“If you’re going through hell keep going”*

As Churchill famously said, in times of crisis, you have no option but to carry on. The current global Covid-19 pandemic is unprecedented with the likely impact at a macro and granular level, and the consequent economic fallout, being incredibly difficult to evaluate. The question that businesses and their managers and directors face in such uncharted and fast-moving waters, especially those operating globally, is how to ensure that they are protecting their people, communities and wider stakeholders.

In time-pressured situations, it is important to rapidly understand the legal environment in order to chart the best course of action. While legal regimes vary across the world and there is no magic formula to deal with crisis, there are certain areas of focus that are key to identifying the right path forward. Perhaps most critical is to confront the situation head on and to partner with appropriate colleagues and advisers. With lawyers operating in jurisdictions across the Americas, Asia and Europe, Mayer Brown’s global restructuring practice is well-positioned to help clients address the ever developing economic situation as the world grapples with the fallout from the Covid-19 pandemic.

Certain sectors and geographies are going to be hit harder by the Covid-19 pandemic than others. For example, companies in the oil and gas sector are likely to be significantly affected by a global drop in demand caused by the Covid-19 pandemic (as well as other adverse market forces) with particularly acute exposure for upstream exploration & production companies as well as oil field services and mid-stream companies whose business lines are sensitive to commodity prices. While some short-term commodity price risk may be hedged, given the uncertain timeline for the current crisis, the overall impact on the industry is likely to be substantial.

The effects on airline, cruise line, tourism and hospitality businesses – some of the businesses to first suffer the effects of the Covid-19 outbreak – will likely be even more immediate and increasingly

severe as travel bans and quarantines are implemented across an increasing number of jurisdictions. For brick-and-mortar retailers, an industry in the midst of a period of transition and restructuring, the Covid-19 pandemic will only accelerate market disruptions.

For those businesses connected to these and other “ground-zero” industries the effects will reverberate for some time to come. In fact, all industries across the world are likely to feel some impact as a result of the Covid-19 pandemic and businesses need to look closely at their own set of circumstances.

Managers of those businesses that may be impacted to any meaningful degree by the Covid-19 pandemic – as well as suppliers, vendors, lenders and other stakeholders of those businesses – will need to take many if not all of the following steps and do so on a limited time frame and possibly with scarce resources:

- Re-examine strategies and forecasts.
- Review supply chains and other logistics and contingency plan for possible supply chain and logistical disruptions (e.g., staffing and logistics in light of the potential unavailability of employees, vendors and others).
- Consider steps that should be taken to preserve contractual rights, and fulfil contractual obligations, that are tied to disruptions caused by COVID-19 including provisions relating to items such as defaults, materially adverse events<sup>[1]</sup> and force majeure clauses.
- Consider ways to improve fixed cost bases, explore liquidity management options, and run stress tests against existing base cases and consider the impact on existing financing or financing alternatives.

Inevitably decisions will need to be made with imperfect information and lack of certainty of outcome. To mitigate against this, thought should be given to appropriate processes to access the best available information, as well as clear protocols on decision-making and responsibilities. Maintaining a record of how and why decisions were made is incredibly important to provide contemporaneous records.

From an individual director’s perspective, these high pressure times are when boards should be most cognizant of their duties and the value in obtaining the advice of trusted legal counsel. In global organizations, the director’s duties may change company-to-company and country-to-country. For example, for an English company (and indeed, broadly, companies in jurisdictions subject to English law based regimes globally, such as Hong Kong and Singapore) there is a shift from promoting its success for the benefit of shareholders, to acting in the best interests of creditors in the “twilight zone” before insolvency and a director may be personally liable if they continue to trade on the run up to formal insolvency without taking every step to minimise loss to creditors. In the US and Brazil, officers owe a duty of care (to act in a reasonable and prudent manner) and loyalty (not to act in their self-interest) to the entity itself rather than specific stakeholders, which more directly implicates the interests of creditors when, depending on the relevant U.S. jurisdiction, the company has become insolvent or enters the “zone of insolvency”. By contrast in Germany directors can be liable under both civil and criminal law if they fail to file for formal insolvency proceedings within 21 days of illiquidity or over-indebtedness.

In times of distress or crisis, it is necessary to balance legal certainty against commercial reality. The

legal environment and contractual matrix may say one thing, but the ultimate outcome during a state of flux may in fact be based more on trust, goodwill and stakeholder management. Success in restructuring, as in crisis management, requires working with stakeholders to jointly solve problems to preserve viable businesses – alignment of stakeholders requires transparency and credibility.

[1] A recent Mayer Brown legal update discussing the applicability of material adverse change (MAC) clauses in the context of public health crises such as COVID-19 is available [here](#).