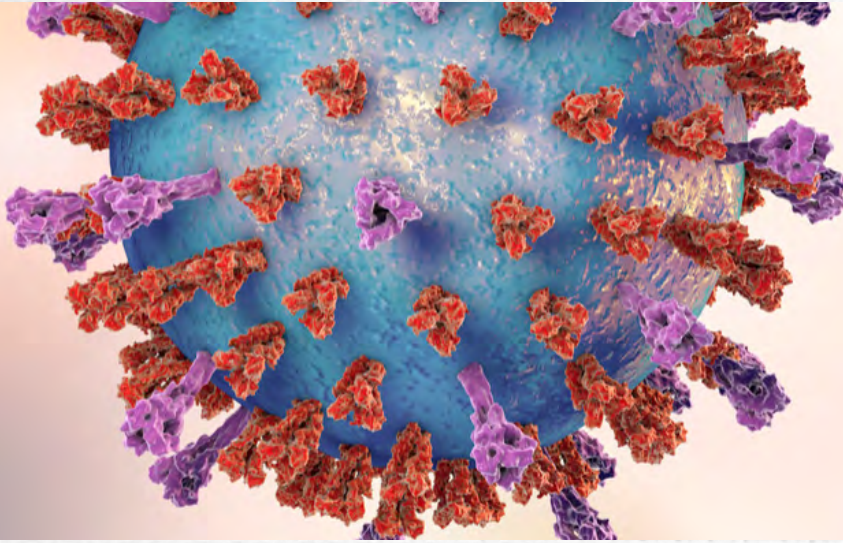


NEWSLETTER

COVID-19: LEGAL ISSUES



INTRODUCTION

As Nigeria joins the rest of the world in grappling with the COVID-19 pandemic (“the pandemic”), the Federal Government has declared a curfew in the Federal Capital Territory and two other major States as well as restricted inter state travel. Prior to this, several organisations had commenced remote working as precautionary measures against the spread of the virus. The statutory, regulatory and contractual obligations of many businesses will certainly be impacted by the pandemic. Depending on the sector where a business operates, there are a number of statutory obligations to be performed. Most of these statutory obligations are time bound and may attract penalties in the event of a default. For contractual obligations, the wording of a force majeure clause may offer respite to parties who can demonstrate that the pandemic has affected the performance of their contractual obligations.

The pending Economic Stimulus Bill 2020 proposes to provide tax relief, suspension of import duty on selected medical goods and deferral of residential mortgage obligations. This measure is expected to protect jobs and alleviate the financial burden on citizens in response to the economic downturn occasioned by the outbreak of the pandemic. While the Economic Stimulus Bill has not been passed by the Senate, the President of the Federal Republic of Nigeria has given some directives, including a three-month payment moratorium on government funded loans and negotiation of concessions for on-lending facilities from international and multilateral development partners. However, these directives do not provide answers to the concerns of many businesses affected by the pandemic. In this newsletter, we examine some of the issues businesses will be confronted with and recommend legal and business strategies that will mitigate the impact of the pandemic.

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BANKING & FINANCE

Lenders and borrowers will need to consider their rights and obligations under their facility documentation to determine how these will be impacted by the pandemic.

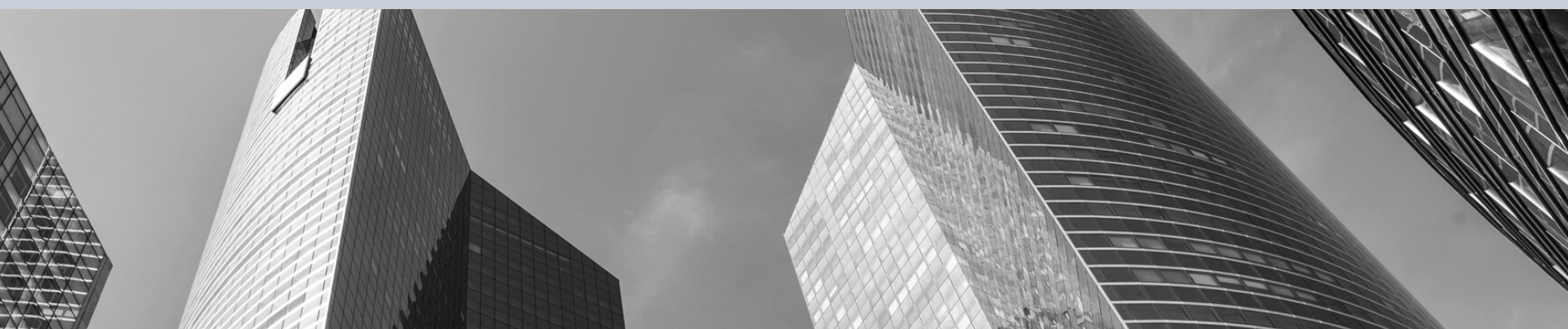
Some issues to be considered include:

1. Whether any information undertaking under their facility agreement is triggered, especially in relation to the business and operations of the borrower. For example, an information undertaking to notify a lender where the profit margin of the borrower falls below a stipulated threshold may be triggered where the pandemic impacts the revenue of the borrower. It is important to seek legal advice and to ensure that such notifications are given within the notice period stipulated by the facility agreement to avoid a breach of contract.



2. The pandemic will impact some borrowers' ability to meet their obligations under any applicable facility agreement including but not limited to their repayment obligations and financial covenants. It is advisable for such borrowers to seek a renegotiation of terms before an event of default occurs. The Central Bank of Nigeria (CBN) has issued policies in response to the pandemic and has granted deposit money banks leave to consider temporary and time-limited restructuring of the tenor and loan terms for businesses most affected by the pandemic.

Some restructuring options include obtaining a moratorium on interest payment obligations or relaxation of certain financial covenants. As the Naira's value relative to the US dollar is being adjusted, Nigerian borrowers earning mostly in Naira but with FX loans should be particularly conscious about and seek legal advice on assessing their ability to meet their obligations and any resultant effects.



DISPUTE RESOLUTION

(LITIGATION/ARBITRATION)

In light of the pandemic, it is anticipated that disputes are likely to arise out of:

1. Interpretation of contracts and force majeure clauses

The key issue will be whether disruptions to performance of contractual provisions as a result of the pandemic can be classified as force majeure events. If there is no force majeure provision in a contract, the issue will be whether parties can rely on the common law principle of frustration to avoid liability for breach of contract.



2. Renegotiation of contractual terms & termination of contracts

The key issues will be the extent to which parties (whose contractual obligations have been affected by the pandemic) may seek to renegotiate contractual terms. Additionally, the extent to which parties will be willing to consent to a “no faults” termination of the contract where performance of the contract has been disrupted.

It is therefore imperative that parties seek legal advice on the extent of their liabilities for such contractual obligations and ways to mitigate such liabilities.

With the Federal Government’s declaration of curfew and general lock down, other issues to be considered by parties with (potential) disputes include:

1. Filing claims within statutory timeframes

Limitation Laws of various States of the Federation provide strict timelines for initiating certain actions, e.g. breach of contract and torts. Actions against public officers are also required to be initiated within three months of the accrual of the cause of action.



DISPUTE RESOLUTION (LITIGATION/ARBITRATION)CONT.D

Failure to initiate these actions within the stipulated timeframe would extinguish a cause of action by effluxion of time. The question then is, where a party's right of action is to lapse within the period of the pandemic, and courts are not open to the public, what happens to the right of the aggrieved person. Although these are unprecedented times, there have been certain interpretations by the courts as to how limitation laws should be interpreted in events beyond the contemplation of an aggrieved party. Therefore, parties may be able to find some recourse. In instances where time will lapse during the period of lockdown, it is advised that an aggrieved party seeks legal advice on creative ways to navigate and/or extend the limitation timeframe.

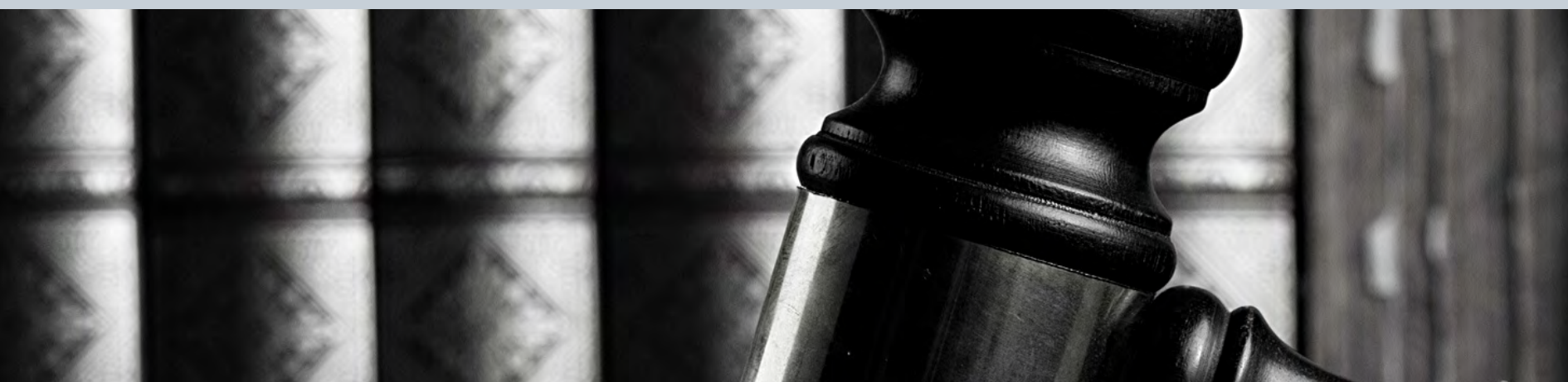


2. Non-compliance with procedural timelines

Rules of court provide for certain procedural timelines and penalties for non-compliance. The issue would be whether parties should be penalized for being unable to meet procedural timelines in view of the curfew/lockdown. In the absence of any directive from the judiciary, parties would be required to seek extensions of time and comply with the penalties.

For alternative dispute resolution mechanisms such as arbitration, parties may agree to proceed despite the lock down. Parties may choose to proceed by a documents-only hearing or use technological means like video conferencing to continue proceedings.

However, there may be delay in the proceedings where court intervention is required for reliefs in the aid of arbitration.



ENERGY

In light of the pandemic, curfew and recent crude oil price crash, it may be necessary to re-evaluate pricing and valuation mechanisms, particularly for the acquisition of interests in OPLs and OMLs, which were benchmarked on previous crude oil price. Other issues which should be considered in the sector include:

1. Disruptions in transaction timelines for projects concerning acquisitions and divestments of oil and gas assets. Parties should consider and seek legal advice on the most effective manner to mitigate the effects of these disruptions.
2. With respect to off-grid generation, the restrictions on importation caused by border closures may render contractors who are required to import renewable energy generating equipment for off-grid projects unable to do so.



The implication is that this may trigger a force majeure event, causing delay or termination of contracts. However, the ability to rely on force majeure will depend on negotiations by parties, and how well the clause is drafted.

3. Production cuts and reduced production expenditures will negatively impact upstream projects for oil producing companies. It is expected that oil and gas companies will be seeking ways to effectively mitigate the economic implications. It is therefore advisable that such oil and gas companies seek legal advice with respect to anticipated amendments of contract terms and delivery expectations.



INFRASTRUCTURE

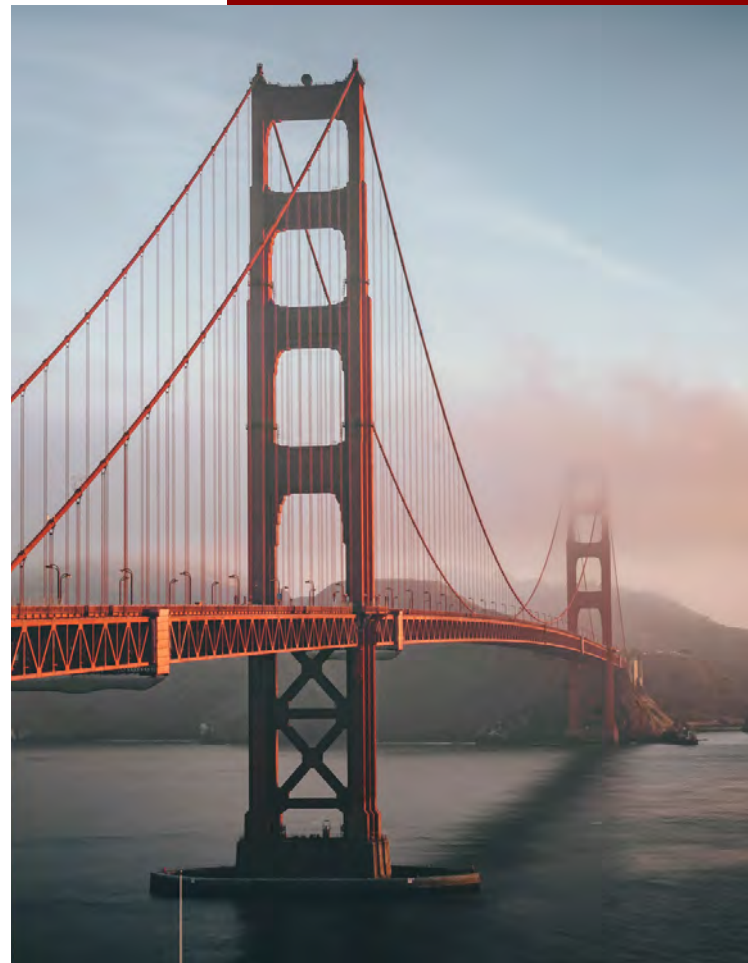
To manage the impact of the pandemic on infrastructure projects, relevant parties need to consider key issues, such as:

1. Managing disruptions to project timelines

Parties need to assess the effect of the lock down, movement restrictions and the associated supply chain disruptions on project milestones and timelines. The outcome of this assessment may prompt early negotiations on contract variations and project term extensions.

2. Excuse of performance/obligation

It is important for parties to assess the effect of potential long-term restrictions on performance obligations and determine whether the pandemic would constitute a force majeure event under the applicable contract. How would the force majeure clause (or principles of frustration, impossibility and impracticability)



work vis-à-vis governing law clauses and contractually agreed dispute resolution mechanisms? Such collaborative analysis may make the force majeure notification and acknowledgement process non-contentious.

3. Financial considerations

How does the pandemic impact on project revenues (such as toll revenues and third-party lease payments where applicable) and the project budget and valuation? Will the parties be able to meet payment obligations (such as remittances to project owners, loan repayments and interest payments)? Is there a need to engage the project financiers on payment term extensions or other concessions? Do the parties need to approach the government for guarantees, or relief provided for under the economic stimulus legislation?

These are all issues which adequate legal advice will deal with while mitigating the risks and the impact of the pandemic on infrastructure projects.



INSOLVENCY

In view of the pandemic, lock down and general economic downturn, many businesses across different sectors would have accrued, deferred or suspended payment obligations to their employees, trade creditors and critical suppliers whose services may be essential to the survival of the affected companies. Creditors may therefore set in motion the machinery for the compulsory liquidation of such debtor companies.

Furthermore, if a company defaults with respect to loan obligations, such default may result in the crystallization of a charge and trigger the enforcement of the security by the lender. Depending on the terms of the loan documentation, the lenders may exercise their rights by selling the securities to repay the loan or appoint a receiver over the affairs of the company.



Confronted with any of the above realities, it is prudent and advisable for affected companies to seek the legal advice of an insolvency professional on the available options it could take to prevent insolvency during these unprecedented times and more importantly as to what extent the doctrines of force majeure and frustration occasioned by the pandemic can be employed as shields to avert insolvency.



INSURANCE

The pandemic has had significant impact on businesses which are expected to fall back on insurance policies to mitigate the resulting losses. The pandemic is likely to generate claims across several lines of business, especially in life and health insurance, travel policies and event cancellation. Some of the key issues to be considered by businesses at this time are:

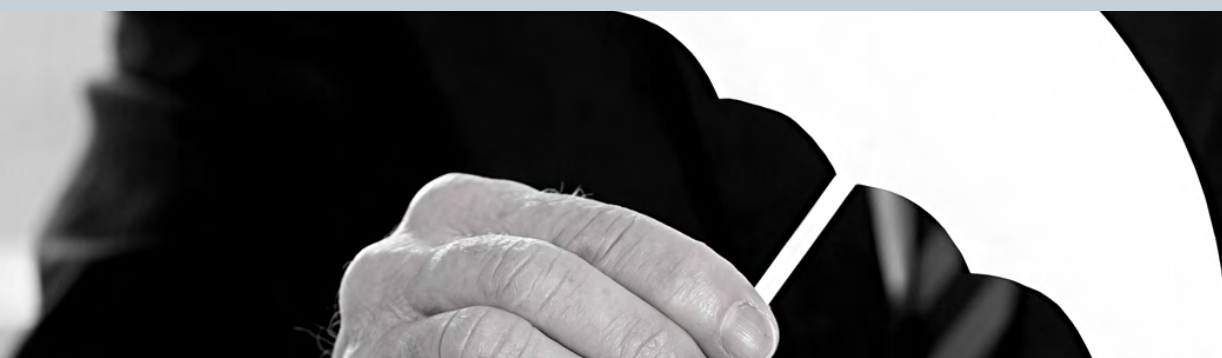
1. Whether the terms of existing policies accommodate losses arising from the pandemic. Businesses are of course advised to obtain professional advice on this, including whether an 'epidemics' cover will be sufficient. It is also important that businesses consider negotiating future insurance contracts with epidemics and pandemics in mind.



2. If the risks coverage of the policies includes epidemics and pandemics, then an insured should be aware of the timeline for making claims and ascertain if there is a prescribed mode of initiating such claims.

While it is expected that an email should suffice, there is the possibility of any other mode being impacted by the current state of affairs, i.e., business suspensions and movement restrictions.

In any event, professional advice should be sought by businesses to determine the scope of their insurance cover, what options are available for claims recovery and the mitigation of any potentially negative impact.

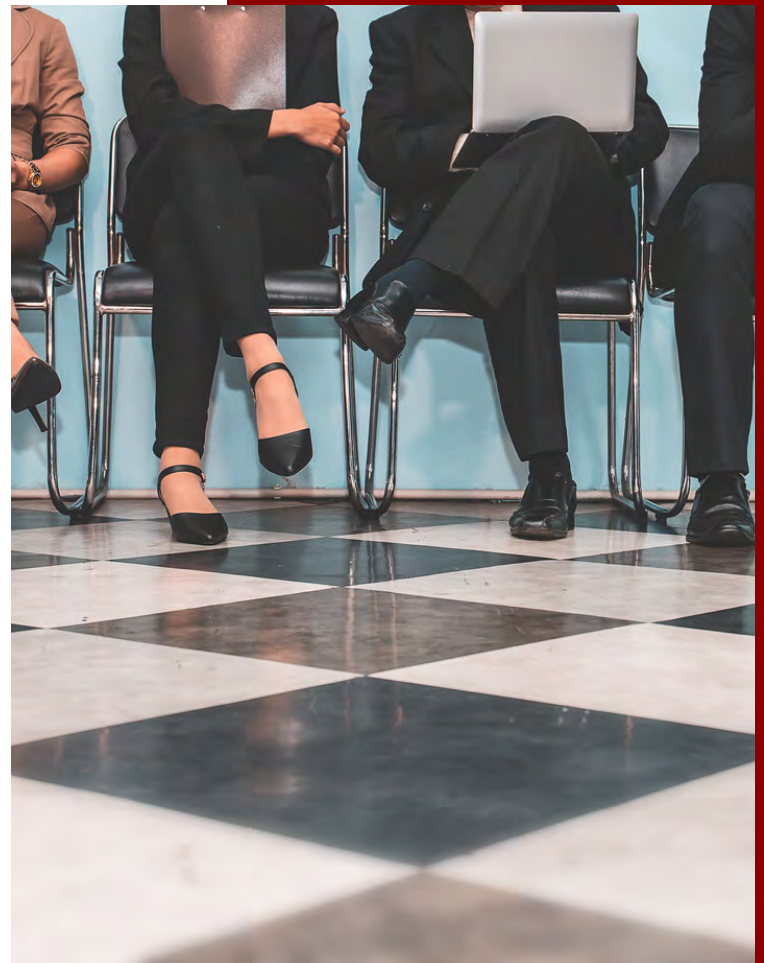


LABOUR & EMPLOYMENT

According to the International Labour Organization (ILO), the outbreak of the pandemic is a major labor market and economic crisis, which could lead to the loss of up to 25 million jobs. The ILO says, "The effects will be far-reaching, pushing millions of people into unemployment, underemployment and working poverty..."

Employers, whose businesses have been negatively impacted, are considering whether to declare redundancy, while also looking into possible alternatives to retain and keep staff. Aside from a declaration of redundancy, some of the key issues being considered in Nigeria by employers include:

1. Whether the pandemic can be interpreted as a force majeure event absolving the employer from its employment obligations or whether the employer



can rely on the doctrine of frustration to avoid such obligations.

2. Compulsory leave and non-payment/reduction of salaries for an extended period despite the provisions of the Nigerian Labour Act.

3. The involvement of the Federal Ministry of Labour & Productivity with respect to negotiations with some classes of employees.

4. Regulations for remote working and the extent of the employer's vicarious liability.

5. Government palliatives for retrenched employees.

6. The likelihood of courts' interpretation of renegotiated employment terms as being unfair clauses and being unenforceable.

In order to mitigate risks and liabilities that may be associated with dealing with these labour & employment issues, it will be necessary to seek legal advice as to the best course of action for an employer in these unprecedented times.



MERGERS & ACQUISITIONS (M & A)

Parties to M&A transactions will need to make necessary adjustments to mitigate the increased risk and uncertainty which the pandemic presents. Some fundamental issues which parties would have to consider and potentially negotiate include:

1. A reassessment of valuations and adjustment of pricing mechanisms. The question to answer here is whether historical financial information accurately reflects a target, particularly considering the impact of disrupted supply chain, lower inventory levels and distorted accounts receivable and payable.

2. For pricing mechanisms, parties now have to decide whether a fixed pricing mechanism or locked box will be more appropriate in the circumstances or whether the parties should now negotiate forms



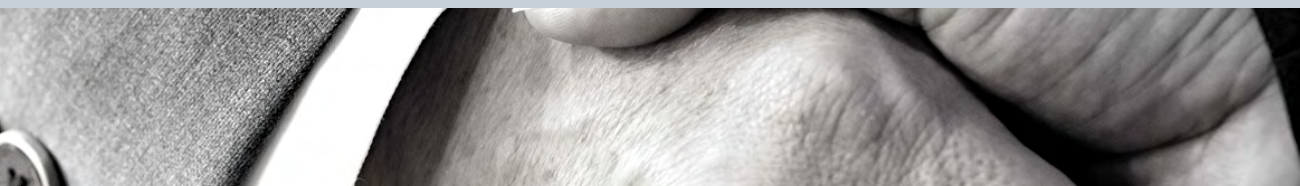
of contingent consideration like earn-outs in case profits are adversely affected during a specified period following completion.

3. Mitigating the potential disruptions to the transaction timetable, including whether extra time will be required to perform due diligence. Other timeline issues will be pre and post-completion regulatory approvals.

4. Adjustments to Material Adverse Change (MAC) provisions in light of the impact of the pandemic on the target. It is expected that sellers may want to draft MAC exceptions with explicit reference to the pandemic. A buyer may on the other hand consider including a 'disproportionately affects' qualification. The effect of this qualification is that a MAC exception favouring a seller will only apply unless the pandemic disproportionately affects the target compared to its industry peers.

5. Management of the target in relation to its response to the pandemic, and what the interim operating covenants in the purchase agreement should contain? It is usual for restrictions to be placed on the activities that the seller can undertake where signing and completion do not occur on the same date. This will usually include a generic obligation to operate the target in the ordinary course of business. The question to answer here is whether this is possible in the circumstance or if the seller would need to negotiate some carve-outs.

In order to navigate these issues or others that may arise in M & A transactions, it will be necessary to seek legal advice on the most favourable renegotiations and terms



TRANSPORTATION

In view of the restrictions on travelling, the global transportation sector has taken a massive hit with the pandemic. CAPA Center for aviation warned that most aviation companies may be bankrupt by May 2020, if the pandemic continues to spread. Airports, shipyards and land borders have closed which translate to loss of revenue to the industry due to stalled ships, grounded airline fleets and closed airports. Considering the pressure the pandemic puts on the transportation industry, who bears the cost of storage fees and demurrage? What happens to statutory payments to the regulators? To remain profitable operators would have to seek legal advice and explore various interventions including tax concessions and bailouts. Other areas to be considered in the transportation sector include:



1. Supply chain disruption

In the short term, manufacturers of aircraft are unable to meet their obligations to manufacture aircraft resulting from the lack of supply of the components for the assembly line, leading to a reduction in productivity and a breach of the terms of their contracts. While in the medium to the long term, the pandemic would lead to a decrease in, and even cancellation of orders for new aircraft. Parties to a contract would therefore need to renegotiate contracts and consider the effect of the pandemic on delivery timelines.

2. Commercial Agreements

There is a need to mitigate the potential disruptions to the terms of lease and rental payments under existing lease agreements with third parties, which may have a domino effect on the obligations of the operators under security agreements. Airlines and shipping companies, therefore, have to seek legal advice in order to pursue creative legal solutions in this circumstance.

Additionally, it is anticipated that there would be consumer claims (e.g. from flight cancellations) and employment related issues.



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