



# **Corporate Survival in the Aftermath of Pandemic**

A Consideration of Liquidity Issues, Revised  
Business Plans and Legal Strategies for Navigating  
Sudden and Unexpected Financial Distress



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# CANADA



## Canada

- Overall attitude seems to be “wait and see”
  - Waivers/forbearance
  - Bridge financing
  - Government subsidiaries/program
- Exploration of Long Term Refinancing Options
  - Permitted indebtedness/junior financing
  - “trap door” possibilities (J. Crew/Neiman Marcus)
- Where there have been filings
  - file and “mothball”
  - Limited ability to advance sale or SISP process

# Longer Term Trends



## Canada

- Seems self evident that there will ultimately be a wave of insolvency filings and a need for informal or formal workouts and the survey broadly reflected this consensus
- Defaults will increase as financial covenants begin to capture Q1, and especially Q2 (compare: Australia's six month hibernation period/moratorium on new filings)
- Massive cash hole to fill for companies
  - Worst: Travel/hospitality/live entertainment – near 100% reduction in receipts for 3 months to ???
  - Pretty Bad: Retail (excl. grocery and other staples)
  - Recent Statistics Canada survey
    - 1/3 of respondents – 40%+ drop in revenue
    - 1/5 of responds - 20% to 40% drop

# Longer Term Trends (cont'd)



## Canada

- Refinancing Options
  - Existing equity/lenders
    - Potential for controversy if valuation disputes
  - New investor
    - \$1.5 trillion of “dry power” in private equity
- Restructuring Trends
  - Consensual/out of court where possible
  - If a court process required:
    - Continued focus on pre-packs
    - Corporate (i.e. non “insolvent”) arrangements



# Germany

# Modification of Insolvency Laws



## Germany

- Objective: Flattening the Curve
- Core Changes: Obligation to file for insolvency suspended
- Further Changes
  - Payment prohibitions are relaxed
  - New credits are protected
  - Insolvency-Avoidance also otherwise largely excluded
  - Landlords may not terminate building and real estate lease agreements for cause if the tenant does not pay the rent for the months of April, May and June
  - Insolvency applications by creditors restricted until 28 June 2020



# Government Financial Support



## Germany

- Which programs have been announced or implemented?
- Changes to short-term working regime (subsidies, social security contributions and working payments)
- Tax changes to help liquidity
- Credit support and subsidies (EU Commission's temporary framework and related programs)



# India

# Regulatory Changes in FDI Policy



## India

- The Indian Government, in order to curb opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic, has introduced an amendment in the Consolidated Foreign Direct Investment Policy, 2017.
- In terms of the amendment, an entity of a country which
  - shares land border with India or
  - where the beneficial owner of an investment into India is situated in or is a citizen of any such country, such investment can only be done under the Government route.
- Further, the transfer of ownership of any existing or future FDI in an entity in India, if directly or indirectly, results in the beneficial ownership falling within the restriction/purview of the above, such subsequent change in beneficial ownership will also require Government approval.

# Regulatory Changes in FDI Policy



## India

- This amendment is largely to keep an eye on Chinese Investment in India, either directly or indirectly.
- Certain points for consideration that arise from this change in FDI policy are:
  - What is the meaning of direct and indirect beneficial ownership?
  - How the beneficial ownership will be computed?
  - What will be the impact of the amendment on the existing FDI made by Chinese investors?

# Changes in Foreign Investment Policy



|               |  |
|---------------|--|
| Germany       | Germany has proposed to modify the Foreign Trade Act and has established the Economic Stabilization Fund.  |
| Australia     | Post-Covid, all proposed foreign investments into Australia are subject to the Foreign Acquisitions and Takeovers Act 1975 and will require FIRB approval, regardless of the value of the investment or the nature of the foreign investor |
| Spain         | Ex-ante approval will be required for foreign (non-EU) direct investments in strategic sectors in Spain such as energy, transport, water, health, communications, defence, etc.  |
| Italy         | Italian government expanded what it calls the ‘Golden Powers Law’, meant to restrict foreign investment in sensitive areas to include a large number of other sectors.   |
| Canada        | Canada has also applied extra scrutiny to foreign investments in companies.  |
| United States | Continuing active review of foreign investment, based on national security grounds, by the inter-agency Committee on Foreign Investment in the United States (“CFIUS”)   |

# Regulatory Changes - India



|  |   |
|--|---|
| Law of Limitation  | Period of lockdown w.e.f 15.03.2020 to be excluded for the purposes of limitation.  |
| Minimum threshold amount increased   | the minimum default amount for triggering the provisions of Insolvency law has been increased from INR 100,000 to INR 10,00,000/- (from USD 1331 increased to USD 1,33,180) |
| Regulation 40C in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 | A new regulation introduced- the period of lockdown shall not be counted for purposes of timeline for any activity that could not be completed in relation to CIRP.         |
| Interim Orders to continue   | Any interim order/ stay order passed by Appellate Tribunal will be having the continuous effect till the date of next hearing.  |
| Suspension of the Code   | The government is set to move an ordinance to suspend fresh insolvency action against firms for six months which may even extend up-to 1 year.                              |

# Foreign Perspective



|                |  |
|----------------|--|
| Germany        | <p>The COVID-19 legislation, amongst other things suspends the obligation to file for insolvency for companies affected by the Coronavirus crisis until 30 September 2020</p> <ul style="list-style-type: none"><li>• suspends personal liability of directors;</li><li>• landlords may not terminate building and real estate lease agreements for cause if the tenant does not pay the rent for the months of April, May and June.</li></ul> |
| Australia      | <p>The minimum debt to which these processes can apply will be increased to A\$20,000, up from the A\$2,000 in the case of statutory demands and A\$5,000 for bankruptcy notices.</p>  |
| France         | <p>The company that has fallen in cessation of payment after March 12, 2020 does not have to file for bankruptcy anymore, but it can wait until three months after the end of the health emergency crisis.</p>   |
| United Kingdom | <p>UK government announced emergency measures to be implemented to provide protection to directors of companies by suspending wrongful trading provisions and a moratorium period suspending the filing of insolvency of companies in distress due to COVID-19.</p>  |
| Luxembourg     | <p>Suspended the obligation on companies to file for bankruptcy within one month of ceasing payments to creditors. No modification of periods of limitation</p>  |
| United States  | <p>For a one year period, expanded eligibility of small businesses for expedited and streamlined bankruptcy process</p>  |

# Other Regulatory & Statutory Changes



## India Perspective

- Ministry of Labour and Employment, Government of India:
  - Provision for full remuneration to employees during lock down;
  - Directions not to terminate contracts of employees/workmen;
- In the absence of financial support/ package by the government, it is likely that the companies may be subjected to additional financial distress and may even resort to triggering on its own the Insolvency Resolution Process, particularly in the case of MSMEs.
- Several measures to ease the various statutory compliances under different laws such as Income tax Act, Companies Act, Securities Laws, etc have also been announced.





# United States

# A Deluge of Insolvency Proceedings



## United States

- An expected deluge of insolvency proceedings—likely to hit at the end of the second quarter or the beginning of the third quarter of this year
- Driven by impending maturities and covenant defaults, as well as a precipitous falloff in revenue
- Potentially impacts multiple industries at the same time, resulting in an avalanche of filings beyond the capacity of the bankruptcy courts to handle
- The problem is compounded by the fact that, due to U.S. venue rules, a substantial portion of the large insolvency proceedings will be filed in three jurisdictions: the Southern District of New York, the District of Delaware and the Southern District of Texas

# Remote Hearings: Solutions and Problems



## United States

- the solution: extensive use of videoconferencing, coupled with adjournment or suspension of non-emergency matters
- the problems:
  1. adjournment is a good solution for a liquidating business (Modell's Sporting Goods), but poses many problems and challenges for a distressed operating business
  2. videoconferencing works well for status hearings and simple arguments, but less well for evidentiary hearings
  3. the coming cycle will have many contested hearings on use of cash collateral, valuation of the enterprise and confirmation of contested restructuring. Witness testimony will be critical on these issues, and the failure to allow live testimony and cross examination may implicate constitutional issues of due process

# Increased Filings – Potential System-wide Solutions



United States

1. Emergency appointment of additional judges in bankruptcy “hot spots.”
2. More cases filed outside New York, Delaware and Texas, so as to take advantage of less crowded dockets
3. Longer life cycles for pending cases, and less 24 hour turnaround on hearings
4. Possible legislative support and solutions

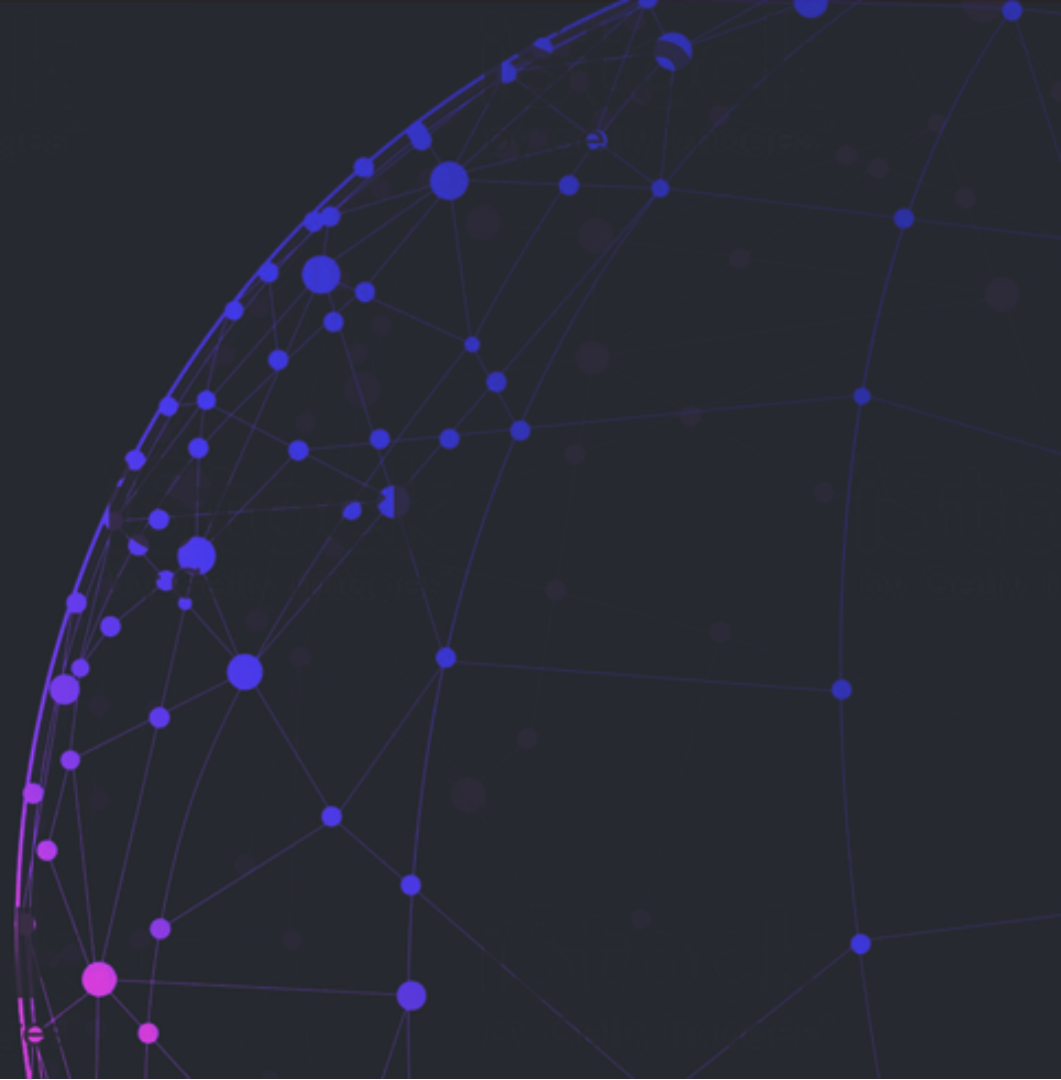
# A Comparison to India



- The Apex Court in India has issued directions to ensure smooth functioning of courts through videoconferencing even at district courts level.
- National Company Law Tribunals all across the country are hearing urgent matters through video conferencing w.e.f. 21.04.2020.
- Detailed guidelines for filing memo of written submissions are provided for effective functioning of NCLTs through video conferencing
- E-litigation may become the new normal—will accelerate the law reforms

Thank You!

**QUESTIONS?**



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