Global Arbitration Review

The Arbitration Review of the Americas

2022

Valuation and Damage Quantification: Do the Same Principles Apply in the Covid-19 Era?

The Arbitration Review of the Americas

2022

The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Generated: February 8, 2024

Explore on **GAR**

Valuation and Damage Quantification: Do the Same Principles Apply in the Covid-19 Era?

Neal Mizrahi, **Leonardo Florencio** and **Natalie Quinn**
FTI Consulting

Summary

IN SUMMARY

The global spread of the covid-19 pandemic has significantly impacted businesses in various aspects, resulting in potential increased complexity when valuing businesses or assets. In this article, FTI Consulting professionals consider the economic consequences of the pandemic, disputes that are likely to flow from events related to the pandemic and ideas on the application of principles of valuation in assessing economic loss. This article highlights the importance of applying fundamental principles when performing business valuations and damage quantification assessments in times of uncertainty.

DISCUSSION POINTS

- Economic effects of the covid-19 pandemic in various regions and sectors
- Types of disputes that may be likely to arise as a result of events related to the pandemic
- How the pandemic will impact the approach to valuation and damage quantification
- Considerations and impacts on valuation dates
- Considerations in applying the market approach and the income approach

REFERENCED IN THIS ARTICLE

- *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA 227)
- *National Grid plc v Argentine Republic* (UNCITRAL arbitration)

INTRODUCTION

The covid-19 pandemic affected virtually every business around the globe in many aspects, including customer demand, supply chain, operational restrictions, commodity price shocks and macroeconomic policies. Although the pandemic has created new challenges for valuing assets and businesses, practitioners may find that the key to answering difficult questions still lies within the fundamental principles of valuation.

This article offers a summary of the economic consequences of the pandemic, observations on disputes that may be likely to flow from events related to the pandemic and ideas on the application of principles of valuation in assessing economic loss.[1]

ECONOMIC EFFECTS OF COVID-19: REGIONS AND SECTORS

From a macroeconomic perspective, the world output (in real GDP) fell by 3.3 per cent in 2020.[2] However, the impact was diverse across different regions. The table below shows the forecast and actual output growth for 2020 (percentage compared to 2019).[3]

World	+3.3	-3.3
Advanced economies	+1.6	-4.7
Emerging markets	+4.4	-2.2

United States	+2.0	-3.5
Canada	+1.8	-5.4
United Kingdom	+1.4	-9.9
Euro area	+1.3	-6.6
Brazil	+2.2	-4.1
Mexico	+1.0	-8.2

As reported by IMF, countries experienced different levels of change in expected growth in 2020 as a result of the covid-19 pandemic, and such divergence is expected to extend into the future owing to differences in access to vaccines, fiscal policies and containment measures taken by governments.[4]

For example, the Goldman Sachs Effective Lockdown Index rated the responses taken by the United Kingdom (three lockdowns to date, including closing schools) to be far more stringent than Japan (requested restaurants to close earlier and urged residents to stay at home).-[5] Fiscal policies also varied greatly; for instance, while the global health sector spending represented 1.2 per cent of GDP in 2020, there was significant regional variance (India: 0.4 per cent, South Korea: 0.5 per cent, the United States: 3.3 per cent and the United Kingdom: 7.5 per cent).[6]

As we explain further in this article, now more than ever it will be important for valuators to carefully analyse assets and business activities in different geographical locations, given the diverse impact of the pandemic and government responses around the globe.

Not all industries have been affected in a similar manner by events related to the pandemic; interestingly, some have experienced a positive effect. Examples showcasing the diversity of the impact of events related to the pandemic include the following.

- Stay-at-home entertainment, such as streaming services, have experienced widespread increases in subscribers.[7] At the same time, as cinemas have typically been subject to lockdowns globally, studios have adapted to digital platforms and video-on-demand services to recoup costs.[8]
- Internet retailers have reported growth over the course of the pandemic.[9] Studies indicate that a majority of consumers expect to shop online more after the pandemic than before.[10] On the other hand, brick-and-mortar stores have generally seen a decline in sales.[11]
- Oil and gas companies have been negatively impacted, in part owing to the sharp fall in crude oil prices triggered by an unprecedented demand shock. More than 100 companies filed for Chapter 11 bankruptcy, the highest seen since the last oil bust in 2016.[12]
- The travel and accommodation industry has seen a dramatic decrease in customers; however, the camping sub-industry is thriving as a result of increased demand for domestic holidays.[13]
-

> Increased demand for semiconductors, which power computers and internet infrastructure, has led to a current global shortage. As a result of the lack of supply in auto chips, the automotive industry has reported halts in production.[14]

As illustrated above, the effects of events related to the pandemic on one industry can create opportunities (or threats) for other related industries. Further, businesses within an affected industry may each have unique issues or advantages in dealing with the crisis. For instance, the enterprise communication platform, Zoom, increased its revenue by 325 per cent in 2020 to US$2.65 billion[15] while users shifted away from the once popular platform, Skype.[16]

As analysts often look to the past to predict the future, it is interesting to compare the macroeconomic effects of the covid-19 pandemic with the 2008 global financial crisis (GFC). Both, while different, have had pervasive macroeconomic effects. For instance, in both cases, there was increased volatility in stock markets, central banks lowered interest rates, and governments provided economic relief programmes and assistance to businesses. Although it is perhaps too early to draw definitive conclusions, the expected recovery profile (as at April 2021) appears to follow a similar pattern to that of the 2008 GFC. The table below presents a comparison of world economic growth in the period 2008–2011 and 2019–2022F.[17]

t	+3.0	+2.8
t+1	-0.6	-3.3
t+2	+5.1	+6.0*
t+3	+3.8	+4.4*
t = 2008 (GFC) and 2019 (covid-19) * Forecasted growth figures		

TYPES OF DISPUTES THAT MAY BE LIKELY TO ARISE AS A RESULT OF EVENTS RELATED TO THE PANDEMIC

The covid-19 pandemic has brought with it a range of political, economic and social issues globally. Many countries have experienced damaging effects of varying magnitudes from not only the virus itself but also the range of government measures, such as taxation and legislative changes, lockdowns and travel restrictions, which have caused turmoil in many industries. This has resulted in financial distress, supply disruption, stalled projects, reneged commitments and missed payment obligations.

As a result, events related to the pandemic will likely prompt an increase in the number of corporate disputes as businesses fail to meet their contractual obligations, as well as investor-state disputes resulting from increased government measures. The volume and nature of those disputes will likely vary by industry and geographic region, given the significant disparity in pandemic-related impacts.

A review of new arbitration filings in 2020, for institutions that had released their 2020 data at the time of writing, indicates an increase in claims at many institutions. The London Court of International Arbitration (LCIA) reports that events related to the pandemic have triggered many disputes, in particular those involving entertainment, sports events and commodities, as well as the aviation and shipping sectors.[18]

The expected timing of covid-19-related disputes is mixed. The LCIA reports a reduced 'lag time' of new disputes, with a higher percentage of disputes arising in 2020 from agreements entered into in the past two years.[19] On the other hand, certain disputes caused by events related to the pandemic are not expected to surface for a longer period of time, including matters arising from M&A earn-out clauses (discussed below), businesses focusing on managing the challenges of the current crisis in priority to commencing proceedings, and government aid programmes prolonging otherwise imminent disputes.[20]

Below we discuss a few of the types of disputes expected to increase in the future.

Contractual Disputes

Given the disruptions and pressures weighing on businesses, some companies may find difficulty in fulfilling contractual obligations. Disputes may arise from non-performance or non-payment, at times with the breaching party seeking justification or defences, such as force majeure, frustration or material adverse change (MAC). For instance, in 2020, the LCIA observed a 'common thread' of claims of force majeure among cases stated to be triggered by events that resulted from the pandemic.[21]

M&A Disputes

Since the onset of the pandemic, several high-profile M&A transactions have either collapsed or fallen into dispute, such as:

- the cancellation of private-equity firm Sycamore Partners' takeover of Victoria's Secret after a disagreement over the seller's handling of certain operational and financing matters following the outbreak of the pandemic;[22] and
- the almost failed transaction of fashion brand Tiffany & Co when the purchaser, LVMH, ended plans in September 2020 to buy the company for US$16 billion (originally announced in November 2019), causing Tiffany & Co to launch litigation proceedings against LVMH. The transaction completed after the parties agreed on a price discount.[23]

Disputes may arise before or after the closing of a transaction agreement.

Between signing and closing, the target company's outlook (and, therefore, the investment proposition to the buyer) may have materially changed since the onset of the pandemic, with buyers, for instance, trying to either terminate the deal or seek to reprice the target and negotiate a lower purchase price. Additionally, disputes may arise from an alleged failure of the target company to act in the normal course of business, whereby the target has altered operations in an effort to reduce the impact of the pandemic. Buyers may claim that a MAC was triggered, which typically allows a buyer to withdraw from a transaction if events occur that are detrimental to a target company or its assets.

After closing, disputes may comprise claims of a breach of the contracted representation and warranties, price adjustments or disagreement regarding price earn-out[24] (deferred consideration) clauses, for example:

- representation and warranties: financial pressures from the pandemic may give rise to misstatement of sales and major agreements, the collectability of accounts receivable, undisclosed liabilities, the value of inventory or the need for asset impairment, to name just a few examples; and

- earn-out clauses: the operational and financial impact of events resulting from the pandemic on companies will complicate the assessment of whether earn-out targets have been achieved; for example, disputes may arise over the appropriate accounting treatment of expenses incurred specifically in response to the pandemic after the closing, and whether these should be reported as 'ordinary expenses' and included in the calculation of earn-out target earnings before interest, taxes, depreciation and amortisation (EBITDA), or rather as 'extraordinary expenses' and excluded from the calculation.

Although we expect a higher volume of post-M&A disputes across industries, it is sensible that volatile industries and those that have been harder hit by the pandemic may have a greater share.

Investor-state Disputes

Governments have taken different approaches to protecting public health and mitigating economic damage during the pandemic. In addition to lockdowns, some countries, such as Italy and India, have taken measures to suspend manufacturing, construction and mining,[25] and others have nationalised businesses. For example, Spain nationalised private hospitals and healthcare providers and repurposed their facilities for covid-19 patients.[26]

Investors may challenge government-mandated restrictions if the measures breach protections the state owes the investor. Examples of government actions that have or may give rise to such disputes include:[27]

- Mexico's adoption of two energy policies as a result of the pandemic that prioritise the conventional electricity generated by the state-owned utility over renewable energy, which is largely operated by foreign investors; and
- Moldova's attempt to cancel international investors' concessions to operate the country's main international airport (a process that commenced prior to the pandemic owing to suspicions of wrongdoing by the investor),[28] with the investor accusing the state of using the pandemic as grounds to justify cancellation.

Subject to the terms of the specific international investment agreement, common protections afforded under the agreements may enable an investor to make one or more of the following claims as a result of government covid-19 measures:

- a breach of an investor's right to fair and equitable treatment (FET): steps taken by governments to discriminate against investors (regardless of whether nationals of the host state are treated in the same manner) may breach the FET obligation unless there was reasonable justification;[29]
- a breach of the national treatment standard: if a host state affords less favourable treatment to a foreign investor (eg, financial support) compared to a domestic investor in similar situations;[30]
- a breach of an investor's right to full protection and security of its investments (FPS): a state's failure to implement adequate and timely covid-19 prevention measures (if FPS extends to legal and commercial protection); or[31]
- indirect expropriation by the state: government regulations, such as lockdowns restricting the ability of businesses to operate or import or export products, may possibly give rise to indirect expropriation claims.[32]

A review of a state's possible defences to the above types of claims is beyond the scope of this article; however, an example from a previous crisis event may be instructive.

In ***National Grid plc v Argentine Republic,*** a dispute arising from measures taken by Argentina in 2002 during its financial crisis,[33] the Argentine Republic pleaded that the measures were taken in response to a 'state of necessity' as a result of a number of external factors.[34] The tribunal noted that necessity is not a defence if the state has contributed to the situation of the necessity and found that '[i]nternal factors such as external indebtedness, fiscal policies or labor market rigidity were under the control of the Respondent and created fertile ground for the crisis to develop'.[35]

In the current crisis, the same reasoning may apply if the state is found not to have taken the necessary actions to reduce the spread of the virus.

HOW WILL COVID-19 IMPACT THE APPROACH TO VALUATION AND DAMAGE QUANTIFICATION?

While there are a number of approaches to the quantification of economic loss, many involve the valuation of a business or business interest. This article will focus on the potential impact of events related to the covid-19 pandemic on business valuation in the context of disputes.

There are standards of value that are often used in practice and disputes, such as market value, fair value and fair market value. The United States Internal Revenue Service[36] and the CBV Institute[37] provide definitions of fair market value that are generally consistent with the definition used by the International Valuation Standards definition for market value, which is the 'estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.'[38] We use this definition for the purposes of this article.

There are three main valuation approaches: the income-based approach, the market approach and the asset-based (or cost) approach. In this article, we focus primarily on the income-based and market-based valuation approaches, which are more commonly used in practice.

Although covid-19 has not changed the manner in which those approaches are applied, the economic implications may give rise to considerations and challenges in the valuation process. In our view, it is too early to determine how those changes will play out in practice; however, we expect increased emphasis on a sound analysis, consideration of all relevant key factors and professional judgment.

Valuation Date Considerations

A key principle in valuation is that value is determined at a specific point in time and is based on the facts, circumstances and expectations of the business at that time. In the context of disputes, there are two main approaches to the selection of the valuation date. Subject to the facts and legal framework, an expert valuator may be instructed to use either an ex-ante or ex-post approach.

Under the former approach, the valuation date is typically at a historical date in time (ie, prior to a breach); thus, only information that was known or available at that time can be taken into account. Under the ex-post approach, however, the valuation date is at a later date, such as the date on which the award is rendered, and can incorporate hindsight information.

The valuation of a business may differ materially at various points in time, particularly where there have been significant changes in relevant economic, industry and business-related factors. A well-known example of the impact of the selection of a valuation date is the *Yukos v Russia* award, where the tribunal's choice of an ex-post valuation at a deemed award date of 30 June 2014 (as opposed to the date of expropriation of 19 December 2004) increased damages by approximately US$45 billion (before taking into account deductions as a consequence of the claimants' contributory fault). The main drivers of the difference were the rise in oil prices as well as dividends payable to shareholders following the expropriation date.[39]

Given the pervasive impact of the covid-19 pandemic, the potential for changes in relevant economic, industry and business factors that may impact value is heightened; thus, while we stress that each case must be assessed individually, in the context of an economic loss analysis, the selection of different valuation dates (ie, before, during or after the pandemic) may have a significant impact on value. Some have commented that we may see claimants possibly choosing to delay initiating a claim until there is greater visibility of the long-term financial effects from the pandemic.[40]

In determining if the impact of the pandemic was known or knowable as of the valuation date, an understanding of the timeline of the pandemic both globally as well as in the subject asset's geographical region is necessary. Consider a valuation date in early 2020, a time when the severity of the pandemic and government measures were rapidly changing: additional care would need to be taken in determining what was known or expected at the specific date. Further, each industry participant would have faced individual circumstances that should be assessed on a case-by-case basis, adding an additional layer of complexity.

Considerations In Applying The Market Approach

The market approach is based on the premise that value can be inferred from the price of assets with similar characteristics. A business valuator will observe, develop and apply market-based metrics, often expressed as 'multiples' of a value-related metric (eg, EBITDA, revenue, earnings or an industry measure, such as barrels of oil). There are two principal market-based valuation methodologies:

- comparable transactions approach: multiples are calculated based on M&A transactions of comparable companies (not based on stock exchange trading prices); and
- comparable public companies approach: multiples are calculated based on the publicly traded equity prices for the securities (typically common shares) of a public company listed on a stock exchange.

Below, we explain the considerations in the application of market-based valuation methodologies. In general, the utility of those methodologies depends on the ability to identify and develop valuation metrics for assets that are sufficiently 'comparable' to the subject asset. This can be challenging even in the absence of economic volatility. However, market-based information should be considered on a case-by-case basis and weighed, along with all other relevant information, in arriving at a range of values for a given asset.

Comparable Transactions Approach

This approach involves the development of valuation benchmarks with reference to historic transactions involving 'comparable' assets. In evaluating comparable transactions, one should be cognisant of the extent to which relevant economic, industry and business factors may have changed from the time of the comparable transaction to the relevant valuation date. Material changes can result in a different outlook, risk profile and, potentially, valuation metrics for the business.

Adding another layer of complication is that companies within industries may have been impacted differently than their peers. Additionally, if a seller (buyer) is compelled to transact, they may accept less (or pay more) for a particular business – something to look out for with distressed sales. Finally, companies may be affected differently by covid-19 responses, economic circumstances and other factors, such as government support. These are all factors that may impact transaction multiples.

Notwithstanding those factors, it may be the case that available transaction data is the most useful and relevant information available. It is worth repeating that in estimating value, one should evaluate the body of relevant information before them and apply the necessary professional judgment.[41]

The impact of broader economic, industry and business factors on the comparability of transactions are not new considerations, having been tackled in other times of economic crisis. In the case of ***National Grid plc v Argentine Republic,*** the tribunal acknowledged the difficulties of selecting comparable and appropriate transactions that reflect the relevant market conditions during the Argentinian economic crisis and 'without measures', resulting in the reliance on one of only a few available transactions.

In relation to the valuation methodologies applied in that case, the tribunal concluded: 'Though none of the proposed approaches is perfect, the Tribunal finds that the approach adopted here appropriately reflects the impact of the Measures, while still recognizing that, because of the economic and social crisis, the situation of the Argentine economy was definitely not "business as usual."[42] The tribunal's approach demonstrates that relevant information should be weighed appropriately in the absence of 'perfect' information.

Comparable Public Companies Approach

- In contrast with the comparable transactions approach, this approach involves the development of valuation benchmarks with reference to comparable public companies. The considerations regarding comparability are similar to those outlined above, perhaps with the exception of timing. However, other differences that are beyond the scope of this article, such as potential stock liquidity issues, exist with the analysis of comparable public companies.
- Additionally, public company multiples are sometimes determined based on forecast financial metrics (forward multiples), in contrast with historical financial metrics (trailing multiples). While not always the case, in times of rapid change, forward multiples may be viewed as more relevant (as they take into account future considerations) while, alternatively, trailing multiples may be viewed as more reliable, as they are based on what a company actually achieved.

To demonstrate the impact of events related to the pandemic on market multiples, the table below shows the evolution of the TEV/EBITDA[43] trailing market multiples and 31 March 2021 forward multiples of some example participants in different industries, namely

Carnival Corporation & plc (Carnival Cruises); Delta Airlines, Inc. (Delta); and Netflix, Inc (Netflix). Cruise liners and airlines were adversely impacted by the pandemic, while home entertainment offerings profited.

31 Dec 2019	5.7x	8.3x	58.8x
31 Mar 2020	4.8x	4.1x	56.7x
30 Jun 2020	10.5x	10.1x	56.1x
30 Sep 2020	NM	NM	56.3x
31 Dec 2020	NM	NM	54.3x
31 Mar 2021	NM	NM	43.0x
31 Mar 2021F	22.0x	NM	36.1x
NM = non-meaningful			

The table illustrates how market multiples have changed since the onset of the covid-19 pandemic across the three companies. Both Carnival Cruises and Delta suffered a plunge in share price, increasing debt, and a fall in EBITDA in the first half of 2020, resulting in an increase in their EBITDA multiples by June 2020. By September 2020 both companies reported losses, returning non-meaningful negative multiples. Forecast multiples in March 2021 show Carnival Cruises continuing to be loss making in 2021, while Delta is forecast to earn a low profit, resulting in a forward multiple of 22x.

The trends for Carnival Cruises and Delta are a stark comparison to Netflix, which had a higher EBITDA multiple prior to the onset of the pandemic at 58.8x owing to a high market capitalisation compared to EBITDA. Then, with EBITDA more than doubling from December 2019 to March 2021 (a reflection of consumers spending more time at home), as well as an increase in market capitalisation and higher EBITDA expectations (indicating higher consumer sentiment), Netflix's forward EBITDA multiple declined to 36.1x by March 2021. These changes in multiples over time demonstrate the importance of ensuring consistency between the valuation date and comparable data, and that multiples should be read in the context of the business or industry – a higher multiple is not always 'better'.

Considerations In Applying The Discounted Cash Flow Approach

The discounted cash flow (DCF) method of valuation, one of the most commonly applied income-based approaches, has two main components: a forecast of future cash flows; and, a discount rate, which is used to determine the present value of those cash flows. Depending on the circumstances, the economic impact of the covid-19 pandemic may present certain challenges in the application of the DCF.

Depending on the valuation date and the business at hand, there may be increased uncertainty in cash flow forecasts. With supply-chain disruptions, shifting demand and changing operational and economic environments, outdated business forecasts can become obsolete. For industries experiencing significant effects from the pandemic, whether historical cash flows are truly representative of future results should be considered.

The unpredictability around certain government measures, the unknown timing of recovery and the risks of variants of the virus may create additional uncertainty around the forecasts of some businesses. There is uncertainty associated with all forecasts, and these factors do not, on their own, invalidate the use of a DCF, as there may be ways to account for these and other relevant risks in the valuation analysis.

One way to address risk is in the use of an appropriate discount rate, which reflects the return required by market participants, commensurate with the risk associated with achieving the forecasted cash flows. In general, a valuator should exercise proper professional judgment when developing an appropriate discount rate. It is also useful to use multiple valuation methods to test the reasonableness of valuation conclusions, where possible.

In the arbitration National Grid plc v Argentine Republic, the tribunal acknowledged that the estimation of the discount rate, which 'is the subject of a great deal of theoretical debate', was 'complicated further' given the context of the Argentine economic crisis of 2001 to 2002. Given these challenges, the tribunal determined that the appropriate discount rate was one that used a reasonableness check to the market approach.[44]

In the assessment of economic loss, isolating the impact of an alleged breach requires careful analysis of economic and legal issues. In many cases, on a high level, economic loss is based on the difference between actual and counterfactual cash flows. With businesses that have been significantly impacted by events resulting from the covid-19 pandemic, whether the counterfactual scenario is realistic relative to actual economic, industry and business circumstances should be considered.

For example, take a factory that temporarily shut down because its supplier of raw materials breached its supply agreement immediately before the pandemic. In constructing the counterfactual scenario to assess the factory's loss of profits, one may need to consider whether the factory would have reduced its production capacity regardless of the wrongful acts, due to the pandemic.

This issue is complicated by potential shifts in the valuation date; for instance, if a breach occurred prior to the pandemic, a strict application of the DCF (using an ex-ante approach) means that it should not include the impact of such events. However, the appropriate counterfactual is, at times, the basis of legal or factual finding.

The issues discussed above are just some of the challenges faced by business valuators when applying the DCF methodology to valuation and damage quantification during a period affected by the pandemic. However, the DCF is a widely used valuation methodology and may be the best available tool for the circumstances of the case, with the additional complexities encountered possibly encouraging the application of unique approaches.

As demonstrated by ***National Grid plc v Argentine Republic***, supporting valuation conclusions using other relevant methodologies as a point of reference for reasonableness will be important in bolstering valuation inputs and conclusions.

CONCLUSION

In general, dispute activity is anticipated to increase as a result of events related to the covid-19 pandemic as the events have led to greater volatility in markets and have had an unexpected impact on many industries and geographical regions.

While, perhaps, more challenging to apply, the fundamental principles of valuation are generally the same. Valuators should always be mindful of the context of their analysis; they should conduct independent analyses and research of the relevant factors for the case at hand, where possible. The need for these practices has not changed in the current market as these have always been fundamental elements of a valuation.

It is not uncommon for a valuator to be faced with incomplete information, such as imperfect forecasts, lack of market transaction data, and uncertainty surrounding future market conditions. However, this does not mean that an opinion of value cannot be rendered. All available relevant information should be considered, and where necessary, the valuator should use their professional judgment in weighing that data and the conclusions of the valuation approaches, as prudent and informed market participants often do.

During these times, with such a divergent impact to different sectors and geographies, triers of fact will be relying on experts to properly assess value and economic loss. Knowledge and careful application of the fundamental principles of valuation, together with a sound analysis of micro and macroeconomic factors affecting the business at hand, remain crucial elements in arriving at a valuation that is reasonable.

** The authors would like to thank Marco Shek (senior director, FTI Consulting), Jose Alzate (senior director, FTI Consulting) and Sheri Herblum (senior consultant, FTI Consulting) for their contributions to this article.*

Endnotes

1 This article was written during a period of volatile economic and financial conditions, and as such the commentary herein may not be relevant in light of materially different conditions. This article does not constitute an expert report, nor is it reflective of the views and opinions of the authors or contributors. The views expressed in this article are not necessarily the views of FTI Consulting, Inc, its management, its subsidiaries, its affiliates, or its other professionals. FTI Consulting, Inc, including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm. The article is based on limited scope and provided for the interest of the reader. The valuation of a business or interest thereof, including all supporting research and analysis, should be considered on a case-by-case basis. ^ Back to section

2 IMF, 'World Economic Outlook' (April 2021): www.imf.org/en/Publications/WEO. ^ Back to section

3 IMF World Economic Outlook published in January 2020 and April 2021. ^ Back to section

4 OECD, ***OECD Economic Outlook***, Volume 2021, Issue 1 (31 May 2021). ^ Back to section

5 See figure 1.1.3 of endnote 2; and IMF: 'Policy Responses to COVID-19' (7 May 2021). ^ Back to section

6 IMF, 'Fiscal Monitor Database of Country Fiscal Measures in Response to the COVID-19 Pandemic' (April 2021). ^ Back to section

7 'TV Watching and Online Streaming Surge During Lockdown', ***BBC*** (5 August 2020). ^ Back to section

8 FTI Consulting: 'The Economics of Film: Changing Dynamics and the COVID-19 World' (3 September 2020). ^ Back to section

9 Aaron Orendorff, 'The State of the Ecommerce Fashion Industry: Statistics, Trends & Strategy', ***Shopify*** (29 March 2021). ^ Back to section

10 McKinsey & Company, ***Perspectives on Retail and Consumer Goods*** (8 August 2020). ^ Back to section

11 Office for National Statistics, 'The impact of the coronavirus so far: the industries that struggled or recovered' (9 December 2020). ^ Back to section

12 Paul Takahashi, 'Over 100 oil and gas companies went bankrupt in 2020', ***Houston Chronicle*** (20 January 2021). ^ Back to section

13 See endnote 11. ^ Back to section

14 Sam Shead, 'The global chip shortage is starting to have major real-world consequences', ***CNBC*** (7 May 2021); Sam Shead, 'Governments are deploying "wartime-like" efforts to win the global semiconductor race', ***CNBC*** (17 May 2021). ^ Back to section

15 Zoom Video Communications, Inc, annual report for year ended January 2021. ^ Back to section

16 Chris Stokel-Walker, 'How Skype Lost Its Crown to Zoo', ***Wired*** (12 May 2020). ^ Back to section

17 IMF World Economic Outlook published in April 2010, October 2012, October 2020 and April 2021. ^ Back to section

18 LCIA 2020 Annual Casework Report. ^ Back to section

19 Ibid. ^ Back to section

20 Freshfields, 'International Arbitration in 2021'. ^ Back to section

21 See endnote 18. ^ Back to section

22 Khadeeja Safdar and Cara Lombardo, 'Victoria's Secret Buyer Seeks to Cancel Takeover After Coronavirus', ***The Wall Street Journal*** (22 April 2020). ^ Back to section

23 Jef Feeley and Kim Bhasin, 'LVMH Fights Fast-Tracking Tiffany's Suit Over Busted Deal', Bloomberg (16 September 2020); LVMH press release, 'LVMH Reaches Agreement with Tiffany & Co' (25 November 2019); and LVMH press release, 'LVMH completes the acquisition of Tiffany & Co.' (7 January 2021). ^ Back to section

24 Earn-out clauses allow for the potential payment over time of additional consideration contingent upon the target's achievement of specified financial targets. ^ Back to section

25 Corrs Chambers Westgarth, 'Investor-state disputes arising from COVID-19: balancing public health and corporate wealth' (27 August 2020). ^ Back to section

26 'Part I of a Trilogy: State Measures in Response to the COVID-19 Pandemic', ***Global Arbitration News*** (5 March 2021). ^ Back to section

27 Ibid. ^ Back to section

28 Nicoleta Banila , 'Moldova's govt prepares to seek cancellation of Chisinau airport concession in court', ***SeeNews*** (5 September 2019). ^ Back to section

29 Norton Rose Fulbright, 'International Arbitration Report. Investor-State Claims in the Era of the COVID-19 Pandemic' (June 2020). ^ Back to section

30 Lucas Bent and Jingtian Chen, 'Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses', ***Kluwer Arbitration Blog*** (8 April 2020). ^ Back to section

31 See endnote 25. ^ Back to section

32 Ibid. ^ Back to section

33 National Grid, a British firm, was the shareholder of an electricity utility in Argentina. The utility's payments were expressed in US dollars and were indexed to US inflation measures. As a result of its economic crisis, Argentina altered its regulatory framework, resulting in payments to the claimant to be converted into Argentinean pesos (which were no longer pegged to US dollars). The tribunal found that the Argentine Republic had breached FET and FPS standards owed under the UK-Argentine bilateral investment treaty. ^ Back to section

34 Specifically, Argentina argued the economic crisis was the result of a number of external factors including but not limited to: increases in the dollar rate of interest; collapsing emerging markets; the devaluation of the Brazilian currency; and falling prices of exported goods. See Elizabeth Whitsitt, 'Tribunal rebuffs defense of necessity in recently published award: National Grid p.l.c. v. Argentine Republic', ***Investment Treaty News*** (2 March 2009). ^ Back to section

35 Elizabeth Whitsitt, 'Tribunal rebuffs defense of necessity in recently published award: National Grid p.l.c. v. Argentine Republic', ***Investment Treaty News*** (2 March 2009). ^ Back to section

36 For US tax purposes, Regulation §20.2031-1 states: 'The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.' ^ Back to section

37 The CBV Institute defines fair market value as '[T]he highest price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.' ^ Back to section

38 International Valuation Standards of the International Valuation Standards Council (31 July 2019). ^ Back to section

39 *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case NO. AA 227), Final Award. Dated 18 July 2014. ^ Back to section

40 Kluwer Arbitration Blog: A Black Swan Event? COVID-19 for Damages and Valuations in International Arbitration. Dated March 15, 2021. http://arbitrationblog.kluwerarbitration.com. ^ Back to section

41 The use of judgment is important in valuation. For instance, in certain circumstances, a valuator may increase the size of the sample or define the business more broadly to address information constraints. The appropriateness of those potential approaches (and the results they yield) should be evaluated on a case-by-case basis. ^ Back to section

42 *National Grid plc v Argentine Republic award* (3 November 2008), paragraphs 286 to 290. ^ Back to section

43 Total enterprise value/earnings before interest, taxes, depreciation and amortisation. EBITDA reported on a past-12-months basis. TEV comprises equity and net debt. ^ Back to section

44 See endnote 42, paragraphs 282 to 290. ^ Back to section

Neal Mizrahi neal.mizrahi@fticonsulting.com
Leonardo Florencio leonardo.florencio@fticonsulting.com
Natalie Quinn natalie.quinn@fticonsulting.com

200 Aldersgate, Aldersgate Street, London EC1A 4HD, United Kingdom

Tel: +44 20 3727 1000

https://www.fticonsulting.com/

Read more from this firm on GAR