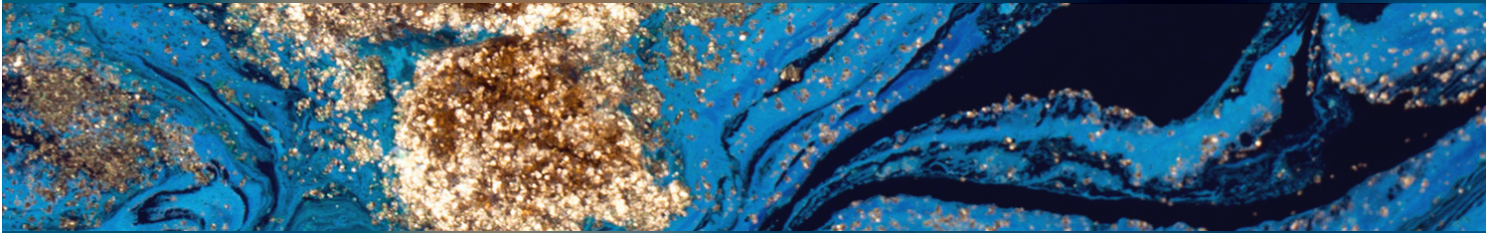


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C H A N C E



**FIDUCIARY DUTIES IN LATIN AMERICA:  
BEST PRACTICES FOR BOARDS OF  
DIRECTORS IN TIMES OF CORONAVIRUS**

## CONTENTS

Introduction	3
Your fiduciary duties as a director	3
Fiduciary duties under Delaware corporate law	3
Fiduciary duties in Latin America	4
Argentina	4
Brazil	5
Chile	6
Colombia	7
Mexico	8
Peru	9
Best practices to ensure compliance with directors' fiduciary duties	10

## **FIDUCIARY DUTIES IN LATIN AMERICA: BEST PRACTICES FOR BOARDS OF DIRECTORS IN TIMES OF CORONAVIRUS**

### **Introduction**

The sudden and wide-ranging impact of COVID-19 has resulted in companies and boards of directors facing unprecedented situations and challenges. The pressure on boards of directors and companies is higher than ever. Accordingly, directors should be mindful of their fiduciary duties and act in a manner consistent with such duties.

The nature of a director's fiduciary duties has not changed as a result of COVID-19—fiduciary duties exist whether or not a company is facing a crisis, financial distress, or any other circumstances—but, in many board rooms across the Latin America region, directors are asking if exercise of their fiduciary duties should change in light of the current circumstances.

As the Delaware Supreme Court has stated on many occasions, “[t]here is no single blueprint that a board must follow to fulfill its duties” and the same principle applies in Latin America. There are, however, certain guidelines that directors should follow. This article highlights what these fiduciary duties entail, as well as best practices that directors of Latin American-based companies can adopt to comply with their fiduciary duties and help their companies navigate this challenging environment.

### **Your fiduciary duties as a director**

The fiduciary duties of a director are determined by the laws of incorporation of the company and its governing documents. While some best practices may apply across the globe, others vary from jurisdiction to jurisdiction and may be influenced by special circumstances and rules applicable to each company. That is why understanding what those fiduciary duties are and to whom such fiduciaries duties are owed to is key. This is particularly relevant for directors appointed by shareholders to the board of different portfolio or group companies, some of which may be subject not only to different governing laws but entirely different legal systems (i.e., civil and common law systems).

Below are key considerations with respect to fiduciary duties that may be of particular relevance to directors in the context of COVID-19. This summary focuses on fiduciary duties pursuant to corporate law in Delaware, Argentina, Brazil, Chile, Colombia, Mexico and Peru.

### **Fiduciary duties under Delaware corporate law**

With Delaware being the “birth place” (i.e., the place of incorporation) of many corporations for its business-friendly and yet robust legal system, it should not come as a surprise that Delaware corporate law is also a reference in the legal world when it comes to fiduciary duties.

**“Directors are, and should be, focused on how to support their companies in the current environment, not on how to elude liability that is inherent to their role. The conversations we are having with boards all over Latin America are about what other boards and companies are doing in response to COVID-19. Companies that have strong corporate governance policies and highly engaged boards and management teams are better equipped to deal with some of the challenges and opportunities the current circumstances may present.”**

**Thais Garcia,**  
Partner,  
Clifford Chance

Directors of Delaware corporations ordinarily owe fiduciary duties of care and loyalty to the corporation and its stockholders. The duty of care requires directors to make informed, careful and prudent business decisions. The duty of loyalty requires the directors to exercise their authority in good faith for the benefit of the corporation and its stockholders (and not for their own interest or those of another person or entity).

One of the most important obligations of directors of companies facing a crisis like the one resulting from the COVID-19 pandemic is to exercise oversight, keep themselves informed and ensure there are adequate systems and controls in place to facilitate timely and accurate reporting to the board of events and circumstances that materially impact the business of the company, including supply chain issues, relationships with key customers, the need to adapt to changing political and economic challenges, including changes in law and regulatory requirements, and liquidity needs (including covenants under debt instruments and lines of credit). Given the times we are living in, boards should more than ever “stress test” the corporation’s potential responses to changes in any of these and similar areas.

Another key consideration that directors should keep in mind is that when a corporation becomes insolvent, directors have a responsibility to direct the affairs of the corporation to maximize value for the benefit of the corporation and all of its constituents including its creditors.

While managing a crisis like the one created by COVID-19 has its challenges, absent evidence to the contrary, directors will be protected by the business judgment rule. The business judgment rule is a presumption that, in making business decisions, directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the corporation and its stockholders. In practical terms, this implies that courts will not second-guess the decisions made by the directors if those decisions can be attributed to any rational business purpose and that a director will not be personally liable for such actions so long as the presumption stands. Such presumption may be overcome in extraordinary circumstances, such as when a director has acted in bad faith, disloyally, fraudulently or with gross negligence.

Therefore, despite all of the challenges and uncertainties generated by COVID-19, directors should continue managing the corporation in order to preserve and increase its value in the long term, without concerns of increased liability, provided their deliberative process is careful and free of conflicts.

## **Fiduciary duties in Latin America**

### **Argentina**

The Argentine Companies Law imposes on directors a duty of loyalty towards the company and its shareholders. A director’s duty of loyalty encompasses the obligation to perform its responsibilities with the diligence of a “good businessman,” meeting the standard of an “honest person” and defending the interests of the company.

**“It is a bedrock principle of the corporation law of most states in the US, including Delaware, that the well-informed, conflict free decisions of a board of directors are protected by the business judgment rule. Courts will not second guess the decisions of directors if those decisions can be attributed to any rational business purpose.”**

**David Brinton,**  
Partner,  
Clifford Chance

In a constantly changing environment, with several regulations being issued and modified almost every day, as in many other markets, best practice in Argentina requires directors to be constantly monitoring the company's situation; strategically planning decisions to be adopted during the crisis; and overseeing management to ensure that appropriate measures are being implemented. More than ever, directors must take a proactive approach in managing and administering the company and protecting its employees, business, assets and operations.

In an insolvency scenario, creditors' rights and interests are protected by certain mechanisms under Argentine law, including the appointment of an official receiver (*síndico*) in the context of a reorganization proceeding. Furthermore, in the event of financial distress or insolvency, the "good businessman" standard requires directors to timely call a shareholders' meeting to report the situation to the shareholders, so that the shareholders can implement measures to address such situation, which may include making additional capital contributions by the shareholders or seeking third-party equity or debt investments. If no such measures are adopted or available, and the company is facing insolvency, the board should propose the adoption of other measures at the shareholders' meeting, including filing for restructuring or bankruptcy.

While Argentina has not formally adopted the business judgement rule, directors are protected from liability to the extent they act diligently, in good faith, and comply with the "good businessman" standard. If a director does not agree with the decisions adopted by the board in connection with a specific matter, such dissenting vote shall be reflected in the minutes or similar instrument and be reported to the company's statutory auditors, the shareholders' meeting or, in certain circumstances, the dissenting director may file legal proceedings challenging the decision made by the board, to be fully exempt from liability.

## Brazil

Under the Brazilian Corporations Law, directors and officers owe fiduciary duties to the company but not to the company's shareholders. Such fiduciary duties include the duties of diligence and loyalty, the obligation to pursue the company's interest and the prohibition on acting in conflict of interest. Directors shall perform their duties with the care and diligence which an ordinarily careful and prudent person would use in similar circumstances in dealing with its own businesses. This entails making informed decisions, exercising proper oversight over the business affairs of the company and implementing the decisions taken at the board level. It also includes the so-called "duty to intervene and to investigate", the subject of increased scrutiny over the past few years as a result of the car wash (*lava-jato*) scandals. This duty requires a director to actively intervene and investigate if he or she becomes aware of any potential irregularities in the business of the company.

While fiduciary duties have not changed as a result of COVID-19, the powers of the boards of directors have. Brazil enacted legislation in late March 2020 in response to the pandemic which, among other things, allows boards to have a more active role in

**“In Argentina, it is not common for companies to indemnify directors from liability in connection with the performance of their role as directors. There is a debate as to what extent any such indemnification would be enforceable because it may undermine the duties and liability principles imposed by Argentine law and the rights of creditors and third parties. That is why, from a practical perspective, it is advisable to explore the possibility of obtaining such indemnification directly from the shareholder that appointed the director or a parent company that may not be subject to the same limitations. This may be a useful tool for providing coverage to directors from liability arising from high-risk areas such as labor, tax and foreign exchange regulations.”**

**Barbara Ramperti,**  
Partner,  
Marval O'Farrell Mairal



the decision-making process and crisis management. While there are exceptions and nuances to the rule, the key advantage of the new regime is that it allows boards to decide on urgent matters affecting the company subject to subsequent ratification by the shareholders' meeting as opposed to being paralyzed and not being able to take any such actions until a shareholders' meeting is convened. This new rule does not apply if the bylaws of the company expressly prohibit the delegation of these decisions to the board. In addition, the board is entitled to declare interim dividends at its discretion, even if the bylaws do not expressly provide for this option, until the annual shareholders' meeting is held (such meetings traditionally had to occur within the first four months of the year, but such deadline has now been extended to seven months given the existing lockdown measures and travel restrictions). Directors should be particularly cautious with respect to any decisions involving the distribution of profits and dividends though. More than ever, these decisions should be assessed on a case-by-case basis and made in compliance with a director's fiduciary duties.

In Brazil, the business judgement rule is construed under the standards of behavior and conduct of business expected from officers and directors under the Brazilian Corporations Law, which are quite similar to the standards of the business judgement rule under Delaware law. A court may excuse the director or officer from liability if it determines that he or she acted in good faith and in the interest of the company. Typically, directors are only held liable for damages resulting from acts performed with negligence, fault or deliberately fraudulent conduct; or in violation of any provision set forth in the bylaws or Brazilian law.

### **Chile**

As is the case in Delaware, the Chilean Corporations Act provides that directors owe fiduciary duties—the duty of care and the duty loyalty—to the company and its shareholders. Directors are required to fulfill their roles and discharge their duties with the degree of diligence, care and skill that an ordinary person would exercise in their own personal business (i.e., an ordinary standard of care). The Chilean Corporations Act expressly provides that the directors appointed by a group or class of shareholders—as may be the case for private equity appointed directors—have the same duties with respect to the company and the other shareholders as the remaining directors. Such directors are thus, prohibited from favoring the particular interests of the shareholders who appointed them.

While there are no particular rules that alter or shift directors' fiduciary duties when facing a crisis like COVID-19 or in a distressed scenario, there are certain additional considerations that directors should keep in mind. Particular care should be placed, among other matters, in thoroughly considering the financial and legal implications of entering into credit transactions and transferring corporate assets; diligently considering the different courses of action that the corporation has available, including debt and/or corporate restructurings. Similar to Argentina, the board needs to report financial distress situations to the shareholders. The board of a company that has ceased to pay its obligations as they become due or that is entering a bankruptcy proceeding (*procedimiento concursal de liquidación*) is required by law to call for a shareholders' meeting to be held within 30 days.

**“Even though suspending or postponing dividend distributions may seem a sensible policy for companies heavily affected by the effects of the COVID-19 pandemic—and certain publicly held companies have indeed put distributions on hold—, there might be other considerations to be taken into account which may require the company to distribute a minimum dividend or comply with certain limitations to the retention of profits.”**

**Pedro Whitaker de Souza Dias,**  
Partner,  
Mattos Filho, Veiga Filho,  
Marrey Jr. e Quiroga Advogados

**“Depending on the decision at hand, there may be a need to involve regulators in the decision-making process or to keep them informed and consulted. Being proactive rather than waiting until the regulator is knocking on your door may pay off.”**

**Pablo Iacobelli,**  
Partner,  
Carey

While Chile has not adopted any variation of the business judgment rule, general principles of good faith are likely to be considered by a court when assessing a potential breach of fiduciary duties by a director. Directors shall be jointly and severally liable for the damages suffered by the company and its shareholders to the extent they have acted negligently or with fraud. Consequently, if a director does not agree with the decisions being adopted by the board in connection with a specific matter, he or she shall reflect such dissenting vote in the minutes to be fully exempt from liability, and any such dissenting votes or disagreements should be reported to the shareholders at the next shareholders' meeting.

### Colombia

Directors of Colombian companies owe fiduciary duties of care, loyalty and good faith to the corporation and its stockholders. In addition, Colombian Corporate Law expressly sets forth other specific duties that directors should comply with, such as fulfilling the corporation's purpose; procuring compliance with the law and the organizational documents; refraining from improperly using privileged information; treating all shareholders equally (as is also the case in Chile and Mexico); and abstaining from taking part in transactions involving a conflict of interest.

An interesting feature of fiduciary duties in Colombia is that the market has evolved in the past few years towards being more protective of minority shareholders. In fact, the general understanding is that an important part of the role performed by a director is to protect minority shareholders from potential abuses by the controlling shareholder. As a result, the Colombian Superintendence of Companies has indicated in several instances that any transaction between the company and any of its affiliates (which includes a controlling shareholder of the company) automatically creates a conflict of interest for any director appointed by the controlling shareholder, which requires the conflicted director to disclose the conflict and obtain clearance by the shareholders. In response to such trend, many companies in Colombia have created independent committees to deal with potential conflicts of interest, including related-party transactions.

When it comes to financial distress, insolvency or bankruptcy, Colombian law and courts have not formally developed a doctrine pursuant to which directors owe any fiduciary duties to the company's creditors. However, this matter has caught the attention of legal scholars and practitioners lately and, as a practical matter, similar oversight obligations as the ones applicable in the US should be considered whenever a Colombian company is in the proximity of or already facing insolvency. Pursuant to the Colombian Bankruptcy Code, there are two specific grounds for a debtor to request admission to an insolvency proceeding, be it under a reorganization or a mandatory liquidation proceeding scenario: (i) failure to pay two or more debts for more than 90 days or acting as a defendant in one or more collection proceedings; or (ii) the debtor's imminent and foreseeable inability to discharge its obligations. It is up to the officers and directors of the company to decide, in accordance with their fiduciary duties, when either one of these two grounds have been met and, therefore, when to file for reorganization, mandatory liquidation or bankruptcy.

**“While the value of the precedents of the Superintendence of Companies that apply the business judgement rule is not as strong as case law in the US, it is an indication that the standard of review applied to decisions taken by directors in Colombia is changing.”**

**Darío Laguado Giraldo,**  
Partner,  
Brigard Urrutia

In response to the pandemic, the Colombian government has enacted measures allowing a fast-track, pre-judicial process (*negociación de emergencia*) that allows companies facing financial distress to privately negotiate with some or all of the creditors pre-packaged restructuring agreements so that once approved by the insolvency court, such agreements produce the same effects as a reorganization agreement. Hence, it is critical, especially in the current times, that directors closely monitor the financial situation and the business affairs of the company on a regular basis, and discuss the various alternatives available, including the new fast-track process aforementioned.

While the business judgement rule has not yet been enacted through statute, the Superintendence of Companies has applied its version of the rule in certain cases. In fact, there are two relevant precedents in the field—the Pharmabroker and the Morocota cases—where the Superintendence supported the notion that directors should have sufficient discretion to take business risks, without being concerned about being exposed to liability or that such actions may be overturned or challenged simply because these actions resulted in a negative impact to the company. In both cases, the Superintendence expressed the view that directors cannot fully discharge their fiduciary duty in accordance with the “good businessman” standard if each and all business decisions are scrutinized by courts as a general norm.

## Mexico

In Mexico, fiduciary duties of directors of privately held companies are regulated by the Mexican General Law of Business Companies and in the company’s bylaws. Directors owe fiduciary duties (and are liable) to the company but not to the shareholders. Statutory responsibilities include, among others, the duties to act diligently in the best interest of the company, without acting in favor of a specific shareholder or group of shareholders; to oversee the existence and maintenance of the accounting, control, registration, filing or information systems as required by law; to comply with the resolutions of the shareholders’ meetings; and to act free of any conflicts of interest. In fact, directors may be liable for any damages or loss profits incurred by the company as a result of a vote cast while being conflicted.

The fiduciary duties of directors of companies facing financial distress or insolvency are heightened. Pursuant to the Mexican Insolvency Law, when insolvency (either equity or balance sheet insolvency) becomes imminent (i.e., expected to occur within the next 90 days), in addition to their usual fiduciary duties, directors and officers of a company shall strive to maintain or increase the value of the company. One of the best practices a director can follow in circumstances where insolvency is imminent is not to approve or adopt any action that may be construed as a deliberate action to cause or worsen the financial situation or insolvency of the company. A director shall also refrain from approving any resolutions that may result in the breach of any of the covenants of the company to preserve and maintain the rights of any creditor with respect to the relevant collateral or that may cause a direct loss to any creditor or third party without consulting legal counsel.

**“A director of a Mexican company should diligently analyze the effects of the Covid-19 crisis for the company, and should actively participate in the design and oversight of a transitory business continuity plan and the ensuing adjustments to the pre-Covid-19 business plan and financial projections. Seeking professional advice at the appropriate time will help the board to anticipate and navigate the financial and legal hurdles ahead.”**

**Michell Nader,**  
Partner,  
Nader, Hayaux & Goebel



As a general rule, directors of Mexican companies who breach their fiduciary duties could be deemed jointly liable to the company for the resulting damages and losses. Notwithstanding the foregoing, the Mexican Insolvency Law provides that directors are protected from liability arising from decisions adopted while observing the business judgement rule. As a result, directors are not liable for losses incurred as a result of decisions adopted in good faith when (a) resolutions are approved to comply with the applicable law, the bylaws or resolutions adopted by the shareholders; (b) resolutions are adopted based on information of the senior management of the company or reputable advisors; or (c) if the relevant losses were not foreseeable.

## Peru

In Peru, as is the case in Delaware, the directors owe fiduciary duties of care and loyalty to the company and the shareholders. Moreover, the directors should perform their duties with the diligence of an “organized merchant and a loyal representative”. Peru’s General Corporations Act sets forth additional directors’ duties, including, among others, to act in the best interest of the company and not only in interest of the shareholders who appointed them into office, nor favor a third party over the company’s interests.

These fiduciary duties apply in any circumstance, including during crisis management, as may be the case of companies dealing with the challenges generated by the COVID-19 pandemic. The “organized merchant and loyal representative” standard requires that if a company’s net worth (*patrimonio*) is reduced or is expected to be reduced to less than half, the board should call a shareholders’ meeting to determine which actions should be taken to address such situation. In the same vein, if the board determines that the assets of the company are not enough to satisfy its liabilities, the board shall also report these findings to the shareholders at a duly called meeting. The shareholders may adopt measures to mitigate such situations, which may include capital contributions (by shareholders or third parties), and capital reductions, among others. If no such measures are adopted or available, the board should propose the adoption of other measures at the shareholders’ meeting, including dissolution and liquidation of the company or filing a bankruptcy proceeding (*procedimiento concursal*).

Peruvian law does not expressly contemplate the application of the business judgment rule. However, the General Corporations Act provides that directors will not be liable to the company, the shareholders and/or third parties for the damages caused as a consequence of their agreements or acts, unless the claimant proves that those agreements or acts were performed against the law or the bylaws or with willful misconduct, abuse of power, or gross negligence. In any other case, the directors will not be held liable and the courts will presume that they acted according to their business judgment and duties.

**“In Peru, an issue that often comes up in connection with fiduciary duties is conflicts of interest. A director is expected not to favor his or her personal interests or the interests of a third-party over the interests of the company or to compete with the company. While each potential conflict needs to be assessed on a case by case basis, in certain instances, the board can waive a conflict of interest in order to allow the director to enter into business with the company.”**

**Alberto Rebaza,**  
Partner,  
Rebaza, Alcázar & de las Casas

## **Best practices to ensure compliance with directors' fiduciary duties**

As mentioned above, while the nature of a director's fiduciary duty has not changed as a result of the pandemic, boards of directors all across Latin America are stepping up to support their companies as they navigate the uncertainties, the challenges and, in some instances, even opportunities, brought by COVID-19.

Below is a list of the top 10 best practices that we are seeing boards of directors across the Latin America region apply to assist companies in navigating the current environment while complying with their fiduciary duties.

### **1. Understand your duties**

Not only do fiduciary duties differ from one jurisdiction to another and how to comply with them may vary from one company to another, but such duties may also be enhanced when companies face financial distress or insolvency. Companies listed on stock exchanges or conducting business in regulated markets, for example, may be subject to different rules and regulations as well. Therefore, it is advisable for the board to ensure that directors are familiar with their specific fiduciary duties and the existence of any special circumstances such as the ones outlined above.

Many companies, as well as industry associations, often publish guidelines and group policies about corporate governance and fiduciary duties that directors should review on a regular basis, and have also made available guidelines on a variety of COVID-19 related issues that could be helpful in designing a response plan to the pandemic.

### **2. Meet regularly and keep proper records**

Holding regular board meetings and keeping accurate and complete minutes is another good practice when it comes to ensuring compliance with fiduciary duties. Remote meetings and telephone calls are widely accepted means of making board decisions, which may be particularly useful in the current environment given the existing lockdown measures and travel restrictions. Even in countries like Argentina where remote meetings traditionally had burdensome requirements, new regulations have recently been passed by the Public Registry of the City of Buenos Aires and the Argentine Securities and Exchange Commission simplifying the requirements to allow remote board and shareholders' meetings in response to the pandemic. Similarly, Brazil also recently passed legislation setting forth detailed requirements and proceedings to allow remote shareholders' meetings.

Board members should be proactive in calling board and shareholders' meetings to address COVID-19 related issues and any particular challenge that this situation creates for the company. It is imperative that the board remain informed and consider these issues in real time. Daily developments emerging on the effects of the pandemic require that meetings be held more frequently and that the board work closely with management.

Good recordkeeping practices are also key. Having objective evidence that directors made careful and educated decisions, supported by the appropriate paper trail, is always advisable to mitigate potential directors' liability, especially in a crisis scenario. This includes detailed board minutes outlining the alternative courses of action and support for the decisions adopted and any abstentions or dissenting votes, back-up materials for the board meetings, evidence of the follow-up measures with management, and having adequate accounting records and other corporate books kept up-to-date. A board can protect itself and the company by approaching issues in a consistent manner and documenting the rationale in real time. These documents could serve as a source of contemporaneous evidence in regulatory or judicial proceedings that a director or even the company may face.

### **3. Be proactive, stay informed and know when to report or escalate**

Overall, fiduciary duties require a director to act diligently, make informed decisions and believe, in good faith, that such decisions are in the best interest of the company and, in certain cases as outlined earlier, its shareholders and other stakeholders. The duty to stay informed is not passive, but instead requires the active involvement of the directors. Therefore, directors should procure all information available and support necessary before making decisions and ensure the corporation's decision-making process and records properly reflect consideration of each of these factors.

Exercising appropriate care may include calling meetings, requesting appropriate information sufficiently in advance of meetings and between meetings when it becomes available, and escalating matters to shareholders or other authorities when needed. If sufficient information to allow a director to make a decision is not provided, the director's duties require the director to request such information, and leaving a proper record of the request is advisable.

The board should also actively engage with management in the design of a strategy and response plan to address the difficulties that the company is facing and should closely monitor its implementation. This will allow the directors to detect potential areas of improvement and reassess periodically based on more recent developments. Identifying especially sensitive areas for the company will be particularly important in this scenario and, as previously mentioned, the directors should closely oversee management in these cases. The board should also develop engagement strategies to proactively address potential issues investors may be concerned about and build strong, ongoing relationships with them. Overall, directors should try to have fluid and continuous communication with management, shareholders and other relevant stakeholders.

### **4. Seek professional advice**

Obtaining expert advice (including in connection with waivers, standstills, new financings, employee obligations, customer and supplier arrangements, compliance and disclosure obligations, restructuring or insolvency proceedings) is also advisable because of the novel threats and disruptions caused by COVID-19 and the

numerous changes in laws and regulation passed daily by governments across Latin America in response to the pandemic, most of which have yet to be tested by the courts. Companies will likely face new challenges as this pandemic unfolds which may present complexities that the board may not be sufficiently familiar with. In this context, seeking experts' advice may be necessary for the board to be able to fully grasp the consequences of the different courses of action and for directors to appropriately comply with their fiduciary duties.

Seeking professional advice in a timely manner can not only corroborate that a director has acted diligently, but in certain cases, may allow directors to rely on such advice to mitigate potential liability for breach of fiduciary duties. Having said that, directors should not hesitate to test the information and recommendations being made to them. A director should ultimately be comfortable with the decisions he or she is making.

## **5. Watch out for potential conflicts of interest**

Directors should also be mindful of their role as board members and be proactive in addressing any potential conflicts of interest that may arise between the director, the company and/or the shareholder that appointed such director.

For instance, under Delaware law, a conflict of interest affects a director's duty of loyalty. Directors are bound to act in good faith and in the best interests of the corporation and must not place themselves in a position in which their duties to the corporation and its relevant constituencies may conflict with their own personal interests. Likewise, in Argentina, Brazil, Chile, Colombia, Mexico and Peru, directors are required not only to disclose conflicts of interest but also to refrain from voting if they are conflicted. In certain instances, directors should even refrain from participating in the deliberation of a matter over which they are conflicted. All of these circumstances should be properly documented in the corporate records.

Another important reminder is that directors must make their own independent determination in fulfilling their fiduciary duties, even when they have been appointed by or may be otherwise employed by a shareholder.

## **6. Monitor financial conditions and compliance with key contracts**

Directors should regularly assess the company's financial condition and compliance with key contracts, including financial covenants, guarantees and termination events.

Directors should not only consider the ability of the company to meet its current and future obligations, but also the financial situation and prospects of their key clients and suppliers. Regular financial and operational reporting and timely escalation of issues are essential and very time sensitive as previously outlined. This assessment has now become even more relevant in light of the impact of COVID-19 to companies' businesses and the challenges that may result from interruptions in the supply chain and the needs of their customers who may themselves be suffering the effects of the pandemic.

## 7. Consider sector and other applicable regulations

Directors should be aware of any specific regulations that may apply to the company, for example, to publicly held companies or companies in regulated sectors such as financial services, telecommunications, infrastructure, energy, pharmaceuticals and insurance.

Boards of companies in regulated sectors should be particularly proactive in engaging with governments and regulators as they address the challenges of the COVID-19 pandemic and define their action plans. When and how to approach governments and regulators requires careful analysis by board members and sometimes being proactive may pay off. A recent example of the benefits of early engagement with government and regulators was seen in the utilities sector in Chile. Due to the major business disruptions caused by the COVID-19 pandemic, public opinion put pressure on both Chilean utilities companies and the government to provide relief to households in connection with the payment of utility bills. Rather than waiting for the enactment of potentially more stringent and onerous regulation by the Chilean Parliament, utility companies decided to engage in discussions with the government to reach an agreement on a relief plan, which was ultimately successful.

When it comes to companies listed on stock exchanges, directors should carefully determine the need to disclose “relevant facts” to the public, for instance, as a result of changes to business plans or financial projections, or the identification of potential risks to the business or prospects of the company that result from the COVID-19 pandemic. While the actual consequences that this situation may ultimately have to the company may be uncertain, the timeliness of the disclosure to the public of the challenges being faced and the mitigation measures is of utmost importance.

## 8. Are there other interests at stake?

Particularly in crisis scenarios, directors should not only consider their legal obligations, including their fiduciary duties, when making decisions, but also if there are other interests and risks at stake. Reputational risk is an issue at the forefront of all current board discussions, and how the directors and the company respond to the pandemic could have a long-term impact on the business and market perception.

Additionally, all measures adopted during these uncertain times should consider not only the effect on the company in the immediate term to survive the pandemic, but also the long-term consequences and whether they preserve the company’s structure, clients and suppliers for when the company resumes its “normal” operations after the pandemic.

Any COVID-19 response plans should also consider the company’s employees and staff. In Mexico, taking effective measures at all times to protect the health and safety of the employees and staff of the company is not only a good practice, but a legal requirement. In fact, directors are deemed legal representatives of the company, as employers, for purposes of health and safety measures in the workplace, and their actions towards the employees in health and safety matters are attached to the employer. Mexican Federal Labor Law establishes certain penalties against employers when a health and safety provision is not observed.



## **9. Risks mitigants and limitations to director's liability**

When dealing with a crisis, especially something as sudden as the COVID-19 pandemic, directors should be focused on helping, assisting and advising their companies to navigate these challenges and preparing them for what will happen next, as opposed to worrying about the risks and liabilities that come with their role.

In fact, there are many available protections and limitations of liability for directors under applicable laws. In many jurisdictions, including Delaware, Brazil and Colombia, the business judgment rule operates as an evidentiary presumption that the board complied with its fiduciary duties, and to the extent the presumption is not rebutted, the court will not second guess the board's business decisions. In certain jurisdictions, directors can also mitigate their liability by having their decisions ratified by the shareholders.

Directors should also understand to what extent indemnification is or can be lawfully provided by the company, as well as applicable carve-outs, exclusions and limitations. While in Argentina, Chile and Colombia, companies cannot indemnify their directors, in Delaware, Brazil, Mexico and Peru such indemnification is permitted subject to certain limitations. In certain instances, directors may also be indemnified by their appointing shareholders and enter into tailored indemnification agreements.

Directors and officers (D&O) policies are generally available in Latin America. Directors should confirm the policies' terms and conditions to ensure that they and the risks arising from the company's situation are properly covered. Directors should also confirm their company's D&O policies are issued by insurance companies in compliance with local regulations.

## **10. More than ever, be active and remain engaged**

Resignation by itself will not discharge a director's responsibility for breach of fiduciary duties for any previous conduct. Therefore, remaining on the board engaged and committed to leading the company through this pandemic may be the most effective means of mitigating personal risks and liabilities and ensuring the company is prepared to deal not only with the challenges brought by COVID-19 but also with the opportunities that may lie ahead.

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