COVID-19 in Asia: An Erosion of Contractual and Investor Rights?

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Contact Information

If you have any questions concerning this alert, please contact:

Matthew Puhar
Partner
matthew.puhar@akingump.com
Hong Kong
+852 3694.3060

Daniel L. Cohen
Consultant
daniel.cohen@akingump.com
Hong Kong
+852 3694.3032

Many governments across Asia have been proactive and innovative in their responses to COVID-19. The region has seen sweeping relief measures, like those deployed in the U.S. and Europe, which are deeply impactful for businesses and investors, in a variety of ways.

In some respects, Asia has led the way. For instance, Australia was one of the first jurisdictions to amend its insolvency regime to provide relief for financially distressed companies. Those measures were announced on 22 March 2020 and include greater scope for directors of distressed companies to avoid personal liability for insolvent trading, as well as changes that impact statutory demands. More recently, Australia implemented other temporary changes to its foreign investment review regime (administered by the Foreign Investment Review Board), to facilitate greater scrutiny and oversight of inward investment.

Suspending the enforcement of contractual rights

Singapore is now going a step further, with hard-hitting new laws to provide relief for parties who are unable to perform certain contractual obligations due to COVID-19. The Singapore Ministry of Law announced on 1 April 2020 temporary relief in the form of the COVID-19 (Temporary Measures) Bill (the "Bill"). Passage of the Bill through the Singapore Parliament is being expedited this week. According to the Ministry of Law, the Bill aims to provide targeted protection for businesses and individuals. It was described by the Singapore Minister for Home Affairs and for Law as a "whole-of-Government effort".

These new provisions will intervene significantly, albeit temporarily, in the rights of contractual parties in various commercial contexts, including construction contracts, certain goods or services contracts and leases or licences for non-residential real estate. Among other curtailments, the Bill prevents a party from instituting court, arbitration or insolvency proceedings, or enforcing security, if a defaulting counterparty has served a notification for relief - a fairly straightforward procedure, it seems.

Furthermore, the Bill is a rare example of retroactive legislation, since it covers relevant contractual obligations due for performance on or after 1 February 2020, for

contracts that were entered into or renewed before 25 March 2020. The moratorium on legal action and other steps for breach of contract will operate for a period of six months, subject to extension.

Measures of this type also raise important cross-border issues for investors and other stakeholders. For example, how will proceedings commenced outside of Singapore be impacted, and will it be possible later to enforce in Singapore a judgment or award obtained in a different jurisdiction at a time when equivalent proceedings in Singapore could not have been commenced under the terms of the Bill?

Investor rights under pressure

We have also seen certain investor rights come under a degree of pressure in Asia as the public health crisis has unfolded. In both Hong Kong and Japan, for instance, whilst regulators have been keen to encourage listed companies to disclose to the market on a timely basis the actual and expected impact of the COVID-19 crisis on their businesses, investor protections have, to some extent, been loosened.

The Hong Kong Stock Exchange ("HKEx") is holding off from suspending the shares of listed companies even when deadlines for publishing audited financials are breached (for example, due to travel restrictions preventing audit completions), provided that the company can publish suitable unaudited financial information to keep the market appropriately informed. Meanwhile, the Hong Kong Securities and Futures Commission and the HKEx have also encouraged listed issuers to consider (if permitted by company law) adjourning or delaying shareholder meetings for a reasonable period until the legal restrictions on group gatherings are lifted by the Hong Kong government.

In Tokyo, the Tokyo Stock Exchange is permitting an extension of the deadline for disclosure of listed companies' financial results due to the impact of COVID-19, and is also relaxing the listing standards for new applicants coming to market in this crisis-impacted period.

Given the importance of the timely and accurate disclosure of listed company information, investors would be well advised to monitor closely how these developments may impact their Asian positions.

Vigilance is the watchword, as this unique situation continues to unfold

At the end of the day, COVID-19 response measures which have the effect of varying parties' rights under private commercial arrangements, facilitating less timely corporate disclosures or reducing market transparency may be fully justified as tools to address the current crisis. Indeed, similar measures are being implemented for understandable reasons in other parts of the world.

At the same time, however, such measures—and we expect to see more of them in the coming weeks and months—sit somewhat uncomfortably against the backdrop of the improvements in these areas gained by investors and other market participants over recent years in Asia.

Whilst there is no current reason to expect a more permanent change in direction, we recommend continued vigilance as this unique situation continues to unfold.

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