COVID-19 Across Asia: Your Essential Toolkit in the Rapidly Changing Commercial and Legal Risk Landscape

March 24, 2020

Whatever your business—whether you are an investor looking at new investments, managing existing positions or planning exits, or a corporate concerned with protecting and enhancing your business—the current public health crisis has brought a host of additional risks and challenges to Asia.

In this summary briefing, our team looks at some of the key legal risk issues that businesses need to be aware of in order to position themselves optimally—to protect and enhance returns for their stakeholders. As the public health crisis in many parts of Asia enters what we hope is a stabilization phase, its continuing impact remains a key variable, which will continue to drive business and risk planning across the region.

Key contracts – when is a commitment no longer enforceable?

The COVID-19 pandemic is radically altering commercial expectations, creating legal risks and uncertainty for existing contractual relationships. It may be possible for a party to be excused from the proper performance of a contract, depending on the scope, meaning and effect of a force majeure provision, the application of doctrines such as frustration at common law (or statutory equivalents in jurisdictions across Asia, including mainland China) and other mechanisms, such as termination, material adverse change or change in law. The current market dislocation can be expected to give rise to significant disputes focusing on the circumstances in which contracts end, so parties should be extra vigilant about the consequences of premature or wrongful termination, in particular.

Some of these issues are explored in our review of the impact of the pandemic on global transactions generally (see The Global Impact of COVID-19 on Corporate Transactions). Across key markets in Asia, we see parties wrestling with contractual difficulties. For instance, the China Council for the Promotion of International Trade has reportedly issued thousands of force majeure certificates to enable local exporters to avoid fulfilling agreements with overseas counterparties, although the effectiveness of such certificates remains untested. We are also seeing attempted reliance on and greater scrutiny of force majeure provisions in the context of long-term liquefied natural
gas contracts and construction contracts, both of which areas we review more closely at here and here.

**Public takeover & privatization offers – can announced deals be withdrawn?**

So-called material adverse change (MAC) conditions to public bids come in various different forms in Asia’s capital markets. In the current crisis, as a matter of contract law, a MAC condition may be available as a way to lapse an announced offer. However, applicable regulations will require that before the bidder can take that step, at a minimum the situation at issue must be specific to the target group and be so serious that it strikes at the heart of the offer transaction. A change in market conditions affecting the market or the sector as a whole will not normally be enough to effect a MAC-based withdrawal of the bid, because as a basic principle the offeror is obliged to bear the risks of the market, not target shareholders.

These principles—or ones very similar—are reflected in the approach taken by the regulators of public offer transactions in at least Hong Kong, Singapore, Australia, Japan and Korea. As a result, it is unlikely (but not out of the question) that the existing public health crisis would provide a MAC-out for a bidder, despite the recent and extensive market downswings - and case by case analysis on this topic is recommended. You can find out more about how the pandemic is affecting global corporate transactions at Global Corporate Transactions and COVID-19.

**International trade - how should companies manage supply chain disruption and related trade compliance issues?**

The impacts of COVID-19 cut across many aspects of international trade, including supply chain management, business travel, immigration, manufacturing, sales, importing, exporting, customs and logistics. As events continue to unfold, a serious and ongoing evaluation of supply chain issues related to changing suppliers, altering logistics routes and updating sourcing will be required. Regulatory requirements will continue to apply in the face of these changes, and international trade compliance programmes must remain nimble, while also ensuring compliance programme continuity, in the face of rapidly evolving risk factors. Trade compliance professionals should be connected to changes within their organizations to help ensure that the new reality does not result in inadvertent compliance issues, violations or penalties—as well as operational costs to unwind noncompliant activities.

A checklist of supply chain considerations, as well as additional guidance and analysis, can be found in our alert here: International Trade Impacts of COVID-19.

**How will credit instruments and financial restructurings be affected?**

Companies hit hard by supply chain issues and operational disruptions will likely face liquidity needs and may look to draw down on revolvers or available commitments. Loan Market Association (LMA) form facility agreements will often include representations and warranties that there has been no material adverse change to the business or operations of the borrower and/or an event of default relating to the occurrence of a material adverse change, and similar provisions relating to events which have caused a material adverse effect. Disputes may arise as to whether the COVID-19 situation has caused such a material adverse change or effect. This will require an analysis of, among other things, the drafting of the clause and the precise factual circumstances. Our overview of some of the key United States jurisprudence

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Declining financial performance may also give rise to investment rating downgrades of bond issuers (which may trigger more restrictive covenants) and/or financial covenant defaults. It will be important for lenders and bondholders to closely monitor the performance of their borrowers and issuers.

The precise scope of the economic fallout from COVID-19 remains uncertain, although it seems inevitable that there will be an increase in insolvency and restructuring activity in the region. In recent years, a number of key jurisdictions in Asia, such as Singapore, India, mainland China and South Korea, have overhauled their insolvency and restructuring regimes or taken steps to improve their legal infrastructure in this area. In contrast, Hong Kong has fallen behind its peers with several failed attempts to introduce a "provisional supervision" corporate rescue regime. The COVID-19 situation may prove to be the impetus required for the Hong Kong government to finally achieve this.

Australia has acted quickly in response to the current situation and put in place temporary measures to give some relief to distressed companies and their directors which will apply for the next 6 months. The measures include relieving directors from personal liability for insolvent trading provided the debts are incurred in the ordinary course of business. The minimum claim of a creditor issuing a statutory demand to a company (which is a typical route to insolvent winding up) has been increased from AUD 2,000 to AUD 20,000 and the period of time for a company to respond to such a demand has increased from 21 days to 6 months. It will be interesting to see whether other countries in the region introduce similar temporary measures.

In large-scale restructuring cases with significant numbers of creditors, the current recommendation from governments in the region is to avoid large public gatherings. Novel solutions will be required for meetings of creditors and shareholders, where stakeholders are entitled to attend and vote in person. Hyflux Limited, an SGX-listed Singaporean company with over 34,000 retail investors, has recently announced that in light of the evolving COVID-19 situation, it is considering how best to hold its April 22 financial restructuring scheme meeting.

You can see more on these issues at MAE in Loan Agreements: A Framework for Lenders and Borrowers During the Current Crisis.
far, South Korea and Indonesia are the only Asian equity markets where short selling has been officially banned. More information on this and other key matters relevant to the asset management industry can be found here: Navigating the “New Normal” – The Fallout for Hong Kong Based Asset Managers and Financial Institutions with Exposure to Asia or Hong Kong.

The responses from regulators around Asia have also included useful measures such as the HKEx 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. In the Hong Kong financial sector, the Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) have both encouraged regulated businesses to consult them as soon as possible in the event of anticipated compliance or other difficulties arising out of the public health crisis.

For a global perspective on all of these issues and more, please visit the Akin Gump Covid-19 Resource Center at www.AGCovid19.com

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