CORPORATE
COVID-19 IN ASIA

Covid-19 v investor rights

Akin Gump lawyers review how measures taken by various governments, stock exchanges and regulators are likely to impact the operation and transparency of the market

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 US 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 temporary relief for financially distressed companies. Those measures were first announced on March 22 2020 and include greater scope for directors of distressed companies to avoid personal liability for insolvent trading, as well as changes impacting statutory demands. Many other jurisdictions, including a number outside of Asia, thereafter followed suit with similar initiatives. 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 has taken matters significantly further. On April 7 2020, the Singapore Parliament enacted the Covid-19 (Temporary Measures) Act 2020, which entered into force on April 9 2020.

The scope of the Act is broad, covering a number of different areas, including temporary measures addressing the conduct of meetings, court proceedings and financially distressed individuals, firms and other businesses.

In addition, part two of the Act addresses non-performance of 'scheduled contracts' entered into before March 25 2020. This includes construction or supply contracts (and performance bonds or equivalent granted pursuant to such contracts), event and tourism-related

1 MINUTE READ

Sweeping relief measures in Asia in response to Covid-19 will have a major impact on businesses and investors. The region has been innovative, for instance, leading the way on amendments to insolvency legislation. Recent developments include new legislation in Singapore, which comprises a significant intervention in private contracts, and a relaxation of timely disclosures by listed companies in several jurisdictions. Such measures may be reasonable in the circumstances, but they sit uncomfortably against a better investment environment in recent years in Asia. Investors should be vigilant and closely monitor changes in the legal landscape.

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contracts (which are fairly broadly defined) and leases or licences of non-residential property. It may also include a secured loan facility if the borrower is an enterprise in a group which has a turnover not exceeding S$100 million ($70 million) in the latest financial year.

The relief regime bites if a party to a scheduled contract is unable, as a result of a Covid-19 event, to perform a contractual obligation which is to be performed on or after February 1 2020 and notifies contractual counterparties and guarantors in a prescribed manner. If the validity of such a notification is disputed, the matter is adjudicated by an assessor appointed by the government (it seems around 100 in total are to be appointed). The process is supposed to be quick, inexpensive and practical, but therefore involves few checks and balances; the parties must bear their own costs, are not permitted to be legally represented, and the assessor's decision is final and cannot be appealed. Failure to comply with an assessor's decision attracts potential criminal liability.

The protections provided to the defaulting party are significant. They prevent an array of actions being taken against it, including the commencement or continuation of court or arbitration proceedings, enforcement of security over immovable property or moveable property used for the purpose of a trade, business or profession, the appointment of a receiver or manager over any property or undertaking of the defaulting party, and termination of a lease or licence of immovable property for non-payment of rent. The Act also prohibits various insolvency and restructuring-related steps from being taken against the defaulting party. The fort is therefore held firmly, for up to six months initially.

This all amounts to a significant, albeit temporary, intervention in private contractual rights in key commercial settings. The Act is also a rare example of retroactive legislation, since scheduled contracts are ones entered into before March 25 2020 and the trigger for relief is an unsatisfied contractual obligation due for performance on or after February 1 2020.

Interventionist measures of this type are bound to raise unique complications, including possible cross-border issues. For instance, implementation may give rise to questions about the enforceability in Singapore of a foreign judgment when equivalent proceedings could not have been brought in Singapore under the Act. For arbitrations, only those which are domestic and within the scope of the Arbitration Act are caught by the temporary moratorium on legal proceedings.

Investor rights under pressure

Investor protections have been under pressure in other ways too, including weakening market transparency in key jurisdictions.

In Hong Kong SAR, for instance, requirements relating to the timely disclosure of periodic financial information by listed companies have been considerably relaxed since the Covid-19 outbreak. Under normal circumstances, a company listed on the Main Board of the Hong Kong Stock Exchange (HKEX) is required (i) to publish its preliminary results in respect of each financial year within three months after the end of the financial year; and (ii) to publish its annual report in respect of each financial year within four months after the end of the financial year. Failure to comply with these requirements would normally result in a suspension of trading in the listed company's securities.

On February 4, the HKEX and the Securities and Futures Commission (SFC) issued a joint statement, allowing listed companies to defer the publication of their audited financial statements or preliminary results, if travel and other restrictions arising from the Covid-19 outbreak have disrupted the reporting or audit processes of these companies. A listed company experiencing difficulty in this regard was given the option of publishing its preliminary results without agreement from its auditors, or if that was not achievable, publishing financial information that it is able to report on, provided that such information was sufficient to maintain an orderly, informed and fair market for the trading of the company's securities. The HKEX and SFC confirmed that they would hold off from suspending the securities of listed companies as long as those companies can comply with these alternative approaches.

The regulators provided further guidance on March 16, to, among other things, '*encourage market participants to accord priority to the health and safety of all concerned, including the accounting and other personnel of listed issuers and auditors carrying out their work. Listed issuers should assess what is reasonable in fulfilling their reporting obligations in light of their individual circumstances…*'

Listed companies have been given more flexibility in relation to the publication of their annual reports, which can now be deferred for up to 60 days initially, with further extensions possible. Importantly, the HKEX and SFC stated that to the extent there are material differences between the previously announced unaudited results and the annual report, the regulators *'will not take disciplinary action solely because of material differences… [and instead] will consider whether the issuer and its directors have been diligent and reasonable in their treatment of accounts or put a good faith effort on the available information'.*

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The other key channel via which shareholders receive information from listed companies, as well as exercising their rights as investors – the annual general meeting – has also been affected. The SFC and the HKEX have urged listed companies 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 SAR

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government (in force until May 7 2020). Listed companies were *'encouraged to consider a longer adjournment or delay'* to allow themselves more time to monitor the situation and to explore and assess measures to reduce the need for shareholders to physically attend general meetings.

In Japan, the Tokyo Stock Exchange (TSE) is permitting an extension of the deadline for disclosure of listed companies' financial results due to the impact of Covid-19. The TSE is also relaxing the listing standards for new applicants coming to market. For instance, the TSE is now more prepared to disregard any temporary deterioration in an applicant's business performance caused by Covid-19 and to accept a qualified opinion on an applicant's financial results where there has been difficulty with physical inspection of inventory or premises. In addition, the TSE is giving companies in distress as a result of Covid-19 an extended grace period of two years (up from one year) before delisting them.

Vigilance is the buzzword

At the end of the day, Covid-19 response measures that have the effect of varying parties' rights under private commercial arrangements, facilitating less timely corporate disclosures, or reducing market transparency, may be fully justified and reasonable in the circumstances.

During the passage of the Covid-19 (Temporary Measures) Act 2020 before the Singapore Parliament, the Minister for Law stressed the sanctity of contracts as a foundation of the rule of law in Singapore. He also said that matters could not simply be left to the market, describing the proposed legislation as a *'legal circuit breaker…a time out, until this virus dies out, and contracts, like life, can return to normal'.*

Be that as it may, such measures – of which there will likely be more – sit uncomfortably against the backdrop of a better investment environment for market participants over the past few years in Asia. Market transparency improvements have been critical in a region that has seen its fair share of corporate governance scandals.

While there is no reason to expect a more permanent change in direction, investors will nonetheless wish to be vigilant and monitor closely how ongoing developments may impact their Asian positions.

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