SQUIRE PATTON BOGGS

COVID-19 Impact on Business Acquisition Agreement (M&A)

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Globally, the coronavirus disease 2019 (COVID-19) pandemic has impacted industries at every level, as well as government operations. Due to COVID-19 lockdowns and its economic impact, which are taking place and being felt in many countries, parties to ongoing M&A transactions may be grappling with inabilities to fulfil conditions precedent to completion or completion deliverables by the specified long stop date or completion date.

Risks and Obligations in M&A Agreements

Certain key risks and obligations in business sale and purchase agreements (whether by way of a shares acquisition or acquisition of a business as a going concern through acquisition of assets) ("M&A Agreement") which may be impacted by COVID-19 include:

Key Concepts	Common Principles	Potential Covid-19 Impact
Conditions precedent	May include: • Obtaining regulatory approvals and third party consents • No material adverse change ("MAC") in the business, financial or trading position, or assets, liabilities or profitability or prospects of the target company or business to be acquired • No material breach of the seller warranties	If conditions precedent are not fulfilled or waived by a long stop date, completion does not proceed and the agreement is terminated A party may be liable for failure to fulfil, or failure to use best efforts to procure the fulfilment, of a condition precedent Seller typically bears the risk for the fulfilment of most of the conditions precedent During COVID-19 lockdowns (which include workplace shutdowns), obtaining regulatory approvals and/or third party consents, including original wet ink signatures (if this is a requirement under the agreement), may be delayed and result in such condition precedents not being fulfilled by the long stop date COVID-19 may result in a breach in seller warranties or a MAC in the business, financial or trading position, or assets, liabilities or profitability or prospects of a business. Unless there are qualifications or exceptions for situations which COVID-19 can fall under, a buyer may be entitled to terminate the agreement for failure to fulfil such condition precedent. A MAC may also entitle a buyer to terminate the agreement prior to Completion. Even if Completion occurs, a MAC may also result in a breach of warranty by the seller and the seller may be subject to a breach of warranty claim
Completion deliverables	May require: • Physical delivery of assets • Delivery of original wet ink documents	If a party is unable to perform or deliver Completion obligations or deliverables which it is responsible for under the agreement, unless the other party agrees to extend the completion date or waive the completion deliverable, the agreement typically terminates. The party would also be in breach of the agreement In most countries, mail and delivery services have been considered essential services and permitted to continue during COVID-19 lockdowns. Therefore, it may still be possible for parties to exchange original documents on completion although the logistics and timing of the delivery will need to be carefully thought out in advance. The physical delivery of assets however, depending on the assets, may not be possible unless exemptions from the lockdowns apply or can be obtained. For example, during the Singapore Circuit Breaker Period, companies may apply for time limited exemptions to enable a limited number of staff to work on the business premises for a limited amount of time. However safe distancing measures must still be complied during such time.

Unless the M&A Agreement provides exclusions or qualifications, which would apply to the current COVID-19 situation, or parties are able to reach an agreement to extend the contract dates or a party is willing to waive certain conditions or completion deliverables, the agreement is likely to be terminated and a party may be subject to potential liabilities.

Force Majeure Provision

M&A Agreements typically do not contain *force majeure* provisions. Meaning "superior force" in French, statutory *force majeure* protections are provided for in the civil codes of some civil law jurisdictions (e.g. France or the UAE). However, in common law jurisdictions (e.g. Australia, Singapore and the UK), *force majeure* is generally a creature of contract and *force majeure* relief is only available if and to the extent provided under contract.

Force majeure provisions typically:

- Define what constitutes a *force majeure* event – commonly thought of as "events which are beyond the reasonable control of a party", although generally, there is no recognised or implied definition of *force majeure* under common law and the term requires definition under the contract
- Excuses the affected party from performance of obligations affected by the *force majeure* event
- Sometimes, extends deadlines or milestones dates under the contract or the term of the contract for the period of or to take into account the *force majeure* event
- Entitles the parties to terminate the contract in the event that the *force majeure* event persists beyond an agreed period of time

The absence of *force majeure* provisions in M&A Agreements is reflective of the risk allocation under an M&A Agreement where the seller commonly bears the risks relating to its business prior to completion and each party bears the risk of the condition precedents and completion deliverables that they have agreed to be responsible for under the M&A Agreement.

For example, if the seller has agreed to be responsible for obtaining a third-party consent in relation to the sale as a condition precedent, the seller also takes the risk of such third-party consent not being obtained. It is not entirely within a seller's control whether a third party is willing to provide the consent. However, from the buyer's perspective, the buyer would not wish to proceed with the purchase if such consent is not obtained and it does not matter to the buyer that the third party's refusal was not within the seller's control.

Therefore, a *force majeure* provision, which would excuse the seller for failing to obtain the third-party consent because, beyond the seller's control and best efforts, the third party simply does not wish to provide its consent would render the intended risk/responsibility allocation meaningless and should not be included.

Not discussed in this article is the doctrine of frustration that a party may also seek to rely on. For more information, please refer to our article "Comparison of Force Majeure and Frustration".

Exceptional circumstances exclusions for M&A

However, given what the world is currently experiencing under COVID-19, is there room for *force majeure* in M&A Agreements? Particularly in relation to extreme and disastrous events such as war, acts of terrorism or pandemics (including epidemics)?

Going forward, and certainly in the new future, parties to M&A transactions will now be more conscious of the potential impact to transactions from extreme or disastrous events, such as wars and pandemics. Two key components of a *force majeure* clause in the context of an M&A transaction would need to considered:

- Definition of *force majeure* – as mentioned above, a broad definition of *force majeure* as events "beyond the reasonable control" may not be consistent with the risk/responsibility allocation under an M&A Agreement. Therefore, the definition of *force majeure* may need to be a narrower definition, which is limited to specified events or classes of events, such as war, acts of terrorism, pandemics (including epidemics) or other extreme events that may be appropriate given the jurisdiction, industry or environment.
- Relief granted in the event of a *force majeure* – common *force majeure* relief includes relief from performance obligations, liability or default and extension of time. Relief that is appropriate in the context of an M&A transaction will need to be catered for.

  For example, whether a *force majeure* should result in an extension of the long stop date or completion date (and for how long) should be carefully considered on a case-by-case basis. We envisage that for most cases, not having an extension of such contract dates due to *force majeure*, would be a better option for all parties. Parties will still have the option to extend the dates by agreement at that point in time and each will have the ability to make an informed decision under the circumstances. It would be impossible for any party to decide at the point of signing the M&A Agreement whether it would want the long stop date or completion date to be extended should such *force majeure* event occur. From the seller perspective, an extension of the long stop date or completion date prolongs the state of "limbo" for employees, which could be detrimental to the business. While in theory it is "business as usual" for the business being sold, the reality is that employees of companies undergoing a sale often feel a great sense of uncertainty and there will unavoidably be resignations, which, in turn, could impact the business operations. The longer it takes for the change in ownership to occur, the greater the risk of losing personnel, which could lead to breaches in seller warranties.

Parties wishing to include some form of *force majeure* provision or qualification or exclusion for exceptional circumstances into M&A Agreements should do so carefully and seek legal advice. Please feel free to contact us for additional guidance or questions on this topic.

Contacts

Ignatius Hwang
Partner, Singapore
T +65 6922 8660
E ignatius.hwang@squirepb.com

Melissa Kwek
Of Counsel, Singapore
T +65 6922 8659
E melissa.kwek@squirepb.com