

# Impact of COVID-19 on Cross Border Transactions

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As coronavirus pandemic (COVID-19) continues to spread across the globe, companies and transaction participants are grappling with increased risk and uncertainty posed by COVID-19. In terms of cross border transactions, COVID-19 may cause the buyer and the seller to adjust and renegotiate the terms of transaction documents, including without limitation the valuation and pricing mechanism, and may cause the buyer and the seller to postpone the execution and closing so as to reduce the impact of COVID-19 on the business operation of the target company and mitigate the losses under the current COVID-19 situation. This article will focus on the impact of the COVID-19 on the cross-border transaction process and how to adjust the relevant terms of the transaction documents to promote the transaction process from several perspectives.

**Due Diligence:** Business travel has been substantially curtailed due to the outbreak of COVID-19 and such limitation is likely to continue well into the future. Due diligence is now usually conducted through “Virtual Data Room” (“VDR”) that provide the parties and their advisors with controlled access to company documents in a secure cloud environment. VDR is widely used in auction deals and it is still necessary to learn the business situation of the target company through on-site due diligence for cross border transactions. For instance, first round bidding normally is in VDR but the second round bidding may further need on-site due diligence or management discussion. The buyer/investor will have to assess the risk in the case that only online due diligence or limited on-site due diligence can be conducted while assessing whether the transaction can be continued or not.

**Definition:** Certain key definitions may need to be amended or adjusted, including without limitation the “Business Day”, “Material Adverse Effect” (“MAE”) and long stop date. The usual formulation for the definition of a “Business Day” refers to a day (other than a Saturday or Sunday or other public holiday) on which banks are open for general business in the relevant jurisdictions. Where the government of the relevant jurisdiction has declared temporary lock-down measures due to COVID-19, it is better to revisit the definition of “Business Day” and clarify whether these temporary lock-down measures would impact the definition of “Business Days” in transaction documents.

**Representations and Warranties:** Representations and warranties are statements of the facts made by the parties. A party should carefully consider the wording of each representation and warranty in light of the COVID-19 outbreak to see if such representations and/or warranties are true and accurate. In the overseas insurance market, Representation and Warranty Insurance is widely used in M&A transactions to reduce the risk of cross-border transactions. In recent years, with Chinese enterprises further participating in the cross-border M&A transactions, such

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insurance has begun to be used by the Chinese enterprises in the M&A transactions to reduce the risk of cross-border transactions. The transaction parties and insurance companies need to re-evaluate the impact of COVID-19 on such insurance, such as whether to include the COVID-19 as the carve out for the insurance and whether the insured transactions will be affected etc.

**Condition Precedent:** It is generally agreed in the transaction documents that a series of conditions precedent shall be satisfied prior to the closing and the payment made by the investor/buyer unless such conditions precedent are waived by the investor/buyer. Parties to an agreement should consider whether the conditions precedent can be satisfied during COVID-19. If not, the parties shall negotiate to ensure that the investor/buyer will issue a waiver simultaneously with prior to or upon the closing of the transaction documents to avoid breach of contract. However, it should be noted that for cross border transactions which includes statutory conditions, such as approvals involving state-owned enterprises in accordance with the state owned assets laws, or those that trigger anti-trust filing, such conditions precedent are compulsory and cannot be waived by the parties.

**Material Adverse Effect:** The definition and scope of MAE are critical terms that may affect the closing. During the negotiation, the investor/buyer expects to expand the scope of MAE, including events, facts, conditions, changes or impacts that have or may have material adverse effects on the operation, development, financial or other conditions, property (including intangible property), management, debts or prospects of the target company. For the seller, wider scope of MAE will increase the possibility of the investor/buyer giving up the transaction without any responsibility, so the seller expects to limit the definition and scope of MAE, such as adding carve-outs for MAE, including but not limited to the change of general economic conditions or other conditions generally affecting the industry in which the target company competes, changes of national or international political or social conditions, changes in law after the date of the execution of the transaction documents and other force majeure events shall not be deemed as MAE. For M&A transactions conducted during COVID-19, the most concern of all parties to the transaction is whether COVID-19 is deemed as an MAE. The investor/buyer may refuse to fulfill the closing or terminate the agreement on the basis of MAE. Conversely the seller may claim that the MAE shall not include COVID-19. In view of this, the parties and their counsels should pay more attention to the definition and scope of MAE during COVID-19, so as to avoid affecting the transaction process and the disputes.

**Execution:** Most of cross border deals are executed on-site by both sides. During COVID-19, the most common alternatives for a face-to-face signing was initializing the transaction documents by both sides followed by a simultaneous execution by a video conference. It is worth noting that under laws of different countries, execution of such transaction documents may need to be in the form of a deed or a notarial procedure. Each side may have to adjust the execution procedure due to the impact of COVID-19.

COVID-19 also brought many legislation organs and international organization's attention in the area of social responsibility standards, including three main aspects of environmental, social,

and corporate governance. COVID-19 forces cross border conglomerate to adopt an efficient and effective corporate governance to cope with management of employees and commercial operation during COVID-19. Meanwhile, it is vital that public companies of each country could help its government facilitate community safety with sufficient social welfare.