

How to manage M&A risk

Key questions for companies doing deals amid COVID-19-related market disruption

- Have you determined whether and how the target or relevant counterparties will be affected by the COVID-19 outbreak and the timing and materiality of the impact?
- Have you reviewed your acquisition or joint venture agreements to determine if they contain MAC/MAE clauses? What is the scope of these clauses – is COVID-19 included/excluded?
- What other express termination rights may be available? For example, breach of warranty or other contractual terms. Consider also termination rights at law such as frustration.
- What pre-closing covenants are in place? Sellers may be required to seek consent for actions required because of the consequences of the outbreak, eg drawing on liquidity sources. Breach may amount to grounds for termination or damages.
- Does your contract contain a mechanism or other scope for a purchase price adjustment? If using listed company stock as consideration, consider impact of recent market activity.
- Regulatory clearances – have you contacted the relevant authorities to assess the impact of COVID-19 on timetable and process? Notify them of relevant hard deadlines in your agreement.
- What is the impact on timetable? Will long-stop dates be inadequate to cater for protracted clearance processes? Consider amending now if the parties remain committed to the deal.
- What other conditions to closing may be affected by the deal - eg pre-closing reorganisations or obligations to repeat warranties at closing? What mitigating actions can be taken now? Consider practical issues such as filings at registries etc.
- Consider whether conditions to closing could be used by your counterparty to engineer a walk away right. What obligations are there to satisfy the conditions? Shareholder approvals/regulatory clearances are particularly relevant here.
- **Transitional services** – can the parties continue to provide these or are services expected to be disrupted? What mitigating action can be taken? If none, what remedies are available for non-performance?
- **Confirm recommendation** - for deals involving listed companies, consider reaffirming recommendation of the transaction to provide certainty to counterparty and the market
- **Boilerplate provisions** – are these still fit for purpose? Check that notice provisions allow for email notices as well as physical delivery, and that inboxes are monitored. Similar considerations apply to agent for service of process provisions

