

The outbreak of COVID-19 has massively impacted the global economy. This economic impact has all the potential to have a profound effect on the Mergers & Acquisitions (M&A) activity in the region as COVID-19 will inevitably be a complicating issue at each stage of M&A transaction. In this legal briefing, we will consider a wide range of implications for companies undertaking M&A activity in the United Arab Emirates (“UAE”), with a specific focus on the effects of COVID-19 on the Material Adverse Change Clauses and Due Diligence.

1. Introduction

The COVID-19 pandemic has dramatically changed the dynamics of the global M&A market. The current disruption in the supply chain has halted many transactions that were in diligence or bidding stages as it has become increasingly difficult to conduct valuation of businesses or to predict the degree of effect of the pandemic on the target businesses. Furthermore, the concerns of global recession have increased fears amongst prospective investors, which – in some cases - have compelled such investors to diffuse their plans of cross-border investments temporarily. The UAE M&A market which is known for its resilience is also taking a hit by an unprecedented situation as there is a clear decline in potential transactions and many ongoing transactions haven been put to a halt. Therefore, in the current scenario buyers and sellers in the UAE M&A market are required to realign their strategies by identifying and then acting upon the specific challenges stemming out of the current crisis, in order to secure their interests in the transactions.

2. Effect on the Material Adverse Change Clauses

Material Adverse Change Clauses (**MAC Clauses**) have always been an integral tool in the buyer’s armour to walk away from the transaction in case there arises a material adverse change with regard to the target company’s business. It is very common for a Sale & Purchase Agreement (**SPA**) to contain a MAC Clause, however, it is very rarely put into practice as the threshold for invoking such a clause has always been very high. In order to effectively invoke a MAC Clause, the material adverse change event should be so substantial that it strikes at the heart of the purpose of the transaction in question.

COVID-19 has dramatically increased the importance of MAC Clauses. The potential effects of the outbreak on the entire economic spectrum may compel buyers to walk away from ongoing transactions. MAC Clauses can be effectively invoked in the UAE as the law recognizes the intentions of parties

as a paramount factor in contractual matters. Hence parties can agree to the inclusion of any provision in the contract, given it does not defy the public order and morality. While enforcing a MAC Clause, the UAE courts are likely to consider the following:

- a) Whether the MAC Clause is broad enough to encompass the current pandemic situation; and
- b) If a pandemic situation is covered by the MAC Clause, the pandemic would have to cause a substantial adverse change in the target company's business.

Therefore, the fate of a successful invocation of the MAC Clause will depend on the individual interpretation of the MAC Clause under the SPA. As in the UAE there is no concept of judicial precedents, each case will be decided solely on the relevant facts and circumstances of each case.

In respect of the deals that have not already been signed, the parties should consider the inclusion of an appropriate MAC Clause in their SPA to mitigate the potential drawbacks of negative developments due to COVID-19. Prospective buyers should, in particular, consider the following:

- a) The MAC Clause is carefully worded to encompass the effects caused by COVID-19 as the substantial effects to trigger the clause; and
- b) The time period between the signing and closing of the transaction: a short time period at

this stage would mean that the transaction is more likely to be affected by the present scenario.

3. Effect on Due Diligence

The occurrence of COVID-19 has directly affected buyers' interests in carrying out new transactions amid hindrances in conducting a due diligence of target companies, which is the very foundation of any M&A activity. The transactions that are already underway have also been impacted as the way due diligence was carried out before has been drastically changed. Prior to the outbreak, buyers were content with information on generic business activities of the target companies, however, pursuant to the outbreak it has become integral for the buyers to obtain specific information regarding the impact of an infectious disease on the business' continuity arrangements.

As the situation continues to worsen, buyers in M&A transactions are advised to add the following considerations to their due diligence criteria:

- a) Regulatory changes resulting from the pandemic that will directly affect the target company;
- b) Effectiveness of business continuity/crisis management policy of the target company;
- c) Impact of the pandemic on customer and supply chain arrangements of the target company;
- d) Effect of the pandemic on contractual obligations (contracts

with customers and suppliers) of the target company; and

- e) Possibility of a target company to be absolved from its contractual obligations by invoking Force Majeure clauses.

4. Other Important Considerations

In addition to the above-stated, the parties who are engaged in M&A activity in the UAE, should consider the following:

- a) Parties should negotiate for a simultaneous sign-and-close of the transactions, where possible, so that any potential risks can be mitigated at the very outset;
- b) Where simultaneous sign-and-close is not possible, parties should negotiate interim covenants to address the impact of COVID-19 for the interim period between the signing and closing of the transaction;
- c) Parties should be wary of the effects of COVID-19 e.g. long-term

travel restrictions, on the effective post-merger integration;

- d) Parties should consider carving out certain representations and warranties which have the potential to be affected due to the current crisis; and
- e) Parties should keep in mind time delays in the completion of transactions and should plan accordingly for logistical challenges and other disruptions presented by travel restrictions, delayed regulatory responses or approvals and difficulties with acquisition financing.

5. Conclusion

The spread of COVID-19 has been rapid, and its future remains unpredictable, hence, eliminating risks associated with it from M&A transactions is impossible. The parties currently engaged in M&A activities must consider the issues raised in the legal briefing to successfully mitigate the current and potential risks.

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SCHLÜTER GRAF Legal Consultants

The Citadel Tower, Offices 2001-2005 Business Bay, P.O. Box 29337

Dubai / United Arab Emirates

Tel: +971 / 4 / 431 3060

Fax: +971 / 4 / 431 3050

Andrés Ring, Managing Partner (andres.ring@schlueter-graf.com)

Usama Munir, (usama.munir@schlueter-graf.com)