

1. Do you believe that we could separate the pandemic itself from the material impact of the exceptional measures adopted by most European governments in relation to the verification of the MAC?

*Paul Josephus Jitta: I don't think such separation can be made, at least not in this initial stage of the pandemic. The pandemic is the direct cause of extreme governmental measures adopted by most of the European governments, leading to a hard stop of the economies involved. If a MAC-clause makes reference to a pandemic, it is clear that the pandemic can be triggering this clause. But the biggest economic effects are not by the pandemic itself, but by such governmental measures. So the wording of the MAC clause might be decisive here.*

2. Do you know if W&I insurance has the same relevance in these times? And how are premiums being affected?

*Dinesh Melwani: yes, W&I insurance has the same relevance, and will perhaps be more relevant, given the unprecedented impact of COVID-19 on the economy the likelihood of resulting claims (given missed earn-outs and further scrutiny by buyers over reps and warranties). Insurers have already begun adding coverage exclusions for business interruptions or losses related to COVID-19 (to their non-binding indication letters when evaluating new M&A transactions). The increase in number of W&I insurance "players" have kept the premiums and retentions generally stable (e.g. policy premiums and retentions do not appear to have fluctuated materially to date). Because the M&A market has slowed and the W&I market has followed, parties seeking W&I would be well served to negotiate the cost of policy premiums and retentions (to the extent they begin to change), as certain insurers may be willing to negotiate these items to remain competitive. As noted during the webinar, parties considering W&I insurance should expect the insurer to seek exclusions for losses related to the COVID-19 pandemic and should seek to define these exclusions as narrowly as possible. In addition, many policies do not cover breaches that first arise and become known between signing and closing. The risk created by this coverage gap may be exacerbated by the uncertainty of the current business environment, particularly for transactions where a longer period between signing and closing is expected.*

3. How would ongoing pandemic impact the M&A across the world ahead?

*Dinesh Melwani: general outlook on M&A in the US (and likely globally) is that the number of deals will increase very rapidly once the market is stabilized from the effects of the pandemic.*

*We are likely to see an increase in number of tech deals:*

- Increased investment in automation technology (for both in store and back end), analytical tools and capabilities, e-commerce platform-management services, and ed-tech to name a few sectors of interest

*Other strategic M&A deals are likely to involve the following:*

- Opportunistic purchase of distressed assets
- Like-for-like acquisitions/supply chain consolidations: acquisitions of competitors that serve similar consumers, with the goal of gaining scale
- Channel expansion: buying into a new category or channel with the goal of improving growth exposure and/or broadening the product offering to the buyer's existing customer

4. Do you believe there will be any permanent effects of the C-19 crisis on the M&A market or on the way we make M&A deals in the future?

*Dinesh Melwani:* some of the permanent effects will be seen in the terms and conditions Merger Agreements themselves. Given the unpredictability of future events, the potential impact of this uncertainty on the assumptions underlying a transaction, including those regarding future performance, and the elevated risks presented by the pandemic will be allocated, either expressly or implicitly, under the agreement.

*Material Adverse Change/Material Adverse Effect clauses:* We expect to continue to see heightened negotiation of MAC/MAE clauses after the pandemic, as well as an uptick in associated litigation.

*"Dealmaking from Home":* Number of sizable, even "[mega](#)" deals being negotiated and sealed via video conferencing are on the rise. This global experience will lead deal parties to be more open to remote negotiations than before, and could even lead to a new normal in which the efficiencies of remote work on deals are preferred given both cost and time savings of travel for deal teams and their advisors (lawyers, investment bankers, etc.)

5. Do any of you have experience of a party to a contract invoking force majeure and is the usual language, including use of the term, epidemic, sufficient to pull the contract on account of force majeure?

*Seiichi Okazaki:* whether the usual force majeure language is sufficient depends heavily on the governing law and the particular facts and circumstances under which the contract was not performed. Having said this, if you use the specific word "epidemic", I believe that you have a better chance of successfully invoking force majeure.

6. For M&A deals signed before the pandemic which foresee an earn-out on FY 2020, will there be, in your opinion, a reasonable possibility to obtain the shift of the reference period?

*Luciana Tornovsky:* the parties should negotiate in good faith and be reasonable in reaching an agreement which would be good for both of them. I believe that in view of the current scenario it would be fair to discuss the shift reference periods which comprise the year of 2020 for reckoning earn-outs. Almost all sectors are experiencing important variations in their outcomes, being them negative or positive, and parties probably did not foresee any perspective of the situation we are currently undergoing – which directly affects the negotiated terms and conditions for earn-outs. Considering that these are not ordinary times, and taking into consideration work from home policies, social distancing and/or lockdowns in Brazil and around the globe, discussions about the shifting of reference periods are on the table and parties should analyze their specific situations to try to reach an amicable agreement if possible.

7. Are there instances where lenders and other financiers are seeking to exit acquisition financing commitments (when the deal looks like it would otherwise close)? Is acquisition finance (banks or bond market) currently just plain dead?

*Ralf Morshäuser:* We are not aware of instances where arrangers have refused to sign/close the financing in breach of the terms of the commitment letter/facilities agreement. Where the commitment was subject to conditions, e.g. satisfactory current trading update or credit committee approval, and such conditions could not be satisfied due to the Corona crisis or lockdown arrangers have relied on such condition. Anyway, a resignation of lenders from acquisition financing, generally does not affect the M&A transaction itself under German law, unless a financing out was

*expressly agreed in the purchase agreement (which was rarely the case in the last years due to the seller-friendly M&A market in Germany). Therefore, a financing out is currently not a common tool for buyers to abandon M&A transactions in Germany; investors are rather using MAC clauses in cases where sellers have accepted them despite the seller-friendly market. The market was dead in the first few weeks of the lockdown (save for certain financings provided by debt funds for companies unaffected (or even benefitting) from the crisis). In the last few weeks the bond market has reopened (for the right companies) and there are signs that the syndicated loan market reopens as well. Some debt funds have continued to provide financing even at times where the syndicated loan market was closed, but at significantly higher pricing than pre-crisis and only for the selected companies.*

8. Which part of the world or sector will see a sharp fall in influx of foreign investments?

*Seiichi Okazaki: the parts of the world that have been hardest hit by the pandemic, such as South America and certain Asian regions, will likely see a sharp decline in foreign investments.*

9. Protectionist measures implemented by various jurisdictions including India which has also impacted M&A and Private Equity. Do you think this is a temporary measure or are we expecting a rise in such sentiments and measures?

*Seiichi Okazaki: my view is that "protectionist measures" will most likely stay in place for some time. The pandemic has led many people to believe that relying too much on foreign countries for critical supplies (e.g. medicine and medical devices) could be dangerous.*

10. Are prices/valuations falling/have already fallen? If so, in all sectors? Are there any sectors where prices/valuations are increasing?

*Luciana Tornovsky: In Brazil, we have noticed the fall of prices/valuations in a big range of sectors, such as aviation, tourism, fashion and retail. These (and others) sectors are directly affected by the social distancing policies and will continue to experience hard times until we return to normal conditions. On the other hand, the niche of technology companies, such as food and groceries delivery applications, companies that sell work from home solutions and distance learning – and also drugstores chains, hospital equipment companies and agribusiness in general – are booming. Of course we cannot predict if these variations will remain in place in whatsoever sector once normal conditions are reestablished.*

11. In Covid era, we are witnessing several countries like Germany, Australia and India imposing restrictions on incoming foreign direct investment- Do you see this trend growing in months to come as that has potential to affect global M&A landscape or you think more countries will liberalise foreign investment laws to attract more investment?

*Ralf Morshäuser: already prior to the pandemic, investment control regimes in Europe have been tightened, partly domestically, partly based on EU harmonization ("Screening Directive"). In view of worldwide protectionist tendencies, political leadership in the US etc. we expect further restrictions rather than liberalization in the coming years (even if weak markets could generally be a good argument to liberalize). Just recently, Germany has extended its investment control rights by subjecting further technology and medical businesses to more stringent review procedures (review threshold 10%, mandatory approval requirement). Additionally, an amendment of the investment control act is currently in the legislative process that would extend government's right to prohibit foreign direct investments also in less sensitive business fields.*

12. Would you agree that offering shares as consideration as an alternative for cash, can lead to additional complexity? and cause longer periods of organization and therefore a deceleration of deals. Particularly for private company buyers. If sellers are willing to accept shares in a private company and will be in a minority position, they are likely to seek certain key protections (such anti-dilution protection and some "veto rights" or "reserved matters" in respect of key decisions).

*Charles Martin:* offering shares as consideration in the context of a private company acquisition will always be more complex than cash. Clearly if the buyer is a public company issuing shares then the complexity will be significantly reduced. If it is a private company, all the usual issues to do with minority interests such as rights of board appointment, minority protections and drag and tag provisions will apply. There will also be need for "reverse" due diligence on the acquiror by the selling shareholders and their advisers. This could even entail reverse warranties with the buyer giving warranties to the sellers. However, there may be advantages in having share consideration where it allows the sellers to keep indirectly some upside benefit from the synergies that the deal creates and in future performance of the combined group.

13. Do we see a sudden increase of M&A related disputes during this period, litigation, arbitration and others? What are the most contested clauses/areas of a SPA and what is the trend? Knowing all these may help us draft better SPAs.

*Charles Martin:* there has certainly been a sudden increase in M&A related disputes and we expect to see this continue. At the moment much focus is on MAC clauses and the other clauses in a sale and purchase agreement that can allow a buyer to withdraw. We discussed those on the panel but they include the provisions relating to the conduct of the business between signing and closing, the satisfaction of conditions such as anti-trust requirements prior to a longstop date and major breaches of warranty either at exchange or prior to closing. In the longer term a number of M&A deals that were closed prior to the pandemic will turn sour and that is bound to involve increased scrutiny and therefore litigation in relation to warranties and earnout provisions. As usual all of this will cause those drafting sale and purchase agreements to think even more carefully about eventualities and their experiences coming out of the pandemic. I agree that we can expect to see more tightly drawn SPAs and greater attention given to the provisions that are currently being litigated. That is particularly so for as long as the danger of a second wave of the pandemic is out there.

14. Are private equity buyers generally adopting a wait and see attitude; or are they waiting for prices to come down and financing to become more available; or are they carrying on pretty much as normal?

*Charles Martin:* yes, private equity buyers are generally focussing on their portfolio companies and making sure that the liquidity issues are addressed. As things start to improve they will be looking at bolt-ons for their existing portfolio companies where risks are reduced by working with their tried and tested management teams. They may also look to repurchase companies that they have owned previously. Public to privates will be seen as lower risk in terms of due diligence and potentially more straightforward to execute. They will want to see prices reflect business prospects and that will take a little time. Financing is currently available but expensive so they will want to see the costs come down. There will also be significant opportunities as corporates spin out divisions to private equity as an alternative to raising further equity from shareholders.

15. What type of objective thresholds you would think should be added in the context of MAC as that has the potential of going into disputes or being invoked more often now -subjective provisions like "materially adverse impact" often leaves room for interpretation/potential dispute- Any learnings from Sycamore-VS deal for instance.

*Seiichi Okazaki: getting parties to agree on objective thresholds in advance is often difficult. I would not push a negotiation in that direction too hard. After all, the MAC definition would most likely end up having some form of subjective language (like "materially adverse impact"), and the parties will need to decide whether to proceed with a provision that leaves some room for interpretation.*

16. Parties are doing a COVID impact analysis on valuation, both on sell and buy side. Do you know what kind of time horizon parties and financial advisers are putting on the duration of the impact?

*Luciana Tornovsky: no official date has yet been issued by Brazilian authorities, but we have heard speculations that social distancing policies might last still for some months. In this sense, we are all expecting the Brazilian economy to slowly heat up in 2021, with M&A deals benefiting from great acquisition opportunities. We consider to be too soon to put a date for the duration of the impact since we cannot predict how consumers will behave after this all new experience, but we will certainly see changes to the behavior we have known for the past decades.*