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# CORONAVIRUS ISSUES RELATING TO CAPITAL MARKETS IN APAC

The Coronavirus (Covid-19) outbreak is causing disruption to businesses across sectors and jurisdictions. In this briefing we highlight capital markets related issues arising from the outbreak and offer some practical considerations when executing capital markets transactions during this time.

## Company filings and financial statements

In some jurisdictions, professional advisers were not and in some cases, are still not, able to carry out necessary audit work, surveys and other on-site due diligence as usual due to interruptions caused by Coronavirus, such as travel restrictions and quarantines. This may adversely affect the process of preparing financial statements and annual reports, and result in delays in their finalisation and publication.

### Compliance obligations

It may be worth checking whether relevant regulatory authorities and stock exchanges have put in place emergency measures to deal with difficulties faced by companies in publishing financial statements and dispatching annual reports.

In Hong Kong for example, the Securities and Futures Commission (SFC) and The Stock Exchange of Hong Kong Limited (SEHK) issued a joint statement on 4 February 2020, encouraging listed issuers to contact SEHK as soon as possible if they are unable to publish preliminary announcements of results or issue audited financial statements in accordance with the listing rules. It gave guidance on what information SEHK expects listed as issuers to provide and situations where trading may be allowed to continue, as well as the factors SEHK and the SFC may jointly consider in such cases. It also stated that the overall objective of SEHK and the SFC is to minimise disruptions to trading while ensuring that the investing public continues to receive sufficient information to make informed investment decisions. The joint statement can be found at: https://www.hkex.com.hk/News/News-Release/2020/200204news?sc_lang=zh-HK.

Similarly, the Shanghai Stock Exchange (SSE) published a notice on 2 February 2020, stating that listed companies finding it difficult to disclose their 2019 annual reports in the scheduled timeframe due to the impact of Covid-19 may apply to the SSE for an extension until 30 April 2020 in accordance with the listing rules. The notice can be found at: http://www.sse.com.cn/aboutus/mediacenter/hotandd/c/c_20200202_4991650.shtml.

For issuers subject to filings with the U.S. Securities and Exchange Commission (SEC), the SEC issued an order on 4 March 2020, providing regulatory relief with respect to deadlines in March and April for companies affected by Covid-19. The order can be found at: https://www.sec.gov/news/press-release/2020-53.

### Regular reporting under bond documentation

Bond issuers may wish to review the deadlines by which they are obliged to deliver financial statements and other related reports or certificates (including certificates relating to compliance with financial covenants) under their bond documentation in the form of information undertakings and covenants. Deadlines are typically set by reference to a specified period after the end of any financial reporting period (for example, 120 days after the last day of each financial year).

It may not be possible or practical to get holder consent for relief from information undertakings and covenants (including compliance with financial covenants) and so bond issuers who think they will have difficulties complying should consult their advisers.

Bond issuers are reminded to check their obligations to notify upon the occurrence of an event of default or potential event of default.

### New transactions

Pursuant to disclosure requirements for capital markets offerings, updated financial statements are often required for bond issuers to access the market. Bond issuers and their advisers should take into account the timing and availability of fresh financial statements when considering new transactions.

## Unscheduled non-business days

Capital markets participants may want to consider the possible impact of unscheduled non-business days on payment and delivery obligations, calculation periods, valuation dates and the ability to service notices under contracts. The definition of a business day in such provisions is often based on whether banks or markets open for business.

## Due diligence, disclosure and risk factors

For ongoing or new transactions, careful analysis and consideration is also necessary to determine the extent and effect of disruption to the actual business and operations of the issuer as a result of the Covid-19 outbreak. This is particularly so in light of its increasingly global impact.

### Asking the right due diligence questions

The following is not meant to be an exhaustive list and each issuer and transaction will require specific consideration, but consider:

- The issuer's current or potential future exposure to countries or regions that have been affected by Covid-19 (in terms of operations or financial performance or other factor);
- Current or potential future impact of Covid-19 on the issuer's operations or supply chain (including sourcing of any relevant materials or services);
- Effect or potential effect of Covid-19 on any of the issuer's staff, creditors, customers, suppliers, distributors, partners or other material counterparties;
- The impact on liquidity, financing obligations and access to funding, including on compliance with financial covenants, regulatory ratios and other limits, any potential or actual events of default, associated cross-defaults and other potential issues; and
- Details of any contingency or other alternative plans as a result of any of the above.

### Due diligence

Enhanced due diligence may need to be conducted in the context of a capital markets transaction, with the aim of eliciting from the issuer the immediate, ongoing and future impact of disruptions to its actual business and operations. See *"Asking the right due diligence questions"*.

Discuss the due diligence plan at the outset of the transaction as there may be practical difficulties – for example, on-site due diligence (including on-site documentary due diligence often undertaken in offerings by PRC issuers) may no longer be possible due to travel restrictions.

### Disclosure and risk factoring

Once the impact of the Covid-19 outbreak on the issuer has been ascertained, the disclosure and risk factors in the offering document should then reflect the results of due diligence. Any disclosure should of course accurately reflect the impact of Covid-19 so that it provides investors with an accurate picture of the situation.

Offering documents often already contain a risk factor discussing outbreaks of epidemics and contagious diseases such as swine flu, H1N1, MERS and SARS. Careful consideration should be given and discussions should take place between the issuer and advisers as to whether enhancing such a risk factor or the introduction of a specific Covid-19 outbreak risk factor may be required. The market has seen various iterations of, and is perhaps converging on, the latter approach in recent weeks. This process will naturally be driven by the severity of the impact of the Covid-19 outbreak on the issuer.

## Force majeure, no material adverse change and "disaster" clauses

Subscription, underwriting and placement agreements in capital markets transactions typically include all or a combination of force majeure, no material adverse change and "disaster" clauses.

A force majeure clause will usually make the closing of the transaction conditional upon there having been no change in national or international financial, political or economic conditions or currency exchange rates or exchange controls as would in the view of the subscriber, underwriter or placement agent, prejudice materially the success of the offering and distribution of the securities or dealings in the securities in the secondary market.

A no material adverse change clause will usually make the closing of the transaction conditional upon there having been no adverse change, or any development reasonably likely to involve an adverse change, in the condition (financial or other) or general affairs of the issuer that is material in the context of the issue of the securities.

A "disaster" clause will usually make the closing of the transaction conditional upon there having been no event or series of events (including the occurrence of any local, national, international outbreak or escalation of disaster, hostility, insurrection, armed conflict, act of terrorism, act of God or epidemic) as would be likely to prejudice materially the success of the offering and distribution of the securities or dealings in the securities in the secondary market.

Unlike many other commercial contracts that are effective over an extended period, subscription, underwriting and placement agreements are typically effective over a relatively short period of time between signing and closing. Parties in capital markets transactions are advised to exercise a high level of caution when contemplating whether to invoke such clauses. The change, development, event or escalation to constitute a force majeure, material adverse change or "disaster" (as the case may be) would need to be of such severity in the days between signing and closing as to cause a marked deterioration in the markets or the affairs of the issuer (as the case may be). Such circumstances are difficult to prove and such clauses are invoked only in extremely rare circumstances. Parties should appreciate the severity of terminating transactions in this way and how this could be viewed by the market.

Clifford Chance has produced client briefings discussing the Covid-19 outbreak and its impact on force majeure clauses in other commercial contracts here: https://www.cliffordchance.com/briefings/2020/02/coronavirus-and-force-majeure.html and on force majeure clauses in a loan financing context in Asia Pacific here: https://www.cliffordchance.com/briefings/2020/03/coronavirus--covid-19--issues-relating-to-loan-financings-in-apa.html.

## Central bank and regulatory intervention

Central banks and other regulatory authorities may intervene to tweak macroprudential policies and introduce new funding schemes for banks and financial institutions to mitigate the economic impact of the Covid-19 outbreak on companies. The Hong Kong Monetary Authority announced a 50bp downward adjustment in the base rate to 1.5% on 4 March 2020, which followed the U.S. Federal Reserve's emergency rate cut of 50bp to the Fed Funds Rate, the first emergency cut since the 2008 financial crisis.

### "Virus control" Bonds

Clifford Chance has advised the joint global coordinators, joint bookrunners and joint lead managers on the Agricultural Development Bank of China ("**ADBC**")'s CNY1.5 billion 3.40 percent five-year bonds issued on 17 February 2020. These are the first dim sum bonds to raise funds to help combat the coronavirus outbreak.

**Have you considered these issues in your transaction?**

The following is not meant to be an exhaustive list and each transaction will require specific consideration.

- *Due diligence* – is there a need, and has your due diligence been enhanced, to consider the impact of Covid-19 on the issuer? See "*Asking the right due diligence questions*"
- *Disclosure and risk factors* – is there a need and has disclosure and risk factors in the offering document been included or updated, to reflect the impact of Covid-19?
- *Approvals and consents* – if approval or consent is required from regulators or other parties, have you considered whether the application and approval process has been affected by the Covid-19 outbreak? The National Development and Reform Commission (NDRC) in the PRC published a notice on 4 February 2020 announcing that any company affected by the Covid-19 outbreak may submit a written application within a prescribed period to apply for an extension of their registration certificate for foreign debt quota of up to six months.
- *Execution and delivery of documents* – with logistics and supply chains disrupted, and many companies permitting staff to work from home, legal and practical steps required for valid and timely document execution and delivery will need to be considered well in advance, particularly where transactions require the delivery of original documents such as deeds, global bond certificates and security documents. Time should also be factored in for delivery of original post-closing filings with regulators (who may have special arrangements in place due to Covid-19). Clifford Chance has produced a client briefing discussing electronic execution of documents here: https://www.cliffordchance.com/briefings/2020/03/coronavirus--can-electronic-signatures-help-.html.
- *Availability of fresh financial statements* – will these be ready in time for a new offering or in order to comply with statutory or contractual obligations? See "*Company filings and financial statements*"
- *Roadshows and marketing* – with disruptions and restrictions on travel, physical roadshows and marketing have increasingly been replaced by net roadshows, online platforms and teleconferences. Parties are reminded to ensure the right procedures and controls functions are in place to protect the integrity of the marketing process. Consider whether net roadshow disclaimers need to be refreshed or updated to cover issues such as unauthorised participation, recording and downloading of presentations. Underwriters and advisers assisting issuers need to ensure that they confirm their regulatory position and licensing when conducting net roadshows and marketing through virtual means. For example, are they accessible in multiple jurisdictions and are persons inadvertently conducting regulated activities in jurisdictions in which they are not licensed to do so?

Clifford Chance has produced a series of client briefings discussing the Covid-19 outbreak and its impact which can be accessed here: https://www.cliffordchance.com/insights/thought_leadership/coronavirus.html

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