

COVID-19: BUSINESS AND M&A's

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Given the current situation the world is going through, the scope and impact that covid-19 may have on business and M&A's may be called into question. It is relevant to note as well certain aspects that will become more relevant today when examining a potential business.

• MOU/LOI

In order to ensure clear and transparent negotiations, it is more important now than ever to lay the foundations on which the parties will begin the negotiations. Thus, writing a clear memorandum of understanding or letter of intent (MOU or LOI) takes on special relevance.

For example, to establish which obligations will be binding and which ones will not be, the subject of the negotiations, in order to avoid a potential misunderstanding regarding the will of the parties, or in order to avoid any pre-contractual liability. This must be specifically analyzed because in the Uruguayan's legal system, the parties must negotiate and contract in good faith. Good faith is required all throughout the negotiations to the execution of the contract.

• DUE DILIGENCE

During this phase, buyers must pay special attention about the company's compliance with the new regulations in force resulting from the Covid-19 and the possible liabilities in a noncompliance event. Hence, it is key to carry out a Due Diligence especially focused on the pandemic most affected areas, for instance:

- In contract related matters, it is key to analyze in force agreements, their potential breaches, termination, etc.
- In tax related matters, analyzing the compliance with tax obligations, payment terms, granted grace periods, and other measures taken by the corresponding tax authority.
- In labor related matters, it is important to examine the company's compliance with the legally required labor security measures, unemployment insurance, home office, among others.
- In terms of data protection, especially with respect to health related data, be in compliance with the Data Protection Law.

- In matters of consumer protection, complying with the Consumer Relations and Consumer Protection Law, especially if using digital media and web pages.

Analyze aspects such as cyber-security and the potential risks and responsibilities that may arise from the use of digital platforms and web pages. As well as the possible repercussions that the covid-19 may have on the operation of the company, for example in the event that there have been workers, products, or surroundings that may have been exposed to the virus.

• DRAFTING OF THE CONTRAT AND PRE-CLOSING

We advise to consider some of the following recommendations while drafting the contract:

- Specific and rigorous “representations and warranties”, “indemnity” and “force majeure” clauses.
- Clear clauses that reflect parties intentions and expectations regarding the current situation conditioned to the occurrence of future events.
- Regarding force majeure events, it may be useful to take into account ICC’s recently published standard clause.
- Including MAC and MAE clauses (material adverse changes and material adverse effects). Such clauses provide for considerations regarding the eventuality of an unexpected economic or financial event that affects the company’s situation. These clauses are different from force majeure clauses, since they only consider economic or financial events, and not natural disasters, wars, acts of authority, among others.
- Mechanisms for determining and revising the price of the transaction, as well as evaluating deferring the moment of payment or setting adjustment mechanisms – e.g. liabilities and contingencies, earn out, among others –.

• CLOSING

Since face-to-face interactions are not possible or should be at least restricted, the overall timeframe and deadlines of the M&A will be affected. For instance, procedures regarding apostilles, legalizations, permits, regulatory and administrative matters, original documents analysis and exchange will certainly require longer terms and new alternative methods.

- **FINAL CONSIDERATIONS**

From now on, certain aspects will become more relevant when selecting the area in which to invest. Businesses that can implement the use of digital platforms and home office regimes, as well as businesses that provide basic services and e-commerce businesses, among others.