


Mergers and acquisitions transactions and COVID-19

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Please note: the information contained in this legal update is correct as of the original date of publication

The global COVID-19 pandemic has seen unprecedented levels of employees working from home and now the Government has insisted on "lockdown", how is the UK's mergers and acquisitions market going to cope with the disruption?

For those transactions that are in the early stages and maybe weeks or months away from completion, a substantial number of transactions are being postponed until such time when there is more certainty in the market. There may also be transactions which have exchanged, but not yet completed. In these circumstances, buyers may wish to re-visit the legal documentation to review any termination rights associated with "material adverse change" clauses to identify whether the impact of COVID-19 would fall within this definition.

However, some transactions will not be impacted by the current situation or indeed arise as a result of it in order to support good businesses experiencing an unforeseeable challenge to their cashflow. In these circumstances, there are practical issues with the current social distancing rules if it's not going to be possible to have people in a room together unless they are from the same household.

Mercury rules

It's not unusual for corporate transactions to be completed in accordance with the principles of virtual signings set out in the "Mercury" case (*R (on the Application of Mercury Tax Group Limited and another) v HMRC* [2008] EWHC 2721 (Admin)). This requires each signing party to print the signature page of the relevant document, sign it and circulate a scan of the signed page along with a copy of the final form document in Word or PDF format. This is a helpful set of rules to rely upon in order to validly complete a transaction, but in the current climate with employees working from home, it is not a given that they will have access to a printer or a scanner and in any event there may still be an impractical number of signature pages.

E-signatures

The increased use of e-signature platforms offer a helpful alternative which does not require the use of a printer or scanner. The user can use their mobile phone or computer to insert their electronic signature to documents before automatically sending the "signed" versions back to their solicitor. The use of electronic signatures hasn't been universally embraced by legal practitioners due to the practical challenge of obtaining electronically signed deeds and certain institutions requiring "wet ink" signatures for documents to be lodged with them, including Companies House, the Stamp Office (HMRC) and The Land Registry.

Whilst we as a firm have been facilitating e-signatures for our clients in the right circumstances over recent years, we are now seeing the market's appetite for electronic signatures markedly increasing.

Of course, in these exceptional times, there will be new challenges including the availability of independent witnesses to ensure the proper execution of deeds which in normal circumstances would be best practice. In the case of companies, it is now advisable, where

possible for two directors or a director and a company secretary to sign so that individuals in different locations can execute documents as the company.

Board approval

As part of an M&A transaction, the entities involved will need to hold various board meetings to approve the transaction at board level and they may also need shareholder resolutions to be passed too. Companies should take advantage of being able to hold board meetings via telephone or video link and where companies have international boards, take appropriate tax advice to ensure their domicile remains as intended.

In circumstances where shareholder resolutions are required, the use of written resolutions by private limited companies, which can be executed in counterpart should also be utilised where possible and can be signed using the virtual and e-signature methods referred to above.

Public companies and listed public companies will experience further challenges and should consider making full use of proxies as well as holding general meetings with the minimum permissible quorum.

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