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Asia Pacific insights

Business ethics and anti-corruption

Part of the global regulation and investigations group

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In this issue:

From the editor

Welcome to the September 2016 edition of *Asia Pacific insights* into Business ethics and anti-corruption matters.

This edition of *Asia Pacific insights* covers some of the most important issues that businesses face in Asia Pacific. We interview Kevin Harnisch and Paul Sumilas, who have vast experience dealing with US investigations in Asia Pacific. One important point to take away is the increasing co-operation of regulators in the region, including the US. Businesses cannot afford to approach bribery and corruption issues in the region as only creating exposure in the country in which the bribe is paid. It is important to plan for the interest of multiple regulators from the outset. Paul has just relocated to Singapore, further increasing our depth in the region.

Wilson Ang and Victor Katheyas consider the M&A corruption risks in the Asia Pacific region. This is an issue that comes across our desks routinely. Designing a due diligence program that is responsive to the risks is critical. M&A activity in Asia Pacific is seldom without corruption risks and this article provides some simple pointers to assist you to manage that and hopefully create value.

Wilson Ang also summarised a recent Singapore prosecution where a bribe was never actually paid. Simply receiving monies that were intended to be paid out to an employee of a customer as a bribe was held to be "obviously corrupt". The accused was sentenced to jail for nine months, a salient reminder that individuals who commit bribery risk a custodial sentence.

Finally, I look at recent amendments to the Australian criminal code, which creates an offence to intentionally or recklessly conceal the occurrence of bribery or corruption in the books or records. Any company dealing with an Australian corporation needs to be aware of the extraterritorial application of these laws, which apply to Australian corporations and any person doing business with an Australian corporation in the course of that business.

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Business ethics and anti-corruption in Asia Pacific

Norton Rose Fulbright advises clients across the globe on all matters relating to business ethics and anti-corruption. Within Asia Pacific, we have acted in major corruption investigations and have a track record of advising on complex, cross-border matters. We are amongst the largest global legal practices in the region. Our team operates across offices in Bangkok, Beijing, Hong Kong, Jakarta, Shanghai, Singapore, Tokyo, Brisbane, Melbourne, Perth and Sydney.
The quarterly review *Business ethics and anti-corruption: Asia Pacific insights* explores the impact of anti-corruption developments in the Asia Pacific region and offers practical insights in response to topical issues.

See also
Business ethics and anti-corruption world
A global bulletin published by Norton Rose Fulbright LLP

Contents

New false accounting offences bolsters bribery toolbox for Australian Federal Police

Unlike most regulators responsible for bribery prosecutions, the Australian Federal Police have not been able to prosecute corporations for concealing bribery, corruption or loss to a person that was not legitimately incurred – until now. New False Dealing with Accounting Documents offences came into effect on March 1, 2016.

Background

In 2013, the OECD's phase III report in relation to Australia's implementation of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions recommended the creation of a false accounting offence. Legislating for these offences has also followed submissions to the current Senate Committee on Foreign Bribery, which is yet to report.

The new crimes are similar to those found in the United States of America's Foreign Corrupt Practices Act 1977. Experience in the US, where regulators often prosecute for books and records offences as an alternative to bribery charges, suggests that bribery is often misdescribed in accounts as fees, gifts or entertainment. Now the act of simply misdescribing bribes in an accounting document has been criminalized in Australia.

The new crimes may have significant consequences for Australian corporations, their employees and contractors (regardless of where they are domiciled or provide a service).

New offences – False dealing with accounting documents

Under the new Part 10.9 of the Criminal Code, it is now an offence for an individual or corporation to intentionally or recklessly facilitate, conceal or disguise in their accounting documents an occurrence of bribery, corruption or loss to a person that was not legitimately incurred.

Accounting documents are broadly defined as

- Any account, record or document made or required for any accounting purpose
- Any register under the Corporations Act 2001 (Cth)
- Any financial report or financial records within the meaning of that Act.

Importantly, under section 490.5, proof that a benefit (not legitimately due) was actually received or given by the accused or another person is not required. This overcomes an evidentiary limitation that has historically been difficult for prosecutors to overcome.

The new crimes also overcome perceived limitations in the Corporations Act accounting provisions. In particular, the failure to accurately describe bribes in corporate accounts needed to be "material" to a company's financial position to contravene the Corporations Act. The new crimes say nothing about materiality thresholds. Compendious records of administrative expenses which are in aggregate above a materiality threshold but include bribes of whatever amount will contravene section 490.5, but may not have contravened section 286 of the Corporations Act, which states the obligation to keep accurate financial records.

Jurisdiction

The new provisions have extra-territorial effect and apply to

- An Australian corporation
- An employee or officer of an Australian corporation

- A person engaged to provide services to an Australian corporation and acting in the course of providing those services
- A Commonwealth public official

regardless of whether the conduct occurs in Australia or in a foreign jurisdiction, or whether the accounting document is in Australia or in a foreign jurisdiction. The Attorney-General's written consent is required in order to prosecute a foreign service-provider for an offence committed wholly in a foreign jurisdiction (but an arrest may be made or a charge laid before that consent is granted). The extension of jurisdiction to international companies that contract to provide services to Australian companies around the world is significant given that such contractors would ordinarily be beyond the jurisdictional reach of Australian prosecutors.

Corporate liability

The Criminal Code provides that a corporation commits the new offence if the concealment was undertaken by its officers, employees or agents in the actual or apparent scope of their authority and the requisite mental element is made out (i.e. intention or recklessness).

A corporation will have the requisite intent if a high managerial agent intentionally, knowingly or recklessly engages in the conduct or authorizes it. Corporations can have the necessary intent if a corporate culture exists that encourages or tolerates the offence.

A corporation that has exercised due diligence to prevent such concealment will not be found to have the necessary intent.

Penalty

A company found guilty of intentionally facilitating, concealing or disguising bribery can face a penalty of

- Up to A$18 million
- Three times the value of the benefit obtained
- Ten per cent of its turnover for the 12 months prior to committing the offence (whichever is greatest).

Individuals found guilty of an offence can face penalties of up to A$1.8 million or up to ten years' imprisonment. Penalties for recklessly facilitating, concealing or disguising bribery are lower but still substantial.

These penalties are significantly greater than those currently available for breaches of the accounting provisions in the Corporations Act.

What to do?

In light of these new provisions, Australian corporations will need to review yet again their anti-bribery and corruption policies, and to ensure that their corporate culture positively discourages the misdescription of expenditures in corporate accounts. They must take additional care in preparing and maintaining accounting books and records to ensure that all payments are properly described, and ensure that adequate compliance regimes, controls and protocols are in place to enable them to do so and to demonstrate that they are doing so.

International businesses that provide services to Australian corporations will need to do likewise.

Auditors will have to revisit their tests and corporate questionnaires to ensure that they are appropriate to the new environment.

We are yet to see how these new offences will be utilised by the Australian Federal Police. It is likely that these are simply the first wave of amendments to Australia's bribery laws.

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US investigations and compliance: what Asian businesses need to know

In conversation with: Kevin Harnisch and Paul Sumilas

In this article, we profile two of our US colleagues who have extensive experience conducting investigations and dealing with compliance issues, particularly those involving the Foreign Corrupt Practices Act (FCPA). Kevin Harnisch previously worked in the Enforcement Division of the US Securities and Exchange Commission (SEC) and was Branch Chief in Washington DC. Paul Sumilas who was based in Washington DC, and is relocating to Singapore, has assisted corporate and individual clients appearing before regulators and enforcement agencies like the US Department of Justice (DOJ), the US Federal Reserve, the UK Serious Fraud Office, the UK Financial Conduct Authority, the Indonesia Corruption Eradication Commission (KPK) and the Hong Kong Independent Commission Against Corruption (ICAC).

Tell us about your experiences of working on matters arising in Asia?

Kevin Harnisch: I have had the opportunity to work on a variety of matters involving operations in Asia, many of them related to China. In addition to FCPA investigations and due diligence projects, I have represented clients in SEC investigations regarding financial reporting, SEC and DOJ investigations regarding insider trading, and multi-agency investigations regarding potential manipulation of securities and futures contracts.

Paul Sumilas: Luckily, my work has taken me all around Asia, including investigations involving China, Hong Kong, Singapore, Japan, Thailand, Indonesia, and South Korea. These matters have included internal investigations, government investigations in front of the DOJ and SEC as well as local Asian regulators like the ICAC, and compliance advice for multinationals attempting to mitigate risk.

For US-based businesses, what are the attractions and challenges of doing business in Asia-Pacific?

Kevin Harnisch: For many types of US-based businesses, the Asia-Pacific area continues to be a growth area. While many countries in the region have some challenging regulatory regimes, US businesses have become increasingly knowledgeable about how to assess risk in emerging markets. As a result, companies are more willing to consider an even wider array of potential business opportunities in new markets.

Paul Sumilas: Our clients see many opportunities in Asia, whether it be a new customer base, cheaper natural resources, or as a cost-cutting measure. US companies sometimes struggle with making that initial foray into certain markets and finding the right local partners. Our clients have found that in certain Asia-Pacific markets, knowing the right people is often a key factor in being successful. US companies have to get comfortable that they are working with the right local partners who are not creating additional risk for the company.

From a US regulatory perspective what are the key risks for businesses operating in Asia-Pacific?

Kevin Harnisch: The use of third parties, whether as consultants, service providers or joint venture partners, is a continuing theme in FCPA investigations. The SEC, in particular, is using hospitality as a means for pursuing publicly traded companies on books and records and internal controls grounds, even in the absence of definitive proof of bribery. Appropriate risk-based due diligence continues to be a must. Anti-money laundering, market manipulation, and how financial institutions detect and prevent those activities are other current hot topics with US regulators.

Paul Sumilas: We have seen companies struggle with the gift-giving culture in certain Asia-Pacific countries. In a number of recent settlements involving Asia, the alleged bribes were often extravagant and luxurious gifts, travel, and/or entertainment. While the DOJ and SEC do not intend to restrict all business courtesies, companies must clearly draw the line of what types gifts and entertainment are acceptable and what creates the appearance of impropriety that can lead to government scrutiny.

Do you have a sense of the sectors which are under particular scrutiny by US regulators?

Kevin Harnisch: Companies operating in the mining and extractive sectors, construction and pharmaceuticals and life sciences face continuing challenges in this area.

Paul Sumilas: Financial services companies should also be aware of increased US scrutiny in a variety of areas, including anti-corruption, money laundering, and antitrust/cartel-like activities, as seen in the recent LIBOR cases.

Are the US regulators working closely with their counterparts across Asia-Pacific?

Kevin Harnisch: International regulatory cooperation is real and commonplace. While the cooperation framework may be more developed in other parts of the world, it is improving significantly in Asia-Pacific. As a practical matter, when assessing how to proceed with an anti-corruption matter, businesses should have a plan for dealing with regulators in each of the relevant countries. It is rarely safe to assume that the DOJ or SEC will not contact their foreign counterparts (or vice-versa).

Paul Sumilas: Absolutely. During a recent matter in Indonesia, we were explicitly told by the DOJ that it had been working with the KPK and training its overseas colleagues on common investigatory methods in the US, including the use of undercover operations. We have seen cross-border cooperation in other Asian jurisdictions as well. Companies should know that a disclosure in one jurisdiction will likely lead to information being shared with other relevant regulators.

When corruption and other issues arise, what are the key "crisis management" tips which will facilitate the most effective initial risk management response?

Kevin Harnisch: Clear, rational thinking is at a premium. Address how to scope the issue, preserve and gather relevant information, assess whether the issue is on-going and if so, how to stop it. A "crisis response" protocol provides a valuable checklist of priority items to address and who to contact. Trying to do those things "on the fly" is difficult and risks things being overlooked.

Paul Sumilas: Having a protocol in place to handle crisis situations and training the appropriate personnel about that protocol is critical. For example, when a company receives a subpoena or request for information from a regulator, key personnel should know who to contact and how to undertake those initial steps noted above such as preserving evidence and creating an internal communication plan.

What are the critical elements of a successful investigation?

Kevin Harnisch: Critical aspects of a successful investigation include properly scoping the matter, while considering whether changes need to be made as new information is learned; keeping potentially conflicted individuals out of the decision-making and oversight functions; remediating any damage; assessing how any improper conduct occurred and enhancing the company's control structure to prevent such issues from recurring; and carefully assessing disclosure issues. It is in the company's best interest to use experienced counsel when conducting such investigations.

Paul Sumilas: Strategies for an effective investigation include continuous assessment of the scope and end goals of an investigation, and constant communication between the internal team and any external third parties assisting with the investigation. Making sure that everyone is on the same page is critical in an investigation.

How do organisations develop and embed effective compliance programmes which reflect US and global expectations as well as local differences and customs across Asia-Pacific?

Kevin Harnisch: Each company is different and there is no one-size-fits-all approach. Each compliance program should be tailored to the risks of the business, including geographic and industry risks, and resources should be deployed accordingly. It is important to demonstrate commitment from the top levels of the organization.

Paul Sumilas: Getting buy-in from local managers, including having them conduct compliance training, can often help bridge the gap between the US/global expectations and local cultural issues. We have worked with clients who have effectively used local managers to drive the compliance program, rather than only having compliance lawyers from the US or headquarters parachute into locations once a year for a day of training. While such training may still be necessary, effective compliance programs should also have managers who demonstrate the importance of compliance on a daily basis.

You both joined Norton Rose Fulbright from other organizations: what attracted you to the firm?

Kevin Harnisch: I was attracted to Norton Rose Fulbright because of its reputation around the world for providing sophisticated and connected services to its clients globally. That type of global reach has become increasingly important for clients.

Paul Sumilas: I was struck by, and continue to be struck by, the cross-office integration. I have had the pleasure of working with colleagues in nearly every US office and in a number of our non-US offices, including Singapore, Hong Kong, Tokyo, Shanghai, Beijing, Jakarta, Bangkok, and Sydney. This global approach has led to the opportunity for me to move from the Washington, DC office to the Singapore office this year to expand on those relationships.

You have had different but complementary professional careers – tell us about your backgrounds and how that fits at Norton Rose Fulbright

Kevin Harnisch: I began my career in the Enforcement Division of the SEC in Washington, DC where I became a Branch Chief. I conducted numerous types of investigations involving issues such as the FCPA, accounting fraud, municipal bond issues, market manipulation, and insider trading. For the past 17 years I have been in private practice doing many of the same types of cases but representing clients on the other side of the table from the government.

Paul Sumilas: I have been in private practice since graduating from law school. Because of this, I have an understanding of the type of work that lawyers at all levels within the firm perform on a compliance matter or in an investigation.

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Bribe and Prejudice: The crime for the bribe that was never paid

Against the landscape of increasing enforcement activity against bribery and corruption, a typical fact pattern that often emerges is one where a person bribes the employee of a customer in order to gain an advantage and get more business from that customer. The giver of that bribe will have, under the laws of most regimes, committed a crime of corruption. If the giver was acting on behalf of his principal, the principal may also incur legal liability for the acts of its agent, the giver.

But what if the giver fails to give the bribe at all? What if he chooses to pocket the payment instead of giving it to the employee of that customer? He may have arguably defrauded his principal but could he have committed the crime of corruption?

In a recent Singapore case concerning bribes that were intended to be paid by the accused to an employee of a French luxury goods company as inducement for furthering the business relationship of the accused's employer, the judge was confronted with the scenario where the bribe was actually never paid but lined the pocket of the accused instead (LV case).

In a twist of legal reasoning that achieved an outcome of a conviction for corruption, notwithstanding that the bribes were not actually given, the accused was found guilty of being a corrupt recipient of the payments instead, and sentenced to nine months' jail and a penalty of S$49,500.

Facts

Koh Puay Boon (Accused) was the managing director of a company called Artmazement Global Pte Ltd (Artmazement) that provided renovation contracting services specializing in fitting out luxury boutiques. The Accused was in charge of developing clients, securing projects and managing the production. One of its main clients was Louis Vuitton (LV). The Accused's fellow director Evan Lim (Lim) was in charge of the financial, human resource and administrative matters for the company, including the preparation of payment and salary vouchers.

From July 2012 to March 2013, five cheques totaling S$49,500 jointly signed by Lim and the Accused were made out to and received by the Accused. Lim's evidence, which was accepted by the court, was that the payments were meant to be commissions to an LV employee so that Artmazement could secure continued business with LV. The Accused did not dispute receiving the payments but denied giving them to anyone else, much less as bribes to an LV employee. As a result, it was argued Artmazement could not have gained any business advantage from such payments.

The Accused left Artmazement in April 2013 and the company ceased operations at the end of 2013.

Decision

The Accused was charged under section 5(a)(i) of the Prevention of Corruption Act (Cap 241) (PCA) which provides that:

"Any person who shall by himself or by or in conjunction with any other person (a) corruptly solicit or receive, or agree to receive for himself, or for any other person … any gratification as an inducement to or reward for, or otherwise on account of (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed … shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$100,000 or to imprisonment for a term not exceeding five years or to both."

The court decided that the prosecution need only prove that the Accused received the monies on the basis that it was for an LV employee as

an inducement for that employee to further Artmazement's business relationship with LV. The judge added: "The fact that [the bribes] were not paid is not fatal to the prosecution's case".

Taking a different perspective to the classical bribery fact pattern, the judge held that: "paying an employee of your client in order to secure more business is obviously corrupt and so is the receiving of monies to do the same". In other words, the Accused was not convicted of giving a bribe, but of receiving monies corruptly from Lim so as to potentially pay them out as bribes.

The court also ruled that the Accused's credibility was successfully impeached by the prosecution due to his multiple inconsistencies in testimony – which further undermined and prejudiced his argument that the payments were actually commissions meant for himself.

In imposing the nine months' jail sentence on the Accused, the judge warned "I must reiterate that there is no presumption that only a non-custodial sentence will be imposed for cases of private sector corruption", and affirmed the position taken by *Chief Justice Menon in PP v Syed Mostofa Romel* [2015] 3 SLR 1166 (see our article on Bribery and corruption in the shipping industry) where it was made unequivocally clear that the perception that public sector corruption typically attract a custodial sentence while private sector corruption typically attract fines was wrong, and not reflective of the law in Singapore.

Analysis

The Singapore court showed in the *LV* case that it was prepared to overcome the evidential hurdle that the bribe was never paid. It nevertheless found the Accused guilty of corruption by holding him culpable for corruptly receiving the payments. On the facts, the Accused had received S$49,500 from cheques signed by Lim and himself. It would not be difficult to conceive of scenarios where the accused was using his own monies for the intended bribe but did not actually carry out the payment. In such cases, the accused would not have received anything and may not be liable for corrupt receipt.

The Singapore court was also prepared to find the Accused guilty of corruption even in circumstances where Artmazement could not have gained any business advantage from LV since the bribes were not actually paid to the LV employee. This approach draws a parallel with section 9 of the PCA where a person who has corruptly received or given a bribe would be guilty even if the recipient did not have the power, right or opportunity to carry out the act that he was bribed for.

The Accused was the managing director of Artmazement and, it would appear, had a strong hand in running the business. He could arguably be considered the directing mind and will of the company. His conduct could potentially have been attributed to the company and, if so, corporate criminal liability could have been imposed on Artmazement (see our article on Corporate criminal liability for bribery offences). The point was, however, moot because the company ceased operations by the end of 2013. While the Singapore Attorney-General's Chambers has historically focused on individual criminal liability for bribery offences, there is now a rebalancing of prosecutorial discretion to consider the appropriateness of prosecuting corporate entities as well.

While Singapore stays vigilant against public sector bribery, the Corrupt Practices Investigation Bureau – the country's graft-buster – has articulated on more than a few occasions that private sector bribery actually outstrips the public sector in terms of cases reported and investigated. The stance of the Singapore courts reflects a similar resolve not to treat private sector bribery with any less seriousness. The prevailing sentencing consideration remains that of general deterrence. In the appropriate private sector bribery case, custodial sentences will still be meted out.

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Divergent diligence? Uncovering M&A anti-corruption risks in Asia-Pacific

Mergermarket's global and regional M&A report indicates that, in respect of the Asia-Pacific region (excluding Japan), there were a total of 1,591 deals worth US$307.4 billion announced during the first half of 2016. A large number of these deals were driven by attractive valuations, industry consolidation and interest in specific sectors (such as semiconductors).

In each of these cases, acquirers would have performed due diligence on targets to assess the risks of the acquisition, plan around these risks and, if appropriate, adjust their valuations.

It is, however, our experience that whilst acquirers in the Asia-Pacific region are familiar with traditional legal, financial and tax due diligence, not all are equally familiar with performing robust anti-bribery and corruption (ABC) due diligence.

What is ABC due diligence?

Parties to corporate transactions (for example joint ventures, strategic alliances and acquisitions) often perform some level of ABC due diligence on their counterparties. This is for good reason: bribery and corruption extract value from investments, and have the potential to expose parties to regulatory risks, sometimes outside the jurisdiction in which the transaction occurs.

Evidently, the siphoning off of significant profits for illicit purposes and the imposition of billion dollar fines fundamentally change the business case for an acquisition and result in reputational damage – in some instances, a party might have been better off aborting the transaction.

The need thus arises to ascertain if counterparties and acquisition targets are in compliance with applicable ABC laws and that there are sufficiently robust internal processes to prevent or, at a minimum, detect and respond to the occurrence of such illicit value-extracting activities. This, in essence, is ABC due diligence.

But what exactly does ABC due diligence entail? And just how much time ought to be spent on this? The answer, as is often the case, is "it depends". The extent of the ABC due diligence often diverges depending on the risk profile of the transaction and its parties, as well as applicable laws and other compliance requirements.

Common mistakes parties make regarding ABC due diligence

In our experience, a significant number of parties do not adopt a risk-sensitive approach to ABC due diligence. This is relatively common in deals done in emerging market jurisdictions, including those in the Asia-Pacific region.

Sometimes, ABC due diligence is ticked off the pre-completion checklist simply by asking management to complete an ABC due diligence questionnaire, which is subsequently not thoughtfully considered so as to identify latent risks and implement necessary follow up actions.

This is sometimes supplemented with online internet and media searches. Such searches are useful in retrieving publicly known information about the target and its officers. However, these searches may not be sufficient to identify other latent deficiencies which have yet to come to light, such as poor internal controls and weak oversight. Alternatively, acquirers may rely on a business intelligence report produced by a third party due diligence service provider, focusing on watchlists and sanctions databases. Whilst this is likely to be more useful, depending on the particular risks and facts at hand, a more involved process is often necessary.

In certain instances, there may even be no clear allocation of responsibility for ABC due diligence, and hence this critical compliance issue could remain unattended to despite parties being aware of its importance.

We strongly recommend that parties specifically discuss the following points with their lawyers in relation to ABC due diligence.

Who is responsible for ABC due diligence?

Similar to other aspects of diligence, such as financial and legal due diligence, it is important that members of the deal team be specifically tasked with responsibility for ABC due diligence, who would usually be the compliance officer as supported by external specialist counsel.

A clear division of responsibility, while obvious, is not always prioritized when transactions progress at an accelerated pace. We are aware of instances in which ABC due diligence is left out altogether, or carried out far too late in the transaction, neither of which is ideal.

What is the scope of ABC due diligence?

The scope of ABC due diligence would depend on the overall risk profile of the transaction, as well as applicable laws.

The following factors are often considered in calibrating the scope of the ABC due diligence

- Identity and compliance track record of the parties and their respective ownership structures
- Jurisdictions involved
- Nature of business and industries involved
- Degree of government sales and interaction, participation in public tenders and political involvement (if any)
- Use of third party intermediaries
- Other results of due diligence (whether legal, financial or otherwise)
- Revenue of target and value of transaction.

Depending on the circumstances, a desktop review may suffice for low-risk transactions, perhaps with more detailed analysis performed post-closing. In other instances, face-to-face interviews with senior management and customer-facing employees may be required, together with a rigorous review of financial records and internal controls.

Where there is sufficient nexus to the US or UK, the extraterritorial application of ABC laws in these jurisdictions such as the Foreign Corrupt Practices Act and the UK Bribery Act ought to be considered as well.

Where parties have internal ABC due diligence guidelines, these ought to be customized and implemented with the purposes of the transaction in mind.

In short, the scope of ABC due diligence ought not to be a one-size-fits-all questionnaire; instead, it should always be thoughtfully tailored with the needs and risks of a party and transaction in mind.

How can ABC due diligence be used to preserve or create value, rather than solely minimize liability?

ABC due diligence is traditionally thought of as fulfilling a compliance requirement. However, such diligence can also be used to preserve existing value and potentially create value as well.

For example, a targeted diligence exercise can identify weaknesses in a target's internal processes. Remedial action may then be taken to prevent ABC risks from materializing, and thereby extracting value from the investment. This preserves value. The cost of the remedial action can be factored into the purchase price. If the weaknesses cannot be remedied, the purchase price can be reduced correspondingly so as to reflect the additional risk that the acquirer will be taking on.

In cases where the acquirer has significantly more bargaining power, the purchase price or part thereof may be paid into an escrow account (instead of being immediately paid to the vendor on the completion date). Post-completion, if lapses or weaknesses in internal controls are identified, such amounts may be deducted from the escrow account and returned to the acquirer.

Less apparent is the advantage that the target's internal processes may be brought in line with exacting international best practices (and not just domestic standards) using the findings of ABC due diligence. This, in turn, has a positive positioning effect in relation to potential co-investors, private equity investors, sovereign wealth funds and other parties which may be subject to more rigorous ABC

compliance requirements (e.g. those imposed by US and UK legislation). To elaborate, such other parties may view the target as a more favourable

- Joint venture partner
- Investment
- Supplier/distributor/other contractual counterparty
- Acquisition target (if an exit is eventually desired).

This, in turn, creates value by improving the target's revenue generation potential. In the event an exit is desired, the pool of potential acquirers is also expanded beyond those comfortable with domestic standards (which may lag behind international best practices), and this accordingly means that a higher price may potentially be negotiated for and obtained.

Conclusion

By approaching ABC due diligence thoughtfully, and by asking the right questions, parties can obtain positive outcomes in a manner that preserves and creates commercial value. The above questions, while fairly obvious to most, often remain unasked and hence unanswered, with unintended long-term repercussions. We hope that the above will serve as a useful starting point for parties as they progress ABC due diligence alongside general diligence in their corporate transactions.

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Jakarta[1]
Shanghai
Singapore
Tokyo

Australia

Brisbane
Melbourne
Perth
Sydney

Africa

Bujumbura[3]
Cape Town
Casablanca
Dar es Salaam
Durban
Harare[3]
Johannesburg
Kampala[3]
Nairobi[3]

Middle East

Abu Dhabi
Bahrain
Dubai
Riyadh[2]

Central Asia

Almaty

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3 Alliances

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