

Mergers and Acquisitions Q&A

The start of a new world order?

Loo Choon Chiaw discusses the promise of Asian



Loo Choon Chiaw

Asian Legal Business: As we enter the new year, what do you feel are the prospects for recovery for mergers and acquisitions (“M&A”) in Asia?

Loo Choon Chiaw: There are definitely indications of economic recovery. The stock markets in the region are picking up. Emerging economies in Asia appear to have weathered the financial tsunami. The US economy also appears to be recovering gradually. Some analysts have also opined that we have returned to a point where there would be a more active M&A market, citing supporting factors including, the high amount of cash reserves, the strong desire of conglomerates to acquire revenue boosting businesses, the return of private equity, funding and investor confidence. Many companies which have postponed their acquisition plans in the last two years, whether due to market volatility or a desire to shore up their internal resources, or for other reasons, are now back in the market. Smart investors should still be able to seize good opportunities over the next year or so.

On the other hand, in the light of the resurgent IPO market, some companies may prefer to go through the IPO process to raise funds as opposed to inking a deal with a strategic buyer.

ALB: Are there signs that Asia-Pacific will be increasingly important to global deal making?

LCC: The escalating importance of Asia-Pacific to global deal making was already evident in 2009. The 2009 statistics from Thomson Reuters showed that the Asia-Pacific region contributed to approximately 20% of total worldwide M&A activities compared with statistics from 2006, where the Asia-Pacific region contributed just 10% of the global M&A activities, there has certainly been an encouraging increase.

ALB: Recent studies out of the US/ Europe show that over a third of CEOs at Fortune 500 companies will make acquisitions this year. Are your Asia-based clients expressing similar views?

LCC: Our clients, especially those based in China, have expressed keen interests to continue with their expansion and acquisition

plans. Again, according to Thomson Reuters, China’s economy has increased over the course of the year, and inbound deal value jumped 75% in 2009 over the prior year. This is primarily attributed to strong domestic demand across many sectors, mainly contributed by the government’s stimulus plans particularly in the infrastructure and construction sectors.

As noted by the recent issue of the Wall Street Journal, the total outbound M&A activities of China in 2008 and 2009 collectively surpassed the total outbound M&A activities of China for the previous eight years. For instance, in terms of outbound transactions, Chinese investments into Australia alone reached a record high of \$6.2bn in the first half of 2009.

China’s outbound M&A activities have also been driven by the country’s need for natural resources to secure long-term strategic supplies for its growing population. China’s economy picked up significantly in the third quarter, with its GDP growth jumping to an annual 8.9 percent from 7.9 percent in the second quarter. These factors bode well for Chinese outbound transactions going forward.

ALB: A key concern of cross-border M&A recently seems to be competition law.

Has this affected your clients?

In a move to align legislation to international standards, competition laws are gaining momentum across many countries.

For those of our clients who are considering pursuing a M&A deal in China, they will be advised (with the assistance of our associates in China) on the implications of the Unfair Competition Law, the Consumer Interests Protection Law, the Price Law, as well as China’s Anti-Monopoly Law. China’s Anti-Monopoly Law came into force in August 2008 and allows Chinese authorities to implement a new merger-control regime consisting of formal guidelines and filing rules for both local and foreign companies. Concentration reviews conducted by the Ministry of Commerce (MOC) are generally triggered by thresholds regarding the size of the businesses involved in a transaction, whether the deal takes place inside or

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outside China. MOC has power to approve, prohibit or impose conditions on an M&A deal. The Chinese government always maintains that the Anti-Monopoly Law is not meant to deter foreign investment.

Although such pre-merger procedures have, in several cases, affected transaction schedules, competition laws have, by and large, not really worked as a deterrent against foreign investment.

ALB: How has closing deals during the downturn differed from closing them in calmer times? An example here would be ideal.

LCC: During the downturn, due to the increase of distressed selling, we saw distressed company facing limited time frame and accelerated due diligence process. Distressed M&A is also associated with limited representations and warranties from the vendor. Purchasers would also insist for a holdback amount on closing to prevent against losses that may arise from "hidden" encumbrances that may follow the assets. Purchasers that we represented had better bargaining power to request for specific quantitative material adverse change benchmarks to enable them to terminate the deal without any liability should the financial and business conditions of the target company deteriorate after the execution of the M&A agreement. Purchasers who were financially strong had also been able to get tighter vendor representations, warranties and indemnities supported by securities. In deals requiring external financing some of our clients were also able to bargain for an "escape" provision which allowed them to terminate the agreement in the event that financing could not be secured.

Currently, the focus will move away from distressed selling to strategic acquisitions. We will see a more balanced approach in the legal process and documentation.

ALB: Location: Discussion of M&A in Asia is dominated by outbound PRC deals. What other jurisdictions are your clients interested in at the moment?

LCC: Our clients are interested in all jurisdictions (to name a few, Australia, Indonesia, Russia, and New Zealand), which

are not hostile to foreign investors, politically relatively stable, and having resources or strategic value for our clients to expand their existing business.

ALB: Structures & deal types: Some have foreshadowed more involvement from sovereign wealth funds and private equity in financing/acquisitions in 2010. Do you agree with such assessments?

LCC: With the increasing availability of debt financing, especially so in China where the government supports local private equity funds to boost M&A activities, private equity buyers are able to secure loans to facilitate completion. However, in the light of the last global financial crisis, private equity buyers have been more cautious and certainly more concerned about earnings visibility.

The Chinese government's recent decision to inject an additional \$200 billion in its CIC sovereign investment fund is an indication that sovereign wealth funds may well become major M&A players again in 2010.

ALB: How are your clients structuring deals with a view to close the "valuation gap" and external funding problems?

LCC: To address the "valuation gap" issue, some of our clients have been adopting an "earn-outs" approach, namely, a deal structure which allows for contingent payments to be made upon future performance objectives. This effectively helps them in mitigating the risks associated with inaccurate valuations in a volatile market. With the recovery of the stock markets, listed purchasers are also enthusiastic about offering new shares in satisfaction of the consideration payable to the vendors.

ALB: We've seen a rise in the number of hostile take-over bids in the West since 2H09. Do you see this sort of activity becoming prominent in Asia?

LCC: To date, most of the M&A deals in the Asian region are rather "friendly" in nature. This may be a cultural thing. The Asians, especially the Chinese, aim to do things in a harmonious (和谐) manner. I don't foresee many hostile take-over bids in the near future. Confrontations are frowned upon and not encouraged.



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