

Navigating Asia-Pacific Health M&A In The Wake Of COVID

By **Bernard Lui and Vanessa Ng** (August 24, 2021)

2020 saw a wave of health care activity in the Asia-Pacific region.

Buyouts rose to a record high of 156 deals in 2020, up from 68 in 2019. Disclosed value reached a new peak of \$16.9 billion compared with \$11 billion the year earlier.[1] This is attributed to macroeconomic trends such as aging populations and increasingly affordable health care, and favorable government policies encouraging local manufacturing and development of health care products.

Not surprisingly, biopharma contributed significantly to the increased number of buyouts, accounting for over half of the region's deals.[2] Asia-Pacific health care investors chose to place their bets on domestic innovation in biopharma and medtech.

In January 2021, DKSH Holding Ltd. announced two acquisitions in Asia-Pacific: Bosung Scientific Co. Ltd., a Korean life sciences distributor, and MedWorkz Pte. Ltd., a medical device business in Singapore.

Health care information technology buyouts, including health tech, through sponsor investments and initial public offerings also were active. For developed markets, investors focused on nonhospital deals.

Singapore's investors have been investing heavily in health care startups due to the growing openness to health tech innovations that address the needs and problems of health care. For example, Lucence Diagnostics Pte. Ltd., a genomic medicine company from a Singapore-owned laboratory, raised SG\$20 million (\$14.8 million at current exchange rates in the U.S.) from investors for their technology to diagnose cancer through blood tests.[3]

In respect of health care providers, emerging markets with less developed provider infrastructure saw a rise in hospital deals. In such markets, investors were inclined toward hospital targets such as acute care centers providing multidisciplinary or general care. For example, GIC Pte. Ltd., the Singaporean sovereign wealth fund, in partnership with Vingroup Joint Stock Co., invested in the Vietnamese private hospital operator Vinmec International Hospital Joint Stock Co. for \$203 million.[4]

Significant investment opportunities in Singapore and Asia-Pacific also were exhibited through the influx of digital health, or health tech. Not only did 2020 see an increase in new players in the digital health market, existing traditional health care facilities started to recognize the imperative need for digitalization even in the post-COVID-19 world.

The interest in investment opportunities in digital health has been prominent in Singapore even before the COVID-19 pandemic. The medical technology market is the fastest-growing segment in health care. In the Asia-Pacific region, the medical market has become the second-largest market globally, reaching \$133 billion from \$88 billion in 2015.[5]

Health care companies have also used the increase in investments to expand their businesses. For example, Singapore-founded Verita Healthcare Group announced in late 2019 that it would be investing into three digital health companies, namely Heartvoice Pte.



Bernard Lui



Vanessa Ng

Ltd., CelliHealth Pte. Ltd. and Hanako GmbH, as part of its international expansion strategy.[6]

TE Asia Healthcare Partners, a Singapore-based private specialty health care group, will also be injecting \$90 million with the intention to open specialized hospitals in Southeast Asia to increase its regional footprint.[7]

Finally, the legal considerations for health care M&A deals remain largely similar for M&A deals generally in the post-COVID-19 world. Such considerations are as follows:[8]

1. Valuation and Purchase Price

The pandemic has brought about uncertainty in the commercial world, and purchasers increasingly have to consider whether the effects of the pandemic will need to be taken into account in assessing the valuation of target companies, and if so, how that may be done.

This is exacerbated by the high likelihood of unforeseeable events and/or fluctuations that may affect the valuation and purchase price of these target companies even between signing and completion, therefore encouraging purchasers to consider price adjustment mechanisms or other mechanisms designed to mitigate the potential impacts of such fluctuations.

2. Legal Due Diligence

Purchasers may have to consider expanding the scope of legal due diligence in the wake of the pandemic in order to better assess the impact of the pandemic on the target business in particular areas such as:

- The target business's level of exposure to and reliance on jurisdiction which are severely affected by the pandemic, which may impact the viability and future prospects of the business;
- The ability of the target business and its counterparties to perform their contractual obligations under material contracts and the consequences of nonperformance, including reviews of material contracts for force majeure, material adverse change and related termination provisions;
- Customer and supply chains, the extent to which they are disrupted by the pandemic, and the availability of alternative sources;
- The target business's continuity planning and crisis management strategies;

- Solvency of the target and the impact on the target's ability to service existing debt; and
- Compliance with applicable laws, regulations and advisories relating to the pandemic.

The pandemic and its restrictions and social distancing guidelines have also made in-site visits for the purposes of due diligence extremely challenging and near obsolete, which has prompted a significant increase in the use of virtual data rooms and other forms of technology to conduct legal due diligence to circumvent such restrictions.

The use of technology may also help expedite due diligence to allow investors and/or purchasers to capitalize on market opportunities efficiently in this period of great volatility.

3. Termination, Force Majeure and Material Adverse Change

The pandemic has also prompted both purchasers and sellers to reconsider the termination and force majeure clauses of transaction agreements, as well as the definition of "material adverse change" for the purposes of allowing parties to withdraw from the transaction upon the occurrence of such material adverse change.

Purchasers may wish to negotiate for broader clauses, allowing them to retain the flexibility of withdrawing from or terminating the transaction in future events similar to the pandemic, or if the current situation in light of the pandemic does not improve.

Sellers, on the other hand, in an attempt to protect their interests, may consider negotiating for clauses with a more limited scope of applicability, such that the impact of the pandemic have been well considered by both parties and this will preclude purchasers from walking away from a transaction generally by reason of the pandemic and the impact it has on the target business.

Regardless, parties will now have to consider the specific applicability of such clauses and ensure that such clauses are well-drafted and precise enough to capture the allocation of risk as envisaged by the parties, rather than relying on standard clauses that may not necessarily capture such considerations.

Besides relying on termination or force majeure clauses, purchasers and sellers operating in Singapore may rely on the country's COVID-19 Temporary Measures Act, which has provided relief for parties that are unable to carry out their contractual obligations due to the pandemic.

4. Representations, Warranties and Indemnities

Parties may need to reconsider the representations and warranties given in the context of the pandemic, and to be mindful of providing subjective and forward-looking warranties that may easily be subjected to change due to the uncertainty of the pandemic.

Sellers may also consider incorporating exclusions in the transaction agreement to limit the ability of the purchaser to bring COVID-19-related claims across all warranties or indemnities generally. Parties may also look to warranty and indemnity insurance as a way

to apportion risk and reduce losses as a result of the pandemic. Sellers may use this insurance as a way to ensure a clean exit and a strategic risk management tool for M&A transactions.

5. Change-of-Law Clauses

Various jurisdictions are rapidly implementing new laws and regulations in order to cope with the impacts of the pandemic, and Singapore is no exception. Parties will therefore have to consider mechanisms that help to mitigate the impact of such new legislation on the transactions, and discuss the allocation of liability for changes in legislation that might have a detrimental effect on the transaction or the target's business prospects.

Bernard Lui and Vanessa Ng are partners at Morgan Lewis & Bockius LLP and directors at the firm's Singapore affiliate Morgan Lewis Stamford LLC.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.bain.com/insights/asia-pacific-global-healthcare-private-equity-and-ma-report-2021/>.

[2] <https://www.bain.com/insights/asia-pacific-global-healthcare-private-equity-and-ma-report-2021/>.

[3] <https://asia.nikkei.com/Business/Startups/Singapore-investors-plow-into-health-care-startups>.

[4] <https://www.bain.com/insights/asia-pacific-global-healthcare-private-equity-and-ma-report-2021/>.

[5] <https://www.straitstimes.com/business/companies-markets/medical-tech-firms-drawing-more-investment-amid-crisis>.

[6] <https://thejournalofmhealth.com/verita-healthcare-group-builds-global-digital-healthcare-platform-with-new-acquisitions/>.

[7] <https://www.businesstimes.com.sg/asean-business/tpg-backed-te-asia-to-expand-specialty-healthcare-in-singapore-malaysia-and-indonesia>.

[8] https://eoasis.rajahtann.com/eoasis/gn/at.asp?pdf=../lu/pdf/2020-05_Covid-19-MA.pdf&module=LU&topic=LU0012972&sec=b; <https://www.twobirds.com/en/news/articles/2020/singapore/singapore-legal-m-and-a-strategy-in-the-post-covid19-world>.