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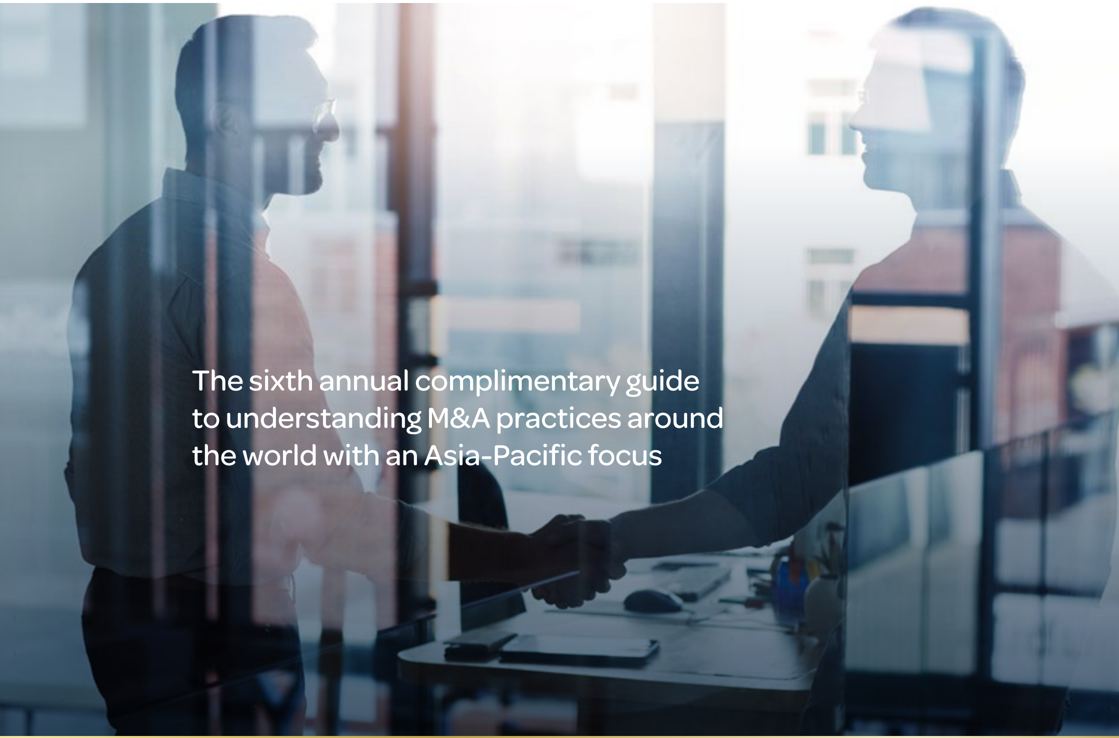

The sixth annual complimentary guide to understanding M&A practices around the world with an Asia-Pacific focus

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LexisNexis® Mergers & Acquisitions Law Guide 2019

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Mergers & Acquisitions Law Guide 2019

Jurisdiction: India
Firm: Singhania & Partners LLP
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SINGHANIA & PARTNERS LLP
SOLICITORS AND ADVOCATES

1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Mergers and acquisitions in India are governed by the following main legislation:

a. The Companies Act 2013.
b. The Competition Act 2002.
c. The Foreign Exchange Management Act 1999 (In case of cross border merger).
d. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.
e. The Income Tax Act 1961.
f. Indian Stamp Act 1899.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

Following government regulators and agencies play key roles in the process of merger and acquisition in India:

a. Registrar of Companies and Regional Director under Ministry of Corporate Affairs;
b. National Company Law Tribunal;
c. Competition Commission of India;
d. Securities and Exchange Board of India;
e. Reserve Bank of India; and
f. The Income Tax Department.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

A bid from an acquirer is considered to be hostile when the promoter does not wish to sell off its shares, voting rights and control to the acquirer whilst the acquirer is still making all the possible efforts to purchase the shares and the rights attached to the same. The above situation relating to takeovers in India is governed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 which mandates the acquirer to make several disclosures at various stages of acquisition of shares, voting rights and control of the listed company. Hostile bids are possible but the person acquiring shares will also have to comply with the aforesaid Regulations. Hostile bids are rare in our jurisdiction.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

A transaction that causes appreciable adverse effect on competition is void under the Competition Act 2002 ("Act"). Any acquirer entering into a transaction above a specified threshold is required to give a notice to the Competition Commission of India ('CCI') disclosing the details of such transaction. If the CCI is of the view that the transaction might cause an appreciable adverse effect on competition, it will direct that the transaction not to take effect. Where the CCI feels that certain modifications in the transaction might prevent an appreciable adverse effect on the competition, it shall direct the acquirer to make such modifications. The acquirer may accept the modification or make amendments which will have to be approved by the CCI.

Further, the CCI has power to make inquiries in case of certain agreements, abuse of dominant position or any combination thereof. Additionally, the CCI has the power to impose penalties in case of any offence under the Act.

5. What documentation is required to implement these transactions?

Documentation will depend on the nature of transaction. However, generally the following documentation will be required:

a. Documents for obtaining approval from the Board of Directors and Shareholders of both the acquirer and target company, wherever applicable;
b. Scheme/Petition to be filed before the concerned authority;
c. Notices to the shareholders and creditors;
d. Consent from the shareholders and creditors;
e. Notice to be published in newspaper;
f. Public Announcement in case of acquisition of shares of a listed company;
g. Various affidavits, declarations and other documents;
h. Share subscription/ purchase agreement;
i. Share Transfer form; and
j. Reporting to stock exchanges in a prescribed format in case of a listed company, as applicable.

6. What government charges or fees apply to these transactions?

The following government charges/ fees shall apply, as applicable:

i. Fee for filing merger petition before NCLT;
ii. Share transfer stamp duty on consideration for acquisition of shares where shares are held in physical form;
iii. Fee payable to the Regional Director/ Registrar of Companies on filings the forms/ application;
iv. Stamp duty on Share Purchase/Subscription agreement, Affidavits, merger order, etc., as applicable;
v. Fee payable to notary for notarisation of affidavits/ undertakings;

7. Do shareholders have consent or approval rights in connection with a deal?

In case of a scheme of merger, approval from the shareholders of respective companies shall be required. However, where written consent of the shareholders has already been filed along with the merger petition before the NCLT, the NCLT may dispense with the requirement of convening a shareholders meeting at its discretion. In case of acquisition of shares, the Indian acquirer company may be required to obtain approval of the shareholders where its total investment is in excess of the threshold provided under Indian laws in this regard. Where the acquirer is a foreign company, the requirement of shareholders' approval shall be governed by the laws of its overseas jurisdiction.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

The Companies Act 2013, casts a fiduciary duty on the directors of a company to act for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment. Directors are required to exercise their duties with due and reasonable care, skill and diligence and to exercise independent judgment. At the time of placing a deal for the approval of the shareholders, the directors are required to inform the shareholders of the company about the rationale, benefits and risks of the deal, to enable the shareholders to take a considered decision. Further, the directors are responsible for ensuring that the deal is in the best interest of the company as well as the stakeholders. Additionally, the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, requires the board of directors of a listed company to constitute a committee of independent directors to provide reasoned recommendations on each offer, which are required to be published by the company.

Further, the code for independent directors detailed under the Companies Act 2013 imposes an obligation on an independent director to safeguard the interest of all stakeholders, balance the conflicting interests of the stakeholders and acting within his authority, assist in protecting the legitimate interests of the company, shareholders and its employees.

The law imposes no obligation on the controlling shareholders of the company towards the stakeholders. However, balancing provisions have been provided for the minority shareholders to challenge the deal if the same is prejudicial to their interests.

Ravi Singhania
Managing Partner, Singhania & Partners

Ravi Singhania is India's renowned corporate-M&A, lawyer according to the researches by Chambers & Partners, Legal 500 and Asialaw. He is amongst top legal luminaries of India in surveys conducted by Lexis Nexis Publications and Indian Corporate Counsels Association. He provides both hands-on legal advice and overall strategic inputs while drafting and negotiating contracts for complex transactions to serve clients' interests in all the scenarios. Ravi is a board member in CRISIL Ltd., Asset Care Enterprise, McGraw-Hill, American Bureau of Shipping, and National Instruments. He is also a charter member of TiE- Delhi chapter which is an association of start-ups worldwide and was founded in Silicon Valley. Also, he has authored a book titled "Drafting of Contracts- Templates with Drafting Notes" published by Bloomsbury Professionals.

9. In what circumstances are break-up fees payable by the target company?

Although break fees are not provided for under the law, they can be contractually agreed between the parties. The Indian Contract Act 1872, allows damages to the non-breaching party to a contract to the extent of losses as may be reasonably foreseeable as a natural consequence from the non-performance of the contract by the breaching party. The commonly agreed instances under which the obligation to pay break-up fees is triggered are as follows:

a. Break-up of the negotiations by one of the parties;

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Partner, Singhania & Partners

Manish, a Lawyer and a Company Secretary is a Partner with the firm and has been in legal practice for 25 years. Recently, he has also added Insolvency Professional to his list of qualifications. He has led various transactions related to foreign investments, mergers and acquisitions, private equity and, regulatory & general corporate advisory. He has rendered legal advice and assisted many companies in multimillion dollar capital market transactions of domestic public issues and rights issues, overseas listing including Global Depository Receipt (GDR), Foreign Currency Convertible Bond (FCCB) issues and Alternative Investment Market (AIM) listing.

Manish has also advised clients across continents including S&P Global Inc., USA; Kingfa Sci. & Tech. Co. Ltd, China; McGraw Hill, USA; WSP Group; Simplot, USA; Sig Sauer Inc USA; SABIA Inc. USA; Mertex, UK; Arab Potash Company (APC), Jordan; G.N. Store, Nord, Denmark; and Standard & Poor's South Asia Services Private Limited.

b. A seller choosing a different buyer than the one named preliminary agreement;

c. When a seller opts to open the investment opportunity to the public instead of the private investor named in the agreement; and

d. If a defect is discovered in the target company that had not been previously disclosed.

In most cases, the party breaching the letter of intent or memorandum of understanding is required to reimburse the expenses incurred by the other party in connection with the transaction.

10. Can conditions be attached to an offer in connection with a deal?

In India, it is open for the parties entering into a deal to negotiate and agree upon the terms and conditions of the deal. Some of the common conditions attached to an offer in connection with a deal are the fulfilment of the conditions precedent and subsequent (findings of the comprehensive due diligence exercise), lock-in period of the securities, restriction on transfer of shares and affirmative voting rights to be provided to the investor. In case of acquisition of a listed company, the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, requires the acquirer to make an open offer conditional as to the minimum level of acceptance.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Mergers are generally different from acquisitions in the way they are financed. Mergers are generally cashless and involve share swaps. In case of acquisition of an unlisted company, the law is silent on the level of financing by the purchaser and the acquisition agreement records the terms of financing by the purchaser therein.

In the case of acquisition of a listed company where the acquisition triggers a mandatory public offer under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, the said regulations contains provisions for securing the acquirer's performance of the financial obligations. The acquirer is required to deposit a part of the consideration (as prescribed under the said regulation) payable under the open offer in an escrow account not later than 2 (two) working days prior to the date of the detailed public statement of the open offer for acquiring shares. The escrow account may be created by way of a cash deposit, a bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, or a deposit of frequently traded and freely transferable equity shares or other freely transferable securities with an appropriate margin.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The Companies Act 2013, contains provisions for squeezing out of minority shareholders form the company.

The Act requires an acquirer holding 90% (ninety percent) or more of the issued equity shares in a company, to make an offer to the minority shareholders to buy the equity shares held by such minority shareholders in the company and the minority shareholders may sell their equity shares to the majority shareholders at the price determined on the basis of valuation by a registered valuer.

The procedure for the same has been detailed hereunder:

a. The acquirer holding at least 90% (ninety percent) of the shares will be required to notify the company of their intention to buy the minority shares;

b. The majority shareholders will have to make an offer to the minority shareholders to buy their equity shares at the price determined on the basis of valuation by a registered valuer;

c. The majority shareholders will have to deposit an amount equal to the value of the equity shares to be acquired by them, in a separate bank account to be operated by the company for payment to the minority shareholder;

d. The payment is required to be disbursed to the minority shareholders by the company within a period of 60 (sixty) days which will be continued to be made to the minority shareholders who have not received the payment, for a period of 1 (one) year; and

e. The company will be required to deliver the equity shares to the majority shareholders upon receipt of the same.

Further, the said Act also gives a right to the minority shareholders to make an offer to the majority shareholders to purchase their shares.

13. What is the waiting or notification period that must be observed before completing a business combination?

For the purposes of business combinations, the Competition Act 2002 prescribes the following timelines for various actions to be undertaken by the applicant and the Competition Commission of India:

Activity	Timeline
Notification to the Competition Commission of India by the party proposing to enter into a combination	Within 30 (thirty) days of approval of the proposal relating to the merger or amalgamation by the board of directors of the enterprise concerned, or execution of any agreement or other documents for acquisition of shares, assets, voting rights or control, as the case may be.
Order or directions to be issued by the Competition Commission of India	Within a period of 210 (two hundred and ten) days from the date of filing the notice with the Competition Commission of India.

14. Are there any industry-specific rules that apply to the company being acquired?

The industry specific rules that apply to the company being acquired depends on the particular sector to which the company falls. Typically, the said rules apply to highly regulated sectors or sectors of strategic importance, such as banking, financial services, insurance, media, telecommunications, defence, civil aviation, electricity etc. Accordingly, sector-specific regulators have been established to regulate some of the aforesaid industries, e.g. the Telecom Regulatory Authority of India and the Department of Telecommunications regulate the telecommunications sector, the Directorate General of Civil Aviation regulates civil aviation, the Reserve Bank of India regulates the banking and financial services sectors, the Insurance Regulatory and Development Authority regulates the insurance sector, and the Ministry of Information and Broadcasting regulates the electronic media sector.

Further, the Foreign Direct Investment Policy, the Foreign Exchange Management Act 1999 and its regulations contain industry specific rules such as the permissible limit of foreign investment, entry routes etc.

15. Are cross-border transactions subject to certain special legal requirements?

The Companies Act 2013 contains provisions pertaining to inbound and outbound mergers and amalgamations. The provision envisages a scheme of amalgamation providing for, amongst other things, payment of consideration, including by way of cash or depository receipts or a combination of both.

The Foreign Direct Investment Policy provides that foreign investment in India can be made either with or without the approval of the Reserve bank of India. Further, the rules and regulations framed by the Reserve Bank of India under the Foreign Exchange Management Act 1999 will be applicable to cross border transactions in India.

The Foreign Direct Investment Policy prescribes certain conditions for making investments in India in different sectors, such as maximum permissible limits on investment by a foreign party, pricing guidelines to be adhered to for making the investments, lock-in requirements of such foreign investment, etc.

Arjun Anand

Partner, Singhania & Partners

Arjun is a corporate lawyer with more than 12 years of rich experience behind him. He has handled legal aspects of organization mergers, joint ventures, fund raising, and acquisitions. He has been providing various clients holistic legal solutions on intricate business matters. He featured as one of the top 20 young lawyers of India in the publication ‘On the Rise’.

He has advised clients engaged in various sectors including real estate, manufacturing, financial services, hospitality, healthcare, e-commerce etc.

He has extensively advised various private equity funds such as, VisVires Capital, ICIC Prudential Asset Management Company Limited, India Emerging Capital Private Limited etc.

He has advised fortune 500 companies such as SKE&C, Coca Cola India, Serco Group Plc, Gate Group, etc. on their strategic investments in India.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Where the ownership or management of an undertaking is transferred, every workman who has been in continuous employment for not less than 1 (one) year in that undertaking immediately before such transfer must be given a notice of transfer. Also, every such workman is entitled to 1 (one) month written notice or salary in lieu of notice and retrenchment compensation in accordance with the provisions of the Industrial Disputes Act 1947. Retrenchment compensation shall be an average pay of 15 (fifteen) days for every completed year of continuous service and a notice has to be served in the prescribed manner on the appropriate government or such authority as specified by the appropriate government.

No such compensation shall be payable by the employer to a workman in any case there has been a change of employer by reason of the transfer, if—

a. the service of the workman has not been interrupted by such transfer;

b. the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

c. the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Foreign Exchange Management (Cross Border Merger) Regulations 2018 ("Merger Regulation") was notified by the Reserve Bank of India on 20th March, 2018 which regulates the cross-border mergers in India. Cross border mergers are categorised as:

a. 'In bound merger' when an Indian company ("IC") acquires assets and liabilities of a foreign company. Some of the essentials of an Inbound Merger are:
   i. Merger Regulations allow transfer of securities to a foreign shareholder, subject to compliances applicable to a foreign investor under the foreign direct investment regulations ("FDI Registration").
   ii. Where the cross border merger results in transfer of securities of a joint venture ("JV") or a wholly owned subsidiary ("WOS") of an IC, situated in a foreign jurisdiction, the same is subject to compliance, such as pricing of shares in a specified manner, any outstanding's owed to the IC being cleared prior to such transfer, etc. set out under the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations 2004).
   iii. If the cross-border merger results in acquisition of a step-down subsidiary (situated in a foreign jurisdiction) of the JV/WOS, by an IC, then certain additional conditions laid down in the Foreign Exchange Management (Transfer or issue of any foreign security) Regulations 2004 will have to be complied with.
   iv. The IC has to ensure that the overseas borrowings of the foreign company, proposed to be taken over by it, are compliant with the provisions of the overseas borrowing Regulations under Indian law ("Overseas Borrowing Reg.") within a period of 2 (Two) years from the date of sanction of the scheme pertaining to such cross-border merger by the relevant authority. However, the IC cannot remit any monies from India for repayment of such overseas borrowings.
   v. Further, it is to be noted that the Overseas Borrowing Reg. inter-alia stipulates specified interest rates, maturity, end use restrictions, on borrowings, from overseas, by an IC (however, end use restrictions are not applicable to an IC per the Merger Regulations).

b. 'Outbound Merger' when a foreign company ("FC") acquires assets and liabilities of an IC. Some of the essentials of an Outbound Mergers are:
   i. In such cases the law applicable in the jurisdiction where the FC is situated will regulate such cross-border merger.
   ii. Merger Regulations also stipulate certain conditions by which guarantees that outstanding borrowings of the IC shall, as a result of such cross-border merger, become guarantees or borrowings of the FC. This however is subject to the FC not acquiring any such guarantee or outstanding borrowing, in rupees payable to Indian lenders, non-compliant with the relevant foreign exchange law in India.

Sudhanshu Gupta

Associate , Singhania & Partners

Sudhanshu Gupta, Associate with Singhania & Partners is a qualified Company Secretary and LLB. He has been working for 7+ years in the area of Corporate and commercial advisory, Corporate Compliances, Legal Governance, FDI, RBI regulations, FEMA compliances etc.

Clients commend him for his commitment, dedication and resourcefulness and ability to assess all legal issues and producing astounding results while adhering to rigid guidelines. He has extensive experience in the area of drafting and finalization of various legal agreements and other legal documents. He has vast experience in conducting legal due diligences and seeking approvals and registrations with various regulators and authorities across India.

He has advised various multinational companies across globally including fortune 500 corporations in setting up its business in India and conducting negotiations with various India parties for business expansion. He has also advised companies on Overseas Direct Investment in Joint Ventures and Wholly Owned Subsidiaries outside India and on various issues on Foreign Direct Investment in India, External Commercial Borrowing and Trade Credits.

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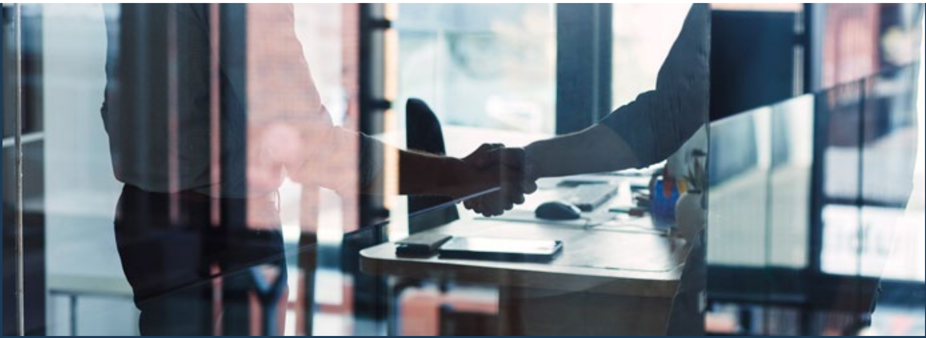

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The sixth annual complimentary guide to understanding M&A practices around the world with an Asia-Pacific focus

The LexisNexis Mergers and Acquisitions Law Guide 2019 provides you with a detailed review and analysis of the current legislation and regulations that govern mergers and acquisitions around the world with a focus on the Asia-Pacific region.

The Guide helps you understand M&A practice in unfamiliar jurisdictions through Q&A style chapters that can be easily compared with other jurisdictions.

The Guide includes a Special Focus featuring jurisdictions that are part of China's One Belt One Road initiative.

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