Chandrawat & Partners

Mergers and Acquisitions

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Preface

Mergers and Acquisitions ("M&A") is an area of commercial law and finance. It involves combining two or more companies through various transactions such as mergers, acquisitions, consolidations, and asset purchases. Companies that engage in M&A activities for strategic, financial, or operational reasons seek to achieve growth, expand into new markets, gain a competitive advantage or increase shareholder value.

When one company takes over another and establishes itself as the new owner, the purchase is called an acquisition.

On the other hand, a merger describes two firms, of approximately the same size, that join forces to move forward as a single new entity, rather than remain separately owned and operated. This action is known as a merger of equals.

A business can experience growth over time as its products and services gain recognition and value. Alternatively, it can also achieve growth through an inorganic process, characterized by sudden expansion in workforce, customer base, infrastructure resources, and overall revenue and profits. Mergers and acquisitions represent examples of this inorganic growth. While mergers involve the combination of two entities into a single organization, acquisitions occur when one entity purchases another and integrates it with its operations.

Mergers and acquisitions in India follow a court-driven process that tends to be lengthy and problematic. While initial agreements between the parties may be made, they do not provide sufficient legal cover. Approval from the High Court is necessary to finalize the merger or acquisition.

Mergers and acquisitions are becoming increasingly recognized and utilized by the businesses as essential tools for significant growth and strategic business purposes. They are commonly employed in various sectors, including information technology, telecommunications, business process outsourcing, and traditional industries. The primary motivations behind mergers and acquisitions include strengthening the business, expanding the customer base, reducing competition, and entering new markets or product segments.

Types of mergers

Horizontal mergers

Also known as horizontal integrations, occur when competing businesses at the same stage of the industrial process combine. This type of merger aims to eliminate a competitor and strengthen the merging entities' market position, potentially moving them closer to a monopoly. Horizontal mergers offer benefits such as economies of scale and economies of scope.

Vertical mergers

These involve the merger of two entities operating at different stages of the industrial or production process. For instance, when a construction company merges with a company involved in brick or steel production, it signifies vertical integration. Such mergers offer benefits like reduced transaction costs and improved coordination of demand and supply. Additionally, vertical integration allows companies to achieve greater independence and self-reliance.

Congeneric mergers

These involve merging two companies operating in the same or related industries or markets, but offering different products. In this type of merger, the companies may have common distribution channels, which can create synergies and benefits for the merger. The acquiring company and the target company may have similar technology or production systems, making the integration of the two entities smoother. Entities often opt for congeneric mergers to increase their market share or expand their product lines.

Conglomerate mergers

A conglomerate merger occurs when two entities from unrelated industries merge. The primary motivations behind a conglomerate merger include the utilization of financial resources, expanding debt capacity, increasing the value of outstanding shares through leverage and earnings per share, and reducing the average cost of capital. By merging with an unrelated business, a company can enter diverse industries without incurring the substantial startup costs typically associated with launching a new business.

Cash merger

In a cash merger, also known as a cash-out merger, shareholders of one entity receive cash instead of shares in the merged entity. This allows them to effectively exit their investment.

Triangular merger

A triangular merger is often utilized for regulatory and tax purposes. It involves a three-party arrangement where the target company merges with a subsidiary of the acquiring company. Depending on which entity survives the merger, it can be classified as a forward triangular merger (the target merges into the subsidiary, and the subsidiary survives) or a reverse triangular merger (the subsidiary merges into the target, and the target survives).

Types of acquisition

Acquisition usually refers to a larger commercial entity acquiring a smaller company. In a broad sense, acquisition refers to acquiring company ownership wherein, one company purchases another outright. It is the acquisition of a controlling interest in the share capital of another existing company by one corporation.

There are two basic forms of acquisitions:

Stock purchase

In a stock purchase, the acquirer pays the target firm's shareholders cash and/or shares in exchange for shares of the target company. Here, the target's shareholders receive compensation and not the target.

Asset purchase

In an asset purchase, the acquirer purchases the target's assets and pays the target directly.

Indian economic overview

Mergers and acquisitions ("M&As") in India experienced record-breaking levels in 2023, primarily due to an increase in first-time buyers and the significant growth of industry disruptors or insurgents in various sectors and business domains.

Acquiring to Transform" highlights that merger and acquisition ("M&A") activity in India reached unprecedented levels in 2023, primarily propelled by first-time buyers. According to a study, India witnessed the completion of 85 strategic deals valued at over US$75 million, with first-time buyers representing 80 percent of the overall volume.

India has seen a boom in these mergers and acquisitions in the past couple of decades since governments liberalized laws regarding monopolies and restrictive trade practices. The years 2014, 2016, and 2018 particularly stood out in terms of the value of M&A transactions across India. The total value of the mergers in 2018 even crossed the 100-billion-dollar mark.

The merger of two giant organizations has one of the following consequences; destroy the competition or replace it with the technology, customer base, financial resources, etc. of the two companies to such an extent that it will cease to function or will soon be reduced to a lower level. This monopolization of the market also has many consequences. Price shifting, price manipulation, total control of production and supply, and lack of substitutes are part of the market when a monopoly-like situation has developed.

Laws governing mergers and acquisition in India

Companies Act, 2013

Section 230-240 of the Companies Act, 2013 and the rules, orders, notifications, and circulars issued thereunder prescribe the general framework governing companies in India, including the manner of issuance and transfer of securities of a company incorporated in India and the process for schemes of arrangements of such companies.

Securities and Exchange Board of India ("SEBI") Regulations:

SEBI is the regulatory body overseeing the securities market in India. It has issued regulations governing M&A activities involving listed companies. These regulations cover takeover codes, delisting requirements, open offer obligations, disclosure requirements, and insider trading regulations.

Competition Act, 2002

The Competition Act, 2002 regulates anti-competitive practices, including mergers, acquisitions, and combinations that may have an adverse impact on competition in India. The act mandates obtaining approval from the Competition Commission of India ("CCI") for certain types of M&A transactions that meet the prescribed thresholds.

Foreign Exchange Management Act, 1999 ("FEMA")

FEMA governs foreign exchange transactions in India, including investments by foreign entities in Indian companies. It regulates cross-border M&A transactions, outlines the restrictions and conditions for foreign investments, and governs repatriation of funds.

License and registration

The Companies Act, 2013 defines the entire merger and acquisition process in India. During the merger and acquisition process, a company analysis is carried out, which includes obtaining information about the company, reviewing its positions, and reaching a conclusion about the implementation of the acquisitions.

Effective and complete M&A execution involves technology that is structured to maximize performance and minimize risk.

Dig into the memorandum to examine the object clause

The primary and paramount thing to do while going for an M&A in India is to scrutinize the memorandum of association of the company to carry out a search and check directors whether the power of the merger is endowed in it or not.

Share a word with the stock exchange

It is a good idea to illuminate the stock exchange about the proposed merger and acquisition occurring and send all the relevant documents such as notices, resolutions, and orders to the stock exchange within a stipulated time.

Draft a merger proposal

The Board of the Directors of both organizations will introduce an affirmation on the draft of the merger proposition and pass the resolution for approving its key administrative staff and different administrators to further pursue the issue.

Apply to the High Courts

In the wake of getting the affirmation on a proposal by the Board of Director, the merger organizations should record an application to the Hon'ble High Court of the individual state where the organization's headquarter is situated.

Notice dispatched to shareholders and creditors

With the earlier approval of the High Court, a notification ought to be sent to all the investors and creditors of the organizations about the gathering to be held, and 21 days of timely notification is required. The notification will be distributed in two papers, one in the vernacular language of the state, and the other one in an English paper.

Filing of the orders with the registrar of companies

The genuine confirmed copy of the request for the High Court of the state must be documented with the registrar of companies within the limited period as indicated by the High Court.

The assets And liabilities of both the company should be merged

The assets and liabilities of both organizations ought to be passed on to the blended organization.

The issue for the subscription of shares and debentures

When the merged organizations go to the present as a different lawful substance, then the organization can give offers and debentures after listing on the stock exchange.

Dispute resolution

Dispute resolution related to mergers and acquisitions ("M&A") in India involves the resolution of conflicts or disagreements that may arise during or after the M&A process. Here are some key aspects of dispute resolution in the context of M&A in India:

Arbitration Agreement

The parties involved in an M&A transaction can include an arbitration clause in their agreements, such as the Share Purchase Agreement ("SPA") or the Investment Agreement. This clause specifies that any disputes arising out of or in connection with the agreement will be resolved through arbitration.

Arbitration Act

The primary legislation governing arbitration in India is the Arbitration and Conciliation Act, 1996. This act governs the conduct of arbitration proceedings, including the appointment of arbitrators, the procedure for arbitration, the enforcement of arbitral awards, and other related matters.

Arbitral tribunal

In an arbitration proceeding, the parties appoint an arbitral tribunal to hear and decide the dispute. The tribunal can consist of a sole arbitrator or a panel of three arbitrators, depending on the agreement between the parties or the applicable rules.

Regulatory authorities

The Competition Commission of India ("CCI") and the Securities and Exchange Board of India ("SEBI") play significant roles in regulating and overseeing M&A activities in India. These bodies ensure compliance with competition laws, takeover regulations, and disclosure requirements, thereby helping to prevent disputes.

Dispute resolution mechanisms

Parties involved in M&A transactions typically include provisions in their agreements for dispute resolution mechanisms. Common methods include negotiation, mediation, arbitration, and litigation. The choice of mechanism depends on the nature of the dispute, the preferences of the parties, and the enforceability of decisions.

Contractual disputes

Disputes related to M&A transactions often arise from contractual agreements, including share purchase agreements, asset purchase agreements, and merger agreements. These disputes may involve issues such as breach of contract, representations and warranties, post-closing adjustments, and indemnification claims.

Timelines and complexity

Dispute resolution related to M&A transactions in India can be time-consuming and complex, depending on the nature and complexity of the dispute. The resolution process may involve gathering evidence, legal arguments, expert opinions, and hearings before the chosen dispute resolution forum.

Court proceedings

In certain cases, M&A disputes may be brought before Indian courts. The courts have jurisdiction to hear and adjudicate on matters related to M&A, including disputes arising from competition law violations, shareholder disputes, and challenges to regulatory decisions. High Courts and the Supreme Court of India handle such cases.

How we can help?

Our team plays a crucial role in facilitating and ensuring the successful execution of merger and acquisition ("M&A") transactions. M&A deals involve the consolidation or purchase of companies, and the legal complexities involved in such transactions require specialized expertise to navigate. Here are some ways the firm can help in the M&A process:

Deal structuring

The firm helps clients in structuring the M&A deal to achieve the desired outcome while considering tax implications, corporate governance, and other regulatory requirements. The team can recommend the appropriate transaction structure, such as asset purchase, stock purchase, merger, or other alternatives.

Regulatory compliance

M&A transactions often require approval from government regulatory bodies, such as antitrust authorities. The firm can assist in navigating the complex regulatory landscape and obtaining the necessary approvals to ensure the deal complies with all applicable laws.

Intellectual property ("IP") protection

For deals involving companies with significant IP assets, the firm helps in protecting and transferring the assets while ensuring compliance with IP laws and avoiding infringement issues.

Confidentiality and non-disclosure

The firm manages the legal aspects of maintaining confidentiality during the negotiation process and ensures that sensitive information is safeguarded through non-disclosure agreements ("NDAs"). After the deal is completed, the firm continues to support the clients during the post-merger integration process, helping to align the operations of the merged entities and resolve any legal challenges that may arise.

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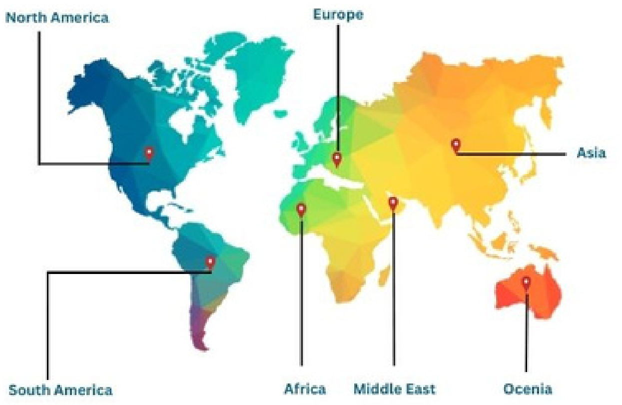

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