



## **ARTICLE: COMPANY RESTRUCTURING AND M&A POST THE PANDEMIC**

### **INTRODUCTION**

The Merger and Acquisition (M&A) exchanges are a type of agreements which are among companies to consolidate with each other after a procedure of valuation being completed. The merger is the common meeting up of monetarily equivalent organizations while the acquisition includes an organization obtaining the benefits of the other organization supplanting the Board of Directors of that organization. The 'Covidisation' of the globe has smashed the facade of the present world order and has sent shockwaves everywhere around the world since its detection.<sup>1</sup> COVID-19 crises is having and will continue to have a material worldwide effect on M&A. For a monstrous scope in a brief timeframe, a huge number of organizations have covered or curtailed their tasked essentially, a great many laborers have been laid off or furloughed, buyer spending has been radically decreased, flexibility chains have been disturbed and vitality sources has plunged.

The outbreak of COVID-19 and the endeavor the world over to contain its spread have achieved passionate business interferences ad financial agitation, rising various new thoughts for parties participating in proposed or pending M&A trades and for open associations assessing their shortcoming to unconstrained suggestion. The issue looked by solitary associations are clearly ceaseless, yet there are different topics that we want to be explicitly convincing to M&A individuals.<sup>2</sup>

### **THE UNDERLYING PROBLEM**

The worldwide business condition is experiencing an irregular and inappropriate test. The key regions that will influence mergers and acquisitions are concerns with respect to valuation, reshaping the business viewpoints, liquidity crunch inferable from decrease in loaning by banks bringing about overflow subsidize reallocation. The M&A bargains stuck at the documentation organizing will currently presumably be conceded to a date till the emergency dies down. The conclusion of worldwide outskirts has adversely affected the cross-fringe mergers likewise now in

---

<sup>1</sup> <https://blog.ipleaders.in/impact-of-covid-19-on-ma-transactions/>

<sup>2</sup> <https://www.latestlaws.com/articles/mergers-and-acquisitions-in-covid-19-times-challenges-and-way-ahead-by-bhumesh-verma/>



light of the fact that the MNC's and Private Equity supports ration money and limit their standpoint of business.

It is quite tedious work to predict the consequences of such a pandemic and the extending lockdowns globally, having a huge impact in daily life. With such an amount of unpredictability and uncertainty as to the post crisis the businesses will definitely focus on managing the core business and recovery of the time which was lost due to lockdown thus may result in M & A deals taking a backseat.<sup>3</sup>

## IMPACT ON M&A TRANSACTIONS BECAUSE OF COVID-19

As per the experts, the most probable impact of COVID-19 would be a worldwide recession. The organizations could detect the advanced effect of the COVID-19 on the Indian economy and settle on educated choices to not place themselves in a disadvantageous position. The current situation would be directed by the capacity of each organization to anticipate that the proportion of their earnings should use. A positive proportion would persuade the organizations to make quality exchanges while a negative proportion would compel the organizations in taking careful steps to moderate the misfortunes. Subsequent to the pandemic, certain clauses needs to be specifically reviewed:

## MATERIAL ADVERSE CHANGE (MAC) CLAUSES

The Material Adverse Effect/Change (hereinafter referred to as 'MAE') or the termination clause typically allows a stakeholder to terminate the agreement in the event of any material adverse change in the seller company.<sup>4</sup> Even the courts in our nation neglect to give any rules as to materiality of an event and have confined their supposition with respect to "any event or activity" making it inconceivable or limiting any party to perform will be named as Material Adverse Effect. Specifically the incorporation of this clause in M&A Agreements arises from Section 56 of the Indian Contract Act, 1872 wherein the Doctrine of frustration is enumerated which states that the contract becomes void when the promisor due to an act, after the contract is made can't prevent an event. Also Regulation 23(1)(c) of the SEBI (Substantial Acquisition of Shares and Takeovers)

---

<sup>3</sup> Samir Sheth, Navigating merger & acquisition activity during Covid 19, Consultancy (Apr.7, 2020) <https://www.consultancy.in/news/2940/navigating-merger-acquisition-activity-during-covid-19>

<sup>4</sup> Prithviraj Senthil Nathan, What to expect in M&A deals in India, KSK (Mar.21,2020)



Regulations, sets out that “any open offer can be withdrawn in circumstances where any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer” signifying that parties can withdraw from the obligations any time when the performance becomes impossible, due to reasons which are beyond the control of parties.

It is said that all such conditions constitute MAE that may adversely affect the target business upon which the target business has no control thus preventing buyers from walking off from closing the deal. As to the subsisting of COVID-19, the parties would now negotiate on the impact of pandemic on transactions and business. Also the seller would want for narrower terms in MAE and the buyers would insist to include lockdowns, closure of territorial boundaries, epidemic to be included in the agreement. As of today’s situation when the duration and long term impact of the pandemic is undetermined, it is not viable to deduce that courts will address the issue of invoking of MAC clauses. It is to be noted now that as of now in case any party invokes this clause the court will certainly decide on materiality of the impact of pandemic on the transactions of the company.

## **FORCE MAJEURE CLAUSE**

Since, the Ministry of Health has imposed restrictions on the movement of goods and persons owing to the pandemic, suspicion as to breach of contract is anticipated by many parties for the time being.

Force Majeure means an “event or effect that can be neither anticipated nor controlled . . . [and] includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)”<sup>5</sup>. Such clauses are negotiated to include acts like that of god, riots, embargos, that of government, terrorism, war, pandemics, boycotts, plague etc. Force Majeure Clause in contracts is dealt as corollary to MAC clause. However, Force Majeure accounts for both artificial and natural events with specific prescription of the events where MAC clause triggering events are not

---

<sup>5</sup>Blacks Law Dictionary (11th Edition, 2019).



# ARK JURIS

Advocates & Consultants

specified. The affected parties are released from performance of contract as and when the force majeure event arises, if it is specifically mentioned under the clause.<sup>6</sup>

The Indian Contract Act, 1872 contains 2 provisions relating to act of god and force majeure clause. Section 32 deals with 'contingent contracts' which inter alia specify that contract depends upon the happening of an event and if it doesn't occur the contract becomes void. Further Section 56 of the Act inter alia provides a contract becomes void if becomes impossible by happening of an event which the promisor couldn't prevent. It entails the Doctrine of Frustration which is basically an act outside the scope of the contract and the events beyond their control make the performance of contract impossible, difficult or even illegal.<sup>7</sup> Further this doctrine can find its application during the COVID-19 wherein the contract contains the force majeure clause in a very restrictive manner not specifically mentioning the epidemic/act of god and also doesn't contain all catch phrases.

Although the Ministry of Finance of India through its official notification dated Feb.19, 2020 declared COVID-19 as pandemic and be treated as a natural calamity thereby enabling parties to invoke Force Majeure Clause. Invocation of this clause as owing to act of god can derive its support from the judgment of the Apex Court in **The Divisional Controller, KSRTC v. Mahadeva Shetty**<sup>8</sup> signifying that the expression Act of God means "operation of natural forces free from human interventions with the caveat that every unexpected natural event doesn't operate as an excuse from the liability of there exists a reasonable possibility of anticipating the occurring"<sup>9</sup>. Reiterating the law of force majeure the Supreme Court in **Energy Watchdog v. Central electricity Regulatory Commission**<sup>10</sup> laid down guidelines that should be considered before invoking the clause. They are (a) events being beyond the control of parties, for which they can't be held liable; (b) analyzing if best endeavors taken to mitigate the event; (c) the event was

---

<sup>6</sup> Md. Serajuddin v. State of Orissa, AIR 1969 ORI 152.

<sup>7</sup> Abhishek Arya, Doctrine of frustration, Mondaq (Jun.29,2015) <https://www.mondaq.com/india/contracts-and-commercial-law/407868/doctrine-of-frustration>

<sup>8</sup> 2003 7 SCC 197

<sup>9</sup> Id.

<sup>10</sup> (2017) 14 SCC 80.



unforeseeable by the parties; (d) the event rendered it impossible to perform the terms of agreement.<sup>11</sup>

What complicates the matter is whether COVID-19 is the direct cause of non-performance or is it the action taken by authorities by imposing the lockdown and thereby restricting the movement of goods and services nationwide. In the case of **Standard Retail Pvt. Ltd. V. M/s Global Corp and Ors**<sup>12</sup> an injunction was refused by the court as to encashment of letters of credit on the ground that movement of steel was restricted by the government authorities. The court then highlighted that the steel is an essential good and its distribution being an essential service is allowed. Therefore there is no link between COVID-19 and non-performance of obligation.

It is, therefore, stated that the Force Majeure clause can be invoked where the event is directly related to COVID-19 and the onus lies heavily on the party seeking the excuse of non-performance of the contract and thereby invoking the clause.

## REPRESENTATIONS AND WARRANTIES

Representations and warranties clauses are highly negotiated by the seller. The purpose of this clause in the M&A Agreement is to protect for losses that arise due to seller's breach of representations made in the agreement.

For the deals in their negotiating phase specific repayments, representations and warranties should be included owing to inconsistent environmental and labour laws due to the COVID-19. "Parking part of the consideration amount in an escrow account is a common mechanism for purchasers to offset some of the risk associated with the seller's representations and warranties being untrue."<sup>13</sup>

A major contract which needs to be diligently negotiated due to the pandemic is the Insurance Agreement. In spite of the fact that insurance companies try to reimburse the losses covering a hazard, numerous provisions with respect to the rejection to the secured claims have been brought

---

<sup>11</sup> Mohana Roy, COVID 19: A pandemic, Force Majeure and MAC, Mondaq(Mar.24,2020) <https://www.mondaq.com/india/maprivate-equity/907230/covid-19-a-pandemic-a-force-majeure-and-a-material-adverse-change>

<sup>12</sup> Order dated April 8, 2020 passed by the Bombay High Court in Commercial Arbitration Petition (Lodging) No. 404 of 2020.

<sup>13</sup> Id.n.4.



# ARK JURIS

Advocates & Consultants

into place. Such exclusion clauses deem to encompass every loss arising due to COVID-19 and the scope of such clauses can only be limited by negotiation depending upon the operational profile of the target company.<sup>14</sup>

## DEAL VALUATION AND PRICING MECHANISMS

The pricing clause, payment structure and valuation of the deal have consistently been vigorously negotiated even before COVID-19, making it difficult to align both buyer and seller on same financial value. Owing to the pandemic there exists economic uncertainty and vulnerability in the economic forecasts and thus sellers who earlier preferred the locked box mechanism will now be unable to transfer the economic risk of business onto the buyers. With regard to finances for valuation, buyers are more likely to consider the deferring of payments with earn-outs and escrow mechanisms by linking the payments to valuation forecasts. The parties would also like to extend the time limitations wherein earn outs are employed to account for the market conditions and the COVID-19 volatility.<sup>15</sup>

Considering the potential delays as to regulatory approvals, parties may prefer structures involving less role of regulatory bodies like acquisition via shares or by compulsorily convertible instruments directly linked to target's performance also they may want a financing out option as it would become harder to obtain third-party funding for financing the purchase price.<sup>16</sup>

## ORDINARY COURSE OF BUSINESS AND TIME BETWEEN SIGNING AND CLOSING OF THE DEAL

The draft of M&A Agreement ordinarily contains Covenants and Undertakings which fundamentally commands the objective to proceed "in the standard course of business" inferring the business to be operational on an everyday premise to safeguard the estimation of the objective business. The agreements incorporate terms like not to change the remuneration of representatives

---

<sup>14</sup>PankhuriSaxena, M&A in the times of pandemic, Inc42(May.10,2020)

<sup>15</sup>Eric M. Kogan, How will COVID-19 impact M&A?,Natlaw(Apr.15,2020)

<sup>16</sup>BhumeshVerma, Challenges and way ahead for M&A in COVID-19, Latestlaws(Apr.19,2020)



# ARK JURIS

Advocates & Consultants

or end them, promise resources outside the typical course of business or to make capital consumption just with the consent of the purchaser.<sup>17</sup>

Inferable from the pandemic even the agreement needs a couple of special cases to be added to empower the objective to execute the business and in light of the current conditions and sticking to government guidelines some noteworthy changes will be taken by organizations which would end up being the activities outside the course of common business which might be in eventual benefits of the organization. What should be dealt with is that gatherings think about how to adjust the trustee commitments and guarantee that activities don't disintegrate the purchaser's advantages.<sup>18</sup>

## THE RAY OF HOPE FOR M&A DEALS

At this time of emergency the traditional methodology for M&A arrangements would need to change for making such arrangements a triumph and would open-up some purchase side chances. Drawing in with counsels, reinforcing the conditions of the arrangement and proactive arranging would be the best approach to encourage the exchanges.

As to adapt to the COVID-19 circumstance, extreme changes has been found in the human services and Medicare offices including the fields of partnered clinical exploration, gear, gadgets and innovation. Web based stages have brought forth openings which further encouraged retail offer of medications and prescriptions at the doorstep of purchasers

Government initiatives like assessment relaxations, favorable tax reforms and fast tract compliances would monetarily go about as an impetus for the M&A procedure.

In parts like customer merchandise and fabricating where COVID-19 had not that greater effect, purchasers in that may reevaluate or reexamine their valuations additionally in light of the fact that the securities exchange in Jan 2020 was at an untouched high.

## CHANGES IN LEGAL STANDPOINT

---

<sup>17</sup> Supra n.16.

<sup>18</sup> <https://corporate.cyrilamarchandblogs.com/2020/04/covid-19-and-ma-in-india-navigating-risks-and-understanding-opportunities/>





# ARK JURIS

Advocates & Consultants

- Before the imposition of pandemic applications for Merger, Acquisition or Restructuring used to be filed before NCLT for seeking appropriate orders. However, post pandemic as the NCLT is not functioning physically as such the said applications may now be filed online along with the application for seeking interim order if any. These days Supreme Court and the High Courts are receiving petitions online and for passing appropriate orders via video-conferencing
- It is also clear that during pandemic no effective orders can be passed against the companies which are under merger or acquisition, etc.
- As per the guidelines of the Supreme Court delay in filing such applications is going to be condoned.
- Recently the Supreme Court has directed the Reserve Bank not to recover interest on interest during the period of moratorium.

## CONCLUSION

The COVID-19 situation has deeply affects key fragments of the economy. This will affect every single key partner including banks, financial establishments, speculators and corporates. The need of great importance is to set up an extensive activity plan that tends to affect from short-term income worries to longer-term balance record changes.

The economic impact of COVID-19 on India has been significant with all the sectors of the economy incurring losses due to lack of consumers. Post COVID-19 majority of companies may have to fight for survival and some of them may even have to face the prospect of business closure. Due to this proposition the M&A segment is likely to witness a significant drop in business deals. This calls for Company Restructuring and techniques to manage the current economic crisis caused because of the pandemic.

**Author:** Arpit Maheshwari (Partner) and Srishti Jain

**Date:** 01.07.2020