M&A LAB

GREAT OFFSHORE TAKEOVER SAGA –
Bharati Shipyard v/s ABG Shipyard

Dissected by – *Team M&A*

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PROLOGUE

The age old fable of the hare and the tortoise has come true but only this time the story concludes with two winners. The hare had no choice but to run all the laps for its prize but the clever tortoise has bagged the prize even without completing the race. The hot and enthralling scuffle to acquire Great Offshore Limited ("**GOL**") saw aggressive bidding by two shipyard giants, Bharati Shipyard Limited ("**BSL**") and ABG Shipyard Limited ("**ABG**")[1]. The climax turned out to be even more thrilling when ABG suddenly withdrew from the bidding race a day before its open offer[2] by selling almost its entire stake in GOL to Edelweiss Capital Limited ("**Edelweiss**") and others; thus, retracting from the battlefield. It is estimated that after the withdrawal of ABG from the Transaction, BSL would now be spending approximately INR 900 crores[3] (approx USD 187.5 million) to complete the acquisition of stake in GOL, which includes the acquisition cost of shares in the open offer (i.e. at INR 590/- per share) and the monies that it has already invested for acquiring 23% stake in GOL through open market acquisitions.

The chase to acquire GOL by both BSL and ABG resulted in the open offer price of GOL shooting from INR 344/- per share to INR 590/- per share, increasing BSL's investment by an additional amount of INR 450 crores (approx) (approx USD 93.75 million). The fierce takeover battle between BSL and ABG and the crucial decision of ABG to drop out of the race at the last minute have ignited controversies which are relevant from a legal, regulatory and business perspective.

In this M&A Lab, we attempt to evaluate the Transaction from its inception to the commencement of the open offers by both the acquirers and in the process analyze the commercial, legal and regulatory implications of the Transaction relying on the set of facts which are currently in the public domain. Maintaining our tradition to analyze commercial, legal and regulatory regimes, we have, in this M&A Lab assessed the provisions relating to competitive bid of the Takeover Code amongst others.

PARTIES INVOLVED IN THE TRANSACTION

1. Great Offshore Limited

GOL was hived off from Great Eastern Shipping Company Limited ("**GE Shipping**") and incorporated as a separate company on July 14, 2005 under the stewardship of Mr. Vijay Kantilal Sheth. It is India's prominent integrated offshore oilfield services provider offering a broad spectrum of services to upstream

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[1] The race to acquire GOL between BSL and ABG shall be hereinafter referred to as the "**Transaction**".

[2] Under Chapter III of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**Takeover Code**"), acquisition of 15% or more of shares or voting rights or acquisition of control over a listed company, would trigger the open offer requirement and would mandate the acquirer to make an offer to acquire at least an additional 20% of the voting shares from the public shareholders.

[3] Bharati Ship revises Great Offshore open offer to Rs 590/sh, December 2, 2009, http://www.moneycontrol.com/news/cnbc-tv18-comments/bharati-ship-revises-great-offshore-open-offer-to-rs-590sh_428471.html

oil and gas producers to carry out offshore exploration and production (E&P) activities. From drilling services to marine and air logistics, marine construction, port/terminal services and beyond, GOL caters to a wide gamut of offshore requirements. GOL is listed on both the National Stock Exchange ("**NSE**") and the Bombay Stock Exchange ("**BSE**").

2. Bharati Shipyard Limited

BSL was established in 1973 as a small shipbuilding facility at Ratnagiri and incorporated as a company on June 22, 1976. BSL is the leading privately operated shipyard in India today in terms of building facilities. Promoted by Mr. P.C. Kapoor and Mr. Vijay Kumar, BSL has earned its reputation by constructing a large array of specialized sophisticated vessels for diverse offshore, coastal and the marine market sectors. BSL is listed on both NSE and BSE and owns six strategically located shipyards at different parts of the country.

3. ABG Shipyard Limited

ABG was incorporated on March 15, 1985 as the flagship company of the ABG Group. The company promoted by Mr. Rishi Agarwal is one of the largest private sector shipbuilding companies in India. ABG is an established manufacturer and service provider of a variety of ships, including bulk carriers, interceptor boats, diving support vessels, anchor handling tugs & other multipurpose vehicles. ABG has client base worldwide including countries like Europe, Middle East and South East Asia and is listed on both the NSE and BSE.

BACKGROUND AND CHRONOLOGY OF KEY EVENTS

Background

The battle between BSL and ABG for the ownership of GOL captured a lot of limelight recently but it is interesting to note that the seeds of this clash were sown way back in 2008. A deeper probe into the eventful past of GOL would reveal that an ambitious move by its then promoter Mr. Vijay Kantilal Sheth had backfired in 2008 which rendered GOL prone to such a thunderous acquisition. The offshore division of GE Shipping was hived off into GOL under the stewardship of Mr. Sheth in 2005. Mr. Sheth held 3% stake in both GOL and GE Shipping respectively. To tighten his grip on GOL and have a comfortable holding, Mr. Sheth proposed to buy out the stakes of other family members in GOL. His strategy was to raise his stake from 3% to 15% in GOL in his personal capacity. Consequently, he sold his 3% shareholding in GE Shipping to his cousins (at an undisclosed price) and used the money to buy part of their holding in GOL.[4] The price he paid for each share was INR 850/- per share which was much higher than the then market price of GOL shares. He also made a futile attempt to increase his shareholding in GOL by declaring a share buyback of up to INR 60 crores in March 2008. The money Mr. Sheth got by selling his holding in GE Shipping was not enough to buy additional 12% in GOL. He desperately needed another INR 300 crores and had few options to raise it. His decision at this critical juncture decided the

[4] Tamal Bandyopadhyay, THE UNTOLD STORY OF GREAT OFFSHORE, August 31, 2009, www.livemint.com/2009/08/31000839/The-untold-story-of-Great-Offs.html

fate of GOL and kicked off a series of events which ultimately resulted in the great battle of 2009 between BSL and ABG.

Infrastructure Leasing and Financial Services Limited ("**IL&FS**"), one of the country's leading infrastructure development and finance companies, and Motilal Oswal Financial Services Limited ("**Motilal Oswal**"), a Mumbai-based brokerage firm, stepped in to aid Mr. Sheth in funding the buying, accepting shares of GOL as collateral. Mr. Sheth pledged 14.89% of GOL's shares to raise the loan, but he was required to bring in more shares as additional security when GOL's share price dropped. He failed to do so; and IL&FS and Motilal Oswal threatened to sell the shares in the open market in December 2008. A desperate Mr. Sheth sought the help of an old friend and a long-term business associate of GOL, Mr. P.C. Kapoor of BSL. Mr. Kapoor cleared the debt by taking the 14.89% stake in GOL as a fresh pledge.

History repeated itself and Mr. Sheth defaulted on his interest commitments to BSL owing to the market crash and poor performance of GOL. BSL invoked the pledge and acquired the 14.89% of Mr. Sheth's stake on May 6, 2009 at INR 31/- per share. Mr. Sheth and his immediate family still hold around 0.75% in GOL. From then on, the drama unfolded quickly with innumerable twists, turns and surprises.

Competitive bids and takeover battles run in GOL's family. It is an irony that Gesco Corp. Limited and GOL, two companies hived off from GE shipping were both targets in historic bidding wars.

In 1999, the real estate division of GE was spun off into a separate company, Gesco under the stewardship of Bharat Sheth, current deputy chairman and managing director of GE Shipping. Abhishek Dalmia of New Delhi-based real estate firm Renaissance Estates Ltd made a voluntary offer in October, 2000 to buy 45% of Gesco at INR 23/- per share after acquiring a 10.5% stake from the market. The Sheth family faced the prospect of losing control over Gesco as the promoter holding was a mere 13.5%, identical to its holding in GE Shipping. Fearful of losing control over Gesco, the family sought the guidance of Deepak Parekh, chairman of India's largest mortgage firm, Housing Development Finance Corp. Ltd. Parekh extended a line of funding and Mahindra Realty and Infrastructure Developers Ltd of Mahindra and Mahindra group, along with the Sheth family, jointly mounted a counter-offer for 33.5% of Gesco at INR 44/- per share.

The Washington-based International Finance Corp., an arm of the World Bank which owned 6.34% of Gesco, sold its stake to the Sheths. Dalmia gave up and agreed to sell his 10.5% stake in the company for INR 16.35 crore (at INR 54/- per share, higher than the offer price) and in the process amassed INR 9 crores as profit.

<u>CHRONOLOGY OF KEY EVENTS</u>

Following table encapsulates the key events between the three companies till the commencement of the open offers:

Sr. No.	Date	Event
1.	May 30, 2009	Mr. Vijay Kantilal Sheth resigned from the post of vice-chairman and managing director of GOL.
2.	June 3, 2009	Public Announcement of open offer under Regulation 10 (and not under Regulation 12) to acquire up to 7,826,788 equity shares (20% of the share capital) of GOL at INR 344/- per share by BSL, Natural Power Ventures Private Limited ("**NPVP**L") and Dhanshree Properties Private Limited ("**DPPL**").[5] The open offer period proposed by BSL and the aforesaid persons acting in concert with it ("**PACs**") was July 25, 2009 to August 13, 2009.[6]
3.	June 23, 2009	Public Announcement of competitive bid (defined below in detail) for acquiring 12,571,072 shares (32.13% of the share capital) of GOL by Eleventh Land Developers Private Limited ("**ELDPL**") and ABG[7] at INR 375/- per share. The proposed dates of the open offer by ABG and PAC were August 13, 2009 to September 1, 2009.[8]
4.	July 04, 2009	NPVPL along with BSL and DPPL revised their offer price to INR 405/- per share.[9]
5.	July 29, 2009	ABG acquired 1,926,721 shares (4.92% of the share capital) of GOL at INR 449.99/- per share.[10]
6.	July 29, 2009	ABG revised its offer price to INR 450/- per share.
7.	July 30, 2009	ABG acquired 212,348 shares (0.57% of the share capital) of GOL at INR 450/- per share.[11]
8.	August 03, 2009	ABG acquired 150,000 shares (0.38% of the share capital) of GOL at INR 498.39/- per share (max. INR 519/-).[12] The cumulative shareholding of ELDPL and ABG increased to 7.87% of the share capital of GOL.
9.	August 03, 2009	ABG revised its offer price to INR 520/- per share.[13]
10.	August 05, 2009	ABG issued Second Addendum to their public announcement of June 23, 2009 summarizing the developments of the latest status of shareholding in GOL, the new offer price (INR 520/- per share) and the revised maximum consideration (INR 6,536,957,440) for the acquisition of 12,571,072 shares in GOL.[14]

[5] NPVPL and DPPL are the affiliate entities of BSL which are acting in concert with BSL for the purposes of the acquisition.

[6] http://www.sebi.gov.in/takeover/greatpa.pdf

[7] ELDPL is an affiliate entity of ABG which is acting in concert with ABG for the purposes of the acquisition.

[8] www.sebi.gov.in/takeover/public/offshorepa.pdf

[9] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_070709.pdf

[10] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd1_300709.pdf

[11] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd5_300709.pdf

[12] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_040809.pdf

[13] Ibid

[14] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_050809.pdf

Sr. No.	Date	Event
11.	September 16, 2009	BSL picked up additional 3% shares from the market through DPPL to consolidate total stake in GOL to 22.48% at INR 560/- per share. It acquired 5,600,000 shares on the BSE and 360,000 shares on the NSE through bulk deals at an average price of INR 558.81/- per share. The purchase also included 223,000 shares held by Videocon Industries Limited.[15] Therefore the offer price was hiked to INR 560/- per share.
12.	September 24, 2009	GOL filed 60 caveats against both BSL and ABG in the courts of Mumbai as a precautionary measure to ensure that day-to-day operations and the normal course of business will not be a disrupted in case of litigation.[16]
13.	September 30, 2009	BSL issued first corrigendum to their public announcement and retracted from earlier stand to make open offer only under Regulation 10 of the Takeover Code without management control of GOL. Moved Securities and Exchange Board of India ("**SEBI**") to modify their public announcement and make open offer under Regulations 10 and 12.[17]
14.	October 8, 2009	BSL increased its stake in GOL to 23.17% by buying 302,140 equity shares of GOL for about INR 14.24 crores through open market transactions through DPPL.[18]
15.	October 2009	ABG challenged the new directors of GOL – Mr. Vinesh Davda, Mr. Ram Nath Sharma, Lt. Gen. Deepak Summanwar, Mr. Chandan Bhattacharya and Mr. Soli C Engineer as biased towards BSL. It was also alleged that Vinesh Davda independent director of GOL is also an independent director of Weizmann Corporate Services, a company run by Mr. Chetan Mehra, who is the son-in-law of BSL promoter and managing director Mr. PC Kapoor.
16.	November 18, 2009	ABG received SEBI approval for open offer for 32.12% stake in GOL at INR 520/- per share. The open offer was permitted under Regulations 10 and 12 as ABG had made public announcement for open offer under Regulations 10 and 12 in the first place itself.
17.	November 18, 2009	SEBI issued the observation letter permitting open offer by BSL only under Regulation 10.[19]
18.	November 20, 2009	BSL issued the second corrigendum explaining to the shareholders that offer would be under Regulation 10 only in light of the SEBI observation letter.[20]
19.	November 23, 2009	ABG and PAC issued the Letter of offer to the shareholders of GOL.[21]

[15] http://www.bseindia.com/qresann/news.asp?newsid={A549E993-71E5-4C05-B32A-1E698C9FFF81}&param1=1

[16] P.R. Sanjai, GREAT OFFSHORE FILES CAVEATS AGAINST POTENTIAL ACQUIRERS, September 25, 2009, http://www.livemint.com/2009/09/25235107/Great-Offshore-files-caveats-a.html

[17] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_051009.pdf

[18] Letter of Offer, Pg. 8, http://www.sebi.gov.in/takeover/greatoffshorelof.pdf

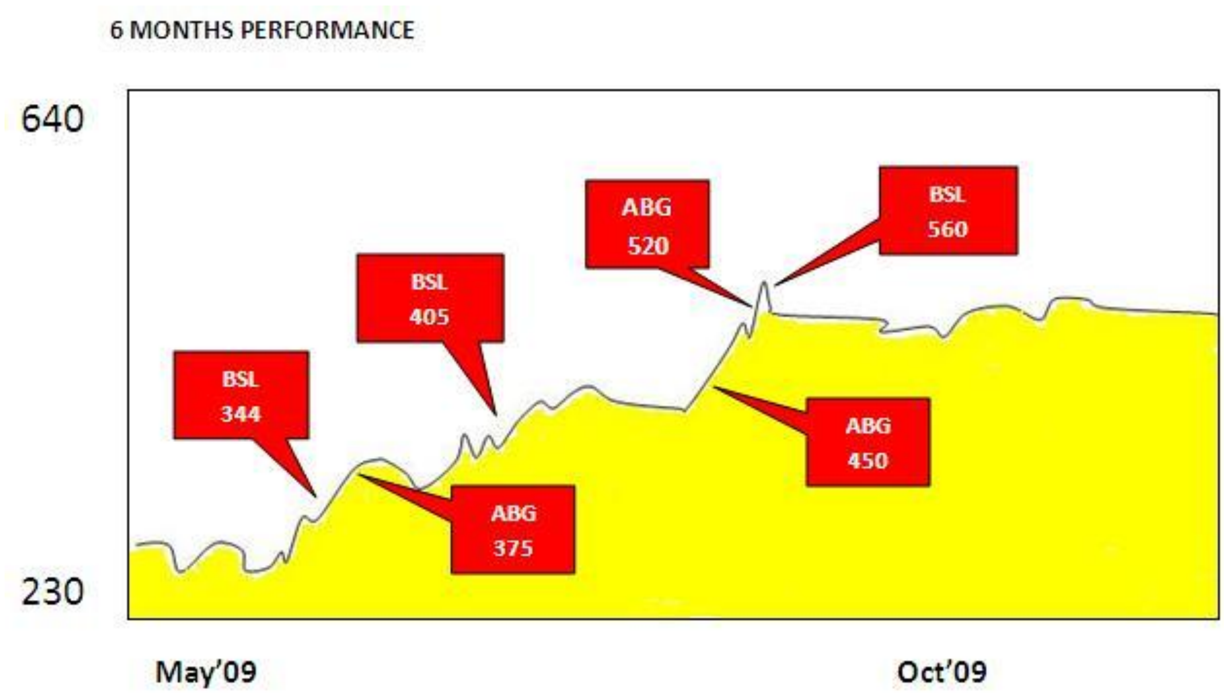
[19] http://www.bseindia.com/qresann/news.asp?newsid={BDF79983-6D8B-4A3E-8A96-0370A23CCA20}&param1=1

[20] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_241109.pdf

[21] http://www.sebi.gov.in/takeover/greatoffshorelof.pdf

Sr. No.	Date	Event
20.	November 24, 2009	BSL and PACs issued the Letter of offer to the shareholders of GOL.[22]
21.	December 1, 2009	BSL revised the offer price to INR 590/- per share.[23]
22.	December 2, 2009	ABG sold its entire stake of 8.29% (3,078,000 shares) stake in GOL through stock market sale. As of now, ABG holds only 517 shares of GOL. ABG sold its stake at significant gains over its purchase price.[24]
23.	December 3, 2009 – December 22, 2009	BSL's open offer for 20% stake at INR 590/- per share. ABG's open offer for 32.12% stake at INR 520/- per share.
24.	December 4, 2009	SEBI has summoned ABG for clarifications on sale of its stake before the commencement of the open offer.

The following graph shows the different points at which the open offers and competitive bids were made by either BSL or ABG:



[22] http://www.sebi.gov.in/takeover/greatofflof.pdf
[23] http://www.bseindia.com/qresann/news.asp?newsid={003D023D-8615-4F7A-82B6-DC2CBBDA97AB}&param1=1
[24] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_091209.pdf

COMMERCIAL CONSIDERATIONS

❖ **What makes GOL a prized possession for the shipping giants?**

GOL is presently valued at over INR 2,000 crores and has been a leading player in the industry. In the last fiscal year the company made a net profit of INR 211 crores on a turnover of INR 950 crores. Though it seems obvious that GOL offers a sound investment but it is also clear that the bidders (BSL and ABG) were looking beyond mere future earning potential or the present economic position of GOL.

In the wake of the economic slowdown the Indian shipyards faced a sharp decline in fresh orders, particularly for bulk carriers. However, with the market picking up again the offshore sector seemed to offer a good potential and to reap maximum out of the booming market, both BSL and ABG felt the need for the expertise and infrastructure of an offshore service provider like GOL.

Further, anchor-handling tugs and rigs constitute around 50% of the offshore supply vessels with a huge replacement demand. GOL has a fleet of over 40 floating assets, including offshore support vessels, drilling vessels, anchor-handling tugs and construction barges. A number of these vessels are to come up for replacement in the next three to five years offering a sizeable captive business for anyone who could get control of GOL. Besides the large fleet, GOL's vessels offer huge dry-docking and repair business potential.[25] Thus, GOL offers extremely lucrative prospect to any acquirer.

❖ **Whether acquisition of GOL would be an ideal strategic fit for BSL?**

For BSL, the acquisition of GOL is an ideal strategic fit. The acquisition presents significant synergies to BSL, whose current order book would last only for another two-three years. In the next two years, 70% of GOL's assets will come for replacement or repairs. These orders could be worth INR 2,500 – 3,000 crores. Thus, it is expected that GOL's orders would come at the time when BSL's orders are about to get exhausted.[26]

For BSL, the fit is exceptional because GOL has been one of their clients even when it was part of GE Shipping. It ensures stability in the revenue stream to the tune of 25% given that 25% of BSL's revenue comes from GOL.[27] Many of GOL's vessels were built at the BSL yard. Currently, it is building a rig and a multipurpose vessel for GOL, costing around INR 1,200 crores. BSL has recently expanded its ship-building facility and also set up a new floating dry-dock facility at Dabhol, in Maharashtra. In this context, BSL could not afford to see anyone, least of all a rival yard, get control of GOL, as huge captive business

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[25] N.K. Kurup, WHY THE RACE TO BAG GREAT OFFSHORE?, September 21, 2009 www.blonnet.com/2009/09/21/stories/2009092150180500.htm

[26] P.R. Sanjai & P. Manoj, BHARATI, ABG SURGE ON GREAT OFFSHORE OPEN OFFER, December 4, 2009, http://www.livemint.com/2009/12/04001705/Bharati-ABG-surge-on-Great-Of.html

[27] Sanju Verma, CEO, Institutional Business of Proactive Universal Group, BHARATI SHIPYARD EXCELLENT BET FOR LONG-TERM, December 3, 2009, http://www.moneycontrol.com/news/market-outlook/bharati-shipyard-excellent-bet-for-long-term-sanju-verma_428829.html

is at stake.[28] If ABG acquired GOL then it would have been a huge blow to BSL as it would have not only lost a dedicated client but also a major chunk of its business.

❖ **Was it an attempt by ABG to eliminate competition?**

ABG, with better financial back-up, naturally felt uneasy at the prospect of BSL getting large captive business.[29] It was also the golden opportunity for ABG to eliminate competition from BSL in the sector once and for all by grabbing its major client. It was also a positive stride from ABG in preparing itself for a superior performance in the recovering market. GOL was a valuable acquisition for ABG also as the services provided by ABG would have perfectly matched with the business of GOL and would have been a perfect case of forward integration.

Alternatively, there may be a possibility that the intention of ABG was to wield a double edged sword by participating in the race against BSL to make the acquisition of stake by BSL a costly affair and at the same time amass profits for itself.

❖ **Why did ABG make a striking move by selling its stake before the open offer?**

The action packed drama was no less exciting than a thriller throughout but the show stealer was the climax. ABG as the competitive bidder all along clamored to oust BSL from the Transaction. It first consolidated its stake in GOL and then sold almost the entire stake in one swift move to Edelweiss at INR 580/- per share, ECL Finance Limited at INR 575/- per share, and Carmona Investment & Finance at INR 570/- per share just a day before its open offer opened, making a sweeping profit of INR 50 crores.[30]

Ever since the sale, various theories have surfaced in the attempt to ascertain the rationale of the move. It is believed that ABG did not find it commercially prudent to acquire shares of GOL at a rate higher than INR 590/- per share which was the price offered by BSL. This may be the reason why ABG did not bother to revise the offer beyond INR 520/- per share even when BSL revised the offer price twice. From a practical perspective this seems to be the simplest reason why ABG dropped out of the race which was till then a cut throat competition. Also, BSL seemed clear in its intention to fight till the last breath to acquire GOL, which intimidated ABG forcing it to rethink the entire proposition and take a pragmatic step of exiting with a mammoth profit rather than ending up with a half baked share in GOL, with the greater control and share being bagged by BSL. With the huge difference in the offer prices and the size of the offer, ABG had little chance against BSL which could be the reason why ABG opted out of the race. ABG may have thought that it was better to sell and exit with profit rather than continue in a losing acquisition battle. Also, ABG believed that the board of GOL was biased towards BSL which could be a reason that compelled ABG to drop out of the race.

Another theory that is also taking the rounds postulates that ABG never intended to acquire GOL. BSL was resolute to acquire GOL which was always known to ABG and ABG simply made the competitive bid to hike the GOL share prices. ABG consolidated its stake in GOL with the sole intention of selling them

[28] Supra No. 24

[29] Ibid

[30] http://www.bseindia.com/xml-data/corpfiling/announcement/Great_Offshore_Ltd_091209.pdf

when the price was befitting.[31] To put an end to the uncertainty and prevailing confusion, SEBI has summoned ABG to clarify the sudden stake sale to Edelweiss and others.[32]

- **What made Edelweiss and others buy ABG's stake in GOL?**

If reasons for ABG selling the stake in GOL have paved way for curious theories, equally exciting are the theories on why Edelweiss and others have bought the stake from ABG. Consensus is yet to be arrived and public perception is highly varied. It is said that Edelweiss and others may have acquired the shares from ABG on behalf of BSL and once the offer process is completed Edelweiss and others would transfer the shares to BSL.[33]

Another version of the story states that Edelweiss and others may tender the shares acquired from ABG at INR 570/- – INR 580/- per share in the open offer of BSL at INR 590/- per share making a clean profit. However, this may lead to the question whether this decision of Edelweiss, which is a public listed company, is in the interest of its existing shareholders and commercially justifiable.[34]

The sudden intervention of Edelweiss and others may not be prohibited by law and seem justifiable from a commercial perspective, but SEBI's reaction towards the same is eagerly awaited. Mr. Siddharth Shah, Head of Corporate and Securities Law Practice at Nishith Desai Associates, is of the opinion that "*these developments would test the regulators and the regulations. So much in terms of how SEBI would really look at the entire scheme of things is something, for which we will have to wait for the reaction of the regulator. But commercially speaking, one can really justify the stand taken by each of the participants in the transactions.*"[35]

- **Who is the winner?**

After eventful six months covering offers, competitive bids, allegations, approvals, twists, surprises and a shocking climax the scores seemed tallied to a great extent.

Undoubtedly, it was festive season for GOL with its share prices soaring, even though uncertainty loomed over its head for substantial time period, and the founder promoter lost control of the company. The exiting shareholders are taking home a dream price.

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[31] N. K. Kurup, GREAT OFFSHORE: WINNER'S CURSE FOR BHARATI SHIPYARD?, December 7, 2009, http://www.thehindubusinessline.com/2009/12/07/stories/2009120751140500.htm

[32] Archana Shukla, SEBI SUMMONS ABG SHIPYARD, December 5, 2009, http://profit.ndtv.com/2009/12/05002531/Sebi-summons-ABG-Shipyard.html

[33] SEE NO ARBITRAGE OPPORTUNITY FOR EDELWEISS: EXPERTS, December 3, 2009, http://www.moneycontrol.com/news/market-outlook/see-no-arbitrage-opportunity-for-edelweiss-experts_428796.html

[34] The last traded price of GOL on BSE as on December 15, 2009 is INR 512.80

[35] Ibid

BSL has bagged the control of GOL despite the acquisition turning out to be expensive costing around INR 900 crores. The valuation of GOL may be high and the acquisition over priced but definitely it is an ideal strategic fit for BSL as discussed earlier and they have managed to get what they struggled for.

ABG lost the battle in the last round. It exhibited the sensibility of a prudent investor in selling its stake to make glittering profits when it realized that its offer could not be a success. One may conclude that the deal is a win-win situation for all the three relevant players.

❖ **Can market manipulation and unfair trade practice be read into?**

Regulation 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Market) Regulations, 1995 states that no person shall:

> "*effect, take part in or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities and thereby inducing the sale or purchase of securities by any person enter into a purchase or sale of any securities, not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress, or cause fluctuations in the market price of securities.*"

It has been debated that the act of ABG to sell its stake prior to the open offer reeks of unfair trade practice and market manipulation. The allegation is an offshoot of the assumption that the sale of stake by ABG defeats the spirit of the Takeover Code. It is argued that ABG purposefully foiled BSL's plan to acquire GOL by increasing the offer price of BSL. It is true that ABG has not withdrawn its open offer and provides double opportunity for the shareholders to exit but the entire competitive bid process may be questioned on grounds of unfair trade practice and market manipulation.

LEGAL AND REGULATORY CONSIDERATIONS

❖ **Under what legal provisions did ABG make the competitive bid against BSL?**

Competitive Bid: A competitive bid is an open offer made by any person, other than the acquirer who has made the first public announcement under Regulation 25 of the Takeover Code. The person making the competitive bid has to follow the procedure and conditions prescribed under the Takeover Code. Usually the offer under competitive bid would be at a price higher than the original offer to ensure the success of the offer. Competitive bid is a voluntary open offer made by the bidder for commercial reasons and is not pursuant to an obligation arising from the trigger of the Takeover Code.

Regulation 25 of the Takeover Code permits ABG to make a competitive bid against the offer of BSL within 21 days from the date of public announcement of the BSL's offer. The objective of this provision is to provide the shareholders as many exit options as possible with maximum exit price. The shareholders are free to tender their shares according to their choice and normally the offer of the acquirer who offers the highest price becomes successful. Also, as such the provisions for open market acquisition of shares, competitive bidding and revision of the offer do not discriminate against hostile takeovers in India.

In this takeover saga, the open offers by both BSL and ABG were voluntary offers as both of them had not triggered the thresholds under the Takeover Code at the time of the public announcements. BSL was the first to make the public announcement and within the statutory period of 21 days, ABG startled BSL with its competitive bid. Since BSL made the first offer it is the acquirer who made the first public announcement as mentioned under Regulation 25 and ABG's offer which followed the first offer is the competitive bid.

- **When were the open offers made by BSL and ABG expected to close?**

Under Regulation 25(7), the date of closure of the original bid as also the date of closure of all the subsequent competitive bids will be the date of closure of public offer under the last subsisting competitive bid and the public offers under all the subsisting bids shall close on the same date. It is a legal requirement that the date of closure of all the open offers in a competitive bid should be the same. The offers can open on different dates but they should necessarily close on the same date which should be the date of closure of public offer under the last subsisting competitive bid.

In the instant case, BSL's offer period was initially scheduled as July 25, 2009 to August 13, 2009 and ABG's offer period was initially scheduled as August 13, 2009 to September 1, 2009. Since the last subsisting competitive bid was ABG's offer, both the offers had to close on September 1, 2009.

The surge to acquire stake in GOL and the rage to prevail over the competitor was so severe that both BSL and ABG ventured into a bidding war, revising the offer price constantly and in this process failed to stick to the timelines under the public announcements. Therefore, both the acquirers had to seek approval of SEBI for rescheduling their offer periods. SEBI suggested the acquirers to align both the open offers and complete it simultaneously. Hence, the open offers by BSL and ABG were re-scheduled to simultaneously commence on December 3, 2009 and close on December 22, 2009.

> When Alcan Aluminium Limted (Canada) had made a competitive bid in 1998 for the shares of Indian Aluminium Company Limited against the offer by Sterlite Industries (India) Limited, SEBI had directed them to complete the open offers simultaneously.

Despite the prevailing criticism against SEBI's stand discussed aforesaid, there have been arguments that running the two open offers simultaneously would be more in the interest of the shareholders as it may give them an opportunity to tender shares partly in one open offer and partly in the other. This may enable them to sell off as much shares as possible in both the open offers at a price much higher than the prevailing market price, thus, minimizing the risk in the event of their tendered shares being taken up on a pro rata basis. This may give a better exit opportunity to the shareholders. On the flip side, ABG may yet end up with shares in the open offer without any intent to acquire a substantial stake or control. Though, the Takeover Code does not prohibit them from selling these shares to BSL post closing of the open offer.

- **What were the options available to BSL against ABG's competitive bid?**

It is very important to note that prior to 2002 the original acquirer had the right to withdraw his offer if a competitive bid was made at a higher price. The same was however deleted from the Takeover Code in the light of the recommendations made by the "**Reconvened Committee**" on Substantial Acquisitions of Shares and Takeovers under the chairmanship of Justice P. N. Bhagwati in 2002.[36]

Accordingly, the original acquirer who makes the first public announcement is prohibited from withdrawing his offer in the light of a competitive bid at a higher price but has the right to make upward revisions in his offer, in respect of the price and the number of shares to be acquired to defeat the competitive bidder under Regulation 25 (4) of the Takeover Code. Upward revision of offer price and the shares is permitted by Regulation 26(6) of the Takeover Code subject however to keeping the other terms of the offer unchanged.

Therefore, the only option that was available to BSL in response to ABG's competitive bid was the upward revision of the offer price and the number of shares to be acquired. The increase in the offer price from the original price of INR 344/- per share to INR 590/- per share was the outcome of constant upward revisions of the offer price by both BSL and ABG.

> "*The Reconvened Committee noted that the extant regulations provide for withdrawal of offer by the original acquirer following a competitive bid. When the original bid which gave rise to the competition is withdrawn, a question arose as to whether the competitive bidder can also withdraw his offer. The Reconvened Committee discussed this issue and was of the opinion that rather than allowing the competitive bidder also to withdraw which would mean that no offer ultimately subsists, withdrawal of offer by the original bidder should not be allowed also because an acquirer while making a bid for any company should be fully prepared for the consequences including the possibility of a counter offer. The shareholders of the target company should have the option to decide which of the offer(s) should succeed. This will also provide double exit option to a shareholder which is in their interest.*"

- **What were the options available to ABG once BSL revised its offer price?**

As is the case for the original acquirer, even the competitive bidder is not allowed to withdraw the offer once the public announcement of the competitive offer has been made and can only make upward revision in the offer price to beat the original acquirer. Competitive bidder is denied the right to withdraw the offer because he is expected to have analysed and anticipated all possibilities before making the

[36] The said provision was omitted from the Takeover Code subsequent to the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002 w.e.f. 9-9-2002.

offer. He is expected to know that the original acquirer would revise the price and that cannot be a reason for him to withdraw the offer. So in the instant case, ABG also revised its offer price to the latest offer of INR 520/- per share to defeat the offer made by BSL initially.

❖ **Does the Takeover Code permit ABG to sell off its stake prior to the open offer?**

ABG sold its entire stake in GOL to Edelweiss and others on December 2, 2009, one day before the opening of its offer. The sale set in tremendous panic and uncertainty in the industry as well as the legal circles. The legality of the transaction itself was challenged but an appropriate reading of the Takeover Code clarifies the point that such a sale is not prohibited as long as the bidder continues with the open offer. ABG has not withdrawn the offer and the same was opened as scheduled. Therefore, ABG has not violated the Takeover Code. It is not relevant whether the acquirer sells his stake after triggering the Code or making a public announcement but it is critical and obligatory that the open offer is continued and exit opportunity is provided.

In the instant case, the price offered by ABG is lesser than what is offered by BSL and logically shareholders would prefer BSL's offer over and above ABG's. It is a process of natural selection based on commercial prudence of the shareholder. This would have happened even if ABG had not sold its stake to Edelweiss and others. The only layer of protection prescribed by the Takeover Code is the exit opportunity at fair price which is in any case guaranteed. Therefore, it can be argued that ABG has not erred in law by selling its stake before the open offer.

❖ **Could ABG withdraw from the offer after selling its stake to Edelweiss and others?**

The Takeover Code does not prohibit ABG from selling its stake in GOL but the prohibition on withdrawal of any offer once made is absolute except as provided under Regulation 27.

Regulation 27 of the takeover Code permits withdrawal of open offer on limited grounds. It reads:

> *"no public offer, once made, shall be withdrawn except under the following circumstances:—*
>
> *(a) [Omitted]*[37]
> *(b) the statutory approval(s) required have been refused;*
> *(c) the sole acquirer, being a natural person, has died;*
> *(d) such circumstances as in the opinion of the Board merit withdrawal."*

It is clear that an open offer under the Takeover Code once made cannot be withdrawn except as provided under Regulation 27. Regulation 27 applies to the offers made by the original acquirer as well as the competitive bidder.

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[37] Omitted by the Reconvened Committee w.e.f. 9-9-2002. Prior to its omission, clause (a) read as "(a) the withdrawal is consequent upon any competitive bid;".

> The interpretation of the Regulation 27 has posed problems to SEBI many a times in the past. It has always been debated whether the term 'once made' in the Regulation 27 implies only an offer which has already been open for shareholders to tender their shares i.e. during the offer period or whether it also includes an offer, the public announcement of which has been made but is not yet open.

The same concern was raised even in the present case when ABG sold almost its entire stake one day prior to the opening of the open offer. In light of the spirit of the Takeover Code, it has to be understood that Regulation 27 would apply the moment the public announcement of the offer is made. The term 'once made' does not refer to opening of the offer but the public announcement of the offer.

Under the terms of the Takeover Code, there is no restriction on sale of stake prior to the opening but no acquirer can withdraw an offer once made irrespective of whether the stake is sold or not. The fundamental objective of the Takeover code is to provide protection to the shareholders of the target company. Hence ABG may be allowed to sell its stake before the open offer but the sale cannot be a justification for it to withdraw the open offer. The open offer by ABG after the sale of stake would fulfill the obligation of ABG under the Takeover code but the offer would be a mere formality because BSL's bid, at Rs 590 a share, is 13% higher than the open offer price ABG and ABG has already sold its stake in GOL. The sale of stake by ABG has not changed the fate of its open offer. Even if ABG had not sold off its stake there was little chance for its offer to be successful due to the remarkable difference in the offer prices.

Another controversial provision in the Takeover Code is the power of SEBI to permit withdrawal on application by the acquirer or the competitive bidder. It has been clarified that the power of SEBI to permit withdrawal is a limited power and withdrawal can be permitted only in extreme circumstances where reasons for withdrawal are as grave as the other two reasons specifically mentioned under Regulation 27. The point has been categorically laid down in the matter of Nirma Industries Ltd. v. Securities and Exchange Board of India as: [38]

> "*Clause (b) envisages a situation where statutory approval(s) have been refused. It is axiomatic that in such an eventuality it would not be possible for the acquirer to go through or complete the public offer. The law will not permit him to continue with the offer. Death of the sole acquirer who is a natural person is yet another circumstance which may entail the withdrawal of the public offer in terms of clause (c). Here again, death has made it impossible for him to complete the public offer. Then we have clause (d) which refers to "such circumstances as in the opinion of the Board merit withdrawal". This is a residuary clause containing general words. The specific circumstances under which the public offer could be withdrawn are mentioned in clause (b) and (c) followed by the general words in clause (d). In such a situation the rule of ejusdem generis gets attracted and the general words in clause (d) have to be construed as limited to things or circumstances of the same kind as those specified in the preceding clauses. To put it differently, the general words "such circumstances" in clause (d) must draw their colour from the circumstances referred to in clauses (b) and (c).*"

[38] [2009] 90 SCL 23 (SAT- Mumbai) http://www.sebi.gov.in/satorders/nirma.html

❖ What is difference between open offers under Regulations 10 and 12?

SEBI decided on November 18, 2009 not to permit BSL to make a single open offer under both Regulation 10 and Regulation 12 while allowing ABG to make the offer under both Regulations 10 and 12. This raises various interpretational issues under the Takeover Code. It is the fundamental principle that the Takeover Code would be triggered on acquisition of shares or voting rights at or beyond 15% (Regulation 10) and/or management control of the target company (Regulation 12).

Regulation 10 reads "*no acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations*."

Regulation 12 reads "*irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations. Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a special resolution passed by the shareholders in a general meeting: provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided"*.

Regulation 2(1)(c) defines control to include "*the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner*".

It is pertinent to note here that Regulation 10 and Regulation 12 are distinct and mutually exclusive triggers under the Takeover Code.[39] While Regulation 10 refers to the acquisition of shares or voting rights Regulation 12 deals with change in control. Trigger of Regulation 10 may be accompanied by trigger of Regulation 12 in some cases, but it need not be the case always. In situations where acquisition of shares beyond 15% is accompanied by change in control, the acquirer will be required to make open offer under both Regulations 10 and 12 as both substantial stake in the target and management control is being acquired.

Regulation 12 applies exclusively to change in control and control is not connected to any particular factor. Control need not necessarily be only on account of shareholding; it could be exercised in any manner. Open offers under Regulations 10 and 12 are meant to attain two different objectives and the open offers under these regulations can either be independent or combined.

❖ Why did BSL make its initial voluntary open offer only under Regulation 10?

BSL had not triggered the Takeover Code on June 3, 2009 when it made the public announcement of the open offer as the total stake of BSL and the PACs taken together was only 14.89% of the share capital,

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[39] Swedish Match AB v. SEBI, Securities Appellate Tribunal, February 18, 2003.

which does not trigger Regulation 10. Further, Regulation 12 too was not triggered as BSL had not acquired control over GOL. The open offer from BSL was a voluntary open offer to acquire up to 20% stake from the public to consolidate its stake in GOL without acquiring management control. BSL's intention was to consolidate its stake in GOL while retaining the then existing management of the company.[40] Hence, it was disclosed in the public announcement that the open offer was under Regulation 10 only.

On June 23, 2009, ABG made the competitive bid at a higher price for acquiring 32.12% from the public under Regulations 10 and 12. In the light of the competitive bid, BSL retracted from its earlier stand and issued the First Corrigendum to the public announcement dated October 1, 2009 amending the public announcement to include Regulation 12 also and thereby acquire the control of GOL along with consolidation of its stake in the company.

- **Why did SEBI reject BSL's request for amending the public announcement to make the open offer under Regulations 10 and 12?**

Since BSL's offer was a voluntary open offer and its intention was to consolidate stake without acquiring control, the public announcement was then made only under Regulation 10. When ABG made the competitive bid for stake and control under Regulations 10 and 12, BSL modified their public announcement by issuing the First Corrigendum to the public announcement dated October 1, 2009. The First Corrigendum amended the public announcement to include Regulation 12 also. However, SEBI vide Observation letter dated November 18, 2009 directed them to revert back to the original position and prohibited BSL from making an open offer under Regulation 12.

Under the Takeover Code, it is obligatory on the acquirer to disclose in the public announcement the regulations pursuant to which the open offer is made. Once the public announcement is made, the terms of the offer cannot be modified except for upward revision of price and number of shares to be acquired in the open offer as provided under Regulation 26(6). Therefore, under the Takeover Code, if the acquirer has made the public announcement of the open offer citing a particular regulation under which the offer is made then the same cannot be altered later. This is the stand adopted by SEBI in the Observation Letter issued to BSL which is a technical interpretation of Regulation 26(6).

It is of significance to note the developments between June 3, 2009 and November 18, 2009 which SEBI seems to have ignored. After the public announcement by ABG of its competitive bid, BSL went on a consolidation spree and acquired up to 23.18% of GOL from the open market. This holding along with the stake that BSL would acquire in the open offer would trigger Regulation 12 as BSL's total stake would then rise to 43% (assuming full acquisition of 20% in the open offer).

Even without taking into consideration the acquisition in the open offer, the consolidation by BSL after the public announcement was a reason sufficient enough for SEBI to allow BSL to modify the public announcement and permit open offer under Regulation 12 also. Post consolidation, the total stake of BSL is 23.18% which is very close to the critical 26% threshold under the Indian Companies Act, 1956 that

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40 THE GREAT OFFSHORE SAGA!, December 5, 2009, http://www.moneycontrol.com/news/management/the-great-offshore-saga_429274.html

may be equated to negative control of the company. This coupled with the resignation by Mr. Vijay Kantilal Sheth from the post of chairman of GOL indicated towards a probable change in control of GOL which could have hit the trigger button of Regulation 12.

Notwithstanding the above, SEBI seems to have ignored the above logic and gone ahead by interpreting that by not allowing the open offer to be made under both Regulation 10 and 12 in view of Regulation 26(6). Also, one of the other reasons which could have prompted SEBI that since both Regulation 10 and Regulation 12 were triggered at different points in time by BSL, SEBI directed BSL to make separate open offers under each of the triggered regulations rather than making one open offer under both Regulation 10 and Regulation 12.

- **Can acquisition in one open offer trigger another open offer under the Takeover Code?**

It seems highly improbable that BSL would make another public offer under Regulation 12 for acquiring management control of GOL. The interpretation of terms of the Takeover Code by SEBI to not permit BSL to make a combined public offer under Regulations 10 and 12 is a technical one. BSL did not want the management control of GOL at the time of the public announcement but this intention changed when ABG made the competitive bid later. Now, since ABG has dropped out of the race, BSL would not want to make a fresh offer for another 20% shares of GOL after the current open offer. In the letter of offer dated November 24, 2009, BSL has made it very clear that open offer is only for consolidation and no control would be acquired. Also, SEBI has not directed them to make any additional open offer and the Observation Letter merely directs them not to modify the public announcement.

The critical question here is – if BSL would actually acquire management control of GOL pursuant to the open offer. Assuming full subscription in the open offer, BSL's total shareholding in GOL would increase to 43% which is a substantial stake and any shareholder with such a substantial stake would definitely enjoy a say in the management of the company. Control as defined under Regulation 2(1)(c) may arise from shareholding also. Hence, it has to be seen if SEBI would direct BSL to make another open offer for trigger of Regulation 12. Countering this point, it could be argued that the change in control is the consequence of an open offer under the Takeover Code and one open offer should not trigger another open offer.

EPILOGUE

The Great Indian takeover drama of 2009 has come to a startling halt but the unprecedented climax is not letting the euphoria die. The strategic move by ABG to sell its stake in GOL before the open offer has been the headlines ever since. The best minds in the country have not been at rest and yet consensus on the issue remains distant. The takeover battle is definitely one of the best episodes in the corporate history of India Inc. It has revealed the rage and spirit of competition prevailing in the market today and also how the entrepreneurs are preparing their arsenal to reap maximum benefits out of the booming market in the days to come. Another point of academic and commercial interest is the realization that the days of hostile takeovers are not yet over. The panic set in by the economic turmoil and the surge to recover fast could make India Inc. witness more of such hostile acquisition attempts.

The war has unearthed loopholes in the Takeover Code which the recent constituted committee appointed to review the Takeover Code can tackle and if possible negate. The law on competitive bid is clear but sale of stake by the bidder before the open offer to defeat the purpose of the offer is legally not prohibited. The sale by ABG is unprecedented and is the first of its kind in the history of the Takeover Code and hence the committee has to stitch in time to prevent any more of such audacious events which could be detrimental to the interest of the shareholders.

The deal is definitely going to leave a lasting impression and it delivered a win-win situation for both the rival bidders. BSL has achieved what it fought for and is undoubtedly the winner. GOL is a prized possession which in the days to come will be the biggest source of income for BSL. Branding ABG as the villain would be a gross mistake. Acting on commercial and legal prudence, ABG may not be as desperate as BSL to acquire GOL. Therefore losing GOL to BSL may not be a huge setback for ABG but of course the competition from the combined force of BSL and GOL would give ABG sleepless nights in future. Though ABG could not win the battle but it has not lost it either.

The battle between ABG and BSL was for the goose which lays golden eggs. At the fag end of the episode we have a beaming BSL, the proud owner of the precious but viciously expensive goose, and a canny ABG carrying home a big bag full of golden eggs. Could it have been any better?

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