M&A Hotline

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DEAL MAKING IN INDIA: WHAT TO EXPECT IN 2023?

INTRODUCTION

The past year has been a rocky road for global mergers and acquisitions ("**M&A**") activity, mainly due to the aftermath of geopolitical instability caused by the situation in Ukraine, the possibility of recession in USA, Europe and China, sky-rocketing oil prices, inflation rates and the corresponding funding winter stemming from a fear of the impending recession. Multiple industries have witnessed continued shutdowns, layoffs and salary freezes, creating uncertainty amongst stakeholders worldwide. Within the first seven months of 2022, global M&A deal volume fell by 13% as compared with the same period in 2021, along with a corresponding drop in deal value by 32%.[1] Overall, 2022 witnessed the biggest year-over-year percentage drop in the total global deal value since 2001.[2]

Despite such bleak statistics, deal advisers predict that deal momentum will soar in 2023.[3] Interestingly, amidst the uncertainty prevalent within 2022, India witnessed a record total M&A deal value of USD 152 billion.[4] High-value deals such as the HDFC Ltd.-HDFC Bank merger,[5] the Adani-Holcim deal[6] and the announcement of the Vistara-Air India merger by the Tata Group[7] have taken place in 2022. Thus, it is safe to say that the future of inbound M&A activity in India is ripe and will only bolster the country's economic growth. Pharmaceuticals & healthcare, technology, financial services and infrastructure including renewable energy shall continue to dominate such M&As in India, given the possibility of innovation, potential for scale and increasing dependability on the end products created by key players within these sectors.

With this backdrop, we examine deal-making in India in 2023 and highlight important commercial and legal developments that are likely to dominate cross-border M&A deal negotiation, structuring and documentation in India going forward:

1. Acquisitive Adani Group

   From being founded as a modest commodities trading group in 1988, the Adani Group has today become one of the most prominent acquirer across Indian sectors today, with its listed entities growing at a rate of over 10 times over the past 3 years and surpassing the Tata Group to obtain a combined market capitalization of USD 280 billion in November 2022.[8] While the Adani Group was initially focused on and began its operations in relation to coal and mining, it has recently forayed into port management, generation and transmission of electricity, transport and logistics, cement, natural gas, infrastructure and food processing.

   Interestingly, the Adani Group has been resorting to acquisitions, joint ventures and greenfield projects (across related and unrelated businesses) as its preferred mode of expansion in India. The Adani Group has carried out more than 30 acquisitions since 2014.[9] Throughout 2022, the Adani Group has been involved in several major deals, some of which include the acquisition of Holcim's Indian cement portfolio (including controlling stake in Ambuja and ACC Cement) through acquisition of 100% shareholding of Holcim's Dutch entity,[10] the hostile takeover of NDTV,[11] acquisition of D.B. Power Limited from the Dainik Bhaskar Group in the coal and mining industry,[12] and the acquisition of the 'Kohinoor' food brand from McCormick Switzerland GMBH in the food FMCG market.[13]

   The Adani Group continues to remain ever ambitious in its plans to expand their presence across industries, and plans to take its value to USD 1 trillion in coming years.[14] In this vein, the Adani Group's aggressive expansion is likely to be a major driving force and key trend in Indian M&A in 2023, both in terms of the number of deals closed and the deal values associated with these transactions. For instance, out of the USD 82 billion M&A deal value in the second quarter of 2022, the Adani-Holcim deal itself contributed USD 10.5 billion.[15] Additionally, given that the Adani Group companies often raise equity and debt from overseas for their operations, they are likely to drive foreign players into India through attractive legal and tax structures.

2. Rising shareholder activism and board governance

   The past few years have also shown a marked rise in shareholder activism and board governance in India. Amidst the occurrence of the pandemic, increasing awareness of shareholder rights amongst retail and minority shareholders alike, rise of proxy firms and the parallel growth in the presence of institutional investors within Indian companies, company stakeholders are becoming more conscious of their rights and remedies under Indian company law – a trend which may have far-reaching implications on M&A deal activity in India in 2023.

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Section 241 of the Indian Companies Act, 2013 ("**CA 2013**") provides protection against oppression and mismanagement of shareholders of the company. The long drawn Tata-Mistry saga, that was finally settled by the Supreme Court of India,[16] is one of the first cases dealing with Section 241 of the CA 2013, and only demonstrates the increasing resort to company law for shareholder rights in India. The extant company law regime in India provides adequate protection to shareholders, such as class action suits, appointment rights, voting rights in relation to specified critical matters (such as the remuneration and removal of directors and appointment of the auditor), etc.[17]

We believe that these concerns are likely to form an important part of discussions between acquirers and potential targets during transaction structuring. Accordingly, we anticipate that minority investors are likely to insist on board and committee representation, along with continued access to select veto rights in order to safeguard their position in the company. Lastly, increased shareholder activism during M&A deals may lead to addition of favourable covenants into transaction documents, that may, if appropriately implemented, contribute to the environment, social and governance ("**ESG**") matrix of target companies and increase their potential attractiveness to foreign players.

3. Revival of the initial public offering ("**IPO**") markets in the second half of 2023

   In respect of the Indian primary market, despite the lull in activity across most of 2022, the Indian market for IPOs is likely to revive within the second half of 2023.[18] There is a two-fold reason for this key development: (i) a gradual rise in retail investor participation in IPOs in India, a phenomenon that has only been witnessed in the aftermath of the COVID-29 pandemic;[19] and (ii) the increase in the number of listing approvals being granted by the Securities and Exchange Board of India ("**SEBI**") to companies. The IPO market in India raised over INR 57,000 crore in 2022.[20] Further, three companies (Cyient DLM Limited, J.G. Chemicals Limited, and Rishabh Instruments Limited) have already filed their draft red herring prospectuses with SEBI as of January 17, 2023.[21]

   IPOs are generally beneficial because upon listing, public companies are subject to the greater regulatory scrutiny and regime of SEBI. Since the regime is modelled on disclosures and shareholder transparency, it provides greater comfort to domestic and overseas retail and institutional investors looking to invest in India and contributes to increases foreign direct investment and foreign portfolio investment in India. In the long run, this may increase the foreign exchange rate and reduce the Indian trade deficit.

   Specifically in respect of documentation, investors must examine exit clauses (related to IPOs) to ensure that they clearly delineate their rights and obligations within transaction documents, so as to avoid being construed as a "promoter" by the SEBI at the time of filing of the IPO documents. Furthermore, it may be beneficial for investors to negotiate terms which provide them with a strategic advantage during the IPO – such as a priority in the order for offer of shares for sale and veto rights on procedural aspects concerning the IPO, However, it is important to note that none of these will necessarily guarantee direct enforcement of an IPO clause as an exit right when litigated before Indian courts, and are mere safeguards guaranteeing more control and involvement of an investor during the IPO process.

4. Impact of the upcoming 2024 India General Elections

   While the 2024 general elections are over a year away, it is pertinent to discuss how the months leading up to the elections (particularly, the period after September 2023) may impact deals that are in the pipeline, particularly in light of the fact that deal making is a long-drawn process spanning into months. It is likely that there may be a slowdown in deal making during the months after September 2023 and leading up to the elections, majorly due to the uncertainty in the incoming government. Additionally, the judicial and administrative machinery of India is likely to function at a reduced efficiency, leading to a delay in pronouncement of judgments and grant of approvals.

   Parties that are entering into deals with Indian entities during these months must assess the following factors carefully: (i) there is a need to understand the political landscape within the country, a few months immediately preceding the election, in order to understand the prevalent Indian sentiment in respect of the key contesting parties, and the general outlook of these parties towards investments into and outside India; (ii) transaction documentation during this phase must provide for adequate safeguards against "change in law" and "material adverse effect" caused as a result of the onboarding of a new government enacting contrasting laws; (iii) deal timelines must be evaluated (and, wherever possible, extended in good faith) keeping in mind the slower functioning of courts and regulators in India; and (iv) due diligence must account for valuation gaps that can arise as a result of foreign exchange fluctuations that we typically see closer to the general elections.

5. Boost to outbound acquisitions due to enactment of the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("**OI Rules**")

   In August 2022, the Indian Government and Reserve Bank of India overhauled the Indian regime in relation to overseas investments by Indian entities, through the respective enactments of the OI Rules, Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("**OI Regulations**"), and the Foreign Exchange Management (Overseas Investment) Directions, 2022 ("**OI Directions**") (the OI Rules, OI Regulations and OI Directions, collectively referred to as the "**OI Regime**"). While the OI Regime is starkly different from its predecessor (being the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004), it has been heralded as a progressive development by stakeholders for its efforts to ease deal making in India.[22]

   An important consequence of the OI Regime is the ability of non-financial services companies in India to invest into financial services companies outside India, through the automatic route, subject to the non-financial services entity having generated profits over the last 3 years in India. This is a considerable change which allows multiple possible deal structures and lays down guidelines in relation to funding through equity, debt or guarantee. Separately, larger conglomerates can now set up family foreign offices abroad (and structure them as financial services entities under respective local laws) for effective investment and wealth management. To provide further impetus to investors, the 3 year profitability criteria has further been relaxed in the context of an investment made

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into an investee foreign financial services entity that is located in the International Financial Services Centre at GIFT City, Gandhinagar, India.

This development provides immense relief to Indian investors by giving them clarity in relation to the eligibility criteria, permissible structures and the possibilities of integration. Additionally, given that these structures are now permissible under the automatic route, there is a reduced uncertainty of the outcome of the transaction. From a documentation and structuring perspective, this reduces the delay in timelines and the pressure on parties to build in monetary contingencies for such events.

Amidst other key changes, the OI Regime has also permitted "round tripping" for Indian entities up to 2 layers of subsidiaries, including entering into joint ventures with foreign entities. As a result of this development, Indian businesses can expand globally by acquiring structures that have downstream Indian subsidiaries.

In the long run, the increased outflow occurring due to the OI Regime will only bolster confidence of Indian and foreign players alike in the Indian Government's vision for the ease of deal making across the coming few decades.

6. The rise in hostile takeovers: time to create documentary safeguards?

   Hostile takeovers occur when the acquirer seeks to obtain shares of a target company in contrast to the wishes of and without the consent of its management. Conventionally, proxy voting (which involves potential acquirers convincing the existing shareholders to vote out the management of the target) and tender offers (acquirers offering to buy shares of the target from an existing shareholder at a price higher than the market value) are the most common ways in which hostile takeovers occur worldwide.

   While there have been numerous attempts to resort to hostile takeovers for acquisition of companies, the recently concluded hostile takeover of NDTV by Adani Group is a classic example of a successful hostile acquisition for the acquirer. By way of this deal, Adani acquired indirect control in Vishvapradhan Commercial Private Limited ("**VCPL**"), an entity possessing nearly 29.18% shareholding in NDTV, which made them the single largest shareholder of NDTV (surpassing its promoters Prannoy and Radhika Roy).[23] In the past, India has witnessed hostile takeovers such as the takeover of MindTree by L&T[24] and the acquisition of stake in Zandu Pharaceutical Works Limited by Emami Limited.[25] Despite major Indian companies continuing to remain promoter-owned and controlled, the law has evolved to reduce hurdles that were previously associated with the transfer of shares to a bidder. Thus, this creates a favourable environment for multiple hostile takeovers across sectors.

7. The emergence of the ESG matrix in M&A

   ESG is a three-step matrix that assists impact investors in evaluating the potential "investability" of entities through an analysis of their commitment towards the environment, internal management and reporting procedures, and adherence to associated laws.

   In 2022, ESG reporting by India's top 1,000 listed entities has become mandatory under the Business Responsibility and Sustainability Reporting introduced by the Securities and Exchange Board of India,[26] in addition to the prevalent regime for corporate social responsibility under the Companies Act, 2013.[27] While it appears that ESG has found some resonance in India recently (with ESG assets under management increasing from INR 26.3 billion in 2019 to INR 123.2 billion in 2021[28]), there continues to remain a lack of mainstream awareness of its benefits, a trend that is likely to change in the M&A sphere in 2023.

   With increasing knowledge of and commitment to reduction of carbon emissions by institutionalized and retail investors worldwide, discussions surrounding the ESG criteria will become more prevalent amongst parties at different stages of structuring and documentation of M&A deals. Incorporation of ESG representations and warranties, detailed commitments to sustainable practices (along with associated timelines) in business plans of entities and indemnification for associated breaches are also likely to become common features of transaction documents. Commercially, acquirers are likely to focus on asset allocation and development of internal controls / protocols within the target companies to ensure adherence to ESG. In this vein, ESG-focused due diligence is also likely to take a centre-stage, given the importance of compliance with applicable anti money-laundering, labour, diversity, human rights and privacy laws and the resolution of any issues arising therefrom.

   Separately, with the growth of ESG, capital will be increasingly diverted towards business models utilizing greener sources of energy and renewables. In India, acquisitions are already the most popular route for financing in the renewable sector, accounting for 42% of the total investments in FY 21-22 alone.[29]

8. National security and regulatory considerations: The institutionalization of Press Note No. 3 (2020 Series) ("**PN3**")

   On April 17, 2020, during the onset of the COVID-19 pandemic, the Indian Government introduced a protectionist regime to curb 'opportunistic' foreign direct investments ("**FDI**") into India from countries sharing land borders with India. According to the PN3, prior approval of the Indian Government is required in all cases where an investing entity is situated in a country sharing land borders with India, or where the beneficial owner of an investment into India is situated in or is a citizen of any such neighbouring country.[30]

   The issuance of PN3 has been supplemented by multiple regulatory amendments, to align the existing regime with the intent of the PN3. *Inter alia*, the Ministry of Corporate Affairs enacted the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 on June 1, 2022, which lays down a prior security clearance requirement for any person that is a national of a neighbouring country and seeks to be appointed as a director in an Indian company. Through various other amendments, the regime currently mandates that all companies and persons belonging to such neighbouring countries must provide declarations or obtain relevant approvals and clearances in accordance with applicable law.[31]

   Within the current backdrop, it is evident that the PN3 is here to stay and is part of the current Indian FDI policy.[32] PN3 shall continue to be a crucial deciding factor for major M&A deals across 2023. New entrants into Indian entities will have to be particularly mindful of: (i) the holding structure of the investing entity and its ultimate parent

(if any), (ii) the proposed transaction structure, and (iii) the manner of transfer of ownership and control (either direct or indirect), to ensure compliance with the intent of PN3. In the absence of cogent guidelines laying down the timelines within which PN3 applications will be reviewed and cleared, all prospective foreign acquirers must ensure that this new regime and associated delays are adequately accounted for within deal timelines. Parties should also evaluate transaction structures carefully to determine the stage at which such applications are to be filed with the Indian Government.

9. The growth ofWarranty & Indemnity ("**W&I**") Insurance in M&A

   W&I Insurance is an insurance policy that covers the insured's liability in case of a breach of representations and warranties provided by the insured in a Share purchase agreement ("**SPA**"). W&I Insurance may either be obtained buy-side or sell-side, wherein the buyer is the insured in the former and the seller is the insured in the latter.

   Given the global increase in M&A activity over 2021 and 2022 (even in the aftermath of the COVID-19 pandemic), coupled with the advantages of such insurance to the parties, the demand for and incorporation of W&I Insurance into big-ticket deals primarily, has fast increased.[33] A study conducted in relation to the claims made under such policies in Asia across the previous decade further indicates a 250% growth in such claims between 2015-19, which is a strong indicator of the trust that is being reposed by parties within the effectiveness of such policies.[34]

   What we have observed over the course of the last two years particularly, is that, both buyers and sellers have been actively engaging underwriters early on in the process of M&A deal negotiations in a bid to ensure that (i) major uncertainties within the deals (such as taxation and accounting considerations) do not hamper their risk appetite during the final stages of deal closure and cause potential rifts between parties, and (ii) to ensure that adequate diligence has been undertaken in respect of the representations and warranties provided within the SPA. Owing to the larger risk appetite, the W&I Insurance market for Indian deals is currently dominated by global players like AIG, Beazley, Tokio Marine. Interestingly, however, we have noticed some interesting new entrants such as Berkshire Hathaway and CFC Underwriting venturing into the Indian deal market. Additionally, we foresee Indian brokers becoming increasingly prominent within this space upon development of adequate capabilities.

10. Data Privacy: an up and coming concern?

    In November 2022, the Indian Government released the much-awaited draft of the updated Digital Personal Data Protection Bill, 2022 ("**Data Protection Bill**") for public comments. While the Data Protection Bill is still to be presented before the parliament, the growing mobility of data and privacy considerations in India and worldwide seem to indicate that M&A activity in 2023 will place greater emphasis on data privacy and transfer.

    Regulators worldwide are tightening scrutiny in respect of the transfer of data in corporate transactions. In India, the current law governing sensitive personal data and its transfer is the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("**SPDI Rules**"), read with the Information Technology Act 2000, which provides for an uncapped liability for failure of body corporates to protect sensitive personal data held by them.[35] The continued regulatory intent to penalize such breaches is further evident from the Data Protection Bill, which also proposes to impose a penalty of up to INR 500 crores (approximately USD 61,649,600) for non-compliances basis an assessment of their nature, gravity and duration.[36]

    The focus in relation to data privacy in M&A deals will be spread across the following: (i) at the structuring and documentation stage, acquirers will analyse the business models of target companies from a commercial perspective, to determine the quantum of data, specifically sensitive personal information, that the target company currently possesses and will transfer as a result of the M&A; (ii) in terms of the management of the due diligence process, foreign acquirers entering India may further insist on utilization of virtual data rooms that are in compliance with *inter alia* the General Data Protection Regulation ("**GDPR**") or the California Consumer Privacy Act ("**CCPA**"), and (iii) adequate diligence will be conducted to determine the nature of data possessed by the target companies, their impact on the transaction and the target company's compliance with data protection laws in India in relation to such data. Given that most foreign entities and institutional investors are likely to be bound by data protection laws such as GDPR or CCPA, cross border M&As will also consider the potential implications of data transfer to other jurisdictions that may arise from the agreed transaction structure.

11. Labour & Employment – Structuring Employee Transfers

    While M&A deals generally require streamlining of the governance and operations of the target, for acqui-hire transactions or deals which entail an element of business transfer, structuring of employee transfers is a relevant point of discussion between parties.

    Depending on the sector and business model of the target, the manner of transfer of employees (resignation-rehire or automatic transfer), timing of transfer and associated statutory and contractual compliances need to be thought through at the time of structuring itself. Currently, under the Industrial Disputes Act[37], the service of workmen (or the blue collar employees) must not be "interrupted" due to the occurrence of an M&A, and the terms and conditions of employment that were provided to them prior to the proposed transfer must either be matched or exceeded upon consummation of the acquisition.

    Correspondingly, from a commercial standpoint, it becomes imperative for the acquirer to carry out diligence adequately to ensure that any non-compliances of the target under applicable labour laws are solved for, prior to the consummation of an acquisition, so as to reduce any risks for the acquirer who will be the succeeding new employer. Particularly, an examination of post termination obligations and guaranteed statutory / contractual benefits in relation to transferred employees becomes very critical. Separately, given the welfare and pro-labour nature of Indian labour legislations, non-compliances under laws relating to employee insurance, provident funds, payment of bonus and gratuity attract heavy financial and penal consequences and can majorly impact deal valuations.

12. Antitrust concerns

An antitrust analysis for all M&A transactions will continue to remain a critical item for board room discussions. To determine whether the M&A deal will trigger the requirement of a notification to the Competition Commission of India ("**CCI**") under Section 5 of the Competition Act, 2002, contracting parties will be have to evaluate each of: (i) the deal value, (ii) the target company's asset size and turnover, and (iii) whether a potential acquisition of "control" may occur as a result of the transaction, by virtue of which the acquirer obtains the ability to have "material influence" on the affairs of the target. Prior knowledge of the potential notifiability under the Competition Act, 2002 gives parties greater clarity in relation to purported deal timelines, and provides them with a timely option to explore alternate transaction structures that may not trigger the requirement of notification.

These concerns are likely to aggravate with the recent introduction of the Competition Amendment Bill, 2022 ("**2022 Bill**"), which if passed will bring in significant regulatory developments (at par with global standards) for effective regulation of cross-border deals. The 2022 Bill introduces the "deal value" threshold for notification, pursuant to which prior approval from CCI will become mandatory for all deals valued above INR 2,000 crore (approximately USD 246,498,400). The value of the deal, for the purposes of said notifiability, may be acquired as a result of acquisition of any control, shares, voting rights or assets.[38] If the Bill gets passed, cross border deals will have to be structured in light of this regulatory development in order to ensure compliance with the intent and spirit of the law.

Separately, the CCI has been aggressively pursuing its enforcement agenda (with its recent endeavours to heavily fine conglomerates such as Google[39] and Amazon[40]) in 2022, which may only points towards continued scrutiny of enterprises striking deals in India in 2023. Additionally, the withdrawal of approval of the Amazon-Future deal by the CCI coupled with imposition of penalties, leading to the effective suspension of the deal,[41] has increased uncertainty and led to added concerns amongst dealmakers in respect of the vagaries of the Indian legal regime and their impact on ongoing transactions. There is unfortunate distrust in the Indian legal regime, predominantly in lieu of the fact that an order passed (in respect of a big-ticket deal) has been withdrawn after considerable progress within the deal and between the parties. In light of these developments, parties must ensure that they adequately account for the legal and commercial risks accruing from a CCI inquiry / order in respect of notifiability to their deal, such as a loss of valuation and delay in satisfaction of conditions precedent, and a potential breach of indemnities.

13. Stressed assets regime: an added "stress" to M&A deals?

While M&A deals are known to conventionally occur in respect of "healthy" and commercially promising target companies, acquisition of stressed assets (that may have the potential to perform in the near future with appropriate immediate monetary support) has become increasingly popular. Interestingly, in the Indian context, acquisitions of distressed assets are likely to grow through resort to the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), private sales by near-bankrupt entities, and divestments by the Indian Government.[42]

In India, "insolvency" or "winding up" may occur under the regimes of either the IBC or the Companies Act, 2013, in each case for different reasons. The IBC route to M&A, which is directly relevant to acquisition of stressed assets, is triggered when the corporate insolvency resolution procedure ("**CIRP**") has already been initiated against an entity that has defaulted on a debt due and payable to a creditor ("**corporate debtor**"). During the CIRP, interested acquirers must provide a "resolution plan" to the committee of creditors of the said corporate debtor, who will evaluate the feasibility and viability of the proposal before permitting the sale/transfer/merger of the corporate debtor to the acquirer. Prior to this, interested acquirers must undertake a thorough review of the business model (along with potential gaps leading to the distress), the industry environment of the corporate debtor, and the source of liabilities, in order to determine whether the corporate debtor can be commercially revived post acquisition. This will also form a key focus area for any due diligence that may be conducted by the acquirer. Generally, the scope of the diligence is likely to be limited and focus on the indebtedness, material contracts and valid licenses of the corporate debtor. Accordingly, upon understanding the liabilities of the corporate debtor through diligence, the acquirer may also be able to tweak the transaction structure into an asset purchase or a share purchase.

From a legal standpoint, the acquirer will have to be wary of the fact that documentation will not have robust representations and warranties, and must accordingly draft indemnity clauses that safeguard their investments and are in consonance with the spirit of the IBC. Acquirers may also consider incorporating additional provisions which, in consonance with the terms of the approved resolution plan, lay down the mechanism for utilisation of any funds that may be provided to the corporate debtor as a result of the acquisition. Additionally, acquirers may also consider obtaining W&I Insurance to safeguard themselves from changes in law that can impact the operations of the corporate debtor. Given the inherently similar nature of an acquisition of entities nearing bankruptcy (that may not have attracted the provisions of the IBC) by way of private sales, the legal and commercial considerations are likely to be similar.

14. Tax issues in M&A and OECD Pillar II Framework

As has been the trend over the last couple of years, tax considerations continue to remain relevant at the transaction structuring, negotiation and documentation stage. In the recent past, while inbound M&As (mergers and investments through intermediaries) have witnessed a flux, the hope is that provisions of the Income Tax Act ("**ITA**") with respect to exemptions from capital gains tax in the cases of domestic and inbound mergers & demergers will be rationalized, and offered to outbound mergers as well (which, as on date, while being permitted under the foreign exchange law framework, continues to remain subject to capital gains tax in India). This is a key expectation from the Finance Budget for 2023.

With respect to indirect transfers (i.e., an overseas entity holding Indian investments through another overseas intermediary entity), it is important to consider the applicability of "indirect transfer tax" provisions under the ITA (especially in the case of cross-border restructuring of MNEs). This makes the gains derived by the ultimate parent entity from the transfer of the intermediary entity (which holds the Indian investments), as being taxable in India.[43] The question of whether the benefit of exemption under a tax treaty from capital gains tax on the disposal of grandfathered shares (by way of an indirect transfer) applies is currently pending before the Delhi High Court.[44] A positive ruling will imply a relief from capital gains taxation in the case of disposal of grandfathered

investments under the India-Singapore, and India-Mauritius treaty.

From the perspective of documentation, carving adequate tax indemnities, and appropriate representations and warranties (with respect to tax) are crucial to avoid the transaction being held as void, or being subjected to further tax liabilities. Sellers are usually required to obtain a no objection certificate from the income tax department prior to effectuating transactions, so that the transfers are not held to be void by the tax authorities (under Section 281). In a welcome ruling, the Madras High Court, recently held that section 281 does not create an automatic charge in favour of income-tax department, making a transaction void. The Court also reiterated that secured creditors have priority over tax debt unless there is an express provision in the statute providing otherwise.[45]

2022 also witnessed the ITA get amended to include the procedure of taxation in the event of succession through reorganization or restructuring of businesses (i.e., mergers and demerges). The highly litigated issue of the invalidity of tax assessments against the predecessor entity on account of it ceasing to exist (due to the merger) was also adjudicated by the Supreme Court in 2022, which held the assessment against the predecessor to be valid (as, while the outer shell of corporate entity ceases to exist after amalgamation, the corporate venture of transferor continues to exist in form of new or the existing transferee entity).[46] In line with this, the amendment to the ITA (which now states that the assessments on the predecessor entity made during the course of pendency of the reorganization application before the relevant court, are now deemed to have been made on the successor) should put a rest to the litigation.[47]

Lastly, beneficial tax rates under certain tax treaties will continue to remain one of the most vital considerations while structuring international transactions and business. While jurisdictions such as Netherlands, Singapore, Delaware, and now UAE continue to remain preferred choices for setting up foreign entities, the recent progress through 2022 on the OECD Pillar II framework to introduce a global minimum tax rate of 15% (through the Global Anti-Base Erosion Model Rules) is likely to cause significant global restructuring in the coming years.

CONCLUSION

Despite the bleak picture for global M&A activity, India's macroeconomic and financial health continues to remain strong, making it an attractive destination for sector-wide foreign investments that will lead to a sector-wide flurry of M&A activity in 2023. Stakeholders and dealmakers anticipate increasing strategic interest from global companies as well as PE funds into India, resort to unique structures in respect of consolidation and buy-outs, and development of technological capabilities by foreign entrants and Indian companies alike.[48] As India leverages this attractive atmosphere to capitalise on deal making, whilst structuring transactions for M&A with Indian entities, parties must carefully monitor legal, political and regulatory changes, and ensure alignment with consistent past practice in Indian deal making, to ensure that their deal structures are adequately covered in respect of any potential regulatory or commercial uncertainties and can reap benefits in India.

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You can direct your queries or comments to the authors

[1] https://www.bcg.com/publications/2022/the-2022-m-a-report-dealmaking-remains-active.

[2] https://www.wsj.com/articles/m-a-is-expected-to-pick-up-in-2023-as-companies-adapt-to-tougher-conditions-11672874676.

[3] Ibid.

[4] https://www.livemint.com/companies/start-ups/india-sees-record-m-as-in-2022-at-152-billion-11672243599275.html.

[5] We have analysed the legal, regulatory and tax implications of this merger in our 'M&A Lab' at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/M&A_Lab_HDFC_Bank.pdf.

[6] We have analysed the legal, regulatory and tax implications of this merger in our 'M&A Lab' at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/M&A_Lab_ADANI_HOLCIM.pdf.

[7] https://www.livemint.com/news/india/tata-group-announces-merger-of-vistara-with-air-india-11669744986885.html.

[8] https://timesofindia.indiatimes.com/business/india-business/adani-beats-tatas-to-be-most-valued-group/articleshow/94255942.cms.

[9] https://www.moneycontrol.com/news/business/mergers-acquisitions/adani-group-building-an-empire-through-acquisitions-8517571.html.

[10] Supra note 6.

[11] https://indianexpress.com/article/business/gautam-adani-approval-ndtv-offer-boosting-takeover-bid-8268369/.

[12] https://www.business-standard.com/article/companies/adani-power-to-acquire-db-power-for-enterprise-value-of-rs-7-017-crore-122081901074_1.html.

[13] https://www.vccircle.com/adani-wilmar-buys-basmati-rice-brand-kohinoor.

[14] https://www.businessinsider.in/business/corporates/news/gautam-adani-puts-in-place-plan-to-take-group-valuation-to-1-trillion/articleshow/94857619.cms.

[15] https://www.bqprime.com/business/adani-ambani-are-driving-force-of-india-s-m-a-barclays-says#:~:text=India%20saw%20about%20%2482%20billion,Ltd.'s%20Indian%20operations.

[16] We have analysed the legal, regulatory and tax implications of this case in our 'M&A Lab' at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/The_Tata_Mistry_Saga.pdf.

[17] We have provided a detailed overview of provisions aiding Indian shareholders, along with other provisions for shareholder activism, in our article at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/ACLR-Journal-Issue-II.pdf.

[18] Analysts have predicted that the market for initial public offerings is likely to strengthen, along with a specific increase in startup IPOs in the second half of the year. See generally: https://economictimes.indiatimes.com/markets/expert-view/etmarkets-smart-talk-ipo-likely-to-pick-up-in-2023-nifty-target-seen-at-21035-amnish-aggarwal/articleshow/95991691.cms, and https://inc42.com/features/after-the-lull-in-2022-will-startup-ipos-pick-pace-in-2023/.

[19] See generally: https://economictimes.indiatimes.com/markets/ipos/fpos/retail-investors-back-for-some-dhoom-on-ipo-boom-also-fire-up-grey-market/articleshow/95287836.cms.

[20] https://economictimes.indiatimes.com/markets/ipos/fpos/the-biggest-best-worst-performing-ipos-of-2022/articleshow/96590979.cms.

[21] https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=3&ssid=15&smid=10.

[22] Please see our legal update in relation to this development, providing greater insights into the changes and corresponding provisions, at:

https://www.nishithdesai.com/generateHTML/8277/4#:~:text=The%20OI%20Rules%20provide%20Indian,

shares%20for%20making%20such%20ODI.&text=The%20OI%20Rules%20provide%20flexibility,ODI%20under%

20the%20automatic%20route.

[23] Supra note 12.

[24] We have analysed the legal, regulatory and tax implications of this case in our 'M&A Lab' at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Don_t-Mind-You_ve-been-Acquired.pdf.

[25] We have analysed the legal, regulatory and tax implications of this case in our 'M&A Lab' at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Zandu-Emami%20Deal%20-%20December%203%202008.pdf.

[26] Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562, available at: https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html. Please also see our analysis of the ESG framework in India generally at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/ESG_Prevalence_and_Relevance.pdf.

[27] Section 135, Companies Act, 2013.

[28] https://www.iflr.com/article/2a647ozkguxokspfils74/m-a-report-2022-india.

[29] https://ieefa.org/articles/record-us145-billion-investment-indian-renewable-energy-sector-last-financial-year.

[30] https://dpiit.gov.in/sites/default/files/pn3_2020.pdf.

[31] Please see our legal update in relation to these developments at: https://www.natlawreview.com/article/pn3-here-long-haul.

[32] Please see our analysis of the 2-year performance of PN3 and a comparative analysis of its performance vis-a-vis other jurisdictions at: https://www.nishithdesai.com/fileadmin/user_upload/Html/Hotline/Regulatory_Digest_M_Sep0722.htm.

[33] https://www.lexology.com/library/detail.aspx?g=b6bd4262-c5aa-4ba7-a6f1-9cdf737bf0e8.

[34] A report by Marsh provides greater insights into the use of W&I Insurance in Asia during the years 2015-20, at: https://www.marshmclennan.com/content/dam/mmc-web/insights/publications/2020/october/warranty_indemnity_insurance_in_asia_2020.pdf.

[35] Section 43A, Information Technology Act, 2000.

[36] Section 25, Digital Personal Data Protection Bill, 2022.

[37] Section 25FF, Industrial Disputes Act, 1947.

[38] Section 6, Competition Amendment Bill, 2022.

[39] https://pib.gov.in/PressReleasePage.aspx?PRID=1870819#:~:text=936.44%20crore%20on%20Google%20for,to%20its%20Play%20Store%20policies.

[40] https://www.business-standard.com/article/companies/nclat-rejects-amazon-s-plea-against-cci-order-directs-to-deposit-rs-200-cr-122061300267_1.html.

[41] https://timesofindia.indiatimes.com/business/india-business/cci-suspends-amazons-2019-deal-with-future-retail-citing-suppression-of-information/articleshow/88342430.cms.

[42] See generally, the report by Nangia Anderson, which states that the distressed asset deal space in India shows promising opportunities due to the enactment of the IBC: https://nangia-andersen.com/wp-content/uploads/2022/02/Stressed-assets-in-India-Opportunity-for-investors.pdf.

[43] For a detailed analysis of the broader implications of indirect transfer tax on M&A, please see our paper titled "Mergers & Acquisitions: An India Legal, Regulatory and Tax Perspective" at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Mergers___Acquisitions_in_India.pdf.

[44] Applications for Advance Rulings made before the Authority for Advance Rulings, Delhi, by Tiger Global International II Holdings, Mauritius (Application Nos.: AAR / 04 / 2019, AAR / 05 / 2019, AAR / 07 / 2019).

[45] Please see our legal update on this development, and our views on the applicability of Section 281 to M&A transactions at: https://www.nishithdesai.com/SectionCategory/33/Tax-Hotline/12/53/TaxHotline/8475/1.html.

[46] Please see our legal update on this development at: http://nishithdesai.com/NewsDetails/5481.

[47] Addition of Section 170(2A) to the Income Tax, 1961, through the Finance Bill, 2022.

[48] https://www.moneycontrol.com/news/business/whats-the-ma-roadmap-for-2023-top-dealmakers-have-their-say-9803131.html.