

M&A Interactive

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WHERE THE RUBBER MEETS THE ROAD – LABOUR STRIKES M&A !

Based on the new central government and vibrant capital markets, M&A activity in India is expected to witness a significant upsurge in 2015. Typically, M&A strategies and structuring in India have revolved around two pivotal considerations – tax optimization and regulatory hurdles (including foreign investment regulations). However, with the changing climate of labour mobilisation, the labour-force has emerged as an important stakeholder in the M&A landscape. The largest example of this was seen last year, when the \$2.5 Billion Apollo-Cooper deal was aborted primarily because of labour agitations in the US and China.

Under Indian company and securities law, the consent of shareholders and creditors is required for a transaction when a business is being sold or significantly restructured. Employment law in India requires that workmen, whose employment is impacted by the merger or acquisition, are either paid all statutory severance dues or afforded equal or more beneficial terms of employment with the transferee employer. Additionally, judicial precedent has introduced a new dimension in the form of requiring employee consent for a transfer of their employment (if the employing entity changes). While this position has been heavily litigated with judgments on either side, the Apex Court in its most recent judgment on the matter seems to have held in favour of requiring such consent.

Employee consent for a transaction, though not a legal requirement has practically emerged as highly relevant to the consummation of a deal. Often, the value of an organization being acquired is itself heavily dependent on the employees in it. Leveraging this and the fact that strategic labour-force disruptions can potentially bring any deal to a stand-still, employees have given themselves a space at the deal negotiating table. Instances of this may be seen in the recent reports relating to Coal India and ING Vysya, where employee action was targeted at blocking deals which posed a threat to their position in the company. The reports of unionization of TCS-employees further highlight a transcendence in the character of unionization in India which is becoming sector agnostic. Trade unions are also usually influenced by external bodies, political or otherwise, which could pose different challenges, and introduce additional players to a deal.

In order to keep pace with the labour environment, the outlook towards deal strategy must correspondingly change. First, it is paramount to recognize the labour force as an important participant in a merger or acquisition, and consult with them at a timely juncture. Often this timing is key to successfully closing a deal and must be strategically planned. An acquirer may also consider entering in to collective bargaining agreements with existing unions and proactively seek their co-operation to ensure certainty with respect to the acquisition.

Secondly, due diligence requirements take on a new avatar, in that gauging the labour culture of a target company becomes an integral part of the information gaining process before any investment. More often than not, this determination will not be something that emerges from documents, and may require some form of dialogue with current or past employees/unions. A thorough analysis of the costs of employee benefits as a part of diligence is also a recommended must.

Thirdly, parties to a deal could choose to insulate themselves by ensuring that the purchase price or deal consideration includes any severance dues that may be payable and that valuations can be adjusted to take into consideration any related losses.

Lastly, entities looking to expand by way of M&A at a future stage must also be cognizant of the fact that labour issues might pose a threat to such growth and hence identify and resolve labour issues on a continuous basis, and maintain good relationships with employees and unions.

The growing impact of labour on the M&A process coupled with the fact that the Companies Act 2013 places a responsibility on the directors to also act in the best interest of its employees has brought about a shift in the M&A ethos, bringing in new aspects to investment assessment and risk management. How this shift will interact with the rising market is yet to be seen in 2015.

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Chambers and Partners Asia Pacific: Band 1 for Employment, Lifesciences, Tax and TMT
2020, 2019, 2018, 2017, 2016, 2015

IFLR1000: Tier 1 for Private Equity and Project Development: Telecommunications Networks.
2020, 2019, 2018, 2017, 2014

AsiaLaw Asia-Pacific Guide 2020: Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax

FT Innovative Lawyers Asia Pacific 2019 Awards: NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)

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Benchmark Litigation Asia-Pacific: Tier 1 for Government & Regulatory and Tax
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– Ashish Alexander, Shreyas Bhushan, Veena Gopalakrishnan & Simone Reis
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