THE TECHNOLOGY M&A REVIEW

Editor
Michael J Kennedy

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Michael J Kennedy

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BUSINESS DEVELOPMENT MANAGER
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CONTENTS

PREFACE.. v
Michael J Kennedy

Chapter 1 ARGENTINA.. 1
Juan Manuel Campos Alvarez

Chapter 2 AUSTRIA.. 10
Peter Huber and Irene Ng (Huang Ying)

Chapter 3 BRAZIL.. 22
Augusto Cesar Barbosa de Souza and Fábio Pereira

Chapter 4 CANADA.. 38
Richard Corley, Allan Goodman and Michelle Vigod

Chapter 5 CZECH REPUBLIC 54
Vojtěch Chloupek, Ľubomír Brečka, Radomír Pivoda and Jiří Švejda

Chapter 6 DENMARK.. 69
Ted Rosenbaum and Filip Patrzalek Kaas

Chapter 7 FINLAND.. 80
Maria Carlsson and Johanna Rein

Chapter 8 FRANCE.. 89
Olivier Deren, Sébastien Crepy and Camille Paulhac

Chapter 9 HUNGARY.. 103
Pál Szabó, Eszter Gál and Barnabás Simon

Chapter 10 INDIA 116
Vaibhav Parikh, Huzefa Tavawalla and Aishwarya H

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Chapter 11 ISRAEL.....127
Liron Hacohen, Ezra Gross and Barry Levenfeld

Chapter 12 MEXICO 144
Juan Francisco Torres Landa Ruffo, Pablo Corcuera Bain, José Antonio Noguera Watty, Valentina Schmid, Ana Rumualdo, Francisco Palmero Rivera Cambas and Regina Torrero Ordaz

Chapter 13 POLAND.....155
Błażej Zagórski and Grzegorz Pączek

Chapter 14 RUSSIA 167
Yulia Solomakhina, Andrey Lipin, Ilya Nekrasov, Nikita Klepalov and Dmitriy Sokolov

Chapter 15 UNITED KINGDOM 183
Anu Balasubramanian, Jamie Holdoway, Sarah Pearce and Ashley Webber

Chapter 16 UNITED STATES 198
Michael J Kennedy

Appendix 1 ABOUT THE AUTHORS.....257

Appendix 2 CONTRIBUTORS' CONTACT DETAILS.....271

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PREFACE

Welcome to the initial annual *Technology M&A Review*. This addition to the Law Review series grew out of discussions between the publisher and editor in late 2019 and early 2020. Like every contributor to this book, I am an active M&A practitioner. As such, it seemed fair to agree to an annual review in the late days of 2019 and early days of 2020. If there is one thing M&A lawyers can do, it is put out words.

I know I do not need to explain why 2020 was and is a different year than most. The first quarter buffer that most practitioners would use to write in was slowly eroded by the growing viral threat of covid-19. Then the second quarter was 'consumed by trying to consume' the meaning of that present not only on a global basis, but for each firm contributor here, and her or his family.

And yet, the publisher and each member of its staff continued to support the project, and gently nudged it forward. It and they each deserve credit in large part for whatever is well done in this book.

And so we have an annual review that looks backward to the nadir of 30 June 2020, for the most part. In retrospect, this will be the base date that future reports will reference and so, serendipitously, it is the right base date.

As you can see from the book's contents, technology M&A has been vibrant over the past 30 years. Even compared to the awful decline registered by all M&A activity measured at 30 June 2020, technology M&A far outpaced every other category of M&A. As of the writing of this preface in October 2020, technology M&A (excluding bankruptcies and workouts) in terms of growth in value and numbers continues that champion's jog around the track; the race is not even close.

Why? Growth prospects and resiliency. While the technology M&A sector shares its DNA with other sectors, it is a growth sector even though it is ubiquitous, and in its nature is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space without worrying about much physical harm.

Embedded in the previous paragraph is a rate of change equation of sorts. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in 2000, and now it is quite difficult to actually describe it, and yet it is huge. There have unbelievable advances in, inter alia, food production and power plants since that same date, but no one thinks of these as growth industries. These industries are thought of, consciously or unconsciously, as recipients of technology but not creators of technology.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology

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and normal are in that context. One of its unstated premises is that because of technology's importance, effective technology lawyering in M&A necessarily involves and requires a broad set of legal skills across many practice areas; and that requirement will likely increase as governments and interest groups from all spectrums focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will go.

At least as of the time of writing this in late October 2020, technology M&A in the US is robust, reflecting its advantage in a digital world. As noted in the book, the duration of that vibrancy is a function of how long traditional economic pursuits are locked down or restricted by covid-19.

Michael J Kennedy
Paul Hastings LLP
San Francisco
October 2020

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Chapter 10

INDIA

Vaibhav Parikh, Huzefa Tavawalla and Aishwarya H[1]

I OVERVIEW

India witnessed 881 M&A deals worth US$37.05 billion in 2019.[2] As against 2018, inbound M&A activity had also increased in 2019. Further, despite the ongoing global pandemic, India's Jio Platforms (a technology platform to provide digital services) has raised over US$13 billion from global marquee investors.

The relaxation in foreign investment norms, tax cuts and ease of doing business campaign has contributed significantly to M&A activity in India. The introduction of the bankruptcy law has also resulted in a surge in M&A activity in cases of stressed assets.

The information technology, telecom and industrial sectors have been the three preferred sectors for M&A activity in the past few years.[3]

India has also been witnessing scope dealmaking with buyers intending to enter into new markets or product lines as against just economies of scale. Several non-technology companies have also been acquiring technology companies to enhance their tech capabilities and become self-reliant.

II YEAR IN REVIEW

2018 saw the acquisition of Flipkart Internet Private Limited by Walmart Inc for US$16 billion, while in 2020, India's Jio Platforms raised over US$13 billion from investors such as KKR, Facebook, Google, General Atlantic and Silverlake.[4]

Early, 2020 saw another interesting deal on the digital lending platform with the acquisition of a majority stake in India-based PaySense by Netherlands-based PayU for US$185 million to merge PaySense with LazyPay.[5] An example of a non-tech company acquiring a technology company was the acquisition of assets of Unbox Technologies Private Limited by ICICI Lombard General Insurance Company for US$31.8 million to help the insurance company enhance its technological infrastructure.[6]

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1 Vaibhav Parikh, Huzefa Tavawalla and Aishwarya H are lawyers at Nishith Desai Associates.
2 2019 Annual Deal Report, VCCEdge, https://app.vccedge.com/vccedge/reports.
3 See footnote 2.
4 https://economictimes.indiatimes.com/tech/ites/now-tpg-looks-to-join-jio-juggernaut-with-billion-dollar-bet/articleshow/76312336.cms.
5 https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/payu-buys-paysense-for-an-equity-valuation-of-185-million/articleshow/73183368.cms?from=mdr.
6 https://www.vccircle.com/icici-lombard-to-buy-saif-backed-unbox-s-software-assets-for-about-32-mn/.

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2019 also witnessed India's first hostile takeover in the technology sector, that of Mindtree, one of India's leading information technology companies by Larsen and Turbo (L&T). Post the acquisition, L&T holds 60.55 per cent of Mindtree.

III LEGAL AND REGULATORY FRAMEWORK

The key legislation and regulations that govern the behaviour of buyers and sellers include the following:

a The Companies Act, 2013 (Companies Act) is the primary legislation that, inter alia, governs the incorporation and management of companies, share issuances and transfers, corporate restructurings and wind ups. The process for undertaking restructuring and seeking approval of the National Company Law Tribunal (NCLT) for such restructuring is laid down under the Companies Act. The restriction on transferability of shares, and the procedure for share issuances and transfers, are also laid down under this legislation.

b The Foreign Exchange Management Act, 1999 and the rules and regulations issued thereunder (FEMA) by the Reserve Bank of India (RBI) and the government regulate foreign trade and inflow and outflow of foreign exchange. FEMA lays down pricing guidelines that need to be adhered to in the case of transactions involving residents and non-residents. Further, FEMA restricts a non-resident entity from directly acquiring a business in India without having a local India presence to conduct full-fledged business operations.

c The Competition Act, 2002 and the Competition Commission of India (CCI) set up under the legislation grants antitrust approvals. The legislation lays down thresholds to determine if a transaction requires the approval of the CCI and may impact timelines. Recently, a green channel route has been introduced where parties who meet certain criteria may proceed with a transaction once the acknowledgment of filing seeking approval is received from the CCI.

d The Income Tax Act, 1961 (ITA) is the legislation that provides for the levy, administration and collection of taxes on income earned by persons. The rate of capital gains tax depends on the type of asset being transferred and the holding period of the asset, and may impact the decision of the parties to prefer one mode of transfer over the other.

e The latest legislation in India is the Insolvency and Bankruptcy Code, 2016 (IBC) which regulates distress sales under an insolvency resolution process. Since the enactment of the IBC, the acquisition of assets as part of insolvency resolutions has become popular.

f The public markets are additionally regulated by various pieces of legislation issued by the Securities and Exchange Board of India[7] (SEBI), inter alia, being the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations) and the SEBI (Delisting of Equity Shares) Regulations, 2009. Particularly, an acquisition of shares or voting rights of more than 25 per cent of a listed company

7 The SEBI is the statutory regulatory body entrusted with the responsibility to regulate the Indian capital markets. It regulates the securities market and protects the interests of the investors by enforcing rules and regulations.

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would trigger an open offer to public shareholders.[8] Any merger or demerger involving a listed company would also require prior approval of the stock exchanges and the SEBI before approaching NCLT.

g The Indian Stamp Act, 1889 and state-specific stamp legislation impose stamp duty on certain instruments and agreements, including instruments of transfer. The rates of stamp duty depend on the nature of a transaction and in which state the instrument is being executed. The rates of stamp duty may have an impact on the mode of acquisition adopted.

IV KEY TRANSACTIONAL ISSUES

i Company structures

Entities in India are commonly set up as public or private limited companies or limited liability partnerships (LLP). Other types of entities such as one-person companies, sole proprietorships or partnerships are less common owing to the limitation on the number of shareholders in one-person companies and the unlimited liability of members in sole proprietorships and partnerships.

Public or private limited companies are set up under the Companies Act and LLPs under the Limited Liability Partnership Act, 2008 (LLP Act). Private companies are set up with a minimum of two and a maximum of 200 shareholders and public companies with a minimum of seven shareholders.[9] A restriction on the transferability of shares is inherent to a private company, while shares of a public company are freely transferable. Public companies are also subject to more scrutiny, accountability and compliance requirements.

While corporate governance, functioning and compliance requirements of companies are laid down under the Companies Act, the LLP Act regulates very little of LLPs, and therefore LLPs have the flexibility to lay down governance requirements and internal operations under their partnership agreement, being their bylaws. The other significant benefit of LLPs over companies is the ease with which capital can be repatriated. Companies have several requirements under law to repatriate or reduce capital.

Historically, LLPs were popular as outsourcing captive structures but lately, company structures have become equally competitive because of a reduction in corporate tax rates and the abolishment of the dividend distribution tax.

From a listing perspective, an LLP will first need to be converted into a company, for which costs, tax neutrality and timing are critical.

ii Deal structures

The purchase of a business or shares can be undertaken as a share purchase, merger, demerger, or an asset or business transfer. The reasons for choosing one structure over the other can be commercial or tax-related.

Mergers and demergers are court-approved processes in India. Indian laws also permit mergers between an Indian and foreign company (although this is not common due to FEMA and tax reasons). While a merger is a combination of two or more entities into one, a demerger involves the splitting up of one entity into two or more entities. An entity that

8 Regulation 3, Takeover Regulations.
9 Section 3, Companies Act.

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has more than one business may decide to hive off one of its businesses into a new entity. A demerger may be undertaken through a court-driven process or contractually by way of a business transfer (commonly referred in India as slump sale).

A merger or demerger that meets certain conditions as laid down under the ITA is tax-neutral. The primary conditions for tax neutrality are that all assets and liabilities, and the entire undertaking of the transferor or demerged entity, are transferred to the merged, resulting entity and, post the merger or demerger, shareholders holding not less than 75 per cent (three-quarters in terms of the value of the shares) in the transferor or demerged company become shareholders of the amalgamated or resulting company.[10] Further, although the parties have the flexibility to choose the effective date of a merger, since the approval of mergers and demergers (court-driven) are subject to the vagaries of NCLT, these are typically undertaken for tax reasons.

Acquisitions may also be undertaken way of an acquisition of shares; a business transfer or an asset transfer.

Share acquisitions, although not as time-consuming as court-approved processes, result in the buyer inheriting all assets and liabilities of the target, including any risks in relation to share title or entity level liabilities such as taxes or regulatory non-compliances.

In the case of a business transfer, the entire business (assets and liabilities) is transferred on a going-concern basis without assigning values to individual assets and liabilities. Such a transfer on a going-concern basis is referred to as a slump sale under the ITA.[11]

Buyers may be able to avoid inheriting liabilities by undertaking an asset purchase by cherry picking the assets and liabilities. However, a goods and service tax (GST) under the Central Goods & Services Act, 2017, and state-specific GST laws may be applicable on asset purchases, thereby increasing transaction costs for such purchases as compared to other structures (such as share transfers and slump sales).

While GST is not applicable on a slump sale, in such transfers, ideally, all liabilities must move with the business transferred. However, it may be possible to exclude certain liabilities if the assets and liabilities transferred are sufficient to run the business and the transferred undertaking or business is able to produce sustainable revenue on a standalone basis.

iii Acquisition agreement terms

Agreements typically follow the structure of deal description, purchase consideration, conditions to close, closing obligations, post-closing covenants, representations and indemnities, termination and costs. The purchase consideration may be subject to working capital adjustments, escrow, earnouts or holdbacks. Earnouts and holdbacks are particularly relevant when a buyer is acquiring a technology company with significant talent and to hedge against uncertainties. Escrow, holdbacks and earnouts that form part of the purchase consideration may be taxed upfront in the year in which the transaction occurred; however, earnouts structured as salary payment may be taxable as salary income when received. It is also becoming increasingly common in India to provide for a deal going south especially in the case of transactions contemplating several regulatory approvals by way of a break fee or reverse break fee. Parties in India are free to negotiate break fees as there is no law currently restricting the same.

10 Section 2(1B) and Section 2(19AA) of the ITA.

11 Section 2(42C) of the ITA.

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iv Financing

An offshore buyer has multiple financing options outside India, including loans from international banks, financial institutions and debt funds. However, a foreign buyer may not be able to offer the shares of an Indian company as security for such debt. Under FEMA, a pledge may be created on securities, inter alia, if the loan is for genuine business purposes overseas (and not for any investments into India directly or indirectly) and availed from an overseas bank.[12] Indian banks and financial institutions cannot lend to an offshore buyer to purchase shares of an Indian company. A company that is foreign owned and controlled (i.e., owned and controlled by persons resident outside India (FOCC)) also cannot leverage funds in the Indian market for the acquisition of shares.[13]

The primary source of funding for Indian buyers may be equity, loans from non-banking financial institutions[14] or the issuance of non-convertible debentures (NCD) to resident Indians, or the issuance of NCDs by listed or to-be-listed companies to foreign portfolio investors.[15]

While share swap transactions between domestic buyers and sellers are permitted, Indian shareholders are also permitted to be issued shares of the foreign buyer in lieu of an issue of shares of the Indian target to the foreign buyer, provided that foreign direct investment is allowed without any approvals in the sector in which the Indian target is operating. Secondary share swap transactions (involving a transfer of existing shares between an offshore buyer and resident seller) are not permitted without approval. A valuation must also be undertaken in the case of share swap transactions. Under FEMA, it is also possible to issue shares to non-residents against funds payable by the Indian company to the non-resident.[16] This may particularly help technology companies to be issued shares in lieu of any technology or IP provided by the non-resident to the company.

Further, from a listed company perspective, the Takeover Regulations require the buyer to maintain an escrow account in the form of cash deposited with a commercial bank or bank guarantee in favour of the manager of the open offer by any commercial bank if the acquisition triggers the open offer requirements.[17]

v Tax and accounting

The primary consideration from a tax perspective is the applicability of capital gains tax on the transfer[18] of a capital asset.[19] Under the ITA, capital gains arising to even a non-resident are considered taxable in India if they are earned directly or indirectly through the transfer of a capital asset situated in India.

12 Rule 9, Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (NDI Rules).
13 Rule 23, NDI Rules.
14 Companies registered with the RBI that are engaged in the business of providing loans and advances.
15 Entities registered with the SEBI under the SEBI (Foreign Portfolio Investors) Regulations, 2019.
16 Schedule 1, NDI Rules.
17 Regulation 17, Takeover Regulations.
18 Transfer includes sale, exchange, relinquishment of an asset or extinguishment of any rights therein.
19 Capital asset is defined as property of any kind held by an assessee whether or not connected with his or her business or profession, but excludes stock in trade, consumable stores or raw materials held for the purposes of his business or profession; personal effects, i.e., movable property held for personal use; and certain agricultural land.

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Further, when shares of a foreign company that derives its value substantially from assets located in India is transferred, such a transaction could be subject to capital gains tax in India. A foreign company is considered to derive its value substantially from assets located in India if the value of such assets exceeds 100 million rupees and represents at least 50 per cent of the value of all the assets owned by such foreign company. This taxing provision is commonly known as indirect tax transfers.[20] Certain exemptions are available to shareholders who hold less than 5 per cent of the foreign company.

Moreover, in cases where shares of an unlisted company are transferred at less than the fair market value (FMV), (calculated as per principally the net asset value method), then the FMV shall be deemed to be the full value consideration for the purposes of computing capital gains tax in the hands of the seller, and even the buyer may be subject to tax on the difference between the FMV and the consideration paid.

While slump sales at the book value or net worth of the target should not attract capital gains tax, a cash consideration exceeding the book value will be subject to tax depending on the duration for which the entire undertaking has been held (irrespective of the duration for which each asset has been held). In the case of asset purchases, however, the duration for which each asset being transferred has been held will determine the capital gains tax.

The tax treatment of capital gains depends mainly on whether the gains are short term or long term. Short-term capital gains arise upon the transfer of capital assets held by a taxpayer for a period of 36 months or less before the date of transfer (12 months or less in the case of securities listed on a recognised stock exchange in India, and 24 months in the case of unlisted shares of an Indian company). Long-term capital gains arise upon the transfer of a capital asset held for a period of more than 36 months (12 months in the case of listed securities and 24 months in the case of unlisted shares of an Indian company).

vi Cross-border issues

India currently does not permit full capital account convertibility, and there are restrictions on foreign buyers purchasing shares of a company in India or acquiring immovable property in India. While foreign investment is permitted fully without any restrictions or conditions in most technology-specific sectors, there are restrictions on entities providing telecom or broadcasting services.

Share purchase transactions between residents and non-residents are also subject to pricing restrictions under FEMA.[21] In the case of a transfer of shares from a resident to a non-resident, the shares cannot be transferred at a price lower than the FMV, which is to be determined by a prescribed valuer, as per any internationally accepted pricing methodology for valuation of shares on an arm's-length basis. Likewise, for a transfer of shares from a non-resident to a resident, shares cannot be transferred at a price greater than the FMV determined in a similar manner. Further, FEMA restricts the period for which consideration can be deferred in such transactions. Only an amount not exceeding 25 per cent of the total purchase consideration can be deferred for a period not exceeding 18 months from the date of the transfer agreement. Such consideration may also be settled through an escrow or may be indemnified by the seller if full consideration has been already paid. There are no pricing guidelines or restrictions on the payment of deferred consideration in the case of transactions between residents or between non-residents *inter se*. However, pricing guidelines

20 Section 9, ITA.

21 Rule 9, NDI Rules.

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and other restrictions continue to apply if a FOCC purchases the shares of an Indian company from residents.[22] From a tax perspective, in the case of a deferred consideration, the entire consideration (including the deferred portion) may be subject to tax at the time of closing, which may not be tax-efficient from either the seller's or buyer's perspective (if the buyer needs to withhold taxes, in which case he or she will need to withhold on the entire consideration). In addition, cross-border mergers, unless undertaken in accordance with the regulations issued by the RBI in this regard, require the approval of the RBI.

In the case of the export of goods, software or services outside India, there are also limitations as to the period within which the export proceeds must be realised.

V IP PROTECTION

India became a party to the Agreement on Trade-Related Intellectual Property Rights in 1995 and has complied with its obligations thereunder. India is also a member of the Paris Convention, thereby allowing reciprocity for claiming priority.

Trademarks in India are protected under both statute and common law. India recognises service marks, three-dimensional marks, collective marks and even unconventional marks (such as sound marks). While registration of trademarks is not compulsory, registration allows the owner of a trademark to exclusively use the mark and obtain the relief of infringement.

With regard to copyright, Indian law does not provide any special rights or privileges for registration. Protection under the Copyright Act, 1957 (Copyright Act) is provided to original literary, dramatic, musical or artistic work. Computer programs and databases are also considered as literary works and thereby afforded protection under the Copyright Act. This has significantly benefited technology companies. India is also a member of the Berne Convention and the Universal Copyright Convention granting any work first published in any of these Convention countries the same treatment as if it was published in India.

The Patents Act, 1970 is the law governing patents in India. Usually computer programs per se are not patentable, but when coupled with hardware could be patentable.

Trade secrets and confidential information are also protected only by way of contractual arrangements.

IP is the core asset of a technology company, and while acquiring an entity, the most pertinent question to the buyer is whether the ownership of the IP vests with the company. In the case of copyright, the author of the work is considered as the first owner, except in certain cases including the employer–employee relationship. In the case of any work made under a contract of employment, the employer is considered as the first owner of the copyright, unless the contract provides otherwise. Further, in the case of any other relationship such as that of a consultant or contractor, it is pertinent to ensure that any form of IP created by such an individual is adequately assigned, especially for software and computer programs, which are protected under the Copyright Act. As per the Copyright Act, if the term and territory for the assignment are not specified, then said assignment is deemed to be for the territory of India and the period of assignment is limited to five years. Hence, suitably drafting IP provisions for title perfection is critical.

22 Rule 23, NDI Rules.

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VI EMPLOYMENT ISSUES

Employees and the IP created by them are the key assets of most technology companies. Employee retention and incentivisation are primary concerns of an employer. The enforceability of non-compete restrictions in India often hampers the decision of buyers to impose harsh non-compete restrictions on individuals. An agreement in restraint of trade, that is, 'an agreement by which one party is restrained from exercising a lawful profession, trade or business of any kind', is to that extent treated as void. An exception to this rule is when a party sells goodwill to another, in which case the party selling the goodwill may agree with the buyer to refrain from carrying on a trade or similar business within the specified local limits, provided that the limits appear to the court to be reasonable.

Non-compete restrictions during the term of employment are generally not regarded as restraint of trade, and the courts have upheld such restrictions. However, individual non-competes beyond the term of employment are usually held in restraint of trade and accordingly not enforceable.

In the case of asset or slump sale transactions, employees of the seller will need to be transitioned to the buyer. This may be undertaken by way of a transfer under the Industrial Disputes Act, 1947 (IDA), or by the voluntary resignation of the employees from the seller and the offer of fresh employment by the buyer. In such cases, employers usually incentivise employees to join them by recognising the continuity of service for determining seniority and computing employment benefits (especially gratuity). In the case of transfers under the IDA, it is important to ensure that the services of workmen[23] are not interrupted pursuant to a transfer, and the terms and conditions post-transfer are not less favourable than those immediately before the transfer.

VII DATA PROTECTION

The current regime for data protection in India is laid down under the Information Technology Act, 2000 and the rules issued thereunder, being the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (Data Protection Rules). The categories of information covered under the Data Protection Rules are:

a personal information (PI), being any information that relates to a natural person that can identify such person; and

b sensitive personal data or information (SPDI), being any personal information that consists of:
- information relating to passwords;
- financial information such as bank accounts or cards or other payment instrument details;
- physical, physiological and mental health conditions;
- sexual orientation;

23 IDA applies only to workmen, who are defined to mean persons employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, excluding an employee in a managerial or administrative capacity; or in a supervisory capacity drawing wages exceeding 10,000 rupees per month. Whether an employee qualifies as a workman is a fact-based analysis.

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- medical records and history; and
- biometric information.[24]

The Data Protection Rules are applicable to a body corporate,[25] incorporated in India, that is engaged in the collecting, receiving, possessing, storing, dealing or handling of SPDI (and not any other personal information) using an electronic medium, and sets out compliances for the protection of SPDI by such body corporate. There are no compliances applicable for collecting PI.

In the case of acqui-hire transactions such as asset or business purchases, the buyer must ensure that the seller obtains the consent of employees before transferring any of their SPDI.[26] The buyer will also need to comply with all the requirements under the Data Protection Rules in respect of these employees. Since only SPDI and no other information relating to an employee is required to be protected, sellers are usually free to provide employee-related information such as salary, designation, location of work and benefits to the buyer prior to the acquisition.

The data protection law in India is on the threshold of change, and the Personal Data Protection Bill, 2019, currently draft legislation that has similarities with the EU General Data Protection Regulation and the California Consumer Privacy Act, is expected to drastically change the data protection law in the country.

VIII SUBSIDIES

The government introduced special economic zones (SEZ), the export oriented (EOU) scheme, the software technology park (STP) scheme and other similar schemes to provide impetus for the technology sector in India. The SEZ, EOU and STP are geographically demarcated regions where the legal regime may be liberalised, and with entities set up in such regions being exempted from certain duties and taxes. Primarily, entities operating from such schemes are exempted from customs duty on the import of hardware, software and equipment that is linked to their premises of operation, commonly termed bonded premises, and the assets are commonly termed bonded assets.

In cases where the sale of a technology company involves the sale of bonded assets, then prior permission of the relevant SEZ, STP or EOU authority will be required to de-bond the assets and transfer to a regular tariff zone. Such de-bonding would be subject to payment of applicable duties. The requirement to de-bond and the payment of duties will, however, not be required if the bonded assets are transferred to another unit in such SEZ, STP or EOU.

Additionally, entities in such SEZ, STP or EOU are also required to maintain a positive net foreign exchange. This is calculated cumulatively in blocks of five years. A buyer will need to consider this ongoing obligation and also inform the concerned authority of any change in shareholding of the target so that the target can continue to import and export and avail these benefits.

24 Rule 3, Data Protection Rules.

25 The term body corporate is defined under the Information Technology Act, 2000 as a company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities.

26 Rule 7, Data Protection Rules.

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IX DUE DILIGENCE

Due diligence is undertaken to identify any risks associated with an acquisition, be they commercial, financial, tax or legal. The due diligence exercise aids the buyer in identifying actual, potential or contingent liabilities of the target and in identifying the value of the target.

While commercial due diligence involves identification of the pertinence of a target's business, software, brand and IP to the business of the buyer, the current and projected performance of the target and its business plan, financial and tax due diligence involves validation of, inter alia, the financials of the target, sources of cashflow and revenue, expenditure, off-balance sheet liabilities, risks that may impact the financial performance of the target and potential tax liabilities. Non-compliances or issues identified in the diligence may be included in the transaction documents as requirements to be completed before the M&A.

The extent of the legal due diligence undertaken by the acquirer depends on the mode adopted for the acquisition. While diligence for a share purchase or merger is typically more extensive as it entails the entity being acquired along with all its assets and liabilities, diligence for an asset purchase or business purchase is limited and need not involve a review of entity-level compliances.

The foremost requirement in diligence for a share purchase is the identification of any risks that affect the title to the shares being acquired. This will involve verification of compliance with Indian laws for the issuance of shares and any share transfers, and compliance with restrictions on foreign investment for the acquisition of shares by non-residents, as well as any reporting or filings undertaken for the issuance and transfer of shares under the Companies Act and FEMA. Other aspects of legal diligence involve:

a the validity of the board of directors and any decisions taken;

b entity-level compliances, business permits and registrations obtained and compliances thereunder;

c employee and labour law-related compliances;

d financing arrangements and security granted;

e litigation; and

f potential liabilities.

The diligence for an asset or business purchase may involve only the identification of title to the assets or business being purchased and any potential liabilities. The overarching aspect of legal diligence in a technology company where the principal asset may be IP is to identify whether the target being acquired owns the IP and if the chain of title of such IP is valid.

X DISPUTE RESOLUTION

The most preferred method for resolving disputes, particularly those with a cross-border element, is arbitration. While expeditious disposal, confidentiality and procedural flexibility tilt the tables in favour of arbitration even in the case of disputes between Indian parties, the most important factor for preference of arbitration over court proceedings, especially in cross-border transactions, is that foreign decrees (except from reciprocating countries) are not automatically enforceable in India. While a party seeking to enforce the decree of a court

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from a reciprocating country can directly file execution proceedings in India, in the case of a decree from a non-reciprocating country, a fresh suit must be filed before the relevant court in India, which would effectively result in the suit being re-litigated in India.

However, in the case of arbitration, since India is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a binding award rendered by a country that is a signatory to the New York Convention and notified as a Convention country in India will be enforceable in India. India has notified about 48 countries as Convention countries as against 13 reciprocating territories.

To put this in context, while the United States has been recognised as a Convention country for the enforcement of arbitration awards, it has not been recognised as a reciprocating territory for the purpose of enforcing a judicial decree. The ease with which arbitral awards can be enforced, the time taken to complete court proceedings in India, the flexibility to choose the procedure of arbitration, the neutrality and expertise of arbitrators, and the ability to maintain confidentiality are other reasons for the preference for arbitration.

XI OUTLOOK

Despite the global economic slowdown, trade relations of various countries and covid-19, deal activity in India, while it has slowed down, has not stalled. The technology sector has continued to be resilient during these times, and new age and enhanced digital offerings are being introduced to facilitate the 'new virtual normal'.

Further, with the lifting of curbs on movement and the Make in India initiative, along with the efforts of the government to revive the economy, inbound M&A activity is expected to steadily increase, and India is being considered as an upcoming market among Asian countries. The government has realised that the legal framework for M&A in India must be easy and facilitative, and not restrictive. Although outbound M&A activity has slowed down in the past few years, with India aiming to become more self-reliant, outbound M&A activity is also set to grow.

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Appendix 1

ABOUT THE AUTHORS

VAIBHAV PARIKH

Nishith Desai Associates

Vaibhav Parikh heads the mergers and acquisitions, private equity and technology practice at NDA. He has led several high-profile M&A and private equity deals and specialises in legal and tax structuring of complex cross-border transactions. Mr Parikh is an expert in technology (including e-commerce), media and telecom. He also advises major multinational corporations on corporate and securities laws, the structuring of inbound and outbound investments, private equity investments, IP laws and exchange control law.

HUZEFA TAVAWALLA

Nishith Desai Associates

Huzefa Tavawalla heads the disruptive technologies practice at the firm and is an integral member of the M&A practice group. He has been with the firm for over 13 years and has been involved in numerous cross-border technology M&A projects. Mr Tavawalla has also been accredited by various publications especially as 'an accomplished professional with a deep understanding of M&A transactions'.

AISHWARYA H

Nishith Desai Associates

Aishwarya H is a senior member of the mergers and acquisitions and private equity practice at NDA. She has been involved in structuring several cross-border transactions from a legal, tax and regulatory perspective. Aishwarya also advises leading technology companies in their outbound and inbound acquisitions and divestments.

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NISHITH DESAI ASSOCIATES

3, North Avenue
Maker Maxity, Bandra-Kurla Complex
Mumbai 400 051
India

93 B, Mittal Court
Nariman Point
Mumbai 400 021
India
Tel: +91 22 6669 5000
Fax: +91 22 6669 5001
vaibhav.parikh@nishithdesai.com
huzefa.tavawalla@nishithdesai.com
aishwarya.h@nishithdesai.com

www.nishithdesai.com

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