



‘ANALYSIS OF LAWS RELATING TO MERGERS AND ACQUISITIONS IN UNITED STATES OF AMERICA AND UNITED ARAB EMIRATES’

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Introduction:

United States of America

The Merger and Acquisition industry in the United States oversees tens of thousands of deals each year. In favourable economic conditions, the value of these deals is well over a trillion U.S. dollars. This helps companies come together in a way that makes them more efficient, taking advantage of economies of scale and scope. These companies are bound to comply with the Merger and Acquisition laws of the country. Laws that deal with Mergers and Acquisitions in United States of America fall under the category of Federal Antitrust Laws, namely:

- Clayton Act;
- Sherman Antitrust Act;
- Federal Trade Commission Act.

Along with this there are few other laws in the form of guidelines that are applicable to Mergers and Acquisitions, they are:

- Joint guidelines of the Antitrust Division and the Federal Trade Commission;
- Antitrust Guidelines for Collaborations Among Competitors;
- Hart-Scott-Rodino Filing Requirements.

United Arab Emirates

Having become a strong trading centre and has a wealth of resources, United Arab Emirates ranks first in the regions where investors are most interested. The Mergers and Acquisitions market in the United Arab Emirates has been one of the most active of the near and Middle East jurisdictions during the past 12 months. In terms of deal volume, the most active sector was the oil and gas and energy sectors. Another very active sector was the banking and finance industry. This industry has been subject to some significant transactions involving the consolidation of the banking sector throughout the GCC, with the largest transactions being closed in the UAE. There are varied methods to establish such companies in this region. The state supports the formation of foreign capital companies in the free zone by identifying some special regions for this purpose. All types of companies be it foreign or domestic must comply with the laws of United Arab Emirates. One of these methods is the way of Merger or Acquisition. Laws that deal with Mergers and Acquisitions in the United Arab Emirates are:

- Federal Law No. 2 of 2015 on Commercial Companies (the “Companies Law”);
- Federal Law No. 4 of 2012 on the Regulation of Competition (the “Competition Law”).

These federal laws are further supplemented by few Rules and Regulations, namely:

- Securities and Commodities Authority (“SCA”) Disclosure and Transparency Regulations 2000;
- Regulations for Trading, Clearing, Settlement, Transfer of Ownership and Safekeeping of Securities (SCA



- Board of Directors' Decision No. 2 of 2001);
- Cabinet Resolution No. 13 of 2016 Concerning Application of the Competition Law;
 - SCA Administrative Decision No. (62/RT) of 2017 Concerning the Technical Requirements for Acquisitions and Merger Rules;
 - Rules of Acquisition and Mergers of Public Shareholding Companies (Decision of the Chairman of the SCA Board of Directors No. (18/RM) of 2017);
 - Abu Dhabi Securities Exchange ("ADX") Rules (this is only applicable to companies listed on the ADX).

Overview of United Arab Emirate's Legal Framework concerning Merger and Acquisition:

The United Arab Emirates is a federation of seven emirates, Abu Dhabi, Dubai, Sharjah, Umm Al-Qaiwain, Fujairah, Ajman and Ras al-Khaimah. Its currency is United Arab Emirates Dirham and the exchange rate has been pegged at approximately 3.67 dirhams per US Dollars. The United Arab Emirate's Federal Constitution divides its powers between the Federal Government and the Governments of the Constituent Emirates. Wherein some subjects are only regulated at the federal level whereas some subjects are only regulated at the emirate level. Other matters are regulated at both the emirate and federal levels.

The government regulators and entities that play key roles in mergers and acquisitions are:

- Securities & Commodities Authority for listed entities;

- Competition Regulation Committee of the United Arab Emirates Ministry of Economy;
- United Arab Emirates Central Bank for banks and licensed financial companies;
- Department of Economic Development in each of the emirates.

Overview of United States of America's Legal Framework concerning Merger and Acquisition:

Mergers and Acquisition in the United States of America is governed by a dual regulatory regime, consisting of state corporation laws as well as the federal securities laws. The Securities and Exchange Commission is the regulatory agency responsible for administering the federal securities laws. Certain federal securities laws apply in the context of a merger, including the federal proxy rules governing the solicitation of target shareholder approval and the tender offer rules in the context of an offer to purchase shares directly from shareholders of a publicly traded company. Furthermore, an acquisition or merger will implicate fiduciary duties, as developed and applied in the target company's state of incorporation. While state corporation laws applicable to Merger and Acquisition have a large degree of similarity across different states, state corporation laws do vary, especially with regard to the protections afforded to companies facing takeover threats. Unlike most other jurisdictions, the US patchwork of federal and state Merger and Acquisition regulation is generally not focused on substantively regulating changes of control of target companies. Rather, US regulation focuses on disclosure, ensuring that target company shareholders have the time and information required to make a fully informed decision



regarding accepting a tender offer or voting in favour of a merger.

Analysis of Laws relating to Mergers and Acquisitions in United Arab Emirates:

In the recent times there have been talks in respect of easing the 49/51 rule so as to encourage Foreign Direct Investment into the United Arab Emirates. The United Arab Emirate's Ministry of Economy is on its way to introduce a new law with regards to foreign direct investment. The 49/51 rule is essentially an ownership restriction that is imposed on foreign investment so as to avoid any hostile takeover. It states that a foreign bidder or investor may not own more than 49% of a United Arab Emirates Company whether public or private. This rule can however be bended to suit particular situations, constitutional documents so that the foreign investor has more control in the company or a tailored shareholder's agreement that entrusts more rights to the foreign investor as compared to the United Arab Emirates Company. Acquisitions of certain regulated industries that are outside defined zones are till date outside the purview of foreign investment or require a heavy set of permissions/ approvals that are extremely time consuming.

When it comes to regulations there are certain laws set up to deal with restrictions of acquisitions. There is a threshold for both domestic and international takeover, that the resulting economic concentration has to affect the level of competition in the relevant market or create or enhance a dominant market position. This is so as to maintain a competitive market to strengthen the economic conditions with each merger that takes place. This regulation applies to international takeover as well, so as to gain more output out of an international merger.

Which brings us to financing of a merger transaction. Currently there are no laws that holds that a minimum level of financing is required from a potential bidder or purchaser. However, the SCA requires the acquirer to have a confirmation document from its financial consultants, along with the document of intent to make an offer, that the acquirer has the required financial resources and ability to execute the said offer without any troubles. This document must be executed after the phase of bargaining when the final price has been settled and the deal has been finalized so as to avoid any confusion as to the settlement of the merger.

Another topic of contention in the recent days is legal requirements of cross border transactions. The only regulation that puts a heavy hand on such transactions as mentioned before is the 49/51 rule. This rule tends to majorly impact cross border transactions as well, acting as a blockade to many international mergers and acquisitions in various sectors of major industries of the United Arab Emirates.

The documents required for Mergers in the United Arab Emirates are:

- letter of intent / heads of terms agreement;
- offer letter;
- corporate authorisations, including board and shareholder resolutions and relevant power of attorneys;
- sale and purchase agreement;
- a standard share transfer form in Arabic or English and Arabic;
- in the case of an asset sale, separate agreements for the transfer of specific assets;
- shareholder agreements;



- any ancillary documents such as transitional services agreement, key employee agreements, intellectual property licences and other material documents;
- a disclosure letter with the bundle of disclosed documents.

Analysis of Laws relating to Mergers and Acquisitions in United States of America:

In the early months of 2020, the United States of America Merger and Acquisition had declined significantly, predominantly because of the covid-19 pandemic. But Merger and Acquisition activity dramatically rebounded in the mid months of 2020 as business confidence improved, led by the technology sector and other sectors resilient to the economic effects of covid-19. Many existing deals were withdrawn or terminated as a result of covid-19, and various high-profile deals resulted in litigation. With respect to corporate law, Delaware courts continued to demand robust disclosure for shareholder votes on Merger and Acquisition transactions, and reaffirmed that demonstrating an MAE remains a high bar for acquirors, which may have implications for the aforementioned cases subject to litigation. US inbound cross-border Merger and Acquisition activity was also severely affected by covid-19. Antitrust enforcement continued to be aggressive. While financing for Merger and Acquisition transactions was muted owing to the decline in Merger and Acquisition activity, pricing remained relatively borrower-friendly owing to US government stimulus, and yield-starved investors were eager to finance transactions targeting creditworthy companies and companies less impacted by covid-19.

Regulation of Merger and Acquisition activity falls within the dual jurisdiction of

the federal government and the individual state in which the target company is incorporated. The federal government regulates sales and transfers of securities through Securities and Exchange Commission and Policies Competition matters through the Antitrust Division of the Department of Justice and the Federal Trade Commission. The law of the state of incorporation of a company, including the fiduciary duties owed by the target company's board of directors and officers to its shareholders in responding to a takeover bid and applicable statutory requirements for approving and effecting merger transactions. The ability of a target company to impose anti-takeover devices also will largely depend on the law of its state of incorporation.

The rules governing certain mergers and acquisitions transactions will differ depending upon the state of incorporation of the target company. The laws of the state of the target company will regulate all the approvals of shareholders and board of directors that are required in the Merger and Acquisition transaction. All the sales as of all or substantially all assets will also be regulated by the laws of the state in which the company has been incorporated.

Considering laws and regulations for foreign buyers including but not limited to cross border transactions, foreign investments and international transactions, the committee on Foreign Investment in the US has broad authority to identify and mitigate risks to U.S national security arising from foreign investment in the US business.

The most common method of acquiring a US public company are statutory merger, tender offer and exchange offer. In these methods the main and important documents needed to



complete a Merger and Acquisition transaction are:

- Merger Agreement or tender/exchange offer
- Tender Offer Statement
- Exchange offer- Registration Statement (which includes the bidder's prospectus)
- Proxy statement
- Certificate of Merger

The US usually does not have Hostile takeovers. There are several reasons for the same, firstly hostile takeover is usually very time consuming and difficult to complete. Secondly some companies have in place anti-takeover protections, such as shareholder rights plan that increases the target company board's bargaining power. And finally considering the influence of activist shareholders, it is difficult in today's environment for a target company board to reject out of hand a bid that is economically attractive to shareholders. As a result, hostile takeovers usually do not succeed in the US.

Conclusion:

Thus, so is the analysis of the laws that regulate Mergers and Acquisitions in the United States of America and the United Arab Emirates. The structure of laws in both the countries is more or less similar to that of the Indian structure dividing the laws into two main divisions i.e., Central and State laws as is done in the country of India.
