

The International Comparative Legal Guide to: **Mergers and Acquisitions 2008**

A practical insight to cross-border Mergers and Acquisitions



Published by Global Legal Group with contributions from:

Allen & Gledhill
Andreas Sofocleous & Co.
Arthur Cox
Bae, Kim & Lee
Bech-Bruun
Bell Gully
Camilleri Preziosi
CHSH Cerha Hempel Spiegelfeld Hlawati
De Brauw Blackstone Westbroek
Dittmar & Indrenius
Edward Nathan Sonnenbergs
ELIG
Elvinger Hoss & Prussen

Eubelius
Freshfields Bruckhaus Deringer
Goodrich, Riquelme y Asociados
Grimaldi e Associati
Kelemenis & Co.
Lejins, Torgans & Partners
Lenz & Staehelin
Mannheimer Swartling
Meitar Liquornik Geva & Leshem Brandwein, Law Offices
Mitrani Caballero & Ojam Abogados
Nishimura & Asahi
Pachiu & Associates
Premnath Rai Associates

Saladžius & Partners
Schönherr
Skadden, Arps, Slate, Meagher & Flom LLP
Slaughter & May
Squire Sanders & Dempsey
Stikeman Elliott
Tamme & Otsmann
TozziniFreire Advogados
Udo Udoma & Belo-Osagie
Weinhold Legal
Wikborg Rein
Žurić i Partneri

India

Premnath Rai



Premnath Rai Associates

P. Srinivasan



1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions are primarily regulated by the Companies Act, 1956 ('Companies Act'). Sections 391 to 396 of the Companies Act govern schemes of arrangement and mergers etc. Section 494 of said Act provides for an alternative form of reconstruction where a liquidator is empowered to receive shares etc. in lieu of cash for the transfer of the whole/part of any undertaking. Certain restrictions on the acquisition/transfer of shares are also found in Section 108A to 108I involving undertakings which produce, supply or control 25% or more of the total quantity of relevant goods or services produced or rendered in India. Special norms for Producer Companies (i.e. companies having objects involving farmers' produce) have also been stipulated. The Companies Act stipulates *inter alia* that in the case of transaction involving merger of companies, the transferee company should be a company incorporated under the Companies Act. In other words, the transferor company could be a company incorporated in India or outside of India, but the transferee company should be a company incorporated in India.

The Securities and Exchange Board of India ('SEBI') Act, 1992, and the guidelines/rules/regulations made thereunder govern M&A transactions involving public companies listed on a recognised stock exchange. In particular, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, ('Takeover Code') regulates transactions involving acquisition of shares that are traded over the stock market (but exempts schemes of amalgamation approved under the provisions of the Companies Act). The Listing Agreement that companies enter into with recognised stock exchanges are relevant in M&A transactions in case of a merger of a company listed on the stock exchange(s). The Listing Agreement requires *inter alia* filing of the scheme of arrangement with the Stock Exchange prior to filing application with the High Court for seeking approval of the scheme of arrangement. The conditions applicable for continued listing stipulate *inter alia* norms for a minimum level of public shareholding and prior approvals of the Stock Exchange.

Anti-trust issues are regulated by the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTPA') which at present does not require pre-merger clearances. However, the Competition Act, 2002, which is soon to be fully operational, provides for repeal of the MRTPA. The Competition Act contains provisions for regulation of acquisition, takeover, merger, and combination etc. of companies. The Competition Commission of India (CCI), established under the Competition Act, has the power to regulate mergers or combinations and to reverse mergers or combinations if

it is of the opinion that a merger or combination has or is likely to have an 'appreciable adverse effect' on competition in India.

Other relevant sources of laws that regulate merger or acquisition transactions are the Income-tax Act, 1961, governing M&A transactions, and the Accounting Standard -14 which provides for Accounting for amalgamations.

1.2 Are there different rules for different types of public company?

Listed public companies, as opposed to those that are not listed, would require compliance with applicable SEBI laws and the listing regulations. The Takeover Code is not applicable to companies, which are not listed on stock exchanges in India.

The Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA') regulates industrial companies that turn sick, and empowers the Board for Industrial & Financial Reconstruction ('BIFR') to order amalgamation of sick industrial companies with any other company or vice-versa.

1.3 Are there special rules for foreign buyers?

Foreign buyers must comply with the provisions of the Foreign Exchange Management Act, 1999 ('FEMA') and the rules/regulations made thereunder. The Foreign Direct Investment ('FDI') Policy, formulated by the Government of India, provides for sector specific regulations, in the form of investment caps, conditions for investment, and sectors in which FDI is prohibited. Investments by Foreign Institutional Investors, other entities and individuals, are further regulated by applicable FEMA and SEBI regulations. The FDI Policy allows investment by an overseas investor in an Indian company either under the 'automatic route' or under the 'approval route'. Investment proposals for the acquisition of shares in an Indian company, which satisfy the parameters for investing under the automatic route, can acquire the shares or securities under the automatic route. Proposals which do not satisfy such qualifying parameters are required to seek prior approval of the Foreign Investment Promotion Board ('FIPB') of the Government of India for investing in Indian companies.

1.4 Are there any special sector-related rules?

Yes. For instance, there are sector specific rules that govern investment in specific sectors such as banking, telecom, insurance, electricity etc.

1.5 What are the principal sources of liability?

Mergers. Failure to comply with the applicable procedural requirements, depending upon the type of M&A transaction being effected, would invite liability.

Takeovers. Penalties for non-compliance with the provisions of the Takeover Code are stringent. Failure to comply on the part of a bidder may invite action for forfeiture of the escrow deposit amount. In addition to monetary penalties, certain actions may invite criminal prosecution.

Any insider trading or disclosure of unpublished price-sensitive information would invite action under the provisions of the SEBI (Prohibition of Insider Trading) Regulations, 1992. Any fraudulent or deceptive practice in the securities market would also invite action under the SEBI (Unfair Trade Practices) Regulations, 2003.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Mergers. Schemes of arrangement for mergers and takeover offers are the two primary modes through which acquisitions take place. Scheme of arrangements may take the form of mergers, amalgamations, demergers and reverse mergers etc.

Schemes of arrangement require approval by the shareholders and creditors and the approval of the High Court (please see question 1.1 also).

Producer Companies may be amalgamated by passing a special resolution of its members, with notice to all members and creditors. No prior approval of the High Court is required. The amalgamation comes into effect on registration of the resultant company with the Registrar of Companies ('RoC').

Takeovers. Takeover proposals require compliance with the Takeover Code. The Takeover Code mandates disclosure of the level of shareholdings, once the shareholding reaches the threshold limit, and disclosures at stipulated shareholding levels thereafter. The Takeover Code mandates the acquirer to make an open offer for acquisition of shares from public shareholders, once the acquirer's shareholding in the target company, acquired directly or through persons acting in concert for him, exceeds the threshold level of 15%.

2.2 What advisers do the parties need?

Mergers. Financial advisors, chartered accountants, legal advisors and investment bankers, are generally engaged for an M&A transaction.

Takeovers. In the case of takeover of listed companies, the public announcement, which is required to be made under the Takeover Code, must be made through a Category I Merchant Banker who acts as a manager to the offer. The Merchant Banker is required to ensure *inter alia* that the bidder is able to implement the offer and that the required funds for making payment to the shareholders are in place along with compliance with the Takeover Code and any other applicable laws. In cases of acquisitions involving infrequently traded shares, SEBI may, if it considers necessary, require that such shares be valued by an independent merchant banker or an independent chartered accountant (of a minimum 10 years standing), or a public financial institution.

2.3 How long does it take?

Mergers. Time frame for completion of a merger under the

Companies Act would depend on complexities of the merger proposal. Since a merger proposal involves hearing by the High Court of opposition, if there is any, to the merger proposal from affected parties and approval of the Scheme of arrangement by the High Court, time frame for completion of the merger would depend on such activities. Merger proposals normally entail a time frame of six to twelve months for completion. However, if the Central Government orders amalgamation of two or more companies, in public interest under Section 396 of the Companies Act, the entire transaction may be completed within 2-3 months.

Takeovers. The Takeover Code requires that public announcements in cases of acquisition of shares/voting rights must be made not later than 4 working days after the acquirer enters into an agreement to acquire shares or voting rights exceeding the stipulated threshold level. In cases of acquisition of control alone, the public announcement must be made within 4 working days of the changes that result in the acquisition of control. However, in cases of indirect acquisition or change in control of a target company, the public announcement must be made within three months of the consummation of such acquisition or change in control of the parent or the company holding shares of, or control over, the target company in India. The public announcement must contain a "specified date" for the purpose of determining the names of the shareholders to whom the Letter of Offer should be sent. The specified date cannot be later than 30 days from the date of such announcement. Further, the draft Letter of Offer must be submitted to SEBI, and also placed before the Board of the target company, within 14 days from the date of public announcement. The Letter of Offer is required to be dispatched to the shareholders not earlier than 21 days from the above said submission to SEBI. The offer must open not later than the 55th day of the public announcement, and the offer must remain open for a period of 20 days. Acquirers are required to complete all procedures relating to the offer within 15 days from the closure of the offer.

2.4 What are the main hurdles?

Mergers. Schemes of arrangement are subject to (i) approval by special resolution of the shareholders and creditors, accorded in their separate meetings; (ii) Reports of the Official Liquidator and the Regional Director to the effect that the affairs of the company have not been conducted in prejudice to public interest; and (iii) approval of the Scheme of arrangement by the High Court. The Scheme of arrangement should be approved by the shareholders and creditors in their respective meetings, by a majority in number and three-fourths in value of votes, polled at the meeting.

Takeovers. Obtaining acceptances of the shareholders of the target and regulatory approvals are significant hurdles in a takeover bid. Further, an acquirer must ensure that firm financial arrangements are in place for the bid. The acquirer is also required to disclose in its Letter of Offer whether it proposes to dispose of or encumber any of the target's assets in the succeeding 2 years, except in the ordinary course of business. The acquirer, however, is not permitted to sell, dispose of or otherwise encumber any of the target's 'substantial' assets without the prior approval of the shareholders. The acquirer must also be mindful that the minimum level public shareholding, required for the target company to remain listed on stock exchanges, is maintained.

2.5 How much flexibility is there over deal terms and price?

Takeovers. In a Takeover bid, it is mandatory while making a public announcement that the acquirer offer to purchase a minimum 20% of the voting capital of the target company. However, the offer may be conditional upon level of acceptance that may be less than

20%. The offer price is subject to detailed regulations and must be stated in the Letter of Offer. Parameters are fixed for ascertaining the minimum possible price that can be offered to the shareholders of the target. If the acquirer acquires shares after the public announcement at a price higher than the offer price as stated in the Letter of Offer, then the highest price paid for such acquisition shall be payable for all acceptances received under the offer. The underlying principle being that all shareholders must be afforded the same offer price. Upward revisions in the offer price and the number of shares to be acquired are permitted, at any time up to 7 working days prior to closure of the offer.

It is also specifically provided that any acquisition, pursuant to an agreement, whereby the acquirer's shareholding exceeds 15%, then such agreement shall contain a clause to the effect that in case of non-compliance of any of the provisions of the Takeover Code, the agreement for such sale shall not be acted upon by the seller or the acquirer. Further, any payment made to persons other than the target, in respect of a non-compete agreement that is in excess of 25% of the offer price, shall be added to the offer price.

2.6 What differences are there between offering cash and other consideration?

Mergers. In schemes of arrangement, the share exchange ratio for exchange of the shares of the transferor company with shares of the transferee company, is determined on the basis of accepted valuation norms.

Takeovers. In takeover bids, the offer price is payable in, or by a combination of, (i) cash; (ii) equity shares of the acquirer (provided the acquirer is listed); or (iii) secured instruments of the acquirer with a minimum 'A' grade rating from a registered credit rating agency. However, if the acquirer had acquired any shares for cash, 12 months prior to the date of public announcement, the acquirer will be required to offer an option to shareholders to accept payment in any of the three modes stated above. Further, if equity shares are issued, and shareholder approval is required for the same it must be obtained within a period of 7 days from the date of closure of offer. Compliance with the SEBI (Disclosure and Investor Protection) Guidelines, 2000, dealing with preferential allotments of securities, must be ensured if the aggregate value of the securities offered exceeds five million Rupees.

2.7 Do the same terms have to be offered to all shareholders?

Yes. The shareholders of the same class should be offered the same terms. Please see question 2.5 above.

2.8 Are there any limits on agreeing terms with employees?

Mergers. The High Court while approving schemes of arrangement takes into account the interest of employees. Scheme of arrangement generally provide for protection of the employees service conditions and benefits.

Takeovers. The Takeover Code does not contain any specific limitations on agreeing terms with employees. However, the highest of the offer prices offered to any of the shareholders must be offered to all the shareholders of the target. It is further specifically provided that any payment made to persons other than the target in respect of a 'non-compete' agreement, in excess of 25% of the offer price, shall be added to the other offer price.

2.9 What documentation is needed?

Mergers. Schemes of arrangement generally require the issuance of

a notice to the shareholders and creditors, which must be appended with an explanatory statement explaining the salient terms of the compromise or arrangement as well as the submission of a petition along with the proposed scheme of arrangement to the High Court for approval.

Takeovers. Takeover bids involve a public announcement in the press and a Letter of Offer in the stipulated formats. The Letter of Offer is generally appended with a form of acceptance-cum-acknowledgement, a draft transfer deed and a form for withdrawal. A due diligence certificate of the Merchant Banker must also accompany the draft Letter of Offer that is submitted to SEBI. In addition, all relevant documents including *inter alia*, Chartered Accountant's certificates to certify the net worth of the acquirer and the adequacy of financial resources, audited financial reports, any agreement which triggered the open offer, etc must be made available for inspection to the target's shareholders.

2.10 Are there any special accounting procedures?

Mergers. Standards for accounting for amalgamations are provided in Accounting Standard -14 as issued by the Institute of Chartered Accountants of India.

Takeovers. No special accounting procedures are stipulated for takeover bids. However, the accountant's views are generally obtained for issues regarding determination of offer price, certification of net worth, etc.

2.11 What are the key costs?

Mergers. Besides fees payable to advisers for merger transaction, costs of merger include stamp duty and fees. The order passed by the High Court, approving the merger is treated as an instrument for stamp duty purposes. Some of the State Governments have amended their respective state stamp laws for subjecting the merger transaction to stamp duty, based on value of the immovable properties that are involved in the merger transaction and the value of new shares to be issued in satisfaction of the consideration for merger.

Takeovers. Takeovers that involve purchase of shares would also attract stamp duty if the shares are in a physical form (as opposed to shares in dematerialised form) at the rate of 0.25% of the value of the shares.

2.12 What consents are needed?

Mergers. Schemes of arrangement would require the approval of shareholders and creditors by special resolution (as separate classes) as a pre-requisite for approval of the proposal by the High Court.

Takeovers. If the proposal involves allotment of securities in the acquirer company in satisfaction of the acquisition price, the same may require the consent of the acquirer's shareholders depending upon the kind of securities being issued. In the case of acquisition of shares of a listed company by an overseas investor, prior approval of the FIPB would be required, for consummating the transaction.

2.13 What levels of approval or acceptance are needed?

Takeovers. The Letter of Offer should be filed in draft form with SEBI. Comments, if any, received from SEBI should be incorporated in the Letter of Offer, prior to mailing to shareholders. The acquirer is obliged to accept the entire acceptances received, in response to the offer, subject to a maximum of 20% of the voting

share capital of the target company.

Mergers. The merger proposal should be supported by shareholders and creditors by special resolution passed in their respective meetings. The resolution should be supported by a simple majority in number of shareholders present and voting at the meeting and three-fourth in value of the shares held by such shareholders. The said requirement is applicable for the resolution by the creditors as well. The Listing Agreements further require that a listed company should file the scheme of arrangement with stock exchanges for approval thirty days prior to filing the same in the High Court.

2.14 When is the consideration settled?

Mergers. In schemes of arrangement, the consideration is settled as per the scheme of arrangement set forth in the scheme of arrangement and approved by the High Court.

Takeovers. In cases of takeover bids, the consideration must be settled within 15 days of the closure of the offer.

3 Friendly or Hostile

3.1 Is there a choice?

Takeovers. In case of Takeovers, the takeover could be friendly or hostile. However, the hostile takeover by an overseas acquirer is practically not feasible, as the overseas acquirer would require approval of the FIPB for acquiring shares of the target company. One of the documents required to be submitted to the FIPB, for seeking its approval, is a resolution from the Board of Directors of the target conveying their consent for acquisition of shares by the acquirer. Since it may not be possible for an overseas acquirer to obtain consent of the target company in a hostile takeover bid situation, the option of hostile takeover is practically not available to an overseas bidder.

3.2 How relevant is the target board?

Takeovers. The draft Letter of Offer is required to be placed before the board of directors of the target company within 14 days of the public announcement of the offer. The Takeover Code permits the board of the target to send their unbiased comments and recommendations of the offer(s) to the shareholders, keeping in mind their fiduciary responsibility and for the purpose seek the opinion of an independent merchant banker or a committee of independent directors.

3.3 Does the choice affect process?

Takeovers. Yes. Friendly acquisitions would allow for access to the target's information, a due diligence and a negotiation as to the terms of the transaction. A scheme of arrangement may also be entered into in the case of a friendly acquisition. A hostile takeover would have to proceed without such advantages. Further, the benefits of a negotiated offer price would also not be available to the target's shareholders.

4 Information

4.1 What information is available to a buyer?

Takeovers. In the event no access is provided by the target, the

Takeover Code only mandates that the target board furnish information regarding the shareholders' details to the acquirer. In such cases, the acquirer's entitlement is limited to publicly available information such as the Memorandum and Articles of Association, and the returns, filings and registers as required under the Companies Act and the information filed with the stock exchanges.

4.2 Is negotiation confidential?

Takeovers. There is no embargo against keeping negotiations confidential.

4.3 What will become public?

Takeovers. Even if the transaction becomes public, prior to effecting the transaction, there is no obligation to disclose any further information as long as the salient features of any agreement arrived at are disclosed in the public announcement required to be made to effect an acquisition exceeding the thresholds stipulated in the Takeover Code.

4.4 What if the information is wrong or changes?

Takeovers. The target and the target's directors may be held liable for penal action, for any mis-statement or concealment of information that is statutorily required to be furnished under the Takeover Code. In addition, the acquirer is permitted to withdraw the offer if there are circumstances which in SEBI's opinion justify withdrawal. Hence, an acquirer on the particular facts of its case may apply to SEBI for such withdrawal. However, if the offer is withdrawn, the acquirer is not permitted to make any offer for acquisition of the target's shares for a period of six months from the date of announcement of the withdrawal. Statutorily, the acquirer would be able to access only those changes in the information that the target is required to disclose to the stock exchanges and SEBI as per the SEBI Regulations and the Listing Agreement.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Takeovers. Yes. The salient features of any such agreement prior to making the public announcement would be required to be disclosed in the Letter of Offer. Please see questions 2.5 and 5.2.

5.2 What are the disclosure triggers?

Takeovers. All acquirers are required to make disclosures on crossing the thresholds stipulated in the Takeover Code. Any acquirer whose shareholding (or voting rights) exceeds 5% or 10% or 14% or 54% or 74% is required to disclose at every stage its aggregate shareholding to the target and the stock exchanges. Any acquirer whose shareholding exceeds 15% but is less than 55% on seeking to acquire additional shares of more than 5% in any financial year is required to make a public announcement and a disclosure for every purchase or sale aggregating 2% or more, pursuant thereto, to the target and the stock exchanges. Further, every acquirer whose shareholding is 15% or more is required to make yearly disclosures. The SEBI (Prohibition of Insider Trading) Regulations, 1992, also require disclosures to be made by all shareholders having shareholding exceeding 5% of any change exceeding 2% of the total shareholding of the company. Further, if

shares are acquired after the public announcement, the acquirer is required to disclose the number, percentage, price and the mode of acquisition of such shares to the stock exchanges on which the shares of the target are listed and to the merchant banker within 24 hours of each such acquisition, and the stock exchanges shall forthwith disclose such information to the public.

5.3 What are the limitations?

Takeovers. If the price paid for the shares is higher than the offer price as stated in the Letter of Offer, the higher price shall have to be paid to all the shareholders. Please see question 2.8.

6 Deal Protection

6.1 Are break fees available?

Indian law does not specifically contemplate or restrict the payment of break fees. The parties to the agreement may stipulate the payment of a break fee. While submitting the draft Letter of Offer which would contain the salient terms of any agreement entered into between the parties, SEBI does have the power to require changes to the Letter of Offer. In such a case, if SEBI is of the view that the break fees as stipulated are unreasonable, it may direct changes in such terms.

6.2 Can the target agree not to shop the company or its assets?

The Takeover Code permits any persons, other than the acquirer, from making competitive bids within 21 days of the public announcement of the first offer. This right, however, is confined to the shares of the target. The target may agree that it would not shop its assets, more particularly so when the Takeover Code itself requires that the target will not be allowed to sell or encumber its assets during an open offer, unless the approval of the general body of shareholders has been obtained.

6.3 Can the target agree to issue shares or sell assets?

The Takeover Code provides that unless the approval of the general body of shareholders is obtained after the public announcement, the target board cannot (i) transfer or encumber or otherwise dispose of any of its or its subsidiaries assets (except as sold in the ordinary course of business) during the offer period; (ii) issue or allot any authorised but un-issued securities carrying voting rights during the offer period; or (iii) enter into any material contracts. The above restriction on issue of securities does not, however, affect the right of the target to issue/allot shares upon conversion of debentures already issued or upon exercise of option against warrants as per pre-determined terms of conversion or exercise of option and also the issue or allotment of shares pursuant to public or rights issue in respect of which an offer document has already been filed.

6.4 What commitments are available to tie up a deal?

Indian law does not specifically contemplate any commitments that can be made by a target to assist a preferred bidder. Contractually, the parties may stipulate terms that do not otherwise violate the provisions of the Takeover Code.

7 Bidder Protection

7.1 What deal conditions are permitted?

Takeovers. Acquirers may make an offer conditional as to the level of acceptance (which may be below the minimum of 20%), and in such cases where a public offer is pursuant to any agreement, the agreement must contain a condition to the effect that in case the desired level of acceptance is not received, the acquirer shall not acquire any shares under the agreement and shall rescind the offer. The acquirer nevertheless is not relieved of acquiring the minimum of 20% shareholding unless the acquirer has deposited in the escrow account in cash, 50% payable under the public offer. In such a situation, the acquirer is also not permitted to acquire any shares in the target during the offer period, except by way of a fresh issue of shares.

SEBI has the power to reject the inclusion of any conditions in the Letter of Offer.

7.2 What control does the bidder have over the target during the process?

Takeovers. The Takeover Code imposes certain restrictions on the target, so as to prevent the frustration of an offer (see question 6.3 above). In addition, the target is required to furnish all details of the shareholders and assist the acquirer in verification of the securities tendered in acceptance. During the offer period, the acquirer or the persons acting in concert with him shall not be entitled to be appointed as directors of the target company.

7.3 When does control pass to the bidder?

Takeovers. The acquirer is not entitled to acquire control till the offer process is completed. *Status quo* of the target should be maintained till the offer is completed. Day-to-day control would pass to the acquirer when the acquirer and the persons acting in concert with him have obtained a simple majority in the shareholding of the target. 'Control' is defined in the Takeover Code to include the right to appoint a majority of the directors or to control the management or policy decisions exercisable by a person or persons acting in concert by virtue of their shareholding or management rights or shareholders agreement or voting agreements or in any other manner. Hence control would also have been deemed to have been passed on to the acquirer if it has otherwise acquired through any agreement any such rights.

7.4 How can the bidder get 100% control?

Takeovers. There is no specific procedure whereby the bidder is entitled to gain control and all the shares would have to be bought from the target's shareholders. Per the Listing Agreement, a listed company is required to maintain a certain level of public shareholding in order to remain listed. For acquiring 100% of the share capital of the target, the acquirer needs to resort to de-listing of the target company. For de-listing a listed company, the target and the acquirer have to comply with the provisions of the De-Listing Guidelines issued by SEBI.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

Takeovers. There is no specific obligation envisaged in the

Takeover Code in this respect.

8.2 What can the target do to resist change of control?

Takeovers. The board of directors of the target can send their unbiased opinion and recommendation to the shareholders. The restrictions as pointed out in question 6.3 would not apply if the approval of the general body of shareholders is obtained. The target would also be entitled to solicit competing bids from third parties as there is no restriction in that regard.

8.3 Is it a fair fight?

Takeovers. There is implicitly largely in the Takeover Code a level playing field for a preferred bidder and a hostile bidder. However, if the bidder is an overseas entity, the bidder will be in a slightly disadvantaged position in a hostile takeover situation, as the overseas bidder would require approval of the FIPB for acquiring the shares of the target company and the acquirer needs to provide a copy of the consent of the target company in support of the overseas bidder's application to FIPB for its approval. While the target board is entitled to air its views to the shareholders over the merits and demerits of an offer, it is ultimately the shareholders that have the final say. The Takeover Code does, however, lean in favour of a preferred bidder in the case of acquisitions pursuant to the disinvestment of a public sector undertaking owned either by the Central Government or the State Government.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

As shareholders have the final say, it is the ability to convince the shareholders of the target, whether the shareholder should sell out or continue to show confidence in the existing management of the target, as it stands prior to any such acquisition. If the acquirer is able to reach an agreement with major shareholders to acquire their shareholdings, prior to triggering the obligation for making an open offer, that would have a positive impact on success of the acquisition bid.

9.2 What happens if it fails?

In the case of an unconditional offer, the acquirer would be required to purchase all the shares tendered for acceptance, even if it is below the acquirer's expectations. However, if the offer is conditional upon a minimum level of acceptances, the acquirer would be required to purchase the shares tendered for acceptance only if the minimum level of acceptance has been reached.

10 Updates

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in India.

The Competition (Amendment) Act, 2007, has mandated pre-merger clearances from the Competition Commission of India to ascertain whether a 'combination' has an appreciable adverse effect on competition within India. The said provisions are yet to be fully operational, but once in force, would present a whole new dimension to the merger process in India.

It is also learnt from media reports that the Ministry of Corporate Affairs proposes to introduce two new fast-track merger routes i.e. (i) contractual mergers (that would take effect by virtue of a contract and merely require the approval of shareholders); and (ii) a simplified approval system for mergers between group companies and unrelated private companies where the public interest involved is minimal.

The Supreme Court in the case of *GL.Sultania v. Securities and Exchange Board of India*, (2007) 5 SCC 133, has held that when a public offer under the Takeover Code is challenged on the ground that the valuation has not been done properly, the Court must examine whether the provisions of the Takeover Code with respect to the prescribed method have been scrupulously complied with. However, it has been held that the share valuation, being a question of fact and involving technical and complex issues, is better left to the wisdom of experts and that interference would be warranted only when it can be shown that valuation was made on a fundamentally erroneous basis or that a patent mistake has been committed.

Generally, stamp duty is payable on the order of a High Court sanctioning a scheme or arrangement under Section 394 of the Companies Act, only if there is clear entry to that effect in the schedule of rates brought out by each state for the same. However, there has been a difference of opinion in the Division Bench of the Uttar Pradesh High Court in the case of *Hero Motors Ltd. v. State of UP - Writ Petition No. 41811 of 2006* dated April 6, 2007 that even de hors such an entry stamp duty would be payable on all the assets transferred under the scheme, as a conveyance. The matter has been referred for the decision of a third judge.

**Premnath Rai**

Premnath Rai Associates
W-126, Greater Kailash - II
New Delhi - 110 048
India

Tel: +9111 4067 6767
Fax: +9111 4067 6768
Email: prem@raiassociates.com
URL: www.raiassociates.com

Premnath Rai is a founder member of Premnath Rai Associates, which focuses its practice in the areas of corporate, commercial and business laws. He has advised Indian and foreign clients on a variety of transactions involving mergers, acquisitions, takeovers, corporate restructuring, joint ventures and strategic alliances. Prior to moving to taking up private practice, he served as general counsel of Indian subsidiary of a leading international IT major. He is a graduate in Commerce (University of Mysore), Law (University of Bangalore) and a Fellow Member of the Institute of Company Secretaries of India. He has presented papers in national and international programmes and conferences and contributed articles to international publications.

**P. Srinivasan**

Premnath Rai Associates
W-126, Greater Kailash - II
New Delhi - 110 048
India

Phone: +9111 4067 6767
Fax: +9111 4067 6768
Email: srini@raiassociates.com
URL: www.raiassociates.com

P. Srinivasan is a senior associate in Premnath Rai Associates (PRA), a New Delhi based law firm that focuses on corporate and commercial laws. In addition to being a lawyer, he is qualified in the areas of cost accounting, company secretarial and finance. He is one of the initial members in PRA. Before joining the firm, he worked in the financial services sector in a leading non-banking financial services company and as a senior associate with another Delhi based law firm. He is primarily involved with and advises clients in areas of corporate restructuring, competition and domestic & international trade laws including anti-dumping investigations, apart from general corporate and legal issues. He also advises industry specific clients in sectors such as information technology, insurance & financial services, biotechnology & healthcare and not-for-profit organisations, apart from traditional manufacturing and services companies. He has written articles on mergers & acquisitions and has attended conferences and seminars on corporate restructuring, international tax and capital markets.

Premnath Rai Associates

Premnath Rai Associates (PRA) is a corporate and commercial law firm that focuses its practice in providing quality and solution oriented services. With the diverse knowledge, qualification and experience of members of the PRA team, PRA constantly endeavours to implement the concept of solution oriented legal practice. PRA has a blend of Indian and international clients, commercial and not-for-profit organisations. As part of discharging its professional and societal responsibility, PRA renders pro-bono services. With its offices in New Delhi and Bangalore, India, and a network of professional associates in other major cities in India and abroad, PRA is well equipped to service its clientele and cater to their needs. Members of PRA team devote part of their time and efforts to specific focused areas of practice and actively participate in professional, industry and academic activities.

PRA focuses its practice in its specialised domain of corporate and commercial laws including dispute resolution and litigation. PRA serves a wide range of client needs in Practice Horizontals and Practice Verticals.

In Practice Horizontals, PRA has strong presence in the areas of in-bound and out-bound Investments, mergers and acquisitions, joint ventures and collaborations, corporate and business structuring & restructuring, capital raising, legal due diligence, legal and regulatory audit, securities law, employment laws, corporate litigation and arbitration.

In Practice Verticals, PRA has strong presence in life and general insurance, information technology (IT) and IT Enabled Services, healthcare and hospitality, financial services, food and confectionery, biotech and pharmaceutical, in addition to advising clients in various other sectors and projects.

Delhi Office
W-126, Ground Floor,
Greater Kailash - II,
New Delhi-110 048 India
Tel: (91-11) 4067 6767
Fax: (91-11) 4067 6768
Email: prem@raiassociates.com

Bangalore Office
54/1, 2nd Main
Vyalikaval
Bangalore-560 003 India
Tel:(91-80) 2334 2414, 4113 7814
Fax: (91-80) 2334 2415
Email: dr@raiassociates.com