

IBA –M&A Conference

Public Company M&A –Contractual Positions and Legal Enforcement

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Outline

- ▮ Uncertainty in Financing and Impact on Public M&A
- ▮ Regulatory Conditions - Recent Trends and Practical Implications
- ▮ Contractual Conditions as Protection from Uncertainty
 - Material adverse change
 - Due diligence conditions
 - Take private conditions
- ▮ Fiduciary Outs, Break Fees & Exclusivity
- ▮ Practical Implications for Public M&A
- ▮ Other Risks & Mitigants

Uncertainties in Financing & Impact

- ▮ Key factors causing uncertainty
- ▮ Practical implications for public M&A
 - Availability of financing and activity levels
 - Contractual implications & feasibility of financing conditions
 - Regulatory requirements for certainty of funds/cash confirmation rules in different jurisdictions
 - Buy side asks and sell side protections
 - Structuring impact
 - Non cash deals
 - Schemes
 - Business/asset deals

Regulatory Conditions and Impact on Public M&A

- ▮ Scrutiny trends of various regulators across jurisdictions and impact on timelines / deal approaches being witnessed
 - Antitrust
 - Public market regulators
 - Direct v. indirect open offers
 - Foreign investment considerations e.g., screening frameworks, FDI limits
- ▮ Approach to antitrust conditions in contracts
 - Hell or highwater clauses –recent trends and standards
 - Standstill provisions & gun jumping
- ▮ Special considerations for tech M&A

Business and Contractual Conditions

- ▮ Material Adverse Change
 - Evolution of the MAC clause and standard carveouts – comparison across jurisdictions
 - Objective v. subjective MAC
 - Carveouts
 - MAC outs – approach of securities market regulators
 - Ability to invoke
- ▮ Due diligence conditions and price adjustments -- how can they be addressed
- ▮ Regulatory approach to interim operating covenants – comparison across jurisdictions
- ▮ Take private conditions
 - Feasibility in India, recent regulatory changes and risk mitigation
 - Comparison with other jurisdictions

Fiduciary Outs, Break Fees & Exclusivity

- ⌌ Revlon rule and duties of directors
 - Applicability across jurisdictions
 - Practical measures to mitigate risk
- ⌌ Fiduciary outs
 - Prevalence and scope
- ⌌ Exclusivity in public market deals
 - Competing offers

Fiduciary Outs, Break Fees & Exclusivity

▮ Break fees

- Prevalence, caps, quantum and other considerations
- Regulatory permissibility

▮ International learnings

- UK - General prohibition on deal protection measures
 - Limited exceptions
 - Reverse break fees are permissible but subject to certain conditions
- Other jurisdictions
 - Position is mixed

Other Risks & Mitigants

- ▮ Buy in of key stakeholders in advance?
 - Regulatory permissibility
 - Insider trading concerns
 - Information asymmetry
 - Comparison across jurisdictions
- ▮ Role of activism and proxy advisory firms

Questions and Answers



Thank you

