#### **IBA** —**M&A** Conference

#### Public Company M&A —Contractual Positions and Legal Enforcement

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**April 24, 2023** 

Mumbai















### **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















Private & Confidential 2

### **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















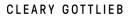
#### **Business and Contractual Conditions**

- ¬ 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













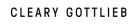


# **Questions and Answers**























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