BREAK-FEE CLAUSE IN MERGER AND ACQUISITION AGREEMENTS: AN OVERVIEW

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ABSTRACT

India has experienced a significant increase in the demand for merger and acquisition activity over the past several decades, as well as for the relevant rules and regulations to control it. According to professionals, these merger and acquisition operations have a significant influence on shareholder interests and, as a result, the whole economic system. In general, these have a great chance to promote and push economic efficiency by permitting interesting improvements in business management and allowing businesses to combine or merge. In addition to helping the affected firm become more cost-effective, a merger or acquisition transaction may promote trade rationalisation, to the benefit of the economy as a whole. This may enable the incorporated firm to achieve gains due to the absence of duplication of expenditures on research and development, redundant production, and various other harmful factors to growth. Currently, these transactions, when completed at the right moment, have the potential to increase shareholder value in addition to providing benefits to society and private parties on top of that. It is exciting that the law may offer a dependable method for determining the legal propriety of activities that could either help or obstruct these transactions.

While the effects of the Pandemic are still being felt in the financial sector, parties are being extra cautious when it comes to M&A Transactions. Therefore, it is essential that actions be done to boost the agreements' level of certainty. A "break fee" is a sum of money that the firm seeking acquisition must pay to potential bidders in the event that certain predetermined and agreed-upon circumstances happen between the signing and closing of the contract that prevent the transaction from going through. Understanding how Break Fee is implemented into M&A deals is important when discussing this area of the law. The paper examines the reasonability test used in the United States as a measuring device because there are no systems in place to control the monetary value of the break fee provision. In order to gain inspiration or ideas for governing such a part of merger and acquisition

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transactions, this paper discusses how and why break fee agreements are used, how their implementation in other countries is carried out, how India is dealing with it in the current scenario, and what else has occurred in India to date. In light of M&A deals in India, it aims to assess the law supporting the "break fee" provision and compare how it is used in other comparable countries

INTRODUCTION

M&A agreements must be thorough and include provisions for the event if the acquisition fails. Given the amount of M&A transactions in India, which is constantly increasing, it is vital to examine the terms that account for the potential of a bad deal.

A break fee clause will promote competition among prospective purchasers, which is advantageous for businesses looking to be bought by other businesses. Potential purchasers would be eager to invest more in such deals if they were assured that they would receive compensation for any additional costs incurred over the course of the transaction.

It may have unanticipated repercussions for the parties involved when a company is poised to combine in some way and the deal is confirmed but not yet completed. As a result, parties increasingly believe that it is safer to engage into a sealed agreement that forbids one party from "walking away" without consequence and leaves the other side to pick up the pieces of a failed deal, particularly when they have committed substantial fees and costs.

Imagine that after careful consideration, Company A offers to buy Company B, and the two parties enter into a contract with mutual intentions, however, acquisitions, especially for publicly traded companies, do not go into effect steadily. Regulators may have found difficulties that cannot be addressed, or Company B may just be searching for better offers. The efforts made by Company A in such circumstances could be useless.

Break fee provisions are therefore added to induce an acquirer to submit a bid and to make up for any losses it might incur if the deal is unsuccessful. Another requirement of sellers is reverse break fee clauses, which pay the seller back if the acquirer is unable to complete the transaction. Break fee and reverse break charge are deal protection techniques. Deal protection is a clause in a contract relating to an M&A transaction involving a target public company that offers benefits to the bidder in the event that the deal is not completed as planned owing to certain circumstances. The purpose of this research is to analyse break fee provisions and related trends in certain other securities markets.

If the intended deal is not completed, the seller will pay the buyer a break fee (also known as a termination charge or break-up cost)[2]. A break fee clause's purpose is to reimburse the bidder for their out-of-pocket costs.

A "Break Fee" Agreement is a type of agreement that occurs between the target firm of the deal and the prospective buyer or acquirer of the said company in Merger and Acquisition Transactions. When the potential acquirer's offer cannot be possibly carried forward for any reason, the target firm agrees to pay any fees to the potential acquirer under the terms of the "Break Fee" agreement[3]. These Agreements are typically regarded as useful tools for contract protection. But different governments with differing methodologies manage and regulate the amount of these agreements. Many other industrialised nations, including the United States, the United Kingdom, Australia, Hong Kong, and many more, have well-established systems controlling the rule and regulation of break fee agreements. The majority of these nations follow the UK's de minimis limit;[4] a "de minimis" limit is the standard percentage value of transaction value against which all break fees are adjudged.

The two most important factors for the promotion and expansion of merger and acquisition agreements in India are the creation of good government policies and economic stability. Rationalization is encouraged via M&A, which eventually benefits the economy and raises shareholder value.

Despite the lack of any written laws defining the rules and regulations dictating how Break Fee Agreements operate, the idea of Break Fee Agreements has been entrenched in Indian law. This is valid even if the word "Break-up fee" is not specifically included in the Companies Act of 2013 or any other rules that are applicable in India to control the Companies. When this happens, more powerful higher bodies like SEBI step in to help resolve the issue, fill in any loopholes in Indian law and offer support as necessary.

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[2]Venture Assocs. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 278 (7th Cir. 1996)

[3] Break Fees and Broken M&A Deals Posted by Oliver E. Browne, Latham & Watkins LLP, on Wednesday, November 15, 2017, https://corpgov.law.harvard.edu/2017/11/15/break-fees-and-broken-ma-deals/, Accessed on 17 November, 2022

[4] BREAK FEES UPDATE: PUSHING THE 1% GUIDELINE AND THE RETURN OF THE NAKED NO VOTE 29 July 2014 | Australia, Brisbane, Melbourne, Perth, Sydney Legal Briefings – By Andrew Rich https://www.herbertsmithfreehills.com/latest-thinking/break-fees-update-pushing-the-1-guideline-and-the-return-of-the-naked-no-vote, Accessed on 06 February, 2023

Sample Break-Fee Clause:

"In the event that this Agreement is terminated, except by mutual agreement or as contemplated by the agreement herein, then party shall pay, within twenty (20) business days following the date of termination, the sum of 5,00,000 (the "Break Fee").

How Do Break Fees Clause Operate?

In merger and acquisition deals, a break fee is thought of as a negotiating point that is constantly there. It may be helpful in encouraging the target firm to complete and implement a deal and offers a guarantee of financial recompense to the target company's acquirer in the event that such a deal is not performed. Based on an evaluation of the expenses related to completing due diligence and the period of time required by acquiring businesses to examine and negotiate the terms of the merger and acquisition, the total amount of compensation set forth in the Agreement was calculated. A Break Fee Agreement shall become effective in the event of a breach of a no-shop provision or in the event the Target Firm accepts another offer from a party to the Agreement. In a form called Form S-4[5], which was created by the United States Securities and Exchange Commission (SEC), break fees were first extensively disclosed. Break fees agreements are another type of contract that may be used in commercial transactions to deal with non-performance and compensate a party in the event that it truly occurs.

A Break Fee Agreement may be viewed as a termination provision in some derivatives contracts, outlining the steps that must be followed to protect one of the counterparties in the event that the other counterparty defaults, cancels the contract early, or breaches the contract's terms and conditions. This often includes, but is not limited to, any type of reimbursement for the losses to the affected counterparty. In the event of an early termination, both parties will be released from their obligations under the contract, and the party that caused the early termination will be liable for any payments that were previously agreed upon. In light of the current situation, the parties to the contracts are now being more careful when it comes to any merger and acquisition-related activity. As a result, some actions must be conducted since they are urgently required.

Break Fee is a frequent contract protection strategy in the West. However, it is not yet as widespread in India. But there are now excellent odds that it will be used in M&A deals in India. Numerous examples demonstrate that these gadgets should be given more recognition in India, especially in light of the worldwide pandemic conditions. As it ensures a fair amount that the

[5] FORM S-4 REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 https://www.sec.gov/files/forms-4.pdf

target company's management will be required to pay to the company making the offer for any already agreed-upon or contractually stipulated terms and conditions based on potential events that could occur before the Agreement is fully executed and ultimately result in the contract's failure to be completed. For most businesses, an M&A transaction is not a typical transaction. In reality, it is a once-in-a-lifetime opportunity for many businesses.

It is, therefore, understandable that the parties involved (especially their senior management) invest a sizable amount of time, effort, and money into any M&A transaction, from conceptualization to execution of the term sheet, completion of the due diligence exercise and execution of the acquisition agreement, fulfilment of the prerequisites outlined in the acquisition agreement, to closing. Unintended consequences for the parties may result from an agreement that has been made public but has not yet been finalized.

Given the aforementioned, it makes sense that participants would want a binding contract that forbids parties from "walking out" with impunity and leaving the other party high and dry after devoting a lot of time and money into it. To safeguard this interest, the concepts of a break charge and a reverse break fee become more pertinent. The possibility of paying a significant termination fee can keep the parties on their toes and ensure that the terms of the contract are upheld.

Use of Break Fee clause in M&A transactional Agreements

A Break Fee agreement functions as a tool to encourage competition among bids or potential purchasers for target firms that are prepared to be purchased or combined. It gives the prospective buyers the assurance that they will be compensated for any expenses paid before the deal is finalised. It would encourage buyers and bidders to invest more in analyses of the target business and submit stronger offers for the M&A transaction. Because of the Break Fee Agreement, prospective purchasers are now certain that they will get fair compensation for their efforts, increasing the number of prospective purchasers who will work on the offer and giving the target firm greater alternatives. Break fees, on the other hand, are regarded as deal protection tools that favour one bidder over another.[6] Although it has little effect on the target company's assets, it has the ability to completely eliminate the target company's yearly revenue. The target

[6]MERGER AGREEMENTS, TERMINATION FEES, AND THECONTRACT-CORPORATE TENSION, J UDD F. S NEIRSON, Assistant Professor, University of Oregon School of Law. B.A., Williams College; J.D., University of Pennsylvania, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/colb2002&section=19

firm would gradually become less appealing to successive bids as a result of this. As a result, a large compensation sum in a break fee agreement can help to reduce competition.

Since mergers and acquisitions are typically once-in-a-lifetime events for businesses, the threat of having to pay a sizable termination fee as compensation throughout the entire M&A-related transaction prevents the parties from engaging in unfair business practises and ensures that the contract's terms and conditions will be upheld.

For the benefit of target companies and investors, a break fee agreement might promote competition among the offers. By assuring prospective acquirers that they will be compensated for various expenses incurred prior to closing a transaction, a break fee would encourage bidders to invest in such evaluations and make higher offers (target identification and evaluation, due diligence fees, etc.). Prospective buyers are more likely to enter the race if they are confident they will be compensated for their efforts, creating competition and providing shareholders with more options. In this way, break fees aid M&A transactions.

Contrarily, break fees are tools for deal protection that always favour one bidder over the other. A break fee may completely eliminate the target's annual revenue, despite having little impact on the company's net asset base. Potential rival bids would therefore find the target less desirable. Therefore, a high break charge may aid in reducing competition. It's possible that a significant break charge will restrict shareholders' options. Coercion occurs when shareholders are forced to support business decisions that management supports. A vote is regarded as structurally coercive if the directors "have created a scenario where a vote may be understood to be in avoidance of a harm caused by the form of the transaction, rather than a free decision to accept or reject the proposition voted on."

When a high break fee amount guaranteed by the management is disclosed to the shareholders, they become aware of the exact cost to be borne if the merger is not completed. A proposal like that makes it difficult and expensive for the shareholder to vote no. A higher break fee, therefore, gives the company's management more power to influence votes.

Despite this effect, it is questionable whether a break fee arrangement is structurally coercive. In Brazen v. Bell Atlantic Corp.[7], the Delaware Supreme Court held that mere knowledge that voting against the merger would trigger the fee does not by itself constitute shareholder coercion. Additionally, the agreement would not be coercive because the shareholders would only vote against the merger in favour of a higher offer from another bidder. This justification might not

[7] Brazen v. Bell Atlantic Corporation, 695 A.2d 43 (1997)

be valid in the Indian context, however, given the minority shareholders who would continue to own shares of the company with lower value as a result of the break fee's activation.

When in M&A deals should a break fee be applied?

Each transaction is unique. Additionally, a lot will rely on the particulars of each transaction as well as the parties' negotiation positions. But some of the criteria that the purchaser should consider in order to have a claim for a break charge are "No-shop" and exclusivity limitations (which stop a vendor from receiving other offers): No customer would like to be a "stalking horse." Therefore, the buyer is in a good position to demand a break fee if the seller or target terminates the purchase agreement and decides to move on with a different buyer (in violation of the exclusivity agreement).

Some of the grounds on which the buyer should look to have a right to claim a break fee are;

1. Unable to get the target company's shareholders' approval.
2. Failure to satisfy important prerequisites
3. occurrence that takes place and causes a significant shift.
4. material breach of the seller's/target company's interim covenants and limitations.
5. material violation of the seller's and the target company's representations and warranties.[8]

The Break-Fee clauses protect the deal and have the power to guarantee that the parties uphold the terms of the agreement. The target firm would find it challenging to draw in prospective purchasers in the future if it were to breach the agreement and be forced to pay the break fee. When shareholders are compelled to accept the deals supported by management, this is coercion. When the directors "have created a scenario where a vote may be understood to be in avoidance of a harm caused by the form of the transaction rather than a free decision to accept or reject the proposition voted on," a vote is considered structurally coercive.

The shareholders learn the precise cost to be borne if the merger is not completed when a high break fee amount guaranteed by the management is communicated to the shareholders. Such a proposal makes it impossible and expensive for the shareholder to vote against it. As a result, a greater break fee gives the company's management more leverage to sway votes.

[8] Mergers And Acquisitions Acquisitions: The Process Can Be a Problem by David B. Jemison and Sim B. Sitkin, Harvard Business Review Home https://hbr.org/1986/03/acquisitions-the-process-can-be-a-problem, Accessed on 20 November, 2022

Regardless of this impact, it is debatable whether a break fee agreement constitutes structural coercion. In Brazen v. Bell Atlantic Corp.,[9] the Delaware Supreme Court ruled that mere awareness of the consequences of voting against the merger did not, by itself, amount to shareholder coercion. Additionally, the agreement wouldn't be coercive because the shareholders would only vote against the merger and in favour of a higher offer from another bidder. However, given the minority shareholders who would continue to own shares of the firm with lower value as a result of the activation of the break fee in the Indian scenario, this justification might not be relevant.

Scope of Reasonability Test

In an M&A transaction the break fee clauses are mainly governed by the contractual terms. However, certain of these terms are scrutinised by the courts, the fee specified in the agreement must pass the "reasonability test." If the court determines that the fees are excessively high, it has the authority to reject them.

The Delaware court's "reasonability test" is unquestionably a good starting point for publicly listed corporations looking to add break fee clauses in their contracts while avoiding ambiguity. Additionally, the Delaware courts offer some legal advice on the Board of Directors' defence tactics (Board). In the well-known case of Revlon Inc. v. Macandrews & Forbes Holdings[10], the court determined that the defensive tactics employed by the Board to combat unfavourable bidders must be "fair," with the objective of stimulating rather than restricting competition.

According to a subsequent decision in Unitrin, Inc. et al v. American General Corp[11], the Board's defensive response in the discharge of its fiduciary duties cannot be preclusive or coercive. As a result, a break fee, a common defensive tactic, must function as an incentive to one bidder without putting pressure on the shareholders or deterring other proposals.

This idea was put to the test in the Delaware Court of Chancery decision on break fees in Re Comverge, Inc[12]. The termination fee and reimbursement expenses in the aforementioned scenario would equal 5.55% and 7% of the deal value, respectively, if the company entered into a superior transaction before or after the go-shop period.

[9] Brazen v. Bell Atlantic Corporation, 695 A.2d 43 (1997)
[10]Revon, Inc. v. MacAndrws&FobesHoldigs., 56 A.2d 13 (Del. 1986)
[11] Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (1995)
[12] Re Comverge, Inc., C.A. No. 7368-VCP

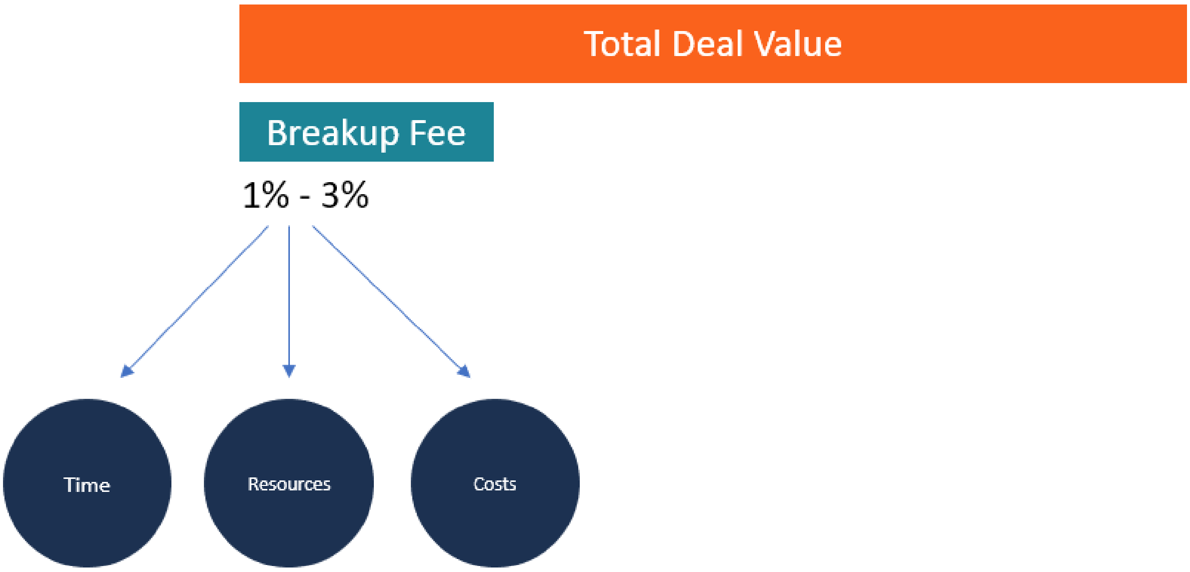
These percentages pushed the boundaries of what this court has previously judged fair (3-4% of transaction value). Furthermore, the acquirer's notes conversion privilege, worth USD 3 million, might be seen as a break fee by potential bidders. As a result, the court assessed whether the break fee of 11.6% (during the go-shop time) and 13.1% (after the go-shop period) of the contract value may have had an excessively preclusive impact on possible bidders. The directors who had accepted such a potentially preclusive arrangement was held in violation of their fiduciary obligations were also held accountable by the court for acting in bad faith.

The break fee and reverse break charge amounts

Given the absence of standardisation and consistency in the application of these deal protection tools, there is no amount that can be referred to as standard, particularly in the Indian context. A range of 1% to 3% of the contract consideration might be referred to as the typical ballpark figure, if one were to take inspiration from more developed countries where these notions are applied more regularly.

Additionally, the parties may use a two-tier break charge and reverse break fee system. In this case, a smaller break fee can be due in the event of an unforeseen circumstance beyond the parties' control. For instance, even though the application party took all the necessary measures to get such permission, the regulatory consent that was crucial to the conclusion of the transaction was rejected. In contrast, if a party wilfully violates the purchase agreement's provisions, a larger break fee can be due. For instance, if it violates the "exclusivity" or "no shop" clauses.

Before proposing and deciding on the break charge and reverse break fee amount, parties would be wise to consider all pertinent considerations. These are only general indicators. These factors include total deal consideration, enterprise value, reasons of breach (such as intentional vs accidental violation), financial capacity of the parties, negotiating strength of the parties, the "hotness" of the target firm, and the importance of the transaction. Parties must also decide on a sum that is sufficient as deterrence but does not take on a punitive character.



How the US Handles Break Fees

The distributed structure of US ownership is one of its distinguishing characteristics. This feature allows the board and management to serve as the shareholders' agents and gives them the authority to make choices that affect how an offer will be received. They have responsibilities to the shareholders and must consider the company's best interests while making these choices. The management's use of these authorities has been particularly encouraged by the Delaware jurisdiction. In this way, more regulation has also been produced[13].

Because ownership is frequently concentrated and not diffused in other countries, the varied criteria of review in the US should not be easily applied other jurisdictions (e.g., the jurisdictions of India, Japan, Korea, Singapore, and China). These jurisdictions have embraced the UK-originating principle of board neutrality. According to the Board Neutrality Rule, the shareholders, not the management, are the ones who ultimately decide whether to accept an offer. Once an offer is made, the management has very little to no flexibility to participate into deal protection mechanisms. The management may only take such action with the shareholders' prior consent. In these jurisdictions, a judgement rule that is based on management's autonomy and authority to make decisions without shareholder consent would be very illogical.

How Break Fee is Handled in the UK and Most Asian Countries

In support of its board neutrality guideline, the UK establishes a de minimis threshold for break fees. The standard proportion of transaction value (1% in the case of the UK) used to determine

[13] Julian Velasco, The Fundamental Rights of the Shareholder, 40 U.C. Davis L. Rev. 407 (2006-2007). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/311

all break fees is known as a de minimis limit. De minimis limitations are currently considered the norm in jurisdictions such as Australia, Hong Kong, etc., outside the UK.

De minimis restrictions, however, have several problems. They prioritise rigidity and predictability above flexibility, to start. Although certainty makes a market more predictable, flexibility enables managers to tailor the fee to the particular challenges their firms confront. Second, the quantitative criteria of a de minimis restriction would not be the best way to discern between and determine the legality of such an agreement given the dual nature of break fees as both inductive and anti-competitive.

These issues have been brought up in many jurisdictions. According to the Australian Business Community, given the different unique situations an organisation can encounter, a target might need to exceed a de minimis level[14]. It was determined that a similar justification existed for the US not employing a de minimis restriction. In re IXC Communications, Inc. Shareholders Litigation[15], the Delaware Chancery Court found that a break fee arrangement must be determined by examination of the entirety of the agreement and the terms of discussion that led to it.

Compliance in Asia

De minimis limitations should not be exported to Asia since doing so would defeat the objective of their introduction in the UK. The more comprehensive Board Neutrality regulation includes the de minimis cap. The UK's scattered shareholding setting is where this regulation was first adopted. It makes sense in this situation to transfer decision-making authority from boards to shareholders because of agency issues between management and minority shareholders. This regulation raises issues between the dominant owners and the minority shareholders in the Asian environment, where shareholding is concentrated. The managers and the controlling shareholders are the same interest group in jurisdictions with concentrated shareholding, and these shareholders exert influence on the managers. This interest group, it may be said, opposes the desires of minority shareholders.

As a result, the board neutrality rule, which was implemented in the UK to safeguard shareholders, has the unintended consequence of further entrenching the decision-making authority of the dominant shareholders at the expense of minority owners.

[14] Break Fee Agreements in M&A: Regulatory Challenges, https://cbcl.nliu.ac.in/mergers-acquisitions/break-fee-agreements-in-ma-regulatory-challenges/, Accessed on 06 February, 2023

[15] re IXC Communications, Inc. Shareholders Litigation, C.A. No. 17324, 17334

Indian Break Fee Agreement Regulations

There is no legislation in India that specifies the maximum amount of a break charge that is acceptable, nor have the courts had a chance to establish the law regarding such a cost. However, despite appearing to be a grey area, businesses have continued to include such terms in their contracts. In actuality, they play a significant role in major agreements. According to reports, one of the reasons the merger talks between Swiggy and UberEats fell apart was because the parties could not come to an agreement on the break fee[16]. The break fee and reverse break fee associated with Apollo Tyres Ltd.'s attempted acquisition of the US-based Cooper Tire and Rubber Co. were $50 million and $112.5 million, respectively[17].

India strictly adheres to the "board neutrality rule" or "no frustration rule" when it comes to defensive strategies. This provision gives the shareholders the exclusive authority to make decisions, rendering the target's Board helpless in the event of a hostile takeover offer. However, Section 166(2)[18] of the Companies Act 2013 mandates that directors have a fiduciary obligation to the company's stakeholders. In this position, directors may add break fee provisions to the purchase contract in order to persuade the white knight (a dependable investor) to offer a greater price. However, by encouraging the shareholders to accept the white knight offer, this charge shouldn't inadvertently deprive them of their ability to make decisions. To decide whether a break fee is legal, a compromise must be made between the "board neutrality rule" and a director's fiduciary obligations.

According to the terms of the agreement and the kinds of businesses engaged, break fee clauses may also be treated differently. The Indian Contract Act of 1872 would apply in the instance of a transaction between private entities since the agreement is contractual (Contract Act). Section 74 of the India Contract Act[19] is invoked because a break fee is only due when a contract is basically "breached." This clause gives the courts the authority to award a justifiable settlement that will be decided on the basis of the specific facts of the case.

When listed businesses incorporate break fee provisions in their purchase agreements, additional challenges arise. By filing a Draft Letter of Offer (DLOF), such agreements would be brought to

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[16] Swiggy, UberEats can't tally numbers for a deal https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/swiggy-ubereats-cant-tally-numbers-for-a-deal/articleshow/68731884.cms?from=mdr

[17] Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd. Civil Action No. 8980-VCG

[18] "A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."

[19] Compensation for breach of contract where penalty stipulated for.

the Securities and Exchange Board of India's (SEBI) attention. Given the remarks made on the DLOF, it is therefore quite plausible for the market regulator to reject such a charge on the grounds that it is too high and has no reasonable connection to the transaction. Furthermore, in accordance with Section 67 of the Companies Act, 2013, an excessively large break charge may also be considered "financial aid." Any public corporation that provides financial aid in connection with the acquisition of shares is prohibited under this clause. Further the High Court of England and Wales also concluded that the break fee did constitute financial aid since it facilitated the acquisition of the shares in Paros Plc v. Worldlink Group Plc[20], a case involving Section 151 of the English Companies Act 1985[21], which is similar to the section 67 of the Companies Act, 2013. It is very possible that more M&A participants will utilise all of the tools at their disposal to minimise risks and increase transaction certainty as the Indian business landscape continues to develop and incorporate best practises from across the world.

Thus, in future Indian M&A negotiations, the notions of the break charge and the reverse break fee are anticipated to become increasingly important.

Court Decisions Regarding Break Fee Agreements

1. Apollo-Cooper Agreement[22]

Cooper Tire & Rubber Co. lost a plea for a $112 million breakup fee when a court agreed with India-based competitor Apollo Tyres Ltd., which claimed that the US tire maker's $2.5 billion sale was doomed due to a failure to honour conditions of a buyout agreement. Labour unrest in the United States, as well as resistance to the purchase by Cooper's Chinese joint-venture partner, caused the findlay, Ohio-based tyre business to breach the sale contract, preventing it from closing the deal and according to Delaware Chancery Court Judge Sam Glasscock III, Cooper did not meet the closing requirements of the contract, and it was "a huge impediment" to completing the purchase conditions since the business owns Chinese subsidiary Chengshan Cooper Tires, took control of its facilities after the merger announcement and refused to produce financial documents.

2. Microsoft purchasing LinkedIn[23]

[20] Paros Plc v Worldlink Group Plc [2012] EWHC 394 (Comm)

[21] Section 151 of the English Companies Act 1985 Financial assistance generally prohibited.

[22] APOLLO TYRES B.V., APOLLO ACQUISITION CORP. and COOPER TIRE & RUBBER COMPANY dated as of June 12, 2013, https://www.sec.gov/Archives/edgar/data/24491/000119312513256252/d555217dex21.htm, Accessed on 17 November, 2022

2016 saw the beginning of discussions between Microsoft and LinkedIn about LinkedIn's non-heritability by Microsoft. A "no search clause" was included in each party's agreement. And just in case during the discussions LinkedIn invited a third party emptor, it is required to pay Microsoft a $725 million break-up fee. Salesforce, Microsoft's main rival, submitted an ambitious unsolicited proposal to LinkedIn. If LinkedIn even slightly accepted the Sales force offer, it would be in a position to pay Microsoft a $725 million break-up fee.

3. Failure of AT&T to acquire T-Mobile USA[24]

The US Department of Justice and the US telecom regulator rejected the planned merger of AT&T and T-Mobile USA in 2011. Deutsche Telkom was paid a breakup fee by AT&T since the two parties initially consented to a breakdown fee clause. The payment consisted of $3 billion in cash, $1 billion to $3 billion in wireless spectrum, and a long-term agreement allowing T-Mobile USA to use UMTS roaming inside the US.

Suggestions

The Break Fee Clause, which requires each party to compensate the other for any expenses incurred by that party in the event that the collective action is unsuccessful, is drafted into the contract in the most straightforward manner feasible. To avoid unforeseen fees, the parties should be cautious when drafting a break-up fee provision and carefully assess whether a certain group action is legally authorised. However, it does not seem like firms are being discouraged from creating such partnerships by the absence of restrictions surrounding break costs. Break Fee Agreements must be appropriately addressed by the Indian law-making body because they serve only to encourage and support merger and acquisition activity in the Indian market. SEBI may think about declaring and adopting several key precautions since they might provide additional support, flexibility, and a solid foundation for the regulation of merger and acquisition-related activities. It is very possible that more M&A participants will utilise all of the tools at their disposal to minimise risks and increase transaction certainty as the Indian business landscape continues to develop and incorporate best practises from across the world. Therefore, the break fee notion is probably going to become increasingly important in future Indian M&A agreements.

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[23] 4 Reasons Microsoft Wasted $26.2 Billion To Buy LinkedIn Peter Cohan, https://www.forbes.com/sites/petercohan/2016/06/13/4-reasons-microsoft-wasted-26-2-billion-to-buy-linkedin/?sh=70188fe2a3cd, Accessed on 17 November, 2022

[24] AT&T's dead T-Mobile takeover: from beginning to end By VERGE STAFF 29 updates since Apr 22, 2011, https://www.theverge.com/2011/11/24/2584574/att-t-mobile-acquisition, Accessed on 19 November, 2022

CONCLUSION

Break Fee provision is written in such a way within the contract that either one or all of the parties to the contract must pay to the other party all of the expenditures that the opposite party has spent in the event that the group action does not become in. Due diligence should be exercised by the parties when drafting a break-up fee clause to avoid unnecessary expenses, and parties should rigorously analyse whether or not a specific group action is lawfully allowable, whereas a lack of regulation of Break Fee does not appear to discourage corporations from coming together with such devices. It would be wise to establish some standards for publicly traded firms who want to include break fee provisions in their contracts in order to avoid any potential confusion. The Delaware courts' "range of reasonableness" approach is unquestionably a smart place to start.

According to the research and other available literature, there appear to be issues with both theoretical and actual regulatory approaches for putting break fee provisions into practise. They can be employed more frequently as a lure and a tool of defence, reducing the frustration of ambiguity when they are present. There is no sum that can be regarded as regular, which furthers the lack of consistency and standardisation in the application of such provisions in India. The predicted "break charge" will range between 1% and 3% of the contract valuation, taking cues from previous regimes where these phrases are more often utilised. It would be wise to set down explicit rules for publicly listed corporations looking to add break fee provisions in their contracts in order to eliminate any uncertainty. The "reasonability test" used by the Delaware court is unquestionably a good starting point. Incorporating rules that would assist to control such terms in M&A deals is another option SEBI might take into account.