Aviation Corporate Laws
Mergers, Acquisitions & Joint ventures in India

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SCOPE OF SESSION

- ❖Introduction;
- ❖Understanding the definitions of mergers, acquisitions and joint ventures;
- ❖Law governing mergers, acquisitions and joint ventures in Aviation Law.
- ❖Regulatory framework
- ❖Recent mergers and acquisitions

Introduction

❖ Airline mergers and acquisitions have become highly popular across the globe as it is highly strategic in nature and are executed in order to achieve the following:

1. Financial performance efficiency,;
2. Profitability;
3. Cost reductions;
4. Increased revenues and capital market standards

Understanding the definitions of mergers acquisitions and joint ventures;

- **Merger:** It can be defined as an activity wherein corporations come together in order to **combine and share their resources to achieve common objectives**. In a merger, both firms combine to form a third entity and the owners of both the combining firms remain as joint owners of the new entity.

- **Amalgamation:** It is a situation where two or more Companies come together to form new company or entity. Amalgamation is distinct from a **merger** because neither company involved survives as a legal entity. Instead, a completely new entity is formed to house the combined assets and liabilities of both companies.

- **Acquisition:** An acquisition is a situation where a company takes a controlling ownership interest in another firm, a legal subsidiary of another firm, or selected assets of another firm.

- **Joint Venture:** It is situation where two or more airline sector come together for strategic reasons to improve their respective business prospects retaining their legal existences & operations.

Relevant Legislations/Laws

- ❖Companies Act, 2013 & Rules
- ❖Income Tax Act, 1961
- ❖Central Sale Tax Act, 1956
- ❖Indian Stamp Act, 1899
- ❖Competition Act,2002
- ❖SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1977
- ❖SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009
- ❖Foreign Exchange Management Act, 1999
- ❖The Aircraft Act, 1934
- ❖The Carriage by Air (Amendment) Act, 2009
- ❖The Air Corporations (Transfer of Undertakings and Repeal) Act, 1994
- ❖Such other laws which govern and regulate aviation sector

Principal Regulatory Authorities for Aviation Sector in India

There are principal regulatory authorities which function under the authority of the Ministry of Civil Aviation , Government of India **(“MCA”)** such as:

- The **Airport Authority of India** (in short **"AAI")**- creates, upgrades, maintains and manages civil aviation infrastructure both on the ground and in the air space in India;
- The **Directorate General of Civil Aviation(**herein referred to as **"DGCA")**- enforces the civil aviation regulations and regulates air transport services, air safety and airworthiness. The DGCA draws its authority **from Rule 3A of the Aircraft Rules, 1937** and provides that any power or duty conferred;
- The **Airport Economic Regulatory Authority** (herein referred to as **"AERA")**- determines tariff for aeronautical services and Passenger Services Fees to monitor the performance standards relating to quality, continuity and reliability of service; and
- The **Bureau of Civil Aviation Security** (herein referred to as **"BCAS"**)- which ensure the aviation security standards follow national and international obligations/ treaties on air safety, to which India is a signatory to.

Government regulators and agencies which play key roles in the process of merger and acquisition in India

- Registrar of Companies and Regional Director under Ministry of Corporate Affairs
- National Company Law Tribunal (NCLT)
- Competition Commission of India (CCI)
- Securities and Exchange Board of India (SEBI)
- Reserve Bank of India (RBI)
- The Income Tax Department (ITD)
- FEMA

Companies Act, 2013

- The Company Act, 2013- **Sections 230 to 240** of the Act covers the statutory provisions governing M&As including arrangements which are involve companies, their members and creditors. The procedural aspects are covered in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. With the implementation of the 2013 Act, the body for adjudging on M&A matters involving an arrangement shifted from the High Court to the National Company Law Tribunal and the National Company Law Appellate Tribunal.

- The Companies Act, 2013 allows merger of Indian Companies also into foreign companies and **Section 234 deals with such schemes of mergers and amalgamations between companies registered under the Act** and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government.

- As per the Act, a threshold beyond which a stakeholder can object to the scheme of arrangement has been prescribed which states that a proposed scheme can be objected only by shareholders having not less than 10% shareholding or creditors whose debt is not less than 5% of the total outstanding debt as per the last audited financial statement or the provisional financial statements which is not older than 6 months.

Companies Act, 2013 Contd

- No arrangement shall be sanctioned by the NCLT unless a certification from the statutory auditors has to be filed with the NCLT to effect the accounting treatment as proposed in the scheme of arrangement as prescribed under Section 133 of the Act. This is applicable in case of listed companies only.

- In a case of a Fast Track merger, the Act prescribe that the approval of the NCLT is not required but post the approval of the board of directors of the company notice would be sent to the ROC and official liquidator inviting objections/suggestions to scheme.

- The Act also makes it mandatory that notice of meeting to discuss the scheme of amalgamation/arrangement must be accompanied by valuation report. As per Section 247, it introduces the concept of 'registered valuers', where any valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities.

Income Tax Act, 1961

- The IT ACT, 1961 defines an Amalgamation as the merger of one or more companies with another company or the merger of two or more companies to form a new company. For the purpose of the ITA, the merging company is referred to as the "amalgamating company" and the company into which it merges or which is formed as the result of merger is referred to as the "amalgamated company". An Amalgamation must satisfy the following criteria:
- (a) All the properties and liabilities of the amalgamating company must become the properties and liabilities of the amalgamated company by virtue of the Amalgamation; and
- (b) Shareholders holding at least 3/4th in value of the shares in the amalgamating company (not including shares held by a nominee or a subsidiary of the amalgamated company) become shareholders of the amalgamated company by virtue of the Amalgamation.

Income Tax Act, 1961
Contd.

- **Section 47 of ITA specifically exempts the following transfers from liability to capital gains tax.**
- **(a) Transfer of capital assets by an amalgamating company to the amalgamated company if the amalgamated company is an Indian company.**
- **(b) Transfer of shares in an Indian company by an amalgamating foreign company to the amalgamated foreign company if both the criteria below are satisfied:**

  (i) At least 25% of the shareholders of the amalgamating company continue to remain shareholders of the amalgamated company. Hence, shareholders of amalgamating company holding 3/4th in value of shares who become shareholders of the amalgamated company must constitute at least 25% of the total number of shareholders of the amalgamated company.

  (ii) Such transfer does not attract capital gains tax in the amalgamating company's country of incorporation.

Income Tax Act, 1961 Contd.

(c)Transfer of shares in a foreign company in an amalgamation between two foreign companies, where such transfer results in an indirect transfer of Indian shares. The criteria to be satisfied to avail this exemption are the same as above.

(d) Transfer of shares by the shareholders of the amalgamating company in consideration for allotment of shares in amalgamated company is not regarded as transfer for capital gains purpose. This exemption is available if the amalgamated company is an Indian company.

For such shareholders, the cost of acquisition of shares of the amalgamated company will be deemed as the cost at which the shares of the amalgamating company were acquired by the shareholder

The Competition Act 2002

- **Sections 5 and 6 of the Competition Act require the mandatory pre-notification of all acquisitions, mergers and amalgamations that cross specified asset or turnover thresholds (collectively described as ‘combinations’)** to the Competition Commission of India (CCI), which is the enforcement agency.
- **The formation of a joint venture is not specifically covered by section 5 of the Competition Act,** as it only covers the acquisition of an ‘enterprise’ and mergers and amalgamations of ‘enterprises’.
- To prevent the merger control regime from becoming unduly onerous, the CCI introduced, **in Schedule I of the CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations 2011 (the Regulations),** categories of transactions that are ‘ordinarily’ not likely to cause an appreciable adverse effect on competition (AAEC) in the relevant market in India and, therefore, are not ‘normally’ required to be notified to the CCI.

The Competition Act 2002

- The CCI has up to 210 calendar days from the **date of notification to approve or prohibit a notified combination**.
- The 30-working-day periods for the parties to submit amendments to proposed modifications, and for them to accept the CCI's original modifications in case the modifications are not accepted, are excluded from this 210-day time period.

IBRC & SEBI

- **The Insolvency and Bankruptcy Code, 2016 -** The NCLT, being the regulating body as constituted in accordance with the IBC, regulates dealing of distressed assets under the corporate insolvency resolution process.
- **SEBI:** The Securities and Exchange Board of India- The securities market in India is governed by the regulations and directions issued by SEBI which is the market regulator for publicly listed companies.
- The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 governs Mergers and Acquisition transactions which involve the acquisition of a substantial stake in a publicly listed company.

Foreign Exchange Management Act, 1999- FEMA

- Various rules and regulations are issued under FEMA by the Reserve Bank of India regulate foreign exchange transactions in India. The FDI policy issued by the Department of **Industrial Policy and Promotion, Government of India** (in short "DIPP"), inter alia, provides contours of law governing foreign investment in India.
- FEMA Regulations **cover both inbound and outbound investments**.
- The term **"Inbound Merger"** means a Cross Border Merger where the Resultant Company is an Indian company and **"Outbound Merger"** means a Cross Border Merger where the **Resultant Company is a Foreign Company**. The **"Resultant Company"** means an Indian company or a Foreign Company which takes over the assets and liabilities of the companies involved in the cross-border merger. The FEMA Regulations define "Cross Border Merger" as any merger, amalgamation or arrangement between an Indian company and a Foreign Company in accordance with the Compromises Rules.

Cross Borders Mergers & Acquisitions & Foreign Exchange Management Act, 1999- FEMA

- FEMA Cross border merger involves **merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies** (**Compromises, Arrangements and Amalgamation) Rules, 2016** notified under the Companies Act, 2013.
- Cross border **mergers are a combination of two or more companies belonging to or registered in different countries**. It is regulated by the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 notified under the FEMA on 20th March 2018. **Sub-section (2) of Section 234 of Companies Act, 2013 requires a prior Reserve Bank approval in the cross-border mergers**.
- The FEMA Regulations provide **that the valuation of the Indian Company and the Foreign Company shall be done in accordance with Rule 25A of the Compromises Rules**. Compensation by the Resultant Company to a holder of a security of the Indian Company or the Foreign Company, may be paid, in accordance with the Scheme sanctioned by the NCLT.

New Strategic and financial objectives that influence mergers and acquisitions

- Increasing the market power
- Learn and develop new capabilities
- Growth of the company
- Acquisition of required managerial skills, assets or technology
- Economy of Scale which enables combined companies to reduce fixed costs by downsizing departments or operations.
- Economy of Scope which refers to increasing or decreasing the scope of marketing of the different products/services.
- Mergers and acquisitions help in reducing competition which adversely affect the pricing as it leads to higher operating margins.

Recent mergers & acquisitions

Etihad Investment in Jet Airways

- **In 2012, Etihad, a company incorporated in the United Arab Emirates proposed to acquire a 24% stake in Jet Airways. The Proposal had received approval from SEBI, FIPB and Cabinet Committee of Economic Affairs. Thereafter, the investment agreement, shareholders agreement as well as the commercial cooperation agreements between Jet and Etihad were submitted to the CCI for their approval. The CCI while considering the case filed before it had to consider whether the transaction between the two entities would have an Appreciable Adverse Effect on Competition ("AAEC") in the relevant market India.**

- **The relevant market was held to be the market for international passenger air transport based on their point of origin and destination (O & D), each constituting a different route. The CCI observed that there were 38 routes to and from India to other destinations where Jet and Etihad flew and there was at least one competitor on each of such routes.**

Some recent mergers & acquisitions Contd....

- There were only 7 destinations where Jet and Etihad had a combined market share of more than 50%. **The CCI observed that such a combination would result in potential efficiencies whereby the proposed transaction would generate significant synergies for both airlines in terms of network efficiencies and cost savings.**
- The CCI also considered the importance of the proposed **equity infusion**, as Jet had been facing a financial crunch. The Commission therefore, vide a majority order dated **November 12, 2013 approved the combination under sub-section (1) of Section 31 of the Competition Act**. However, the CCI also warned that such an approval should not be construed as immunity in any manner from subsequent proceedings brought before it for violations of the Competition Act.

Issues & Challenges in mergers and acquisitions transactions

❖**Time for completing the Combination:** The time invested in the process of the merger and acquisition is quite cumbersome and substantial time is lost before the actual purpose for the combination is achieved.

Regulatory Compliances & Approvals: When it comes to the approvals, airline companies need to take multiple approvals from the government from different authorities in order to establish a merger and acquisition. Since, there are multiple agencies governing the business of aviation, delay in granting approvals is implicit in all the mergers and acquisition transactions.

Thank you

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& ASSOCIATES
LAW CHAMBERS