July 2020

India in the Spotlight

Post COVID-19

Welcome to our latest update on developments and opportunities in India

Freshfields Bruckhaus Deringer

Court closures

India was in complete lockdown from 24 March until 31 May, a situation that inevitably impacted the functioning of Indian courts. Even though most implemented measures to conduct virtual hearings, these hearings have been limited to only the most urgent cases. Once courts return to business as usual, they are likely to receive a surge in filings, which will increase the backlog in a country that already has 30 million pending cases.

With courts focused on the most urgent proceedings, disputes involving foreign investors will likely experience even greater delays.

Meanwhile, most courts have extended interim orders in existing cases, and the Indian Supreme Court has suspended the limitation period applicable to all cases across the country with effect from 15 March 2020.

Insolvency claims

India enacted a new bankruptcy law in 2016 that made it easier for creditors to file bankruptcy claims against defaulting companies. The law requires companies to go through a resolution process, which must be completed within 330 days. The normal threshold for initiating this process is $1,300.

However, the lockdown in India has severely impacted the cash flow of companies, resulting in a greater likelihood of debt defaults and, in turn, increased bankruptcy petitions. Anticipating this situation, the Indian government – similar to other jurisdictions – has temporarily increased the threshold for initiating bankruptcy proceedings to around $130,000 and announced that the lockdown period will be excluded from any time limits imposed by the usual corporate insolvency and liquidation processes.

The government has also announced a law banning creditors from initiating new claims for a period of time and announced it plans to exclude all COVID-19 related debt from defaults covered under the bankruptcy law.

These measures may bring temporary relief but are unlikely to prevent an increase in bankruptcy claims altogether. Apart from new claims, there are around 1,900 claims pending before the Indian courts, and resolution professionals may be forced to reconsider their existing plans.

Force majeure and material adverse change

Consistent with global trends, force majeure and material adverse change (MAC) clauses have assumed greater prominence in recent months. For example, India's finance and shipping ministries have issued 'clarifications' that disruptions caused by COVID-19 are to be considered force majeure events and a few Indian companies in the energy sector have already written to their crude suppliers declaring force majeure, and Indian ports have declared force majeure with respect to excusing loading and unloading delays.

Indian courts have already seen some force majeure-related claims with different court decisions not being consistent across the board. There is likely to continue to be an influx of COVID-19 force majeure disputes, including on the binding effect of the clarifications issued by the Indian ministries. Indian courts have not yet seen any MAC cases related to COVID-19 and it will be interesting to observe the development of Indian jurisprudence. Will Indian courts, when faced with COVID-19 related MAC cases, turn to English and American law for guidance? Anyone likely to be involved with such litigations will need to keep a watchful eye on developments

Faced with the expected swell in force majeure and MAC related litigation, many large corporates in the manufacturing, services and real estate sectors are considering using alternative methods such as mediation to settle disputes in the hope that this will avoid public-safety issues and the courts' case backlog, while also reducing costs.

Increased foreign investment regulation

A common global theme emerging from the pandemic has been governments across the world stepping in to protect domestic companies left weakened by the crisis or protecting perceived national interests. India is no different and the Indian government amended its foreign investment policy announcing that any investments by a neighbouring country would now mandatorily require prior government approval.

Even though the new policy is applicable to seven countries, there is a perception that the move is designed to prevent Chinese companies acquiring Indian businesses that have fallen in value due to the pandemic. India and China have since been embroiled in a public exchange of words and recent escalation of border tensions, which has led to further restrictions on Chinese investments in India. For instance, the Indian government, citing threats to national security and sovereignty, banned 59 Chinese applications including some popular ones such as TikTok, WeChat, UCBrowser and Cam Scanner and there have been reports of imports from China being delayed at customs clearance in India. The overall impact of these new policies is yet to be assessed and any operational or business disruption will need to be swiftly addressed.

Potential investors might need to consider carefully their 'nationality' when looking at investments in India. As geopolitical rhetoric and tensions in the region heat up, questions may be asked about the investment climate. It will be interesting to see the impact of these new policies on the business and foreign investment landscape environment in India. Will this encourage innovation and invigorate local entrepreneurs and start-ups? Could the validity of such policies be challenged in the Indian courts or indeed, whether investment treaty claims from existing affected investors might be forthcoming? This will remain an area to watch over the next few months.

M&A activity

The pandemic has unsurprisingly caused uncertainty and a dip in international investment activity in India with a corresponding impact on deal values and volumes.

Q1 of 2020 saw 87 deals in India totalling $18.7bn, a drop of 30.1 per cent in terms of deal value compared to $26.7bn in the same quarter last year. Four of the top 10 deals were a result of the government selling state owned assets and the highest M&A activity was recorded in the financial services sector primarily as a result of consolidation amongst domestic banks.

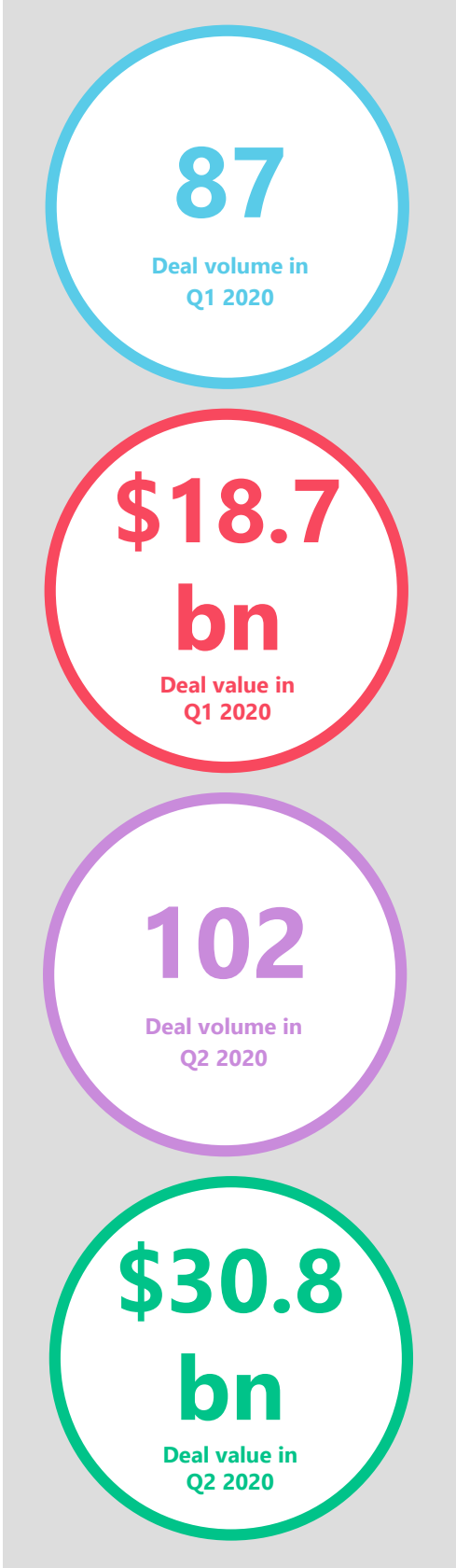
The number of deals in Q2 2020 has seen an increase compared to Q1 with 102 deals worth $30.8bn. This is lower in terms of deal volume but, interestingly, higher in terms of deal value compared to the same period last year when there were 167 deals worth $19.05bn.

Top 5 deals in India in Q1 2020

Value (US$m)	Target	Bidder	Seller
1,631	Krishnapatnam Port Company (75% Stake)	Adani Ports and Special Economic Zone	3i Group and Navayuga Group
1,505	THDC India (74.45% Stake)	NTPC Limited	Government of India
1,498	GMR Airports (49% Stake)	Aeroports de Paris	JM Financial Investment Managers; GMR Group; Macquarie SBI Infrastructure Management and Affirma Capital
1,455	IndoStar Capital Finance (62.77% Stake)	Brookfield Business Partners	IndoStar Capital Mauritius
1,437	North Eastern Electric Power Corporation	NTPC Limited	Government of India

Top 5 deals in India in Q2 2020

Value (US$m)	Target	Bidder	Seller
5,708	Jio Platforms Limited (9.99% Stake)	Facebook, Inc.	Reliance Industries
2,632	Aircel Limited	UV Asset Reconstruction Company Limited; Aircel Limited	-
2,151	Vedanta Limited (49.86% Stake)	Vedanta Resources Limited	-
1,512	Jio Platforms Limited (2.32% Stake)	Kohlberg Kravis Roberts & Co. L.P.	Reliance Industries
1,512	Jio Platforms Limited (2.32% Stake)	Vista Equity Partners Management, LLC	Reliance Industries



Source: Mergermarket

Beyond the pandemic

Looking beyond the pandemic, the great unknown remains how long the pandemic could last and the extent of its impact on India – will M&A surge beyond its pre-crisis level or are we looking at something more akin to a systemic global dislocation? What will the "new normal" look like after the pandemic abates? The strict lockdown continues in many parts of India and Indian businesses are under increasing pressure with liquidity concerns being further exacerbated. The longer the pandemic related disruption continues, the greater the challenges and the more fragile the recovery.

We expect M&A to slowly recover with foreign investment beginning to regain momentum towards the end of the year, depending on the Indian and global response to the pandemic. The 'hot' sectors remain healthcare and technology. The pandemic has naturally drawn increasing attention to the healthcare sector with healthcare providers, and medical device and pharmaceutical manufacturers being particularly attractive. India is the world's third largest drug producer by volume with its pharmaceuticals sector generating a turnover of $20bn in 2019, a number that is expected to grow to $100bn by 2025.

Technology related M&A continues to generate interest and remote working has increased focus on ecommerce and consumer technology. Q2 of 2020 demonstrated this trend with high profile international investments in the digital sector. Businesses relating to fintech, edtech and digitisation are expected to continue to be attractive to investors in the short to medium term. We also expect an uptick in distressed M&A with opportunistic buyers seeking assets at attractive valuations.

A current global theme is around diversification of supply chains and the question is whether attempts at diversification of supply chains could benefit India? The evidence is not, at this stage, conclusive and will depend on a number of factors including the global competitiveness of India as a business and financial hub, continued improvement in the ease of doing business and economic and tax stability and predictability.

For more insights on the global legal implications of COVID-19, visit our global and US coronavirus hubs.

Source: Mergermarket

For further information, please speak to your usual relationship contacts.

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