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Pakistan: Law & Practice
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RIAA Barker Gillette

PAKISTAN

Law and Practice

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RIAA Barker Gillette offers the full range of corporate, commercial and dispute resolution legal services from offices in Karachi, Lahore, Islamabad and Peshawar. With nine partners and more than 40 associates, the Pakistan branch of the firm is among the country's largest practices. Its clients include multinational corporations, financial institutions, non-profit organisations, Pakistani conglomerates, private clients and government agencies. RIAA Barker Gillette is also the primary contact in Pakistan for many major international law firms. It has extensive experience of complex cross-border work and in advising across a number of industry and regulatory sectors. The firm is routinely called on to act in projects, M&A, private equity, corporate restructuring, tax advisory mandates, and commercial disputes. In addition to support from and access to the resources of its offices in London, New York, Dubai, Beijing and Kabul, RIAA Barker Gillette is the exclusive representative of Pakistan to be a member of Lex Mundi (the world's leading network of independent law firms, with members in more than 100 countries).

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1. Trends

1.1 M&A Market

The pace of M&A activity has increased in the past 12 months. Businesses are pursuing an M&A strategy for growth and to take advantage of depressed valuations after the pandemic. Interest rates in Pakistan are at an all-time high of 20%, which has caused smaller businesses to experience a liquidity crunch – thereby forcing them to sell a stake (in some cases, a majority stake) in the business to stronger sponsors. Businesses that have a lower leverage ratio are taking advantage of their profitability (compared with their leveraged peers) by absorbing competitors.

1.2 Key Trends

The M&A market saw little activity in the aftermath of the COVID-19 pandemic. While the government of Pakistan attempted to focus on the privatisation of federal government assets, many such deals fell through as a result of the increased uncertainty due to COVID-19.

The Pakistani government also created policies to encourage investment, including tax benefits and amnesty for builders and developers in the construction sector, low-cost housing, the State Bank of Pakistan (SBP)'s refinancing scheme which provides concessionary refinancing for the setting up of new industrial units, and the establishment of public-private partnerships and special economic zones for tech companies. All these policies encouraged investment in new projects instead of M&A.

Venture capital funding in e-commerce, tech and healthcare also saw an increase in 2021. Tech start-ups multiplied largely as a result of an investor-friendly e-commerce policy, as well as tax advantages for start-ups and software companies (and the relaxation of foreign exchange structures for such enterprises). These trends continued to contribute to M&A activity in the IT enabled services industry throughout 2022.

1.3 Key Industries

The key industries that experienced significant M&A activity in 2022 were the IT sector (and the IT enabled services sector), the independent power producers sector, and the consumer goods sector.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In Pakistan, companies are primarily acquired either by acquisition of shares or through schemes of arrangement.

In the former instance, a company is acquired via acquisition of 100% or the majority of its shares. In certain limited situations, a minority stake is acquired and management control is obtained through a shareholders' agreement. For private companies, this involves a share transfer or share issuance procedure and compliance with the statutory right of first refusal for existing shareholders. For public companies, the takeover requirements detailed in **4.2 Material Shareholding Disclosure Threshold** apply. If the shareholding is being sold by a federal or provincial government (or a state-owned entity), the process is completed through a competitive bidding process.

The Companies Act 2017 (the "Companies Act") provides a framework for schemes of arrangement for the amalgamation and restructuring of companies. Applicable provisions, inter alia, allow companies to enter into a compromise or an arrangement with their members or credi-

tors. Where a compromise or arrangement is proposed between a company and its members or any class of them, the Securities and Exchange Commission of Pakistan (SECP) or the High Courts (depending on the size of companies involved) may – upon application of the company or member of the company – order a meeting of the members of the company in such manner as the relevant forum directs. Additionally, there are some industry-specific regulations on M&A – for example, the framework for mergers and acquisitions of banking companies is governed by the Banking Companies Ordinance 1962 and the framework for acquisition of insurance companies has been provided in the Insurance Ordinance 2000.

2.2 Primary Regulators

The primary regulatory authority for M&A activity is the SECP, which is the primary regulator of corporate sector and capital markets in Pakistan. Where the shares in question are of a listed company, the Pakistan Stock Exchange (PSX) – and the rules/regulations implemented by it – come into play.

If the transaction involves a non-Pakistani individual/entity, the foreign exchange regime of Pakistan implemented by the SBP becomes relevant. Parties are required to complete the transfer of shares/securities under the general or special permission of the SBP.

For transactions meeting thresholds stipulated under the competition law regime of Pakistan, prior approval is required from the Competition Commission of Pakistan (CCP) before consummation of the transaction.

2.3 Restrictions on Foreign Investments

Industry-Specific Requirements

Pakistan encourages foreign investment and, as such, the Foreign Investment (Promotion and Protection) Act 1976 allows for equal treatment for foreign investors. Although there is no minimum foreign equity investment requirement in any sector in Pakistan, there are upper limits on investment by foreigners in newspapers (up to 25% subject to approval), broadcast media (49%) and airlines (49%).

Arms and ammunitions, consumable alcohol, currency and mint, high explosives, radioactive substances and security printing are not open to foreign investment. Although licences are required prior to engaging in certain industries (eg, aviation, banking, electric power, finance, insurance, oil and gas and pharmaceuticals), these and all other industries are open to foreign investment.

Security Clearance

Foreign investment is subject to prior security clearance by the Ministry of Interior (MOI). Incorporation of companies by foreigners is subject to the security clearance of each director and shareholder of the Pakistani company by the MOI. Foreign persons (including companies) may proceed with incorporation of a local subsidiary on the basis of an undertaking confirming that they will hold shares/office in the company incorporated in Pakistan subject to the MOI's security clearance. In case of a refusal of security clearance, the foreign shareholder and/or director must take immediate steps to transfer shares and/or resign from office. For individuals of Indian nationality/origin, the company is incorporated following receipt of the security clearance from the MOI. The same requirements apply to transfer/issuance of shares to a foreigner.

Registration on Repatriable Basis

There is generally no requirement to register or intimate the investment of foreign capital. However, applicable law requires that shares held by non-residents in companies in Pakistan are registered with the SBP on a fully repatriable basis – following which such non-resident shareholders are able to receive dividends and disinvestment proceeds in respect of such shares outside Pakistan.

Import and Export Restrictions

The import and export of goods in Pakistan is regulated by the Ministry of Commerce under the Imports and Exports (Control) Act 1950 and the statutory regulatory orders issued thereunder. Pakistan does not recognise Israel as a state and has a strained business relationship with India. The Import Policy Order 2022 places a blanket prohibition on the import of goods from (or originating in) Israel or India – however, in relation to India, such prohibition will not apply to therapeutic goods regulated by the Drug Regulatory Authority of Pakistan (DRAP).

Foreign exchange laws provide that it is not permissible to issue letters of credit or register contracts or otherwise facilitate the imports of goods into Pakistan where such goods originate from Israel or India. Pursuant to the Export Policy Order 2022, no goods are allowed to be exported to India, apart from therapeutic products regulated by the DRAP.

2.4 Antitrust Regulations

The primary legislation is the Competition Act 2010 (the “Competition Act”), which is a federal legislation aimed at ensuring free competition in all spheres of commercial and economic activity, enhancing economic efficiency, and protecting consumers from anti-competitive behaviour. The Competition Act applies to all undertakings and all actions or matter that take place in Pakistan and distort competition within Pakistan. The Competition Act is implemented by the CCP and regulates business combinations through four sub-regimes – of which the most relevant to business combinations is the approval of M&A.

Where a merger or an acquisition meets the thresholds stipulated under the Competition (Merger Control) Regulations 2016 (the “Merger Regulations”), the parties are required under Section 11 of the Competition Act to obtain a pre-merger clearance from the CCP prior to consummation of the transaction. The Merger Regulations stipulate different thresholds for transactions undertaken by asset management companies and those undertaken by other parties. These thresholds must be taken into account when assessing the need for a pre-merger clearance.

A formal application prepared in accordance with the requirements of the Merger Regulations must be submitted for a pre-merger clearance, upon evaluation of which the CCP may grant the same. Such a clearance may be granted with or without conditions stipulated by the CCP.

2.5 Labour Law Regulations

Labour is governed by provincial and federal legislation in Pakistan. Accordingly, Islamabad Capital Territory (ICT) and each of the provinces of Pakistan (Sindh, Punjab, Khyber Pakhtunkhwa and Balochistan) have their own labour laws governing the relevant obligations of employers and the rights of employees (white-collar employees) and workers (similar to blue-collar workers) at the establishments located therein.

The most significant laws in respect of employment of employees and workers are as follows.

Regulation of Workers

The Industrial and Commercial Employment (Standing Order) Ordinance 1968 regulates workers in Punjab, Balochistan and the ICT, the Khyber Pakhtunkhwa Industrial and Commercial Employment (Standing Order) Act 2013 governs employees in the province of Khyber Pakhtunkhwa, and Sindh Terms of Employment (Standing Orders) Act 2015 is applicable in the province of Sindh (collectively referred to as the "Standing Orders"). The applicability of Standing Orders for each respective province is subject to the employment of the minimum number of workers prescribed therein. Relevant provincial and federal industrial relations laws regulate workers' unions and their rights.

Regulation of Employees

The West Pakistan Shops and Commercial Establishments Ordinance 1969 regulates employees in Balochistan and the ICT, the Punjab Shops and Establishments Ordinance 1969 governs employees in the province of Punjab, the Sindh Shops and Commercial Establishments Act 2015 is applicable in the province of Sindh, and the Khyber Pakhtunkhwa Shops and Commercial Establishments Act, 2015 is applicable in the province of Khyber Pakhtunkhwa.

In addition to the aforementioned laws, the target company will also be required to ensure compliance with – inter alia – the Provincial Employees' Social Security Ordinance 1965 (or the Sindh Employees' Social Security Act 2016) and the Employees' Old-Age Benefits Institution Act 1976 (applicable in all provinces of Pakistan apart from Sindh, where the Sindh Employees' Old-Age Benefits Act 2014 applies).

2.6 National Security Review

As noted in **2.3 Restrictions on Foreign Investments**, share issuance/transfers to foreigners and incorporation of companies by foreigners is subject to a security clearance. Such security clearance must be obtained from the MOI for each foreign director and shareholder of the Pakistani company. Foreign persons may proceed with incorporation of a company on the basis of an undertaking confirming that the shareholding will be subject to the MOI's security clearance. In the security clearance is refused, the foreign shareholder and/or director must take immediate steps to transfer shares or resign from office (as the case may be). For individuals of Indian nationality/origin, the company is incorporated following receipt of the security clearance from the MOI.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

In 2021, the Islamabad High Court (Writ Petition No 4942 of 2010) and the Lahore High Court (2021 CLD 214) settled the decade-long litigations challenging the constitutionality of the Competition Act. The challenges brought argued the Competition Act to be ultra vires the Constitution of Pakistan. The ability of the federal government to legislate on competition in Pakistan was contested, as the matter was argued to be within the provincial legislative competence following the Eighteenth Amendment to the Constitution of Pakistan. The High Courts rejected this argument while upholding the Competition Act as a validly enacted federal legislation.

3.2 Significant Changes to Takeover Law

Takeovers are regulated by the Securities Act 2015 (the "Securities Act") and the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017 (the "Takeover Regulations"). While no significant changes

have been made to the Securities Act 2015, the Takeover Regulations were amended in 2022 to incorporate changes that were largely geared towards clarifying the options for and the mode of payment of consideration for voting securities acquired through public offers.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Generally, no set pattern or practice has been observed with regard to stakebuilding. Each acquirer structures its acquisition according to its own requirements.

4.2 Material Shareholding Disclosure Threshold

The material shareholder disclosure thresholds are provided in the Companies Act, the Takeover Regulations and the Securities Act.

Under the Companies Act, a company is required to notify the SECP of any change in more than 25% of shareholding or membership or voting rights.

Any acquirer who acquires voting shares that – taken together with voting shares (if any) already held by the acquirer – would entitle the acquirer to more than 10% of voting shares in a listed company is required to disclose the aggregate of their shareholding in that company to said company, the securities exchange on which the voting shares of said company are listed, and the SECP. This disclosure must be made within two working days of the receipt of intimation of allotment of voting shares or the acquisition of voting shares (as the case may be).

An acquirer may acquire additional voting shares within a period of 12 months following acquisition of voting shares without making a further disclosure if the total acquisition does not exceed an aggregate of 30%.

Apart from the foregoing, every director, executive officer or substantial shareholder (ie, a person who has an interest in shares of a company the nominal value of which is equal to or more than 10% of the issued share capital of the company or which enables the person to exercise or control 10% or more of the voting power at a general meeting) of a listed company is required to submit to the SECP – in the prescribed form – a statement of beneficial ownership in the listed equity securities of the company or any other kind of securities as may be prescribed by the SECP, along with the details of any change in this interest and any change in their position. This reporting requirement must be completed within seven days of the date on which the requirement first arises.

The public announcement of the mandatory offer must contain prescribed information, including the reasons for acquiring shares or control of the target company and details regarding the future plan for the target company – for example, whether or not the target company will continue as a listed company after acquisition. Please see **6.2 Mandatory Offer Thresholds** for the thresholds that trigger a requirement to make a public offer.

Certain transactions are exempt from the requirement to make a public offer, including the following:

- acquisition of voting shares in the ordinary course of business by banks and financial institutions as enforcement of security;
- a scheme of arrangement or reconstruction (including amalgamation, merger or demerger); and

- allotment of voting shares by way of a rights issue.

4.3 Hurdles to Stakebuilding

While no restrictions apply to stakebuilding generally, certain industry-specific consents are required prior to acquiring shareholding. Under Section 67 of the Insurance Ordinance 2000, acquisition of more than 10% of shareholding in an insurance company requires prior approval from the SECP. Similarly, Section 14 of the Banking Companies Ordinance 1962 requires prior approval of the SBP for holding more than 5% of total voting rights in a banking company.

If the transaction meets the applicable thresholds under the Competition Act and the Merger Regulations, the requirement to obtain a pre-merger clearance from the CCP is also triggered. This regime prohibits consummation of the transaction until such approval has been granted by the CCP.

4.4 Dealings in Derivatives

In general, the applicable law only allows for a limited number of identified derivatives to be traded in Pakistan. Regulation 8 of the Financial Derivatives Business Regulations 2004 (the "Financial Derivatives Regulations") issued by the SBP allows dealings in derivatives; however, such transactions are limited to hedging underlying risk exposure only. This is a licensed activity and requires at least one entity in the transaction to be a financial institution approved to act as an Authorised Derivatives Dealer. Permission has been granted under the Financial Derivatives Regulations to carry out transactions including foreign currency options, forward rate agreements, interest rate swaps, third currency options and cross currency swaps.

Dealings in derivatives are also permitted under Section 46 of the Futures Market Act 2016 (the "Futures Act") under a licence granted for exchanges/brokers (as the case may be). A derivative has been defined under the Futures Act as a forward contract, an option contract or a swap contract.

4.5 Filing/Reporting Obligations

No specific reporting requirements exist for end users under the securities disclosure laws and competition laws of Pakistan.

4.6 Transparency

There is a mandatory requirement for an acquirer to make a public offer under the Securities Act for acquisitions meeting certain thresholds. The public announcement of the mandatory offer is required to provide certain prescribed information (see **4.2 Material Shareholding Disclosure Threshold**).

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The requirement to disclose a deal varies depending on the type of company the target is. Where the shares that are subject to acquisition belong to a listed company, the disclosure requirements prescribed in the Securities Act read in conjunction with the Takeover Regulations will apply. In such case, it is mandatory for a target company to disclose a deal immediately in writing, in the manner prescribed, to the PSX and the SECP in the following circumstances:

- if a firm intention to acquire control or voting shares of the target is notified to the target company;
- when negotiations or discussions are about to commence with a person(s) for acquiring

control or voting shares of the target company;
- when a director, chief executive and/ or majority shareholder of a target informs the target that they – individually or in concert with each other or their family members or associates – are entering into negotiations for sale of their shareholding; and
- when the target is subject of rumour and speculation or there is an unusual movement in its share price or traded volume and there are reasonable grounds for concluding that the potential acquirer's actions have led to the situation.

Disclosure requirements in the first three abovementioned situations would be triggered only if the acquisition is beyond the prescribed limits set out under Section 111 of the Securities Act and detailed in **6.2 Mandatory Offer Threshold**.

All listed companies are required under the Pakistan Stock Exchange Regulations (the "PSX Regulations") to disseminate all price-sensitive information to the PSX and the SECP. Such information may include information regarding any joint ventures, merger, demerger, restructuring, acquisition or any material contract entered into or lost.

There are no requirements prescribed under relevant laws for disclosure other than in cases of acquisition of voting shares in a listed company.

5.2 Market Practice on Timing

Market practice does not differ in situations where legal requirements have been prescribed.

5.3 Scope of Due Diligence

The scope of due diligence depends on various elements, including the commercial considerations of the acquirer, the structure of the transaction, the size of the target and the specific sector-related laws. Where the target and acquirer are both local, relatively detailed legal due diligences are common – particularly if the target is undertaking a regulated business.

Where the M&A relates to indirect acquisition of a subsidiary of the target in Pakistan (which is not ordinarily listed), red flag legal due diligences are more common. The acquirer often outlines materiality and quantitative thresholds for the purposes of due diligence to save time and costs. Ordinarily, the legal due diligence covers general corporate information, employment documents, pending and threatened litigation proceedings and other disputes, regulatory compliance, land-related documents, material contracts (including financing documents), and related security.

The scope of due diligence activities has not been impacted by the pandemic.

5.4 Standstills or Exclusivity

Standstills are not usually demanded but are common. Exclusivity is demanded during the due diligence phase and is common practice.

5.5 Definitive Agreements

Although there are no restrictions on offer terms to be recorded in definitive agreements, only those commercial terms that have been agreed to and are binding on both parties are included in definitive agreements.

6. Structuring

6.1 Length of Process for Acquisition/Sale

How long it takes to acquire/sell a business in Pakistan depends on the type of company sought to be acquired, the level of due diligence

to be conducted, and whether the target is otherwise undertaking a licensed business. For listed companies, there is a prescribed period of 180 days between public announcement of intention and public announcement of offer by the acquirer. This may be extended by 90 days if requested to the SECP on reasonable grounds.

Given that the public announcement of intention must be made before the due diligence is commenced in order to evaluate the share price of the target, the acquirer will have between six to nine months – depending on whether an extension request is granted – to complete the due diligence and make a public announcement of offer. For companies that undertake licensed businesses (eg, those that operate in the electric power sector), acquisitions will require approval of a specialised regulator, which may affect deal timing.

Governmental measures taken to address the pandemic have not created any major practical delays in deal-closing processes.

6.2 Mandatory Offer Threshold

The mandatory requirement pursuant to Section 111 of the Securities Act for an acquirer to make a public offer is triggered if the acquirer (either directly or indirectly) intends to:

- acquire voting shares that – taken together with voting shares (if any) already held by such acquirer – would entitle the acquirer to more than 30% of the voting shares in a listed company;
- acquire additional voting shares, where the acquirer already holds more than 30% but less than 51% of the voting shares of a listed company (provided that such acquirer will not be required to make a fresh public offer within 12 months of the date of the previous public offer); or
- acquire control of a listed company.

The public offer must be made for at least 50% of the remaining voting shares of the target.

6.3 Consideration

Generally, cash is permissible in a merger – although it is more common for shares to be issued against the transfer of an undertaking. Under the Takeover Regulations the consideration for the voting shares in a listed company to be acquired by the acquirer can be payable in the form of, inter alia:

- cash;
- transfer or exchange of shares, listed debt instruments, convertible debt securities, government debt securities; or
- a combination of the foregoing, subject at all times to prescribed conditions.

The Takeover Regulations set out a minimum price requirement for a takeover offer on the basis of whether or not the shares of the target company are frequently traded. Shares will be deemed frequently traded if they have been traded for at least 80% of the trading days during the six months preceding the date of public announcement of offer and their average daily trading volume in the ready market is not less than 0.5% of its free float or 100,000 shares (whichever is higher).

If the shares of the target company are frequently traded, the public announcement of offer will be at the price that is the highest of the following:

- the negotiated weighted average price under share purchase agreement(s) for the acquisition of voting shares of the target company;
- the highest price paid by the acquirer for acquiring the voting shares of the target

company during the six months preceding the date of public announcement of offer:
- the weighted average share price of the target company as quoted on the securities exchange during the 180 days leading up to the date of public announcement of offer;
- the weighted average share price of the target company as quoted on the securities exchange during the 28 days leading up to the date of public announcement of intention; and
- the price per share calculated on the basis of net assets value carried out by a chartered accountant firm based on audited financial data not older than six months from the date of public announcement of offer made by the manager to the offer.

If the shares are not frequently traded, the public announcement of offer to acquire shares will be at the highest price of the following:

- the negotiated weighted average price under share purchase agreement(s) for the acquisition of voting shares of the target company;
- the highest price paid by the acquirer for acquiring the voting shares of the target company during the six months prior to the date of public announcement of offer; or
- the price per share calculated on the basis of net assets value carried out by a chartered accountant firm based on audited financial data not older than six months from the date of public announcement of offer made by the manager to the offer.

6.4 Common Conditions for a Takeover Offer

For listed companies, the public offer by the acquirer is required to be made for such minimum number of voting shares and for such minimum offer price (as discussed in **6.3 Consideration**) as prescribed under the Securities Act read in conjunction with the Takeover Regulations. Moreover, the acquirer is also required to appoint a manager to the offer before making any public offer and the manager to the offer cannot be an associate (or a group company) of the acquirer or the target company.

In addition to the aforesaid, the Takeover Regulations set out the general obligations of the acquirer, which include the following:

- the acquirer will only make its public announcement of offer after careful and responsible consideration; and
- the acquirer and its manager to the offer must be satisfied that it can (and will continue to be able to) implement the takeover offer in full.

On or before the date of issue of the public announcement of offer, the acquirer is required to arrange the requisite security as provided for under the Securities Act and the Takeover Regulations. See **6.6 Requirement to Obtain Financing**.

A public offer cannot be withdrawn once it has been made, except in the circumstances prescribed under the Securities Act read in conjunction with the Takeover Regulations. Such circumstances include those in which:

- a competitive bid has been made;
- the acquirer is a company and it has gone into liquidation or has been declared bankrupt before the completion of the acquisition process; or
- the sole acquirer (if a natural person) has died or has been declared to be of unsound mind before the completion of the acquisition process.

6.5 Minimum Acceptance Conditions

A public offer by the acquirer may be made conditional upon a minimum level of acceptances and such minimum level must not be more than 35% of the remaining voting shares. The acquirer can still choose to accept the acceptances even if such acceptances, put together, do not reach the specified minimum level. The reason for this limitation is to ensure maximum participation of the public and preclude shareholding from being restricted to a concentration of a specific class of investors.

6.6 Requirement to Obtain Financing

The public offer is made by the acquirer through the manager to the offer. As mentioned in **6.4 Common Conditions for a Takeover Offer**, the acquirer and the manager to the offer are required to ensure that firm financial arrangements for fulfilment of the obligations under the public offer are available and suitable disclosures in this respect have been made in the public announcement. Further, the acquirer is required to furnish security for performance of its obligations under the public offer to the manager to the offer. Such security can be in the form of, inter alia, a cash deposit in an escrow account or a securities deposit or a bank guarantee.

6.7 Types of Deal Security Measures

The Securities Act does not allow for deal exclusivity between the acquirer and the target prior to the close of the public offer.

Where the acquisition does not attract the provisions of a mandatory offer, the acquirer may acquire any number of voting shares through a share purchase agreement. The acquirer and the target company will have the discretion to commercially agree on the terms of said agreement, which may include exclusivity and confidentiality provisions. Further, while break-up fees are not regulated under the laws of Pakistan, the transaction parties may include provisions relating to the levy of liquidated damages. Such damages are calculated in accordance with the pre-estimation of the actual loss that will be suffered by the acquirer upon termination of the transaction by the target company and/or its shareholders.

6.8 Additional Governance Rights

Even if an acquirer does not obtain full control of a target company, once the acquisition of shares has been completed in accordance with the Securities Act read with the Takeover Regulations, the target company is required to allow such changes in the board of directors as would give the acquirer proportionate representation on the board or control of the company. Where the acquirer does not get a proportionate representation on the board of directors of the target company, the acquirer may serve a notice on the target company for the holding of fresh elections and submit a copy of such notice to the SECP forthwith. No additional rights are granted to the acquirer by virtue of a significant shareholding in a listed company.

6.9 Voting by Proxy

The shareholders of a company entitled to attend and vote at a meeting may appoint another person as their proxy to exercise all or any of their rights to attend, speak and vote at a meeting. This, however, is subject to any restriction under the articles of a company (and is not applicable to a company without a share capital). A shareholder is not entitled to appoint more than one proxy to attend any one meeting. If any shareholder appoints more than one proxy for one meeting and more than one instruments of proxy are deposited with the company, all such instruments of proxy will be rendered invalid. The proxy must be a shareholder of the com-

pany unless the articles of a company permit the appointment of non-member as proxy.

6.10 Squeeze-Out Mechanisms

The squeeze-out mechanisms may attract the provisions with regard to minority shareholders' protection under the Companies Act. These protections ordinarily only apply where the minority shareholder(s) hold at least 10% of the total shareholding of the company. The Takeover Regulations also prohibit the oppression of minority shareholders and may subject a contravening person to penalties under the Securities Act for such.

One of the mechanisms for squeezing out dissenting shareholders is by way of a scheme of arrangement. Where a scheme involving the transfer of shares or any class of shares in any company (the "transferor company") to another company (the "transferee company") has been approved by the holders of not less than nine tenths of the value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may give notice in the specified manner to any dissenting shareholder that it desires to acquire the dissenting shareholder's shares. When such a notice is given, the transferee company – unless the SECP thinks fit to order otherwise – will be entitled and bound to acquire those shares on the terms according to which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

Another method to compulsorily acquire minority stakes is through voluntary delisting of the company through buy-back of shares from minority shareholders. The detailed requirements for delisting have been set out in the PSX Regulations. Once allowed delisting under the PSX Regulations, the company will not be allowed to relist on the mainboard any of its securities that have been delisted for a period of at least five years from the date of delisting.

Takeover laws do not describe any squeeze-out mechanisms. Nonetheless, the SECP has been empowered to make regulations governing this process.

6.11 Irrevocable Commitments

Applicable law does not set out any provisions relating to irrevocable commitments by the principal shareholders of the target company. If there is any agreement with the present management, promoters or existing shareholders of the target company, an overview of the important features of the agreement(s) – such as acquisition price per share, number and percentage of shares to be acquired under the agreement(s), name of the seller(s), as well as the details and manner of payment of consideration – must be disclosed in the document for public announcement of the offer.

Where the prescribed thresholds for a mandatory offer are not triggered in respect of an acquisition, the acquirer may acquire any number of voting shares through a share purchase agreement, thereby entitling the transaction parties to commercially agree on the terms of the share purchase agreement.

7. Disclosure

7.1 Making a Bid Public

Any person who wishes to make a competitive bid – apart from the acquirer that made the first public announcement – must make a public announcement of their offer for acquisition of

at least the same number of voting shares of the target company within 21 days of the public announcement of the first offer.

7.2 Type of Disclosure Required

Types of disclosure required for the issuance of shares in a business combination include a prospectus approved by the SECP for a stock-for-stock offer. A merger by way of a scheme of arrangement is exempt from the application of takeover laws and will not require a prospectus to be issued.

7.3 Producing Financial Statements

At the time of making the public announcement of offer, the acquirer is obliged to disclose any information that may be necessary for the shareholders of the target company to make an informed decision. If the acquirer is a company, it must disclose brief audited financial details dating back over a period of at least five years, including income, expenditure, profit before depreciation, interest and tax, depreciation, profit before and after tax, provision for tax, dividends, earnings per share, return on net worth, and book value per share.

Financial statements of companies incorporated in Pakistan are required to be prepared in accordance with the financial reporting standards set out in the Companies Act.

7.4 Transaction Documents

Copies of all announcement and offer documents – together with supporting documents as prescribed in the Takeover Regulations – must be submitted to the target company, the PSX and the SECP. Supporting documents to be submitted with the public announcement offer include a copy of the agreement (if any) for the acquisition of shares and/or control of the target company and evidence that security has been created as required under the Securities Act and the Takeover Regulations.

8. Duties of Directors

8.1 Principal Directors' Duties

The following principal duties have been prescribed for directors under the Companies Act:

- to act in accordance with the articles of association of the company;
- to discharge their duties with due and reasonable care, skill and diligence, and to exercise independent judgment;
- not to be involved in a situation in which they may have a direct or indirect interest that conflicts – or possibly may conflict – with the interests of the company;
- not to assign their office (where they do, any assignment so made will be void); and
- not to achieve – or attempt to achieve – any undue gain or advantage either to themselves or to their relatives, partners or associates.

As regards the final point, any director found guilty of making any undue gain will be held liable for reimbursing the company with an amount equal to such gain.

The duties of directors under the Companies Act are owed to the company, its employees, the shareholders, the community and the environment. In addition to the foregoing, the directors of a listed company have certain duties under the Securities Act and Takeover Regulations.

Once the public announcement of intention has been made, the board of the target company cannot appoint any person who represents (or has an interest in) the acquirer as an additional director or in a casual vacancy on the board of

directors until the acquisition is completed. During the offer period, the board cannot:

- sell, transfer or otherwise dispose of – or enter into an agreement for sale, transfer or disposal of – the undertaking or a sizeable part thereof, excluding the sale or disposal of assets in the ordinary course of business of the company or its subsidiaries;
- encumber any asset of the company or its subsidiary;
- issue any further shares during the offer period; or
- enter into any material contract.

The board of the target company is required to assist the acquirer in the verification of securities tendered for acceptance. The board must also send its unbiased comments and recommendations on the public offer to the shareholders, if so desired by the acquirer(s) or the shareholder(s) of the target company.

8.2 Special or Ad Hoc Committees

It is common for directors to establish committees to regulate the affairs of the company. Therefore, a board may establish a special or an ad hoc committee to oversee the proposed M&A transaction.

Where a director of an acquirer that is a public company is faced with a conflict of interest as a result of a proposed acquisition, the acquirer's board of directors must establish an independent committee to assess the proposed public offer. No such requirement has been prescribed in the case of a conflict of interest faced by a director in the target company's board.

8.3 Business Judgement Rule

The business of a company must be managed by the board. The board of directors is entitled to exercise all such powers of the company that are not required to be exercised by the company through its shareholders in a general meeting pursuant to the Companies Act or the articles of association of the company. The board thus oversees the negotiation process and, with regard to the target company, may be required to send their unbiased comments and recommendations on the public offer to the shareholders – if so desired by the acquirer(s) or the shareholder(s).

It is not common to have shareholder litigation challenging the board's decision to recommend an M&A transaction. There is no precedent available for a rule applied by courts equivalent to the business judgment rule.

8.4 Independent Outside Advice

It is customary for the board of directors of the acquirer to obtain legal and financial advice from independent outside advisers. The manager to the offer must ensure that the contents of the public announcement and offer letter are true, fair and adequate and based on reliable sources, quoting the source wherever necessary. Although applicable laws do not impose an obligation on the directors of the target company to seek advice from an independent financial adviser, it is customary to do so in order to assess the reasonability of the public offer.

8.5 Conflicts of Interest

Conflicts of interest faced by directors have, under relevant provisions of the Companies Act, been the subject of direct scrutiny by the SECP on several occasions.

9. Defensive Measures

9.1 Hostile Tender Offers
Hostile tender offers are not prohibited and are uncommon.

9.2 Directors' Use of Defensive Measures
Defensive measures are permissible. However, given that public tender offers are unusual, the regulatory regime in Pakistan is not conducive to commonly used defensive measures such as the "poison pill" or the "crown jewel" because they are difficult to implement.

It is also common for contracts executed by high leverage companies to have negative covenants for change in control. By way of an example, approval of lenders is required under financing documents before a change in control of a company. Employment agreements with a company's key executives also have generous payouts in case of early termination.

9.3 Common Defensive Measures
Takeovers are permitted under Pakistani law, but these transactions are few and far between because the market has not been very attractive.

The most common defensive measure is to seek an injunction from a court with competent jurisdiction or attract the attention of one of the regulatory agencies (eg, the SECP or the CCP) in case the acquirer is in breach of applicable law. In the famously hostile takeover of Adamjee Insurance Company Limited, an interim injunction against the holding of the annual general meeting was set aside after 16 months.

The pandemic has not had a significant impact on the prevalence of defensive measures.

9.4 Directors' Duties
There are no specific prescribed duties that directors owe when enacting defensive measures. Details on the general duties that directors owe to companies are discussed in **8.1 Principal Duties of Directors**.

9.5 Directors' Ability to "Just Say No"
Directors are required to act in good faith when promoting the interests of the company and for the benefit of their members as a whole. They are also obligated to assist the acquirer and their team by providing all relevant and material information for the purposes of due diligence and share unbiased comments and recommendations (if desired by the acquirer) as per Regulation 25 of the Takeover Regulations.

10. Litigation

10.1 Frequency of Litigation
Litigation is uncommon in connection with M&A deals in Pakistan. Deals involving foreign parties almost always select judicial or arbitral forums outside Pakistan for the resolution of disputes. Parties also prefer to settle contractual disputes amicably, owing to the delay taken by local courts in deciding petitions.

As regards schemes of arrangement, courts avoid engaging in commercial matters and prefer to limit their role in assessing whether there is a violation of the law and whether the scheme is against public interest. As a result, parties are less likely to use litigation to resolve disputes.

10.2 Stage of Deal
The limited number of disputes typically occur pre-closing. They are typically due to a party failing to obtain timely regulatory approvals or comply with the applicable law or restrictions

under shareholder agreements. When it comes to the acquisition of listed companies, failing to make statutory disclosures or depriving minority shareholders of their rights are common reasons for litigation.

In high-value transactions, documents are well negotiated and parties are well apprised of their rights and obligations. As such, disputes are rare.

10.3 "Broken-Deal" Disputes

No specific lessons have been learned from disputes between parties whose transactions were pending in early 2020. Frequent delays in resolving disputes by courts and their inability to appreciate transaction nuances have resulted in parties seeking more and more settlements inter se.

11. Activism

11.1 Shareholder Activism

Shareholder activism in Pakistan is rare. To exercise the key rights of a "minority shareholder", shareholders need to hold at least 10% of the total shareholding in a company. Most of the larger Pakistani corporations are controlled by families or institutions; therefore, it is difficult for minority shareholders to band together in order to reach the aforementioned threshold and engage in activism. Minority shareholders' rights include filing a petition with a court:

- to declare proceedings of a general meeting as invalid on the grounds of a material defect or irregularity in the proceedings that prevented members from effectively using their rights;
- for winding-up of the company, if the affairs of the company are being conducted in a manner oppressive to the shareholders; or
- to declare the election of the directors as invalid, if there is any material irregularity in the holding of the elections.

Minority shareholders can also propose the appointment of company auditors.

There have been a few cases of shareholder activists pushing large corporations to address concerns related to inefficient operations and enhancing the performance of a company. Activists have queried poor performances (including financial losses and lack of growth), pressed for a change in location of operations so as to better suit business interests, and opposed potential mergers with affiliated entities (see **11.2 Aims of Activists**). There have also been examples where shareholders have banded together to remove a CEO and appoint their own nominee.

11.2 Aims of Activists

Activists have generally acted only when the affairs of the company are not being run efficiently and to their detriment. In certain cases, as mentioned in **11.1 Shareholder Activism**, they have objected to mergers and demergers with affiliated companies and have asked to shift operations and assets to more conducive locations in order to optimise the company's operations. The pandemic has not resulted in any significant changes when it comes to activism by minority shareholders.

11.3 Interference With Completion

Activists typically only interfere in M&A transactions if there is a violation of the law or where their rights are being affected detrimentally.

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