GLOBAL ACQUISITIONS TRIGGERING INDIA'S TAKEOVER REGULATIONS

The Securities and Exchange Board of India ("SEBI") (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the "Regulations") regulate takeovers of listed companies in India.

The Regulations require a foreign acquirer of a foreign target company, whether acting alone or in concert with others, to make an open offer in India, if as a result of the overseas acquisition of the foreign target company, there is a change in "control" of an Indian company listed on an Indian stock exchange(s). (Regulation 12 of the Regulations) The term "control" includes the right to appoint a majority of the directors, or to control the management or policy decisions exercisable by a person acting individually or in concert, directly or indirectly, including by virtue of shareholding or management rights, or shareholders or voting agreements, or in any other manner. (Regulation 2(c) of the Regulations) Recently, in *Technip S.A. v. S.M.S. Holding (P.) Ltd.,* [2005] 60 SCL 249 (SC)*, the Indian Supreme Court ("Supreme Court") ruled on* whether French law could be applied to determine if there was a change in control of an Indian company under the Regulations, pursuant to the purchase of shares of a French company by one French company from another.

Technip S.A. ("T") and Coflexip S.A. ("C") were companies incorporated in France. The Institut Francais du Petrol ("IFP"), a government organization in France, through its subsidiary, ISIS ("ISIS"), owned shares of T and C. On November 2, 1994, ISIS, Stena B.V. ("Stena") and other major shareholders of C entered into a formal agreement to control C, under which ISIS had preemption rights over Stena's shares. On, April 11, 2000, T acquired 29.68% of C's shares from Stena, in respect of which ISIS April 11, 2000U waived its preemption rights. On acquiring C's shares, T made a statutory declaration U before the French regulatory authorities that:

(a) T did not, directly or indirectly, hold any other shares in C;

(b) T was not acting in concert with any other person and did not intend to do so;

(c) T had no intention of increasing its equity stake in C within twelve (12) months after the acquisition;

(d) T would not acquire new equity shares in other companies involved in C's scope of activities, except with C's prior written approval;

(e) if T violated any of the aforesaid stipulations, this would entitle C to claim damages against T.

On July 3,2001, T acquired an additional 69% shares of C, and its aggregate shareholding in C rose to 99%. Through a chain of wholly owned subsidiaries, C held 50% (approximately) in the share capital of South East Asia Marine Engineering and Construction Ltd. ("SEAMEC"), an Indian listed company. On acquiring 99% of C, T approached the SEBI seeking an exemption from making an open offer to the shareholders of SEAMEC. However, the SEBI rejected T's exemption application and directed T to make an open offer to the shareholders of SEAMEC taking July 3, 2001 as the relevant date.

At this stage, SEAMEC's shareholders inter alia contended that the change in control of SEAMEC had actually occurred in April 2000, when T acquired 29.68% shares of C, and, therefore, the price at which T should purchase SEAMEC shares under the open offer should be SEAMEC's share price in April 2000 (Rupees 238 approximately) and not SEAMEC's share price in July 2001 (Rupees 43.12 approximately). In this regard, SEAMEC's shareholders preferred an appeal against the SEBI's order before the Securities Appellate Tribunal ("SAT").

The SAT concluded, that T, acting in concert with ISIS, had acquired *de facto* control over SEAMEC in April 2000, and the further share acquisition was merely to strengthen its position de jure. The SAT modified the SEBI's order and directed T to make an open offer to SEAMEC's shareholders considering April 11, 2000 as the relevant date. Against the SAT's order, T preferred an appeal to the Supreme Court.

<u>After considering a number of English and Indian judgments, the Supreme Court upheld the applicability of French law to ascertain whether there was a change in control of SEAMEC by virtue of T's acquisition of C. The Supreme Court *inter alia* based its finding on the fact that, both T and C were French</u>

companies incorporated under the laws of France, and their status and internal affairs could be determined adequately only under French law. Further, the Supreme Court analyzed the provisions of French law pertaining to takeovers and noted that they were no less rigorous than the Regulations. Merely because the key difference between French takeover law and the Regulations pertained to the prescribed limits of shareholding for control by one company of another did not make French law violative of India's public policy. On the basis of the foregoing rationale, the Supreme Court applied the definition of "control" as contained in the French Companies Act, 1966 and determined that T had acquired "control" over C and, in turn, over SEAMEC, in July 2001.

Notwithstanding this, the Supreme Court went on to hold that for two or more persons to be acting in concert, they must have a common objective of acquiring shares, voting rights, or control over the target company. In determining whether T and ISIS were acting in concert in April 2000, the Court relied on the "bright line" test suggested by the Justice Bhagwati Committee Report on Takeovers (1997) ("Report"). As per this test, a company is acquired with the objective of acquiring another company if:

(a) the second company's shareholding constitutes a substantial part of the assets of the first company; or

(b) one of the main purposes of acquiring control over the first company is to secure control over the second company.

C's shareholding of SEAMEC formed only 2% of C's assets, and as such, the acquisition did not meet the first test. Further, it was not evident from the facts that, in April 2000, T was acting in concert with ISIS to acquire control over C and, in turn, SEAMEC. In the circumstances, the Supreme Court concluded that, T was not acting in concert with ISIS.

Although the Supreme Court's decision is very laudable and advantageous to foreign companies acquiring other foreign companies overseas, it does raise a few critical questions.

1. Should the Regulations have not been applied to determine whether T had triggered the Regulations in India, on acquiring control of C (and, in turn, of

SEAMEC), notwithstanding that the Supreme Court had relied on the definition of "control" under French law!

2. In *Technip's* case, both T and C were French companies, and, therefore, it was possible to apply French law. However, if the acquirer and the target company are from different jurisdictions, or if there are several acquirers from various jurisdictions, then it is an open issue as to which law should be applied to determine the resultant indirect acquisition in India.

3. The Supreme Court gave a literal interpretation to the definition of "person acting in concert." In particular, the Supreme Court emphasized that in order to determine the objective of the acquisition, emphasis must be laid only on the target company, which is contrary to the Report, which requires the Regulations to be interpreted liberally for the benefit of the shareholders.

In India, the decisions of the Supreme Court are binding on all subordinate courts and tribunals. This implies that the SEBI or the SAT will be bound by the Supreme Court's decision in *Technip's* case. However, the Supreme Court is always free to overrule its decisions prospectively in subsequent cases. Thus, so long as the judgment in *Technip's case is not overruled by the Supreme Court, international acquirers acquiring* corporations abroad and indirectly acquiring Indian companies as a result, may not necessarily trigger the Regulations.

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