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EMPOWERING TIMES

THINKING ALOUD

The M&A Gold Rush

Jay

PODIUM

Nitin Potdar

M&A Partner -

J. Sagar Associates

WE RECOMMEND

The GPS Paradigm

Nitin Potdar

Dear Reader,

Mergers and acquisitions (M&A) as a growth strategy has evolved over the years. Globally, the first three waves of M&A activity occurred during an economic boom and a flourishing stock market, ending due to economic recessions. The fourth and fifth waves were attributed due to increased enforcement of anti-trust laws and technological innovations while the fifth wave merger (1992-2000) was inspired by globalization especially in the banking sector.

M&As have been a popular business strategy for companies looking to expand into new markets, to gain a competitive edge, or acquire new technologies and skill sets. While the pandemic did halt economic activities, M&A activity is slowly picking up pace. Despite a challenging first half of 2020, India remained resilient and is slowing emerging as one of the top countries leading M&A activity. Case in point: Reliance's acquisition of Future Group's retail business and Hindustan Unilever Limited's (HUL) merger with GlaxoSmithKline (GSK) Consumer Limited.

In the race to capture markets, companies should not be myopic and must consider the timing, due diligence and the objective behind such strategic moves.

ET this month looks at the **'India's M&A landscape: Opportunities or Landmines?'** On the **Podium**, **Nitin Potdar M&A Partner at J. Sagar Associates** elaborates on the importance of M&A in India and globally.

In the **Thinking Aloud** segment, **Jay** shares his thoughts on the aggressiveness displayed by global firms when M&A is used as a powerful growth strategy to capture a wallet share of their respective markets. In the **We Recommend** segment, **Jay** reviews Nitin Potdar's book -**The GPS Paradigm.** The book highlights that Ground intelligence, unconventional Partnerships and Strategic solutions are the essential ingredients and a good model to follow in deal making.

In **Figures of Speech**, **Vikram's** toon takes 'Mergers & acquisitions' to a different level!

Please also **Click Here** to check out our Special issue of ET, which is a collation of selected themes that were featured over the years highlighting the changing landscape of the business world. This special edition has been well received and can be **Downloaded Here** for easy reading and is a collector's item.

As always, we value your opinion, so do let us know how you liked this issue. To read our previous issues, do visit the Resources section on the website or simply **Click Here**. You can also follow us on **Facebook**, **Twitter** & **LinkedIn** - where you can join our community to continue the dialogue with us!

THINKING ALOUD

The M&A Gold Rush

Jay

The quest for rapid growth in a company invariably means that the inorganic route has to be chosen. Hence, the business world witnesses some major transformations from time to time when the competitive landscape is altered by headline making deals. The recent move by Amazon is one such when they announced on May 26th that they have successfully wooed the legendary Hollywood studio, MGM, to join their ranks. While MGM is no longer the powerhouse movie machine of yore, the storied movie house's acquisition brought into focus how the digital world has eclipsed the charming old world when theatres brought joy to weekend moviegoers. Even James Bond, who continues to elude the traps of rogue nations and mysterious villains – and a key & ionic brand property of MGM – had fallen to the lure of Jeff Bezos when he came calling with an offer of USD 8.5 billion. This put to shade the deal made on May 17th by Discovery leading to WarnerMedia being hived off by AT&T to create a new mega firm to straddle the media world. And, so the merger game goes on in every industry.

All this notwithstanding data from researchers that more than 70% (and even up to 90%) of such deals fail, leading the Harvard Business Review to call it a mug's game. Yet, the rate of such deals shows no sign of abating and even the pandemic year of 2020 offered up some surprises in India. While all eyes were on Reliance - as always - with Jio growing from strength to strength with big ticket investments from overseas, other Indian firms were also in the news, including ITC and Unilever India. Besides, 2021 has already seen some big shifts in the business landscape with the titans of the old world making predatory sweeps of the digital realm and consolidating their power to fight consumer battles in the 21st century. Big Basket, Curefit, 1 MG and perhaps others are coming together under the new umbrella called Tata Digital to combat Reliance's huge appetite for gobbling up stumbling firms (like Future Group), and a host of start-ups (Netmeds, etc.).

The aggressiveness displayed by the US firms (both in traditional industries) and the new age firms has always been a key part of their success. It is not a secret that Apple, Google, Cisco, Facebook, etc. are known to roam the start-up alley armed with their cheque books. This enabled them not only to sweep aside emerging technology firms but also disarm and mothball mid-size firms that represented potential threats to their revenue model. Consider this: Apple has publicly acknowledged over 100 acquisitions – many more of course are not known to the press; the number for Cisco, Microsoft and Google is over 200 companies; for Facebook it is over 75. In an industry where talent and technology are wedded together, this is an on-going exercise, as the race to grab the latest technology as it emerges and to fully commercialize what is available, is the vehicle for growth and market cap. The consequence: the cult of the Digital Giants now represents a looming threat to consumers worldwide, leading to calls of anti-trust action to regulate their behavior and immense power.

Conglomerates like GE were built on such strategies in the past and have also fallen victim to this growth mania. The spectacular failure of GE, according to analysts, was caused by indiscriminate and over-priced acquisitions under Jeff Immelt (amongst other reasons), an easy charge when in days past, such moves were lauded by analysts and media as 'innovative & futuristic leadership'.

This brings to fore the other reason why M&A deals are on the agenda of every large corporation CEO. Obeisance to the street dictates that their ravishing hunger can only be met by exponential growth which means that the CEO needs to seek a big target. The cycle of such acquisitions in an industry is triggered usually by one spectacular deal and soon enough others join the bandwagon afraid to miss out on what the press labels as 'emergent trends'. The media, technology and pharma industry have periodically such headline making mega-deals. By the time the feeding frenzy ends, it is time to begin a round of divestment as many of the acquisitions have flamed out leaving bodies in the street. The biggest casualty usually is the CEO whose ego first created the cycle but more often than not he has parachuted out with a handsome retirement package. What is left behind is a wreck of a firm which now serves as a case study in value destruction.

Why then are M&As popular? The answer is that if done right, it is a powerful growth strategy. As mentioned earlier, there are some firms who have carefully cultivated a playbook which allows them to scout carefully, evaluate cautiously, invest frugally and thereafter integrate wisely so that the promised synergy is delivered. Value accretion is a laudable objective but generating positive outcomes needs painstaking management skills behind the scenes, away from the spotlight.

As the numbers of the vaccinated increase, soon a new realization will emerge that the pandemic has created industrial sickness too in India. Certain sectors (travel, transportation, hospitality, etc.) and firms in the MSME sector, may not recover soon from the economic debilitation caused by Covid-19. This also indicates an opportunity for the stronger and more ambitious firms in those sectors. Whether they can use this lever for jump-starting their business and pursue vantage position will be left to their Board for the window of opportunity will close rapidly. JFK's words ring true in this situation that the best time to mend the roof is when the sun is shining. Smart business leaders will revisit their M&A playbook now to get set for the growth which is waiting in the anvil when the economy rebounds. The regulators too will be compelled to cast away some of the laborious processes that delay such aggressive action. Afterall, the journey towards a 5 trillion economy cannot be forgotten.

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Podium

Nitin Potdar

M&A Partner - J. Sagar Associates

Nitin Potdar is a M&A Partner of India's Leading Law firm J. Sagar Associates. He specializes in Public & Private Mergers & Acquisitions, Joint Ventures & Foreign Collaborations, Corporate Restructuring including Asset & Share Purchase Deals. He has rich experience in Private Equity transactions including leveraged buyout, exits, providing strategic and business-oriented advice to investee companies including Start-ups. For over two decades, he has been advising MNCs on their India entry strategies for commencing operations & consolidation in a cross-section of industries.

The Legal 500 recognizes him for being 'The Most influential & significant Lawyer in 2019'. He is solution oriented and would always try and resolve any conflict by creating a win-win for all parties whilst keeping the core commercial interest of parties intact. Simple drafting, straight negotiations and strict working discipline are his tools on any transaction.

He is a frequent speaker at several conferences and seminars organized by leading industries, institutions, and chambers on subjects like - Takeover Code, M&A, and structuring of Joint Ventures.

During the Covid-19 Lockdown, (a) he has set up #IndiaPowerTalk - a platform wherein he invites international leaders seeking their insights, strategies & experiences, and (b) authored a book titled 'The GPS Paradigm' for successful mergers, acquisitions and joint ventures.

He is also the Chairman of Gandhi Films Foundation set up by Pt. Nehru to preserve the filmic material on Mahatma Gandhi, a Charter Member of TiE Mumbai, member of the Knowledge (Skill and Education) Committee of the IMC Chamber of Commerce & Industry, Member CII Western Region Start-up Committee, Ex member of the International Bar Association – Anti-trust section & India advisory group, Member - Ex-Committee of the Maharashtra Chamber of Commerce and has worked with the Chamber of Tax Consultants.

ET: At the outset, please share with our readers why M&As are an important part of an economy?

NP: It is now proven beyond doubt that M&As are the best 'Growth Strategy' across industries and sectors. Given the liberalization, globalization and the advent of information technology the entire global economy is increasingly becoming inter-connected and more inter-dependent. And this is not just for growth but for their own survival. Thus, going forward the term 'competition' would get replaced by productive collaboration and joint venture. In fact, certain future technologies like Internet of Things (IoT), Artificial Intelligence (AI), 3D Printing Technology, Data Analytics would force manufacturing & service industries to keep pivoting not just products and processes but also their entire business models. And that is where M&As would play an extremely important role in the economy. M&As have proved to be great drivers for innovation and provide companies with access to intangible assets such as knowledge and human capital.

M&A allows companies to take advantage of economies of scale that drive prices down. This is especially true for capital-intensive industries such as technology, health care and aerospace.

It allows companies to more effectively compete in international markets that have very large players such as those frequently subsidized by foreign governments.

Larger firms formed post M&A can deliver goods of the same quality at lower prices than before or offer new and better products to consumers. Hence there is the expanded use of an existing distribution network by the acquisition of new product capabilities.

M&A also creates more wealth for shareholders, and a tertiary benefit is to boost real gross domestic product through the "wealth effect." For any given level of income in the aggregate economy, a higher level of wealth will boost consumption spending which is a determinant of calculating the gross domestic product.

By making an economy more efficient and more productive, M&A reduces inflationary pressures. With less inflation, price signals become clearer and resource allocation improves throughout the economy. Subsequently, any given level of income and wages will generate more real demand for final goods and services, which will generate more demand for labor, which in turn creates more income. Providing employment is a major benefit that is accrued from M&A transactions.

"With valuations of companies at an all-time low, there would be cash rich companies that would grab the chance to grow inorganically and prefer to acquire over create any new model. Experienced management would look for cheaper targets which offer innovative products or tech driven firms. Foreign companies that were eying Indian markets would certainly try and seize the opportunities."

Reliance industries has already made over three dozen M&As, and tactical investments in the past 15 months. The growing Adani group has focused on energy tech start-ups. Airtel acquired Gurgaon-based artificial intelligence-driven start-up Voicezen. Cipla bought interest in GoApptiv (healthcare), a digital solutions provider to service customers in rural towns. NBFCs are eying fintech firms to increase their reach and productivity. ICICI Bank funded Auxilo Finserve, an NBFC start-up in the education space.

ET: What are the hurdles for M&A activity in India when compared to global peers?

NP: Typically, any M&A process is heavily regulated and is time consuming in India. While the regulatory framework has evolved, and the market is more mature, M&A transactions still face challenges on account of a multiplicity of diverse regulations, interpretational uncertainty by the regulators and long-drawn-out court approval processes. The court process and consequently the hurdles vary from listed to unlisted companies. Globally the process for M&A is evolved and now standardized, wherein in India though the Courts have always supported and taken consistent stand on issues like valuation, employee protection, public interest, environmental laws etc., there is lot that needs to be done to ease the approval process.

The key to successfully conducting any M&A is getting a team of experienced consultants including legal and finance professionals who understand the business model and commercial aspect of the transaction. The challenge is that not many lawyers or consultants are commercially or technically savvy. M&As typically need experienced professionals who command trust and are able to create a win-win for all parties. M&A is not about merely conducting technical due-diligence, documentation and approvals.

In terms of due diligence for M&A transactions, there are various issues such as non-availability of centralized registry for land and litigation records, obsolete data which has not been updated or availability of documents in local languages, which require translation. Hence, there is increased reliance on local counsel, which is not the case for Western counterparts.

In India, the legal due diligence process generally does not cover financial and tax matters (both direct and indirect tax) and often there are separate firms engaged for the same. To effectively understand the risks, it is critical for the acquirer to view the findings of legal as well as financial diligence which may lead to a disconnect in gaining the full picture.

Indemnities in transactions are typically difficult to enforce in India as under Indian law, indemnities are akin to damages and are required to be proved. Liquidated damages tend to be capped even when there is a genuine pre-estimation of losses. Even where indemnities are established, foreign parties may face difficulties in repatriation of sums awarded outside India and may in some instances need regulatory approval.

Owing to the backlog of cases before the Indian courts, litigation in India is protracted and may not be an efficient means of obtaining relief in disputes. It could also be used effectively by an opponent as an instrument to delay transactions of contractually agreed processes.

Valuations in India are generally on the higher side for majority of companies – this is due to differences occurring because accounting or revenue recognition standards between those used by the company prior to the acquisition and that applied by the acquirer post-acquisition become contentious, particularly in the case of an acquisition that is completed in tranches.

Lastly, the standards of corporate governance and regulatory compliance may often fall short of the expectations of foreign acquirers. This is especially so in areas such as board independence, environment, labour, related party transactions and formalization of arrangements with key customers and suppliers.

Due to the abovementioned, transactional timelines may be delayed/extended and not as easily resolved compared to global peers.

ET: What are some of the challenges that have come about due to the pandemic specifically on the M&A landscape in India?

NP: The Indian economy, especially smaller SMEs/MSMEs have faced an adverse hit in COVID-19 impacted sectors such as Travel, Hospitality, Media & Entertainment and so on. In my view consolidation is inevitable given the lopsided harm inflicted by COVID-19 on smaller players across badly hit sectors.

Mid-sized companies are now facing tougher strategic choices between - whether to jam the brakes or to step on the gas, in respect of the ongoing deals. The key drivers of decision making range from and include change in business outlook, liquidity crunch and the lack of demand.

The global supply chain fallout and restricted international borders have forced investors to take a relook at the valuation of the assets underlying the ongoing and future deals.

At a domestic level, the initial and continuing imposition of nationwide and state-wide lockdown has had the enormous impact of thinning: supply chains, work force, consumer demand, cash flows and funding. Hence, there is a foreseeable reduction in interest rates and the ability to borrow will be severely restricted.

The key to any M&A Deal is the ability to do quality due diligence which itself has come under severe constraint. Consultants must rely less on physical meetings and site visits, while placing more reliance on virtual data rooms, which is not always possible considering that companies in smaller towns in India may not have internet access or viable internet facilities. Consequently, lot of M&A deals in structuring stage have been abandoned by key players for diverse reasons.

Although regulators such as the Securities and Exchange Board of India and Reserve Bank of India have permitted parties to file an application electronically and to get the pre filing consultations for certain transactions through video conferencing, the approvals and consent required from the state, local or municipal authorities might pose to be a challenge due to the restrictions imposed during the pandemic.

It must be considered that the global health pandemic is much larger in size and scale and presents an exponential economic crisis, particularly for India and other developing economies. The global health challenge comes at a time when India is in the grips of some of the overwhelming financial problems like the IL&FS crisis. Given that India has not emerged fully unscathed from these problems, any disruption in the form of disturbed consumption cycles and depleted supply chains would exert a definite negative impact on the country's economy.

The immediate impact from the pandemic was major, with a considerable deceleration in deal activity in the first half of 2020, both in terms of deal values and volumes. As per data presented by Grant Thornton India's Dealtracker, aggregate M&A and PE deals recorded a fall of 37% and 22% respectively as compared to deal volumes in April 2019 and March 2020. However, there was a pickup in deal value towards the end of 2020.

It cannot be disputed that the outlook on M&A has forever changed- with players now placing more emphasis on representations, warranties, indemnities as well as force majeure and material adverse effect clauses while structuring deals in order to safeguard their position.

ET: You have been a strong advocate of the India growth story through M&A. Please tell us what about the playbook on M&A called 'The GPS Paradigm' that you have authored during the current pandemic.

NP: The GPS Paradigm is a concise and instructive playbook for successful corporate mergers, acquisitions and joint ventures for business founders, leaders, bankers, finance heads, legal professionals, and students.

Today due to globalization and high-speed disruptive innovation and breakthrough technologies 'thinking beyond the normal' is the 'new normal'. And the GPS Paradigm, presents a structured framework for achieving measurable and sustainable success.

The core of this book is, a growth strategy equipped with practical tips on the 'What, Why and How' of global M&As and JVs. It is now an accepted fact that exponential growth across different sectors and spheres - and we are talking here of 200X growth, not 10X or 100X - would come only through prudent and purposeful M&As, multiple JVs and global collaborations.

The book talks about the past, present and future in a simple, lucid language - recounting the M&A history, evolution of industrial revolution, and tech challenges of an impending future, while highlighting the landmark M&As executed by tech majors like Facebook, Amazon, Google and Jio, and unfolding how they have unknowingly followed the GPS principle as envisaged by me.

I have also described many of the marquee deals that I have personally conducted over three decades of my global corporate law practice, while highlighting the pivotal role played by the Indian judiciary and corporate law in putting M&As and JVs in proper perspective.

I would again like to reinforce the fact that this is not a technical book. It is a playbook for definitive growth led by M&As, JVs, and collaborations and for all those who are concerned with growth strategies.

I am sure you will enjoy reading as much as the noted chartered accountant Shailesh Haribhakti did. I would like to end this short address with his succinct citation which reads - "The GPS Paradigm is a robust, practical, dependable and immensely energising master algorithm for achieving measurable and sustainable business success."

The book has also received favourable comments from stalwarts such as Robert B. Ahdieh, Dean, Texas A&M University School of Law, PR Ramesh, Former Chairman, Deloitte India as well as Emanuele Sacerdote, Founder, SOULSIDE and is available for pre-order on e-commerce websites Flipkart and Amazon (also in e-version).

ET: What makes your firm, J Sagar Associates, different from other legal practices in the market? What is the nature of support that your firm has provided to firms to weather the current storm?

NP: Founded in 1991 - J. Sagar Associates (JSA) is a leading national law firm in India with over 320 professionals operating out of 7 offices located in: Ahmedabad, Bengaluru, Chennai, Gurugram, Hyderabad, Mumbai and New Delhi.

Our practice has been organised into three clusters – Corporate, Finance and Disputes with twenty-seven service lines. We serve our clients through partner-led teams with domain knowledge across twenty-one sectors:

Our practice is arranged along service lines and sector specialisation that provides legal services to top Indian corporates, Fortune 500 companies, multinational banks and financial institutions, governmental and statutory authorities and multilateral and bilateral institutions.

We take pride in combining the expertise and diversity of experience of a large firm with the personalized attention and responsiveness of a boutique firm. Our lawyers work seamlessly across practice areas and offices to assist our clients.

Through our commitment to social responsibility, we serve our communities by rendering "pro bono" legal services and supporting social responsibility initiatives. The firm has committed to achieve an average of sixty pro bono hours per attorney per year.

The firm has a dedicated COVID-19 resource portal, by means of which concerned parties can access latest updates about the pandemic as well as be informed on government regulations, guidelines and so on.

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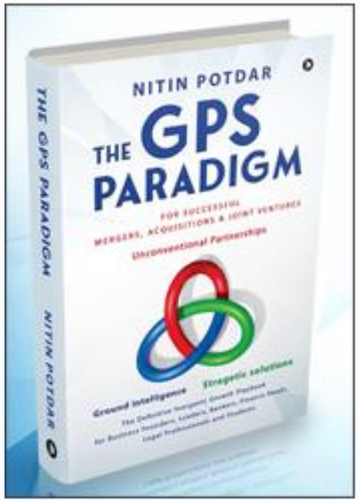
We Recommend

The GPS Paradigm
Nitin Potdar

- Reviewed by K. Jayshankar



The esoteric world of Mergers and Acquisitions (M&As) has been laid open by a veteran legal eagle, Nitin Potdar, in his recently launched book, **The GPS Paradigm**. First, a word on the author. Nitin Potdar is an acknowledged expert on the subject having been the go-to lawyer for firms seeking inorganic growth and innovative answers to complex corporate tangles. Currently a Partner at J Sagar & Associates, based at Mumbai, his stints at India's leading law firms (initially at Crawford Bayley & later at Amarchand Mangaldas) presented him with exceptional opportunities to advise and guide some of the biggest M&A deals in the country over multiple decades. Therefore, his ideas are worthy of serious consideration.

The book is essentially designed as a playbook to explain what the ingredients should be for good deal making. Arguably firms turn to lawyers late in the game, usually after an investment banker has brought interested parties together but that is like playing a match and referring to the rule book post facto. The author's thesis is that for M&As and strategic collaboration through Joint Ventures (JVs), the players seeking growth would be better served if they paid heed to his model from the get-go. Ground intelligence, unconventional Partnerships and Strategic solutions (hence, GPS) would be the right compass that directs the players towards smooth and early results as it is well known that the road to inorganic growth is strewn with legal pitfalls and casualties.

Navigating through this book is easy as the usual legal labyrinth associated with the M&A world has been explained with sufficient ease for any uninitiated corporate reader. Besides, the book also stresses the multiple dimensions involved for a firm to prepare for inorganic growth by presenting the need to go beyond the obvious financial and legal elements. Filled with examples – both global and from India – the author has traced the reasons why the M&A route was not popular in the past (pre-liberalization) and why India's corporate world has been abuzz with deal making in recent times. Going beyond witnessing this change, the author has been an active participant in consummating deals for his clients both with Indian family businesses and multinational firms, which makes his ideas not just appealing but also authentic.

Nitin Potdar's personality also comes through in the book as through its pages he has liberally shared his personal growth story. From the early days as an unassuming, eager and hardworking young lawyer, the author candidly acknowledges his learning debts to the stalwarts that he worked with. The classical model of developing good lawyers is to be apprenticed under the masters and today's generation finds that difficult as patience is in short supply. However, the author shares his experiences to illustrate that a good lawyer is crafted with self-discipline and dedication to his profession. Perhaps all this has prepared the author now to be innovative in his life which has led him to launch a unique digital offering, India Power Talk, building on his global network.

One would have wished to see examples of failed negotiations - with reasons - and deals that went awry at the alter (as M&As sometimes do) from the Indian context but the author is silent in this regard perhaps in the best traditions of good lawyers who maintain client confidentiality. However, with many pointers to young lawyers, the book is a good primer for those who seek to de-mystify not just the world of M&As but also want to chart a pathway to success as a corporate lawyer.

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THROUGH THE LENS

Nature enthusiast, **Rupesh Balsara** identifies a Spotted Crake, which is a small waterbird native to Europe and Western Asia. This species is migratory in nature, wintering in Africa and India. They mainly feed on insects and aquatic animals and live in freshwater wetlands with dense vegetation.

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