

Multi-Layer Protection for Singhs in Daiichi-Ranbaxy Agreement

SOMADAS
NEW DELHI

The share purchase agreement that Japanese drugmaker Daiichi Sankyo inked in 2008 to buy Ranbaxy Labs from former promoters Singh family doesn't have any warranties of the sellers to cover risks of business and provides them multiple layers of protection, corporate lawyers said. Corporate lawyers who reviewed the sale deed for ET found it intriguing that the part that deals with representations and warranties of the sellers, only and only relates to the title transfer from the Singh family. They feel that the agreement — which is at the core of the ongoing arbitration between Daiichi and the Singh family at Singapore's International Chambers of Commerce — heavily favours the sellers. "I would have expected sellers' representations and warranties for a deal of this size to have easily run into 20 pages," a top M&A lawyer said. "It is completely beyond me to decipher as to how has Daiichi agreed to dismiss this critical part in just three paragraphs and two lines in half a page, and this when Ranbaxy's initial problems with US drug regulator were public knowledge by then."

Neither Daiichi nor Singh responded to ET queries.

MULTIPLE LAYERS OF PROTECTION

According to lawyers, the share purchase agreement (SPA) offers multiple layers of protection for the sellers, who in this case mean brothers Malvinder and Shivinder Singh, their mother and the former's wife and daughter. Even if a breach is still proven at the court, the maximum recoverable amount from the sellers is capped at the amount they were paid for sale of their share of stake, according to indemnification by the sellers.

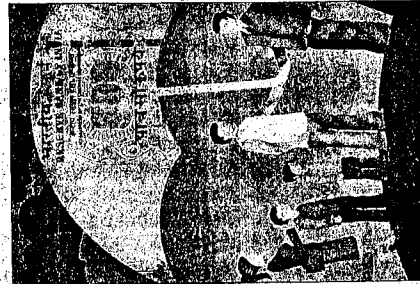
In 2008, Daiichi, shelled out \$2.4 billion to buy Singh family's 34.6% stake in Ranbaxy. The deal valued at a total

of \$4.6 billion remains the largest acquisition in the Indian pharma space. "The SPA was cleverly drafted to favour the sellers," said Krishna Sarma, managing partner at Corporate Law Group. "In terms of the SPA, the company (Ranbaxy), and not the sellers, was bound to disclose any event or situation which would have a 'material adverse effect'. Further, such event or situation should have been within the knowledge of one such seller (Malvinder Singh) at the time of the agreement," he added.

A section in the representations and warranties of the company (Ranbaxy) says, "...to the knowledge of the Company (stands for Malvinder Singh here), there is no event or situation that has not been disclosed to the Buyer and its representatives since the Accounts Date (31 December 2007) and which could have a material adverse effect". It also absolves Singh of 'any obligation' to make any due enquiry for the purpose. Singh can argue at the arbitration that even if some former top executives of the company were aware of some sensitive information, he personally had no idea about it and hence he should be granted immunity from damages.

Thomas Philippe, partner at PwC Law Partners, said that the most unusual part of the agreement is that the knowledge of the company here has been narrowed down to mean just Malvinder Singh. "It is very surprising that no other senior managerial personnel was included for this purpose. In the context of generic pharmaceuticals, divisional heads such as that of R&D and quality control should have been included for the purpose of attributing knowledge," he said.

Another big departure from usual M&A standards is that Malvinder Singh has been put under no obligation to make any enquiry about the affairs of the company in connection with representations and disclosures made to Daiichi. "Ordinarily, the sell-



Family Shelter

ers would have been under an obligation to examine all available information and make enquiries expected of a person of ordinary prudence, having regard to such person's authority," Philippe said.

Another lawyer quoted above said that as per the agreement claims for breaches may be made until 18 months of the 'subscription closing date'. The standard for this in M&A space is three years. It's five years since Daiichi concluded the takeover process in late 2008. This section also clearly states that in no event should claimed damages include indirect, special, punitive or lost profits "whether foreseeable or unforeseeable".

Ranbaxy pleaded guilty to felony charges in May and agreed to pay a penalty of \$500 million to the US govt. for manufacturing and distributing adulterated drugs. Lawyers reckon that the Singhs can argue this sum as both punitive and indirect (faced by a subsidiary of Daiichi and not the company itself. "Also

the many six-month exclusivity window opportunities in the US, Ranbaxy has not been able to capitalise on till date, can be contested as lost profits by Singhs, exempted from the damages," one lawyer said.

Differences between Daiichi management and former Ranbaxy promoters had become clear in 2008 when Malvinder had stepped down as CEO of the company abruptly after promising a five-year stint the year before.

The bad blood between the two parties came out in open in May last after Daiichi, accused Ranbaxy ex-promoters of concealing facts about US regulatory investigations. Denying the charges, Singh hurled counter-allegations saying Daiichi has failed to manage Ranbaxy. The two have been engaged in arbitration since June.

WHAT DOES IT MEAN FOR DAIICHI?

According to Philippe, this would mean that Daiichi would have to go that extra mile and prove that the alleged non-disclosures were within the actual knowledge of Malvinder Singh, and not what he ought to have known as a CEO who had made prudent enquiries into the company's affairs.

Also, the agreement is governed by Indian law.

Sarima of Corporate Law Group said if Daiichi has concrete evidence to show that important disclosures were not made, it can fight for recovering money within the caps cited in the agreement. "The other possibility is for Daiichi to litigate under the Indian penal provisions, and an outcome would depend on the severity of the concealment and the resultant injury to the buyer," he said.

Most lawyers felt that Daiichi cannot rely purely on the fact to make out its case, and may have to pursue it beyond the scope of arbitration tribunal.

Whether or not Daiichi opts for this route of legal recourse beyond the scope of arbitration tribunal, only time will tell.