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Corporate Mergers and Acquisitions in India: Legal Analysis

~Dr. Monika Jain[1]

Abstract

India's economy is one of the fastest-growing in the world. The range of applications for mergers and acquisitions operations has increased recently because of the continuous advancements in technology, globalization, and the legislative framework controlling cross-border mergers. There is now much more competition as a result of these considerations. Due to the numerous factors that need to be planned for and taken into account before, during, and after a merger transaction, cross-border mergers are far more difficult than domestic discussions. This area was selected for cross-border M&A since the majority of the countries there were liberalizing their markets and legislation. Through mergers and acquisitions, the corporate sector is rearranging its operations in ways never seen before due to globalization. Among the conspicuous features of the present M&A scene is the high frequency of cross-border deals, which is a less complicated means of internationalization than Greenfield's way of entry. In light of the global context, the current study aims to understand the character and extent of these transactions in India. The study also seeks to understand the nature, extent, and structure of these transactions in India. The present study argues that a multi-factor perspective is necessary to understand the current boom in cross-border transactions. In addition to the pull elements from foreign firms, the wider market, technology, and efficient operation, this approach should consider the push aspects from home nations, such market limits, the need for low-cost production factors, and expanding global rivalry.

Keywords: *Cross-border, company, M&A, challenges, business, firm, globalization*

[1] Dr. Monika Jain, Senior Advocate, High Court of Delhi

Introduction

Cross-border mergers and acquisitions (M&A) are business partnerships involving entities with their countries of origin in separate countries. Cross-border M&A refers to the acquisition of a firm by another company from another country.[2] Compared to domestic M&As, the process for cross-border M&As follows a similar path, but it has about twice the complexity and processes involved during the execution of such M&As. Strategic considerations for cross-border M&A implementation differ from those for local purchases.[3] In a nutshell, cross-border mergers are agreements between companies that originate in different countries that combine their resources and obligations to establish a whole new firm.[4] Cross-border acquisitions, on the other hand, are commercial transactions in which the assets and liabilities of a local company are transferred to a foreign organization, automatically associating the local company. These cross-border M&As are governed by different regulations and execution strategies than domestic M&As. [5] When one engages in mergers or acquisitions, there are numerous techniques and strategies for gaining control over a public or private firm.[6] Legal considerations must be made while carrying out a cross-border transaction, including a due diligence review, negotiation, valuation, determining the obligations of the parties, scenarios and contract termination structuring, internal and external permissions, etc. The process is largely identical to a domestic one, although there are additional steps to take into account.[7] In short, a cross-border merger occurs when two companies of different nationalities come together to form a third business. A cross-border merger is the combination of an Indian and a foreign corporation, or the other way around.[8] A firm in one nation might get an entity or some other business from multiple foreign countries. The nearby businesses could be privately, publicly, or publicly owned. An purchase or merger that takes place between two foreign

[2] Beena PL. Trends and perspectives on corporate mergers in contemporary India. *Econ Pol Wkly*. 2008, September 28.

[3] Nayyar D. The Internationalisation of Firms from India: Investment, Mergers and Acquisitions, SLPTMD Working Paper Series No. 004. Department of International Development, University of Oxford; 2007.

[4] Kumar N. Mergers and acquisitions by MNEs: patterns and implications. Econ Pol Wkly. 2000;XXXV(32).

[5] Pradhan JP. Trends and Patterns of Overseas Acquisitions by Indian Multinationals, Working Paper No. 10. International Society for Infectious Diseases, October; 2007.

[6] Dunning JH. Multinational Enterprises and Global Economy, Addison-Wesley Publishing Company; 1993.

[7] Narulla R. Globalisation and Technology: Interdependence, Innovation Systems and Industrial Policy. Blackwell Publishing Inc; 2003.

[8] Hunter T. The role of regulatory frameworks and state regulation in optimising the extraction of petroleum resources: A study of Australia and Norway. Extr Ind Soc. 2014;1(1):48-58. doi:10.1016/j.exis.2014.02.001.58

companies is known as a cross-border merger.[9] An international merger will result in a shift in power and responsibility for the management of the combined company or the acquired company.[10] A local firm is automatically linked with a foreign corporation and its assets and liabilities are transferred to the foreign investor in a cross-border purchase.[11] As a consequence, two businesses from two separate nations have their assets and liabilities consolidated into one new legal entity.[12]

Background

Currently, mergers and acquisitions are the primary method used by associations for business development. Mergers and acquisitions appear to be a big fascination for the minds of the top businesspeople as business sectors develop in developed and developing nations.[13] Since 1991, the legislatively initiated process of development, privatization, and globalization has had an impact on the operation and management of Indian corporate endeavors. [14] Indian businesses are refocusing their systems in order to survive and advance in the competitive business environment. [15] Mergers and acquisitions are becoming more common during the period of refocusing. In the Indian economy, mergers and acquisitions are nothing new. Additionally, businesses have used M&A in the past to expand.[16] The justifications for M&A have evolved throughout time. Currently, Indian business ventures that had recklessly stretched their wings are centering on the lines of center fitness, piece of the pie, worldwide intensity, and solidification.[17] The arrival of external rivals has accelerated this refocusing process. Typically, this anticipates that organizations will grow and expand in organizations that they view favorably. In order to have

[9] Meyer CB, Altenborg E. Incompatible strategies in international mergers: the failed merger between Telia and Telenor. J Int Bus Stud. 2008;39(3):508-525. doi:10.1057/palgrave.jibs.8400354.
[10] Schmitz Jr JA, Teixeira A. Privatization's impact on private productivity: the case of Brazilian iron ore. Rev Econ Dyn. 2008;11(4):745-760. doi:10.1016/j.red.2008.01.001
[11] Reddy KS, Nangia VK, Agrawal R. Farmers Fox Theory: does a country's weak regulatory system benefit both the acquirer and the target firm? Evidence from Vodafone-Hutchison deal. Int Strateg Manag Rev. 2014a;2(1):56-67. doi:10.1016/j.ism.2013.10.001.
[12] Hitt MA, Tihanyi L, Miller T, Connelly B. International diversification: antecedents, outcomes, and moderators. J Manag. 2006;32(6):831-867. doi:10.1177/0149206306293575.
[13] Economic Intelligence Service. Monthly Review of the Indian Economy. Mumbai: CMIE
[14] Rakesh B. Corporate Response to Economic Reforms. Econ Polit Wkly. 2000; Mar 4.
[15] Neera B. Mid Merger Blues. Bus India. 1996; Nov 18:74.
[16] Ghosh A. Does Operating Performance Really Improve Following Corporate Acquisitions? J Corp Finance. 2001;7:151-178.
[17] Kumar MR. Corporate Mergers in India: Objectives and Effectiveness. New Delhi: Kanishka; 1995.

a noticeable presence in their upscale central regions, prominent corporate houses have attempted reconstruction. [18] Due to its effectiveness in reviving corporations, mergers and acquisitions (M&A) have become an essential part of corporate endeavors' long-term business systems.[19]

Objective

- To evaluate any legal loopholes that may exist in the laws controlling foreign mergers and acquisitions.
- To comprehend the governance characteristics of Indian organizations and the industry aspects that impact investment companies' cross-border acquisitions.
- This research aims to investigate the impact of cross-border mergers and acquisitions on the economies of India and the world.

Literature Review

The essay examines how economic structure and policy impact cross-border transactions and provides a comprehensive overview of cross-border mergers and acquisitions in India. The study looks at Indian laws governing cross-border transactions as well as cross-border M&A data from 2010. We take a close look at the Indian context for international mergers and acquisitions to see how our investment regulations could impact the M&A deals that happen in our country. [20] Utilizing institutional theory is crucial in explaining the operation of the alliance governance paradigm. Collaborating with well-known businesses to boost legitimacy may be accomplished through cross-border alliances. Competitive legitimacy is based on the three institutional foundations. Institutional theory also considers variations in institutional systems between regions. The host nation's institutional forces, including its value systems, business practices, and competition laws, may have a special effect on decisions made about the governance method.[21] The strong correlation between performance and cultural distance holds true even after controlling for a variety of deal-specific factors and country-level fixed effects. In addition, it withstands

[18] Pawaskar V. Effect of Mergers on Corporate Performance in India. Vikalpa. 2001;26(1):19-32.
[19] Rao NV, Rao PVK. Regulation of Mergers under the Companies Act: A Critical Study. Comp News Notes. 1987;25(6).
[20] Gupta KS. Cross-border Merger and Acquisition: The evolving Indian landscape. Int J Bus Manag Invent. 2017;6(8):12-15.
[21] Ang SH, Michailova S. Institutional Explanations of Cross-border Alliance Modes: The Case of Emerging Economies Firms. Manag Int Rev. 2008;48(5):551-576.

additional long-term performance standards. Friendly cash acquisitions usually perform better over the long term.The fact that acquirers are from more developed economies than the targeted ones may also be a sign of synergy. [22] It is unclear if these inorganic types of international expansion are advantageous to the acquiring corporations, despite the business press giving more emphasis to overseas acquisitions by emerging-economy firms. We argue that foreign acquisitions aid emerging economies in internalizing both tangible and intangible resources, as they are hard to sell through market transactions and require time to develop domestically.[23] They offer a major strategic lever for value creation as a result. When a multinational business from a developed country acquires majority control of a company in an emerging market, the acquiring firm's stock price climbs in a statistically significant and economically substantial proportion. There doesn't seem to be a repetition of positive acquirer returns and dollar value gains when the same developed-market acquirers take up enterprises in developed economies. [24]

Research Questions

- Are there any loopholes in the regulations that control how conflicts in cross-border mergers and acquisitions are resolved?
- Is it possible to modify Indian legislation to align with the cross-border mergers and acquisitions model of China?

Research Hypothesis

The rules pertaining to international mergers and acquisitions are not well-defined in India.

Research Methodology

This study used qualitative research, specifically doctrinal research, as its research methodology. In order to gather material for this paper, both primary and secondary sources must be interpreted

[22] Chakrabarti R, Gupta-Mukherjee S, Jayaraman N. Mars-Venus marriages: Culture and cross-border M&A. J Int Bus Stud. 2009;40(2):216-236.

[23] Gubbi SR, Aulakh PS, Ray S. Do international acquisitions by emerging-economy firms create shareholder value? The case of Indian firms. J Int Bus Stud. 2010;41(3):397-418.

[24] Chari A, Ouimet PP, Tesar LL. The Value of Control in Emerging Markets. Rev Financ Stud. 2010;23(4):1741-1770.

to be useful. The majority of the data will come from publications, academic papers, conferences, and other international events.

Factors to be considered for cross-border mergers and acquisitions

Despite this, it's crucial to stress that cross-border M&A only takes place in circumstances when financial incentives exist.[25] That is to say, because the arrangement serves the interests of both the foreign corporation and the local partner, it will eventually backfire. Because many domestic companies in many emerging nations overstate their ability to attract M&A, international corporations must exercise due diligence when negotiating an M&A deal with a domestic firm. [26] This is because parties to a merger or acquisition engage with investment banks and management consultants prior to executing the deal, and many international companies look to the Companies Act of 2013's Section 2 (42).[27] Political, economic, social, and general risk related to black swan events—which are frequently identified by multinational corporations—are additional risk variables connected to cross-border M&A.[28] Multinational corporations not only compile all of these elements into a risk matrix, but they also identify potential M&A partners and nations. Based on the appropriateness of the agreement, they choose the M&A transaction.[29] Third, political backing and regulatory approvals are also necessary for the success of cross-border M&A. Without these enabling conditions, deals cannot be reached.[30]

- Market pressure and declining demand brought on by foreign competition
- seeking out new business opportunities as technology advances quickly
- Enhancing company productivity in the production of goods and services
- achieving the goal of growing profitably
- expanding the scale of production
- sharing and innovating technology that lowers costs.

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25 Saple V. Diversification, Mergers and their Effect on Firm Performance: A Study of the Indian Corporate Sector. Rev Quant Finance Account. 2000;67.
26 Kumar S, Bansal LK. The impact of mergers and acquisitions on corporate performance in India. Manag Decis. 2008;46(10):1531-1543.
27 Companies Act 2013, §2(42)
28 Economic Intelligence Service. Monthly Review of the Indian Economy. Mumbai: CMIE..
29 Mantravadi P, Reddy A. Relative Size in Mergers and Operating Performance: Indian Experience. 2008.
30 Leepsa NM, Mishra CS. Post Merger Financial Performance: A Study with Reference to Select Manufacturing Companies in India. Int Res J Finance Econ. 2009; ISSN 1450-2887.

Some Recent Examples of Cross-Border M&A

Two recent instances of cross-border M&A acquisitions that illustrate how they should be assessed in light of the previously stated criteria are the Jet-Etihad merger and the Air Asia acquisition in India's aviation business. The Air Asia and Jet-Etihad accords, for example, have both supporters and detractors. For this reason, a lot of international companies are hesitant to conduct business in India.[31] If we shift our focus to cross-border M&A transactions from emerging markets to the developed world, Sinopec, a Chinese oil company, faced significant resistance from the US Senate due to security concerns and possible ownership difficulties. Undoubtedly, one example of a successful purchase is Unilever's recent acquisition of its international businesses.[32] An example of a merger is the purchase of Walmart Inc.'s 77% shareholding from Flipkart.[33] Examples of M&A include the 2011 acquisitions of Jaguar and Land Rover by Tata Motors and Hamleys by the Reliance Group. Strong ramifications of both these accomplishments and their deficiencies include the requirement for an organized, standardized M&A deal-handling procedure in each nation and by each corporation. If not, there are incentives for resentment of the process and for energizing the economic environment for all parties involved.[34] The most well-known failure in 2017 was the proposed merger between IDFC and Shriram Finance. It was suggested to combine an infrastructure business with a non-banking financial firm. Dynasty Acquisitions Ltd. and Piramal Enterprise Limited are two of the investors. An Indian conglomerate is called Shriram Group. The publicly listed Shriram City Union Finance Ltd. and Shriram Transport Finance Company Ltd. are held by Shriram Capital. The principal cause of the deal's collapse was the premiums paid by certain of IDFC's investors out of fear of losing their swap holdings.[35] Reliance Communication and Aircel together is the third case. The merger began in the year 2016. Foreign institutional

[31] Evolution of CCI in the Airline Sector: A Critical Study of Jet and Etihad Airways Combination., Available at: https://www.icle.in/resource/evolution-of-cci-in-the-airline-sector-a-critical-study-of-jet-and-etihad-airways-combination/

[32] PetroChina, Sinopec ponder benefits of merger amid oil slump., Author: Clyde Russell., Available at: https://www.reuters.com/article/us-column-russell-petrochina-sinopec-idUSKBN0LV1182015022 , Published: February 27, 2015.

[33] Walmart-Flipkart merger: All you need to know, Available at: https://www.indiatoday.in/india/story/walmart-flipkart-merger-all-you-need-to-know-1229461-2018-05-09, Published: May 9, 2018.

[34] Tata Motors completes acquisition of Jaguar Land Rover, Available at: https://www.tatamotors.com/press/tata-motors-completes-acquisition-of-jaguar-land-rover/

[35] "IDFC-Shriram $12 Bn Merger Called Off on Differences Over Swap Ratio." Source: The Hindu Business Line URL: https://www.thehindubusinessline.com/money-and-banking/idfc-shriram-12-b-merger-called-off-on-differences-over-swap-ratio/article64285553.ece

investors own the remaining 59% of the publicly listed business Reliance Communication Ltd., after the promoter and promoter group. Aircel was jointly owned and operated by two companies, Maxis Communications, and Sindhya Securities & Investments, with respective stakes of 26% and 74%. [36]

Laws Governing Cross-Border Mergers in India

Section 234 of the Companies Act and Rule 25A of the Companies Merger Rules, when read with Sections 230 to 232 of the Companies Act, make provisions for this. Cross-border mergers were not permitted for Indian corporations prior to the adoption of the Companies Act Rule 2013.[37] Later, this revision lifted the prohibition and made Outbound mergers legal with the notification in 2017. The competition commission must be notified and the directors of the companies involved must approve the proposed plan of the cross-border merger within 30 days of it being submitted, according to section 6 of the Competition Act of 2002. [38] Other requirements for merging companies include meeting the maximum limit and qualifying for the combination rule outlined in section 5 of the act.[39] The documentation is then developed in support of the cross-border merger. A 210-day waiting period, starting from the day the notice to CCI was provided, is also permitted by law in addition to the paperwork.[40] According to the legislation, an inquiry must be conducted to ascertain if this combination would materially harm competition, as stated in sections 29 and 30.[41]The CCI will approve the plan if, following the inquiry, it is satisfied that there is no evidence of a significant adverse effect. [42] If the merger plan, however, negatively affects competition, the CCI will only approve the plan in certain situations and only if there is potential

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36 "Aircel Merger." Source: The Economic Times URL: https://economictimes.indiatimes.com/topic/aircel-merger
37 Companies Act 2013, §§230-232.
38 Competition Act 2002, §6.
39 Competition Act 2002, §5.
40 "Merger Control Laws and Regulations in India." Source: International Comparative Legal Guides URL: https://iclg.com/practice-areas/merger-control-laws-and-regulations/india
41 CCI, §§29-30.
42"Criteria Considered by CCI Before Approval of Mergers, Amalgamation, and Acquisition." Source: Legal Service India URL: https://www.legalserviceindia.com/legal/article-714-criteria-considered-by-cci-before-approval-of-mergers-amalgamation-and-acquisition.html

for revision.[43] Numerous regulations issued by India's SEBI are applicable to cross-border mergers, in addition to the Companies Act and the Competition Act.[44]

- Substantial Acquisition of Shares and Takeovers Regulations 2011,[45]
- Foreign Exchange Management Act; Transfer of Property Act, 1882,[46]
- Indian Stamp Act, 1899[47]
- Insolvency and Bankruptcy Code 2016[48]
- The Department of Industrial Policy and Promotion[49]
- Income Tax Act,1961[50]

Cross Border Merger and Acquisitions: Problems and Apprehensions

- Issues related to the politics
- Legal Consideration
- Accounting and tax matters
- Deligency
- Variations in Intellectual Proeprty Regime
- Turbulence of Currency

Suggestions to Encourage Foreign Mergers and Acquisitions in India

- Current laws that contain pertinent provisions, such as the Income Tax Act and the Exchange Control Regulations, must be amended.[51]

[43] "UK Merger Control: Overview." Source: Practical Law UK URL: https://uk.practicallaw.thomsonreuters.com/0-501-2861?transitionType=Default&contextData=(sc.Default)
[44] K. Naveen Kumar. "Mergers, Acquisitions and Firms' Performance: Experience of Indian Pharmaceutical Industry." Source: Eurasian Journal of Business and Economics, Year: 2020, Volume: 3(5), Pages: 111–126
[45] Substantial Acquisition of Shares and Takeovers Regulations 2011.
[46] Foreign Exchange Management Act; Transfer of Property Act, 1882.
[47] Indian Stamp Act, 1899.
[48] Insolvency and Bankruptcy Code 2016.
[49] Department of Industrial Policy and Promotion (DIPP)., Source: MyGov URL: https://www.mygov.in/group/department-industrial-policy-and-promotion-dipp/
[50] Income Tax Act, 1961.
[51] Income Tax Act, 1961. ,Source: Income Tax Department, Government of India URL: https://incometaxindia.gov.in/_layouts/15/dit/pages/viewer.aspx?grp=act&cname=cmsid&cval=102120000000079560&searchfilter=%5B%7B%22crawledpropertykey%22:1,%22value%22:%22act%22,%22searchoperand%22:2%7D,%7B%22crawledpropertykey%22:0,%22value%22:%22income-tax+act,+1961%22,%22searchoperand%22:2%7D,%7B%22crawledpropertykey%22:29,%22value%22:%222022%22,%22searchoperand%22:2%7D%5D&k=&isdlg=0

- A merger transaction where the transferee is an Indian corporation is exempt from taxation under the Indian Income Tax Act.[52]
- The RBI should establish a thorough regulatory framework outlining the eligibility standards and other factors the RBI will take into account when evaluating cross-border M&A in order to ensure continuity. [53]
- All cross-border merger transactions must be coordinated with the standards outlined in Indian foreign exchange legislation right away.The transferee corporation will only have to comply with Sections 230 to 232 of the Act by requesting authorization in accordance with Rule 25A.[54]

Conclusion

As the business sector in India is rapidly progressing in the direction of a level where globalization and its concepts are meant to be established with the assistance of states through their supportive legislation, it can be assumed that this is the case.[55] It is practically hard to reach the highest feasible perfect level in a single endeavor due to differences in technology, social differences, economic differences, political situations, and laws governing cross-border mergers, among other factors.[56] The cross-border merger is slightly more complicated than the domestic merger because of the transnational nature of these mergers.But with the passing of the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018[57] and the passing of the Companies Act 2013, which saw its scope further expanded with the addition of Rule 25A to the Companies compromise, association, and amalgamation guidelines, 2017 in recognition of merger, cross-border mergers have become easier.[58]The globalization of society is greatly impacted by the growing frequency of cross-border mergers and acquisitions. However, these trades come with larger dangers as well. Companies must be able to conduct these asset acquisition deals in untapped

[52] Income Tax Act, 1961, §47.
[53] "Key Considerations in Cross-Border Mergers and Acquisitions in India.", Source: Lexology, URL: https://www.lexology.com/library/detail.aspx?g=f3f85237-78a9-42fc-8850-c4dc92c49b04
[54] "Regulation of Cross-Border Mergers and Acquisitions in India, UK, and USA.", Source: Enhelion, URL: https://enhelion.com/blogs/2023/07/12/regulation-of-cross-border-mergers-and-acquisitions-in-india-uk-and-usa/
[55] Whitaker S.C. "Cross-Border Mergers and Acquisitions." (2016)
[56] Ramanujam S. "Mergers et al: Issues, Implications, and Case Laws in Corporate Restructuring." (3rd ed. 2011)

[57] Foreign Exchange Management (Cross-Border Merger) Regulations, 2018

[58] Companies (Compromise, Arrangement, and Amalgamation Guidelines), 2017, Rule 25A.

international marketplaces.[59] For the transaction to be completed, all international difficulties that might emerge must be considered and resolved. Each party involved in the M&A transaction needs to be aware of every step taken in order for the process to go well.[60] The parties to a cross-border M&A could consult earlier international expansion initiatives and can prepare well if the earlier strategies by other companies are studied. [61]A due diligence team must make sure that the relevant resources and capabilities of the parties are taken into account when evaluating the resources, assets, and capabilities of both organizations.[62] All relevant aspects must be taken into account, not only the financial ones. With the intention of reshaping their culture without sufficient information, the human and cultural difficulties that are crucial to an M&A's success must not be ignored. [63] The acquirer must make sure that following integration, employee attitudes and management in all groups and departments are properly assessed and taken into consideration.[64] This is because an employee's behavior can have a significant impact on the effectiveness and dynamics of the business.[65]

[59] Rajan, G. (April, 2013). "Tata's to continue drive on acquisitions path for growth.", Source: Economic Times

[60] Amit Raja Naik, 2019. "In Review: Top 10 High-Profile Start-up Acquisitions in India." Inc42 Staff.

[61] P. Bala Bhaskaran and Nasheman Bandookwala. "Walmart's Acquisition of Flipkart: Emerging Paradigm of the Digital Era.", Source: journals.sagepub.com

[62] Bhandari M.C. "Guide to Company Law Procedures with Corporate Governance & E-Filing." (24th ed. 2018).

[63] Angwin D. "In Search of Growth: Choosing Between Organic, M&A, and Strategic Alliance Strategies." In The M&A Collection Themes in Best Practice: Themes in Best Practice 19 (Scott Moeller ed., 2014).

[64] Rohatgi R. "Basic International Taxation." (2nd ed. 2006).

[65] Chandrashekar Krishnamurti & S.R. Vishwanath eds., "Mergers, Acquisitions and Corporate Restructuring: Text and Cases." (2nd ed. 2018).