



Insights of cross-border mergers and acquisition in India

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Abstract

Through cross-border mergers, Indian corporations have engaged in the global trend of consolidation in recent years. This research paper examines the topic of such international mergers and acquisitions in depth. By affiliating with huge enterprises or emerging startups, businesses around the world are moving toward more innovative collaborations. The majority of corporations seek to constrain their operational model through mergers and acquisitions. When a corporation desires to expand its operations internationally, it seeks to merge with a foreign company. This paper also discusses numerous government rules and the significance of cross-border transactions for global expansion, which make it vital for firms to have a thorough understanding of crossborder mergers and amalgamations. This article examines cross-border mergers and acquisitions in India, including their definition, applicable regulations, forms of mergers and acquisitions, and cross-border mergers, as well as the challenges surrounding cross-border M&A and their consequences on enterprises.

Keywords: Amalgamation, cross-border, acquisition, merger, association, partnership, operational

Introduction

Corporate restructuring

Corporate restructuring is an activity or process in which a corporation redesigns or restructures the features of a company. "Corporate restructuring refers to any change in a company's capital structure, operations, or ownership that occurs outside the normal course of business" ^[1]. Restructuring is performed so that the company can develop and withstand market competition by decreasing costs and increasing efficiency and profitability. "In the case of Ion Exchange (India) Ltd" ^[2]. In re, Justice Dhananjay Y. Chandrachud described corporate restructuring as the process of reorganizing a company's capital structure". One of the mechanisms through which a firm might address the issues and problems it faces. "The law should be hesitant to restrict or obstruct the discretion of corporate enterprise to adapt to the changing needs of the times and to satisfy the expanding demands of the marketplace. As the law has evolved in the field of mergers and amalgamations, it has become clear that the Court should not sit as an appellate authority over the financial acumen of those who wish to restructure the firm".

Amalgamation

The process by which two companies merge into one is called amalgamation. "It is defined as the combination of one or more companies into a new entity, such as two or more companies merging to form a new company or a powerful company acquiring control of a weaker company". Typically, Amalgamation occurs between two or more organizations engaged in the same set of activities or with same or comparable operations and transactions. Again, businesses may join forces to diversify their activities or even to extend their offerings. Difference between Merger and Amalgamation: In a merger, two entities typically unite, whereas in an amalgamation, a stronger corporation acquires the other entity. The Merger creates a new entity, whereas Amalgamation dissolves simply the acquired Company's identity.

Amalgamation is done into two types

Amalgamation like Merger

This sort of "Amalgamation occurs when all assets and liabilities of the transferor become those of the transferee, and the transferor's business is intended to continue after the Amalgamation. There are no plans to make revisions to the book values".

Amalgamation like purchase

This procedure is implemented when the prerequisites inherent to Merger remain unfulfilled. Here, one company is acquired by another, and the shareholders of the acquired company typically do not retain a proportional share in the equity of the merged company, or the acquired company's business is typically not intended to continue.

Followings are the various instances where Amalgamation played an important role

1. One of the most recent mergers involved PVR Ltd. and Bijli Holdings Pvt. Ltd. This Amalgamation aims to streamline PVR's sharing structure and minimise shareholding tiers; now, individual promoters can hold shares directly in PVR without affecting the total promoter shareholding in PVR ^[2].
2. **Lincoln parenteral and Lincoln Pharmaceuticals** ^[4]
On September 16, 2021, Lincoln parenteral and Lincoln Pharmaceuticals merged in an effort to strengthen "both the Company and its subsidiaries through increased competitive strength, cost reduction and efficiencies, productivity gains, and logistical advantages, paving the way for sustainable future growth".
3. **Sunrise Foods and ITC** ^[3]
On April 1, 2021, Sunrise Foods merged with ITC. Sunrise firm has strong consumer connections, and this will give the company with significant value development prospects.
4. **Jindal Stainless (Hisar) Ltd and Jindal Stainless Ltd** ^[4]
Jindal Stainless accepts Jindal Stainless (Hisar) Ltd's

plan to merge with Jindal Stainless Ltd. This restructuring produced a super stainless-steel company that became one of the top ten stainless steel companies in the world and the largest in India.

5. **Mahindra & Mahindra and Schoneweiss**
This reorganization occurred in 2007, consolidating and reinforcing Mahindra's position on the worldwide market ^[5]
6. **“STERLITE and ASARCO**
Sterlite, India's largest non-ferrous metals and mining firm with world-class copper smelter and refinery facilities in India”, and Asarco, the United States' third-largest copper producer, inked an Acquisition agreement. In addition, Sterlite became the world's third-largest copper mining corporation ^[8].
7. **TATA STEEL and CORUS**
In 2007, Tata Steel, one of the largest steel firms in Indian history, acquired Corus the Company, Europe's second-largest steel company, making Tata the fifth-largest steel manufacturer in the world ^[6]. This restructure offered Tata steel access to European markets and increased its manufacturing, logistical, etc. capacity.
8. **United Technologies and Raytheon** ^[7]
The restructure culminated in the creation of Raytheon Technology, a merged business that would redefine aerospace and defense.
9. **Royal Dutch Petroleum and Shell**
This reorganization occurred in 2004. It decreased and streamlined management levels and even enhanced the company's assets. This restructure occurred just before to the oil price reaching its legendary highs. The merged entity is currently one of the few big European oil and gas companies.
10. The Gujrat Gas Company Ltd (GGCL) merged with the Gujarat State Petroleum Corporation (GSPC) to become Gujarat Gas. In addition, Gujarat Gas has become India's largest city gas distribution company, with a market capitalization of Rs 10,600 billion, demonstrating the Company's growing value and significance ^[8].
11. **Satyam computers and Tech Mahindra Ltd** ^[9].
The IT division of Mahindra & Mahindra Ltd has merged with Satyam Computer Services Ltd to establish India's fifth-largest IT firm. This restructuring is viewed as a major positive and will enable the new firm to compete more effectively with larger competitors.
12. **“National Institute of Miners' Health (NIMH) and ICMR** ^[10] – **National Institute of Occupational Health” (NIOH)**
The Cabinet has approved the amalgamation of NIMH and NIOH, and NIMH employees will be absorbed into NIOH. This will result in increased expertise in occupational health, effective management, and efficient use of public funds.

Cross border merger and acquisition

In this age of globalization, private companies and organizations are collaborating to create a worldwide marketplace. This has led to cross-border transactions in which the earnings of many firms are distributed globally. Companies, regardless of their ownership, wish to invest and expand their enterprises in order to increase their profits. Governments are currently establishing a global market for easy investment in their nations, which would immediately enhance their economies; they are making substantial modifications to their legal systems to aid multinational corporations in establishing their businesses.

Companies today aim to invest less and make greater returns; as a result, they seek to invest in nations with low production costs, where they can easily manufacture things at low cost and sell them at higher prices. India is regarded as a prime location for investment because its production costs are lower than those of most wealthy nations.

These investments aid corporations in achieving greater profits and aid developing and undeveloped nations in generating employment opportunities for their working populations, so directly boosting their respective economies. Companies typically undergo corporate restructuring to invest in or divest from other businesses.

Mergers and acquisitions are the most typical strategy employed by these companies. Merger refers to the union of two firms to establish a new entity, whilst Acquisition refers to the acquisition or takeover of a target company by another. In general, mergers and acquisitions are synonymous, although they differ in the manner in which the company is restructured. Mergers and amalgamations are on the rise due to the expansion of globalisation. Due to its Conducive Economic Environment ^[11], India is presently regarded as the most desirable commercial destination, and this has fueled the expansion of cross-border mergers and acquisitions. This type of cross-border reorganization is advantageous in so many ways, as it contributes to the expansion of markets, the diversification of the industrial sector, the transfer of technology, and the increase in foreign exchange, all of which contribute to the acceleration of economic growth, the consumption of resources and cheap labour, and the expansion of customer base.

While conducting cross-border commerce, organisations encounter a variety of obstacles, including legal concerns, accounting issues, strict taxation policy, differences in technologies, strategic issues, HR hurdles, failure to integrate, and many others. Despite these obstacles, global cross-border mergers and acquisitions have grown rapidly.

Types of Cross-Border Merge

here are five types of Mergers:

Horizontal Merger

A horizontal Merger occurs when two companies operating in comparable product or service categories unite to secure market dominance ^[12]. This form of Merger appeals to businesses who seek to minimize competition and get economies of scale.

Vertical Merger

Vertical Merger occurs when two companies in the same industry, operating at separate stages of the production chain, unite to form a new entity ^[13]: for instance, wholesaler merger with manufacturer or retailer merger with wholesaler, etc. This sort of Merger attracts organizations

seeking to increase efficiencies and reduce costs throughout the product line's supply chain.

Concentric Merger

It occurs when the acquirer and target company, which are regulated in the same market and sell to the same Customers but have different Products and services, merge to form a new entity; they may be considered indirect competitors despite the fact that their products and services frequently complement one another ^[14]. This might aid businesses in increasing their output and market share.

Market-Extension Merger and Product Extension Merger

Market-Extension Mergers are formed when two companies offer identical products and services in distinct marketplaces. The primary objective of this type of Merger is to grow their market share and consumer base.

Product-Extension Merger occurs when two businesses sell similar items and operate in the same market ^[15]. The primary objective of this type of Merger is to grow their consumer base and product portfolio. This may result in increased returns.

Conglomerate Merger

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Pure Conglomerate Merger

Even after coming together, they continue to function separately in their markets.

Mixed Conglomerate Merger

They may expand their product line and even increase their market reach after Merger.

This type of Merger helps the new entity to diversify its business and increase its market share.

The Companies Act, 2013 under section 234 introduces the concept of two types of mergers, i.e., Inbound and Outbound Mergers ^[17].

Inbound Merger and Acquisition

The Foreign Company merges with or acquires the domestic or Indian Company.

Outbound Merger and Acquisition

in this a Domestic or Indian company merger with or acquire a foreign company.

Statutory Provisions concerning Merger and Acquisition

“Section 234 of the Companies Act, 2013 ^[18], which governs cross-border mergers and amalgamations in India, was announced by the Ministry of Corporate Affairs on April 13, 2017 and went into effect on April 13, 2017”. In India, numerous law provisions regulate cross-border mergers and amalgamations, including:

1. Companies Act, 2013

2. Substantial Acquisition of Share and Takeover Regulations (SEBI), 2018
3. Foreign Exchange Management (Cross-Border Merger) Regulation, 2018
4. Competition Act, 2002
5. Insolvency and Bankruptcy Code, 2016
6. Income Tax Act, 1961
7. The Department of Industrial Policy and Promotion (DIPP)
8. Transfer of Property Act, 1882
9. Indian Stamp Act, 1899
10. Foreign Exchange Management Act, 1999 (FEMA)
11. IFRS 3 Business Combinations

Important Provisions to be followed under Cross-Border Merger and Acquisition

Inbound Merger

Transfer of Securities

After the Merger, the new business may transfer any security (including a foreign security) to any person residing outside India in accordance with the statutory provisions outlined in the FEMA (Transfer or Issue of Securities by a Person Resident Outside India) Regulations, 2017 ^[19]. In contrast, if the foreign company is a joint venture or wholly owned subsidiary of an Indian company, it must comply with the provisions of FEMA, ODI, and regulations.

Branch/ Office Outside India

According to the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015, a foreign company's branch or office outside India must be deemed the office of the resultant company outside India.

Borrowings

According to the Merger Regulation, the External Commercial Borrowings (ECB) regime includes special rules for borrowings that must be repaid within two years²³. The target company's borrowings would become the resulting entity's borrowings.

Transfer of Assets

All Assets acquired by the resulting corporation shall be transferred in accordance with the 2013 Companies Act and any other regulations adopted for this purpose. If any of the Assets that were not permitted to be acquired by the Company are sold within two years of the date the National Company Law Tribunal granted approval, the proceeds must be sent to India ^[20].

Opening of Bank Accounts

The newly formed company is permitted to open an overseas bank account in foreign currency for a maximum of two years in order to conduct business transactions related to cross-border mergers.

Outbound Merger

“Transfer of Securities

If the securities are issued to a person in India, the acquisition must comply with Overseas Direct Investment (ODI) Regulations” ^[21]. The acquisition of securities of the resulting company is permissible so long as their market

value falls within the restrictions specified by the Liberalized Remittance Scheme.

According to “*Foreign Exchange Management* (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016”, any office of the Indian Company in India may be treated as the Branch office of the new company established after the Merger ^[22].

Borrowings

Accordingly, with the approved plan, the resulting company should repay its borrowings.

“Transfer of Assets

Assets that cannot be acquired or utilised by the resultant company must be sold within two years of plan approval”.

Opening of Bank Accounts

In order to assist the outward merger, the resulting “foreign company can now create a Special Non-Resident Rupee bank account for two years in accordance with the FEMA (Deposit) Regulation, 2016”.

Amalgamation or merger of Indian company with foreign company

1. Except as otherwise provided by any other legislation now in effect, the provisions of this Cross-border merger shall apply mutatis mutandis to merger and amalgamation plans pursuant to the Act.
“The Central Government may, from time to time, notify corporations incorporated in the jurisdiction of such countries. In consultation with the RBI, the Centre may formulate rules regarding mergers and amalgamations”.
2. “Subject to the requirements of any other law in effect at the time, a foreign business may merge into a company incorporated under this Act or vice versa with the prior consent of the Reserve Bank of India. The terms and conditions of the Merger project may provide, among other things, for the payment of return to the shareholders of the merging Company in any of the following ways: in cash, in Depository Receipts, partially in cash and partially in Depository Receipts, according to the project to be drafted for the purpose”.
3. “A foreign company incorporated outside of India may combine with an Indian company after receiving the RBI's prior clearance and adhering to sections 230 to 232 of the Act and these stipulations”.
4. “A company may only merge with a foreign company incorporated in one of the dominions listed in Annexure B after getting the prior approval of the RBI and receiving consent as required under Sections 230 to 232 of the Act and these requirements”.
5. “The transferee company shall guarantee that the valuation is undertaken by valuers who are members of a recognised professional body in the transferee company's jurisdiction and that the valuation is completed in accordance with internationally recognized accounting and valuation principles. A Statement to this effect shall be attached to the application submitted to the RBI for its consent under clause (a) of this sub rule”.

Judicial pronouncement regarding amalgamation

a. RBR Knit Process P. Ltd Re

Amalgamation is a natural and inherited power, hence an explicit provision in the Memorandum is unnecessary. The Madras High Court ruled that a company court has the authority to approve schemes of amalgamation regardless of whether the ability to merge with another company is included in the Memorandum of the concerned business ^[22].

b. Highland Electro Appliances P. Ltd., In re

The Delhi High Court ruled that the Court's authority to compromise or make arrangements under Sections 391 to 394 is not limited or contingent on the applicant-powers business's under its objects clause to merge with any other company. In *Aimco Pesticides Ltd. In re* [2001] 103 Comp. Cas. 463 ^[23], the Bombay High Court reached the same conclusion.

c. Areva T & D India Limited

The issue concerning Amalgamation was whether the authorised capital of a transferor company combines with the authorised capital of a transferee business once the plan is approved. “The Calcutta High Court ruled in the negative regarding the problem. It was ruled in favour by a division of the Calcutta High Court”.

d. “Sugarcane Growers and Sakthi Sugars Shareholders' Association Vs. Sakthi Sugars Ltd”

Taking into account Amalgamation before sanctioning the scheme is very necessary, although the fact that the majority has approved the amalgamation scheme.

e. Alembic Chemical Works Co. Ltd

In this case, it was held that while the Court is not supposed to blindly follow the decision of the majority and on the other hand, it is also not supposed to scrutinize the scheme to find out flaws.

Conclusion

In this age of globalization, private companies and organizations are collaborating to create a worldwide marketplace. This has led to cross-border transactions in which the earnings of many firms are distributed globally. Corporate restructuring is one approach for companies, regardless of their ownership, to invest and expand their businesses in order to achieve higher returns. Corporate restructuring is an activity or process in which a corporation redesigns or restructures the features of a company. Corporate restructuring refers to any change in a company's capital structure, operations, or ownership that occurs outside the normal course of business ^[1]. Governments are currently establishing a global market for easy investment in their nations, which would immediately enhance their economies; they are making substantial modifications to their legal systems to aid multinational corporations in establishing their businesses.

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