SVKM'S NMIMS Deemed to be UNIVERSITY

NAVI MUMBAI

National Corporate Law Conference

SENATUS

SVKM's NMIMS School of Law, Navi Mumbai

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FOREWORD

Law as an entity governs almost every part of a human's life. Civilisations across centuries have constantly evolved to adapt to the needs of the society. What began as a deterrent against crime has now grown into the root that provides us with rights, remedies and principles that guide our lives. In this attempt to widen the scope of law, as was highlighted by the golden rule of interpretation, we have opened many new avenues or fields of law. One such avenue is Corporate Law, which is what this conference entailed.

Senatus took place over a period of 2 days and examined the various aspects of the theme: "Evolving Principles of Corporate Law: Lessons to Learn, Unlearn and Relearn". The theme explored the various facets of corporate law and the growing need for corporate law. This rendition is an ode to 2 days of dialogue and enlightenment. For this, we sincerely thank Prof. Saurabh Chaturvedi, Prof. Manisha Band, Adv. Shreya Madali, Prof. Richa kashyap, Adv. Neha Rathore, Prof. Sohini Shrivastav.

We extend our gratitude for their time and to the panel of nine esteemed dignitaries and all our partners and collaborators EBC, SCC Online, Lawctopus. We also thank the Student Council of SOL, NMIMS, Navi Mumbai. We thank the volunteers and staff who have worked tirelessly to make this event a success. Lastly, we thank the participants who have contributed with such zeal and effort to this conference.

We hope that this is as edifying to you as this journey was for us. To quote Henry Ford " The only real security that a man will have in this world is a reserve of knowledge, experience and ability

ASSOCIATE DEAN'S NOTE

SVKM's NMIMS School Of Law (Navi Mumbai) is an excitingly lively place, its depth of character, traditions, diversity, commitment to academic excellence, as well as its beautiful natural surroundings contribute to making SOL such an exemplary academic environment. The Navi Mumbai Campus provides you with professional safety and security services that include incident response, investigation, and follow up of all security related matters that come to our attention. We strive to engage our community via education, information sharing and training programs. The members of SOL are dedicated to the Mission of the University and, as stated in our Mission Statement, to the maintenance of a campus environment that supports academic excellence, independent thought, and cultural collaboration.

It gives me immense pleasure in congratulating participants and all other associated in bringing out the published papers of Senatus 2021 successfully. Organizing, extracting talent, amalgamating the event and making it a huge success was a tough task specially in these trying times where physical availability is the biggest challenge, but the team did it triumphantly. The book provides for nuances that will help the students to excel in their respective fields thus, providing a guidance for their career options. It's important for the students to know the nitty-gritty of corporate law, and all it's sub-fields.

The endeavour of events like Senatus backed by the NMIMS School of Law, Navi Mumbai is to play a vital role in the lives of young law students and legal professionals to blend learning, creativity, skills and knowledge. I would like to express my deep gratitude for having me associated as a small part of Senatus 2021. I would also congratulate our editorial board and the students of Senatus Committee who have tirelessly worked.

Dr. Saurabh Chaturvedi

Associate Dean, NMIMS School of Law,

Navi Mumbai

Editor's Note

It gives me immense pleasure in congratulating NMIMS School of Law, Navi Mumbai, Students of Organizing Committee, participants and all other associated in bringing out the published papers of Senatus 2021 successfully. Organizing, extracting talent, amalgamating the event and making it a huge success was a tough task specially in these trying times where physical availability is the biggest challenge, but the team did it triumphantly. The endeavour of events like Senatus backed by the NMIMS School of Law, Navi Mumbai is to play a vital role in the lives of young law students and legal professionals to blend learning, creativity, skills and knowledge.

I would also congratulate our Director Dr. Parthasarathi N. Mukherjee, our Dean Dr. Saurabh Chaturvedi, and the Students of Senatus Organising Committee who have tirelessly worked towards making this event a huge success.

Shreya Madali

Professor

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SCOPE OF M&A IN THE CONTEMPORARY WORLD

- ***Kujhatika Ghosh*[1]**
- ***Naimishi Verma*[2]**

ABSTRACT

Mergers and Acquisitions, as an external growth strategy, has become an important medium for the companies to enter the new markets, and expand their services in order to achieve the desired goal. This field has undergone several changes in the past 10-20 years and yet, it has played a key role in the expansion of the economy and held its place in the corporate world. The increased competition in the global market has nudged Indian companies to opt for mergers and acquisitions when it comes to restructuring their business. This strategy not only provides the companies with external growth but also gives them a competitive advantage in the global field. In this article, we will attempt to analyze at large the significance of M&A in the present world, highlighting the role of IPR in M&A. Furthermore, we will be exploring the position of M&A in the post-COVID world. The paper looks into better understanding the negative and positive implications that the unprecedented turn of events has had on the M&A sector. Possible outcomes and growth opportunities for the companies have also been discussed. Moreover, the paper focuses on the regulatory challenges involved in M&A, mainly emphasising the 2019-2021 period. The regulatory framework keeps evolving and therefore, needs to be carefully analyzed to understand the position of M&A globally. The paper has been concluded keeping all these aspects in mind, and what the M&A industry holds for us in the future.

Keyword(s)*: Mergers and Acquisitions, M&A, IPR, COVID-19, Pandemic, Regulatory challenges*

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INTRODUCTION

In today's contemporary world, competitiveness has taken the wheel, especially in the corporate world. Globalization is one of the factors for such competition across this sector and due to this, Corporate Restructuring has gained importance all over the world. Mergers and Acquisitions have witnessed tumultuous changes over the past years as it is extensively used to restructure business organizations. What is more appealing about M&As is that it is not restricted to domestic boundaries but is exposed internationally also. In recent times, M&As have become extremely prominent and significant for the overall growth of the companies and competition has become crucial for survival. In the times when Covid had hit the world and the economy had started to flutter, M&A was seen as a major instrument for growth. Mergers and Acquisitions can be described as a process whereby a consolidation takes place between companies through different financial transactions. Although these terms are used interchangeably, they contain different legal meanings. While in mergers, two companies merge to combine their assets and form a single new entity, in acquisitions, a large company acquires a smaller company.

The Covid-19 pandemic has created certain uncertainties and this came as a unique challenge for all the stakeholders. Despite the significant slowdown of the economy due to the pandemic, the years 2020 and 2021 brought some significant and remarkable M&A deals. The companies, while arranging for an M&A exchange, ought to look into the entire transaction as well as the dangers that are associated with it before affecting the same. Intellectual Property plays an extremely significant role while entering into an M&A Transaction. One of the reasons it carries such significance in the Corporate sector is due to its ability to increase the value of the Acquiring company. Companies entering into the transaction cannot assume that Intellectual Property will be transferred automatically upon the acquisition. Critical IP issues are involved which require keen attention as not every IP right of a private company is available for the public domain.

The M&A sector has significantly made its mark in the corporate world, especially during the uncertain times of Covid-19, when the economy was spiraling down and companies were facing losses. Mergers and acquisitions were one of the key industries to contribute towards the revival of the economy and make the corporate sector a better place. Hence, it is necessary for us to examine such opportunities that M&A holds for us in the future.

SIGNIFICANCE OF M&A TRANSACTIONS

The advantages of Mergers and Acquisitions in today's contemporary world are innumerable. From helping the companies to benefit from each other's additional skills to diversification of products, the M&A sector has been established to be one of the most preferred choices in the legal industry. It opens the door for companies to access funds for development of businesses along with exposure to wider customer base and increment in market share. Long-term prospects for their businesses get elevated alongside the reduction of costs and overheads. There is reduced competition in the market and it is an excellent opportunity for businesses in the same sector to merge together to cut down costs on resources and facilities, thereby increasing revenue.[3]

Mergers and Acquisitions can also contribute to an organisation's efficiency and profitability. Not only that, M&As provide pre-existing development, research and brand value to the companies who enter into this venture. The companies end up saving their money and time through acquisitions, as they develop their target products with the help of each other's already available resources.[4] One of the good examples is that of Google acquiring Android in 2005. Their services and ambitions in the industry complemented each other and helped them compete with Microsoft.

The acquiring party in an M&A transaction achieves financial power because of access to new market resources. Both the parties to an M&A transaction get an entry to a bigger market share, and this gives rise to an uplifted business, especially in the international arena. M&A helps in the expansion of businesses into new geographical areas. Companies willing to grow their business in a particular place may get into a corporate deal structuring with another company that has an already established business in that zone.[5]

ROLE OF IPR IN M&A DEALS

Conventionally, the role of IPRs were restricted to IP-intensive industries like pharmaceuticals. They were not evaluated separately owing to the fact that they were considered to be embedded

[3] *Benefits of mergers and acquisitions*, nibusinessinfo.co.uk (Nov. 25th, 2021, 9:00 PM), https://www.nibusinessinfo.co.uk/content/benefits-mergers-and-acquisitions

[4] *Mergers and Acquisitions & Conducting International Business*, Global Expansion (Nov. 25th, 2021, 10:00 PM), https://www.globalexpansion.com/blog/what-is-the-importance-of-mergers-and-acquisitions-in-conducting-international-business

[5] Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/deals/merger/ (last visited Nov. 25th, 2021)

into the M&A industry. Furthermore, the taxing task of valuing it separately was a reason for IPR not playing a big role in M&A deals in the past.

However, with the rising M&A market, the role of IPR in M&A deals has also seen a transformation and it has now become a very significant asset of M&A. Some of the aspects which have led to the growing importance of IPR in this sector include the expansion of M&A transactions in the patent market, the enhanced liquidity, and the sophisticated way in which patents are evaluated. Intellectual Property is an identification of ownership and gives authority and exclusivity to a unique creation.[6] This would help in staying ahead of the competitors through protection of inventions made within the company. It also aids the company's maximisation of returns, especially in the case of high-tech companies.

Technology driven M&A in the form of Trademarks, Copyright, Trade Secrets, Registered Designs, and Geographical Indicators, create value, special rights, profits and generate goodwill and consumer loyalty.[7] It opens a window of opportunity to new innovations, thereby increasing the speed of fresh product innovations. Allocation of resources takes place more efficiently and the cost of R&D gets cut down. One great example of a strategic merger is that of the CleanTech Biofuels, Inc.'s acquisition of the sophisticated technology of Biomass North America Licensing, Inc. where conversion of municipal solid waste into cellulosic biomass and generate electricity had taken place.[8]

IPR plays a huge role in the market valuation of companies in the financial market.[9] The valuation of IP rights affects the stock market standing of big MNCs globally. Analyzing critical IP issues before committing to a merger are conducive to making the M&A deal effective. In case of a private company acquisition, the acquirer's ability to obtain IP related information from public resources is limited, since the seller is not subject to public scrutiny. In regard to this, thirteen key IP related challenges were identified and published by Forbes[10] to give a realistic valuation of Intellectual Property rights in M&A. Some of them include open-

[6] Prayank Khandelwal, Priyamvada Subhash, *Role of IPR in M&A: A Start-up Perspective*, Lexology (26th, 2021, 11:00 AM), https://www.lexology.com/library/detail.aspx?g=ab6baff7-302a-4b2f-a087-3a63fdb70eb5.

[7] Mandavi Singh, *Intellectual Property: The Dominant Force in Future Commercial Transactions Comprising Mergers and Acquisitions*, 2 IJIPL, 180, 181-183 (2009)

[8] *CleanTech Biofuels Enters Into Agreement to Acquire Technology and Develop Commercial Site*, REUTERS (Nov. 26th, 2021, 7:00 PM), https://www.reuters.com/companies/CLTH.PK/key-developments.

[9] Mafini Dosso, Antonio Vezzani, *Firm market valuation and intellectual property assets,* 27 Industry and Innovation, , 705, 705-729, (2019)

[10] Richard D. Harroch, David A. Lipkin, and Richard V. Smith, *13 Key Intellectual Property Issues In Mergers And Acquisitions*, Forbes (Nov. 26th, 2021, 7:30 PM) https://www.forbes.com/sites/allbusiness/2016/03/17/13-key-intellectual-property-issues-in-mergers-and-acquisitions/?sh=4b9d29db3f4e

source software issues, representation and warranties related to IP ownership and IP infringement. Data protection and privacy issues have also been discussed regarding how the acquirer should confirm that the seller has taken protectionary measures to combat cyber security threats.

Conducting due diligence is tremendously crucial before a merger or acquisition takes place in order to avoid unwanted risks in the future. The goal of the due diligence stage in Intellectual Property Rights is to make a checklist of the company's intangible assets, and to determine if there are incomplete transfer pricing and tax risks associated with the intangibles.[11]

M&A ACTIVITY DURING THE PANDEMIC

I. IMPACT OF COVID-19 ON M&A

The pandemic has taken a toll on the M&A market in relation to their operations. The aviation sector, hospitality, real estate and tourism industry have been hindered in particular.[12] Previously, the M&A world had recovered from two economic downturns, one being the dot-com bubble in 2000-2002 and the other was the Great Recession of 2007-2009. However, the pandemic has not just affected the financial system and the valuation of sellers, but has left an impact on a multitude of other factors this time around.[13] New issues with respect to deal terms and due diligence have transpired, and it has also given rise to pricing and other terms of deal financing issues. Another factor is the time required to obtain regulatory and other third-party approvals for transactions which have also been impacted.

While some companies were fortunate to profit from the diminishing economy, the functioning of some other companies came to a halt. On the one hand, certain companies with strong balance sheets have used the adverse situation of COVID-19 as a long-term opportunity to diversify their portfolio using mergers or acquisitions.[14] On the other side of the coin are

[11] *Intellectual Property Rights In Mergers & Acquisitions*, Valentiam Group (Nov. 27th, 2021, 12:00 PM) https://www.valentiam.com/newsandinsights/intellectual-property-rights-mergers-acquisitions
[12] I. Macmillan, S. Prakash, M. Purowitz, *Charting New Horizons*, Deloitte, 7 (2020) , https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/COVID-19/gx-COVID-19-Mergers-Acquisitions-Charting-New-Horizons.pdf
[13] Richard D. Harroch, David A. Lipkin, and Richard V. Smith, *The Impact Of The Coronavirus Crisis On Mergers And Acquisitions*,Forbes (Nov. 27th, 2021, 2:30 PM) https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/?sh=2113733a200a
[14] Chokri Kooli, Melanie Lockson, *Impact of COVID-19 on Mergers, Acquisitions & Corporate Restructurings*, *1*(2) Businesses 2021, 102, 102-114 (2021)

companies which had to part with their business in order to remove the excess dead weight. Given the unpredictability of the pandemic, CFOs underwent major obstacles in forecasting cash flow and performing accurate valuation of assets.

The 2020 economic crisis as a consequence of the pandemic has led to a global health tragedy tangled with supply and demand suppressions. It has therefore had a non-uniform impact on different sectors. In the first half of 2020, deal volume dropped 49%, with deal value down 22% from 2019, the year before.[15] The second wave of pandemic has given rise to several lockdowns across states which has in turn left a drastic impact on the ongoing deal activities.[16] However, the Pwc mid-year report has provided an insight on how despite the impact, deal activity in H1 2021 amounted to USD 40.7 billion across 710 deals, inclusive of both private equity(PE) and strategic acquisitions (M&A).

Some high profile acquisitions ceased their operation during the pandemic. Boeing, for instance, had abandoned a $4 billion deal to acquire 80% of Embraer's commercial jet business as well as a 49% stake in a joint venture creating a new military cargo jet. For companies that are in a vulnerable position and have been impacted severely by Covid and economic lockdown, the sellers would probably wait until a new valuation consensus emerges or until the time they realise the stand on their profit and loss statements.[17]

II. GROWTH OF M&A DURING THE PANDEMIC

At the very same time when companies were striving hard to recover, the M&A world had seen $1.4 trillion worth of M&A deals in the post-lockdown months from June to October 2020, which was 84 percent higher than in the first five months of the year 2020.[18] The news on COVID-19 vaccines had also cast a positive influence on corporate confidence. Deals worth over $40 billion worth were announced in the same week when news about the high efficacy of coronavirus vaccines was reported. In India, the deal numbers in April 2021 touched a decadal high with a total of 30 domestic transactions taking place in that month, with a total

[15] Accenture, *COVID-19: Rebalance for resilience with M&A*, 6 (2020) https://www.accenture.com/_acnmedia/PDF-122/Accenture-COVID-19-Rebalance-for-Resilience-Mergers-and-Acquisitions.pdf

[16] pwc, *Deals in India: Mid-year review and outlook for 2021 – resilience and recovery*, 3 (2021) https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf

[17] Mark Herndon, John Bender, *What M&A Looks Like During the Pandemic*, Harvard Business Review (Nov. 27th, 2021, 3:30 PM), https://hbr.org/2020/06/what-ma-looks-like-during-the-pandemic

[18] Iain Macmillan, Dr. Michela Coppola, Sriram Prakash, *M&A emerges from quarantine, 2020*, Deloitte (Nov. 27th, 2021, 5:30 PM) https://www2.deloitte.com/us/en/insights/topics/strategy/m-a-markets-post-pandemic-business.html/#endnote-sup-10

valuation of over $5 billion.[19] Besides, domestic deals worth USD 6.2 billion have been recorded in H1 (refers to the first half of the year) 2021.[20]

The deal activity in the domestic arena was propelled by a few mega-deals, the largest of them being the USD 1 billion acquisition of Aakash Educational Services by Byju's. Another big-ticket deal was that of Adani Ports acquiring 89.6% stake in Gangavaram Port for USD 755 million for expansion of their logistics network.[21] One of the biggest transmission-project deals was undertaken by India Grid Trust through the acquisition of NER-II Transmission from Sterlite Power at USD 637 million. Although the widely talked about AstraZeneca–Zeneca merger never happened, the hunt for Covid vaccines led many firms to indulge in businesses together.[22] Merck-Themis, Novavax-Praha-Serum Institute of India and the $500 million Pfizer Breakthrough Growth Initiative are some popular examples.

Although the M&A industry suffered a dip due to the pandemic, it gained considerable momentum owing to the unprecedented situation and the companies resorting to growth-specific strategies. The Government has taken initiatives with respect to key policy measures to instill corporate confidence and position India as a preferred choice for investment and innovation.[23] India's growth in the M&A sector is expected to rise given the country's demographic dividend and fresh perspectives and initiatives coming to the forefront. Higher numbers in the deal activity sector are expected to gain momentum in H2 2021, the most of which we have already achieved.

III. WAY FORWARD TO WIN THROUGH THE PANDEMIC SITUATION

A blend of defensive and offensive strategies, if adopted by the companies, could help them maintain their presence by accelerating the recovery process. In this regard, an M&A strategy framework was presented to help companies prioritise their strategic choices in a Deloitte report called "Charting new horizons". This was in order to develop a pathway through the three phases of a crisis: from responding to the shock, to recovering and finally thriving in the

[19] Press Trust of India, *Deal numbers touch a decadal high in April despite second Covid wave*, Business Standard (Nov. 27th, 2021, 7:30 PM)
https://www.business-standard.com/article/markets/deal-numbers-touch-a-decadal-high-in-april-despite-second-covid-wave-121051100829_1.html
[20] Id. at 14.
[21] Id. at 14.
[22] How Covid-19 disruption created a blue sky of opportunities for M&As, The Economic Times (Nov. 27th, 2021, 8:30 PM), https://economictimes.indiatimes.com/markets/stocks/news/how-covid-19-disruption-created-a-blue-sky-of-opportunities-for-mas/articleshow/81690715.cms
[23] Id. at 14.

new business environment.[24] They could perhaps take up M&A activities in order to salvage value. Decisive measures like portfolio optimization could help them identify assets and increase the capital efficiency. This would further lead to divestment of non-core assets.

A study conducted by the EY 2020 Global Corporate Divestment[25] has demonstrated how divestments can increase companies' resilience in the situation of an economic downturn. One of the examples is the 2008 economic crisis, wherein companies who were bold enough to transform their businesses through divestitures had median shareholder returns that were 61.5% greater than companies that did not divest. Taking a broader view on M&A and building upon the required resilience for a particular company's growth will help companies move in the right direction in the post COVID world.

Re-evaluation of M&A and moving ahead with an accelerated pace is the need of the hour. Leveraging M&A and utilising it to its maximum potential for the next few months, companies will be able to outperform those who do not conduct analysis of the M&A return.[26] Reviewing internal portfolios and the ecosystem partners will be a key determining factor in analysing a company's position in the M&A sector. Reshaping the M&A agenda and taking early action will contribute to the enhancement of the company's long-term opportunistic goals.

REGULATORY CHALLENGES IN M&A

I. MARKET OVERVIEW

M&A, in the wake of the pandemic, is being used as a strategy to accelerate the growth and remodel the businesses using technology. Competition is another major factor which retains M&A at the front. The competitiveness that has been triggered by Covid-19 has allowed the firms to focus on those areas or acquire such potential that they lack, for instance, technology. This has led to an increase in the growth of the deal volumes since 2020 and majorly in the beginning of 2021.[27] This has also led companies to recognize those areas or segments which haven't been profitable to them as such for a while. In such uncertain times, consolidation was

[24] Id. at 14.
[25] Jenkinson, D. *Global Corporate Divestment|2020 Study*, EY Canada, (Nov. 28th, 2021, 6:30 PM), https://www.ey.com/en_ca/divestment-study
[26] Id at 13.
[27] PWC, https://www.pwc.com/gx/en/services/deals/trends.html (last visited Nov. 15, 2021)

among the options available to the enterprises to exit the market with higher returns and achieve better economies of scale.[28]

During the period of 2015-2019, India saw a tremendous growth in the M&A sector where companies entered into an ample number of deals, thus, increasing their overall value and contributing to the growth of this sector and economy. In this period, India had witnessed more than 3600 M&A[29] deals which clearly portray the engagement of the companies with enthusiasm in this sector. The number of deals rose exponentially in the second half of 2020 where deals rose by more than 30% in the third and fourth quarters which resulted in more than 28,500 deals by corporate acquirers for a total value of 2.8 trillion worldwide.[30] However, towards the end of 2019 or in the beginning of 2020, when Covid had hit the world, the economy started to shrink as it had started to have detrimental impact across the world. People got sacked off, companies started to shut down, and the newly opened businesses couldn't survive the fall. The fall of the corporate sector was completely uncalled for and unprecedented. It disrupted several sectors including the corporate segment as they suffered from the financial crisis and tried to come out of the web of uncertainty.

Year 2021 had a different picture to offer. M&A activity in India saw a rise in the first nine months of 2021, recording deals worth $90.4 billion according to a report by financial markets tracker Refinitiv. In spite of a dip in the M&A activity in the year 2020, India's inbound transactions increased by 66.4%, recording deals worth $48.6 billion in the first nine months of 2021. This is considered to be the highest that has been recorded ever since the records began in 1980.[31]

II. REGULATORY CHALLENGES

There are various laws which govern the regulatory framework that manages the M&A activity in India. These laws govern the workings of M&A in order to protect the interest of the

[28] Yogesh Nayak & Purvi Kapadia, *Emerging Trends in M&A activities, Post Covid-19,* MONDAQ (Nov. 15, 2021, 4:30 PM) https://www.mondaq.com/india/corporate-and-company-law/996888/emerging-trends-in-ma-activities-post-covid-19-

[29] Nishith Desai Associates, *Mergers & Acquisitions,* 1 (2020), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf

[30] Andrei Vorobyov, David Harding & Shikha Dessai, *2020 Year in Review: The Surprising Resilience of M&A,* Bain & Company (Nov. 16, 5:14 PM) https://www.bain.com/insights/2020-year-in-review-the-surprising-resilience-m-and-a-report-2021/

[31] Swaraj Singh Dhanjal, *India M&A Activity at three-year high,* LIVE MINT, (Oct. 2, 2021, 6:07 PM) https://www.livemint.com/news/india/india-m-a-activity-at-three-year-high-refinitiv-11633176536373.html

shareholders and to ensure smooth functioning of this sector. The laws which govern the M&A in India are-

- The Companies Act. 2013
- The Competition Act, 2002
- Security Laws inclusive of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) (Second Amendment) Regulation, 2018[32]
- Foreign Exchange Management Act, 1999
- Income Tax Act, 1961
- Insolvency and Bankruptcy Code, 1961
- Industrial Disputes Act, 1947

M&A activity in India has been on the rise and this is the reason why several legislative and regulatory challenges have been introduced in order to ensure ease in doing business in India. India has certainly established its position among the global companies and M&A will further help the country to attract foreign investment and deals to stimulate domestic growth.

III. REGULATORY INTERVENTIONS

Recently, few regulatory changes were introduced for the control of M&A activity. One such change was introduced by the Competition Commission of India[33], under which it was made mandatory for the companies to get CCI approval for M&A deals above certain threshold limits. CCI, through the 2019 amendment, introduced 'green channels' which allow deemed approval for certain deals which tend to have a low impact on the competition.[34] The imposition of stamp duty on transfer of dematerialised shares is another change that may impact M&A activity in India since now, even those securities and issuances which were exempted from such stamp duties earlier, will be included, leading to higher transaction costs. Another development has been the inclusion of private unlisted InvITs under SEBI's InvIT.[35] SEBI

[32] The securities in Indian market are governed by the rules and guidelines issued by Securities and Exchange Board of India,1992 (SEBI)
[33] The merger control regime in India is governed by the Ministry of Corporate Affairs, Government of India & the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.
[34] Himangini Dadwal, Akshat Kulshreshtha & Pranav Mody, *Merger Control in India,* THOMSON REUTERS PRACTICAL LAW, (Nov. 18 2021, 6:40 PM) https://uk.practicallaw.thomsonreuters.com/0-501-2861?transitionType=Default&contextData=(sc.Default)&firstPage=true
[35] Infrastructure Investment Trust. The funds collected under InVIT are used to invest in infrastructure assets.

issued *Guidelines for Rights issues of units by unlisted Infrastructure Investment Trusts* which were expected to provide an ease in the funding procedure for unlisted InvITS. Further, the expectations from these guidelines were to increase the market interest in unlisted InvITS.[36]

IV. REGULATIONS PERTAINING TO EMPLOYMENT

Considering the fact that in the coming years, the number of M&A transactions are going to touch the sky, these regulatory and legislative changes are brought in so as to enable the deal-making in M&A hurdle-free. Employment-related regulations carry equal significance when it comes to analyzing the M&A sector. The Industrial Disputes Act,1947[37] was enacted to strike a balance between the labour and the industry to ensure harmony between them and protection of the employees. As per Section 25FF of the Act, whenever there is a transfer of an undertaking to a new employer, an eligible employee is entitled to notice and retrenchment compensation from the employer of such undertaking provided-

- the service of such an employee has not been interrupted by any means
- the terms and conditions applicable to the employee are not less favourable in the new undertaking
- the new employer, under the terms of the contract of transfer of undertaking, is obligated to provide the employee with retrenchment compensation

The main question that arises from such a regulation is whether an employee is obligated to work under the new employer after the transfer takes place? The answer to this question lies in the Supreme Court judgement where it laid down that- "Employees cannot be forced to work under the new employer and a different management. In case, the employee does not give its consent to working in the new undertaking, the employee shall be entitled to retrenchment compensation." [38] Thus, if an employee does not wish to continue his employment in the new undertaking, he cannot be compelled to do the same.

V. REGULATIONS ASSOCIATED WITH CROSS-BORDER MERGERS

[36]Sudhir Bassi, Navodita Gupta & Manasvini Mukund, *SEBI Introduces guidelines for Rights Issues by Unlisted Infrastructure Investment Funds,* MONDAQ, (Nov. 17 2021, 7:37 PM) https://www.mondaq.com/india/trusts/1004528/sebi-introduces-guidelines-for-rights-issues-by-unlisted-infrastructure-investment-trusts
[37] Introduced by the Ministry of Labour and Employment
[38] In the matter of Sunil Kr. Ghosh & Ors v. K. Ram Chandaran & Ors

The Cross-border merger[39] regulations are governed by the Reserve Bank of India to enable the provisions under the Companies Act, 2013 regarding the cross-border mergers. All the M&A deals and transactions which include foreign exchange, cross-border mergers, etc. are regulated by the Reserve Bank of India (RBI) under the framework of Foreign Exchange Management Act 1999 (FEMA). The main regulations under FEMA include:

- The Foreign Exchange Management (Non-debt Instruments) Rules, 2019
- The Foreign Exchange Management (Debt Instruments) Rules, 2019
- The Foreign Exchange Management (Cross-Border Merger) Regulations, 2018

In the case of an inbound merger[40]:

- The resultant Indian company has to adhere to the pricing guidelines, entry routes and sectoral caps laid down by the NDI Rules, 2019 while transferring any security to a non-resident residing outside India.
- As per the FEMA guidelines, an office belonging to a foreign company, which is situated outside India is to be considered a branch of the resultant Indian company which will have a right to undertake any transaction through such foreign branch.
- The borrowings made by the foreign company from overseas sources shall be considered to be the borrowings of the resultant Indian company. Further, these borrowings should be entered in the books of the resultant Indian entity post-merger. The entity is also required to comply with the guidelines related to external commercial borrowing of RBI within a period of two years, provided no remittance was provided for the payment of any liability made from India within a period of two years.
- In case, the resultant Indian company had acquired any kind of asset or security or holds any liability, which is not permitted to be held under the FEMA guidelines, then such an asset or liability should be extinguished within a period of two years from the date of the sanction of the scheme of merger by the NCLT.

In the case of an outbound merger[41]:

[39] It is a merger between two or more companies located in different countries, which results in a third company.
[40] A cross-border merger where the resultant company is an Indian company
[41] A cross border merger where the resultant company is a foreign company

- Under Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004, a person resident in India can acquire securities of a foreign company.[42]
- As per 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, an office of an Indian company situated in India is considered to be the branch office of the resultant foreign company.
- The liabilities and guarantees of an Indian company which become the liabilities of the resultant foreign company should be repaid by the resultant company as per the scheme of merger sanctioned by NCLT post-merger.[43]
- Similarly, any securities or assets acquired in India by the resultant foreign company that cannot be held under the guidelines of FEMA shall be sold off within the two year period of the sanction of the scheme of merger and the proceeds from the same are required to be repatriated outside India.[44]

VI. INVOLVEMENT OF COURT OR TRIBUNAL

The Companies Act, 2013 includes a provision for the establishment of National Company Law tribunal (NCLT) and gives it the power to assume jurisdiction of the High Courts and sanction M&A Deals.[45] The objective of this provision is to ensure that all the M&A deals are carried out in an effective and fair manner and hence, all the mergers and acquisitions are in accordance with the provisions of Companies Act.

The NCLT takes into consideration several factors before sanctioning the M&A deal. It not only takes into account the agreement between the parties, but also why a certain merger or an acquisition is taking place. Certain factors that NCLT considers before sanctioning a M&A deal are-[46]

- Giving significance to the creditors or members' meeting as their decision and approval for the proposed merger is necessary

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[42] RESERVE BANK OF INDIA, https://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=2126 (last visited Nov. 20, 2021) (Sec 22)
[43] RESERVE BANK OF INDIA, https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0 (last visited Nov. 20, 2021)
[44] Id.
[45] Section 408 of Companies Act,2013
[46] Lexology, *India M&A,* Law Business Research 2020 30 & 31 (2020) https://elplaw.in/wp-content/uploads/2020/09/2020_India-MA_Book_secured.pdf

- Determining the values of those creditors or members who are part of the meeting
- Selecting a quorum and analyzing the procedure that is supposed to be followed in the meeting
- Issuance of notice to Central Government, RBI, CCI, Income Tax Authorities, SEBI, and other authorities

Therefore, it is significant for the companies to evaluate their regulatory environment taking into account their target. Over the years, India has relaxed certain regulatory provisions and allowed foreign participation which has encouraged foreign investment in the country. The acquirer must assess the regulatory environment before making the investment to avoid any kind of mishappening in the future.

CONCLUSION

Owing to the COVID-19 pandemic, companies across the globe have undergone a digital transformation in an accelerated manner. Businesses have analysed their weaknesses and have come up with new technology and business models to strive through the unfavourable situation. Mergers and Acquisitions came as a blessing amidst the unpredictability created by the pandemic. M&A is undoubtedly one of the most vital parts of a healthy economy as they help in boosting profits as well as creating shareholder value. With the increasing dominance of technology in the corporate world, the strategic role that IPR plays is indispensable. Protection of Intellectual Property Rights in M&A helps the companies to maintain a competitive parity in the market, while also safeguarding their valuable assets.

The pandemic has demonstrated the importance of acting on your feet and that agility is a crucial factor, especially in the financial sector. From the company's perspective, infusing M&A with enhanced technology could help them build financial resilience by achieving greater speed in an uncertain environment. It is an inevitable fact that the post-crisis world has brought forth new challenges to the table and these new challenges bring regulatory changes with them. Analysing the regulatory environment before entering into an M&A deal has become requisite for the companies in today's scenario. An assessment of the regulatory environment by the businesses would help them understand their target market and the industry they are entering into.

Despite the global tensions and constantly changing regulatory norms, M&A has emerged out to be a game-changer and witnessed enormous growth in the past years, particularly in the year 2021. Considering how the next few years are expected to be extremely challenging for our nation and the growth rate of M&A, this sector will surely display its adaptability and contribute towards nation-building. M&A has made India a key investment destination and in the coming years, it is going to be a game-changer in the long run.

CRITICAL ESSAY ON ENFORCEMENT OF SECURITY INTEREST (SARFAESI)

- ***Shravani Madirala***[47]

ABSTRACT

With the advent of liberalization and globalisation in 1991, the banking sector has flourished and by extension, the Indian economy. A well-regulated banking system is vital to maintain the fiscal soundness of a country, hence the overwhelming dead mass of loans or Non-Performing Assets (NPAs) affects the national economy as a whole. To tackle the mounting NPAs, India enacted the SARFAESI Act[48] in 2002 as a promising legislation to safeguard the interests of secured creditors. Though the act brought about a newfound seriousness in enforcement of securities, global crises and internal turbulences have exposed certain lacunae in the regime which are explored through this '*Critical essay on enforcement of securities.*'

Key Words: *Non-Performing Assets, Bad loans, SARFAESI Act, Security Enforcement, Financial Sector, Recovery of Bad Debts, Debt recovery strategies, Secured Creditors, RDB Act, Debt recovery tribunal.*

INTRODUCTION

Banks are the custodians of liquidity in a national economy and pave the way towards financial prosperity of a country through effective circulation of money. Any loan or advance extended by the bank becomes an asset as it generates income by way of regular instalments and interest. In case of irregularity for more than 90 days[49], RBI norms categorize this as a 'Non-Performing Asset' as it stops 'performing' or 'functioning'. NPAs are further categorized into sub-standard, doubtful and loss assets based on the time elapsed, and require a provision to be made in the books of the creditor.[50]

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[47] Student at Symbiosis Law School, Pune, Maharashtra.
[48] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, No.54, Acts of Parliament, 2002 (India).
[49] Master Circular on Income Recognition, Asset Classification, Provisioning & Other Related Matters By Reserve Bank of India, 10/93 RBI, 2009 (India).
[50] Reshma A., Enforcement of Security Under the Sarfaesi Act, 4 NUALS L.J. 136 (2010).

From One Time Settlement Schemes and Lok Adalats to Asset Reconstruction Companies and Corporate Debt Restructuring, various methods have been adopted by the banking companies as well as the Government entities to minimize the level of NPAs. This is primarily due to the fact that its accretion has a direct impact on the bank's profitability, asset quality and stability and jeopardizes the financial health of a banking company.

I. HISTORY OF LEGISLATION

Using financial assets for securitization in exchange of the credit given was a key practice propelled during the housing boom of the 1970s in the USA. It prompted the creation of a crucial mismanagement tool i.e. securitization. Time and again, different legal mechanisms were instituted to protect the rights of secured creditors and give recourse through enforcement of the entrusted securities. A brief history of the legal resorts available to the secured parties has been used below to trace the evolution of debt recovery mechanisms till the SARFAESI Act, 2002.

I.1. Transfer of Property Act, 1882 and CPC, 1908

The earliest known mode of recovery of mortgage debt without any kind of court intervention was via Section 69 of the Transfer of Property Act[51] but it exempted banks, financial institutions and other secured creditors from recovering their outstanding amount through its private sale provision. Section 34 of the Civil Procedure Court[52] also offered a remedy to the mortgagee to take possession of the defaulting mortgager's security through a foreclosure suit.

I.2. Sick Industrial Companies Act, 1985[53]

The Board for Industrial and Financial Reconstruction (BIFR) and The Appellate Authority for Industrial and Financial Reconstruction (AAIFR) were set up under this act but due to a delayed process of decision making, the act met with little success in realizing its objectives of rehabilitation.

I.3. Lok Adalat

Establishment of Lok Adalats through the Legal Services Authorities Act, 1987[54] was the brainchild of Justice.P.N.Bhagwati to provide for people-friendly judicial systems with an

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[51] Transfer of Property Act, 1882, No.4, Acts of Parliament, 1882.
[52] The Code of Civil Procedure, 1908, No.05, Acts of Parliament, 1908.
[53] The Sick Industrial Companies Act, 1985 (repealed in 2004), No.01, Acts of Parliament, 2004.
[54] The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987.

award equivalent to the decree of a civil court. Though their scheme of instant adjudication succeeded in recovery of minor loans, they were reproached for the lack of an appellate route.

I.4. Recovery of Debts due to banks and Financial Institutions Act, 1993

In the aftermath of the Basel Norms on an international level and the New Economic Policy on a national level, the Government formed the highly acclaimed committee under M. Narsimham[55] to bring reforms in the financial sector. The committee stated the need for an explicit regulation for enforcement of securities as the quickest resolution to India's intensifying problem of NPAs. Soon after its report, the Government enacted the RDB Act of 1993[56] to overcome systemic judicial delays through the establishment of the Debt Recovery Tribunals and the Debt Recovery Appellate Tribunal. However, a noteworthy concern raised under the working of DRTs was the intervention of the court as necessitated for any enforcement of securities.

I.5. Non-Legal Debt Recovery Strategies, 1999

Apart from legal enactments, few mechanisms have been embraced by the Government entities and RBI to regulate strategies aimed at diminishing NPAs. They include:

- Compromise Settlement: It is when a bank grants certain concessions for the defaulting debtors to recover at least a portion of the outstanding amount.
- Corporate Debt Restructuring: CDR occurs in cases of corporate debts exceeding Rs. 20 Crore spread across multiple creditors. Though it is a voluntary negotiation to restructure debt through Debtor-Creditor Agreements (DCA) and Inter-Creditor Agreements (ICA), the contracts are legally binding.
- Credit Information Bureau: It was formed in 2001 as a trans-banking information system for identification of defaulting borrowers.

I.6. SARFAESI Act, 2002[57]

Upon the recommendations of the Narsimham-II Committee[58] of 1998 to bring forth a stringent legislation empowering all banking companies to enforce their securities without requiring

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[55] Report of the Committee to Examine Principles of a Possible Shift from Physical to Financial controls by Narsimham Committee, 1985.
[56] The Recovery of Debts and Bankruptcy Act, 1993, No.51, Acts of Parliament, 1993.
[57] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No.54, Acts of Parliament, 2002.
[58] Committee on Banking Sector Reforms by Narsimham Committee, Reserve Bank of India, 1998.

judicial intervention, a bill on securitization was drafted by the Andhyarujina[59] committee[60] which went on to become the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Ordinance 2002 and later promulgated to become an Act. The act provides for three alternative methods for debt recovery; Securitization, Asset Reconstruction and Enforcement of Security Interest.

The SARFAESI Act is applicable for the recovery of all secured debts through enforcement of the underlying security (hypothecation, mortgage, pledge etc.). It also calls for the establishment of two special purpose vehicles namely, Securitisation Company (SCO) and Reconstruction Company (RCO) along with a central registry under the purview of RBI. Taking inspiration from its global counterparts, the UCC[61] of USA in particular, India marked the establishment of ACRIL as its first ARC.

I.6.1. Amendments

The SARFAESI Act was amended in 2016 by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016 as proposed by the finance minister Pranab Mukherjee in 2011. The amendment permitted ARCs to convert part of the debt into equity to make them a holder of equity, rather than a creditor of the defaulting company. It also allowed the banks to bid on any immovable property put to auction by themselves which facilitates at least a partial fulfilment of the defaulted loan. This acquired property can also be sold to third parties in the future to clear the complete debt. The 2016 amendment also mandated a District Magistrate to pass an order for the bank's possession of the secured assets within the stipulated time of 30 days.

In the case of ***Pandurang Ganpati Chaugale v. Vishwasrao Patil Murgud Sahakari Bank Ltd***[62], it was held that the provisions under SARFAESI Act can be extended to include all the co-operative banks instated under a state and multi-state law. This verdict of 2020 has clarified the conflicting judgements given by various high courts and is highly beneficial to the cooperative societies for their reduction of NPAs.

II. ANALYSIS

[59] Former Solicitor General of India
[60] The Report of the Expert Committee on Legal Aspects of BankFrauds by Andhyarujina Committee, Reserve Bank of India, 2001.

[61] Article 9, Uniform Commercial Code, 1952.
[62] Pandurang Ganpati Chaugale v. Vishwasrao Patil Murgud Sahakari Bank Ltd, 2020 SCC OnLine SC 431.

The SARFAESI Act of 2002 with its 2016 amendment has stood the test of time in proving to be a benchmark legislation for effective reduction of NPAs through enforcement of securities in India. It has successfully provided the requisite legal backing for banks to provide loans in an unfettered manner. Nevertheless, time and circumstance gave rise to certain disputes in enforcement of securities where judicial entities have provided resolve while upholding the objectives of the Act.

For instance, soon after the SARFAESI ordinance was promulgated in 2002, its implementation was halted by way of ***Mardia Chemicals v. Union of India***[63]. Though the court upheld the validity of the SARFAESI Act and reiterated its necessity, it made a minor alteration by repealing the provision that required 75% of the disputed amount to be deposited with the DRTs before entertaining any appeal. It was a highly contended matter but the court had done away with it by terming it 'illusory.' While it called for an unhindered execution of the act, it also iterated the onerous responsibility of the bank to do so in a fair and reasonable manner.

A cursory reading of the SARFAESI Act clearly points to an inordinate authority given to the banks with its presiding officer shouldering a quasi-judicial duty without any intervention by a court. As all the pivotal factors would be determined by the secured creditor, it is pertinent that the authorised officers discharge their responsibilities in a rational and *bona fide* manner. Yet, in more instances than one, debtors have been excluded from essential communication and all contestations raised by them have been dismissed without a just consideration. Another facet of the act that has received flack is the parity given to willful defaulters and non-willful defaulters. Besides, such provisions stand against the principles of natural justice.

Another key conflict to the SARFAESI Act as established was the jurisdiction of tenancy laws of the various states with regards to the SARFAESI Act. In ***Authorised Officer/Assistant General Manager vs. Nippon Enterprises***,[64] it was held that as the SARFAESI act didn't provide for physically taking possessions from a tenant while the state's tenancy laws protected the possessions of the tenants, it cannot be enforced; given that the tenant is in lawful possession. The rights of tenants were further upheld in ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Co. Ltd & Ors***[65] where the court determined that in cases

[63] Mardia Chemicals and others v. Union of India and others, (2004) 4 SCC 311
[64] Indian Bank v. Nippon Enterprises South, (2016) 15 SCC 79.
[65] Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1.

of a valid lease existing from a period before mortgage, the secured creditor can take possession from the lessee only after its expiry.[66]

Furthermore, simultaneous proceedings issued under the DRT and the SARFAESI Act were challenged in the case of ***M/s. Purnea Cold Storage vs. SBI***.[67] As the doctrine of election only applies to legislations inconsistent with each other, the judge established that it wouldn't be applicable here as there is no conflict between the remedies offered by both the legislations. The limitation period necessary for appearing before the DRT also makes cause for issuing simultaneous proceedings.

The intention behind enactment of the SARFAESI legislation was to avoid the systemic delays being experienced by the DRTs. Thus it became pertinent for the SARFAESI Act to accord justice in a timely fashion and the guidelines for the same were issued by the courts in the cases of ***International Asset Reconstruction Company Private Ltd vs. Union of India***[68] and ***Standard Chartered Bank v. Dharminder Bhohi***[69] particularly in reference to applications filed under Section 14 of the Act. Repeated adjournments without reasonable justification were used to cause futile impediments in the implementation of the act. The court viewed the SARFAESI Act in the light of the bigger purpose it serves; to rid the Indian economy of defaulting debtors which is affected by the delays. Alongside, it duly reprimanded the functionaries hampering its objective and held all magistrates to dispose matters under the section within 2 months or less.

Another petition brought to the honourable courts through ***M/s. Kanchee Fashion Sarees & Others vs. Authorised Officer, SBI***[70] was against the practice of e-auctions adopted by the banks but the move was welcomed by the courts for being aligned with the act's objectives as it only benefited both the parties by eliminating middlemen of the public forums. The court also noted that it provided some much-needed transparency and regularity to the whole process. However, it can be argued that with a developing country like India, online channels are still unchartered territory for some publics which affects their accessibility.

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[66] Garima Goswami, Conflicting Rights of Secured Creditors and Tenants under the SARFAESI Act-Ambiguity Resolved: A Critical Analysis, 8 GNLU J.L. DEV. & POL. 62 (2018).
[67] State Bank of India v. Purnea Cold Storage, 2013 SCC OnLine Pat 1023.
[68] International Asset Reconstruction Company Pvt. Ltd. v. Registrar, Debts Recovery Tribunal, 2011 SCC OnLine Bom 1505.
[69] Standard Chartered Bank v. Dharminder Bhohi, (2013) 15 SCC 341.
[70] C.Selvaraj vs The Authorised Officer (2014), W.P.1708 of 2014.

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[68] International Asset Reconstruction Company Pvt. Ltd. v. Registrar, Debts Recovery Tribunal, 2011 SCC OnLine Bom 1505.
[69] Standard Chartered Bank v. Dharminder Bhohi, (2013) 15 SCC 341.
[70] C.Selvaraj vs The Authorised Officer (2014), W.P.1708 of 2014.

It is also observed that defaulting borrowers have approached arbitration with the *mala fide* intention of delaying the process of enforcement of securities simply due to the provision preventing any other legal recourse till the final decision is pronounced in arbitration. While the provision was placed to avoid overlap and discord, it has been prone to gross misuse.

The SARFAESI Act provided for the establishment of the ARCs but there are major lacunae in their functioning and management. For example, the mandate to give a 'fair market value' for the security being acquired needs to be better laid down to protect the interests of the seller i.e. the banks and ensure optimal price is given to the asset.[71]

Also, with the wide ambit of powers given to the banks through the act, the rights of the borrowers inevitably come into demand. Frequent questions were raised on the nature of the act to make them vulnerable and prone to be mishandled. One such provision in question was if the sale of securities didn't occur as planned, should a new notice be given for the 30 day waiting period between the intimation to the borrower and the actual sale? In ***Mathew Varghese vs. M. Amritha Kumar and Ors***[72] it was held that the prior notice would automatically elapse when the sale doesn't go through and required for a renewed notice. However, the Supreme Court recently noted in the case of ***S. Karthik v. N Subhash Chand Jain***[73] that such a provision could be a tool to cause deferments and held that a new notice is not necessary if the borrower was responsible for the initial sale falling through.

Unfortunately, the plight of the borrowers upon the banks' incompliance with the guidelines of RBI laid down to protect both the parties under SARFAESI Act went unheard. The act mandates a notice period of 60 days to be given to the defaulting debtors prior to their enforcement of the pledged securities. However, the responsibility of the banks to entertain the objections of the borrowers within 7 days of the issue of the notice was either performed poorly or not performed at all. In a majority of the cases, the borrowers are kept in the dark about such a right available to them. This, again, goes against the principles of natural justice for it is an exploitative means to strong-arm the borrowers into letting go of their securities.

To further protect the rights of the borrowers, in ***J.Rajiv Subramaniyan Vs. M/s.Pandiyas***,[74] it was determined that clear and transparent communication has to be made to the borrower regarding any and all updates on the sale of properties by the bank. Moreover, it was held that

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[71] Vivek Rajbahadur Singh, A Study of Non-Performing Assets of Commercial Banks and it's recovery in India, Vol. 4,Pg.110 (2016).
[72] Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610.
[73] S. Karthik v. N. Subhash Chand Jain, 2021 SCC OnLine SC 787.
[74] J. Rajiv Subramaniyan v. Pandiyas, (2014) 5 SCC 651.

the defaulting borrower has to be a party to the meetings of the bank and the prospective buyer to accord the debtor a fair and adequate opportunity to retrieve their security. At any point of time before conclusion of the sale of security, the defaulter has the right to pay their dues and retain their security. Any wrongful act done by the presiding officer will not only have punitive consequences but also entitle the debtors to compensation through DRT and DRAT.

The courts' efforts to uphold the rights of the borrowers has been lauded while on the other hand, excessive exercise of jurisdiction under Article 226[75] has been called into question. Despite remedies being available within the DRT and SARFAESI Acts, the public seemed to take their grievances to the courts. The courts have since exercised caution while hearing matters under the SARFAESI Act, especially if all the remedies already available haven't been exhausted.[76]

In enforcement of securities, the banks possess the authority to publish the names and/or photographs of the defaulters on a public domain to lay social pressure on the debtor to pay the loans and save face. However, its misuse could lead to defamation because of the public humiliation and its use has been condemned for violating the privacy of an individual to perpetuate economic interests.[77]

CONCLUSION

Initially, there was an innate reluctance to classify any defaulting instances as bad debts despite the early signs due to the lack of a proper enforcement mechanism which only impaired the bank's functioning and performance. Finally in 2002, for all the shortcomings of the mechanisms of debt recovery available then, the SARFAESI Act became a boon for banking and other financial institutions to take effective action against defaulting borrowers.[78]

The SARFAESI Act not only found a resolve for repeated defaulters but also did it by retaining control with the banks rather than approaching the judiciary. It proved to be a timely and monetarily efficient process that changed the face of enforcement of securities. Despite the act being purported to diminish judicial intervention, the courts have played a strong role in upholding the act's objectives while protecting the defaulters from exploitation and oppression.

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[75] INDIA CONST. art. 226.

[76] Munish Gupta, Effectiveness of sarfaesi act in Controlling NPAs of Indian Banking Sector, DBU (2019), http://hdl.handle.net/10603/316511.

[77] Neha Singh, Impact of SARFAESI on NPA, Vol 6 Issue 4, IJLDAI, Pg. 161 (2020).

[78] Sekar.V, Implementation of SARFAESI Act- Some Issues, Vol 2 No.1, IJMSSR, Pg.70 (2013).

The establishment of ARCs under the central registry of RBI is a significant achievement of the SARFAESI Act. They have lived up to their repute by making the procedure easier for all the stakeholders. ARCs have helped banks clean their balance sheets up while using their specialized knowledge to put the asset at hand to best generate profits. By absorbing the bad loans of the banks, ARCs have considerably increased the asset quality, furthered loans to other borrowers, augmented their credit worthiness and by extension, boosted the economy. They have substantially reduced the operational costs of the bank and increased profitability.

However, it is often overlooked that the SARFAESI Act does not eliminate all the other modes of recovery. On numerous occasions, banks were found to be hasty and remiss in invoking the SARFAESI Act without much attempt at other amiable avenues. The act should be invoked only as a last resort after all other avenues become redundant so as to be more accommodating towards the interests of the borrowers. The incompliance of banks to adhere to the rules and procedures of SARFAESI Act also make it a bane to the debtors for it deprives them of a fair opportunity to honour their dues and save their security.[79]

Despite the varied mechanisms available for the easy discarding of NPAs, the best practice to truly moderate them is for the banks to adopt a superior credit management system along with accurate due diligence through field investigations, vetting and verification before the advancement of credit.[80]

SUGGESTIONS

With all the due deference to the enactors of the SARFAESI Act, the following recommendations are made for its effective implementation in enforcement of securities:

- To ensure clear and transparent communication of the banks with the borrowers.
- To regulate the appointment of the Authorised Officers based on proficiency and experience to effectually discharge the quasi-judicial functions associated with the role.
- To provide adequate training, guidance and sensitisation to the Authorised officers to amicably cooperate with all the stakeholders and find a collective resolve.
- To offer incentives for timely repayment of debt.

[79] Syamjith P, Recovery of debts dues to banks in India with special reference to sarfaesi act 2002 issues challenges in implementation a juristic analysis, TN ALU (2015), http://hdl.handle.net/10603/148916.
[80] Bharati V. Pathak, The Indian Financial System: Markets, Institutions and Services, Pg. 212 (3rd ed. 2016).

- To take judicial cognizance of the grievances of the borrowers against the power tactics and misconduct of the banks to recover their dues.
- To consider the provision of industrial credit insurance.
- To retract the prioritization of Government's claims through its sales tax and land revenue laws as they constantly undermine the efforts of recovery by the SARFESI Act.[81]
- To employ the debt recovery mechanism best suited to the situation at hand through individualisation and expert advice to get optimal gains.
- To adhere to the principles of natural justice while executing the Act's provisions.
- To empower the RBI for bringing regulations not only on the creditors and the other functionaries but also on borrowers and especially, the habitual defaulters.
- To facilitate for early identification of bad loans and take necessary measures before the situation worsens.
- To grant the borrower the first right of purchase of the security interest.
- To determine a repayment schedule that is practicable and considerate; according to the latest banking trends, individual scope and bank policy while taking into account a buffer period.

[81] Neeta Uday Deshpande, A Critical study of recovery problems of banks working in Western Maharashtra in the light of sarfaesi act 2002, SU(2011),http://hdl.handle.net/10603/50703.

LEGAL ISSUES FACED BY FOREIGN COMPANIES IN INDIA

- ***Shruti Navayath***[82]

ABSTRACT

Foreign companies are those which have been incorporated outside India but have a place of business and conduct business activity inside India. Some of the challenges faced by these companies include increased compliance; restrictions on mergers and amalgamations with Indian companies; the requirement of an annual account of its profit and loss for that financial year; compulsory corporate social responsibility and hindrances in voluntary winding up. I have proposed certain solutions such as the employment of Indian accountants and firms, implementing the use of IDRs, amending securities law, providing greater flexibility to branch offices and allowing voluntary liquidation. I believe that these solutions can help foreign companies tackle the issues faced and compel them to enter into the Indian market.

Keywords – *Foreign companies; issues faced*

INTRODUCTION

The Companies Act of 2013 defines foreign companies under Section 2 (42) as any company or corporate body which was incorporated outside India but:

i. Has a place of business within the territory of India, this could be through an agent, physically or through electronic mode
ii. Conducts its business activity in India in any other manner.[83]

For a company to be recognised as a foreign company in India, both the criteria must be fulfilled. The definition in the Companies Act 2013 has a wider scope than that of the 1956 Act. This is because the older Act only considered companies as foreign companies when they had a physical place of business in India.[84] The new definition on the other hand, allows foreign companies to operate in India even with an internet presence rather than a physical office.

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[82] Student at NMIMS, Kirit P. Mehta School of Law, Mumbai, Maharashtra.
[83] Companies Act, 2013 §2 (42), Acts of Parliament, 2013 (India).
[84] Dabur (Nepal) P. Ltd. v. Woodworth Trade Links P. Ltd., Co.Pet. 212/2006.

In order to understand the actual definition of a foreign company in India, it is important to understand the meaning of 'electronic mode' as well as 'business activity'.

The definition for electronic mode with regard to foreign companies is provided under Rule 2 (h) of the Companies (Specification of Definitions Details) Rules, 2014. This definition includes all transactions that are carried out through an electronic medium such as business to consumer transactions and the use of all electronic services such as emails, social media, etc. Thus, even if the company's main server is located outside India, its use will still be considered within the purview of electronic mode.

Rule 3 of the Companies (Registration Offices and Fees) Rules, 2014 states that every company that carries out business through electronic mode in India, including foreign companies, will be deemed to have carried out its business in India. Thus, again, regardless of where the company's main server is located, as long as the company carries out business through electronic mode, it shall be considered to have carried out business in India.

The definitions of 'electronic mode' and 'business activity' are similar. The only difference is that, while the definition of electronic mode only applies to foreign companies, that of business activity applies to all types of companies.

Thus, a foreign company is not just a company incorporated outside India, with a branch inside India, it also includes companies that have entered into any form of transaction with either a person or an entity located in India, through electronic mode.

The 2013 Act changed the definition of foreign companies and in doing so widened its scope. The definition of electronic mode essentially covers every company that carries out transactions in India. The new Act has also made it clear that companies carrying out such transactions must have a permanent place of business in India, but this place of business could be through an electronic mode. Additionally, the definition of business activity also includes broadcasting companies with foreign subsidiaries such as Zee Entertainment, which will also have to comply with the Companies act.

The 2013 Act also increased the compliance of foreign companies by making it necessary for them to file statements of party transactions, auditing of accounts by Indian Accountants, repatriation of profits, etc. Further, Section 379 of the Act[85] stated that for companies where

[85] Companies Act, 2013 §379, Acts of Parliament, 2013 (India).

50% or more of the paid-up capital is held by either a citizen or corporate body of India, they must comply with the provisions of the Act.

The 2017 amendment of the Act answered the question of 'Which foreign companies does the Companies Act apply to?', by making it clear that all foreign companies must comply with the provisions of the Act unless specifically exempted by the Central Government of India.

CHALLENGES FACED BY FOREIGN COMPANIES IN INDIA

In order to succeed, it is essential to take into account the challenges that foreign companies face while running their businesses in India. The following are the main difficulties: -

I. MORE COMPLIANCE FOR FOREIGN COMPANIES

Section 592 of the Companies Act of 1956[86] held that all foreign companies that are carrying out business must file the below documents with the registrar: -

i. Copies of the charter, memorandum of association and articles of association
ii. The address of the registered principal office
iii. The address of the office that would be considered the principal office in India
iv. The list of the company's directors or secretaries
v. Names and addresses of the Indian residents authorised to accept notices and other documents on behalf of the company

The 2013 Act, through Section 380,[87] makes it clear that the following information must be provided to the registrar within 30 days of establishment of the foreign company in India; along with all the information from the 1956 Act: -

i. The particulars of the opening and closing of the principal place of business located in India
ii. Declaration that none of the directors or authorised representatives of the Company in India have ever been convicted or debarred from the formation of companies and management in either India or abroad
iii. And any other information as required

[86] Companies Act, 1956 §592, Acts of Parliament, 1956 (India).
[87] Companies Act, 2013 §380, Acts of Parliament, 2013 (India).

II. MERGERS AND AMALGAMATION

In the Companies Act of 1956, Section 394[88] dealt with reconstruction and amalgamation of companies. Sub-section 4 (b) of Section 394 defined "transferee company" as one that cannot include a company other than one whose meaning is included within the Companies Act of 1956; while a "transferor company" could be any corporate body whether its definition is included within the Act or not. Thus, it can be understood that the 1956 Act allowed a foreign company to merge into an Indian company but did not allow an Indian company to merge with a foreign company.

When it comes to the 2013 Companies Act, Section 234[89] allows both, the merging of a Foreign Company with an Indian Company and also, that of an Indian Company with a Foreign Company. However, prior approval from the Reserve Bank of India is a necessity.

The terms and conditions of the merger scheme may allow the payment of consideration to the merging company's shareholders. This could either be in cash, or depository receipts or partly in cash and partly in depository receipts. Thus, the Foreign Company will not be able to issue shares to the Indian shareholders of the Transferor Company.

For example, if Hindustan Unilever, an Indian Company, merged with Unilever, a United Kingdom Company, Unilever will not be allowed to issue shares to the shareholders of Hindustan Unilever.

Section 234 of the Act also lays down that Indian Companies shall be allowed to enter into mergers and amalgamations with Companies of jurisdictions as notified by the Central Government. However, in order to facilitate increased transparency and disclosure, there should not be any limitations on jurisdiction for inbound mergers.

Further, Securities Law prohibits dual listing of companies

With regards to the Foreign Exchange Management Act rules, there are very limited activities that a foreign company can undertake with respect to export and import of goods, providing consultancy services, promoting financial collaborations between the Indian Company and the foreign company, representing the parent company in India, etc. Also, branch offices must be engaged in the same activities as parent companies. Thus, the actions of branch companies are

[88] Companies Act, 1956 §394, Acts of Parliament, 1956 (India).
[89] Companies Act, 2013 §234, Acts of Parliament, 2013 (India).

limited as well. Subsidiary companies and companies that have been incorporated in India enjoy more flexibility.

Branch offices must have a permanent establishment within the territory of India; and when a Foreign Company merges with an Indian Company, the branch office must continue its operations in India and the profits from the branch office will be taxed according to the Income Tax Act. But what's important to note is that, the profit may be taxed once again in the foreign country as well.

III. ACCOUNTS

Section 594 of the 1956 Companies Act[90] made it compulsory for every foreign company to annually make a balance sheet as well as a profit and loss account in keeping with Schedule VI of the Companies Act of 1956.

The provision is covered under the Companies Act of 2013 in Section 381[91] when read with Rule 4 of the Companies (Registration of Foreign Company) Rules 2014; which lays down that every foreign company must make a balance sheet and an account of its profit and loss for its Indian Business Operations in accordance with Schedule III of the Companies Act 2013, every financial year.

Section 2 (41) of the Companies Act defines 'financial year' as the period ending on the 31st day of March every year, and where it has been incorporated on or after 1st day of the January of a year, the period ending on the 31st day of March of the following year.

The provision to Section 2 (41) explains that in case a foreign company must follow a different financial year for consolidation of its accounts outside India, the company may file an application for the same and if the tribunal is satisfied with the application, another period may be allowed, regardless of whether the other period is a year.

Additionally, every financial statement must be filed with the Registrar along with the following documents attached: -

i. Statement of Related Party Transaction
ii. Statement of Repatriation of Profits

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[90] Companies Act, 1956 §594, Acts of Parliament, 1956 (India).
[91] Companies Act, 2013 §381, Acts of Parliament, 2013 (India).

iii. Statement of Transfer of Funds in case there was a transfer of funds between the foreign company's Indian office and any other company

IV. CORPORATE SOCIAL RESPONSIBILITY

Section 135 of the Companies Act of 2013[92] states that every company that has a net worth of Rs. 500 crore or more, or a turnover of Rs. 1000 crore or more in any financial year must constitute a Corporate Social Responsibility Committee.

Foreign companies that have a branch office or project office in India and fulfil the above-mentioned criteria, must comply with the rules of Corporate Social Responsibility.

When it comes to foreign companies, the Corporate Social Responsibility Committee must comprise of at least two people, one of whom should be an Indian resident who is authorised to accept notices and documents on behalf of the foreign company; and the other personal shall be nominated by the Foreign Company.

In Accordance with Rule 8 of the Companies (Corporate Social Responsibility Policy) Rules 2014, the balance sheet filed by the Foreign Company should contain an Annexure with the report on CSR.

V. WINDING UP

Section 376 of the Companies Act of 2013[93] lays down that in case a corporate body that is incorporated outside India, which has been carrying out business in India, ceases to carry on business in India, it can be wound up as an unregistered company in accordance with Part II of Chapter XXI of the Companies Act, 2013.

Thus, Foreign Companies can't be wound up voluntarily in India.

They can only be wound up on the following grounds as mentioned in Section 375[94] of the Companies Act: -

i. If the parent company is dissolved or has ceased to carry on business or is only carrying on its business in order to wind up

[92] Companies Act, 2013 §135, Acts of Parliament, 2013 (India).
[93] Companies Act, 2013 §376, Acts of Parliament, 2013 (India).
[94] Companies Act, 2013 §375, Acts of Parliament, 2013 (India).

ii. If the company is not able to pay its debts
iii. If the tribunal believes that the company should be wound up

SOLUTIONS

In light of the problems faced by Foreign Companies, I would like to make the following suggestions: -

I. INDIAN ACCOUNTANTS, FIRMS AND EMPLOYEES SHOULD BE EMPLOYED

The best thing a foreign company can do, is employ Indian Accountants, Firms and Employees to work in their Indian branch offices. As the system is very complex and not easy to understand, this will go a long way to ensure that all the required compliances are met in a timely manner. Also, employing Indian firms will enable companies to battle any legal issues considering that India's judicial system is very different from that of most western countries.

II. USE OF IDRS SHOULD BE IMPLEMENTED

The issue of foreign companies not being able to issue shares to Indian shareholders after amalgamation can be solved through the use of IDRs. Indian Depository Receipts or IDR allows foreign companies to raise funds from Indian Securities Markets. Foreign companies are traditionally not allowed to be listed on Indian equity markets. However, IDR can be used to own shares of those companies by listing the IDRs on Indian Stock Exchanges. IDRs allow Indians to directly invest in foreign companies. These IDRs could also be used as a method to pay for outbound mergers. One example of a foreign company that has issued IDRs in India is Standard Chartered Bank PLC UK. Such use can also encourage other foreign companies to issue IDRs in India.[95]

Amalgamation enjoys tax neutrality in India in case the amalgamating companies have transferred their assets. The shareholders of the amalgamating company are also allotted shares in the amalgamated company, in consideration of the surrendered shares. It would be helpful if tax neutrality was provided to Indian shareholders in case IDRs are issued on mergers.

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[95] Angel One, Indian Depository Receipt (IDR), https://www.angelone.in/knowledge-center/share-market/indian-depository-receipts (last visited Dec. 15, 2021).

III. SECURITIES LAW SHOULD BE AMENDED TO THE EXTENT THAT IT ALLOWS DUAL LISTING

Dual listing is the listing of a security on multiple exchanges. It comes with the benefits of increased access to capital, additional liquidity, etc. Several countries such as Australia, United Kingdom and France allow dual listing of companies, but India doesn't. America too, allows the same, except this is carried out through American Depository Receipts. In India, Securities law should either be amended or the use of IDRs should be made more prevalent.

IV. INCREASED FLEXIBILITY FOR BRANCH OFFICES

The Foreign Exchange Management Act Rules limit the actions of the branch company and put added limitations on them as compared to that of Indian Companies. Thus, the FEMA rules should be amended to allow the same amount of flexibility for branch offices.

V. ALLOWANCE OF VOLUNTARY LIQUIDATION

Voluntary liquidation has several benefits including debts being written off, legal action getting halted, cancellation of leases, lowering of costs, avoidance of court processes, etc. Australia allows voluntary winding up under Section 581 of the Corporations Act, 2001.[96] Indian law should be amended to allow the same, this would put foreign companies at par with Indian Companies.[97]

CONCLUSION

Regardless of the problems faced by foreign companies in India, there are several reasons for foreign companies to enter the Indian market.

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[96] Corporations Act, 2001 §581, Acts of Parliament, 2001 (India).

[97] Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/strategy/voluntary-liquidation/ (last visited Dec. 15, 2021).

India is one of the most progressive nations globally. India is equipped with a large potential and an enormous market. The population is a whopping 1.39 billion individuals, most of whom are in the middle class and have money to spend on the goods that they believe they require.

According to the data collected by the World Bank in 2021, India's GDP is about USD135.13 trillion.

India's huge market potential trends have revealed that the FDI inflow is growing in India due to the numerous foreign business that choose to start operations in the country and in keeping with the same, favorable changes have been made in India's Foreign Direct Investment Policy.

If Indian laws implement certain changes such as the use of IDRs, the allowance of dual listing, allowing increased flexibility branch offices and voluntary winding up, Foreign Companies will have to face less hurdles in India. Such actions will ultimately have a positive impact on India's global presence.

India is gifted with an abundance of resources, cheap labour and special investment privileges. Thus, it is no surprise that an increasing number of companies are choosing to bring their business to the country, despite the difficulties that they face.

MERGER AND ACQUISITION OF BANKING COMPANIES: REGULATION BOON OR HINDRANCE

- *Aayush Akar*[98]
- *Prerna Das*[99]

ABSTRACT

In, merger and acquisition, the formerly two independent companies merge to form one entity. Merger & Amalgamation in any industry has a huge economic impact. Mergers are not only done with the motive of increasing business or saving the business of a comparatively smaller company. There are many other dimensions as well which makes mergers and amalgamation a very crucial procedure. Banks are also financial companies and undergo mergers and amalgamation. Certain times it is voluntary other times it is as per the guidelines of India's central bank, i.e., Reserve Bank of India.

Reserve Bank of India has the powers under the Banking Regulation Act, 1949, to regulate the merger and amalgamation between the banking companies. The Companies Act has no jurisdiction in the matters of mergers between banks. The banks can either merge with other banking companies or non-banking companies. Even CCI has been kept away from these matters.

In this paper, comparison and study of the regulatory measures for merger and amalgamation by the statutory body of RBI are done. The paper will analyse whether the regulation is effective or not. Further, is the banking sector, especially the nationalized bank being over-regulated by the RBI. Moreover, whether the strict regulation makes it difficult for the banking companies to function, in turn, harms the economy. It also sees how the forced merger between nationalized banks, which happened very recently in the year 2020, is effective in terms of the economy.

INTRODUCTION

Banking Company is defined under Section 5 of the Banking Regulation Act, 1949. It defines a banking company as "*any company which transacts the business of banking 10 [in India].*

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Explanation. — Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause." Banks are the wheels of the economy. If any one of the wheels is not functioning properly then the economy suffers due to it. So, from time-to-time measures have to be taken and are taken to save the banks.

Banking Regulation Act, 1949 is the regulatory framework for the merger and amalgamation of banking companies. The Companies Act, 2013 does not have power in these mergers. The main difference between a merger under the Companies Act and a merger under the Banking Regulation Act is that a merger scheme under the Companies Act must be approved by a tribunal. Whereas, according to the Banking Regulation Act, a voluntary amalgamation of bank mergers must be approved only by the Reserve Bank of India, which is the sole authority in all matters of banking companies.[100]

ECONOMIC IMPACT OF M&A OF BANKING COMPANIES

Mergers and acquisitions are important processes that financial service industries use to achieve the desired economic growth. Mergers in the banking sector are motivated by cost reduction, branch network rationalization, investment in new technologies and processes, income increase, risk reduction, diversification, and strategic position strengthening. Mergers in the banking system were even encouraged in the report of Narasimham Committee II.

The Narasimham Committee was constituted by the then Finance Minister P. Chidambaram and headed by Mr M. Narasimham, the former governor of RBI. The second committee mainly focused on the reforms of the banking sector. The committee recommended the merger of strong public sector banks with some weaker banks. This would have a "multiplier effect" on the industry. It even gave the perspective from the other side of the coin as well. It quoted that the weaker bank's "contaminated portfolio" would affect the asset quality of the weaker banks. It is further said Mergers would have to produce benefits in terms of staff and branch network;

[100] KULIN DAVE, MERGER AND ACQUSITION OF UNDERTAKING OF BANKING COMPANIES IN INDIA,M&A of undertaking of Banking Companies in India | Kulin Dave (ksandk.com)(March 8, 2019).

otherwise, they would encumber management with operational issues and merely divert attention away from the real issues without providing any compensation.[101]

V.A. Joseph, Managing Director of Federal Bank, believes that the coexistence of large, medium and regional banks are preferable in the current situation. According to him, most acquisitions in India were driven by compulsions, and more than 90% of previous acquisitions failed to meet their objectives.

I. ADVANTAGES

Bank mergers have many advantages for the banks, their customers and the economy at large. Some of the advantages are:

Better Functioning

When banks merge and form a large bank, it makes it easier to face global competition. Professional standards will see growth. The efficiency of the banking operation gets better which in turn benefits the economy. As the bank grows in size, retaining and enhancing its identity becomes easier. The benefits of the merger are enormous, with the most significant being the generation of a brand-new customer base, business empowerment, increased market share, and the opportunity for technology upgrade. Risk minimization on overall risk.

Bettering Credit Culture

NPA and risk management will become more effective when more people are working towards it. Small banks might find it overwhelming to make high lending. However, when small banks are merged with larger banks, the decision making would be much more efficient. Weak banks' merger into larger banks helps them in getting the benefit of large-scale operations.

Increase Global Competitiveness

Larger banks will attract more foreign investors and borrowers. It will gain greater recognition. These large banks will be able to operate on a global scale while improving their operating performance by lowering credit costs.[102]

[101] CHARVI GULATI, NARASIMHAM COMMITTEE REPORT ON BANKING REFORMS, Narasimham Committee Report on Banking Reforms (microeconomicsnotes.com) (last visited Dec. 24, 2021).
[102] BANKING MERGERS IN INDIA, List of Banking Mergers in India - Check Latest Public Sector Ban Mergers (groww.in) (last visited Dec. 24, 2021).

Cost- Reduction & Increased Profits

Merger helps in cost reduction of banking operations. The business of underperforming banks increases which helps them get back the trust of their customers. With a larger capital base and increased liquidity, the burden on the central government to repeatedly recapitalize public sector banks will be significantly reduced. Further, multiple positions such as CMD, ED, GM, and Zonal Managers will be eliminated, resulting in significant financial savings.[103] Better management of banking capital. Bank mergers and acquisitions enable the company to bridge product and technological gaps. Buying a smaller bank with a unique sales model or financial offering is frequently less expensive than starting from scratch.

Effective Regulation

With the merger the reach of banks especially the larger banks increases. With the more geographical reach of the banks, the more people's finances are being secured. RBI's regulations related to liquidity and other facilities become easy. Management of short-term and long-term liquidity becomes better due to larger banks. Instead of facing disparities in service conditions and wages, bank employees will be covered by a single umbrella. The massive investment will be required to transform India into a $5 trillion economy. The country's economic growth will accelerate if banks have enough funds to finance large programs.

II. DISADVANTAGES

Some of the disadvantages are:

Difficult in Merging the Workforce

Only on paper are banks combined. It's difficult to change their people and culture. It's a recipe for disaster because it results in a culture that's not right for the organization or the economy.

Risk of Failure Increases

The risk of failure increases if the executives are not fully committed to bringing together the merger platforms for merging and taking over the bank. Such a failure could be devastating to the economy. Probability of a bank going bankrupt, no prior experience, risk of fraud and robbery, and there is a risk of public debt.

[103] BANKS MERGER IN INIDA: IS IT GOOD FOR INDIAN ECONOMY? GD Topic: Banks Merger in India: Is it good for Indian Economy? (mbauniverse.com) (last visited Dec. 24, 2021).

Larger Banks Might Cause More Problems than Good

Large global banks failed during the global financial crisis, but smaller banks survived due to their strengths and focus on micro-aspects. The small banks' weaknesses are transferred to the larger bank as part of the merger. So far, small-scale losses and recapitalization have been able to restore small banks' capital bases. Now, if the giant-shaped bank books a huge loss or incurs high NPAs, as it has been doing, the entire banking system will struggle to survive.

Impact on Customers

Customers' reactions to a banking merger or acquisition are frequently quite emotional. If customer perception is not managed through frequent and careful communication, it may result in business loss, which is never good for the economy. Overall, mergers are important for the growth of today's banking industries as many banks are failing either due to lack of funds or workforce. Mergers are important both for expansion and economic growth.[104] Further, it also is crucial for the economy as it saves the weaker banks from going bankrupt. Mergers cause a slew of issues that can be disastrous if the process is not carried out correctly. If a merger is required, it must be carried out in a way that fosters trust and agreement among the people of both organizations. Merging will have synergistic effects and create a win-win situation if people, work culture, and vision are well-integrated.

REGULATORY FRAMEWORK OF M&A FOR THE BANKING COMPANIES

In India, the regulatory framework for merger and acquisition among banking companies is given under the Banking Regulation Act, 1949. Originally, it did not have the provision. Section 44A was inserted by the Banking Laws (Amendment) Act, 1950, which recognizes the right to voluntary amalgamation by banking companies. The act now provides regulations for both voluntary and compulsory amalgamation.

Voluntary Amalgamation

[104] JYOTI VERMA, MERGERS OF BANKS IN INDIA-CAN BE POSITIVE OR NEGATIVE, TYPES, EFFECTS AND CONCLUSION, Merger of Banks in India - What are the advantages and disadvantages? (successcds.net) (last visited Dec 24, 2021).

One more type of voluntary amalgamation is that of a non-banking company and a banking company. This type of amalgamation is governed by **Section 391 to 394** of the **Companies Act, 2013.** The procedure for the amalgamation of private sector banking companies is outlined in Section 44A of the Banking Regulation Act. The scheme containing the terms of amalgamation must be approved in the general meeting by a majority in number representing two-thirds of the shareholders' value. A dissatisfied shareholder is entitled to the value of his shares as determined by the Reserve Bank of India. Following shareholder approval, the Reserve Bank must sanction the scheme. Following such approval, the bank's assets and liabilities are transferred to the transferee company.

In **Joseph Kruvila Vellikunnel v. RBI**[105], the Supreme Court held that banking companies cannot be compared to ordinary companies because depositors' interests are paramount in a banking company, and the RBI in India is an expert body in determining and protecting the best interests of banking companies.

Compulsory Amalgamation

The compulsory amalgamation is done as per the guidance of RBI under Section 45 of the BR Act. These are induced or prompted by the Reserve Bank in the public interest, or in the interest of a distressed bank's depositors, or to ensure proper management of a banking company, or for the benefit of the banking system. There has been a question on the constitutionality of Section 45 of the Act. The Bombay High Court in the case of **Shivkumar Tulsian & Ors. v. Union of India**[106], held that Section 45 is constitutionally valid as per articles 19 and 14.

The RBI, in case of a banking company's financial distress, may apply to the Central Government for an order of moratorium and devise a plan to merge the banking company with another banking institution. The Reserve Bank's scheme must be sent to the banking companies involved for suggestions or objections, including those from depositors, shareholders, and others. Following consideration, the Reserve Bank submits the final amalgamation scheme to the Central Government for approval and publication in the official gazette. The notification issued for compulsory amalgamation under Section 45 of the BR Act must also be presented to the two Houses of Parliament. The amalgamation takes effect on the date specified in the notification issued by the government.

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[105] Joseph Kruvila Vellikunnel v. RBI, AIR 1962 SC 1371.
[106] Shivkumar Tulsian & Ors. v. Union of India, [1990] 68 Com Cas 720 (Bom).

Certain recent mergers that happened were the merger of 27 nationalized banks into 12 in the year 2020. The objective of such mergers is to merge the weak bank with a strong bank to save the financially distressed bank. The overarching principles that guided the consideration of the amalgamation proposals were: depositor protection, expeditious resolution, and avoidance of regulatory forbearance.

REGULATORY CHALLENGES IN M&A OF BANKING COMPANIES

Over-regulation through Forced Mergers

In the year 2020, 27 banks were merged to form 12 banks. This was a forced merger. Many have argued that this forced amalgamation is over-regulation and no supervision. Banks even though have the moral duty to do welfare for the economy. Nonetheless, for their functioning, they need to have profits. Forcing mergers upon banks would make them work less for the profitability of the bank.

There are two caveats to keep in mind. The first is that any consolidation process must be driven by a genuine need for merger rather than being imposed from without. The entities must be able to perceive the synergistic benefits. The flat-driven consolidation process is much less likely to succeed, especially if the flat-driven decision is accompanied by restrictions on the merged entity's normal cost-cutting avenues. As a result, any meaningful consolidation among public sector banks must be driven by commercial motivation on the part of individual banks, with the government and regulatory agencies serving only as facilitators. Second, the consolidation process does not imply that small and medium-sized banks are doomed to fail. Many Indian banks are sized appropriately for the Indian market. Experience demonstrates that small and medium-sized banks, even in advanced countries, can survive and remain profitable. These banks, along with very large financial conglomerates, have survived. Small banks are more likely to lend to small businesses.[107]

Consolidation would Not Help Global Competitiveness

Banks contribute a lot to the functioning of the economy. RBI's amalgamation strategy may not work as the bank with which the weaker bank has been merged has to work first to uplift

[107] Excerpts from speech of Dr C. Rangarajan, Chairman of the Economic Advisory Council and former Governor, RBI at Global Banking Conference, 12th Sept 2007.

it. It has to make changes in the working system and bring regulation in the transactions by the weaker bank. Most of the workforce will be involved in doing these tasks. The focus on the business of the bank will not be there.

Not only this but the bank's technology and other system changes. For instance, the IFSC code is changed and the bank with which other banks are merged has to change their IFSC code. These all-procedures cause inconvenience to the customers. When customers are unhappy the business also gets affected, in turn causing inconvenience to the economy. Further, it can affect their global standing as well.

Administrative Issues

Many have the perception that mergers and amalgamation will help in reducing the costs and resources. Nonetheless, the mergers take up a lot of revenue for the banks. From changing the very basic hoarding to all the official documents, everything has to be changed. Not only that, the technologies used by different banks are different. With mergers, it also has to be changed. These regulations are not covered by the RBI. It just governs the procedure.

This lack of proper governance costs a lot to the banks. The financially stronger bank now has to suffer due to it. Some weaker banks which are merged may sometimes not even have the potential to be revived.

CONCLUSION

To sum it all up, it is observed that the RBI's governance in terms of merger and acquisition of the bank is not effective. It is causing more harm than benefit. Especially, when it is a forced merger like the one that happened in 2020 it creates a ruckus in the functioning of the financially healthy bank. If there are four banks that are working in the potential of 30, 50, 80, and 60, and these four are merged, there is a good chance that even the bank with 80% potential would come down to 50 or 40. Merger, when done with the proper guidelines and proper merging time, duration and procedure can do wonders. However, it is seen that RBI's regulation has not helped the banks. The proper duration was not given to the banks to revive their business. Thus, in many ways, RBI has failed in the regulatory work of mergers and acquisitions of banking companies.

MERGERS & ACQUISITIONS- REGULATORY FRAMEWORKS UNDER SEBI ACT & OTHER INDIAN REGULATIONS

- ***Adnan Hameed K.P***[108]

ABSTRACT

Our country, India, is on a path to becoming a global leader with its ever-evolvingeconomy that is opened up to the world. Along with the globalization of our economy, there were many concerns regarding the protection of the marginalized investors, and the government took initiatives to protect them. Various regulatory bodies like CCI & SEBI were incorporated for this purpose. In a growing corporate field, where the competition is high, not every company can sustain itself in this field, companies need to merge with or acquire other companies to maintain themselves and our government has made sure that these propositions are regulated and not chaotic. Without proper regulations, there is a high chance that ordinary investors will be facing many issues. It is usual for companies to pursue unfair mergers and acquisitions to form a monopolistic approach to control the market and increase their profit in the absence of such regulations. This paper will discuss, summarise & review a few of the regulatory frameworks of our country and will see how they have made the relevant market free and fair to each other.

Keywords: *Mergers, Acquisitions, Regulatory, Competition, Companies*

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INTRODUCTION

Our economy has been growing steadily for the past few years in all sectors are leading several markets right now. The aspect of Mergers & Acquisitions is at a point where they have gotten a significant impact in the current corporate world. These are used as methods to reform various trade organizations. In our country, the government was the first to commence corporate restructuring to save depleted companies. Because of the increasing day-by-day competition in the relevant markets, most companies lose out big time and will usually decide to merge into other big companies or get acquired by another company. In the market, the main objective of almost all the firms is to gather a massive network of consumers and generate profit via this. By merging with other companies with similar or common goals help they to retain their objectives. Mergers & Acquisitions are nowadays considered a peripheral expansion due to the sudden increase and leniency in regulations & privatization of public entities in most countries across the world. Ideally, Mergers & Acquisitions have paved the way for many companies to venture into new markets and study them while harnessing their knowledge and expanding beyond their potential, and improving upon their previous mistakes.

Mergers and acquisitions are governed by laws enacted by our government. The fear that mergers will eventually diminish competition between merging enterprises has led to regulation. This risk is more significant when the participants are direct competitors because courts frequently assume that such agreements are more likely to limit output and raise prices. Because of the risk that mergers and acquisitions will stifle competition, the government scrutinizes prospective mergers closely.

Without suitable rules, ordinary investors are likely to face a slew of problems; in the absence of such regulations, firms are likely to undertake unfair mergers and acquisitions to develop a monopolistic approach to market dominance and profit maximization. This paper will examine how a few of our country's regulatory frameworks have made the relevant market free and fair to each other by discussing, summarizing, and reviewing them.

INDIAN CONTRACTS ACT, 1872

Under the "*Indian Contract Act,*" a contract is defined as "*an agreement that is enforceable by law.*"[109] This can be interpreted so that an agreement cannot be considered a contract until it has the backing of the law. From a close reading of the Indian Contract Act, we can see that consensus is the fundamental stone of contract law. There is a no of circumstances in which the agreement would not be in consensus with the law, like cases where "*the agreement has been made based on fraud.*[110]*, coercion*[111]*, undue influence*[112]*, misrepresentation*[113] *, by the incapacity of one or more of the parties,*[114] *or in cases where the subject matter of the contract is harmful in law*[115]*.*"

I. Term sheet

In a typical acquisition, once the preliminary formalities of the acquisition are complete & the acquisition model and primary conditions are fixed, all of the fixed upon terms like the model, conditions, etc., are written down in a preliminary document called the memorandum of understanding or a term sheet. The object of this document is not to bind the parties but to make sure that all the parties have a complete understanding of the situation. This also provides an opportunity for the acquirer to do detailed due diligence.

There is no compulsion that the term sheet should be detailed; it can outline the commercial understanding like t no of shares involved in the transaction, the valuation of the company, etc.

While a term sheet according to the Indian law is not binding upon the parties per se, it is ideal for putting a provision that states that the sheet is binding since the Judiciary of our country has upheld in numerous cases such provisions and has enforced the same.[116]

II. An Acquisition Agreement

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[109] Indian Contract Act, 1872, § 2(h), No. 09, Acts of Parliament, 1872 (India)
[110] Indian Contract Act, 1872, § 17,No. 09, Acts of Parliament, 1872 (India)
[111] Indian Contract Act, 1872, § 15,No. 09, Acts of Parliament, 1872 (India)
[112] Indian Contract Act, 1872, § 16,No. 09, Acts of Parliament, 1872 (India)
[113] Indian Contract Act, 1872, § 18, No. 09, Acts of Parliament, 1872 (India)
[114]Indian Contract Act, 1872 § 11, No. 09, Acts of Parliament, 1872 (India)
[115] Indian Contract Act, 1872 § 23, No. 09, Acts of Parliament, 1872 (India)
[116] Authentic Lifestyle Broadcasting Pvt. v. Turner Asia Pacific Ventures Inc, Co, Co. Appl. No. 2076 of 2012 in Co. Pet. No. 20 of 2011

A share purchase agreement is drafted in the scenarios where the the acquisition of shares of a company takes place. This particular agreement contains provisions detailing the identity of both the parties, no of shares involved in the transaction, and the price at which the shares are transferred.

It is very often noted that the purchaser of the shares would ask the seller and the company involved to take care of certain things prior to the commencement of transfer of the shares, such as obtaining the necessary approvals, getting authorizations, carrying out a thorough audit of the company, etc. This will ensure that everything is incorrect during the time of acquisition and the firm is well. These activities that the seller or the firms are supposed to be carried out to satisfy the purchaser are predetermined and is known as conditions precedent, while on the other hand, the actions that need to take care of by the parties (including the firm) after the transfer of shares is known as conditions subsequent.

This agreement should also have clauses that define the representation and warranties made by each party and will also talk about the event of default and the consequences of the same.

III. Investment Agreement

In the situation where the firm's acquisition happens by the issue of new fresh shares, there would be the involvement of the investment agreement. In this scenario, the purchaser (hereby known as an investor) typically would be in a minority position concerning the other person who holds a controlling share. Typically, these acquisitions are made only for investment objectives, and the investor is not involved in the company's management. The clauses of the Investor Agreement would be similar to those of the Acquisition Agreement, except that the shares acquired would be obtained through the acquisition of new equity rather than the transfer of existing company shares. Because the issue of shares is a power of the company and the share price is paid to the company, the company's role in the scenario would be expanded.

Moreover, the provisions mentioned in the acquisition agreement would usually involve how the company should be managed jointly by the parties, including veto rights in a few matters, how the investors can appoint board members, inspect the company's documents, etc.

IV. Exit Provision

An exit provision is a predetermined set of conditions that enable minority investors to sell their shares. The investor may opt to sell their shares to generate more capital or as a reaction to the actions of the majority shareholder or the company.

A put option is basically an entitlement or right of a person to buy or sell the shares of the company; these options are made by shareholders agreement and represent the obligations of the parties involved in the transaction. When these options are exercised by one shareholder, the other will be obliged to purchase the shares at an earlier fixed price.

Put options are basically exit rights given to a private investor and VC investors of a company. This kind of investors invest in portfolio companies intending to profit from floatation of the shares in the markets provide ample liquidity and exit options. However, Private equity and venture capital investors seek contingency exit alternatives in their contracts with portfolio businesses and their controlling owners because the listing of shares is not always possible. The first is a corporate put option, which requires the firm or the majority shareholders to purchase back the investor's shares if the option is exercised.

The *"call option"* is the polar opposite of the *"put option* ."It allows the option holder to acquire (or "call") the shares held by other people at a fixed or ascertainable price at the moment the option is exercised. When majority owners want to combine their assets, they usually utilize this method. When any shareholder exits the firm in favor of the remaining shareholders, the call and put options are used. A third-party transfer, in which shares are transferred to an entity that is not a firm shareholder, is also feasible. However, such third-party transactions may be subject to restrictions. For example, if a strategic investor decides to depart the company, the promoter can demand that the investor first offer their shares to the promoter. If the investor disagrees with the promoter's offer, the investor has the option to sell their shares to a third party. This is referred to as a right of first refusal. The right of first refusal is a version of the right of the first offer. In this situation, a third-party transferee makes a definite offer to the leaving shareholder. The non-exiting shareholder is then informed of the offer and given the option to accept or reject it. If the offer is accepted by the non-leaving shareholder, the exiting shareholder is forced to sell their shares to the remaining shareholders. In that case, a third-party transfer is an option.

THE COMPANIES ACT, 2013

Following the Amendment of 2013, The companies Act 2013 replaced the age-old 1956 Act with some significant changes, including in Mergers and Acquisitions. The Act of 2013 was considered to be a more business-friendly regulation that enhanced the scope of disclosure norms and provided protection to the gullible investors and therefore made the process of

Mergers & Acquisitions more efficient and smooth. The present companies' act simplified the overall process of mergers, acquisitions, and restructuring and made Indian firms more approachable in terms of PE investments.

Under Indian Law, *"§ 230-232 of the Companies Act.*[117]*, 2013, read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with the Mergers and Amalgamation of the Companies and § 234 read with rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with Merger or Amalgamation of a foreign company with a company and vice-versa."*

"Chapter XV of the Companies Act, 2013[118]*"* deals with *"Compromises, Arrangements, and Amalgamations."* In this Specific chapter, the act aims to consolidate the provisions which are applicable and the issues of *"compromises, arrangements, and amalgamations"* related to them; But still, other §s of the act are also attached to the process at varying stages. In a Merger, the entire composition of one company, including all of its assets & liabilities, is absorbed by another company or an entirely new company. The 2013 Act also aimed to create *"the National Law Company Tribunal,"* a new regulator who will assume the power of a court for approving mergers.[119]

I. Types of Mergers under Companies Act, 2013

There are five types of Mergers under the Companies Act, 2013 which are:

1. *Horizontal Merger:* This type of Merger involves two companies working in the same type of industry. This type of Merger aims to decrease the competition in the market or achieve a monopoly status and control the relevant market.

2. *Vertical Merger:* This type of Merger can be further classified into two types. The first one is where a company acquires another company that produces the "RAW MATERIALS" used by them. The other type happens in the event of one company acquiring another company to get closer to its customers.

3. *Co-Generic Merger*: This type of Merger talks about combining two or more companies that are similar to each other in customers group, functions, or technology.

[117] The Companies Act, 2013, No 18 , Acts of Parliament ,2013 (India)
[118] Chapter XV, The Companies Act, 2013
[119] The Companies Act, 2013, § 408, No 18 , Acts of Parliament ,2013 (India)

4. *Conglomerate Merger:* This type of Merger talks about combining two companies working in industries unrelated to each other.

5. *Cross-border mergers*[120]**:** The Companies Act of 2013 allows "in-principle" mergers between a foreign company & an Indian Firm situated within the local jurisdiction denoted by the central government in consense with the RBI. These kinds of mergers are subjected to approval from RBI, and the Scheme can provide a payout in depository receipts, cash, or both. This payout would provide an exit to the shareholders of the merging company who do not want to be a part of the newly formed merged company.

II. Significant Differences between *"The Companies Act, 1956 & The Companies Act, 2013"*

1. *Regulatory/Third-party approvals*: Since the consent of both shareholders and creditors is essential, and the Old companies act contemplates the issue of a notice to them.[121] The new act of 2013 requires the service of the notice of the Merger along with documents not only to the creditors & shareholders but also to *"Ministry of Corporate Affairs, Reserve Bank of India, SEBI, Competition Commission of India, Stock Exchanges, Income Tax authorities and other sector regulators or authorities which are likely to be affected by the merger."* This will guarantee that the Proposition complies with all other regulatory obligations. The Judiciary has made mergers subject to acquiring permits from the involved agencies under the 1956 Act. The 2013 Act, on the other hand, gives the involved regulators a 30-day opportunity to make their representations, after which the ability to do so will be lost. This is a positive step because delays in court proceedings can now be avoided.

2. *Approval of the proposal through postal ballot*[122]**:** The Old Act of 1956 required the presence of both the creditors & the shareholders in person or proxy for the meetings to cast their vote regarding the Merger, while the new Act of 2013 allows the creditors and the shareholders will also have the option to cast their votes through postal ballot while considering a Scheme. This will ensure greater

[120] The Companies Act 2013, § 234, No 18 , Acts of Parliament ,2013 (India)
[121] The Companies Act, 2013, § 230(5) , No 18 , Acts of Parliament ,2013 (India)
[122] The Companies Act, 2013, § 230(6), No 18 , Acts of Parliament ,2013 (India)

participation by the creditors & shareholders in the process and will be a more significant help to all the other shareholders who will not attend these meetings, usually due to various reasons.

3. *Valuation Report*[123]**:** The old act of 1956 does not say anything about the disclosure of the valuation report to the parties involved, usually for transparency, the companies will disclose the valuation report for inspection and in meetings. The New Act of 2013 now makes it mandatory for the company to annex the valuation report to all the notices for meetings so that the creditors and shareholders can access them readily.

4. *Objections*[124]**:** A very prevalent problem under the old act of 1956 was that it allowed individual creditors and shareholders to raise unnecessary objections to strong-arm the companies and harass them. Under the 2013 act, these kinds of objections were no longer available, and objections can only be raised by *"shareholders holding 10% or more equity and creditors whose debt represents 5% or more of the total debt as per the last audited financial statements."*

5. *The Merger between a listed firm & an unlisted firm*[125]: The New Act explicitly mentions that the Tribunal's approval of the Merger of a listed firm with an unlisted firm will not *"ipso facto"* make the unlisted company listed. Unless the applicable listing requirements and SEBI criteria for allotment of shares to public shareholders are followed, the company will remain unlisted. Moreover, in instances where the shareholders of the listed firm exercised their right to exit, the unlisted firm would handle this exit with a pre-agreed price within the price specified by SEBI. The securities law of our country dictates strict laws regarding the listing of firms. On a case-by-case basis, SEBI had simplified these restrictions for listed businesses considering mergers by granting them exemptions from the IPO standards. SEBI has published rules indicating that if the Proposition provides for the listing of shares of an unlisted company without following the initial public offering requirements, the unlisted company must file a separate application with SEBI after the Scheme has been approved by the court. Such an application must be made

[123] The Companies Act, 2013, § 232(2), No 18 , Acts of Parliament ,2013 (India)
[124] The Companies Act, 2013, § 230(4), No 18 , Acts of Parliament ,2013 (India)
[125] The Companies Act, 2013, § 232(3)(h), No 18 , Acts of Parliament ,2013 (India)

upon, "among other things," the allotment of equity shares to the holders of the listed company's securities.

THE COMPETITION ACT, 2002

The Competition Act, 2002 gives particular emphasis to the aspect of anti-competitive agreements and *"provides that any agreement entered into by business entity engaged in identical or similar trade of goods or provision of services, regarding any aspect/s of business which has the effect of causing an appreciable adverse effect on competition within India is regarded as anti-competitive agreement and is consequently considered void."*[126]

Agreements that can restrict competitions can be classified into two types. The horizontal agreement is made between competitors in the same market, while Vertical Agreements are made between firms at various stages of the production chain in various markets. The § within the act, which forbids anti-competitive agreements, does not apply to *"agreements entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services."*[127]

I. Combination Regulations

The Government of India was very much concerned about preventing mergers & acquisitions that could cause a decisive effect on the competition sector within their relevant market, and therefore, they made relevant provisions to curtail this issue and to regulate Mergers (also known as combinations in the Competition Act) & Acquisitions in the *"Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011" (Also Known as Combination Regulations).*

Any type of Merger or Acquisition between any companies in our country is known as a combination[128]. However, for these provisions to be violated, the given Merger or acquisition must exceed a few predetermined thresholds (which are calculated based on assets, turnover liabilities, etc.) under the Combination Regulations.

A merger that may cause an adverse effect on competition in the related market is strictly prohibited in our country.[129] According to the Act, *"the Competition Commission of India (CCI)"* has to be informed about the proposal of such mergers, and if they failed to do these,

[126] Competition Act, 2002, § 3, No 12 , Acts of Parliament ,2002 (India)
[127] Competition Act, 2002, § 3(3) , No 12 , Acts of Parliament ,2002 (India)
[128] Competition Act, 2002, § 5, No 12 , Acts of Parliament ,2002 (India)
[129] Competition Act, 2002, § 6(1), No 12 , Acts of Parliament ,2002 (India)

then they may attract a fine that can extend up *to "1 % of the total turnover or the assets of the merged company."* The concerned party has 30 days from the Merger's approval by the board of the companies involved to notify the CCI.[130] CCI can take up to 210 days to deliberate upon the notification and deliver a verdict regarding whether the Merger will have any unfavorable effect on the competition in the concerned market.[131] If the Commission does not give its verdict within 210 days, then the mergers are deemed to have no adverse effects on the market.

The Competition Commission of India use variable factors like *"(a)Actual and potential level of competition through imports in the market (b) Extent of barriers to entry in the market (c) Level of combination in the market (d) Degree of countervailing power in the market (e) Nature and extent of vertical integration in the market"*[132] etc., to determine whether a merger has any adverse effects on the competition in the concerned market.

II. Powers of CCI

The *"Competition Commission of India (CCI)"* was formulated in 2003 under *"the Competition Act, 2002"* as our country's anti-trust watchdog that would act as a regulator to control and protect our companies against monopolistic & anti-trust activities that increased due to the globalization of the Indian Market.

The Commission is a "Quasi-Judicial body" that can adjudicate upon the cases that fall under the Competition Act. The main objective of the CCI is to prevent activities that could have a negative effect on the competition by promoting and sustaining competition in the markets to ensure fair competition in the relevant markets of our country and protect the interest of consumers.[133]

The Commission has the power to grant interim reliefs[134] Alternatively, any other situation-oriented reliefs and can direct the Director-General of CCI to start any investigation.[135] The CCI also has powers to penalize the parties involved for violating its orders or failure to follow its directions.

After being notified about the proposed Merger, the Commission looks into the disclosure and decides whether the Merger will have a negative impact on competition and takes necessary

[130] Competition Act, 2002, § 6 (2) , No 12 , Acts of Parliament ,2002 (India)
[131] Competition Act, 2002, § 6(2A), No 12 , Acts of Parliament ,2002 (India)
[132] Competition Act, 2002, § 20(4) , No 12 , Acts of Parliament ,2002 (India)
[133] Preamble, Competition Act, 2002
[134] Competition Act, 2002, § 33 , No 12 , Acts of Parliament ,2002 (India)
[135] Competition Act, 2002, § 29, No 12 , Acts of Parliament ,2002 (India)

steps to prevent these kinds of mergers. The parties involved can go for an appeal to the order of the Commission within 60 days before the Competition Appellate Tribunal. [136]

SECURITIES LAWS IN INDIA

The Securities and Exchange Board of India (SEBI) I the highest authority regarding the listed & unlisted firms on the stock exchanges in our country. *"The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Also known as the Takeover Code)"* Prohibits and controls the acquisition of shares, voting rights, and other aspects of listed companies. When a party Acquires more than 25% of the shares of the company, it entitles the shareholder to exercise his right to make an offer to the remaining shareholders of the involved company further to obtain a minimum of 26% of the shares to gain control of the company.[137]

Moreover, if the acquirer already has *"25% or more but less than 75% of the company"* and moves on to acquire a minimum of 5% shares in the company within the financial year, then he/she shall have to make an open offer in the market, this is strictly subjected to the exemptions given under the Takeover Code. [138] The SEBI is also empowered to grant relaxations or exemptions from the obligations for the open offer in respect to the situation and the market; These relaxations can be asked by the acquirer in the way of an application in front of SEBI.

"The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations)" makes way for a complete framework to control various types of listed firms. Under these regulations, SEBI has brought conditions to be followed by a listed firm while drafting an application in front of the NCLT for the approval of the Merger Proposal. Few Major Provisions of this Regulation are:

a) *Filing of Scheme with the Stock Exchange*[139]

Any listed firm which is planning on getting involved in a merger must file the draft scheme with the concerned stock exchanges before filing them in front of the NCLT. They would have to obtain a no-objection certificate from the concerned stock exchange for the Merger to move forward.

[136] Competition Act, 2002, § 53B, No 12 , Acts of Parliament ,2002 (India)s
[137] The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, 3 read with 7
[138] The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, 10(1)(d)
[139] The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, 37(1)

b) *Complying with securities law*[140]

The listed firms should ensure that their Scheme does not override or violate any of the provisions of the concerned securities law or the relevant stock exchanges.

c) *Change in the Shareholding Pattern*[141]

As per the securities law, the listed firms are supposed to file both the pre & post-merger shareholding pattern and the new current capital structure with the relevant stock exchanges.

d) *Corporate actions pursuant to Merger*[142]

The listed firms should mandatorily disclose to the relevant stock exchanges all the information related to the performance of the company.

"Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations)" is the law that is applied if the acquisition of the Indian firm deals with the issuance of new equity shares or securities convertible into equity shares (also known as specified securities) by the target firm to the acquiring company. A few of the critical provisions in these regulations are:

a) *Pricing of the Issue*[143]

Chapter V of the ICDR Regulations, also known as the Preferential Issue Regulations, decides the floor price for the share issue. *"If the equitthe issuer have been listed on a recognized stock exchange for a period of 26 weeks or more as on the relevant date,26 the floor price of the shares shall be higher of the average of the weekly high and low of the volume-weighted average prices of the stock of the company either (a) over a 26 week period; or, (b) a two week period preceding the relevant date."*[144]

b) Lock-in Period

The26 weeksh are issued to the person acquiring the company are locked in for one year from the two weeksdate. Moreover, if the person who is acquiring the firm holds any equity shares of the company before the allotment of preferential shares, then such equity shares will be

[140] The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, 11
[141] The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, 69(2)
[142] The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, 51
[143] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, 164(1)
[144] Ibid

locked-in for six months. If the securities of the company are allotted based on preferential to the promoters, then they are locked in for three years. All of the above lock-in periods start from the date of trade approval in the relevant stock exchanges.[145] These kinds of locked-in securities can be transferred between the promoters or any person within the company itself, provided that the new owner of the securities will have to undergo the rest of the lock-in period.[146]

c) *Exemption to court-approved Merger*[147]

In a scenario where the preferential share allotment is done based on a scheme of Merger approved by the NCLT, the Preferential Issue Regulations will not apply.

"The SEBI (Delisting of Equity Shares) Regulations, 2009 (SEBI Delisting Regulations)" has a detailed out method and conditions for the delisting firms which are listed in relevant stock exchanges. These regulations allow an acquirer & the promoter of the firm to start the delisting procedure. These regulations are with consensus to the Takeover Code, and under Regulation 5A of the code, A person who is acquiring the firm may delist the firm in the event of an open offer as with the Delisting regulations provided that the acquirer declares his intention upfront.

The *"SEBI (Prohibition of Insider Trading) Regulations, 2015 (PIT Regulations)"* These regulations prohibit any sort of Insider from communicating *"unpublished price sensitive information (UPSI)"* and also any person from procuring unpublished price sensitive information from an insider.

Under these rules, an insider is defined as someone who is connected to or in possession of UPSI[148]. UPSI is defined under regulations as any info relating to a firm or its securities directly or indirectly that is not available in the general market and which, when it is made available for the general public, is likely to affect the market. [149] Moreover, under these regulations, the Insider is exempted from the PIT regulations in certain circumstances where such reveal was done for a legitimate purpose or as part of his duties or to discharge legal obligations.[150]

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[145] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, 167

[146] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, 168

[147] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, 158

[148] SEBI (Prohibition of Insider Trading) Regulations, 2015, 2(g)

[149] SEBI (Prohibition of Insider Trading) Regulations, 2015, 2(n)

[150] SEBI (Prohibition of Insider Trading) Regulations, 2015, 3(I)

A significant change that was incorporated by this regulation was the introduction of trading plans.[151] Ideally, any person under the Insider criteria should make trading plans to protect UPSI with safeguards. These plans have to cover at least one year and should be reviewed and approved by the company's compliance officer and then disclosed to the general public.

The PIT Regulations include a particular exception for communication and information gathering (due diligence) in mergers and acquisitions deals.[152]

The disclosure requirements for various kinds of persons involved in the company's business are a crucial component of the insider trading standards. It is important to remember that, *"going forward, every promoter, member of the promoter group, designated persons, key managerial personnel,"* and director of a company will be required to disclose his holdings of the company's securities as of the date of appointment/notification of the PIT Regulations, which is May 15, 2015. More crucially, every promoter, promoter group member, designated person, or director would be compelled to submit ongoing disclosures.[153]

CONCLUSION

After carefully looking into the few of the regulating frameworks that are related to Mergers & Regulations in our country, we can see that the main objective of all of these frameworks are:-

i. To protect shareholder rights and their interests.

ii. To provide adequate compensation for shareholders in open offers

iii. To allow a free & fair market with transparent and equitable corporate control

iv. To provide a safe exit for shareholders who wish to leave

v. To curb any sort of malpractices related to Mergers & Acquisitions

In order to make our markets safer, The regulator bodies like SEBI & DCA, along with the government, is working hard to protect the interest of the shareholders. For this, there have been quite a few changes in the regulatory framework of our country, which includes but not limited to listing rules, in-depth monitoring of Mergers and Acquisitions Under the Takeover

[151] SEBI (Prohibition of Insider Trading) Regulations, 2015, 5
[152] SEBI (Prohibition of Insider Trading) Regulations, 2015, 3(3)
[153] SEBI (Prohibition of Insider Trading) Regulations, 2015, 7(1)

Code and instructing the concerned stock exchanges to take severe actions against parties who are not complying with the listing agreements.

During these modern times, Shareholding in firms and ownership in firms has created a significant impact. It is essential to ensure smooth corporate governance in a growing progressive nation like ours. SEBI has adopted various measures since control has become a complicated issue. SEBI established these regulations to induce a more smooth functionality of corporate governance in our country.

Like every other law of our country, the laws mentioned above are also not perfect, and there still exist loopholes that the parties are exploiting. In this ever-evolving phase of our growing economy, we can surely hope that the government and the regulating bodies concerned will do their part of the job and lead our nation to a corporate-friendly country while protecting the marginalized consumers.

MERGER AND ACQUISITION ACTIVITIES IN INDIA, CHALLENGES AND LEGAL ISSUES FACED BY THE COMPANIES

- *A. Bharathi*[154]
- *Leonard. L*[155]

ABSTRACT

World has become flat to the business entities as business cycle getting shorter. The strength of corporate is becoming larger and larger and they are anxious in exploring inorganic growth measures. Consolidation of business became a standard norm for profit and product maximization. Multinational Corporation into India and India getting into Multinational Corporation also became a trend. In this backdrop merger and acquisition has become the talk of the industries these days. Industries prefer mergerstocartels since most of the products and services are under monopolistic competition, merger will give more profit. Acquisition on the other hand accumulates the entire business and stands tall as a single entity by driving away accumulated company. In this article it is discussed in detail about challenges faced by companies in the process of merger and acquisition and famous merger and acquisition happened in India in the recent past. Also detailed analysis has been done by calculating the total income of merger and acquisition firm and income to firm during and after merger as well as acquisition. In this article gross value added to the firm and total number of merger and acquisition deals initiated recently in India were also taken into analysis for a better understanding of the impact created by them.

Keywords: *Legal issues, Challenges, merger acquisition, COVID-19.*

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INTRODUCTION

India in recent years showed great progress in merger and acquisition deals. Merger and acquisition are simply the strategic tools used by the management in order to achieve greater efficiency of their business. These tools will create a great synergy among the joint ventures. The existence of these tools occurs because of the prevailing monopolistic competition among products and services in the economy. If there are perfect and oligopolistic competition companies will go for cartels where only price determination will occur. Hence merger will establish a new company and acquisition will lead to the purchase of one company by another. Merger and acquisition comes in all formats, and investors should consider the complex matters involved in merger and acquisition. The most beneficial form of equity structure involves a complete analysis of the costs and benefits associated with the deals. (Sinha, 2010).

HISTORY OF MERGER AND ACQUISITION IN INDIA

After independence many industries in India didn't come forward for consolidation of businesses only few deals were happened here and there. The major reasons behind the hesitation of merger and acquisition were due to the monopolistic and restrictive trade practices act (MRTP) 1969. This act was established to ensure that the function of economic activities does not result in the concentration of economic power in the hands of few. The concept of merger and acquisition was not familiar until 1988. During this period Swaraj Paul had taken over the DCM limited in an unfriendly manner. But later that became ineffective. After the LPG (Liberalization, Globalization and Privatization) reforms 1991 created an intense competition among the companies in India which forced them to adopt merger and acquisition strategies. As the days passed these strategies became a vital tool for the companies to expand horizontally and vertically.

MERGER

An agreement where two companies agree to collaborate their businesses on a relatively co-equal basis because they have adequate resources and capacity that together may ensure better competitive advantage. The collusion between companies occurs generally by giving the stockholders of one company securities in the acquiring company in exchange for the surrender of their stock. Mergers will give the acquiring company or industry a greater opportunity to

establish market share without having to really earn it by doing the job themselves - instead, they acquire a competitor's business for a better price. Usually, these are called horizontal mergers. For example, a cola company may choose to buy out a smaller competing beverage industry, enabling the smaller company to make more cola and sell more to its brand-loyal consumers.

DIFFERENT TYPES OF MERGERS

Horizontal merger: This kind of merger exists between two companies that compete with each other.

Vertical merger: It is a kind of merger in which two or more companies in the similar industry but in various fields collide with each other in business.

Congeneric mergers: It is a kind of mergerin which two or more companies in collaboration are some way or the other related to the process of production, business markets, or basic required technologies.

Conglomerate Mergers: It is a kind of mergerin which two or more companies belonging to different industrial sectors combine their business activities.

Acquisition:

Generally, the term explains a situation when a larger company acquires the assets or stock of a smaller company, while control remains exclusively with the larger company. It also happens with the view of more efficient utilizing a core competence by making the acquired company a subsidiary within its portfolio of business

DIFFERENT TYPES OF ACQUISITION

Friendly acquisition: Both combining companies agree to the acquisition under friendly terms.

Reverse acquisition: When a private company acquire a public company it is known as reverse acquisition

Backflip acquisition: A very rare case of acquisition in which, the purchasing company becomes a subsidiary of the purchased company.

Hostile acquisition: When an acquisition process is done by a force.

Merger and Acquisition Process:

Business Valuation: In this Valuation process of assessing a company's current financial performances will be examined and its future market value also estimated.

Phase of Proposal: After analyzing the business activities and market performances of the target company the proposal for merger or acquisition is given to multiple suitors

Exit Plan: When an owner decidesto exit the target company the structure is decided and proposed to the potential suitors

Structured Marketing: After finalizing the Exit Plan, the target company gets involvedin the business process and tries to achieve the best selling price.

Stage of Integration: In this final stage, the two companies are integrated through Merger or Acquisition.

IMPORTANCE OF MERGER AND ACQUISITION

- Improvement in the market share
- Merger process doesn't require cash
- Shareholders of smaller companies will own a smaller piece of a larger share, increasing their overall net worth.
- Product and profit maximization
- Merger of a private and public company allows the target company shareholders to receive a public company's stock
- Economies of scale
- Reduction in competition and movement towards monopoly power
- More concentration in research and development
- Uses on account of tax shields like carried forward losses or unclaimed depreciation.
- More loyal consumers
- Increased speed to market
- Lower risk compared to developing new products.
- Increased diversification

CHALLENGES IN MERGER AND ACQUISITION

Lack of 100% ownership: A holding company can be formed without a hundred percent share purchase maybe with a noticeof cost savings, it leaves the holding firm with other outside shareholders who will have some controlling influence in the business. This will create disagreements over the direction of the company.

Frictional Unemployment: Employees in the merged or acquired company will not have the same comfort as before. There may be salary issues, promotion issues and working environment issues hence employees will be searching for a new job while working in a company. This will create a frictional unemployment and it will affect theproduction and income of the company.

Clash of Corporate Culture: After merger and acquisition of two companies thehectic task is combining two company's employees, values and their culture. Every company or a firm believes that the operation of colliding business will create a smooth transition but the fact is it's generally far from a harmonious experience. After merger and acquisition a company can face this kind of clash any time by having two different sets of employees with varying methods and processes, there are bound to be issues. Unfortunately, this kind of culture clash will leads to multiple resignations, unmotivated employees, and a broken culture. Mergers and acquisitions are done to increase business value, but so many firms fail to achieve this outcome because they don't effectively manage the corporate culture.

Inability to attain synergy: Efficiencies created from economies of scale, hope and sharing resources across the business in the merged firm creates synergy. Private synergy created when colliding and merging the acquiring and acquired companies assets output capabilities and core competencies that could not be created by colliding and merging either companies assets with a another company. Hence it becomes difficult for competitors to understand and imitate.

Heavy diversification: Diversification is the processof growth of business by varying its range of products or services and field of operations. Over diversification leads to a downward trend in performance, after which two businesses have collaborated.A divestment tends to reshape a firm's competitive scope. Costs associated with acquisitions may result in fewer allocations to activities, such as research and development that are linked to innovation of new production processes or technology. Hence Innovation skills also begin to atrophy.

Multiple taxation: The holding firmsstructure will create another layer to the corporate structure. Generally, stockholders income is subject to double taxation.

Antitrust problems: A holding firm combination may face some of the same antitrust concerns with which an outright acquisition is faced.(Gaughan, 2002)

Increased complexity in business: The complexities created by the larger company more often lead higher officials to initiate more bureaucratic controls to manage the combined companies business operations. Understanding the new product and company officials will also create a complex attitude among the employees and thereby leads to limitationsin the company's growth.

INDIAN LEGAL ISSUES INVOLVED IN M&A

SEBI Takeover Regulations/Company Law in M&A: SEBI regulates takeovers of firms that have shares listed on any stock exchange in India. The major corporate and securities law governing mergers and takeovers are:

- Sections 108A to 108I of CA56, that place restrictions on the transfer and acquisition of shares of the companies.
- Section 390 to 394 of CA56,which looks over the schemes of arrangement between firms and its respective shareholders and creditors, under the supervision of the High Court.
- The Takeover Code, that lays down the procedures governing any attempted acquisition of a company that has its shares listed on one or more authorized stock markets in India. Regulation 10, 11, and 12 of the Takeover Code, that compact with the public offers, do not apply to a scheme figured under the Sick Industrial Companies Act, 1985 ("SICA"), or to an arrangement or reconstruction under any Indian or foreign law (Regulation 3 (1) (j), Takeover Code).

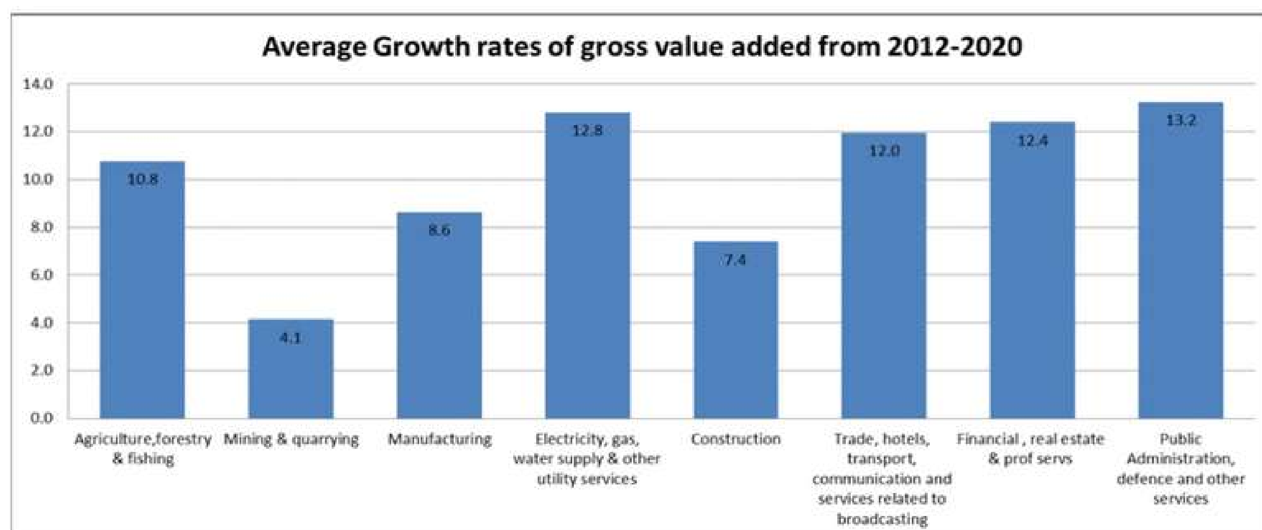
Due Diligence in M&As: The main theme of due diligence is to evaluate any issues that may affect the acquirer's firm. Generally an acquirer will want to know target companies shareholders pattern, composition of board of directors, level of indebtedness, whether any of its properties or assets have been offered as security for some purpose, details of employees, constitutional document details, annual, quarterly and half-yearly reports, any important contracts executed by it, Significant litigation and any other liability details. Hence a target company need to provide whatever the documents demanded by the acquiring firm. If they are neglecting issues will take place in the M&A process.

Contractual Issues in M&As: For the significant execution of M&A contractual and legal formalities plays a vital role. Share sale and acquisition agreement, representations and warranties, non-compete and non-solicitation, confidentiality, asset transfer agreements, governing law, post completion process and indemnities are significant agreements in order to execute M&A in a smooth way.

Intellectual Property Law and M&As: Unregistered trademark or copyright of company's product or services is transferable under the scheme of arrangement framed under section 394 of CA56. In case of registered trademarks or copyrights and patents, the transferring company has to register its title pursuant to the order of the High Court sanctioning the scheme.

Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"): This act was established to ensure that the function of economic activities does not result in the concentration of economic power in the hands of few. Sections 108A to 108I incorporated in CA56 restrict the transfer of shares by corporate companies under the same management having 10 per cent or more of the share capital of any firm without intimating the government of the proposed transfer.

Average growth rates of gross value added to various industries from 2012-2020:



The graph shows the average GVA (gross value added) of industries like agriculture, forestry and fishing, mining, quarrying, manufacturing, Electricity, gas, water supply & other utility services, Construction, Trade, hotels, transport, communication and services related to broadcasting, Financial , real estate &professional services, Public Administration, defense and

other services. Almost every industry's growth rates were stable except mining, quarrying and construction. Merger and acquisition strategies made by management of the companies may also be a reason for this steady growth. Hence we can term merger and acquisition act as catalyst for economic growth. Further study should be made in this topic.

Total number merger and acquisition deals in India from 2016-2020

As of December 7, 2020, the total number of private equity and mergers & acquisition deals in India was 1268. When compared to the year 2019 the number of merger and acquisition deals decreased significantly from 1945 deals in 2019. Nevertheless, the total value of those deals was stable in comparison to 2019.

Source: Statista Research Department, May 31, 2021

THE COVID-19 IMPACT

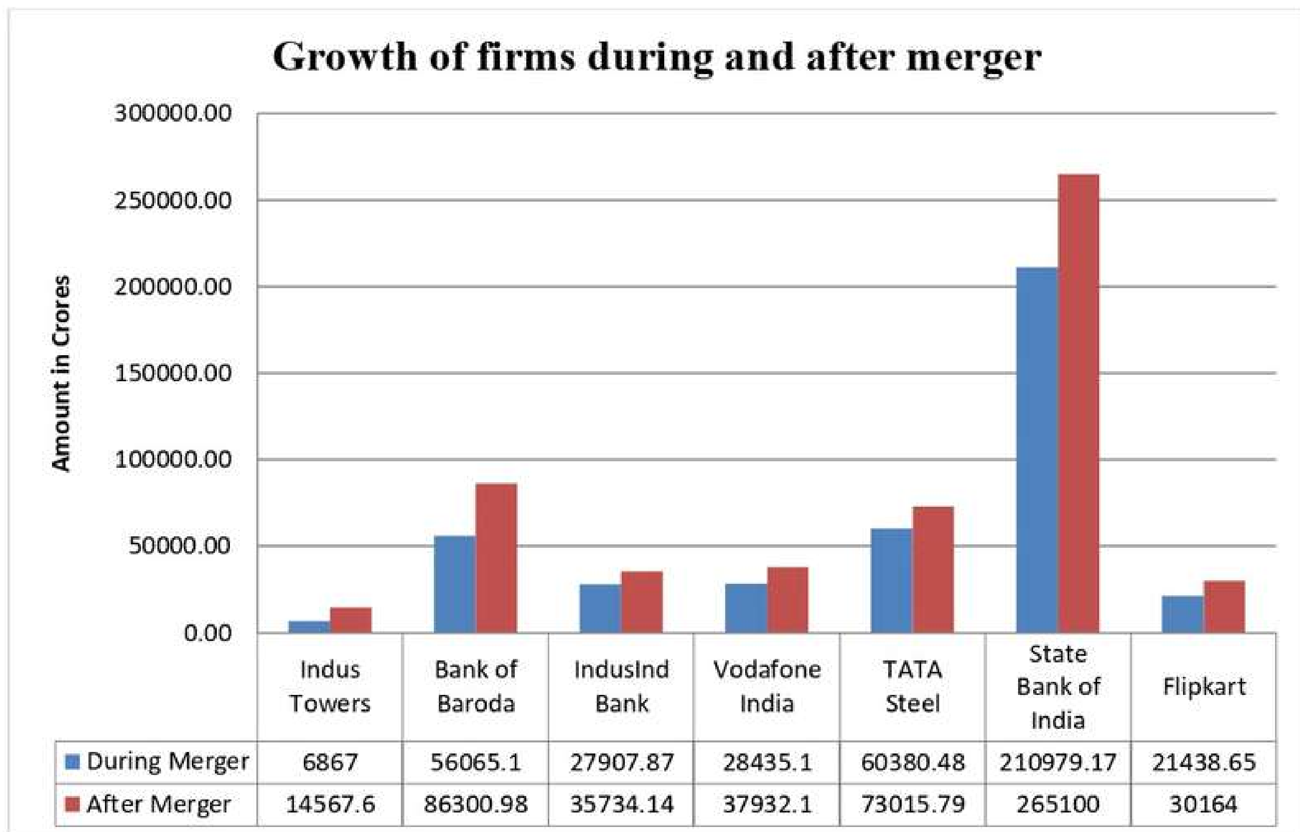
The coronavirus (COVID-19) crisis also negatively impacted the merger and acquisition deals in India on a massive scale. Hundreds of businesseshad shuttered or stopped their business operation and millions of workers lost their jobs. This resulted in reduction in consumer spending and supply chains got disrupted. The above bar diagram clearly shows that merger and acquisition deals were reduced in the year 2020 (1945 deals) when compared to the year 2019 (1268 deals). Almost 677 deals were reduced.

Famous merger activities in India:

Name of the Initial Company	Name of the Company Merged with	Year in which merger happened
Indus Towers	Bharti Infratel	2020
Bank of Baroda	Vijaya Bank and Dena Bank	2019
IndusInd Bank	Bharat Financial (SKS Microfinance)	2019
Vodafone India	Idea Cellular	2018
TATA Steel	ThyssenKrupp	2018
State Bank of India	BhartiyaMahila Bank, SB of Bikaner and Jaipur, SB of Patiala, SB of Travancore	2017
Flipkart	E-bay India	2017

Total income of these firms during and after one year of merger:

Firms	Total Income During Merger (in Crores)	Total Income After Merger (in Crores)
Indus Towers	6867.00	14567.60
Bank of Baroda	56065.10	86300.98
IndusInd Bank	27907.87	35734.14
Vodafone India	28435.10	37932.10
TATA Steel	60380.48	73015.79
State Bank of India	210979.17	265100.00
Flipkart	21438.65	30164.00



	Indus Towers	Bank of Baroda	IndusInd Bank	Vodafone India	TATA Steel	State Bank of India	Flipkart
During Merger	6867	56065.1	27907.87	28435.1	60380.48	210979.17	21438.65
After Merger	14567.6	86300.98	35734.14	37932.1	73015.79	265100	30164

These are the famous mergers which became the talk of the town during merger. The above graph clearly shows the total income of the firms during and after merger. All the firms after collaborating show a drastic improvement in theirtotal income.

Indus towers after merging with Bharti Infratel increased its income by 112 per cent. Bank of Baroda after merging with Vijaya Bank and Dena Bank increased its income by 53 per cent.IndusInd Bank after merging with Bharat Financial (SKS Microfinance) increased its income by 28 per cent. Vodafone India after merging with Idea Cellular increased its income by 33 per cent. TATA Steel after merging with ThyssenKrupp increased its income by 20 per cent. State Bank of India after merging with BhartiyaMahila Bank, SB of Bikaner and Jaipur, SB of Patiala, SB of Travancore increased its income by 25 per cent. Flipkart after merging with EbayIndia increased its income by 40 per cent. These data clearly shows that after merging of two companies their total income has increased drastically.

Merging of companies doesn't require cash and their brand will also get retained. If we look at these companies, all of them are rival to each other and their products and services are under monopolistic competition. Hence merging companies that are under monopolistic competition will create joint profit maximization. Not only profit but also more product sales will be increased. The shareholders will also get more return since merging of companies creates more revenue.

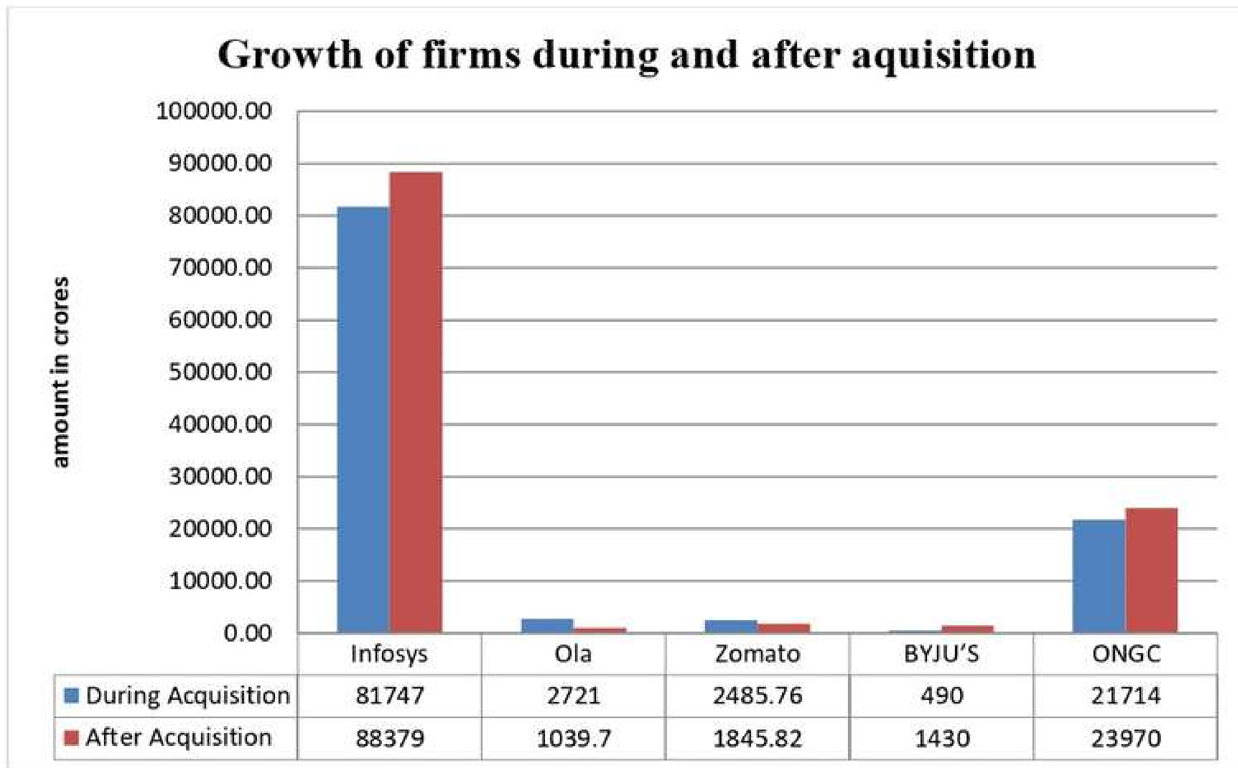
The bar diagrams above shows the growth of the company'stotal income during and after merger. After merger in the sense one year after merging the companies. The entire bar diagram shows an increasing income compared with previous level without merger.

Famous acquisition activities in India:

Acquiring Company	Acquired Company	Year of Acquisition
Infosys	Kaleidoscope Innovation	2020
Ola	Etergo	2020
Zomato	Uber Eats	2020
BYJU'S	Vidyartha	2017
ONGC	HPCL(Hindustan Petroleum Corporation Limited)	2017

Total income of these firms during and after one year of acquisition:

Firms	Total Income During acquisition (in Crores)	Total Income After acquisition (in Crores)
Infosys	81747.00	88379.00
Ola	2721.00	1039.70
Zomato	2485.76	1845.82
BYJU'S	490.00	1430.00
ONGC	21714.00	23970.00



	Infosys	Ola	Zomato	BYJU'S	ONGC
During Acquisition	81747	2721	2485.76	490	21714
After Acquisition	88379	1039.7	1845.82	1430	23970

These are the recent acquisition activities happening in India. When compared to merger acquisition looks quite unstable. Not all the firms after collaborating faced an increase in total income there are firms which faced heavy losses.

Infosys after acquiring Kaleidoscope Innovation increased its income by 8 per cent. Ola after acquiring Etergo faced a decrease in income by 61 per cent. Zomato after acquiring Uber Eats faced a decrease in income by 25 per cent. These two acquisitions happened during covid-19 period that may be also a reason for this backdrop. BYJU'S after acquiring Vidyartha increased its income by 191 per cent. For BYJU'S, COVID-19 impacted positively. Since education happened in home itself many parents and students turned towards BYJU'S which resulted in the enormous raise in income for BYJU'S. ONGC after acquiring HPCL (Hindustan Petroleum Corporation Limited) increased its income by10 per cent.

Inadequate business valuation of Target Company and inability to achieve synergy makes the acquisition process complex and loss in the business. Unlike merger, acquisition requires huge cash. If a firm acquires a company by getting debt and if the acquisition didn't give expected profit then the firm will be in a huge chaos. Hence proper business valuation is mandatory for acquisition process.

The bar diagrams above shows the growth of company's total income during and after acquisition. After acquisition in the sense one year after acquiring the company. In the bar

diagram, except Ola and Zomato other companies increased their income drastically. Hence proper valuation of business will lead to best acquisition.

CONCLUSION

Merger and acquisition plays significant role in development of a country. India is also experiencing the same. In recent past, most of the merging industries showed improved financial performance after merging when compared with before merging. This study provides several interesting findings related to recent merger and acquisitions activities in India. Financial performance of famous merger and acquisition companies were analyzed and the income outcomes suggests the need for such collaborations for overall development of the economy. The merger and acquisition deals of India from the year 2016 to 2020 indicates the importance given to them by various business entities. Such M&A activities will improve revenue and profitability of an industry and it also stimulates faster growth and quicker access to markets. Hence, when a company is merging or acquiring, it relies upon proper planning and business valuation of the company.

OVERSEAS LISTING VIA SPAC ACQUISITIONS – CHALLENGES & WAY AHEAD

- ***Brijesh Devi***[156]

ABSTRACT

Special Purpose Acquisition Companies (SPACs) have gained huge popularity in the last two years. The number of SPAC companies that went public in the United States went from 59 in 2019 to 248 in 2020. SPAC are blank check companies that raise funding via initial public offering (IPO) & have only one objective; to acquire another entity. These corporations do not have commercial operations of their own. SPAC entities are not recognized enterprises in India and cannot be listed on the stock exchanges due to various reasons. In this article, we will explore how SPAC works, what are the advantages of getting listed via SPAC over the traditional IPO process, and some examples of Indian companies which followed a SPAC route to get listed on overseas markets. This article also lays down the key regulatory challenges that Indian companies face while getting listed on foreign markets after a SPAC acquisition and compares it to the laws that allow overseas listing of companies in the US. There have been some discussions by key statutory & advisory bodies regarding the development of the SPAC framework in India. However, owing to the current situation it is difficult to predict whether the ongoing SPAC trend is here to stay and can the Indian corporate sector make the most out of SPAC acquisitions if such entities get legal recognition.

Keywords *– SPAC, De-SPAC, Mergers, Acquisitions, Listing*

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INTRODUCTION

Mergers & Acquisitions (M&A) are key techniques for a company to grow & expand its business operations. Similarly, Initial Public Offering (IPO) is a way to raise capital to pursue & expand the business goals of a company. As the name suggests Special Purpose Acquisition Companies (SPAC) are companies incorporated with the intention to merge and/or acquire a private company with the help of raising capital via an IPO. Though SPACs have been a concept for a long time, it wasn't until 2020 that the true potential of these corporations was bolstered. The year 2020 saw an immense rise in the M&A activity curve by SPAC companies. There were approximately 248 SPAC company listings in the United States in 2020 as compared to 2019 wherein a mere 59 SPAC companies were listed. This number rose to a staggering 553 listings in 2021 with around two months of the year left.[157] There are a number of reasons for the growth in SPAC operations one of them being the growth in liquidity in capital markets during the outbreak of the Covid-19 pandemic leading to lockdowns around the globe. This recent trend relating to SPAC has caught European and Central Asian nations in a frenzy and countries are framing their own sets of laws to regulate SPAC corporations. As countries developing are legal frameworks with the intention to incorporate such types of entities in the country's corporate domain, the future for Mergers & Acquisitions via SPAC entities looks bright.

SPAC MECHANISM

SPACs have been recognized as one of key techniques for corporate restricting. They also provide funding to the potential target entity that they will be acquiring. So, what exactly are SPACs?

I. WHAT ARE SPACs?

SPACs are basically shell companies that have no commercial operations. They are created as a means to acquire or merge with a private company. They are also called as blank-check companies. These companies raise funds (capital) to acquire another company via an initial public offering (IPO).[158] The general public (retail investors), as well as well-known private equity funds and venture capitalists, can invest in SPACs when they get listed on stock exchanges. SPACs are meant to acquire targets within 24 months or 2 years of their listing. In

[157] SPACInsider. 2021. *SPAC Statistics*, https://spacinsider.com/stats/ (14 November 2021).

[158] (Collins, 2012) Collins, M., 2012. Special Purpose Acquisition Companies. *Fordham Business Research Journal*, 2(1), p.1. https://research.library.fordham.edu/bsrj/vol2/iss1/3/.

case of failure to acquire a target, the money raised via public funding is to be returned to the investors.[159]

II. HOW DO SPACs WORK?

The founders of a SPAC are investors & industry experts who invest some amount of working capital in the entity so that the project of acquiring another company can commence. A SPAC is incorporated with the intention to raise capital so that they can acquire another entity. The SPAC's founders buy founder shares at the start of the registration process and pay a small fee for the number of shares, resulting in a substantial percentage ownership stake in the outstanding shares following the IPO.[160] The target company is identified before the listing so that they can issue the capital as per the requirement through an IPO. Generally, the identity of the target is not disclosed. After the public invests in the SPAC, the capital raised is kept in a trust that yields interest towards the investors' money. The funds, once kept in the trust, cannot be used for any other purpose except for acquisition/merger with a private company. If the SPAC does not complete any acquisition by the end of the deadline, it is liquidated with the investors' money being returned. The founders & other KMP's (Key Managerial Person) along with their advisors negotiate the terms of the acquisition. After the target company is disclosed to the public, the investors (shareholders) approve the deal via voting. Once an acquisition is made, the target company goes public via a SPAC deal. This process where a private company is turns public via a SPAC acquisition or merger is called 'De-SPAC'.[161]

INDIA'S POSITION ON SPACs

The Companies Act, 2013 lays down different types of companies that can be incorporated in India. However, provisions to incorporate SPAC entities do not exist. In 2017 the Ministry of Corporate Affairs (MCA) established a task force to look after shell companies. As per section 248 of the Companies Act, the Registrar of Companies (ROC) has the power to remove a company's name from its register if a company has failed to commence its business within one

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[159] Young, J., 2021. *Special Purpose Acquisition Company (SPAC) Investopedia*, https://www.investopedia.com/terms/s/spac.asp (Nov, 10, 2021).

[160] Special purpose acquisition company (SPAC), *CORPORATE FINANCE INSTITUTE (2021)*, https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-acquisition-company-spac/ (Nov 10, 2021).

[161] Joshua A Agen, *FOUR KEY DE-SPAC EXECUTIVE COMPENSATION ISSUES THE NATIONAL LAW REVIEW* (2021), https://www.natlawreview.com/article/four-key-de-spac-executive-compensation issues#:~:text=The%20typical%20de%2DSPAC%20transaction,operating%20company%20becomes%20publicly%20traded. (Nov 14, 2021).

year of its incorporation or if a company has not carried on any business or operation for the two most recent financial years and has not applied for 'dormant' status under section 455.[162] So, the first major issue for SPACs in the Indian context is that the Companies Act does not allow shell corporations to prevail. Similarly, Section 26 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 lays down the conditions for a company to qualify for a public issue. These conditions are as follows:

1. It (The company offering the issue) has net tangible assets of at least three crore rupees in each of the three previous full years (of twelve months each), of which not more than half is held in monetary assets:
2. It has a track record of distributable profits for at least three of the preceding five years, as defined by section 205 of the Companies Act, 1956.
3. In each of the previous three full years, it has had a net worth of at least one crore rupee.
4. The combined amount of the proposed issue and any previous issues made in the same financial year does not exceed five times the company's pre-issue net worth as determined by the previous financial year's audited balance sheet.
5. If it has changed its name in the last year, it must have earned at least half of its revenue from the activity indicated by the new name for the previous full year.[163]

Hence there is no scope for a SPAC to get listed via an IPO as they cannot satisfy these conditions. Therefore, from the above information, it is clear that the corporate regulatory framework in India does not allow establishing SPAC entities in the Indian market. However, the private companies of India are allowed a De-SPAC route after certain conditions are fulfilled. Let us observe some examples of Indian companies who got listed on foreign markets via SPAC acquisition & what challenges are faced when private companies opt for De-SPAC.

OVERSEAS LISTING OF INDIAN PRIVATE CORPORATIONS THROUGH SPAC ACQUISITION

With changes in emerging economies at favorable pricing and the booming startup ecosystem of India, it appears that SPAC investments will rise in the near future. Here, we will look at a company's motives to list on foreign markets via SPAC, examples of Indian companies listing in overseas markets as well as the regulatory hurdles that come with conducting a standard De-SPAC deal with an Indian private company.

[162] Companies Act, 2013, § 248, No. 18, Acts of Parliament, 2013
[163] Ministry of Corporate Affairs, http://www.iepf.gov.in/IEPF/Eligibility_norms.html

I. REASON FOR OPTING SPAC ACQUISITIONS & FOREIGN LISTING

There are various reasons for a company to go public via De-SPAC. Some of them are listed below:

1. **Higher valuation:** Because SPACs are negotiated agreements, the target entity may be able to obtain a better valuation than it would through an IPO.
2. **Faster process as compared to IPO:** A traditional IPO takes anywhere between 12-18 months to execute while on an average listing via SPAC merger (De-SPAC) takes a mere 3-6 months.
3. **Power to raise extra capital:** SPAC sponsors can inject private investment in the public equity popularly known as PIPE investments which can be used to facilitate smooth transaction as well as working capital & expand business operations.
4. **Management remains intact:** Normally, when an investment occurs in a firm, the promoter group's interest is diluted significantly, resulting in a change in management. The target's management, on the other hand, is frequently left intact in SPAC transactions.[164]

There are a lot of advantages of listing via a SPAC merger/acquisition which when executed properly can be a game-changer for private corporations. This makes SPAC transactions a desirable route over traditional IPO listing. Listing in foreign markets has its own sets of advantages. Companies getting listed overseas get the best of both worlds, international investors from their hometown & also foreign investors from the place they are getting listed. Similarly, they are able to get clients from the country they are from as well as from the country they listed on. Overseas listing helps a company to reach the different markets and improves their visibility on an international level. Listing on premium markets such as New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotations (NASDAQ) and the London Stock Exchange (LSE) gives a boost to the company's image.

II. EXAMPLES OF INDIAN COMPANIES OVERSEAS LISTING VIA SPACs

[164] Eric Reed, SPAC vs. IPO: *Key differences Yahoo! Finance* (2021), https://finance.yahoo.com/news/spac-vs-ipo-key-differences 155324344.html#:~:text=In%20the%20best%20cases%2C%20the,aren't%20necessarily%20protectable%20secrets.. (Nov 13, 2021)

Indian companies have a long history with overseas listing through De-SPAC even though there are no provisions for the SPAC regime in the country. The target companies are attracted to the lucrative foreign capital markets and see them as an opportunity to grow with the help of SPAC sponsors & investors.[165] Earlier we saw the advantages of a SPAC acquisition for private companies, now let us look at prime examples of companies that actually followed the SPAC route and got listed on overseas markets.

One of the brightest examples of a SPAC deal for Indian companies is the deal between Indian Hospitality Corporation (IHC)and Mars Restaurants Pvt Ltd & airline catering business Sky Gourmet Pvt Ltd. In 2007, IHC, a SPAC listed on the London Stock Exchange (LSE) acquired the businesses of Mars Restaurants Pvt Ltd & Sky Gourmet from a Malaysian-based private equity firm Navis Capital Partners for around US $ 110 million. The deal went smoothly with the targets being listed on the LSE.[166] Another example is of the acquisition of a stake in Videocon d2h by Silver Eagle Acquisition. Silver Eagle Acquisition, an American SPAC entity bought an approximate 30% stake in Videocon d2h for over US $ 375 million in 2015. Videocon d2h's American Depository Receipts were subsequently listed on the NASDAQ and issued to Silver Eagle's shareholders and warrant holders who approved the agreement-something permissible under the rules at the time. After that, the Silver Eagle was dissolved.[167] In 2016, Terrapin 3 Acquisition Corporation another American SPAC combined with Yatra Online Inc an Indian company that offered traveling-related services to its customers. The deal was reported to be valued at US $ 218 million with Yatra Online Inc getting listed on NASDAQ.[168] One of the most recent examples of a SPAC deal with an Indian company is the deal between ReNew Power Pvt Ltd with RMG Acquisition Corporation at the beginning of 2021. ReNew Power which was one the most prominent companies in the country which was in the business of creating renewable energy resources got listed in August 2021 on NASDAQ via the De-SPAC route. It was the first SPAC acquisition of an Indian company that crossed

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[165] John Lambert, *WHY SO MANY COMPANIES ARE CHOOSING SPACS OVER IPOS* KPMG LLP, https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html. (Nov, 7, 2021)

[166] The Economic Times, IHC acquires Mars, SkyGourmet, https://economictimes.indiatimes.com/industry/services/hotels-/-restaurants/ihc-acquires-mars skygourmet/articleshow/2222154.cms. (Oct. 18 2021)

[167] Bhawna Gupta, *VIDEOCON D2H INKS $375M DEAL WITH US BLANK CHEQUE CO;* ON TRACK FOR NASDAQ LISTING VCCIRCLE (2021), https://www.vccircle.com/videocon-d2h-inks-375m-deal-us-blank-cheque-co-track-nasdaq.

[168] Yatra, https://www.yatra.com/online/terrapin-yatra (Nov. 11 2021)

the US $ 1 billion mark. The SPAC deal leads the valuation of the company to 8 billion US Dollars.[169]

Indian companies are getting accustomed to the overseas listing by De-SPACing and more and more start-ups and private companies with huge potential are being offered lucrative deals by SPAC sponsors. However, the Indian regulatory framework remains to be a hindrance for Indian targets as well as foreign investor companies. A lot of scrutiny and approvals exhaust the patience of the foreign investor creating disinterest in the Indian markets & they end up looking for alternatives in other countries. The procedure for acquiring a stake in Indian companies needs to be more flexible to allow smooth transactions with foreign investors. Let us look into the process & challenges that Indian targets face while opting for a De-SPAC route.

III. REGULATORY APPROVAL PROCEDURE & CHALLENGES FOR INDIAN COMPANIES

Most Indian companies were reserved in their own territories before the multinational corporate (MNC) culture took place. After globalization, Indian countries introduced themselves to the global markets. Before globalization foreign companies found it very difficult to enter Indian markets & vice versa. In recent times there has been a lot of foreign investment by overseas companies & similarly Indian companies have invested in foreign companies on a very large scale as well. The continuous growth in foreign investment led to the development of procedural laws relating to scrutiny, regulatory approvals, etc.

Cross-border mergers are referred to as 'outbound mergers', wherein the acquiring company is of foreign origin which is currently the situation in which the SPAC transactions occur.[170] The SPAC and the target entity are merged in a standard De-SPAC transaction, and the combined entity becomes an operating entity. Below is the entire process of regulatory approvals that shall arise during De-SPAC wherein the Indian companies who are looking for overseas listing have to comply with.

1. As the Indian companies want to get listed on foreign capital markets (via SPAC) the implementation of an outbound merger in accordance with the Foreign Exchange

[169] Utpal Bhaskar, *ReNew completes merger with RMG* II Mint (2021), https://www.livemint.com/industry/energy/renew-power-completes-spac-merger-with-rmg-ii-11629779029898.html (Nov 12, 2021).

[170] KPPB Law *Inbound and outbound mergers and acquisitions* (2021), https://www.kppblaw.com/corporate-governance/inbound-and-outbound-mergers-and-acquisitions/ (Nov 13, 2021).

Management (Cross Border Merger) Regulations, 2018 and Section 234 of the Companies Act, 2013, under the jurisdiction of an NCLT-approved merger scheme is compulsory.[171]

2. The Indian target's shareholders will get the shares of the merged business as merger consideration under the De-SPAC transaction, and the target companies Indian office will be treated as a foreign company/branch office of the combined companies.[172]
3. An outbound merger is deemed to have received prior Reserve Bank of India (RBI) approval if it is carried out in accordance with the Merger Regulations, which include, among other things, compliance with the FEMA Overseas Direct Investment (ODI) regulations, a requirement that the fair market value (FMV) of the combined entity's securities held by a resident individual(s) be within the limits prescribed under the Liberalized Remittance Scheme (LRS), and repayment of the guarantor.[173]
4. While most of these conditions may be met, RBI clearance will be essential in circumstances where Indian shareholders are individuals, because the FMV of shares to be purchased by resident individuals according to a cross-border merger is expected to exceed the present LRS limit of USD 250,000 each financial year.[174]
5. Given that the SPAC firm is a shell corporation with no business operations and the major goal of the merger is an overseas listing and access to money, securing NCLT permission will be a major issue in these transactions which would normally require 6-8 months, in addition to RBI clearance.

OVERSEAS LISTINGS OF US COMPANIES:

Compared to the complex Foreign Direct Investment (FDI) policy of India the United States of America has a very functioning mechanism for the SPAC transactions to thrive on. According to Rule 419 of the Securities Act of 1933, a blank-check corporation (SPAC) must deposit all funds and securities issued in the firm's IPO into an escrow account meaning that the securities/funds raised via IPO must not be transferred or traded until the business

[171] Akila Agrawal et al., *USING SPAC VEHICLES AS A MEANS OF LISTING OUTSIDE INDIA* Cyril Amarchand Mangladas, INDIA CORPORATE LAW (2020), https://corporate.cyrilamarchandblogs.com/2020/09/using-spac-vehicles-as-a-means-of-listing-outside-india/ (Nov 15, 2021).

[172] *ibid*

[173] Atul Pandey, *FEMA CROSS BORDER MERGER REGULATIONS ISSUED BY RBI* - CORPORATE/COMMERCIAL LAW - INDIA MONDAQ (2018), https://www.mondaq.com/india/corporate-and-company-law/689316/fema-cross-border-merger-regulations-issued-by-rbi (Nov 15, 2021).

[174] *ibid*

combination of the SPAC and the target is completed.[175] SPACs come under this part because they hold money in a trust account; nevertheless, the following clause states that in order to be designated a blank cheque company, the issuer must issue a 'penny stock', as defined in Rule 3a 51-1 of the Securities Exchange Act of 1934.[176] According to the definition's exemptions, any issuer's security that has been in business for less than three years and has at least $5 million in net tangible assets is not regarded as a penny stock. And, because SPAC firms typically have a two-year time limit, they are well inside this exception. To claim this exclusion, they must file a Form 8-K, to US Securities Exchange Commission (SEC), along with an audited balance statement that demonstrates relevant IPO compliance.[177]

In case of overseas listing of US entities, the SEC requires the filing of a Form F-4 registration statement for shares issued by a firm that is scheduled to be listed as part of an exchange transaction, and the SEC's approval is a critical prerequisite for the F-4 registration statement's effectiveness.[178] Furthermore, under US securities law, the listed company must retain a valid registration statement (usually in the form of a shelf registration statement that may be brought down as needed) for any subsequent sale of the listed companies stocks by the shareholders.[179]

Hence it is clear that the Indian companies looking for overseas listing don't have a competent ecosystem to thrive on, nor the establishment of SPAC entities is possible as per the regulatory frameworks. The Indian corporate sector needs to ensure the inclusion of such entities as it is missing on one of the biggest trends of the corporate world & also facilitate smooth handling of Indian companies which are taking the SPAC way as a means for overseas listing.

FUTURE OF SPAC IN INDIA

The International Financial Services Centres Authority (IFSCA) has prepared a draft of the framework for the formation of SPAC entities in India. As per regulation 66 of the proposed framework, SPACs will be allowed to be listed as shell corporations & raise capital via an IPO

[175] Financial Industry Regulatory Authority (FINRA), Regulatory Notice 08-54 FINRA.org. (2021) https://www.finra.org/rules-guidance/notices/08-54 (Accessed Nov. 20 2021).
[176] Financial Industry Regulatory Authority (FINRA) *SEC AMENDS AND CLARIFIES PENNY STOCK RULES NOTICE TO MEMBERS* 93-55 FINRA.ORG, https://www.finra.org/rules-guidance/notices/93-55 (Nov 20, 2021).

[177] *ibid*
[178] James Chen, *SEC FORM F-4 INVESTOPEDIA (2021)*, https://www.investopedia.com/terms/s/sec-form-f-4.asp (Nov 20, 2021).
[179] Anna T Pinedo, Brian D Hirshberg & Ana M Estrada, *WHAT'S THE DEAL? – SHELF REGISTRATION STATEMENTS AND SHELF TAKEDOWNS MONDAQ (2020)*, https://www.mondaq.com/unitedstates/securities/971826/what39s-the-deal-shelf-registration-statements-and-shelf-takedowns (Nov 16, 2021).

if they are incorporated with the objective to combine or acquire a business & that the entity will have no commercial operations of its own.[180] IFSCA will be the adjudicating authority for consultation of SPAC-related issues and will consider the listing of SPAC corporations after examining each proposer looking to incorporate such entities. While the IFSCA's proposed framework is a step towards the positive side a more robust regulatory framework from the Ministry of Corporate Affairs (MCA) and/or market regulator SEBI should be considered.

It was recently reported that market regulator SEBI has formed an expert panel to consider the 'feasibility' of SPAC entities and their impact on the Indian market.[181] This has given a huge boost to the chances of including SPAC entities in the Indian corporate sector. India also needs to amend the existing regulatory framework to facilitate smooth transactions of Indian companies with foreign SPAC entities. The worldwide trend in SPACs has risen significantly, despite the fact that the concept has been present for many years in developed economies however such a framework is still on the verge of gaining traction in India.

CONCLUSION

SPAC are shell corporations that raise capital via IPO and they have only one goal, to acquire a private company. Since 2020 SPAC transactions have gained a lot of traction worldwide. As of today, India has no provisions for the establishment of SPAC entities. Developed economies of the US, UK, and other member nations of the European Union have recognized SPAC corporation's fundamental to the countries corporate sector and are making the most of the SPAC frenzy. Similarly, entities of India cannot take thorough advantage of the overseas listing as the process for Indian companies to go public on foreign markets via De-SPAC is also very complex with a lot of regulatory approvals. A developing economy such as India must take SPAC entities in the nation's corporate ambit. The recent developments relating to SPACs by IFSCA & SEBI look promising but the time is of the essence here. India is missing out on a golden-trending opportunity & the time lost will be very difficult to recover as every trend eventually comes to an end.

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[180] IFSCA (ISSUANCE AND LISTING OF SECURITIES) REGULATIONS, 2021 TAXGURU (2021), https://taxguru.in/finance/ifsca-issuance-listing-securities-regulations-2021.html (Nov 17, 2021).

[181] Business World, 2021. *SEBI forms expert group to examine feasibility of SPACS*. http://www.businessworld.in/article/Sebi-Forms-Expert-Group-To-Examine-Feasibility-Of-Spacs/11-03-2021-383624/ (18 November 2021).

THE FUTURE OF BLOCKCHAIN IN CORPORATE GOVERNANCE: AN ANALYTICAL STUDY

- ***Merin Bobby***[182]

ABSTRACT

The future is digital and this can be understood from the day-to-day transactions one engages in. Blockchain likewise is a phenomenal technology that may or may not take rise in the future making all company or corporate transactions taking place in such a decentralised network. Blockchain technology holds a lot of promise in terms of providing effective answers to a lot of issues that are wreaking havoc on present corporate governance structures. Due to the separation of ownership, control, and varied interests among stakeholders, governance procedures are required to align interested parties' interests. Along with its decentralised nature, many blockchain utilisation would also require legislative reforms, as present legislation frequently places faith in centralised actors. With the blockchain, there is frequently no central "body corporate" to which cybersecurity responsibility may be assigned. Businesses in all sectors should be actively evaluating how the blockchain may help them simplify activities. At the same time, because the innovation involves a variety of compromises, they should be geared to see through the media frenzy and only evaluate applications of this technology when they provide actual value. It creates a mechanism that prevents the order from being modified. Furthermore, the usage of blockchains interacts with and confronts enterprises, stakeholders, and financial markets at the same time. Through this article, the author tries to identify what are the ramifications of blockchain use in corporate governance and also look for parallels, trends, and gaps in its application to corporate governance.

Keywords – *Blockchain, decentralisation, corporate, governance, transaction*

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INTRODUCTION

Blockchain is a term that has come to popularity mainly because of the wide use of Bitcoin in the world. The creation, usage, and operation of blockchain/distributed ledger technology in India are governed by no specific legislation or regulation. As the use of blockchain technology has grown in India over the last several years, the government has adopted a favourable position toward its implementation.[183] Organizations that utilize blockchain technology should be aware of the legislative framework that controls the use of technology via the Network, as well as any sectoral restrictions that may apply to the adoption of such technology, bearing in mind the industry in which it is intended to be used. The Federation of Indian Chambers of Commerce and Industry has indeed been actively cooperating with various businesses involved in blockchain technology development to establish a regulatory and governance framework for blockchain deployment.[184] Continuing along the same line of advancement, blockchain has the potential to drastically lower transaction costs. The essence of blockchain is connected to a certain technique of processing data, and it does not need to be linked to any specific financial framework. Even though those are still blockchains, they have some centralization for effectiveness, privacy, and interference in certain instances. The use of private blockchain deployments in traditional business, such as clearing and settlement, logistics, and insurance, has gotten a lot of interest.[185] As a result, Stakeholders should consider if they require a decentralised, trustless, and disintermediated solution when considering blockchain technology applications. If not, existing technology will most certainly suffice, and the expenses of installing the blockchain will likely outweigh the claimed benefits.[186] To understand the concept of blockchain governance, we must first explore what blockchains bring to the table.

FRAMEWORK OF BLOCKCHAIN

Cryptography, smart contracts, peer-to-peer networks, and distributed ledger architecture are the three main techniques that makeup the blockchain. These are all stand-alone technologies that may be utilised in any combination with the others, or alone in stand-alone applications. These technologies have existed for decades, long before the term "blockchain" was coined.[187]

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[183] K. S. Krupa & M. S. Akhil, *"Reshaping the Real Estate Industry Using Blockchain,"* Emerging Research in Electronics, Computer Science and Technology, Springer, 255-263, (2019).
[184] *Id.*
[185] Blair, M. M.,'*Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century.* Brookings Institution Press, (1995).
[186] Micheli, M., *'Emerging models of data governance in the age of datafication'*, *Big Data & Society*, 7(2).(2020) https://doi.org/10.1177/2053951720948087
[187] *Id.*

Developing technologies such as blockchain may be able to bridge that gap left by rules and regulations alone. Information is the backbone of a business. The sooner and more precise it is received, the better. It provides real-time, shareable, and completely transparent data stored on an immutable ledger that can only be accessed by network users with authorization.[188] These transactions depict the movement of a tangible or intangible item. The data block may store whatever information you want, including who, what, when, where, how much, and even the state of cargo, such as temperature. The way data is organised differs significantly between a traditional database and a blockchain. A database organises data into tables, but a blockchain organises data into chunks (blocks) that are linked together, as the name suggests. When applied in a decentralised manner, this data structure creates an unchangeable data chronology. A blockchain enables the data in a database to be distributed across several network nodes in different places. This not only acquires additional information to the database, but it also ensures the accuracy of the data contained there: if someone tries to change a record in one instance, the other nodes will not be affected.

This system aids in the establishment of a precise and visible sequence of occurrences. In this manner, no one node in the network may change the data it contains. Blockchain is a new technology that has the potential to re-engineer economic structures and enable the establishment of markets and goods in developing economies that were previously inaccessible or unprofitable.

INTEGRATING BLOCKCHAIN AND CORPORATE GOVERNANCE

Due to the transparency provided by blockchain, all users on the network can witness the trade by managers or corporate raiders, resulting in good corporate governance. Transparency works as a disincentive to unethical business activities. Corporate crimes have been on the rise in industrialised nations, and blockchain might be a way to reform corporate governance, as bad governance leads to scams and controversies that jeopardize shareholders' interests. The presence of numerous intermediates, administrators, or network operators that operate for their advantage can be attributed to the existing inefficiency of corporate governance, which leads to a complicated structure.[189] However, by utilizing blockchain, the bulk of middlemen may be removed, resulting in improved corporate governance. Blockchain has the potential to

[188] Asharaf, S & S. Adarsh, "Decentralized Computing Using Blockchain Technologies and Smart Contracts: Emerging Research and Opportunities', Hershey Pennsylvania: IGI Global, (2017).
[189] De Filippi, *Blockchain and the Law: The Rule of Code*, Cambridge, Massachusetts: Harvard University, Press, 2018.

transform corporate governance by making transactions visible, particularly in private businesses. Companies will no longer be required to manually update stocks and notify shareholders every time a new transaction occurs if all information is stored on the blockchain. Accurate proxy voting is a key challenge in corporate governance, but blockchain allows all shareholders to vote using different tokens representing their voting power.[190] This way, voting will be protected, and voters will be able to monitor the voting process as it progresses. This method will eliminate any ambiguity and decrease results tampering. Despite years of government initiatives and substantial rule modifications, the current extent of agency issues suggests that the fundamental issues cannot be adequately handled within the basic conceptual and legal architecture. Current governance efforts in the face of unavoidable agency issues fall short of achieving the required governance integrity and reliability. To avoid the unavoidable volatility that comes as a result of the corporate governance system's ubiquitous agency issue. Delaware was the first state to approve legislation permitting Delaware-based enterprises to use blockchain technology for record-keeping, including the upkeep of shareholder and stock issue lists. As Delaware is the area where more than 60% of U.S. corporations are formed, a big number of firms now have the chance to employ blockchain technology for record-keeping.[191]

I. Transparency with Blockchain

Shareholders, according to corporate law theory, are the owners of a corporation and have power over it through the exercise of voting rights. Traditionally, shareholders are the people whose names appear on a company's membership list.[192] A firm's accounts, for example, are available to everybody on the blockchain, not just the accounting department. Smart agency contracts are based on a precision blockchain that allows market participants to maintain debt or promise registries and construct complete marketplaces, among many other features that have yet to be addressed.[193] Blockchain might make it possible to trace share ownership throughout the whole settlement cycle, increasing listed corporations' shareholder sovereignty. As a result, their corporate governance and stock market performance should improve.

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[190] Clarke, T., & Branson, D, *The SAGE handbook of corporate governance*. SAGE Publications, (2012).
[191] Observer, why the blockchain is perfect for government services, http://observer.com/2016/09/why-the-blockchain-is-perfectfor-government-services/ (last visited November 3, 2021)
[192] Edmans, Alex, 'Blockholders and Corporate Governance', 6 Annual Review of Financial Economics,23–50 (2014).
[193] *Id*.

Walmart's usage of blockchain isn't only about efficiency; it's also about being able to track the mangoes and other items back to their source. This enables businesses such as Walmart to better manage stocks, respond to issues or concerns, and validate the histories of their products. If a farm has to recall its product due to contamination, a retailer may use blockchain to identify and remove the produce from that farm while keeping the rest of the farm's goods for sale. JP Morgan has announced the launching of its Quorum technology, which aims to provide financial institutions with transaction-level privacy and network-wide transparency.[194]

II. Inefficiency of proxy rules

By awarding qualified voters a token or vote currency as a number that symbolizes their voting power, blockchain may be utilized to establish correct proxy voting. Voters and the firm may check to see if votes were cast correctly. While management's concern of inconvenience or harassment from enabling proxies to speak is understandable, it must be allowed to become an impediment to these individuals' increased engagement and contribution.[195] To keep such rebellious conduct in check, certain regulations and punishments might be implemented. In most cases, vital information is conveyed through a convoluted take-along approach.[196] The proxy voting systems continue to suffer from many flaws that raise their expenses as well as the costs of shareholder sovereignty. Shareholders and, indirectly, the market bear the brunt of these expenditures. Beneficial shareholders, for example, frequently do not get proxy papers on time or at all due to the large number of shareholders. Shareholders must recognise that proxy participation is a fundamentally defective instrument of accountability when voting on proxy access initiatives.[197] To put it another way, it is a highly inefficient way to encourage excellent corporate governance in a public corporation. As decision-making is moved from the board of directors to shareholders, who will make their nominations based on dramatically minimal information, there will be an increase in error in the nomination of directors. There will also be a shift of the potential for certain unethical conduct, such as retrieving personal benefit from the corporate entity, from a board and nominating committee to certain shareholders who, unlike directors, are not subject to fiduciary obligations.

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[194] *Id*.
[195] Hillman, Amy J et. al., 'The Resource Dependence Role of Corporate Directors: Strategic Adaptation of Board Composition in Response to Environmental Change'. Journal of Management Studies, 235–56, 2000.
[196] *Id*.
[197] *Id*.

III. Mix of on-chain and off-chain models in governance structures

The amount of centralization in decision-making is also influenced by the choice of on-chain versus off-chain governance. On-chain governance allows each proposal to be voted on separately by each network participant, which is more in line with blockchain technology's decentralised nature. However, in such setups, user involvement has remained an issue. Developing the correct monetary benefit and matching them with the network's ultimate goal is a difficult undertaking. On-chain and off-chain governance can be combined in governance schemes. Off-chain processing might be used for functions that demand quick decision-making. These include software update considerations as well as legal risks and regulatory decisions.

IV. Valuable IP storage and asset management

The features of the blockchain make it a good fit for IP accounts and records. Works can be transferred and licensed with the conditions, rights, and pricing associated with them recorded on them. Ampliative Art is a company that uses blockchain technology to enable artists to get contributions and subsidies in exchange for their work. Various uses of blockchain in financial and asset management are discussed in an E&Y study, including the decrease of friction in the consumer orientation program, simplified maintenance of model portfolios, and quick clearing and settlement of deals.

ROLE OF CORPORATE GOVERNANCE THEORIES IN BLOCKCHAIN

AGENCY THEORY: According to the agency hypothesis, shareholders want directors to govern and decide for their mutual benefit, as well as those who have been mandated.[198] On the other hand, the agent is not limited to making judgments that are only in the principal's best interests. This is exactly what blockchain tries to do as the transparency associated with it comes within the purview of transferring information which includes profits as well.

[198] Fama, E.F., *"Agency Problems and the Theory of the Firm"*, 88 Journal of Political Economy, 288-307, (1980).

STEWARDSHIP THEORY: The stewardship theory implies that managers behave in the company's best interests rather than their own and that in a conflict-of-interest situation, they put the company's interests ahead of their own.[199] Manager's roles in corporate governance may vary and even expand as a result of increased transparency.

RESOURCE DEPENDENCE THEORY: Resource dependence is a model of the organisational **(Consider adding an article)** process that stresses the fact that they will be open systems, with the surroundings in which they function and social interactions serving as the foundation for resource allocation decisions.[200] Here once again transparency comes into play.

EFFECTIVENESS OF BLOCKCHAIN DURING COVID 19 PANDEMIC

A major health crisis has struck the world recently and it has changed the normal for everyone. As a result, blockchains would provide a platform for management to evaluate the proposed progress in real-time and employees could safely register pertinent data on the chain. Employees and other stakeholders linked to the organisation would be more accountable as a consequence of the data connections based on transparent monitoring and greater security via blockchains. Furthermore, the epidemic has brought attention to the fragility of existing financial systems and fiat currencies, prompting many to advocate for the use of digital currencies. According to our research, cryptocurrency is a prominent subject in blockchain applications and is important to corporate governance. Businesses keen in blockchain technology can look at incorporating it into their present systems to address challenges caused by the pandemic while also improving the speed and reliability of their systems. Following that, companies may look into using blockchain technology to tackle particular problems in their present systems. As the blockchain sector continues to grow, there are a growing number of organisations that can assist businesses with anything from strategy to implementation. Blockchain technology may be used to track and improve medical supply chain management.

[199] Sundaram, A.K. & Inkpen, A.C, 15 "The Corporate Objective Revisited" Organization Science, 350-363, (2004).
[200] *Id.*

Pharmaceutical items are frequently "registered" with a registration number and confirmed at the time of manufacture. It may be feasible to create a transparent tracking method that reduces costs and eliminates data-based mistakes by putting this data into a blockchain network.

APPLICABLE LAW

The blockchain presents a new perspective on the current judicial system. This isn't to say that Blockchain technology doesn't create serious issues under current regulatory structures; a few of these issues are addressed below. Certain industry restrictions may apply to Blockchain. With the decentralised nature of Blockchain technology, it's impossible to say which laws apply to it in general, because each legal field establishes its requirements for applicability inside its realm.[201] In the case of non-contractual responsibilities, the basic rule is that parties can pick which laws apply to their Blockchain transaction ahead of time. If they do not, the laws of the nation in which the particular performance is performed will, in most cases, apply.[202]

Human rights must be considered from the beginning of this process and deployment of Blockchain applications, as well as in larger conversations about the governance of Blockchain, to ensure that the good influence substantially outweighs the bad. Due to the unique Blockchain feature that data cannot be modified or removed once entered, the right to privacy is especially sensitive in this context. This implies that errors involving personal data are irreversible.[203] The Internet has transformed communication. Those national boundaries are now obscured. You can legally transact business in a nation where you are not physically present. It is difficult since our legal structures are built on national borders.

From a legal standpoint, this is quite important. Which nation any legal act was conducted in; this is important for determining which legislation, which government has the most applications, and which government has the most authority to enact legislation

I. Practical Implications

I. Privacy Concerns: With transparency comes privacy concerns. The privacy concerns of blockchain participants cannot be anonymous, and the distributed ledger is publicly available,

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[201] Hsieh, Ying-Ying, Jean-Philippe Vergne, and Sha Wang, *'The Internal and External Governance of Blockchain-Based Organizations: Evidence from Cryptocurrencies. In Bitcoin and Beyond'*, Abingdon: Routledge, 48–68 (2017).

[202] *Id*.

[203] *Supra* note 10.

which is a counterbalance to the pseudonymity-based legal difficulties. The public keys and IP addresses of blockchain participants can be used to identify them. Most current privacy regulations throughout the globe, including the Indian IT Act, do not envisage privacy safeguards for blockchain participants in this way because blockchain is a novel technology. According to section 43 A of the Information Technology Act.[204] Privacy on the blockchain is unlikely to be possible because there is no one "body corporate" collecting user information and "owning, controlling or operating" a computer resource.[205] They should, nevertheless, strive to maintain accountability. If it's technically possible, lawmakers may consider requiring blockchain operators to include a function.

- A close analysis of the Personal Data Protection Bill 2018 if personal data is kept on the blockchain, a detailed examination of the Bill and the unique character of the blockchain may lead to the conclusion that the blockchain is likely to be contradictory with certain of Bill's requirements.[206] The bill contains duties that require data to be deleted after the operational objective has been met. In a ledger, however, this is not feasible.
- In certain cases, if the data being collected is classed as "essential personal data," the Bill mandates that the data be handled solely inside India. The blockchain, on the other hand, is all about global and decentralisation.[207]
- The bill gives data subjects the ability to change and amend their personal information. However, the blockchain's inflexible design may make this challenging.[208]

Relevant legislation, such as the IT Act and the Information Technology (Reasonable Security Practices and Procedures) Act[209] requirements and personal data or information that is sensitive. Blockchain activities will be governed under 2011 rules because blockchain is internet-based. Wherever blockchain administrators exist, they will be accountable to cybersecurity standards.

II. Unchangeable Nature

This is a very risky aspect of blockchain as well. This is because, although immutability protects transactions, it may be a concern when corrupt parties manage to hide fraud. It's

[204] Section 43 A, Information technology Act, 2000, No 21, Acts of the Parliament, 2000 (India).
[205] *Id.*
[206] Personal Data Protection Bill 2019 (India).
[207] *Id.*
[208] *Id.*
[209] Information Technology (Reasonable Security Practices and Procedures) Act

expected that business blockchain installations will try to address these issues through private systems. Furthermore, each blockchain network's servers are decentralised and presumably distributed around the globe, making it impossible to establish where a hack or malfunction happened. Due to the immutable nature of blockchain, there is still a possibility that blockchain contains errors due to inaccuracy or fraud. Blockchains are relying on maybe a new transaction that can correct the errors. Furthermore, the interested parties would like to revisit the legal aspects of blockchain. But this might disrupt the existing standards and norms of the transacting parties. It must be understood in this instance that there is still some control to correct errors before they are recorded on the blockchain. Where transactions have a smart contract when verification happens it does not verify any errors in the transaction.[210]

III. Smart contracts and role of the judiciary

To uphold the commercial efficacy of each transaction the courts must interpret the contract in a certain way. This will help reduce transaction costs and strive to make blockchain efficient in the future. Smart contracts should not be viewed in a strict sense but a bit flexible indeed. Judiciary must keep in mind principles of equity while dealing with a clever attacker and make restitution.[211] So when one gives power to the developers to build a system of governance within the organisation. One of the major challenges faced would be to determine if smart contracts are real contracts having acceptance, consideration.[212] The immutability would result in rigid contractual terms. Here the rules of equity and unjust enrichment will be feasible. So the rules of commercial contract law may serve as a helpful guide in avoiding turbulence and blockchain can then become a reliable alternative.

CONCLUSION: THE POTENTIAL OF BLOCKCHAIN IN CORPORATE

Unless and until there is a legal regime in place to reduce the transaction costs in blockchain which will increase economic efficiency and further economic growth it will be difficult to adopt this variant. Once the legal regime is in place it will enhance the value proposition for

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[210] A. Norta, C. Fernandez & S. Hickmott, "*Commercial Property Tokenizing With Smart Contracts*," International Joint Conference on Neural Networks (IJCNN), 2018
[211] *Id*.
[212] *Id*.

business. This underlines the value of corporate executives, tradesmen, and decision-makers becoming aware of the technology and its ramifications for businesses, commerce, and entire economies. What is certain is that as blockchain continues to mature and improve, more value will emerge across all industries. Members of the board of directors of companies that may be affected by blockchain technology should join industry associations that give education and insight into the technology's possible influence on certain businesses or activities. The blockchain, like any future software or company model, comes with a slew of regulatory, economic, and organizational issues. As lawyers, we see significant legal ambiguities arising as a result of the blockchain's adoption in the different industries where it has applicability. Investing in blockchain research and platforms could be advantageous to each business in understanding how to effectively use the technology. Blockchain technology is of particular use in the financial, healthcare and insurance sector. These industries rely on persistent records and efficient processing of financial and information transactions. This is an area where blockchain can streamline the current process. In addition, new blockchain-based Internet architectures may emerge. Keeping pace with the rapid advances in technology can be challenging, but the more organizations begin to discuss next-generation technologies such as blockchain, the more likely they are to leverage and incorporate these advances.

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