

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 2

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Mergers & Acquisitions and Its Impact on the World, Law and Legal Profession

ARUSHI JAIN¹

ABSTRACT

The business sector all over the world is reorganising its operations by utilising different combining techniques, such as mergers and acquisitions, to face the problems posed by new globalisation models that involve the convergence of national markets with worldwide markets, given that the rising interdependence and reciprocity in markets for a wide range of commodities and services, as well as the expanding worldwide rivalry, it is apparent that we are living in a time of considerable change. This shift has resulted in firms attempting to expand their global reach in order to grow. Companies that choose to expand are more likely to gain market share, attract new consumers, give returns, and make profits for their stakeholders.

The growth that we talk about usually comes through mergers and acquisitions. Mergers and Acquisitions come with many prospective benefits, with the main focus on increasing profits and shareholders' value. The businesses have become increasingly global in the past few years, and the desire to attain a competitive edge has driven the companies to look for opportunities all around the world. Multi-National companies play a very big and indispensable role in the globalisation process (Das, 1997; Pandya & Rao, 1998).

The globalisation of business has sparked the search for global competitive advantage through economies of scale and scope. The rise in Foreign Direct Investment has been particularly noticeable, and with the global economy being at a surge after the increased participation by companies from emerging economies, Foreign Direct Investment became the most common means for gaining competitive advantage. The most common form of Foreign Direct Investment is cross border mergers and acquisitions.

I. INTRODUCTION

The corporate sector all around the globe is reshaping its operations by using various combining strategies, such as mergers and acquisitions, to address the challenges created by the new models of globalisation that have consolidated national markets with the international markets, given that the growing interdependency and reciprocity in the markets with regard to

¹ Author is an Advocate at Chambers of Sr. Adv. Salman Khurshid, India.

a variety of goods and services and the increasing international competition, it can be clearly seen that we are living in a period of significant change. This change has led to the companies trying to grow by expanding their geographic reach. The companies that choose to grow and tend to seek additional market share, attract new customers, provide returns, generate profits for their stakeholders.

The growth that we talk about usually comes through mergers and acquisitions. Mergers and Acquisitions come with many prospective benefits, with the main focus on increasing profits and shareholders' value. The businesses have become increasingly global in the past few years, and the desire to attain a competitive edge has driven the companies to look for opportunities all around the world. Multi-National companies play a very big and indispensable role in the globalisation process (Das, 1997; Pandya & Rao, 1998).

The globalisation of business has sparked the search for global competitive advantage through economies of scale and scope. The rise in Foreign Direct Investment has been particularly noticeable, and with the global economy being at a surge after the increased participation by companies from emerging economies, Foreign Direct Investment became the most common means for gaining competitive advantage. The most common form of Foreign Direct Investment is cross border mergers and acquisitions.

A merger is the union of two companies, in which only one survives, and the combined company ceases to exist. In a merger, the acquiring company acquires the assets and liabilities of the combined company. Additionally, the acquiring company may become a completely different legal entity after the merger but retain its original identity. An acquisition occurs when one company acquires a controlling interest in another company, another company's legal subsidiary, or selected assets of another company, such as a manufacturing company. In other words, an acquisition is the purchase of an asset, such as a plant, division, or entire company (Scott, 2003). At first glance, the difference in meaning between "merger" and "acquisition" may not be significant because the Conclusion is often the same. Two or more companies with different owners are now operating under the same roof to achieve strategic or financial goals.

II. REASONS BEHIND THE PARTICIPATION IN M&A DEALS

There are various reasons for which a company might choose to go for a mergers and acquisitions deal, but the biggest reason has to be for its own growth. A company can grow internally as well as externally, while growing internally would mean the company has to expand geographically By way of hiring new people and developing new products, which is a very time consuming and strength consuming method. By choosing to grow externally, the

company can choose two go for franchises, licenses, joint ventures, strategic alliances And mergers and acquisitions. Andrade, Stafford (2004) Concludes that “Mergers and acquisitions are a way by which the company can increase its capital, and it is a good growth prospect”.

A company can either choose to grow in its own industry or can diversify by expanding outside its business category. Usually, the merger and acquisition deal is taken up when a company wants to expand into other regions and further accelerate its growth. Geographic expansion of a company through acquisition can be faster and less risky than in house development. This can be especially true for international expansions where many characteristics are required to succeed in the new geographical market companies need to know every new van of the new market and hire new employees as well as overcome many other obstacles such as culture language etc. internal scaling thus can be a very slow and difficult process. “The acquisition of General Financing allows us to set foot on the new fast-growing market.”²

Another reason for mergers and acquisition deals can be symbiosis which means Relation, which is mutually beneficial between different people and groups. It basically means, “when two companies join together to produce a greater effect together than that which the sum of the two operating independently could account for”. In simple words, it means that if two corporations combine together, then it will be more beneficial and profitable than what these two corporations can do individually when they are actually not one. The two main ways by which this can be done is by way of financial synergy or operating synergy; operating synergy is when the two companies combine, performance and value more than the sum of the individual companies, and financial synergy is then the two companies’ combined together and enhance their financial performance to a level which is higher than what was when they used to operate as separate companies.

Intangible assets can also be one reason for which a company might want to go for a Mergers and Acquisition deal as knowledge has brought about significant changes in both the global and local markets for a very long time. Knowledge plays a key role in driving change in an organisation as an organisation's primary resource on the basis of the development of organisational capabilities. The value of today’s intangible knowledge-based resources in enterprises has grown exponentially. Human capital is the sum total of all the abilities that everyone working in a company has, the collective knowledge that they have, the experience that they share their competencies and worldview; each and every ability in these employees

² Rima Tamosiuniene and Egle Duksaite, “The importance of Mergers and Acquisitions in today’s economy”; 2009; <http://www.tksi.org/JOURNAL-KSI/PAPER-PDF-2009/2009-4-03.pdf>

create value for a customer. Structural capital includes the capacity and physical system that a company has, which can be used to transmit and store the intellectual material of the employees of the company. The structural part can be seen in a large part of a company's organisation, innovation, and process. By process, what is meant is the ability of the company to create and deliver goods and services to both the external and internal customers. structural capital has four major components, which are depth, breadth, sustainability, and profitability of the Relation that the company shares with its customers. Horizontal and vertical consolidation can also be a reason for the M&A transaction; horizontal consolidation refers to an increase in market power and market share as a result of a competitor's mergers and acquisitions. Whereas, Vertical consolidation is when merger and acquisition take place between the companies who have a relationship of a buyer and seller. It can be said that when two companies go for mergers and acquisitions, it brings out many benefits, like better research and development and improved management. Furthermore, the companies who are going for the Mergers and Acquisitions deal also get the tax benefits.

III. TRENDS IN CROSS-BORDER M&A

India offers significant opportunities for cross-border mergers and acquisitions. It is one of the best acquisition areas, attracting buyers from other markets for inbound trading, especially when compared to other emerging markets.³ It is also one of the leading countries where companies actively acquire foreign real estate and assets through transactions with foreign companies.⁴

When the Indian business centres began to flood offshore investment and acquire offshore real estate that is when India witnessed a new trend, having gained the trust it needed in a liberalised economy and faced with global competition, India's business house has turned from a passive opponent to an active advocate of globalisation.⁵ These circumstances have been actively and effectively aided by the changes in Indian legal regulations that have eased down on the restrictions on the foreign acquisition by Indian corporations.⁶

By way of mergers and acquisitions, it is a great opportunity and cheaper option comparatively for companies to build themselves internally; thus, more and more companies want to go global. When we look around the world, it can be seen that merger and acquisition are growing

³Mergermarket, "Global M&A Survey: An outlook on global M&A activity".

⁴ Grant Thornton, "Mergers and acquisitions: global prospects for growth", International Business Report (2011): 8-9, <http://www.gt.com.sg/publications/articles/MA%20Prospects%20for%20growth%202011.pdf>.

⁵ Nirmalya Kumar, "India Unleashed", Business Strategy Review 20 (2009)

⁶ Foreign Exchange Management Regulations, 2000; The Reserve Bank of India (RBI) promulgated a set of regulations that govern outbound acquisitions by Indian companies in 2000;

from domestic to cross border transactions because it offers various benefits along with it, as per the International Business Report, out of every five business that wants to grow through acquisition, two of them go for cross border opportunities.⁷

Along with the globalisation of the world economy, the upward trend of cross-border mergers and acquisitions is intensifying—the golden. For the cross border, mergers and acquisitions in the Asian region were the 90's where the cross-border merger and acquisition transaction increased by about 200%.⁸ With most of the countries liberalising their policies and opening their economies, the most preferred choice for cross-border Mergers and Acquisitions was the Asia-Pacific region. In recent years Africa and Latin America have attracted more cross border mergers and acquisitions, which is due to the stale political men in countries like India struggling to determine whether more foreign investment is needed.⁹

IV. GLOBAL MERGERS & ACQUISITIONS LITIGATION

The mergers and acquisition transactions are the revamping corporate events wherein the purchase and sale of companies take place. This purchase and sale of any company have many uncertainties and high risks involved. The transaction of mergers and acquisitions not only impacts the participants to the transaction but also the directors of the company, the employees of the company, stakeholders, creditors, officers and even the customers. All the people who are related to the company at each level of that corporate enterprise get affected by that particular Mergers & Acquisitions transaction. It is very much possible that even the most well-planned mergers and acquisition transactions might fail to deliver the expected, anticipated economic benefit. Thus, because of the said reasons collectively and individually made, merger and acquisition transactions go for litigation. “Mergers and acquisitions litigation gives rise to many key policy issues including the role of corporate debtors and stockholders in any business decision and their role also in Internal corporate misconduct, to the enforceability of contract provisions allocating various risks in connection with private company deals.”¹⁰

There are various similarities that can be seen in different jurisdictions with regard to how they address their mergers and acquisitions litigation issues. All the corporations under various jurisdictions tend to show themselves strong and try to protect the corporate decision making

⁷ International Business report; <https://www.educba.com/cross-border-merger-and-acquisitions/>

⁸“Cross border mergers and acquisitions and some recent trends in this field”; <https://www.managementstudyguide.com/cross-border-mergers-and-acquisitions.htm>

⁹“Cross border mergers and acquisitions and some recent trends in this field”; <https://www.managementstudyguide.com/cross-border-mergers-and-acquisitions.htm>

¹⁰ William M Regan , Jon M Talotta and Ryan m Phillip ; “M&A Litigation 2020”; Law Business Research limited; <https://www.engage.hoganlovells.com/knowledgeservices/news/getting-the-deal-through-ma-litigation-2020>

in the mergers and acquisitions agreements, where the board acts and good faith without any conflict of interest and on an informed basis. Duty to care and to be loyal is required by all the corporate representatives who entered into a merger and acquisition agreement in every jurisdiction. It is important and a prerequisite in every jurisdiction that the corporate representative, who is about to enter into a mergers and acquisitions agreement shall enter in that agreement having good faith and best interest of the corporation. Such corporate representative shall avoid any conflict of interest, and if in case he has any conflict of interest, he shall disclose them, the mergers and acquisition shall take place for the best interest of the corporations and not for any personal benefit or interest of any individual officer or director.

Another thing that is common across jurisdictions is the stakeholder's vote and its impact. "There's a theory that the stockholders vote ratified the board's decision, that the vote cleansed the transaction of any fiduciary duty issues or that stockholders are estopped from challenging a transaction approved by a majority of investors".¹¹ After the mergers and acquisition transaction has been approved by the board, a separate approval has to be taken by the stakeholders before the transaction can finally close. In many jurisdictions, this stakeholder vote is on a fully informed basis, and if in case there are any challenges after such stakeholders vote, with regard to the deal or the conduct of the director in connection with the deal will be barred.

V. CROSS-BORDER M&A AND THE CHANGING ROLE OF LAWYERS

In mergers and acquisition transactions, the lawyers often have to perform some complex tasks, which includes the structuring of the transaction. When a lawyer creates the structure of the transaction, it means creating paths that help clients reach their goals not only legally but also in a cost-efficient manner.¹² By preparing this, the lawyer often guarantees that all the legal formalities are done, and all the laws which are applicable are complied with like that of the Companies Act or the Securities Act. They also guarantee the minimisation of outflow in the form of taxes or stamp duty or, for that matter, any such similar cost. When the general intention of mergers and acquisition transaction is expressed by the parties, then in order to complete that transaction, the acquirer's attorney will perform due diligence to obtain the information about the target company, which is relevant with regard to the mergers and acquisitions transaction. By way of due diligence, information asymmetry between the buyers and the

¹¹ William M Regan , Jon M Talotta and Ryan m Phillip ; "M&A Litigation 2020"; Law Business Research limited; <https://www.engage.hoganlovells.com/knowledgeservices/news/getting-the-deal-through-ma-litigation-2020>

¹²"Value Creation by Business Lawyers: Legal Skills and Asset Pricing", Yale Law Journal 94 (1984): 239.

sellers is reduced, and both are better educated and aware of the adequacy of prices paid for the transaction. When put differently, it is a way for the acquirer to confirm the evaluation of the value of the target company. Drafting and negotiating contracts are one of the most important roles that a lawyer plays. Legal contracts for mergers and acquisition deals reduce uncertainty between the parties by specifying in advance the conditions under which such transaction will be executed. In order to divide the various risks between the parties to the transaction, keywords such as warranties, representations, covenants and indemnification are used. These are often the most difficult conditions to negotiate in mergers and acquisitions transactions. For a large and complex mergers and acquisition deal, lawyers are entrusted with professional compliance tasks, which includes compliance with takeover laws in public mergers and acquisitions listed companies as well as compliance with antitrust and industries specific regulations.¹³

Globalisation and proliferation of cross border mergers and acquisitions have had a very vital impact on the corporate law practice, As can be seen in the way the role of lawyers in mergers and acquisition has changed. Earlier, while there was a cross border merger and acquisition activity, the lawyers primarily acted as consultants of the transaction and the compliance of the transactions' structures and contracts with regard to the law. A leading role in cross border mergers and acquisition earlier was typically being played by international law firms representing buyers on global affiliates where the entire project and most of the due diligence is carried out by the international law firms, and the role of Indian law firms was to review the documents for enforceability under Indian law and to assist in meeting their representatives.

The impact of globalisation has made a very profound impact on the corporate legal community on international practices and standards. Cross border trade has resulted in a gain of experience for the firms. The interaction of the Indian law firms with the international law firms and their clients have resulted in the transfer of knowledge system and practice to the Indian law firms, which now assume a much broader role in cross border merger and acquisition transactions. There are various mergers and acquisition transactions that take place on a regular basis, and such are undertaken by the Indian law firms alone or along with the limited participation of the international law firms.

The in-house counsel has been majorly impacted by the globalisation and cross border merger and acquisition transactions. The in-house counsel is very active in structuring the transactions

¹³ Umakanth varottil, "The impact of globalization and cross-border mergers & acquisitions on the legal profession in india"; <https://www.researchgate.net/publication/272243810>

and acknowledging the potential risks that may arise from the structured transaction. The possibility of incurring costs like stamp duty or taxes is of much concern for an in-house lawyer as such costs affect the commercial viability of a transaction directly. Globalisation and cross border mergers and acquisitions have provided opportunities but have also created challenges in front of the lawyers.¹⁴

VI. CONCLUSION

In this paper, it can be concluded that Mergers and acquisitions are considered a global trend relating to corporate restructuring across all the industries at a global level. It is an important part of a healthy economy and is a major way for businesses to generate profits for their owners and investors. If we go into the buyer's point of view, the motivation for mergers and acquisitions deals are primarily because of the rapid growth and gaining access to intangible assets such as human capital, customer capital, structural capital etc.; another motivation can include achieving horizontal and vertical synergies and adapting to change with regard to undervalued assets, mismanagement issues, and reducing taxes. And from the seller's point of view, what motivates them for selling a business can include the decision to monetise capital, maximise growth and top valuation.

Business around the world has become an international marketplace With national borders and traditional ways of doing business. In particular, the mergers and acquisitions Marketplace has become the mirror image of the Capital marketplace. Just in the manner by which businesses can find funds from all around the world, they can also sell and buy other businesses around the world. In the given circumstances, the role of legal and financial advisors Has rapidly evolved from a traditional and friendly advisory role to a more active trading partner. The market now demands speed, And the focus has shifted from personal relationships to the trading opportunity that the market has to offer. Thus, the traditional relationship between a lawyer and his corporate clients has also changed along with the changing world. It can be said that the person who develops an idea gets a job.

The role of a lawyer is just as important as many issues with regard to a contract. Are not only legal but also common sense issues. They easily transcend the legal system. The merger or acquisition of a company with a foreign subsidiary often entails competing for a jurisdiction that only experienced law firms can handle concurrently.

The globalisation of the legal profession has had a great impact on both the Indian as well as

¹⁴ Umakanth varottil, "The impact of globalization and cross-border mergers & acquisitions on the legal profession in india"; <https://www.researchgate.net/publication/272243810>

international law firms. The domestic legal community have reinvented itself to cope with the changing and challenging role of cross border mergers and acquisitions transactions. The boundaries between the Indian law firms and the international law firms have become clearer in the Indian market, which is due to the characters of the Indian market. The standards for local companies are rising, and at the same time, the ability of international law firms to establish themselves on Indian soil is limited. An analysis of India's legal practice of cross border mergers and acquisitions provides a basis for further exploration of the impact of globalisation on other emerging economies.
