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Strategic Amalgamation of Due Diligence & Corporate Governance in the Field of Merger and Acquisition in India

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ABSTRACT

We live in a world wherein the significance of mergers and acquisitions has become pivotal for the day-to-day functioning of corporations or companies in society. There exist scenarios wherein small corporates merge to have a compelling interest in this predator market. This article will provide a specific impetus to the Strategic Amalgamation of Due Diligence and Corporate Law in the ever-expansive field of mergers and acquisitions, which never ceases to amaze.

Before delving into the concept of Merger and Acquisition, one should understand the reality behind the formulation of such a vital concept. Integration, Synergies, expansion of business. Acquiring assets of the target company, more importantly, the consumer base and success. The idea of Merger and Acquisition is contained via S.230 to 240 Companies Act, 2013 . Understanding the process of compromise, restructuring of debt, and historical analysis of mergers and acquisitions in India. Types of mergers provide an analysis of the strategic decisions required to be undertaken for a successful merger. Amendment of existing policies inculcating novel policies. Analysis of Acquisition with due diligence and the checklist to be followed adequately and to the fullest extent.

Specific importance is provided to the concept of due diligence and corporate governance, as well as the essential checklist and prerequisite for due diligence. Target company's previous financial records and Intellectual Property assets. The Concept of Governance constitutes People, process, purpose and performance. Companies are provided an incentive to ensure that there is no conflict between the internal and external mechanisms of the company. No rule or regulation should be in contravention of the provisions contained in the Law or against the integrity and sovereignty of India. The Board of Directors will constitute the Internal management, which is pivotal for merger and acquisition transactions. External management involves the government and customers. The intersection between the strategic concept of due diligence and corporate governance is quintessential for successful M&A.

Keywords*: Merger & Acquisition, Due diligence, Corporate Governance, Mechanism of Governance, Compromise, Internal-External Mechanism, Intersection.*

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I. Introduction

Merger and Acquisition are effective and efficient methodologies that **expedite the implementation of a business or corporation**, along with rapid expansion and integration in various facets of society. The world is advancing at a fast pace, and India's prominence in the field of corporate expansion and understanding of the concept of Acquisition and compromise are improving adequately. The economy of the Indian country is growing at its utmost potential, and investors and big companies are vesting their interest in the Indian market in anticipation of increasing returns to investors and shareholders. In 2007, **India's corporate expansion** experienced a significant deal worth $40 billion; Mahindra and Mahindra played an instrumental role in taking over a German Company. One should understand that M&A is the cornerstone for the expansion of any corporate business; the complex process includes the transfer of ownership, assets, and liabilities from one company to another. It's paramount to understand the legal **implications of merger and Acquisition**. This article shall provide a way to understand the concept of merger and Acquisition in its entirety. It's quintessential for one to understand the conceptual understanding of compromise before delving into the intricacies of M & A. A merger involves a strategic decision between **two or more entities combining or amalgamating their operation with the sole intention of incrementing the competitive valuation of strength along with expansion and effortless entry into novel markets.** The term is not explicitly defined in the provision contained in erstwhile legislation of the Companies Act 1956 and Income Tax 1961, wherein the concept of merger and Amalgamation is elucidated via the Companies Act of 2013 in itself. **The Companies Act 2013, Chapter XV, S.230 to 240 Act of 2013**, governs the legal procedure involving mergers and Amalgamation. The novel Act of 2013 specifically focuses on the implementation of smooth and effective corporate governance and due diligence. Some rules are pre-requisitely associated with and govern the sections above, which companies have to comply with and adhere to duly. Companies (Compromise, Arrangement and Amalgamation) Rule of 2016[2]: Provide certain procedural and necessary submission of forms and attachments, appropriate due diligence, and time adherence in the process of the execution of merger and Amalgamation. This paper will provide impetus to the ubiquitous concept of compromise, M and A, and the intricate understanding of due diligence and corporate governance, which is a novel field, especially after the induction of the Act of 2013.

[2] Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (India)

II. Understanding the concept of compromise, merger and acquisition

The ever-increasing magnitude of company incorporation has led to preexisting companies modifying their Articles and Memorandum to adapt to society's change in functionality. The objective clause of the company plays a pivotal role. The existing company is required to state its **main object and business endeavor.** There exists diversity amongst competitors, and the resolution of disputed solutions pertains to the nature of the conflict or through the medium of compromise and settlement. Further, it's pertinent to note that to increment the value of taking over the company in its pursuit of Amalgamation or through the medium of takeover, the Companies Act provides provision for the demerger of existing business from the targeted company in order to repay a preexisting debt and to avoid the intricates of Corporate Insolvency Proceeding, submission into National Company Law Tribunal, filling for bankruptcy and compulsory winding up by **Tribunal, S.272 Act of 2013[3].**

(A) Compromise: Restructuring of Debt and Equity Capital Of Company

The term compromise is not explicitly defined under the Act of 2013 or the rules thereof; the term implies **"settlement of conflict through the medium of mutual consent, agreement and understanding"** contained via **S.230 to 232 of the Act[4].** The existence of a dispute involves the company, its creditor, or any class of them and may include a company and its members. Such a dispute will be resolved only by finding an amicable and resolution solution with respect to the conflict; the Tribunal will direct the manner of proceeding with the compromise. According to **S.230 Companies Act 2013[5],** arrangement is a wider concept than compromise. The word arrangement is inclusive of the re-organization of companies' share capital through the medium of consolidation of shares; the transferee company issues shares to the stakeholders concerning the transfer company. Re-arrangement and modification of share capital is possible even if there is no issue or dispute surrounding the company. Any member or class of members may resort to the procedure of compromise and arrangement. Once an application for compromise or arrangement is filed to the Tribunal or liquidator (for the proceeding of winding up), the Tribunal orders a meeting between the member and the creditor.

- **Material Facts** -: The company, applicant or any person filling the application to the Tribunal is required to disclose all material facts of the company, such as the latest financial position, latest auditing report and pendency of any other proceeding against

[3] *Id., § 272*
[4] *Id., § 232*
[5] *Id., § 230*

the company.

- **Share Reduction** -: Provide details of share reduction, S.66 Companies Act, 2013[6], if it is included in the compromise and arrangement process.
- **Corporate Debt Restructuring, 230(2)** -Consented by at least seventy-five percent of secured creditors, inclusive of all creditors responsible for providing statements, safeguard for secured and unsecured creditors, report of auditor for fund requirements, and conform with liquidity after restructuring. Valuation and conformity to the process of corporate debt restructuring at the Reserve Bank of India.
- **All Assets and Tangible Information -:** A valuation report constituting respect of all shares, tangible and intangible, movable and immovable property of the company as approved by registrar value
- **Sick Industrial Companies -A** Compromise and Arrangement to Buy the Creditors under the provisions of the Sick Industrial Companies Act, 2003[7].

No compromise or arrangement will be affected unless a Notice of the meeting of the Tribunal is provided to all creditors, members and debentures of the company, individually or collectively, along with the Security Exchange Board of India[8], RBI and Registrar of Stock Exchange disclosing the details of compromise and arrangement as provided via the registrar valuer. If three-fourths, representing the majority of creditors, agree to compromise, then the process will be sanctioned by the Tribunal. The Tribunal, through S.231[9], has the authority to sanction the order of compromise and arrangement, give appropriate direction for the process or direct the company to undergo liquidation **S.273 of the Act[10].**

(B) **Merger and Acquisition**

The expansion of business over time signifies the inorganic growth process and utility of products and services. Merger and Acquisition involves the manifestation of an inorganic process, while merger means and includes the unification of two entities into a single entity. Acquisition is a situation wherein one company/association buys another, where the decision of the Board of the company is involved in approving and purchasing the business of another. Further, the process of demerger consists of the division of a single entity with the purpose of being acquired by the targeting company. The term merger is not explicitly defined via the

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6 *Id., § 66*
7 Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (India).
8 Securities and Exchange Board of India Act, 1992(India)
9 Supra Note 2 § 231
10 Supra Note 2 § 273

Companies Act 2013 or the [11]**Income Tax Act 1961(ITA).** The main object of the merger is the organization of a business entity as one, not just the accumulation of assets and liabilities of another. Merger is quintessential in economies of scale and access to various sectors for the acquiring company or merged entity. **S.2(1)(b) ITA[12] defines** "amalgamation" as the merger of one or more than one company with another company or the merger of two or more companies to form a new entity as a whole. It is pertinent to note that after Amalgamation, the assets and liabilities of the transfer company are under the ambit of the transferee company. **S.232 Companies Act 2013[13]** facilitates the provision of merger and Amalgamation similar to the erstwhile provision of **S.394 Companies Act, 1956[14].** The Novel Act of 2013 permits cross-border mergers, which allows both Indian and foreign entities to merge in compliance with and approval of the Reserve Bank of India contained in S.234 of the Act. A foreign company is a board corporation registered outside India, whether or not it has a place of business situated in India. A Transferor company can acquire the shares of a dissenting shareholder, wherein the approval of transfer is approved by holders having a nine-tenth value of shares contained in S.235 of the Act.[15]. The Companies Act also provides an option to obtain minority shareholding via S.236 of the Act[16]. The Acquirer or transferee company is required to notify the transferor company of their intention to buy shares of the minority holder of the transferor company.

III. History of merger and acquisition in India

M & A plays an instrumental role in the transformation of various sectors in India, as observed during the Second World War. The economic and political situation during the war eventually led businessmen to amass a colossal amount of income through the medium of high profits and dividend activities. Ultimately leading to the rapid craze of businessmen to acquire and corner share of companies in the open market. This practice of acquiring companies through obtaining control and management. The net effect of gaining control over both the ownership and managerial activities into the hands of prominent businessmen compelled the Britishers to liquidate their holdings at an enormous price before India obtained Independence. The post-war era is regarded as the "era of M & A," a colossal number of mergers and Acquisitions through industries constituting cotton, textile, jute, banking and tea plantations. The predictor implementation of anti-big governmental regulations in the 1960s and 1970s era significantly

[11] Income Tax Act, 1961(India)
[12] *Id.* § 2(1)(b)
[13] See supra Note 2 § 232
[14] The Companies Act, 1956, § 394 (India)
[15] Supra Note 2 § 235
[16] Supra Note 2 § 236

deterred the activities of M & A. The government advocates mergers and acquisitions for sick industrial and company units.

Furthermore, the formulation of the Life Insurance Corporation and the vital aspect of naturalization in 1956 led to the takeover of 243 insurance companies. India's liberation policy, 1991, states the deregulation of industries and the financial sector, as well as the liberation of trade and foreign exchange reforms and policy. The amendment of **the Monopolistic Restrictive Trade Policy (MRTP)[17]** and other legislations paved the way for large businesses and foreign entities to engage in the practice of mergers and acquisitions. The SEBI (Substantial Acquisition of Shares and Take over) Regulations 1994[18] and 1997[19] provide the "government with the ability to allow companies to buy back their share, significantly affecting the functioning of the corporate world in India. The Erstwhile legislation of MRTP was replaced with the Competition Act of 2002[20], which is regulated by the Competition Commission of India (CCI), which is empowered to issue directions, enable fair practice, and avoid anti-competitive agreements. The advent of The SEBI (Substantial Acquisition of Shares and Take over) Regulations 2011[21], Companies Act 2013,

IV. UNDERSTANDING THE CONCEPT OF TYPES OF M & A

Merger is a tool utilized by companies and corporations to expand their operations. It is a consensual understanding and strategic integration of two entities into one. The purpose of a Merger is to increase the long-term probability of merging two entities into one, with the sole purpose of exploring new avenues, lowering operation costs and creating a novel commonplace.

(A) Types of Mergers

Mergers are classified into the following types: Mentioned

a. Horizontal Merger -:

A horizontal merger occurs when "**two merging companies**" produce a similar or indistinguishable product and operate at different stages of production combined as one. It is when two companies competing in the same market combine as one entity. Vodafone India and Idea Cellular Limited are primary examples of horizontal mergers.

[17] The Monopolies and Restrictive Trade Practices (Amendment) Act, 1991 (58 of 1991)
[18] SEBI (Substantial Acquisition of Shares and Take over) 1994, Reg 3
[19] SEBI (Substantial Acquisition of Shares and Take over) 1997, Reg 3
[20] The Competition Act, No 12 of 2002(India)
[21] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (India).

b. Vertical Meger -:

This merger occurs when two companies are working at different stages of production for a similar good combination. A vertical merger adversely affects competitors' ability to gain access to important product distribution due to merged entities. If the manufacturer merges with the distributor, then such a merger will affect distributors in the same sector. Tata Steel and Corus is a classic example of a vertical merger. Tata Steel, an Indian Steel company, acquired Corus for $12.11 billion.

c. Congeneric Meger

Congeneric mergers are a form of merger involving companies of two or more than two entities or companies operating in different industries or markets. The aim of this kind of merger is the creation of a colossal company with a more diversified portfolio, reducing Independence in any market or product. Pure conglomerate involves companies that are unrelated to each other; on the other hand, mixed conglomerate involves companies looking to expand their product in the market.

d. Market Extension Merger

A market merger extension involves "a merger between companies selling the same product or services but operating in different markets. The goal is to gain accessibility and ensure a colossal customer base. Mittal Steel and Arcelor Steel are examples of this kind of merger.

e. Product-Extension Merger

It involves companies that sell their goods, services, and products, but unlike market extension mergers, they operate in a similar market to their competitors. It is pertinent to note that the two companies are not alike but related. Pepsi Cola's Merger with Pizza Hut.

(B) Types of Acquisition

Acquisition refers to colossal companies or entities acquiring varied small companies, developing them, and acquiring ownership. In this process, one company purchases another and obtains the controlling interest in the share capital of another.

- **Stock Purchase** -Stock purchase is also known as stock acquisition, wherein a company or individual purchases the majority of shares of another company or entity. By acquiring the majority of the stock of the targeted company, the acquiring company obtains total control over the management and affairs of the company.

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- **Asset Purchase** -An agreement between the Buyer and seller, acquiring specific assets and liabilities from the seller through an asset of the purchase agreement. Any asset or liabilities obtained will come under the ambit of the new entity

V. Due diligence: complete overview and disclosure of target company

Due diligence refers to the process of thorough analysis and research methodology to investigate the overall operation of a company. The process of due diligence is undertaken by various authorities, which includes the internal team, external advisors, and buyers' knowledge and experience pertaining to M & A of the industry. Due diligence in the process of merger and Acquisition allows the Buyer to confirm certain pertinent information and disclosure of the seller, such as contractual obligation, company finance, auditing statement, intellectual asset, and tangible and non-tangible assets. It is quintessential to conduct due diligence conducted by investors in pursuit of minimum risk of acquisition deals. Due diligence allows buyers in the M&A process to provide undisclosed details regarding the company's financial statement and information on the business to be acquired. The process of gathering, obtaining information and confirming such disclosure is essential for the valuation of the acquiring company. The Buyer signs a Letter of Intent, which commences the process of due diligence in its entirety. The process of gathering and comprehending information about the target company's finances and other disclosures provides for a smooth transition of acquiring the company and evaluating all possible risks associated with the process of M&A. The acquirer conducts an interview procedure with anyone directly or indirectly involved with the company or association in order to safeguard itself from any legal obligation arising from the Acquisition or merger of the target company. Financial information includes balance sheets, income statements, credit reports, tax returns, audit and revenue reports. Company information will provide details of ownership of the company, assets, liabilities, compliance with provision of laws, and copies of annual reports. Product information provides for impetus into the list of services offered by the target company and the prediction in the near future.

(A) Pre-Requisite of Due Diligence in Merger and Acquisition

The complexity of M&A obliges both the buyers and sellers to gather and analyze quintessential information in pursuit of the completion of a successful transaction. The disclosure of information provides both the parties to the compromise, understanding and completion of the deal to have a fair ideology of all information collected in accordance and conformity with the due diligence checklist.

The seller provides key information on the company's operation and finances, and no details should be exaggerated or inflated. The checklist covers all relevant information and is organized into categories: **Documents, Articles and Memorandum, Financial Records, Tax Information, Sales and Marketing, Human Resources, Intellectual Property, and Assets.**

1. **The Buyers Perspective**

Investigating and understanding the company through the medium of collecting, reviewing, and analyzing information garnered from the organization, employees, product, customers and marketing strategic assets. The buy side of due diligence revolves around collecting and disseminating the target company's financial statements and the risk associated with merging or acquiring the target company.

2. **Selling Side Perspective**

As already stated, due diligence involves a detailed process and analysis of the business in relation to its size, structure and details obtained. A target company should prepare all details in advance for the speedy redressal of the process. Due diligence provides the real market valuation of the seller's company. A careful and systematic procedure allows the seller to understand the realistic purchase price by the Buyer or acquiring company after the calculation of all the assets in accordance with the checklist of due diligence of Merger and Acquisition.

3. **Identification of Potential Risks and Liabilities**

Due diligence gives the acquiring company a clear, concise and detailed overview of the target company's operation and financial status, identifying potential risks and hazards, such as compliance norms or environmental issues. It also provides for timely review of contractual obligations to avoid a complex and lengthy litigation process.

4. **Valuation of Target Company**

A thorough review and analysis process provides an opportunity for the acquiring company or merging entity to understand the real valuation of the target's financial company statement. The impetus of real valuation avoids overpaying for the valuation of the target company.

5. **Targets Company's Business and Operation**

Companies understand the workings and operational management of the target company. An informed decision regarding the management and its structure allows buyers to make a strategic decision to purchase the company in lieu of a potential return on investment in the near future.

6. **Recognizing Potential Synergies**

Synergy involves interaction and cooperation, as well as the valuation and performance of two companies when combined in their entirety rather than having an individual separate presence in the market or industry. Due diligence aids and assists in the process of identifying successful synergies between companies. Allowing powers to awaken potential synergies

7. **Complying with Legal and Regulatory Requirements**

Due diligence is pivotal in understanding the company's goals and objectives and addressing any potential legal, financial and regulatory framework that arises at the time of the transaction's completion. Companies need to understand the other company's compliance and observe that there is no contravention of any provision contained in the Law.

VI. Type of Due Diligence: In The Field of Merger and Acquisition

The process of due diligence is of utmost importance, but businesses need to recognize its crucial impact on mergers and acquisitions. Warren Buffet once said, "A sale pitch gives you a price where due diligence gives you a valuation of the pitch. The chances of a successful transaction of acquiring or merging assets of a target company are more successful when the procedure of due diligence is adequately followed.

a. **Operational Due Diligence-** helps to understand the overall operation of the company, its workforce, process and the investment in the company. For any feasible investment, it's pivotal for companies to inquire into the operation of the target company and provide only a fair valuation for the targeted company.

b. **Legal Due Diligence** -Collection of legal documents and information concerning the target company. To ensure all legal compliance is duly adhered to and in compliance with the M&A checklist adequately followed to mitigate any possibility of risk in the near future.

c. **Financial and Accounting Diligence -:** To determine the financial health of the target company, buyers and acquires pre-requisitely indulge in financial clarity and determine the true picture of the economic status of the company along with the balance sheet, income and cash flow statement

d. **Tax Diligence:** An amount that the individual has to pay to the government; tax diligence comprehends the complete portfolio of the target company. The inclusion of tax, guarantee and indemnity is pivotal as the acquiring company will be liable for the

Act of the target company's Acquisition via S.240, Companies Act, 2013[22].

e. **Reputational Due Diligence** involves identifying the "red flag" in new business and mitigating the risk associated with the company. The acquiring company should note that all regulatory, legal and societal checks are undertaken, along with extensive background checks.

f. **Market and Commercial Due Diligence:** If a corporate or private equity firm is interested in acquiring another company, it must undergo a thorough examination of the company's current and projected performance. Commercial due diligence provides the buyers with an impetus to understand the target company's market status.

g. **IP Due Diligence:** Evaluation of the quantity and quality of the assets concerning intellectual property, as well as details of pertinent firms safeguarding their intellectual property rights. The valuation of IP assets may exceed the value of company assets and becomes a crucial aspect of the M&A process.

VII. Corporate governance: understanding norms of corporate

Ever since the inception of the phrase "The market for corporate control," coined by **Professor Henry Maine in 1965**, the phenomena of mergers have been adequately followed and associated with the strategic concept of Corporate Governance. The corporate world is progressing at a rapid pace in India; a few decades ago, it was observed that business practices were unexacting, all the employees of the company and firm were well devoted and reliable and focused upon the goal of working for the welfare of the people and perform with their utmost potential to increment the value of the company. **The reminiscence seems apparent: Lower stock value, in comparison to its real and intrinsic valuation, makes the price more attractive.** The concept of corporate governance refers to the top management controlling the process of management and valuation creation amongst various claimants in the society. There was no major need to focus on multiple stakeholders and set specific rules and regulations for regulating the conduct of internal factors. The advent of globalization in 1991 increased competition in the financial and economic world; every company desires to strive and oust its competitor. The Concept of Corporate Governance has garnered a wider meaning. **It includes a set of rules and regulations that regulate the behavior of a corporation, controlling and directing the firm mindset in the general interest of its stakeholders.** Corporate governance involves the practice and the role of boards, corporations without which no major decision is

[22] See supra Note 2 § 240

undertaken in modern society.

The Definition provides for two concepts of value creation and value transference, along with claimant and accountability. Value is vague, capturing the understanding of economic valuation, which turns into profit and efficiency. Hence, effective governance is essential. Claimants include stakeholders who have a direct or indirect relationship with the firm. The governance mechanism is classified into internal and external aspects of the firm. **If the internal mechanism is well-governed, there will be no relevant need for an external mechanism**. The internal mechanism includes the composition and structure of the Board, Chief Executive Officer (CEO), nature of employment and reward for the performance of the employee. External mechanisms of corporate governance include market constituting capital, product, managerial labor service and corporate control. Competition ensures adherence to the principle of "survival of the fittest." Managers of better-performing firms will be rewarded, and those of worse-performing will be penalized. Shareholders of inefficient companies will sell their shares, thereby reducing the price of the company and creating an incentive for an outside out of the company to acquire control in management for restructuring of the firm.

VIII. Strategic concept of corporate governance in the field of M&A

Merger and acquisition practices commenced to expand after globalization; companies laid the cornerstones for growing, diversifying, and developing their global market presence. Merger and Acquisition involves **"The unification of two or more than two companies or entities with the consensus mindset of achieving successful endeavor in the merger process and obtain maximum benefit from the merged entity."** Corporate governance plays a decisive role in the transaction or scheme of merging acquisitions. Corporate governance, good governance, and due diligence share an interdependent relationship. Good corporate governance is pivotal to the success of M&A transactions; the practice of good governance provides for companies to perform effectively and diligently; otherwise, shareholders of the company reduce their interest in the corporation, and another capable management will take over the overall interest. Developed companies acquire "inefficiently managed companies"; with appropriate management, the acquiring company will acquire strategic synergies to compete in a competitive market. Inappropriate management eventually leads to a lower price of the share, and the acquiring company acquires the target company with the intention of further expansion and synergy purposes. Target companies increase their practice of corporate governance through conformity of laws governing the corporation and duly complying with internal and external mechanisms contained in the corporate governance of a company. Stakeholders play a vital role in managing the operation of the company, ultimately affecting its success. Stakeholders can be internal or external stakeholders. Internal stakeholders constitute direct relationships, and management, employees, and investors represent the general interest in the company. External stakeholders have an indirect relationship with the company but are affected duly by the company's actions and outcomes. These include government, community, consumers and associations. In companies entering into an M&A transaction, the internal mechanism is tasked with making the appropriate decision in the interest and welfare of the company

IX. Corporate governance mechanism in M& A

Corporate governance and M& enjoy a symbolic relationship that is mutually dependent upon each other. M& A incentive for companies to enhance their governance; the concept of a market for corporate control provides that "poorly governed companies" would target the target for Merger and Acquisition. The existence of a possible takeover requires the target company to boost its finances and have majority shareholding along with enhancement of governance policies. Secondly, it's observed that better corporate governance practices lay the impetus for the enhancement of the valuation of the target company in the scope of the acquiring company. Corporate governance acts as a check and balance mechanism, preventing companies from reducing the deal by following the checklists and checklists duly provided in the Checklist of Merger and Acquisition in the process of due diligence. **An M&A transaction is crucial in the life of a company;** there are several economic and business factors, objectives and goals for companies to embrace their M&A and to express their ideology of acquiring and merging with the target entity along with having provision of horizontal, vertical and conglomerate mergers. Due diligence is committed to avoiding any adverse issue that arises from over-paying for a target company and following the due provisions of corporate governance.

(A) Internal Stakeholders

Individuals having a direct relationship with the company, such as through the medium of ownership, investment or employment. Their role in corporate governance depends pertaining to their interest in the stakeholders of the company -:

i. **Employees' decisions** pertaining to the general interest of the companies are undertaken via the top-level management, and employees have no authority to negate the management's decision-making process. Similarly, in a merger and acquisition deal, the top-level management makes an informed decision and negotiates the M&A transaction. Employees play a vital role in the process of mergers and transactions as they perform at the ground level and are responsible for the effective work and management of the company. If the company fails to look into the interests of the workforce, the employee will resist this transaction, eventually leading to the failure of such a deal. Hence, this is where the principle of corporate governance comes into existence to aid and assist in contributing to the success of the transaction.

ii. **The concern of Shareholders-** All the work that a company performs right now is production, selling, distribution, making informed decisions and diversification, and the utmost aim is to satisfy or produce utility for the consumers in the market. After the merger and acquisition procedure, the share price and valuation of both companies are affected in response to the cost and execution of the transaction. It is observed the valuation of the share price of both companies or merged entities will increase in the long run. However, after the M&A, there will be an increase in the number of shareholders and the possibility of even diluting the shareholding power in the resultant company. The shareholders will support the transaction only if they are benefited adequately. Shareholders of the individual company will exit if the transaction does not provide them any benefit.

iii. **Board of Directors(BOD) -:** The role is vital in M&A; the BOD are essentially the ones negotiating the deal and entering into compromise with the company stakeholders. It is the primary duty of the Board of directors in M&A transactions to ensure synergies between the company's stakeholders and mitigate risk and the performance ratio of the firm. Good governance is the perfect cornerstone for achieving the goals of the corporation; the Board of directors is tasked with the responsibility of mitigating and managing the risk, ensuring maximization of shareholders' valuation, and providing a fair, reasonable and strategic decision that directly or indirectly plays a role in effecting the success of the deal. When the Board of a company desires to merge or acquire another or get acquired by another, all possibilities and impact of the transaction should be duly considered. The Board of Directors should proceed with the merger if there is a long-term benefit, as the transactions amount to a reduction in shareholding.

iv. **Board Independence -:** The managerial function of M&A is quintessential, and the concept of independent director has come into existence. Since managers and majority controlling shareholders have a financial or personal interest in this transaction, an independent director is called upon to act as a watchdog. The role of an independent director is even more crucial in the interest of related party transactions contained in

S.2(76), Companies Act, 2013[23]. Principles of corporate governance necessitate the existence of an auditing company or a special committee consisting of independent directors to conduct due diligence on the financial and legal aspects of the target company.

(B) External Stakeholders

External advisors perform the role of gatekeepers and mitigate corporate governance decisions in providing M&A transactions. Accounting firms and investment banking are often called upon to give the fair value of deal transactions. Even lawyers are essential in assuming the role of trust advisors as corporate managers and controlling shareholders, bettering the choice, enhancing the valuation, and mitigating risk.

i. **Government**—One obstacle in the company's path and functioning involves government intervention. The government will intervene in any merger or Acquisition if it negatively affects the consumers, significantly affects a group of people, or poses a threat to the security and integrity of a country.

ii. **Trade Unions** –Trade unions are essential external stakeholders when involving mergers and acquisitions in cross-border transactions. A foreign company is required to adhere to the demands and regulations of the union. Otherwise, the trade union within its intra-vires shall oppose the deal. Often, employees suffer adversely with cross-border transactions; there is a requirement for trade unions to provide an impetus as an external mechanism of governance to provide employees with a suitable wage in accordance with their duties performed. Collective bargaining as a concept ensures speedy disposal and redressal of issues, ensuring flexibility and protection for the workforce and their employment.

iii. **Other Authorities and Department**s –Sectoral heads and departmental control have authority over certain transactions concerning mergers and acquisitions. The transaction between the merged entAcquisitionisition of a target company will falter if the merged entities are negligent towards sectoral and other regulations. A merger between Rcom Aircel failed due to requirements from various authorities, which is a cumbersome process.

X. INTERSECTION BETWEEN DUE DILIGENCE AND CORPORATE GOVERNANCE

Merger and Acquisition transactions are a vital and even critical component of a company's

[23] Supra Note 2 § 2(76)

growth strategy. A successful acquisition is only accomplished when All due diligence is adequately followed. Due diligence is a process of thoroughly examining the financial and legal complications along with the assets and due conformity to the rule of Law. The acquisition company conducts interviews with Target's employees and customers. Corporate governance is a concept involving rules, practices, and progress by which the company governs and functions with due diligence for the welfare of the stakeholders and the best interest of all those concerned. Specialists describe corporate governance as the appropriate functioning of people, purpose, process and performance of the company. The governance ensures that the company is directed and governed appropriately to achieve goals and objectives in the general interest of stakeholders, employees, suppliers and customers. Before the commencement of the merger and acquisition process, companies conduct their due diligence on the target company and understand the real valuation in order to avoid overpaying for the intrinsic value of the company. Understanding of the reputational status of the target company in the response to the customers. The Acquiring company follows the rule of corporate governance and no contravention of any provision contained in the Law; the target company's liabilities and assets come under the ambit of the acquiring company as contained in S.240 Companies Act. It's quintessential to note that "maybe the company will not have assets." Still, their intellectual property assets will be worth acquiring the company in order to expand the business of the acquiring company. The merger and acquisition process ensures that due diligence is adequately followed and that ubiquitous understanding between internal and external mechanisms of corporate governance. A company with inefficient valuation will be easily acquired and will be a dilution of the stakeholder's shareholding pattern. The intersection is crucial as due diligence is interdependent upon each other.

XI. CONCLUSION

The phase of globalization in 1991 led to the expansion of understanding of the concept of merging Acquisition. It is observed that properly administered companies target any inefficient or improperly managed company, which improves the synergy of the acquiring company. The idea of a merger is essential in today's day and age, but the intersection between corporate governance and due diligence is a key aspect. With an understanding of all the reports of the target company and the potential synergy of the companies, any transaction would be beneficial to the company's stakeholders as it leads to share dilution. There is a reason merging entities apply the concept of strAcquisitionisition wherein "only those corporates which provide benefits" and reeling under the ambit of debt or demerge their assets to sell to another company. Demerger provides for diversification and also conceptual analysis of vertical, horizontal and conglomerate mergers. Acquisition concerns itself with shareholder agreement, equity valuation and the rights of the shareholders. The Board of Directors of the company is a vital aspect of internal management and mechanism of corporate Law. They work in conjunction with the employees at the company's ground level. In order to safeguard the interests of stakeholders, it's quintessential that there is an equilibrium between internal and external mechanisms. Companies conduct their research, analysis and examination of their conduct. Financial report, auditing report, investment report and financial statement. All details of assets of the target company, compromised **via s.230 to 233 Companies Act, 2013**[24], for following the process of compromise through tribunal orders. The concept of foreign investment and cross border is contained in **S.234 Companies Act,2013**; a company's association with a foreign company is mentioned under the Act. The intersection between due diligence and corporate governance states that "poorly and inefficient companies cease to exist" and eventually will be taken over by another company having well sound management.

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[24] Supra Note 2 § 233

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