“A MERGER STRATEGY ANDCORPORATE ACQUISITION AN ANALYTICAL STUDY”

DISSERTATION

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LIST OF ABBREVIATION

A.I.R.	:	All India Reporter
SCC	:	Supreme court cases
H.C.C	:	High court cases
HC.	:	High court
SC	:	Supreme court
CAPT.	:	Captain
e.g.	:	Example
I.P.C.	:	Indian Penal Code
Prof.	:	Professor
S.	:	Section
U.S.A.	:	United States of America
V.	:	Versus
i.e,	:	That is
ART	:	Article

LIST OF CASES

laid down in Gopal Dass v. D.M,

Sharma v. Srikrishna

Romesh Thappar, v. State of Madras.

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CHAPTER 1-

INTRODUCTION

Mergers and acquisitions are increasingly becoming strategic choice for organizational growth and achievement of business goals including profit, empire building, market dominance and long term survival. The ultimate goal of this strategic choice of inorganic growth is, however, maximization of shareholder value. The phenomenon of rising M&A activity is observed world over across various continents, although, it has commenced much earlier in developed countries (as early as 1895 in US and 1920s in Europe), and is relatively recent in developing countries. In India, the real impetus for growth in M&A activity had been the ushering of economic reforms introduced in the year 1991, following the financial crisis and subsequent implementation of structural adjustment program under the aegis of International Monetary Fund (IMF). In recent times, though the pace of M&A has increased significantly in India too and varied forms of this inorganic growth strategy are visible across various economic sectors. [1]The term mergers and acquisitions encompasses varied activities of stake acquisition and control of assets of different firms. Besides, there are several motives for different types of mergers and acquisitions seen in corporate world. This chapter provides an understanding of the concept of mergers and acquisitions from industry and regulatory point of view and motives for mergers and acquisitions. Intense competition, rapid technological change, major corporate scandals and rising stock market volatility have increased the burden on companies to deliver superior performance and value for their shareholders. In the modern 'winner takes all' economy, companies that fail to meet this challenge will face the certain loss of their independence, if not extinction. Corporation restructuring has enabled thousands of organisations around the world to respond more quickly and effectively to new opportunities and unexpected pressures, thereby reestablishing their competitive advantage. In the late twentieth and beginning of twenty first century,

[1]http://shodhganga.inflibnet.ac.in/bitstream/10603/103368/15/15_chapter-i.pdf last accessed April 16, 2017

corporate restructuring by means of mergers, acquisitions or amalgamations have become a major force and anthem of new financial and economic environment across the globe.[2]Growth is the key objective of any business entity, irrespective of the political dogma/party which runs the country, in which such business entity functions. But when growth strategies do not visualise or contemplate increase in capital base, companies would go in for consolidations, mergers, amalgamations and management buy outs. The trend towards globalization of all national and regional economies have increased theintensity of mergers, in a bid to create more focused, competitive, viable, larger players in each industry.

Basic Concepts

1. **Corporate Restructuring**

Corporate Restructuring involves reorganisation and rebuilding of areas within an organisation which requires special attention from the management. It includes a complete set of tools to transform existing organisational structure or capital of a company, in order to achieve its corporate objectives and to attain certain strategic and financial synergies. It refers to those activities that enhance or compress a firm's operations or substantially change its financial structure or bring about a significant change in its organisational structure and internal functioning. Simply stated, corporate restructuring is the comprehensive process by which a company can consolidate its business operations and strengthen its position for achieving the desired objectives- staying synergetic, slim, competitive and successful. To sum up, corporate restructuring can be defined as any change in the business capacity or portfolio that is carried out by an inorganic route or a change in the capital structure of a company that is not a part of its ordinary course of business or any change in the ownership of or control over the management of the company or a combination thereof. It occurs inmyriad ways in the form of mergers, acquisitions, spin-offs, leveraged buy-outs, divestitures, demergers, joint-venture, equity-carve outs, etc. As the focus of research is on Mergers and

[2] Ibid no. 1

Acquisitions (M&As), the study will be focused on corporate restructuring through M&As. M&As are the most popular means of corporate restructuring activities. They have played an important role in external growth of a number of leading companies the world over.[3]

2. **Mergers**

A merger[4] is said to occur when two or more companies combine into one company. In a merger, one or more companies may merge with an existing company or they may merge to form a new company. Most generally mergers mean any transactions that forms one economic unit from two or more previous ones. According to Weinberg and Blank: "A 'merger' may be defined as an arrangement whereby the assets of two companies become vested in, or under the control of, one company (which may or may not be one of the original two companies) which has as its shareholders or substantially all, the shareholders of the two companies. A merger is effected by the shareholders of one or both of the merging companies exchanging their shares (either voluntarily or as a result of legal operation) for shares in the other or a third company.Economists classify merger into following four categories[5]:

(1) Horizontal Merger: A horizontal merger occurs when one firm combines with another in its same line of business. It is combination of two competing firms belonging to the same industry and are at the same stage of business cycle. When two book publishers or two retail food chain merge with another to gain dominant market share, it is a case of horizontal merger. The main purpose of such merger is to obtain economies of scale from the larger combined unit. The economics of scale are obtained by eliminating duplication of facilities and operations and broadening the product line, reduction in investment in working capital, elimination of competition through product concentration, reducing advertising costs, increase in market segments and exercise of better control on market.

[3]http://www.icaiknowledgegateway.org/littledms/folder1/chapter-13-merger-acquisitions-restructuring.pdf last accessed April 16, 2017

[4] Ibid no. 03

[5] Ibid no.3

(2) Vertical Mergers: Vertical merger refer to the combination of two entities at different stages of the industrial or production process within the same industry. For example, in pharmaceutical industry, one could distinguish between research and development of new drugs, the production of drugs and the marketing of drug products through retail drugstores. If a firm engaged in production of drugs merges with the firm engaged in marketing, it will be a case of vertical merger.

(3) Congeneric Mergers: A congeneric merger is achieved by acquiring a firm that is in the same general industry but neither in the same line of business nor a supplier or a customer.Congenric[6] means 'allied in nature or action', hence a congenric merger involves related enterprises. Examples of these mergers include the merger of a machine tool manufacturer with the manufacturer of industrial[7] conveyor systems, merger of banking company with a leasing company as well as insurance companies takeovers of mutual fund companies. The benefit of this type of merger is the resulting ability to the use the same sales and distribution channels to reach customers of both business. For instance, merger between Hindustan Sanitary ware Industries Ltd and Associated Glass Ltd is an illustration of congenric mergers.

(4) Conglomerate Mergers: Conglomerate merger is a combination in which a firm established in one industry combines with a firm from an unrelated industry. In other words, firms engaged in two different/unrelated economic business activities combine together. In this kind of merger, the acquiring company is not proposing to expand in its own field of endeavor but in an altogether different sphere. According to Weinberg and Blank: "A conglomerate take-over or merger involves the coming together of two companies in different industries i.e. the business of the two companies are not related to each other horizontally (in the sense of producing the same or competing products), nor vertically (in the sense of standing towards each other in the relationship of supplier and

[6]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf last accessed April 16, 2017
[7] Ibid no. 6

buyer or potential supplier and buyer).[8]The business of two companies lacks any commonality either in their end product or in the rendering of any specific type of service to the society. This is a type of merger of companies which are neither competitors, nor complementaries nor suppliers of a particular raw material nor consumers of a particular product or consumable. The merging companies operate in unrelated markets having no functional economic relationship. A typical example is merging of different businesses as like manufacturing of cement products, fertilisers products, electronic products, insurance investment and advertising agencies. L&T Ltd. and Voltas Ltd. is an example of a conglomerate companies. In the Indian context, takeover of Mohta Steel Industries Limited (MSK) by Vardhman Spinning Mills Limited (VSML) is an illustration of conglomerate merger. In the international arena, Gulf oil's acquisition of Montgomery Ward illustrates a conglomerate merger.

(5) Reverse Merger: In the conventional method, the sick company is absorbed by the profitable one (normal merger). On the other hand, if reverse situation takes place, i.e. if sick company extends its embracing arm to the profitable company and in turn absorbsit in its fold, this action is called reverse merger. In several cases, the survival of a loss making or sick company becomes important for many strategic reasons such as public interest. In such cases, the law does provide encouragement through tax reliefs for the companies which are profitable but get merged with the loss making companies. As such a merger is not a normal or a routine, is called a reverse merger. It gives the profit making company automatic tax entitlement benefits of carry forward and setoff of losses without complying with provisions of Section 72A of Income Tax Act.

[8]http://www.ey.com/Publication/vwLUAssets/Assocham_White_paper_Companies_Act/$File/Assocham_White_paper_Companies_Act.pdf last accessed April 16, 2017

3. **Acquisition**[9]

Acquisition, in general sense, is acquiring the ownership in the property. In the context of business combinations, an acquisition is the purchase by one company of a controlling interest in the share capital of another existing company. An acquisition may be affected by the following:

1. Agreement with the persons holding majority interest in the company management like members of the board or major shareholders commanding majority of voting power.
2. Purchase of shares in open market.
3. Making takeover offer to the general body of shareholders.
4. Purchase of new shares by private agreement.
5. Acquisition of share capital of one company by either all or any one of the following form of considerations viz. means of cash, issuance of loan capital or issuance of share capital.[10] Acquisition may also be effected by acquiring assets. Acquirer may purchase only assets or some specific assets and not all the assets and liabilities of the company. An acquisition can also be defined as an act of acquiring effective control of one company over assets or management of another company without any combination of companies. Thus, in an acquisition, two or more companies may remain independent, separate legal entities, but there may be a change in control of the companies. But in some cases, acquisition may also be aimed simply to consolidation of shareholding or voting rightsin a company without intending to takeover the control and management of the company. It can be noted that in acquisition unlike merger, the target company' identity remains intact. Unless the acquirer company does not specifically decide to merge the target company with itself and carries out all the legal processes required to complete the merger, the target/acquired company continues to exist as earlier. What changes is the entity that now controls its management or policy decisions or the

[9]http://www.corporatelivewire.com/admin/images/guides/872702413.pdf last accessed April 16, 2017

[10] Ibid no. 10

composition of its boards of directors.[11] There are many ways in which control over a company can be acquired. These are:

1. Acquiring i.e. purchasing a substantial percentage of the voting capital of the target company.
2. Acquiring voting rights of the target company through a power of attorney or through a proxy voting arrangement.
3. Acquiring control over an investment or holding company whether listed or unlisted, that in turn holds controlling interest in the target company.
4. Simply acquiring management control through a formal or informal understanding or agreement with the existing person(s) in control of the target company. In today's corporate world, both in India and abroad, acquisition has been well accepted as a growth strategy. Every day in the newspapers, there is some news about some new acquisition. Therefore, there are umpteen number of examples of acquisitions that can be given.

4. **Takeovers**

Takeover[12] is a general term used to define acquisitions only and both terms are used interchangeably. The takeover can be defined as 'acquisition of a certain block of equity capital or controlling interest in a company which enables the acquirer to exercise control over the affairs of the company. Weinberg and Blank, pioneers of the law on mergers and takeovers have defined 'take-over' as follows: "A 'take-over' may be defined as a transaction or series of transaction whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company. Takeover is a part of business strategy whereby an individual, group of individuals or a company, directly or indirectly acquires shares or voting rights in a target company to gain control over the decision-making power of management. Where the shares of the company are closely held by a small number of persons, a takeover may be effected byan agreement with the shareholders. However, where the shares of a company

[11] Ibid no. 1
[12] Ibid no. 1

are widely held by the general public it involves the process as set out in SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011[13]. Takeover or acquisition can be categorised into following two categories:[14]

(1) Friendly Takeover/Acquisition: It is a takeover effected with the consent of target company's executives or Board of Directors. If the target management is receptive to the acquirer's proposal, it may endorse the merger and recommend shareholder's approval. If the shareholders approve the merger, the transaction is consummated. But if the parties do not reach to an agreement during negotiations, the proposal of merger stands terminated and dropped out. The directors of the target company may agree right from the start or after early negotiations or even after public opposition to the bid (which may or may not have resulted in an improvement in the terms of the proposed offer) or the directors of target company may actually have approached the acquiring company to suggest the acquisition.

(2) Hostile Takeover/Acquisition: When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursueseﬀorts to gain control against the wishes of the existing management, such acts are considered hostile on the management and thus called hostile takeovers. The takeover of Great Offshore Limited is an example of hostile takeover, where the Bharti Shipyard Limited acquired management control of Great Offshore Limited against the wishes of the Great Offshore Promoters.51 This method normally involves purchasing of small holdings of small shareholders over a period of time at various places. As a strategy, the purchaser keeps his identity a secret. This kind of takeovers is usually referred to as hostile or violent takeovers.

(3) Bail-out Takeovers: Bail-out takeovers are substantial acquisition of shares in a financially weak company not being a sick industrial company, in pursuance to a scheme of rehabilitation approved by a public financial institution or a scheduled bank (lead

[13]http://mujournal.mewaruniversity.in/JIR2/12.pdf last accessed April 16, 2017

[14]http://shodhganga.inflibnet.ac.in/bitstream/10603/12642/5/05_chapter%201.pdf last accessed April 16, 2017

institution), who has lent money to the financially weak company.The financial institution appraises the financially weak company taking into account its financial viability, the requirement of funds for revival and draws up a rehabilitation package on the principle of protection of interests of minority shareholders, effective revival and transparency. The rehabilitation scheme provides the details of any change in management and may provide for the acquisition of shares in the financially weak company in the following manner: An outright purchase of shares; or An exchange of shares; or A combination of both The person acquiring shares shall make a formal offer to acquire shares from the promoters or persons in charge of the affairs of the management of the financially weak company or financial institution. After that they shall make a public announcement of their intention for acquisition of shares from the other shareholders of the company.61 In the simplest words, takeover of a financially weak company by a financially stable company to bailout the former is known as bailout takeover. The acquisition of Satyam Computers by Tech Mahindra is an example of bail out takeover.[15]

5. **Amalgamation**

The term[16] 'merger' and 'amalgamation' are used interchangeably to denote the fusion or combination of two or more companies into a single company, where one survives and the other(s) loses its/their corporate entity, thus being dissolved/wound up without the process of winding up and the process is carried out through a 'scheme' requiring sanction of the court. However, in the micro sense, merger is different from amalgamation. While all amalgamations are necessarily mergers, all mergers may not necessarily be amalgamations as merger may take place in the form of amalgamation or absorption.The term "amalgamation" contemplates two or more companies deciding to pool their resources to function either in the name of one of the existing companies or to form a new company to take over the businesses and undertakings including all other assets and liabilities of both the existing companies. The shareholders of the existing

[15] Ibid no. 14
[16] Ibid no. 14

companies (known as the amalgamating companies) hold substantial shares in the new company (referred to as the amalgamated company). They are allotted shares in the new companyin lieu of the shares held by them in the amalgamating companies according to share exchange ratio incorporated in the scheme of amalgamation as approved by all or the statutory majority of the shareholders of the companies in their separate general meetings and sanctioned by the court. In other words, in amalgamation, the undertaking comprising property, assets and liabilities of one or more companies are taken over by another or are absorbed by and transferred to an existing company or a new company. The transferor company merges into or integrates with the transferee company. The transferor company losses its legal identity and is dissolved (without winding up). Both the existing companies may form a new company and amalgamate themselves with the new company. The shareholders of each amalgamating company become the shareholders in the amalgamated company.

Motives for Mergers and Acquisitions[17]

Mergers and acquisitions are resorted to by the corporate entities due to more than one reason. Some of the significant motives for mergers include the following:

(a) Growth Broadly there is two alternatives available for growth of a corporate entity as long as investment opportunities exist. The first is through the internal growth where the firm invests its own resources in creating facilities for expansion. This can be slow and ineffective if a firm is seeking to take advantage of a window of opportunity in which it has short term advantage over competitors. The faster way to achieve growth in such case would be to merger and acquire necessary resources to achieve competitive goals. In this process, the acquirer will pay premium for acquisition of other company or assets, but ideally, the strategy would not be as expensive as that of internal growth.

(b) Operating Synergy Synergy is one of the most commonly cited reasons to go for mergers. Synergy is simply defined as 2+2=5 phenomenon. The value of the company

[17]http://www.icaiknowledgegateway.org/littledms/folder1/chapter-13-merger-acquisitions-restructuring.pdf last accessed April 16, 2017

formed through merger will be more than the sum of the value of the individual companies just merged.[18]

(c) Diversification of risk: When a company produce single product then the company's profits and cash flows fluctuate widely. This increases the risk of a firm. Diversification reduces the risk of the firm. The merger of companies whose earnings are negatively correlated will bring stability in the earnings of the combined firm. So diversification reduces the risk of the firm.

(d) Empire building: Managers have larger companies to manage and hence more power. Manager's compensation: In the past, certain executive management teams had their payout based on the total amount of profit of the company, instead of theprofit per share, which would give the team a perverse incentive to buy companies to increase the total profit while decreasing the profit per share (which hurts the owners of the company, the shareholders); although some empirical studies show that compensation is linked to profitability rather than mere profits of the company.

(e) Increase in Market Power and Market Entry

(f) Acquiring Companies with good manufacturing and distribution network or established brands gives the advantage of increase in market power and gaining market leadership. Example of this is Tata-Corus merger. In this case Tata steel had a capacity of around 5 million tones before merger whereas Corus had a capacity of around 22 million tones. Its acquisition of Corus in 2007 made it fifth largest global steel company from fiftysixth global steel company. Thus increase in market power is one of the frequent given reason for mergers as competition inevitably leads to lower prices and lower profits.[19]

[18] Ibid no. 17
[19] Ibid no. 17

(g) Global Competitiveness

Globalisation and liberalisation have forced various business entities to restructure themselves by way of mergers, demergers and acquisitions. In a free competitive and globalised world, it is necessary for a company to be placed in such a manner that it is in position to compete with the best in the world. This could easily be achieved through mergers and amalgamations. The challenged posed by hyper competitive capitalism and globalisation have thrown Indian industry in excel or exit environment and has demanded that Indian industries also restructure. They have to increase their capacity, induct new technology and develop export markets, if they want to compete with MNCs with vast resources, advanced technology and enviable managerial skill. Thus, to acquire global competitive strength, cross-border mergers and amalgamation are being resorted to. The acquisition of Tetley Tea, the world's largest tea brands by Tata Tea was with a view to achieve global competitive strength.

Advantages of mergers and acquisitions

There are certain advantages which accrue to the organisation, shareholders, promoters, managers and consumes. They will be discussed hereunder:[20]

(1) Benefit to the Organisation: Mergers and takeovers are permanent form of combinations which vest in management complete control and provide centralised administration which are not available in combinations of holding company and its partly owned subsidiary.These are the general advantages which accrue to the organisation besides multitude of gains already discussed in the previous topic. Benefit to the Shareholders: The shareholders of the acquired firm benefit the most in the form of huge increments in wealth which result from the premium paid by the acquirer company to induce acceptance of the merger or takeover. The acquirer company usually has to offer price more than the book value of shares to induce shareholders to sell their shares. Moreover, when information about a potential takeover trickles in the market, price of the target company stock moves upwards. On the other hand, shareholders of the buying

[20]http://shodhganga.inflibnet.ac.in/bitstream/10603/1949/5/05_chapter%202.pdf last accessed April 16, 2017

company gain premium in the long run with the growth of the company not only due to synergy but also due to 'boots trapping earnings'.

(3) Benefits to the Promoters: Promoters gain from mergers as they lead to increase in size of the company. A company having shortage of funds can easily grow through this route. A private limited company can be converted into public company without contribution of much wealth by the promoters and without losing control.

(4) Benefits to Consumers: As we have already discussed, mergers lead to economies of scale i.e. consumers get quality goods at lower prices. As M&As also enable an organisation access to better technology, the consumer will get new innovative products at competitive prices. This will raise their standard of living and quality of life.[21]

RATIONALE AND SIGNIFICANCE OF THE STUDY

This study is conducted to find the significant changes introduced by the new legislation i.e. Companies Act, 2013 in the area of mergers and acquisitions. This study aims to find out the how mergers and acquisitions under 2013 is different from the previous legislation i.e. Companies Act 1956. This study will analyse various provisions related to mergers and acquisitions under new legislation. This study will try to find whether new legislation's provisions on mergers and acquisitions is complied with global standards or whether there is still change required to make it more effective.

LITERATURE REVIEW

1) Dr. G.K. Kapoor and Sanjay Dhamija, *Taxmann'sComapny Law, University Edition* (1st edn, Taxmann 2016)

This book covers in detail about the changes introduced by the new Company Act 2013. There is separate chapter in this with regard to corporate restructuring i.e. compromise and arrangements under new act.

[21] Ibid no. 20

2) *Guide To Company Act 2013* **(18th edn, Lexis Nexis 2014).**

This book has special chapter on corporate restructuring and it critically analyses the provisions related to the merger and acquisitions under new legislation.

3) *Corporate Law Referencer* **(2nd edn, Lexis Nexis 2016).**

This book presents 360^{o} view on new company's act 2013. It has given comprehensive analysis of mergers and acquisitions and compared it with the previous legislation.

4) ***COMPANIES ACT, 2013 With COMPANIES RULES & FORMS*** **(27th edn, Bharat Law House Pvt Ltd 2017).**

This book covers in-depth analysis each and every provision of company act 2013 related to mergers and acquisitions along with rules and forms.

P Akhil Bhan has made an attempt to study the insight into the motives and benefits of the mergers in Indian banking sector .This is done by examining the eight merger deals of the banks in India during the period of reforms from 1999 to 2006 . Through the empirical methods by applying t-test and EVA value calculations the potential of the mergers has been evaluate to study the efficiencies or benefits achieved due to the merger .Through this paper and the sample taken for analysis it has been concluded that the mergers in the banking sector in the post reform period possessed considerable gains which was justified by the EVA of the banks in the post merger period.

Dr. V. K. Shobhana and Dr. N. Deepa (2011) made a probe into the fulfilment of motives as vowed in the merger deals of the nine select merged banks. The study uses Summary Statistics, Wilcoxon Matched Paired Signed Rank Test and'‘t’ test for analysis and interpretation of data pertaining to the five pre and post merger periods each. The result indicates that there has been only partial fulfilment of the motives as envisaged in the merger deals.

Egl Duksait and Rima Tamosiunien (2009) described the most common motives for companies decision to participate in mergers and acquisitions transactions. The reason is growth, synergy, access to intangible assets, diversification, horizontal and vertical integration and so on arises from the primary company's motive to grow. Most of the motivations for mergers and acquisitions feature serve as means of reshaping competitive advantage within their respective industries. However, it may be that some of the motives identified affect some industries more than others, and in that sense they can be expected to be associated with a greater intensity of mergers and acquisitions in certain sectors rather than others.

Ms. Astha Dewan (2007) focussed on the post merger financial performance of the acquirer companies in India and performance of firms going through mergers in Indian industry. The merger cases for the year 2003 have been taken for the analysis. The financial data has been collected for six years from 2000-06. Pre-merger and post-merger financial ratios have been examined using paired sample t test. The results of the analysis reveal that there is significant difference between the financial performance of the companies before and after the merger. Further, it has been found that the type of industry does seem to make a difference to the post-merger operating performance of acquiring firms Mital Menapara et al 5 evaluated the impact of mergers and acquisitions on financial Performance of Indian Corporate Sectors and examined the impact of merger and acquisitions on Return on Investment, Profitability and Liquidity position of selected companies. The authors concluded that emerging from the point of view financial evaluation is that the merging Companies were taken over by companies with reputed and good management. And therefore, it was possible for the merged firms to turnaround successfully in due course.

Pramod Mantravadi & A Vidyadhar Reddy (2008) studied the impact of mergers on the operating performance of acquiring corporates in different industries, by examining some pre- merger and post-merger financial ratios, with the sample of firms chosen as all mergers involving public limited and traded companies in India between 1991 and 2003. The results from the analysis of pre- and post- merger operating performance ratios for the acquiring firms in the sample showed that there was a differential impact of mergers, for different industry sectors in India. Type of industry does seem to make a difference to the post-merger operating performance of acquiring firms.

Jagdish R. Raiyani (2010) in her study investigated the extent to which mergers lead to efficiency. The financial performance of the bank has been examined by analyzing data relevant to the select indicators for five years before the merger and five years after the merger. It is found that the private sector merged banks are dominating over the public sector merged banks in profitability and liquidity but in case of capital adequacy, the results are contrary. Further, it was observed that the private sector merged banks performed well as compared to the public sector merged banks.

Rehana Kouser and Irum Saba (2011) explored the effects of merger on profitability of the bank by using six different financial ratios. They have selected 10 commercial banks that faced M&A during the period from 1999 to 2010. The lists of banks were selected from the Karachi Stock Exchange (KSE). Quantitative data analysis techniques are used for inference. Analysis was done by using paired t-test. The results recommend that operating financial performance of all commercial bank's M&A included in the sample from banking industry had declined later. The results shows that there is a decline in all 6 ratios: profitability ratios, return on net worth ratios, invested capital, and debt to equity ratios.

STATEMENT OF PROBLEM

Although it is appreciable that these Rules are meant to simplify the procedure, the extent and manner of disclosures prescribed are numerous. Closely held companies, mid-size companies, etc. will find these requirements cumbersome. The requirement of an affidavit by 90% of creditors in value for dispensing a meeting is rigorous and consequently, convening their meeting would be a cumbersome process for the above-mentioned companies. Furthermore, there is a clear absence of dispensation of a meeting of shareholders would be difficult to expect dispensation for creditors meeting if the condition of 90% consent by affidavit is not complied with because this requirement is embodied in the Act. It will be interesting to see if the NCLT takes any divergent view on this aspect in all fairness of the case. Furthermore, the reporting requirement from the Central Government on affairs of the company is done away with. Instead, it is prescribed that on notice of application served on these statutory authorities, a representation must be made within 30 days and if no such representation is received it is a presumption that they have no representation on the proposal. This is a paradigm shift and indeed a great relief. It is likely to ease the process by removing the reporting requirement from the Central Government. The fast-track merger of certain companies is a welcome step but its success would depend on the Central Government's expeditious action.

Overall, the provisions are a welcome step but some creases must be ironed out as far as the meeting process is concerned. The formulation of the NCLT is under the pretext of a dedicated tribunal for the speedy disposal of corporate matters and it is expected that keeping this objective in mind, M&A activities will receive time-bound closure.

AIMS AND OBJECTIVES OF THE STUDY

Aim of the research is to critically analyze the new provisions relating to mergers and acquisitions under Companies Act, 2013 and find whether they are at par with global standards.

Objectives of the research are:

- To study the new provisions related to mergers and acquisitions under Companies Act, 2013.
- To find the scenario in other jurisdictions.
- To find whether current framework is sufficient or still changes are required.
- To give possible solutions for the same.

HYPOTHESIS

Framework of mergers and acquisitions in India needs to be stronger.

LIMITATION OF THE STUDY

This study is limited only to the critically analysis of mergers and amalgamation provisions under Companies Act, 2013

RESEARCH METHODOLOGY

Doctrinal Research Methodology has been used in this synopsis. Numerous books with regard to concerned topic as well as various articles have been consulted. Apart from that, various online resources like online journals, research papers etc. by various scholars have been used. Armchair method will be followed.

CHAPTER 2:

CHANGES BROUGHT BY COMPANIES ACT, 2013

The Companies Act, 1956 was enacted by the Indian legislature over half a century ago. In that over half a century ago, a radical and drastic change has taken place in the way the business is conducted which has necessitated that robust and young corporate laws are introduced in the system. The globalisation and liberalisation of Indian economy has created a complex, diverse and dynamic business environment. The Companies Act, 2013 has been enacted to suit the requirements of such complex business environment. The amendments have been discussed and elaborated along with the discussion on relevant sections of Companies Act, 1956. But certain new concepts have been introduced by the new Act which are elaborated herewith. Though the sections of the new act dealing with mergers and amalgamations have not been notified but let's have a sneak peek into them.The new Companies Act, 2013 has sought to streamline and make M&A more smooth and transparent. It appears that the New Act can help to deal with the challenges and complexities that the current procedures faces in relation to procedures that were contemplated under the old Act. The New Act has incorporated various provisions to tackles the problems actually faced during the process of mergers, by taking into consideration the practical aspects of the process.[22] The newly added provisions have made it easier for companies to implement 'Schemes of Arrangement' (Mergers & Acquisitions, de-merger, corporate debt restructuring etc) and at the same time impose checks & balances to prevent abuse of these provisions. It is an attempt to fine tune the process by making it more efficient and in-tune effective. The new law allows an Indian company to merge with a foreign company, making cross-border mergers and acquisitions easier. The new law also disallows reverse merger of a listed company with

[22]http://shodhganga.inflibnet.ac.in/bitstream/10603/103368/15/15_chapter-i.pdf last accessed April 16, 2017

that of an unlisted one[23]. The New Act no doubt has some ambiguities attached to it, which would need to be sorted out in order to reduce any complexity in the process. It would need to reduce reliance on rules to be specified later and also ameliorate provisions that contrive other legislations.There are pragmatic reforms for Merger and Acquisitions under Companies Act, 2013, which could make merger, acquisitions and restructuring easier for companies. Introduction of novel concepts fast track merger for Small Companies and Holding and its wholly owned subsidiary Companies, Cross Border merger (removing the restriction on only transferee company being Indian company) under this Act are expected to increase internal restructuring and Cross Border restructuring. Further exit opportunity to the dissenting shareholders is expected to reduce litigation & frivolous complaint and representation of Income Tax Department, Sectoral Regulators would safeguard their interest, though at the cost of prolonged process. This is the first significant change to merger and amalgamations regime in the last six decades, with the previous Companies Act having been in place since 1956.The Ministry of Corporate Affairs has also prepare roadmap for Companies Act, 2013 and in this direction in its recent circular given chance to Income Tax Department and other Sectoral Regulators to make their representation on Merger and Amalgamation in line with the provision of Companies Act, 2013[24].Corporate law has undergone a radical change with the introduction of the Companies' Act, 2013 in India during this era of major economic overturns. Pursuant to receiving the final nod from the President in August 2013, the enactment of the Companies' Act, 2013 has been a significant step in the path of adapting with laws suitable for our times. The provisions enacted in the new legislation bring India at par with its global peers from a corporate law perspective on several fronts. A bright spot in the history of India's legislative initiatives, the new Act aims to improve transparency and accountability in India's corporate sector[25]. It retains the fundamental provisions of the earlier Act while incorporating stronger and progressive new provisions. In the recent past, India's economy has outperformed the West on its growth and

[23]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618272 last accessed April 16, 2017
[24]http://www.ey.com/Publication/vwLUAssets/Assocham_White_paper_Companies_Act/$File/Assocham_White_paper_Companies_Act.pdf last accessed April 16, 2017
[25] Ibid no. 24

attracted large inflows of foreign funds. Economists predict that the West will soon begin heading northwards. In this environment, Indian investors will get significant exposure to global economies. Furthermore, with opening up of international opportunities, companies can look at scenarios where strategic alliances take simpler routes, and global consolidation and fund-raising are required. Global integration and cross-border mergers are now permitted, which is an excellent change from the earlier environment in which only foreign companies were welcomed in India. The challenges faced by many corporate organizations in listing their businesses abroad if their entire business value is housed in India will now be reduced due to cross-border mergers, which will enable them to set up overseas listing vehicles. The introduction of Class Action Suits, the concept of arms' length pricing in related party transactions, the focus on Corporate Social Responsibility, recognition of inter-se shareholder rights, opening of doors to outbound mergers, fast-track mergers, an increased focus on governance and protection of minority shareholders are important initiatives for organizations to move toward global best practices[26]. This paper elaborates on the key provisions of the corporate law affecting mergers and acquisitions. The new Act prescribes rules for implementation of its provisions. It is hoped their implementation will help Indian corporate laws achieve parity with international ones and smoothen the transition from the Companies Act, 1956 to the Companies Act, 2013. It will also help organizations gauge whether Indian corporate laws are focusing northwards.The Companies Act, 2013 appears to be opening new and simple avenues for mergers, acquisitions and restructuring operations in India. While the Act retains the old provisions, it also adds robust and progressive new ones. Changes made in it are likely to have a positive impact on the manner in which corporate structuring is undertaken in India due to numerous procedural changes.The 2013 Act seeks to simplify the overall process of acquisitions, mergers and restructuring, facilitate domestic and cross-border mergers and acquisitions, and thereby, make Indian firms relatively more attractive to PE investors. [27]While some of the changes to look for at the conceptual level include merger/demerger processes, cross-border and fast track mergers

[26] Ibid no. 24
[27] Ibid no. 22

between small companies and holdings, subsidiaries and provisions relating to minority shareholders' protection and exits, among others, a lot still needs to be done in terms of provision of increased clarity on some critical areas and the overall interplay of the 2013 Act with other laws. However, pending notification of the sections and rules in relation to restructuring and absence of transitional provisions has led to concern within industry and professionals engaged in restructuring in the corporate world. The 2013 Act provides for the constitution of the National Company Law Tribunal (NCLT) as the single authority for all schemes relating to restructuring. However, there is no clarity on the time that will be taken for the NCLT to be constituted and become operational. Practical difficulties are expected in implementation of provisions relating to restructuring till the MCA provides clarity on these issues.

(1) Establishment of National Company Law Tribunal: The new Act proposes that the National Company Law Tribunal (NCLT) will assume the jurisdiction of High Courts in context of restructuring schemes.The Act envisages that all the powers and functions of the Company Law Board, Company Court, BIFR under the Sick Industrial Companies Act will now onwards be exercised by NCLT. This move is welcome one since it will be specialised body dealing only with cases under company and relatedlaws thereby introducing elements of timelines and efficiency. As under the earlier framework, the approval by High court no doubt ensured oversight and fairness but the process normally look around six months and in certain cases about one to two years. The establishment of NCLT will facilitate the speedy disposal of cases. Establishment of a single forum which is dedicated to corporate matters is a welcome move and will remove the problem of multiple regulators. With the setting of NCLT, the process may get expedited.[28]

(2) Objections to the Scheme of Mergers and Amalgamations: The Companies Act by introducing a proviso to section 230(4)[29] has sought to create a threshold for making an

[28] Ibid no. 24
[29] https://www.icsi.edu/docs/webmodules/Publications/Full%20Book%20of%20PP-CRVI-2014.pdf last accessed April 16, 2017

objection to the scheme of arrangement. The new Act provides that persons holding at least 10 percent of shareholding or 5 percent of the total outstanding debt as per the latest audited financial statements iseligible to raise objections. No doubt, the main aim of the threshold is to result in efficiency in implementation of the scheme by reducing frivolous litigations by few small shareholders or creditors. But on the other hand, the interest of minority shareholders and creditors are being undermined by substantially eroding their power of objections in case of restructuring schemes.[30]

(3) Cross-border Mergers[31]: Under the Companies Act, 1956, while foreign companies can be amalgamated into an Indian company, the reverse is not permissible i.e. an Indian company cannot merge with a foreign company as section 394(4)(b) provides that transferee company has to be an Indian company. But the 2013 Act[32] has removed this barrier and allowed both inbound and outbound cross-border mergers between Indian companies and foreign ones. Now Indian company can merge into a foreign company incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. But prior approval of RBI and NCLT would be required and the consideration for the merger can be in the form of cash or in depository receipts or in both. The introduction of this provision could have a farreaching impact and will facilitate and promote cross-border M&A as cross-border M&A have ground breaking significance in plotting India on the global M&A landscape. Moreover, many corporate deals have fallen through or failed to meet their desired objectives in the past due to lack of such provisions in the 1956 Act.With businesses no longer limited by borders, cross-border M&A[33] transactions present significant opportunities for economic gain and increased shareholder or investor value. Various factors influence the spurt in recent cross-border mergers and acquisitions, including the ever-increasing need of

[30] Ibid no. 29
[31] Section 234 Companies Act, 2013
[32]http://psalegal.com/upload/publication/assocFile/ENewslineJanuary2014.pdf last accessed April 16, 2017
[33]Ibid no. 31

companies to tap new markets and set up global operations in these, achieve cost reduction and synergies and secure natural resources. Cross-border M&A is also supported by technological advancements, low cost financing arrangements and robust market conditions, which have made deal-makers confident and think more creatively about their global growth strategies. The flow of transactions could be inbound (non-residents investing in India) or outbound (Indian businesses making investments abroad). Current laws only permit inbound mergers (foreign companies merging with Indian ones) and not the other way round. The 2013 Act proposes to allow both — inbound and outbound cross-border mergers between Indian companies and foreign ones. It provides for the merger of an Indian company into a foreign one, whether its place of business is in India or in certified jurisdictions (to be notified by the Central Government from time to time), subject to the NCLT's and RBI's approval. The consideration of a merger, which will also be subject to the approval of the RBI, could either be in cash or depository receipts, or partly in cash and partly in depository receipts2. The provisions mentioned above could have a far-reaching impact that will facilitate cross-border transactions and increase theirflexibility. Cross-border mergers could have ground-breaking significance in plotting India on the global M&A landscape, since corporate deals have fallen through or failed to meet their desired objectives in the past due to the lack of such provisions in the 1956 Act. Enabling of cross-border mergers is expected to help Indian companies in more ways than one, including in the following[34]:

• Restructuring their shareholdings, wherein they can migrate ownership to an international holding structure

• Facilitating listing of entities, which may have Indian assets in overseas jurisdictions

• Providing exit routes to current investors in overseas jurisdictions However, corresponding amendments are required in existing laws including the Income Tax Act, Exchange Control Regulations (relating to ownership of real estate in India, sectoral caps,

[34]http://unijournal.in/wp-content/uploads/2016/02/Merger-Acquisition.pdf last accessed April 16, 2017

definitions of overseas holdings, etc.), security related laws (change in rules regarding dual listings), etc. Currently, tax laws do not provide any tax-neutral provisions to enable such cross-border mergers. The debate on whether cross border mergers should be taxable or not is an interesting one, since in some mergers, companies may be moving some value outside India. If they are operating companies, they will need to move out their Indian operations before the mergers, to avoid operational and tax-related complications.[35]

4) Fast-Track Mergers/Short form Mergers Allowed: The Companies Act, 2013 has created a new provision i.e. section 233 which provides for the option of simplified and fast track merger between: Two or more small companies250 Holding company and its wholly owned subsidiary Prescribed class/classes of company Such form of mergers do not require any approval from NCLT. But notice of such merger has to be issued to Registrar of Companies and Official Liquidator inviting any objections or suggestions to the scheme. The objections and suggestions received are considered by the companies in their respective general meeting and the scheme needs to be approved by at least members holding 90 percent of the total number of shares or by nine-tenths in value of creditors or class of creditors. Once the scheme is approved, a copy of the scheme has to be filed with the Central Government, Registrar and the Official Liquidator. This provision will remove the bureaucratic barriers involved in court proceeding and in turn simplify the process and also reduce the time involved in the process and thus will lead to faster disposal of the matter. The researcher is of the view that this a welcome move as it would save the time of both the courts and of the company. As we know in today's ultra-competitive globalised economy, time is of essence.[36] If a company wants to merge speedily, the purpose is better served by the Companies Act, 2013 then by the Companies Act, 1956. Although, we are not aware of the speed and efficiency of the new provisions in practice as the new provisions have not yet been notified, we can still assume that fast

[35] Ibid no. 34

[36] http://www.ey.com/Publication/vwLUAssets/Assocham_White_paper_Companies_Act/$File/Assocham_White_paper_Companies_Act.pdf last accessed April 16, 2017

track mergers will speedify the process. As in some overseas jurisdictions, the 2013 Act has introduced the new concept of fast- track mergers and demergers. These provide the option of a simplified and fast-track merge/ demerger process, which can be used for the following and is an option for companies[37]:

• Merger of two or more specified small companies
• Merger between holding company and its wholly owned subsidiary
• Such other classes of companies as may be prescribed In this case, the merger will have to be approved by Central Government and there will be no requirement to approach NCLT.

Under this process, the schemes approved by the boards of directors of companies will need to be sent to the Registrar of Companies (RoC) and the Official Liquidator (OL) for their suggestions or objections within 30 days. The scheme will then be considered in the meetings of shareholders or creditors, along with their suggestions or objections, and will have to be approved by the following classes of persons: • Shareholders holding 90% of the total number of shares at a general meeting • Majority creditors (representing nine-tenth in value) in a meeting convened with 21 days' notice Currently, under the 1956 Act, the criterion of "present and voting" is essential for the conduct of shareholders' and creditors' meetings. However, the similar concept of "present and voting" has not been included in the 2013 Act, and there is no clarity on whether voting through a postal ballot will now be an acceptable mechanism.[38] This requires clarity from the Ministry. After the approval mentioned above, the scheme will have to be filed with the OL, RoC and the Central Government. In the event of there being "no objection," this will be deemed as approved. However, in the event of objections from the RoC or OL, the scheme may be referred by the Central Government to the NCLT for it to consider the scheme under the normal process of a merger. In this case, the NCLT can either mandate that the scheme is to be considered a normal merger or it may confirm the scheme by passing an order to

[37] Ibid no. 36
[38] Ibid no. 36

this effect. Therefore, a company is at risk of the process being considered a normal merger process instead of a fast-track merger. In addition to the above, both the companies (transferor and transferee) will need to file a declaration of solvency with the RoC. Among the various features of fast-track mergers of companies, one is the exemption from the need to obtain auditors' certificates of compliance with applicable accounting standards. This is a welcome step that will result in reduction in the administrative burden, timelines and costs of smaller companies that fall within threshold limits. However, on the flip side, there is no clarity on whether fast-track mergers will be allowed prior to NCLT becoming operational. Moreover, under existing tax laws, there is no need for a company to seek the approval of a court to prove the tax neutrality of a merger or demerger. However, clarity in this regard will be required in the case of fast - track mergers involving non-court approved schemes.[39]

5) Extinguishment of Holding of 'Treasury Stocks'[40]: Treasury shares are those that a company holds in itself and are created as a result of buy-backs from the open market or M&As. Since companies cannot hold their own stock, they hold it through a trust or special purpose entity (SPE). For example, company X and Y are going to merge such that one company i.e. company Y would seize to exist and all the shareholders of Y would be shareholders of company X. Company X already has shares in the erstwhile Company Y before the merger took place. While implementing the scheme of amalgamation if Company X decides to use a method of share swap by which Company X will be issuing its shares to buy the shares of Company Y. Now, what does Company X do about the shares it held in erstwhile Company Y which has become Company X? Company X cannot hold shares in itself. Now, in such a scenario, the Company X may transfer the shares to a special purpose entity (SPE), usually a Trust. Therefore, by this method a company is able to hold its own shares. This provision has been provided in the proviso of the section 77 of the old Companies Act, 1956. This provision of 'treasury stock' results in dual advantage to the company as it provides them liquidity in future,

[39] Ibid no. 24
[40] Ibid no. 36

while still allowing the promoters to retain a controlling stake over the company. But the 2013 Act abolishes the practice of companies to hold their own shares through a trust and requires that cross-held shares to be compulsorily cancelled. Indian promoters of companies, including listed ones, have in the past used the route of issuing treasury stocks to consolidate their holdings in companies to raise funds and as an avenue to control voting rights. Promoters have followed the practice of transferring the shares of their subsidiary companies to trusts and issuing shares of holding companies pursuant to the mergers of wholly owned or partially owned subsidiaries with holding companies, instead of canceling such shares. Past precedents include Escorts, Mahindra & Mahindra and Jaiprakash Associates. However, the 2013 Act restricts a transferee company from holding shares in its own name or in the name of a trust. Any inter-company investments between companies involved in mergers need to be mandatorily canceled in this event. The provisions given above should result in greater transparency and reduce the scope of unconventional or ambiguous practices, particularly where valuation and accounting considerations are involved. This change is also in line with the 1956 Act, which prohibits a company from owning its own shares.[41]

6) Merger of Listed Company with Unlisted Company[42]: The 1956 Act does not contain any specific provision governing the merger of a listed company with an unlisted one. It is generally assumed that shares issued pursuant to the merger of a listed company with an unlisted one (or vice versa) need to be listed on the stock exchanges where the transferor company was listed. There have been cases, even in the present scenario, where the resulting company has continued to be unlisted after the demerger. Recent precedents include the schemes of demerger of Wipro Ltd. and Sundaram Clayton Ltd. The 2013 Act sets out formal guidelines and provides an option to a transferee company to remain unlisted till it is listed or applies for listing, provided the shareholders of the merged listed company are given an exit opportunity. It also provides that provision

[41]http://psalegal.com/upload/publication/assocFile/ENewslineJanuary2014.pdf last accessed April 16, 2017
[42] Ibid no. 41

should be made by the NCLT for an exit route for the shareholders of a transferor company who decide to opt out of the transferee company by making payment amounting to the value of the shares and other benefits, in accordance with a predetermined price formula or after a valuation report is produced (which should not be less than the value prescribed by SEBI's regulations).

7) Squeeze out Provisions: Companies Act, 2013 has introduced squeeze out provisions in section 236[43]. The Act has introduced an exit mechanism for minority shareholders. The intent of this provision is to reduce litigation as a result of objection by minority shareholders. The Act says that in the event of acquirer alongwith person acting in concert with such acquirer becomes registered holder of ninety percent or more of the issued share capital of a company by virtue of amalgamation, share exchange, conversion of securities or for any other reason to compulsorily notify its intention to buy out minority shareholders. The offer to be made at a price determined on the basis of valuation by a registered valuer is in accordance with rules as may be prescribed. In addition, the minority shareholders may also offer their shares suo-moto to majority shareholders. No doubt minority buyout has been undertaken by corporate organisations through various corporate restructuring means in the past but this provision has virtually recognised minority squeeze out as a legal option. Moreover, another positive aspect is that in addition to reduction of litigation, the shares of minority shareholders need to be acquired by majority shareholders and not by the company so there will be funds outflow of majority shareholders and not the company. This provision has provided exit option to shareholders of both listed as well as unlisted companies.

[43]http://shodhganga.inflibnet.ac.in/bitstream/10603/12642/5/05_chapter%201.pdf last accessed April 16, 2017

8) Other key changes to the process of compromise or arrangement[44]:

- The 2013 Act provides that a notice for a meeting for the scheme should be sent to the Central Government (i.e., the Regional Director, Registrar of Companies (ROC), the Official Liquidator (OL), Income Tax authorities, the RBI, SEBI, the Competition Commission of India (CCI) and other sectoral regulators for their comments/ suggestions/ objections within 30 days. In case no representation is made within 30 days, it will be presumed that they have approved the scheme. Although the relevant section has not been notified, the MCA is taking steps to increase the role of other authorities in implementation of such schemes. In a recent circular, the MCA has clarified that the RD will invite specific comments from the Income Tax department within 15 days of receipt of the notice before filing his response to the Court. Furthermore, the RD will also consider the feedback required from any sectoral regulator if it appears necessary to him[45].

- Furthermore, with a view to reduce the timelines involved in a restructuring exercise, the 2013 Act has introduced a minimum threshold for raising objections to the scheme of arrangement, i.e., only persons holding a 10% shareholding or with a minimum outstanding debt of 5% can object to the scheme. These limits may be considered high, especially in the case of listed companies, where the minority would need to commit substantial effort in pooling stakes if they are to raise valid objections, unless a large institutional shareholder takes up the cause. However, it provides a safeguard against frivolous litigations by shareholders with negligible stakes (which happens in many schemes), thereby avoiding unnecessary delays.

[44]Rishabh Amber Gupta, “Companies Act, 2013: What is in the Box for Mergers and Amalgamations (M&A) and Corporate Restructuring?”, retrieved from http://legaljunction.blogspot.in/2013/09/ companies-act-2013-whats-in box-for.html last accessed April 16, 2017

[45]http://shodhganga.inflibnet.ac.in/bitstream/10603/103368/10/10_chapter-ii.pdf last accessed April 16, 2017

- The 2013 Act also empowers the NCLT to dispense with meetings of creditors if at least 90% of the creditors in value agree and confirm this by affidavit, thereby reducing the discrepancy in practice followed by different High Courts while granting their approval on the basis of consent letters obtained. However, there is the absence of an explicit provision for dispensation from shareholders' meetings.

- The 2013 Act also requires the valuation report for the share swap ratio to be sent along with the notice for the meeting to all stakeholders, as is currently applicable to listed companies, thereby opening doors for larger scrutiny on the share swap ratio by shareholders, even in the case of unlisted companies.[46]

- Every scheme of arrangement including merger or amalgamation has huge valuation and accounting implications. Valuation implications have been discussed above. The 2013 Act has introduced a new requirement that no scheme of compromise or arrangement whether for listed or unlisted company shall be sanctioned by the tribunal unless a certificate of company's auditor has been filed with the tribunal certifying that the accounting treatment is in conformity with the prescribed accounting standards.267 Such compliance with accounting standards has already been mandated under the listing agreement but it was only mandatory for listed companies.268 Where all listed companies while filing any draft scheme with the stock exchange for approval are mandatory to file such auditors certificate. But the new Act has made it mandatory for both listed as well as unlisted companies. The purpose of this provision is that the court does not consider schemes involving 'dubious' financial re-engineering.[47]

[46] Ibid no. 44
[47]http://shodhganga.inflibnet.ac.in/bitstream/10603/103368/10/10_chapter-ii.pdf last accessed April 16, 2017

- Section 230(11) specifically provides that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the guidelines issued by the SEBI. An aggrieved party may make an application to the tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the tribunal may, on application pass such order as it may deem fit.

CHAPTER 3:

MERGERS & ACQUISTIONS IN INTERNATIONAL JURISDICTIONS

International mergers and acquisitions (also known as cross-border M&As) refer to those that are taking place beyond the boundaries of a particular country. Globalization and worldwide financial reforms have collectively contributed towards the development of international mergers and acquisitions to a substantial extent. International mergers and acquisitions are performed for the purpose of obtaining some strategic benefits in the markets of a particular country. This helps multinationals in enjoying economies of scale, market dominance and also stimulates foreign direct investment.

There are some reputed international mergers and acquisitions agencies which provide educational programs and training in order to grow the expertise of the merger and acquisition professionals working in the global merger and acquisitions sector. Examples include Morgan Stanley, Barclays Capital, Goldman Sachs, J P Morgan, Credit Suisse etc.

3.2 Important Aspects ofGlobal Mergers & Acquisitions

Important aspects of global mergers and acquisitions are as follows:

- Global Mindset: The foremost requirement for a corporate, looking to go global, is to change the old technocrat mindset and think big and global.
- Pricing and Valuations: Pricing and valuations at which the targeted firm should be taken over is the most crucial decision to be taken while contemplating a global acquisition move. Preferably, both the ChiefExecutive Officer (CEO) and the Chief Financial Officer (CFO) ofthe company need to carry out the net costbenefit analysis involved in acquiring an overseas company.

  Abiding Local Laws: An overseas company targeted to be acquired is governed by specific local laws and policies. It could be in the form of local land acquisition laws or even local labour laws with different sets oftrade union rules. The regulatory issues of overseas destination have to be tackled in conformation with local jurisdiction laws and rules under the recommendations of local legal experts.

- Flexible Decisions & Adaptability to Change: Companies have to ensure that their business decisions and mandates are flexible and adaptable to change in the overseas markets. A product which is an instant hit domestically need not necessarily be as much viable in a foreign market. If Plan A does not work over there, the company needs to be ready with Plan B to quickly adapt to the diverse trend oflocal consumers.
- Diverse Tactics of Marketing: Availing services ofthe local employee expertise in production and marketing aspect could be seen as a game clinching aspect for going along with overseas ambitions. Employing local people would attract lesser pressure from them on issues related to employment concerns
- Serving to Social Causes ofLocal Destination: A foremost rule that drives any top class company is to serve the social causes ofthe society. Whatever you give, comes back - goes the saying. A responsible and accountable company would be better-off to part away some small portion of its earnings as a give-back to the local country and its people. It could be in the form of adopting responsibility for improving infrastructure of a specific area or a location, donations to charity organization and leprosy hit people, taking part in rehabilitation of areas hit with natural disasters etc. The companies should also take accountability regarding the environmental aspects and welfare ofthe local country.

3.3 Reasons for Cross-Border M&As

The following factors may influence companies going for cross-border M&As:

The technological advancement has led to massive investment in research and development (R&D), design, marketing and distribution. To achieve economies of scale, companies have adapted themselves to the globalization environment through cross-border M&As

- The economic integration ofEuropean Union and the European Monetary System had a huge impact on cross border trade and investment in both product and financial service market.
- Trends in the equity and bond markets also facilitated the development of crossborder acquisitions. Financial innovations and easy availability of capital to finance acquisitions were also contributing factors for the development of cross border M&A activity.
- Economic liberalization and reforms in developing nations also provided an impetus to the cross border activity. The opening up of markets and removal of regulations with respect to foreign direct investments increased the scope of cross border M&A activity.
- Basically an asset exploiting firm seeks to deploy its strategic assets in a new market in order to gain competitive advantage. Firms may also seek to augment resources and capabilities from host countries. The firm could use resources and capabilities ofthe foreign countries in order to provide competitive advantage.
- Growth is probably the most important motive for international mergers.

International M&A add a new perspective to the growth process. A profitable firm in a slow growing economy may follow the route of cross border acquisition as a strategy to invest surplus cash in a fast growing economy to grow faster.

- Technological considerations also impact international mergers. A technologically superior acquirer would acquire a target firm in order to exploit its technological advantage. A technologically inferior acquirer may combine with a technologically superior target in order to enhance its competitive position.
- Product advantages and product differentiation could also emerge as reasons for international mergers and acquisitions. A firm with a reputation for superior

products in the domestic market may find acceptance for its products in the foreign markets.

3.4 Barriers to Cross Border M&As

Cross border acquisitions can be considered more riskier than domestic acquisitions due to structural, technical, information and cultural barriers that exist in the target country. Structural barriers include both statutory and regulatory barriers. Statutory barriers include discriminatory tax laws and monopoly powers of the board to block mergers. Regulatory barriers include anti-trust regulation and rules of stock exchange. Technical barriers consist of management aspects. These include anti-takeover defence mechanisms, like staggered boards and differential voting rights. Information barriers include aspects like low compliance with international generally accepted accounting principles (GAAP). Cultural barriers also emerge as a reason for dislike of takeovers. It is important to overcome local language barriers and communication problems due to differences in mentalities and cultures and management styles in an international M&A [Sudarasanam, Sudi (2003)].

3.5 A Brief History of Global Merger and Acquisition

Mergers have transformed the corporate landscape over the course ofthe last century. Looking at the global M&A history, a steady rhythm of merger waves can be observed. Like ocean waves, they rose to a peak and then crashed to the ground, with regularity.

The First Wave (1890-1905): Merger movement that happened in between 1890 and 1905 was predominantly a US business phenomenon. During this period small firms with little market share consolidated with similar firms to form large powerful institutions. Many ofthe corporate giants in the US, like General Electric, Eastman Kodak, American Tobacco, DuPont etc. were formed during this period. Oligopolistic or near competitive industries were converted into near monopolies by mergers. One of the major factors that instituted such merger movement was the desire to keep prices high. As a result, when the demand declined, firms found it profitable to collude and manipulate supply to counter any change in demand. This type of cooperation led to widespread horizontal integration amongst firms. In the long run, in order to keep costs low, it was advantageous for firms to merge and reduce their transportation costs, thereby producing and transporting from one location rather than from various sites of different companies. In addition, technological changes prior to the merger movement within companies increased the efficient size of plants with capital intensive assembly lines allowing for economies of scale. The merger movement during this period basically consisted of horizontal mergers, which resulted in high concentration in many industries, including heavy manufacturing industries. This merger movement was accompanied by major changes in infrastructure and production technologies and led to the completion of the transcontinental railroad system, the advent of electricity and the increased use ofcoal.

The Second Wave of the 1920s: This wave followed the 1903-1904 market crash and the First World War. This was a much smaller wave as compared to the first wave in terms ofrelative impact. This wave was characterized by the period of economic growth and stock market boom. Mergers during this period led to emergence of strong competitors in industries which were previously dominated by one giant firm. In the manufacturing sector, most mergers either resulted in small increase in market share for the merging firms or in vertical integration. The public utilities and banking industry were involved in the merger activity to a greater extent during this period. Majority of the mergers occurred in the food processing, chemicals and mining sectors. A large portion of the mergers in the 1920s represented product extension mergers (as in the case of IBM, General Foods and Allied Chemicals), market extension mergers (in food retailing, department stores, and motion picture theatres) and vertical mergers (in the mining and metal industries). It collapsed due to the stock market crash and depression during 1929-1930.

The Third Wave of the 1960s: The merger activity increased after the end of the Second World War and reached its peak during 1960s. During this period, mostly unrelated mergers took place which were basically aimed at achieving growth through diversification into new product markets and thus correctly referred to as the period of conglomerate merger movement. The main reasons behind such diversification are found to be: to avoid sales and profit instability, adverse growth developments, adverse competitive shifts and technological obsolescence. Jensen (1993) proposed that most merger activity since mid-1970s had been caused by technological and supply shocks, which resulted in excess productive capacity in many industries. He argued that the mergers were the principal way of removing excess capacity as faulty internal governance mechanisms prevented firms from shrinking themselves.

The Fourth Wave of the 1980s: The 1980s witnessed one of the most intense periods of M&A activity in the history of international M&As. The fourth wave was unique compared to the previous three waves. The 1980s buyout boom was driven by strong post-1982 economic growth, the creation and growth of the junk bond market which provided the funding for the leveraged buyouts and rising equity values. M&As in this wave were concentrated mainly in service industries like commercial and investment banking, finance, insurance, wholesale, retail, broadcasting and healthcare, and in the natural resource area. In 1988 Kohlberg, Kravis & Roberts (KKR) completed a leveraged buyout of US $ 25 billion acquisition of RJR Nabisco. It was both the high water mark and a sign ofthe beginning ofthe end ofthe 1980s buyout boom which eventually crashed in early 1990s due to rising interest rate and recession. Various studies [Mitchell, M. and Mulherin, J. (1996)] have revealed that a substantial portion of takeover activity in this wave could be explained by reaction of industries to major shocks like deregulation, increased foreign competition, financial innovations and oil price shocks.

The Fifth Wave of the 1990s: The fifth wave that started in the 1990s was distinctly different from the wave that preceded it. The deals of 1990s were not highly leveraged hostile transactions that were common in the 1980s. They could be categorized as strategic mergers. Focus was given on core competencies as the source of competitive advantage. M&A activities during this wave were stimulated by the advancement of new technologies, globalization of products, services and capital markets and lenient enforcement of anti-trust laws. The economic environment saw the emergence of supranational trading blocs, such as the Single Market of the European Union, North

Atlantic Free Trade Association, which includes the US, Canada and Mexico, and creation ofthe World Trade Organization which facilitated lowering of barriers and capital mobility. During this wave, the global telecommunications, oil and gas, electronics, hardware and financial sectors were reshaped through M&A activities. The collapse of the technology bubble, higher interest rates and the 2001 recession took the winds out ofthis M&A boom.

3.6 Global Merger and Acquisitions: Recent Trends

The M&A activities turned around in 2003 and took a big leap since then with recovery ofthe global economies and reduction in the rate of interest to record low by the US Federal Reserve. Debt financing was readily available and no company seemed to be too large to be a target. This time, however, acquisitions covered a wider range of sectors viz. telecommunications, financial services, utility, pharmaceuticals etc. The year 2007 had witnessed the highest total deal values of all global M&As comprising US $ 4.27 trillion with as many as 46644 number of deals. The global meltdown of financial institutions and the global recession in 2008 and 2009 had evidently curtailed this M&A boom.

1) UK

According to UK Legislation, a merger is a legal process whereby one or more public companies, including the company in respect of which the compromise or arrangement is proposed, transfer their undertakings, property and liabilities to another existing public company (a “merger by absorption”). Alternatively, it is a legal process whereby two or more public companies, including the company in respect of which the compromise orarrangement is proposed, transfer their undertakings, property and liabilities to a new company, whether or not it is a public company (a “merger by the formation of a new company”). In other words, a merger is a legal process where one company proposes to acquire all the assets and liabilities of another in exchange for the issuance of shares or other securities of one to the shareholders of the other, with or without any cash payment to shareholders.[48] From the merger concepts mentioned, it can be said that UK legislators are keen and give attention to regulate mergers by providing provisions showing the general concepts of merger, as well as solving the problem of a minority shareholders or partners who are not willing to merge by providing that they can exit the transferor company and recover the value of their shares through payment in cash by the transferee company. UK legislation emphasises that the shareholders of the transferor company get new shares in the transferee company instead of their shares in the transferor company, which merge with the transferee company's shares. Importantly, UK legislators stipulate the transfer of all rights and obligations from the transferor company to the transferee company. In this regard and according to the UK Companies Act[49], mergers can have impacts in different ways. If two entities genuinely desire to combine their business activities for their mutual advantage, then a merger may be a harmonious union of two firms, with the result that a new firm is formed that comprises both of their previous shareholders, employees and management (merger by the formation of a new firm). The practice of mergers tends to be that they are anything but harmonious because the new firm (the resulting entity) usually finds itself with two people doing the same work that had been performed when the businesses were separate firms. Consequently, there will be a period of adjustment in which one group in the management tends to acquire the upper hand. For example, the resulting firm's logo, name and business culture may resemble one of the previous firms more than other.88 Another means by which a merger can take place is where one firm is absorbed into another firm so that there is a merger but the resultant entity is effectively an enlarged form of one of the firms (merger by absorption). In any event, the resulting firm will have to recognise the shareholdings of the shareholders in the previous firm. The UK legislators also give attention to companies taking benefit from the advantages of a merger, as determined by law. This is represented in the exemption of companies involved in mergers or resulting from mergers from all taxes and fees deserved due to the merger, giving priority to mergers of public

[48]https://www.slaughterandmay.com/media/2082932/the-mergers-and-acquisitions-review-united-kingdom-chapter.pdf last accessed April 16, 2017
[49]http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf last accessed April 16, 2017

shareholding companies and distinguishing between mergers by absorption and mergers by the formation of a new company. In cases of merger by absorption, the texts of the laws only allow public shareholding companies with others of the same type to form a new public shareholding company through the merger. In cases of merger by the formation of a new company, the law allows mergers for all public shareholding companies, regardless of the type of company resulting from the merger. According to the UK Insolvency Act 1986, there is a specific mechanism for the merger of companies. According to section 110 of the act, a company that is in voluntary winding up may transfer or sell the whole or part of its business or property to another company. The company may, in the case of voluntary winding up, pass a special resolution authorising the liquidator to receive a variety of property types, including cash, share policies or other interests, in the transferee company for distribution among the members of the transferor company according to their interests in that company. Indeed, a company is not just a legal personality; at the same time, it is a cell or economic entity that needs to preserve and continue its work. The UK legislators take this into consideration when they provide the right of companies in the merger even the companies under liquidation. With reference to this fact, article 110 of the UK Insolvency Act 1986 provides that it is allowed for any company under liquidation to empower the liquidator - by special decisions issued by the General Assembly - to provide the company's activity or its assets to another company, in return for shares or other interests in the company for distribution to the shareholders of the company under liquidation. The meaning of liquidation here is liquidation that happens in accordance with the requests of shareholders. However, in the case of voluntary liquidation in accordance with the requests of creditors, the liquidator derives its powers from the court or from the liquidation committee. [50]In this case, if the merger project cannot be implemented due to the non-issuance of a special resolution from the General Assembly authorising the liquidator to provide the company's assets to another company, or if the shares of the companies involved consist of different categories, then the court can ratify the merger decision according to the rules and

[50]https://gowlingwlg.com/en/united-kingdom/insights-resources/an-introduction-to-uk-mergers-acquisitions-law last accessed April 16, 2017

provisions of the Companies Act 2006.The most important acquisition (takeover) activities in the UK are governed by the Takeover Code addition to part 2897 of the UK Companies Act 2006. With this in mind, section 97998 of the UK Companies Act 2006 provides that a takeover bidder is someone who has already acquired 90% of a company's shares and accordingly has the right to compulsorily buy-out the remaining shareholders. Conversely, section 98399 allows minority shareholders to insist their stakes are bought out. Furthermore, according to the Takeover Code, as a basic principle, all shareholders are to be treated equally within the same class of shares[51]. In order to help ensure such equality, bidders involved in a takeover and mandatory offer are prohibited from paying lesser amounts to other parties for target shares within a certain period.In acquisition cases, it is normal for the acquiring firm to make an offer to the other firm's shareholders to buy their shares at a stated price and with a fixed time within which the offer is to be accepted, with the condition that if a named percentage of the shareholders does not accept the offer, the offer is void. The offer is usually at a higher price than the present market value of the shares as quoted on the stock exchange and it may be in cash or in kind. Economic reasons and rival bidders are the most important reasons for acquisitions.[52] From a legal perspective, takeovers adopt one of three different types: friendly takeovers, bail-out takeovers and hostile takeovers. A friendly takeover means the takeover of one company by changes occurring in its management and control through negotiations between the existing promoters and prospective investors; this is done in a friendly manner. Thus, this type is also referred to as a negotiated takeover. This kind of takeover is carried out in further consideration of the common objectives of both parties. A hostile takeover is a takeover where one company unilaterally pursues the acquisition of the shares of another company without the knowledge of the second company. The main reason that causes companies to resort to this kind of takeover is to

[51]http://bura.brunel.ac.uk/bitstream/2438/7174/1/FulltextThesis.pdf last accessed April 16, 2017
[52] Ibid no. 51

increase their market share. Finally, the bail-out takeover option refers to the takeover of a financially tired company by a financially wealthy company. [53]

2) **Singapore**

The laws and regulations impacting mergers and acquisitions ("M&A") in Singapore are found in various specific rules and regulations and in general principles of contract and company laws. For companies incorporated, registered in Singapore or carrying on business in Singapore, the laws and regulations applicable to M&A are primarily contained in the Companies Act, Chapter 50 of Singapore ("Companies Act")[54], the Securities and Futures Act, Chapter 289 ("SFA") and their relevant subsidiary legislation. Real estate investments trusts ("REIT"[55]) are subject to the SFA and Code on Collective Investment Schemes issued by the MAS. Business trusts ("BT") are subject to the Business Trusts Act, Chapter 31A of Singapore. The Companies Act applies to both private and public companies and generally deals with rules and regulations relating to the establishment of companies, basic governance rules including maintenance of capital, director's duties and liabilities, compulsory acquisition, schemes of arrangement and amalgamations. The SFA deals with securities offerings, licensing and business conduct of providers of capital markets services, substantial shareholder notifications, rules relating to scripless shares and market conduct rules (e.g. insider trading prohibitions and market manipulation). It is worthwhile noting that in Singapore there is no distinction between private and public securities offerings although there are specifi c exemptions available from compliance with the securities-offering regime. In addition, public companies, REIT and BT which are the subject of takeovers, schemes of arrangement, trust schemes or schemes of amalgamation are also subject to the Singapore Code on Take-overs and Mergers ("Code")[56] issued by the MAS pursuant to the SFA. While the

[53]http://www.deloitte.co.uk/investingintheuk/pdfs/southafrica/uk_investingintheuk_sa_sixaguidetomergersandacquistionsintheuk.pdf last accessed April 16,2017

[54]http://www.drewnapier.com/DrewASPX/media/assets/Publications/Global-Legal-Insights-%E2%80%93-Mergers-Acquisitions-5th-Edition-Singapore-2016.pdf last accessed April 16, 2017

[55] Ibid no. 54

[56]file:///C:/Users/abhineet%20sharan/Downloads/SINGAPORE_-_Negotiated_M&A_Guide.pdf last accessed April 16, 2017

Code is drafted with listed entities in mind, it is stated clearly in the Code that the specifi c rules and general principles set out in the Code can also apply to unlisted public companies, REIT and BT with 50 or more shareholders or unitholders and net tangible assets of S$5m or more. Listed entities are also subject to the rules of the Singapore Securities Exchange Trading Ltd ("SGX") set out in its listing manual ("SGX Listing Manual")[57]. The SGX Listing Manual has one set of rules for entities listed on its Main Board and another for entities listed on Catalist (which is for companies with smaller market capitalisationetc). Both set of rulesare broadly similar and deal with continuing listing and disclosure obligations, interestedparty transactions, acquisitions and disposals and routine shareholder matters. We have set out below the more common structures utilised in Singapore for M&A in private and public M&A. It should be borne in mind, though, that certain structures set out below can be utilised by both private and public companies (such as the scheme of arrangement or amalgamation) depending on how the transaction is sought to be effected. In addition, all M&A transactions in Singapore must consider the application of the Competition Act, Chapter 50B[58] which is enforced by the Competition Commission of Singapore, as the Competition Act prohibits, amongst other things: (i) agreements which have as their object or effect the restriction, distortion or prevention of competition within Singapore; (ii) conduct which amounts to the abuse of dominant position in any industry in Singapore; or (iii) mergers resulting in or which may result in a substantial lessening of competition in any industry for goods or services in Singapore. Other industry-specifi c legislation such as the Banking Act, Chapter 19; Insurance Act, Chapter 142; Financial Adviser Act, Chapter 110; may also impact an M&A involving entities governed by these legislation. Where there are entities in other regulated industries, any conditions imposed by the regulatory authority would also need to be considered. Common structures for private M&A In Singapore, private M&A transactions would most commonly be effected by one of the following structures: (i) an acquisition of shares with voting rights by way of a sale and purchase agreement; (ii) an acquisition of a business or assets by way of a business or an asset purchase agreement;

[57]http://www.wongpartnership.com/files/download/474 last accessed April 16, 2017
[58] Ibid no. 54

or (iii) a joint venture whereby two or more parties cooperate for a particular common business goal either by participating in an incorporated or registered vehicle or by way of an unincorporated arrangement. Common structures for public M&A In Singapore, public M&A transactions can be effected, amongst others, by one of the following structures: (i) a takeover of a public listed company, REIT or BT by way of a general offer for all of the voting shares or units in a public listed company, REIT or BT effected in accordance with the Code[59]; (ii) a scheme of arrangement (which is a legislative procedure to restructure a company) under section 210 of the Companies Act which has to be approved at a scheme meeting by a statutorily-imposed majority in numbers and holding three-fourths in value and sanctioned by the High Court of Singapore, at which point it is binding on all shareholders; (iii) a scheme of amalgamation under sections 215A-J of the Companies Act which allows two or more Singapore incorporated companies to amalgamate and continue as one company through a voluntary amalgamation process; or (iv) a trust scheme constituting an acquisitions of units in a BT. Of these, (i) and (ii) are the most common structures.

3) **<u>Switzerland</u>**

Swiss company law (Article 530 et seq. CO) regulates the organization of a Swiss offeree company (see 1.4 below). The following comments will be confined to corporations (Article 620–763 CO), since this type of company is predominant in Switzerland. Swiss company law[60] also contains rules concerning the transferability of shares (see 1.4.1 and 6.5.2 below) and defines the corporate action required to transfer shares or a business. Approval by the shareholders of the acquiring corporation (‘acquirer’) is necessary if: (a) the business of the offeree company is outside the statutory purpose of the acquirer – the shareholders must then approve changes in the Articles of Association of the acquirer, which requires a resolution passed with a quorum of at least two-thirds of the shares represented, combined with an absolute majority of the

[59] http://www.weerawongcp.com/data/know/50.pdf last accessed April 16, 2017
[60] https://www.baerkarrer.ch/publications/4_3_11.pdf last accessed April 16, 2017

total share capital voted[61] (see 1.4.1 below and Article 704 I.l CO); (b) the consideration is to be given in shares (or in the form of equity linked bonds) – the shareholders must then approve an increase in the share capital in order to issue the shares, unless sufficient authorized share capital was created prior to the transaction. The shareholders of the offeree will have to approve the transaction either by: (i) selling their shares; or (ii) in the case of a merger or a sale of all assets followed by a liquidation of the company, by a vote in the shareholders' meeting(see Article 704 CO again requiring a quorum of two thirds of the votes represented in the meeting). Special disclosure requirements apply if the transaction is financed by an increase in the share capital of the acquirer, irrespective of whether the newly-issued shares will be used as consideration to the seller, or whether existing shareholders (or the public) subscribe to these shares for cash which in turn is used to pay the purchase price (Articles 650 II.4, 628, 634, 652e, 652f CO – see 4.5.3 below). The board will have to issue a report detailing how the valuation of the offeree was made and the auditors of the acquiring corporation will have to confirm that this valuation meets accepted accounting standards (Article 652f CO).[62] Finally a prospectus will be required if the shares are offered to the public (Article 652a CO).As a general rule, M&A is regulated by general corporate and contract law provisions contained in the Swiss Code of Obligations (CO)[63]. In addition, other legislations (briefly listed below) are relevant as well. No specific regulations exist, however, with respect to exchange control, general registration requirements for issuance of securities or general restrictions on foreign investments.Under the Act on Cartels, the parties to a business combination are required to notify the Federal Competition Commission (FCC) if, in the last accounting period prior to the signing of the agreement in which the concentration is agreed, (i) the undertakings concerned reported worldwide joint sales of at least CHF 2 bn or sales in Switzerland of at least CHF 500m, and (ii) at least two of the undertakings concerned reported individual sales in Switzerland of at least CHF 100m. Special rules apply for banks and savings institutions, insurance companies and media enterprises.

[61]https://www.baerkarrer.ch/publications/4_3_1.pdf last accessed April 16, 2017
[62]https://www.baerkarrer.ch/publications/4_3_1.pdf last accessed April 16, 2017
[63] Ibid no. 62

Concentrations between affiliated companies are usually not subject to notification. A concentration is deemed approved unless the FCC decides within one month of notification to open an investigation. If so, the final decision has to be rendered within another four months. The merger may be (i) cleared; (ii) cleared subject to conditions; or (iii) prohibited. The test is whether the concentration has the potential to eliminate (and not only significantly restrict) workable competition.Business combinations are, in general, governed by the Swiss Code of Obligations (CO) and by the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Merger Act). Public offers for listed shares are, in addition, subject to the Federal Act on Stock Exchanges and Securities Trading (SESTA)[64]. SESTA applies to cash or share exchange offers addressed publicly to the holders of equity securities of companies whose equity securities are listed on a Swiss exchange. It should be noted that SESTA provides for a mandatory bid rule: a person acquiring, directly or indirectly, more than 33.33 per cent of the voting rights (regardless of whether such voting rights can be exercised) of a Swiss company listed in Switzerland or a foreign company with a primary listing in Switzerland is required to submit an offer for all listed securities of the target. A potential target company's articles of incorporation can provide for an 'opting-out' (no mandatory offer obligation) or an 'opting-up'. (increase of the triggering threshold up to 49 per cent of the voting rights. In the case of a mandatory offer (including offers that would result in the triggering threshold being exceeded), the offer price may not be set below (minimum price): • the weighted average stock price on the relevant Swiss exchange of the 60 trading days prior to the formal pre-announcement or the publication of the offer (if the stock is deemed not liquid, the minimum price corresponds to the value of the shares as valued by a qualifying expert); and • the highest price paid by the bidder for shares in the company (including privately negotiated block trades) in the preceding 12 months. Non-mandatory public offers need to comply with the best price rule only (the highest price paid to a shareholder after the formal pre-announcement or launch of the offer or within a period

[64]https://www.eversheds-sutherland.com/documents/global/switzerland/Publications/GTDTMA2014.pdf last accessed April 16, 2017

of six months following the additional acceptance period has to be offered to all shareholders). In the case of a cash purchase outside an exchange offer, a cash alternative needs to be offered to all shareholders.[65] In the case of a mandatory offer, the offeror must in any case offer a cash alternative (if otherwise structured as an exchange offer). If the business combination results in the listing of new shares on a stock exchange, the listing rules of the respective stock exchange need to be complied with (for example, Listing Rules of the SIX Swiss Exchange (SIX)). In contrast, there is no general requirement to register securities or their owners. The Swiss Federal Act on Cartels and other Restraints of Competition (ACart), in combination with the Ordinance on Merger Control, regulates merger control. In public transactions, business combinations may be subject to insider trading, market manipulation and publicity rules. An impending acquisition or merger is deemed to be price-sensitive inside information. Insider trading and market manipulation are considered a felony under the SESTA. With the revision of the SESTA in 2013, the insider criminal law provisions have been overhauled and the constituent elements of price manipulation have been defined more precisely (see 'Update and trends'). There are no general currency transfer limitations or restrictions on foreign investments.The transaction agreement is typically governed by Swiss law. It is common in Switzerland to draft such acquisition agreements in an Anglo-American style, since the statutory remedies provide only for limited protection in the event of a misrepresentation or breach of warranty or non-performance[66]

[65]http://www.mondaq.com/x/476492/M+A+Private+equity/Statutory+And+Regulatory+MA+Framework+In+Switzerland last accessed April 16, 2017

[66]https://uk.practicallaw.thomsonreuters.com/1-526-6249?__lrTS=20170416075133676&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 last accessed April 16, 2017

CHAPTER 4:

MERGERS AND ACQUISTIONS IN SPECIFIC SECTORS

1) **BANKING SECTOR**

There are two modes of growth for any corporation, the first being the organic mode and the second being inorganic. In organic mode, high industrial utility is achieved by the sales-profit ratio and therefore, a company is said to be growing if it has increasing net sales index. In inorganic growth mode, the corporations undertake mergers, takeovers and joint-venture operations to strengthen their business presence and monopolise the market supply to the maximum extent possible. However, this is a view from a corporate perspective. Banks do not fall in such category, principally because of the fact that they are no-doubt companies, but are under the supervision of their master regulator for all business purposes. Be it appointment of directors or expansion of business, almost everything is supervised and sometimes dictated by RBI in consultation with its Department of Banking Supervision. Banks are the sole institutions that are efficient to ‗credit creation', are privileged borrowers and are the best practitioners in balancing profitability with liquidity. They are entrusted with the high duty to comply with the demands of depositors, as and when they arise.4 Improvement of operational and distribution efficiency of commercial banks has always been an issue for discussion in the Indian policy milieu and Government of India in consultation with Reserve Bank of India (RBI) have, over the years, appointed several committees to suggest structural changes towards this objective.[67] Some important committees among these are the Banking Commissions, 1972 (Chairman: R.G. Saraiya) and 1976 (Chairman: Manubhai Shah), and the Committee for the Functioning of Public Sector Banks, 1978 (Chairman: James S. Raj).[68] Further, the second Narasimham Committee (1998) had also suggested mergers among strong banks, both in the public and private sectors and even with

[67]https://www.ripublication.com/gjfm-spl/gjfmv6n3_05.pdf last accessed April 16, 2017
[68] Ibid no. 67

financial institutions and Non-Banking Finance Companies (NBFCs). These all being ideal prudential norms set by RBI; do not attract much of our attention primarily because they are voluntary mergers or friendly takeovers. However, we need to undertake specific power vested with RBI to implement a forced merger of one bank into another bank, specifying the reasons as it may desire. This not only attracts legal issues of compliance but invokes some human andethical issues as well. This has only led to value erosion but also several other consequences to be debated upon. RBI‘s recent move in taking out bank mergers outside of the scope of CCI is another question which needs to be answered. Miscellaneous interpretations about the Bill has given a considerable hike to the question- Is over-regulation beneficial to the financial market or mere supervision would increase the business and profitability of banking companies? RBI moreover, attempts to gain a significant position in approving or imposing penalties in lieu of the amalgamation schemes or merger proposals forwarded for its approval. RBI has no doubt, been the most successful regulator of its business in India but whether is competent to over-ride issues of competition, takeover etc under the umbrella of core-banking operations‘ is a generic question which attracts considerable thought of the intelligentsia.[69] Many commentators have for example, commented upon the prudential regulation‘of banks and allied regulation of banking companies in India. The complex structure of M&A deals in banking is because of the fact that government is generally the owner of both sides in such a scheme. One of the major reasons that they are urged to be kept out of the purview of CCI is that RBI does consider competition‘to be harmful for the banking sector and with such a view deeply regulates the banking enterprise and its business presence.Mergers in such a scenario are rarely voluntary and mostly are marriage shots fired by RBI[70] in lieu of consolidation to improve supervision over the financial sector. However, the sudden announcement of merger between HDFC bank & Centurion Bank of Punjab was recorded as a merger of strength and the merger was held

[69]https://www.researchgate.net/publication/307639606_Mergers_and_Acquisitions_in_the_Indian_Banking_Sector_-_mergers_and_acquisitions_in_indian_banking_sector_pdf last accessed April 16, 2017
[70]http://uhra.herts.ac.uk/bitstream/handle/2299/3465/902962.pdf?sequence=1 last accessed April 16, 2017

as a merger of strength amongst two healthy banks, thereby creating an exception to the foregoing vision. The recent move of Central Government in propelling the merger of Regional Rural Banks (RRBs) has also attracted debate among the officers of All India RRB Officers‘ Federation (AIBOC). The comprehensive regulatory framework of amalgamation or merger between two banks, irrespective of their business and capital adequacy is by and large the product of sequential work groups appointed by RBI. The regulatory framework for M&As in the banking sector is laid down in the Banking Regulation (BR) Act, 1949[71]. In the post-Independence era, the legal framework for amalgamations of banks in India was provided in the Act. The Act provides for two types of amalgamations, viz., (i) voluntary and (ii) compulsory. For voluntary amalgamation, Section 44A of the BR Act provides that the scheme of amalgamation of a banking company with another banking company is required to be approved individually by the board of directors of both the banking companies and subsequently by the two-thirds shareholders (in value) of both the banking companies. Further, Section 44A of the BR Act[72] requires that after the scheme of amalgamation is approved by the requisite majority in number representing two-third in value of shareholders of each banking company, the case can be submitted to the Reserve Bank for sanction. However, the Reserve Bank has the discretionary powers to approve the voluntary amalgamation of two banking companies under section 44A of the BR Act. The experience of the Reserve Bank has been, by and large, satisfactory in approving the schemes of amalgamation of private sector banks in the recent past and there has been no occasion to reject any scheme of amalgamation submitted to it for approval.18 Most of these voluntary mergers were between healthy banks, somewhat on the lines suggested by the first Narasimham Committee. The Committee was of the view that the move towards the restructured organisation of the banking system should be market-driven and based on profitability considerations and brought about through a process of M&As. Insofar as _compulsory amalgamations‘ are concerned, these are induced or forced by the Reserve Bank under

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[71]http://www.academia.edu/5449422/Merger_and_Acquisitions_M_and_As_in_the_Indian_Banking_Sector_in_Post_Liberalization_Regime last accessed April 16, 2017

[72] Banking Regulation Act, 1945

Section 45 of the BR Act, in public interest, or in the interest of the depositors of a distressed bank, or to secure proper management of a banking company, or in the interest of the banking system. In the case of a banking company in financial distress, the Reserve Bank under Section 45(2) of the BR Act may apply to the Central Government for an order of moratorium in respect of a banking company and during the period of such moratorium, may prepare a scheme of amalgamation of the banking company with any other banking institution. (banking company, nationalised bank, SBI or its subsidiary)[73]. Such a scheme framed by the Reserve Bank is required to be sent to the banking companies concerned for their suggestions or objections, including those from the depositors, shareholders and others. After considering the same, the Reserve Bank sends the final scheme of amalgamation to the Central Government for sanction and notification in the official gazette. The notification issued for compulsory amalgamation under Section 45 of the BR Act is also required to be placed before the two Houses of Parliament. The amalgamation becomes effective on the date indicated in the notification issued by the Government in this regard. In the case of ‗voluntary merger or acquisition‘of any financial business by any banking institution, there was no provision under the BR Act for obtaining approval of the Reserve Bank. In order to revisit the regulatory, legal, accounting and human relations related issues, which may arise in the process of consolidation in Indian banking system, the Working Group was constituted by the Indian Banks‘Association. The Group in its Report titled ―Consolidation in Indian Banking System‖ submitted in 2004[74] highlighted the need for making an omnibus provision in the BR Act requiring any banking institution to obtain prior approval of the Reserve Bank before acquiring any other business or any merger or amalgamation of any other business of banking institution or non-banking financial institution, with absolute right to the Reserve Bank to finalise the swap ratio which should be made binding on all concerned. The Reserve Bank, on the recommendations of the Joint Parliamentary Committee (2002), had constituted a Working Group to evolve guidelines for voluntary

[73]http://www.igidr.ac.in/conf/money1/MERGERS%20AND%20ACQUISITIONS%20IN%20INDIA.pdf last accessed April 16, 2017
[74] Ibid no. 73

mergers involving banking companies. Based on the recommendations of the Group, the Reserve Bank announced guidelines in May 2005 laying down the process of merger proposal, determination of swap ratios, disclosures, the stages at which boards will get involved in the merger process and norms of buying/selling of shares by the promoters before and during the process of merger. However, to ensure the continued strenght of merged entity, it has been provided in the guidelines that in such cases, the banking company should obtain the approval of the Reserve Bank of India after the scheme of amalgamation approved by its Board but before it is submitted to the High Court for approval[75]. In both situations, whether a non-banking company amalgamates with a banking company or amalgamation is among banking companies, the Reserve Bank ensures that amalgamations are normally decided on business considerations. For this, the Reserve Bank also laid down guidelines, to which boards of directors should give consideration during the merger process. These guidelines mainly relate to (i) valuesof assets and liabilities and the reserves of amalgamated entity proposed to be incorporated into the book of amalgamating banking company; (ii) swap ratio to be determined by competent independent valuers; (iii) shareholding pattern; (iv) impact on profitability and, capital adequacy of the amalgamating company; and (v) conformity of the proposed changes in the composition of board of directors with the Reserve Bank guidelines in that context. The statutory framework for the amalgamation of public sector banks, viz., nationalised banks, State Bank of India and its subsidiary banks, is, however, quite different since the foregoing provisions of the BR Act do not apply to them. As regards the nationalised banks, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and 1980, or the Bank Nationalisation Acts authorise the Central Government under Section 9(1)(c) to prepare or make, after consultation with the Reserve Bank, a scheme, inter alia, for the transfer of undertaking of a _corresponding new bank' (i.e., a nationalised bank) to another _corresponding new bank' or for the transfer of whole or part of any banking institution to a corresponding new bank. Unlike the sanction of the schemes by the Reserve Bank under Section 44A of the BR Act, the

[75]https://www.scribd.com/doc/52893843/mergers-and-acquisitions-in-indian-banking-sector last accessed on April 16, 2017

scheme framed by the Central Government is required, under Section 9(6) of the Bank Nationalisation Acts, to be placed before the both Houses of Parliament[76]. Under this procedure, the only merger that has taken place so far relates to the amalgamation of the erstwhile New Bank of India with Punjab National Bank, on account of the weak financials of the former. As regards the State Bank of India (SBI), the SBI Act, 1955, empowers the State Bank to acquire, with the consent of the management of any banking institution (which would also include a banking company), the business, including the assets and liabilities of any bank. Under this provision, the consent of the bank sought to be acquired, the approval of the Reserve Bank, and the sanction of such acquisition by the Central Government are required. Several private sector banks were acquired by State Bank of India following this route. However, so far, no acquisition of a public sector bank has taken place under this procedure. Similar provisions also exist in respect of the subsidiary banks of the SBI[77]. Thus, there are sufficient enabling statutory provisions in the extant statutes governing the public sector banks to encourage and promote consolidation even among public sector banks through the merger and amalgamation route, and the procedure to be followed for the purpose has also been statutorily prescribed. It has to be noted however, that in case an NBFC merges with a bank or vice-versa, the consolidation scheme has to be compulsorily approved by the Reserve Bank of India.In India, consolidation of banks through Merger and Amalgamation is not a new phenomenon, which has been going on for several years. Since the beginning of modern banking in India, through the setting up of English Agency House in the 18th century, the most significant merger in the pre- Independence era was that of the three Presidency banks founded in the 19th century in 1935 to form the Imperial Bank of India (renamed as State Bank of India in 1955). In 1959, State Bank of India acquired the state-owned banks of eight former princely states. In order to strengthen the banking system, Travancore Cochin Banking Enquiry Commission (1956) recommended for closure / amalgamation of weak banks. Consequently, through closure/ amalgamations that

[76]http://shodhganga.inflibnet.ac.in/bitstream/10603/40653/12/12_chapter3.pdf last accessed April 16, 2017
[77] Ibid no. 76

followed, the number of reporting commercial banks declined from 561 in 1951 to 89 in June 1969. Merger of banks took place under the direction of the Reserve Bank during the 1960s.[78] During 1961 to 1969, 36 weak banks, both in public and private sectors, were merged with other stronger banks.28 This way been several bank amalgamations were seen in India in the post-reform period. In all, there have been 33 M&As since the nationalization of 14 major banks in 1969. Of these mergers, 25 involved mergers of private sector banks with public sector banks, while in the remaining eight cases, mergers involved private sector banks. Out of 33, 21 M&As took place during the post-reform period with as many as 17 mergers/ amalgamations taking place during 1999 and after(table 3.8.1). Apart from this, few more merger were occurred in the Indian banking sector (table 3.8.2), the HDFC Bank acquired the Centurion Bank of Punjab on 23 May 2008. In the year 2010, on 13th August, the process of M&As in the Indian banking sector passed through the Bank of Rajasthan and the ICICI Bank[79]. The Reserve Bank of India sanctioned the scheme of merger of the ICICI Bank and the Bank of Rajasthan. After the merger, ICICI Bank replaced many banks to occupy the second position after the State Bank of India (SBI) in terms of assets in the Indian Banking Sector. And in the last ten years, ICICI Bank and HDFC bank in the private sector and Bank of Baroda (BOB) and the Oriental Bank of Commerce (OBC) in the public sector involved themselves as bidder banks in the Merger and Acquisitions (M&As) in the Indian Banking Sector.[80]

2) **AVIATION SECTOR**

Aviation is, by its very nature, a critical part of the infrastructure of the country and has important ramifications for the development of tourism and trade, the opening up of inaccessible areas of the country and for providing stimulus to business activity and economic growth.The airline industry has to operate in a competitive world. Many airlines are unable to survive in their present set up and have to streamline their

[78]http://shodhganga.inflibnet.ac.in/handle/10603/4516 last accessed April 16, 2017
[79] Ibid no.76
[80] Ibid no. 76

operations through cost cutting measures. Merging with another airline provides a possible method to improve airline operations and reduce costs by sharing the available resources and eliminating duplication of service.The history of civil aviation of India may be traced back to the year 1933, when Tata Airlines was formed by Mr. JRD Tata[81]. At the time of Independence nine airlines were operational in the Indian Territory. The number was then reduced to eight when Orient Airways shifted its base to Pakistan. The then operational airlines were the Tata Airlines, Indian National Airways, Air service of India, Deccan Airways, Ambica Airways, Bharat Airways and Mistry Airways. The era of private airlines came to an end on 28th May 1953 - with the enactment of the Air Corporations Act, 1953 - Government of India nationalised the airline industry. In accordance with this Act, two air corporations, viz. Indian Airlines Corporation and Air India International, were established and the assets of all the then existing nine air companies were transferred to the two new Corporations. The operation of scheduled air transport services was made a monopoly of these two Corporations and the Act prohibited any other person or their associates from operating any scheduled air transport services from/to/ or across India.In the year 1990, open-sky policy was adopted by the government and it allowed air taxi- operators to decide their own flight schedules, cargo and passenger fares.Aviation Industry in India is one of the fastest growing aviation industries in the world. With the liberalization of the Indian aviation sector, aviation industry in India has undergone a rapid transformation. From being primarily a government-owned industry, the Indian aviation industry is now dominated by privately owned full service airlines and low cost carrier. At present, private airlines account for around 75% portion of the domestic aviation market. The open sky policy of the government has helped a lot of overseas players entering the aviation market in India. Earlier air travel was a privilege only a few could afford, but today air travel has become much cheaper and can be afforded by a large number of people. The 9th largest aviation market in the world is India with a compound annual growth rate (CAGR) of 18 per cent. However, the Indian Aviation Industry is still in a very nascent stage. India's air

[81]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025282 last accessed April 16, 2017

passenger per capita at 0.09 is still abysmally low as compared to 0.30 in China, 5.63 in Australia and 4.69 in US[82].

Regulatory Authorities in aviation industry

a) Ministry of Civil Aviation

The Ministry of Civil Aviation is the nodal Ministry responsible for policy formulation, development and regulation of the Civil Aviation sector in India. The Ministry also handles the planning and implementation of schemes for the growth and expansion of civil air transport, airport facilities, air traffic services and carriage of passengers and goods by air.[83]

b) Directorate General of Civil Aviation (DGCA)

DGCA is an attached office of Ministry of Civil Aviation. It is a principal regulatory body for Civil Aviation in India and primarily deals with safety issues. It is responsible for:

· regulation of air transport service to/from/within India,

· enforcement of civil air regulations, air safety and airworthiness standards,

· coordinating all regulatory functions with International Civil Aviation Organisation.

c) Airports Authority of India (AAI)

AAI was constituted by an Act of Parliament and came into being on 1st April 1995 by merging erstwhile National Airports Authority and International Airports Authority of India. The merger brought into existence a single Organization entrusted with the responsibility of creating, upgrading, maintaining and managing civil aviation infrastructure both on the ground and air space in the country. AAI manages 125 airports, which include 11 International Airport, 08 Customs Airports, 81 Domestic Aairports and 27 Civil Enclaves at Defence airfields

[82]http://www.legalservicesindia.com/article/article/mergers-&-acquisitions-in-aviation-sector-805-1.html last accessed April 16, 2017

[83] Ibid no. 82

d) Bureau of Civil Aviation Security (BCAS)

BCAS is an independent department under the Ministry of Civil Aviation. Its main responsibility is to lay down standards and measures in respect of security of civil flights at International and domestic airports in India.

e) Federation of Indian Airlines (FIA)

FIA is an apex industry body which has been formed by the scheduled carriers in India. FIA as the voice of India's airline industry works to identify and take up issues on behalf of the industry, with various regulatory authorities, government departments and other key stake-holders. The functioning of the FIA is guided by an Executive Council, comprising chiefs of each of the member airlines[84].

Cases of Airline M&A in India[85]

a) Air India and Indian Airlines

For long decades after its independence, India was served by two state run aviation companies – Air India which served the international market and Indian Airlines which served the domestic market. Even though the two were started with a lot of capital and initial performance was nothing short of remarkable, it was not long that the two companies started to feel the restrictions and stress of a socialistic shackled system. In the recent years, the opening of Indian aviation sector for private players meant that the competition was getting too much for the two. The solution was found by the Indian government in the form of merger of both the entities.

The Government of India, on March 1, 2007, approved the merger of Air India and Indian Airlines to improve operational synergy and increase productivity. Consequent to

[84] Ibid no. 82
[85] Ibid no. 82

the above, a new Company viz National Aviation Company of India Limited was incorporated under the Companies Act, 1956 on March 30, 2007. The company became registered on March 30, 2010. The merger was to help the new entity compete with large global airlines.

Following the merger of the two companies, it was decided that a combined identity should evolve. Since Air India was a globally and nationally recognized brand name, the operational brand name of the company remained Air India and the Maharaja continued to reign as the mascot of the new airline. The logo of the new airline was a flying swan with the Konark Chakra placed inside it.[86]

b) Jet Airways and Sahara Airlines

The two carriers share the same history; both began their operations as air taxi operators and later became full service carriers. Jet and Sahara both used to compete on international routes prior to merger.

Jet Airways, which commenced operations on May 5, 1993, has within a short span of 14 years established its position as a market leader. The airline has had the distinction of being repeatedly adjudged India's 'Best Domestic Airline' and has won several national and international awards.

Background:

Jet Airways and the Shareholders of Sahara Airlines Limited had concluded a Share Purchase Agreement on January 18, 2006 whereby Jet Airways was to acquire the 100% shares of Sahara Airlines Limited for a Total Consideration of Rs. 2,000 crores. The original 65 day Term of the Agreement expired in March 2006. This was mutually extended to 21st June 2006, at which time Jet Airways also paid an advance of Rs. 500 Crores.[87]

At the expiry of the extended period, disputes arose between the parties as to whether or not the agreement had terminated (for non-fulfillment of some conditions). These

[86] https://www.scribd.com/doc/38220843/Mergers-and-Acquisitions last accessed April 16, 2017

[87] Ibid no. 82

disputes were referred for hearing to an Arbitral Tribunal. However, before the commencement of Arbitral Proceedings, the two parties successfully resolved their disputes and were able to draw up a Settlement Agreement and the Arbitral Proceedings were disposed off in terms of the same agreement.

On 20th April, 2007, Jet acquired 100% stake in Air Sahara 15 months after signing the original purchase agreement. Jet purchased its arch rival for 1,450 crores which was 35 % less than the price agreed in 2006. Jet rebranded Sahara as “Jetlite” and announced that the new entity would offer reduced frills but would be over and above low cost carrier (LCC) in terms of service. The private sector Jet-Sahara combine ended the dominating role of the public sector with the new corporate commanding as much as 32% of the domestic market space.[88]

c) Kingfisher Airlines-Air Deccan[89]

Kingfisher Airlines, a premium Full-Service Carrier, is a private airline based in Bangalore, India. Currently, it holds the status of India's largest domestic airline, providing world-class facilities to its customers. Owned by Vijay Mallya of United Beverages Group, Kingfisher Airlines started its operations on May 9, 2005, with a fleet of 4 brand new Airbus - A320, a flight from Mumbai to Delhi to start with. The airline currently operates on domestic as well as international routes, covering a number of major cities, both in and outsideIndia.

Air Deccan is India’s first LCC. It was founded and operated by Deccan Aviation Ltd. by Captain Gopinath in 2003 with regular scheduled flights from Bangalore to Mangalore and Hubli. When it started its operations, Deccan was known popularly as the common man's airlines. Air Deccan triggered price wars in the Indian Skies which forced other players to match Air Deccan’s prices. The consumers benefited while carriers lost. Air Deccan gained market share but at the cost of profitability.

[88]https://www.scribd.com/doc/38220843/Mergers-and-Acquisitions last accessed April 16, 2017
[89] Ibid no. 82

In 2007, Kingfisher Airlines acquired a 26% equity stake in Air Deccan and became the largest single shareholder in Deccan Aviation Ltd. It was agreed that Kingfisher would continue to serve the corporate and business travel while Air Deccan would focus on serving the low fare segment but with improved financial prospects for both carriers. Kingfisher later increased its stake to 46%, and took control of the management of Air Deccan, upgrading it to a value-based airline with higher airfare and repositioned it as 'Simplifly Deccan'.

Air Deccan airlines merged with Kingfisher Airlines and decided to operate as a single entity from April, 2008. Following the merger of Deccan with Kingfisher, in August 2008, Kingfisher renamed Deccan as Kingfisher Red. After the merger, the company has a combined fleet of 71 aircrafts, connects 70 destinations and operates 550 flights in a day. The combined entity has a marketshareof33%. [90]

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[90]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Indian_Aviation_Sector.pdf last accessed April 16, 2017

CHAPTER 5:

CONCLUSIONS AND SUGGESTIONS

We all are familiar with the fact that mergers and acquisitions have become a common phenomenon and are considered as an important mechanism of corporate growth. They are an integral part of the new economic paradigm, especially in today's booming Indian economy. Bet it Tata's acquisition of Corus, Airtel acquisition of Zain Telecom, Sun Pharma's Acquisition of Ranbaxy, Jet-Etihaad Deal, merger of Bank of Rajasthan with ICICI bank, RIL-RPL merger or the most recent one-acquisition in e-commerce segment Flipkart-Myntra Designs, merger and acquisition is the word of the day. They have become an integral part of the new economic paradigm. The corporate world is hit by the Darwin's theory of evolution i.e. survival of the fittest. In today's globalised economy, competitiveness and competitive advantage have become the buzzwords for corporates around the world. Mergers and acquisitions are being increasingly used the world over as a strategy for achieving a larger size and asset base, faster growth in market share and for becoming more competitive through economies of scale. Thus, mergers and acquisitions have become an important tool for corporate growth. Across the world mergers and acquisitions remains high on the agenda for companies in all territories and it remains a key strategic tool to drive growth and build scale. Certainly in the eyes of businesses, it remains the most effective way to enter a new territory.[91] The trend towards globalisation of all national and regional economies has increased the intensity of mergers, in a bid to create more focused, competitive, viable, larger players in each industry. The economic and regulatory reforms have transformed the business scenario across the globe. A restructuring wave is sweeping the corporate sector the world over and taking within its fold both big and small companies. In the ongoing scenario, when the stress is on globalisation, opening up the economy, worldwide competition, expanding markets,

[91]http://shodhganga.inflibnet.ac.in/bitstream/10603/103368/15/15_chapter-vii.pdf last accessed April 16, 2017

extending beyond the national frontiers, fast changing technologies, never ending needs for finance, necessity for diversification and similar such situations, small is no longer beautiful in fields of business, trade, and commerce. The stress now is on larger and bigger establishments/conglomerates to achieve more efficiency for standing up against global challenges and world wide competition by availing of the benefits of economies of scale and large scale production.5 Thus, the whole world is experiencing merger waves. As the sweeping wave of economic reforms and liberalisation has transformed business scenario all over the world, the national economies have been integrated with 'market-oriented globalised economy.' Considering the drastic changes in global environment and its obligation to WTO, India has also changed its economic policies. One of the most vital and welcome dimensions and trends in the present decade is the increasing degree of internationalisation of global economy through mergers and acquisitions. India has realised this fact and has allowed investors across the globe to enter the Indian market without restricting them to any particular type of business. That's why, the market is witnessing increased number of high value inbound M&As in India. On the other hand, liberalisation of foreign investment and foreign exchange policies accompanied by rapid economic growth has enabled Indian companies to acquire softer targets in India or abroad. Indian companies are not only competing with foreign companies operating in India but also managed to compete with them in their home ground. India's emergence as a major developing economy and its potential to drive global economic growth alongwith China in this century is being acknowledged by economists across the globe. A sustained growth of 8-8.5 percent combined with a huge domestic demand is attracting global corporate towards India. This coupled with the increasing appetite of Indian companies for M&As has resulted in an increase in M&A activity in India with more and more companies scouting for potential targets. The present era in M&As is driven by the desire of Indian Industries to go global and withstanding global competition. Acquisition of foreign companies by the Indian businesses has been the trend in the Indian corporate sector post 2005. Tata Steel acquisition of Corus, Hindalco acquisition of Novelis, BhartiAirtel acquisition of telecom business of Zain in Africa, Infosys buying Axon

Group, Videocon buying Daewoo Electronic Corporation, Tata-buying Jacquar and Land Rover-marked this trend in the Indian M&A history. A strategic shift in behavioural patterns of Indian entrepreneurs is being witnessed of off lately-they are willing to sell a part or whole of their stake to exit their business to foreign players. Weak Indian rupee which has made Indian business attractive accompanied by attractive valuations from foreign players are promoting Indian entrepreneurs to evaluate exits. Few successful exits in the recent past include Daiichi-Ranbaxy and Abott-Piramal. This vibrancy in M&A environment was due to positive regulatory mechanism, globally accepted business processes and a robust and optimistic investment climate. The existing Companies Act, 1956 was enacted by the Indian Legislature over half-a century ago. In the ensuing years, much as changed in the nature of business and the manner in which they are conducted both domestically and internationally.22 Therefore, the existing Companies Act, 1956 has been recently replaced by the Companies Act, 2013 to respond to the needs of the every evolving economic activities and business models of India Inc. In business combinations, in any form of merger, takeover or acquisitions the individual and community interest of various parties viz. shareholders, creditors, employees and consumers are involved from different angles. Involvement of social interests in the economic activities implies application of law with a view to regulate the activity to ensure safeguard of general public interest. Various procedural and substantive laws have been enacted to regulate business reorganisations like mergers and acquisitions so that these restructuring activities do not jeopardise the public interest by exploiting minority shareholders, investors, creditors or consumers-the end users of the company's products. Certain sections of the old Act in the amended form have been incorporated in the new Act. In addition to that, the new Act has added robust and progressive new provisions such as cross-border mergers, short-from mergers, dispensation with creditors and shareholder meetings, statutory auditor's certificate, valuation from experts, extinguishment of holding of 'Treasury Stocks', notice of meeting to be sent to various regulatory authorities, option to transferee company to remain unlisted in case of merger of listed company with unlisted company, exit mechanism for minority shareholders, approval of scheme by postal ballot and streamlining of the valuation and the accounting process. The new Act has taken a step forward to give new dimensions to corporate restructuring through mergers and amalgamations. The aim of the new Act is to introduce certain simplistic and forward-looking concepts to bring about transparency and accountability in the age old procedure, thereby making company law regulating M&A relatively friendlier and more acceptable in the global arena. But the full impact of the law cannot be predicted here as the provisions (sections 230-240) of the new Act regulating M&As have not been notified and no rules framed. But the new Act raises certain areas of concern which the regulators should pay heed to while notifying rules and issuing clarifications. As various legislative provisions regarding mergers and amalgamation have developed and become an inseparable part of the corporate jurisprudence with the help of judicial perception, that's why steps various provisions of the Companies Act have been explained with the help of case law. The topic of mergers and amalgamations in general.is fraught with litigation as no scheme can be sanctioned without court's approval. Thus court's have to play a very vital and potent role. It is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informed judgement as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view.

Suggestions

To conclude from the above part, we can say that mergers and acquisitions are an integral part of the new economic paradigm, especially in today's booming Indian economy. They have made Indian companies truly global enterprises able to compete with best in the world. That's why, laws regulating M&As should promote corporate restructuring through mergers and acquisitions. As a result, Company Law, Takeover Code, Competition Act, Taxation Law and FEMA Laws have been constantly evolved by our policy makers, still a lot of loopholes are still there. So here under, the researcher forwards a blueprint of proposals to further promote M&As and make the process of M&As smoother.

Suggestions for amendment in Company Law[92]

Business restructuring through mergers, amalgamations and takeovers have become an important perspective of today's world. In the Indian scenario, the controls and restrictions of seventies and eighties were replaced by liberalisation and free trade post-1991. Therefore, various laws were modified and re-enacted to suit the liberal environment. But the Companies Act, 1956 was continued as such thereby causing hurdles to restructuring through M&As. That's why it was only last year that a new Companies Act 2013 received presidential assent on 29 August 2013. The new Act aims to be forward looking, more transparent, compact and able to adequately respond to the needs of the ever evolving economic activities and business models of India Inc. But there are certain areas of concern which the regulators should pay heed to while notifying rules and issuing clarifications.

1) **Provisions Regarding Cross-border Mergers to be relaxed**: Cross-border M&A transaction present tremendous opportunities for economic growth and increase in shareholders or investors value. They should be allowed freely by the law. But the Companies Act 1956 did not permit the Indian company to merge into the foreign company i.e. outbound mergers. But the Companies Act 2013, has removed the restriction and allowed Indian company to merge into a foreign company but only of select jurisdictions as may be notified by Central Government from time to time. Introducing qualification such as, only allowing transactions with certain notifiedjurisdiction has the potential to erode away the benefits of this provision. This will restrict the scope of outbound mergers. In the view of the researcher, this provision needs to be revisited in the new Act.

[92] Ibid no. 91

2) **Removal of Thresholds for Making Objection**: Section 230(4) provides that persons holding minimum 10 percent of shares or 5 percent of total outstanding debt can raise objections to the scheme. But the interest of small shareholders and creditors are undermined as it substantially erodes their power of objections. The minority would need to commit substantial effort in pooling stakes if they want to raise objections, unless a large institutional shareholders agrees to take their cause.

(3) Notice of the Scheme to Various Regulatory Authorities: Section 230(5) of the new Act provides that notice of the scheme should be additionally provided to various regulatory authorities such as the Income Tax Department, SEBI, RBI, CCI, respective stock exchanges etc. But this will increase the paperwork and the already cumbersome documentation process in M&A will be more time consuming. This provision should be done away with in the 2013 Act and notice to these regulators to be given only in cases when it is required under other acts and regulations.

4) Dispensation of Shareholder’s Meeting: In order to speed up the process of mergers, section 230(9) of the 2013 Act allows for dispensation of creditors meeting in certain cases. This should be extended to shareholders meeting also in similar circumstances when shareholders having 90 percent in value agree to the scheme as often calling the meeting can be a lengthy and cumbersome process which could waste both transferor and transferee company’s vital time and make the process of merger more lengthy.

5) Section 396A/239 to be Done Away With: Section 396A of the 1956 Act has been retained as such in section 239 of the 2013 Act, which provides that books and papers of the amalgamated company or acquired company shall not be disposed of without the prior permission of the Central Government and before granting such permission, the Central Government may appoint a person to examine the books and papers to ascertain any evidence of commission of offence. The Companies Act, 1956 had multiple checks before the sanctioning of the scheme by the Court/Tribunal in form of two provisos toSection 394(1) both of which required reports from Registrar and Official Liquidator to

keep a check on malpractices prevalent in the scheme. In the researcher's view, it would have been better if the two provisos were retained in the new Act as it is always better to prevent any malpractices before the sanctioning of scheme. If the scheme is against public interest then it should not be sanctioned by the court. If any offence is committed in connection with merger or scheme of merger is against public interest, it should be ascertained beforehand. As when amalgamation or acquisition is completed, undoing such amalgamation or acquisition will involve heavy costs for both the companies as well as the economy. Moreover, section 209(4A), of the 1956 Act stipulates that the books of account of every company relating to a period of not less than eight years immediately preceding the current year together with the vouchers relevant to any entry in such books of account shall be preserved in good order. This provision has been retained in the form of section 128(5) in the Companies Act 2013. So section 128(5) of the 2013 Act along with the two provisos (which should have been retained in the 2013 Act) will provide sufficient checks and section 239 should be done away with. Moreover, pre-merger checks are more effective and more rational than post-merger checks. Thus, both the proviso should be added to section 232 and section 239 should be done away it as it corresponds to section 396 A which has outlived it utility. Besides, there are also checks in other acts which can play the role of this section. (6) Approval of the Scheme: The 1956 Act as well as the 2013 Act both require that scheme for merger or any arrangement should be approved by a majority in number also representing 3/4th in value of shareholders/creditors present and voting. The requirement of majority in number does not serve any useful purpose considering that value is simultaneously being considered as criteria and poses an additional hurdle to approval of the scheme. Moreover, international best practices recognize value as the determining factor and do not appear to impose such additional conditions of majority in number. So section 230(6) should be modified to provide only for approval by 3/4th in value of shareholders and creditors, present and voting.

7) **Introduction of Non-obstante Clause in Section 394(2)/section 232(4):** Section 394(2) of the Companies Act 1956/section 232(4) of the Companies Act 2013 provides that when an order transferring any property or liabilities is passed, then by virtue of that order, such assets will be vested and liabilities will be transferred to the transferee company. Since the section does not contain a non-obstante clause, it creates immense practical difficulties in actual transfer of the various properties/assets of the transferor company into the transferee company. It is observed that section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 has clear provisions in the nature of a non-obstante declaratory order while sanctioning a scheme of restructuring. It is therefore recommended that a non-obstante provision like, 'Notwithstanding, anything to the contrary in any other law for the time being in force' to be introduced in section 232(4) of the 2013 to ensure that the assets and liabilities of the transferor company absolutely vest in the transferee company and the transferee company is not subjected to cumbersome formalities for the transfer of assets and liabilities in its own name.

8) **Multi-layered Structures to be Allowed in Genuine Cases**: Section 186(1) of the Companies Act 2013 imposes a restriction for investment through not more than twolayers of investment companies. This reduces flexibility in structuring investments especially in sectors like infrastructure and mining where it is common to have multilayered structures to implement large projects and fulfill financial requirements. No doubt, this provision aims to check tax avoidance through multiple structures but it may act as detriment to merger and acquisition activity as many acquisitions are structured through multiple layers to avoid tax burden. Moreover, these acquisitions through multi-layered structures may have many other economic benefits. Therefore, atleast in case of genuine multi-layered corporate structures exception should be allowed.

9) **Clarification on Voting by Postal Ballot**: Section 230(12) allows voting by postal ballot. The rules to be framed under the new Act should clarify or the law should

specifically clear that the voting by postal ballot should be in addition to and not complete substitution of an actual meeting of shareholders.

With the sections relating to mergers and acquisitions getting notified and establishment of National Company Law Tribunal, well we have to see how far it get succeed and achieve the very aim for which it is established.

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