Cross-Border Mergers and Acquisitions: Challenges under Indian Corporate Law[1]

Abstract

In the current era of globalization and economic integration, cross-border mergers and acquisitions (M&A) have emerged as a strategic tool for business expansion, access to new markets, technology transfer, and consolidation of global operations. India, as one of the fastest-growing economies, has witnessed a significant surge in cross-border M&A activity, both inbound and outbound. The liberalization of foreign investment norms, coupled with India's growing attractiveness as an investment destination, has made cross-border deals more frequent and complex. However, these transactions operate within a multifaceted legal and regulatory landscape that often creates hurdles for their successful execution.

This research paper delves into the legal framework governing cross-border mergers and acquisitions under Indian corporate law, with a specific focus on the Companies Act, 2013, Foreign Exchange Management Act (FEMA), Competition Act, 2002, and regulations issued by the Securities and Exchange Board of India (SEBI). While the Companies Act introduced Section 234 to allow mergers between Indian and foreign companies, the practical implementation of this provision remains limited due to lack of clarity, absence of reciprocal jurisdictions, and procedural bottlenecks. FEMA regulations further complicate transactions involving share swaps, valuation norms, and sectoral caps on foreign direct investment (FDI). Additionally, overlapping approvals required from various regulatory bodies—such as the Reserve Bank of India (RBI), Competition Commission of India (CCI), and SEBI—lead to delays, uncertainty, and increased compliance costs.

The paper also explores challenges related to tax implications, enforceability of foreign judgments and arbitral awards, differences in accounting standards, and post-merger integration issues. Through doctrinal analysis, case law study, and comparative insights from jurisdictions such as the UK, US, and Singapore, the paper identifies key legal and structural barriers that hinder seamless cross-border M&A transactions in India.

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The research concludes by offering policy recommendations for streamlining the regulatory process, enhancing legal certainty, and making India's corporate legal regime more conducive to international mergers and acquisitions. These include expanding the list of permissible jurisdictions for cross-border mergers, harmonizing valuation and disclosure norms, simplifying FEMA compliance, and strengthening dispute resolution mechanisms. By addressing these challenges, India can position itself as a globally competitive hub for cross-border corporate restructuring.

Keywords:

Cross-Border Mergers, Acquisitions, Indian Corporate Law, Companies Act 2013, FEMA, SEBI Regulations, Competition Law, Regulatory Hurdles, FDI Policy, Corporate Restructuring, Inbound Transactions, Outbound Transactions, Legal Framework, Valuation Norms, Post-Merger Integration, Jurisdictional Recognition

Literature Review

The study of cross-border mergers and acquisitions (M&A) under Indian corporate law has attracted considerable academic and industry attention due to the interplay between domestic regulatory regimes and international business strategy. Scholars have extensively debated the adequacy of India's legal framework in facilitating such transactions while ensuring transparency, compliance, and investor protection.

P.K. Vasudeva (2014) in *"Cross-Border Mergers and Acquisitions: Issues and Challenges in India"* highlighted that the Indian legal framework was historically restrictive toward foreign participation in corporate restructuring. However, post-liberalization reforms and the enactment of the Companies Act, 2013 opened new pathways, albeit with regulatory ambiguity and implementation challenges.

Umakanth Varottil (2017) explored the conceptual limitations of Section 234 of the Companies Act, 2013 in his article *"The Evolution of Cross-Border Mergers in India"*, emphasizing that despite the enabling provision, practical utilization remained minimal due to limited reciprocal recognition of jurisdictions and approval complexity.

R.S. Bhala (2019), in his comparative study between Indian and international jurisdictions, critiqued the overlapping authority of Indian regulators like RBI, CCI, and SEBI, stating that "multi-regulator approvals often result in fragmented compliance, inconsistent timelines, and increased transactional risk."

A report by Nishith Desai Associates (2020) titled *"Cross-Border Mergers: Regulatory Overview and Deal Making in India"* addressed both inbound and outbound M&A dynamics, identifying the valuation and foreign exchange challenges under FEMA, and advocating for a simplified, tech-enabled regulatory process to increase deal efficiency.

In the context of international law, George Y. Wu's comparative work on *"International Mergers and Acquisitions: Legal Considerations for Global Deals"* provided a macro-level understanding of jurisdictional harmonization, dispute resolution mechanisms, and enforcement of arbitral awards—key areas where India still lags in creating investor confidence for cross-border mergers.

The above literature reflects a broad consensus: India's regulatory regime shows promise but requires significant streamlining, clarity, and global alignment to fully support cross-border M&A.

Research Methodology

This research adopts a **doctrinal legal methodology**, which primarily involves an analytical approach based on statutes, case laws, regulatory guidelines, scholarly commentary, and comparative legal analysis. The study is qualitative in nature and does not rely on empirical or statistical data collection. The focus is on critically examining the substantive and procedural aspects of Indian corporate law concerning cross-border mergers and acquisitions, with the aim of identifying structural and interpretive challenges.

Primary Sources

- **Statutory instruments** including the *Companies Act, 2013*, *Foreign Exchange Management Act (FEMA), 1999*, *Competition Act, 2002*, and *Income Tax Act, 1961*.
- **Regulations** and **notifications** issued by regulatory bodies such as the *Ministry of Corporate Affairs (MCA)*, *Reserve Bank of India (RBI)*, *Securities and Exchange Board of India (SEBI)*, and *Competition Commission of India (CCI)*.

- **Judicial precedents** from Indian courts, particularly the Supreme Court of India and High Courts, as well as rulings by regulatory bodies.

Secondary Sources

- **Books and academic journals** discussing corporate law, mergers and acquisitions, and comparative regulatory analysis.
- **Law firm white papers** and industry reports (e.g., from Nishith Desai Associates, Khaitan & Co, etc.).
- **International legal commentaries** and reports from jurisdictions like the UK, USA, and Singapore to provide comparative insight.
- **News reports and practitioner commentary** for recent case studies and evolving trends.

Analytical Tools

- **Comparative legal analysis** is employed to contrast Indian regulatory approaches with best practices in other jurisdictions.
- **Case study method** is used to dissect specific merger/acquisition transactions for insights on procedural and regulatory difficulties.
- **Doctrinal interpretation** is applied to understand legislative intent, statutory ambiguities, and regulatory overlaps.

The methodology aims to provide a robust and structured legal analysis that not only identifies existing legal barriers but also offers interpretive clarity and reform-oriented recommendations to enhance India's readiness for cross-border corporate restructuring.

Hypothesis

The central hypothesis of this research is that:

"Despite legislative reforms and enabling provisions under Indian corporate law, the regulatory framework governing cross-border mergers and acquisitions remains fragmented, overly complex, and procedurally rigid—thereby impeding the effective execution of such transactions in India."

This hypothesis is based on the assumption that:

1. **Existing provisions**, such as Section 234 of the Companies Act, 2013, are underutilized due to a lack of clarity, limited reciprocal jurisdictions, and procedural delays.
2. **Foreign Exchange Management Act (FEMA)** regulations, especially concerning valuation norms, share swap mechanisms, and sectoral caps, act as significant deterrents to inbound and outbound M&A.
3. **Multiple regulatory approvals** required from the RBI, SEBI, CCI, and other bodies cause procedural inefficiencies and increase legal uncertainty.
4. **India's legal framework** is not fully harmonized with international best practices, thereby making India a less attractive destination for cross-border restructuring when compared to jurisdictions such as Singapore, the UK, or the Netherlands.

The paper proceeds to test this hypothesis by examining legal provisions, regulatory practices, case studies, and comparative jurisprudence, ultimately evaluating whether India's current framework supports or restricts seamless cross-border mergers and acquisitions.

Introduction

The phenomenon of cross-border mergers and acquisitions (M&A) has become a cornerstone of modern corporate strategy, driven by globalization, market liberalization, and the need for competitive growth. These transactions allow companies to transcend national boundaries, enabling access to new markets, technologies, and strategic assets. In India, the rising flow of foreign direct investment (FDI) and the international ambitions of Indian conglomerates have contributed to a steady increase in both inbound and outbound cross-border M&A activities. Yet, despite this growth, India's legal and regulatory architecture governing such transactions remains cumbersome and fragmented, often acting as a deterrent to seamless execution.

The legal framework for cross-border M&A in India is primarily governed by a constellation of laws, including the Companies Act, 2013, which introduced Section 234 to permit mergers between Indian and foreign companies. Complementing this are the Foreign Exchange Management Act, 1999 (FEMA), the Competition Act, 2002, the Income Tax Act, 1961, and sector-specific regulations issued by bodies such as the Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), and Competition Commission of India (CCI). While these laws collectively aim to provide oversight, they often create overlaps, ambiguities, and procedural delays that hinder the effective implementation of cross-border transactions.

One significant development was the introduction of the *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016*, particularly Rule 25A, which operationalized Section 234 and laid down the framework for cross-border mergers. However, the effectiveness of this rule has been questioned due to its limited application, primarily restricted to a handful of "notified jurisdictions" that reciprocally recognize Indian corporate law[2]. Additionally, issues relating to valuation, foreign exchange regulations, sectoral investment caps, and enforceability of foreign judgments pose persistent challenges for investors and corporations alike[3].

This research explores these challenges through doctrinal and comparative legal analysis, aiming to highlight the gaps in the current Indian corporate law regime. It argues that while India has taken steps toward liberalizing its M&A landscape, further reforms are necessary to align its framework with global best practices and enhance legal certainty for international investors.

1. Legal Framework for Cross-Border Mergers in India

The legal foundation for cross-border mergers in India is principally rooted in the *Companies Act, 2013*, particularly **Section 234**, which was inserted to allow mergers between Indian companies and foreign companies situated in jurisdictions notified by the Central Government. This provision marked a significant shift from the earlier *Companies Act, 1956*, which had no express mention of cross-border mergers. The provision is supplemented by **Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016**, which outlines the procedure and eligible jurisdictions for such mergers.

Under the current framework, only outbound mergers (Indian company merging with a foreign company) and inbound mergers (foreign company merging with an Indian company)

[2] Ministry of Corporate Affairs, 'Notification No. G.S.R. 409(E), Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017' (13 April 2017).
[3] Umakanth Varottil, 'The Evolution of Cross-Border Mergers in India' (2017) 6 NUJS L Rev 1.

with jurisdictions specifically notified by the **Ministry of Corporate Affairs (MCA)** are permissible. As of now, only a limited number of jurisdictions—such as the United States, the United Kingdom, and certain European countries—are recognized under this scheme[4]. This list excludes many significant business partners, thus narrowing the scope of applicability.

Moreover, the process under Section 234 is subject to **National Company Law Tribunal (NCLT)** approval, which involves compliance with multiple procedural steps such as shareholder meetings, creditor consents, and regulatory clearances. While the intent behind this provision is to facilitate international business, the actual implementation has been criticized for being bureaucratic, unpredictable, and time-consuming[5].

A notable aspect of the Indian framework is that it mandates compliance not only with corporate law but also with **FEMA regulations**, **tax laws**, **SEBI norms** (for listed companies), and **Competition Act provisions**. This multiplicity of regulatory touchpoints increases transaction costs and prolongs deal timelines. For example, any cross-border deal involving a share swap mechanism must comply with FEMA pricing guidelines, which may not align with international market valuations[6].

In contrast, jurisdictions like **Singapore and the United Kingdom** offer more streamlined procedures for cross-border mergers through reciprocal recognition mechanisms and simplified regulatory interfaces. India's limited list of eligible jurisdictions and lack of clear timelines for regulatory approvals creates uncertainty and discourages many potential transactions.

2. Regulatory Approvals and Multiplicity of Authorities

One of the most complex aspects of executing cross-border mergers and acquisitions in India is the **requirement to obtain multiple regulatory approvals** from various authorities, each with its own set of guidelines, timelines, and compliance criteria. While such oversight ensures investor protection and national interest, the lack of coordination among regulators often results in **duplicative processes, inconsistent timelines, and legal uncertainty** for the parties involved.

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[4]Ministry of Corporate Affairs, 'Notification GSR 409(E)' (n 1).
[5]Umakanth Varottil, 'The Evolution of Cross-Border Mergers in India' (2017) 6 NUJS L Rev 1.
[6]Reserve Bank of India, 'Foreign Exchange Management (Cross Border Merger) Regulations, 2018' (20 March 2018).

The primary regulators involved in cross-border M&A transactions include:

- The **Reserve Bank of India (RBI)** – for compliance with the *Foreign Exchange Management Act (FEMA)* and sectoral caps on foreign investment.
- The **Securities and Exchange Board of India (SEBI)** – in the case of mergers involving listed companies, ensuring compliance with takeover regulations and disclosure norms.
- The **Competition Commission of India (CCI)** – for merger control clearance under the *Competition Act, 2002*, to prevent adverse impacts on market competition.
- The **Income Tax Department** – for rulings on capital gains tax, transfer pricing, and the applicability of double taxation avoidance agreements (DTAAs).
- The **National Company Law Tribunal (NCLT)** – which must approve the merger scheme as per the Companies Act.

Each authority operates independently, and often sequentially, causing procedural delays. For instance, CCI approval is required even when the transaction does not raise any significant competition concerns, simply because it exceeds threshold limits under Section 5 of the Competition Act[7]. Moreover, RBI approvals, especially in transactions involving **share swaps**, are contingent on compliance with **fair valuation norms**, which are not always aligned with international valuation models[8].

Another bottleneck arises from **SEBI's listing obligations**. For listed entities, any cross-border deal must conform to **SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011** and **Listing Obligations and Disclosure Requirements (LODR) Regulations, 2015**, which may conflict with local laws in the foreign company's jurisdiction[9].

In contrast, countries like the **United States** utilize a more integrated system of "pre-clearance" through federal agencies, reducing the regulatory burden on merging companies. India's fragmented framework not only increases compliance costs but also exposes transactions to legal challenges and delays, adversely impacting deal value and investor confidence.

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[7]Competition Commission of India, *FAQs on Combination Regulations*.
[8]RBI, 'Master Direction – Foreign Investment in India' (updated April 2023).
[9]SEBI, 'LODR Regulations, 2015' and 'SAST Regulations, 2011

3. FEMA Regulations and Foreign Exchange Constraints

A major regulatory hurdle in cross-border mergers and acquisitions in India arises from the **Foreign Exchange Management Act, 1999 (FEMA)**, and the regulations framed thereunder. Since cross-border M&As inherently involve movement of capital across jurisdictions, **foreign exchange laws play a pivotal role** in shaping the legality and structure of such transactions. The **Reserve Bank of India (RBI)**, acting under FEMA, exercises strict control over aspects like capital account transactions, pricing, repatriation of funds, and share valuation norms.

The **FEMA (Cross Border Merger) Regulations, 2018**, notified by the RBI, classify mergers into two categories:

- **Inbound mergers**: where a foreign company merges into an Indian company
- **Outbound mergers**: where an Indian company merges into a foreign company

While the regulations permit both types of mergers, **inbound mergers are more straightforward** in terms of compliance. In contrast, outbound mergers are subject to several restrictions, including requirements that the resultant foreign entity must be incorporated in an **International Financial Services Centre (IFSC)** or a jurisdiction recognized by the Indian government as compliant with FATF guidelines[10].

One of the most **problematic constraints under FEMA** is the **requirement of compliance with the pricing guidelines** for share valuation. The RBI mandates that shares issued to or transferred from non-residents must be valued according to internationally accepted pricing methods certified by a Category I Merchant Banker or Chartered Accountant, and in accordance with **fair market value** norms[11]. However, these may differ significantly from deal valuations agreed upon between parties based on commercial negotiations, leading to deal restructuring or abandonment.

Further, FEMA prohibits or restricts certain types of capital account transactions, such as **guarantees**, **loans**, or **royalty payments**, unless explicitly approved. In cross-border M&As,

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[10]Reserve Bank of India, 'Foreign Exchange Management (Cross Border Merger) Regulations, 2018' (20 March 2018).

[11]RBI, 'Master Direction – Pricing Guidelines for FDI', updated 2023, https://rbi.org.in accessed 19 June 2025.

such transactions often arise in post-deal integration or as part of the consideration structure. The requirement of prior RBI approval in such cases leads to delays and uncertainty[12].

Moreover, **repatriation of proceeds**, including dividends, capital gains, or disinvestment amounts, must be conducted in strict compliance with FEMA norms and sectoral FDI caps. This becomes especially complex in sectors like defence, telecom, and financial services where caps and conditions vary.

Compared to India, **jurisdictions like Singapore** follow a more liberal exchange control policy, which facilitates swift movement of capital during international mergers. Unless India aligns FEMA regulations with commercial realities and global best practices, it risks discouraging high-value cross-border deals.

4. Taxation Challenges in Cross-Border M&A

Taxation is one of the most decisive and complex aspects of cross-border mergers and acquisitions in India. While India offers certain tax-neutral mechanisms under the **Income Tax Act, 1961**, several unresolved issues related to **capital gains, indirect transfers, transfer pricing, withholding tax, and double taxation** continue to create uncertainty and discourage inbound and outbound M&A transactions.

A key tax-related challenge stems from the **absence of comprehensive tax neutrality** for cross-border mergers. Under Section 47 of the Income Tax Act, certain transactions—like mergers or demergers between Indian companies—are exempt from capital gains tax. However, **no such automatic exemption exists for mergers involving foreign companies**, even if the transaction qualifies under corporate law and FEMA[13]. This exposes companies to significant tax liabilities, even in purely paper-based mergers where there is no cash consideration.

Another issue is the **indirect transfer provision** under **Section 9(1)(i)** of the Income Tax Act, inserted post the *Vodafone International Holdings v Union of India*[14] case. It allows the Indian tax authorities to tax capital gains arising from the transfer of shares of a foreign

[12] Nishith Desai Associates, *Cross-Border Mergers: Regulatory Overview and Deal Making in India* (2020) 12–14.

[13] Income Tax Act 1961, s 47.

[14] *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613.

company if such shares derive substantial value from assets located in India. This provision applies even if the transaction takes place entirely outside India between two non-residents, thereby increasing legal uncertainty and the risk of double taxation[15].

Additionally, **transfer pricing regulations** apply to related party transactions, which frequently occur in post-merger integration phases. Disputes often arise due to differences in valuation methodologies, leading to lengthy audits and adjustments that affect the viability of the transaction.

While **Double Taxation Avoidance Agreements (DTAAs)** offer relief in theory, they require strict documentation and eligibility under the **Principal Purpose Test (PPT)** and **Limitation of Benefits (LOB)** clauses. The **General Anti-Avoidance Rule (GAAR)**, in force since 2017, further empowers Indian tax authorities to disregard structures considered to be primarily tax-motivated, thereby deterring strategic cross-border restructuring[16].

In contrast, countries like the Netherlands and Ireland offer favorable tax regimes for cross-border deals, with clear guidelines, tax deferral provisions, and fewer litigation risks. For India to become a competitive M&A hub, its tax policy must balance revenue considerations with investor-friendliness and procedural certainty.

5. Enforcement, Recognition, and Post-Merger Integration Issues

Even when a cross-border merger is approved under Indian law and relevant foreign jurisdictions, the **enforceability of merger orders and recognition of foreign judgments** present major challenges in India. Section 234 of the Companies Act, 2013, is silent on how Indian courts will treat merger orders passed by foreign courts or authorities. This **legal vacuum** complicates post-merger integration, especially in cases of outbound mergers where the Indian entity ceases to exist and the surviving entity is foreign.

Under Indian law, foreign judgments are recognized only if they comply with **Section 13 of the Code of Civil Procedure, 1908**, which allows enforcement of foreign decrees from **reciprocating territories** notified by the Central Government. However, many common

[15] Income Tax Act 1961, Explanation 5 to s 9(1)(i).
[16] KPMG, 'Tax Considerations in Cross-Border M&A in India' (2023)

merger jurisdictions like the Cayman Islands or Luxembourg are not included in this list, making recognition of foreign merger orders a tedious and uncertain process[17].

Furthermore, there is **no standard mechanism** to enforce obligations like debt recovery, asset transfer, or indemnity clauses that may arise under a cross-border merger scheme unless parties initiate fresh litigation or arbitration in India. This undermines legal certainty and creates reluctance among foreign acquirers and investors.

Another major issue is **post-merger integration**, which includes harmonizing accounting standards, transferring licenses, reorganizing human resources, and ensuring IT system compatibility. In India, several sector-specific laws require fresh licenses or permissions upon change of ownership, which delays integration. For instance, a telecom merger may require fresh spectrum allocation approvals under the **Telecom Regulatory Authority of India (TRAI)** guidelines[18].

Cultural integration and workforce management also pose practical challenges, especially when entities operate under different labor laws, organizational cultures, and employment contracts. Indian labor regulations are relatively rigid and impose strict conditions for termination or transfer of employees, which can conflict with more flexible systems in developed economies[19].

These enforcement and post-integration hurdles are less pronounced in jurisdictions that follow **mutual recognition frameworks** and operate under **common legal traditions**. For example, within the European Union, the **Cross-Border Merger Directive** facilitates seamless mergers between companies across member states with uniform procedures and recognition standards.

To overcome these enforcement and integration challenges, India needs to:

- Expand the list of reciprocating territories under the CPC,
- Enter into bilateral arrangements for merger recognition,
- Introduce detailed procedural rules for post-merger operations, and
- Improve coordination among sectoral regulators.

[17] Code of Civil Procedure 1908, s 13; Ministry of Law and Justice, Notification on reciprocating territories
[18] Telecom Regulatory Authority of India (TRAI), *Guidelines for Merger of Telecom Licenses*, 2020.
[19] Bhumesh Verma, *Mergers and Acquisitions in India: Legal and Practical Aspects* (Bloomsbury 2021) 112–115.

Conclusion

Cross-border mergers and acquisitions have emerged as powerful tools for global expansion, technological exchange, and financial restructuring. India, with its growing economy and liberalized investment climate, holds significant potential to become a major hub for such international transactions. However, as this research has illustrated, the journey is riddled with **legal, regulatory, and procedural hurdles** that must be navigated with caution.

The analysis reveals that while the **Companies Act, 2013** and subsequent amendments (particularly Section 234 and Rule 25A) have laid the groundwork for cross-border M&A, the actual operational framework remains restrictive. The **limited list of eligible jurisdictions**, the **overlapping roles of multiple regulatory bodies**, and **delays in obtaining approvals** from the RBI, SEBI, CCI, and NCLT hamper smooth execution of transactions. Furthermore, **FEMA constraints** on foreign exchange movement, **inflexible tax norms**, and **ambiguities in recognition and enforcement of foreign orders** collectively contribute to investor hesitation.

Comparative analysis with countries such as **Singapore, the United Kingdom, and within the EU**, shows that **harmonized procedures, predictable enforcement, and tax certainty** can significantly boost cross-border investment flows. India must adopt a similar mindset—prioritizing clarity, speed, and efficiency in legal and regulatory processes. Expanding the list of notified jurisdictions under Section 234, simplifying FEMA norms, issuing binding tax rulings, and creating a unified approval mechanism could provide much-needed momentum to cross-border M&As.

Additionally, introducing **mutual recognition frameworks for foreign merger orders**, updating labor and licensing laws to support post-merger integration, and ensuring **sector-neutral regulatory consistency** will be critical for India's success in this domain. As global corporations increasingly seek strategic mergers across borders, India must evolve from a cautious regulator to a facilitative partner—balancing regulatory prudence with commercial innovation.

In conclusion, the future of cross-border M&A in India hinges not only on statutory amendments but also on **institutional reforms**, **regulatory coordination**, and **investor-**

oriented policymaking. By addressing these challenges, India can fully unlock the economic and strategic advantages of cross-border corporate integration in the global era.