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NAVIGATING LEGAL FRONTIERS: CROSS-BORDER INSOLVENCY AND MERGERS – A COMPARATIVE LEGAL ANALYSIS

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ABSTRACT

Navigating cross-border mergers and insolvency proceedings in the modern, globalized corporate environment offers both tremendous potential and challenges to multinational corporations. In order to investigate the main problems, roadblocks, and best practices in cross-border bankruptcy and mergers, this paper undertakes a thorough comparative legal analysis. It focuses on global legal frameworks, regulatory hurdles, cultural considerations, and stakeholder consequences.

The UNCITRAL Model Law on Cross-Border Insolvency, the EU Insolvency Regulation, and other pertinent international agreements governing cross-border insolvency proceedings are examined in the first section of the analysis. It highlights similarities, differences, and best practices by contrasting and comparing how bankruptcy proceedings, creditor rights, and asset distribution are handled in various nations.The research also explores the legal frameworks governing international mergers and acquisitions, covering antitrust issues, shareholder safeguards, transparency mandates, and dispute settlement procedures. It assesses how these regulatory obstacles affect the results and success of cross-border transactions, emphasizing the necessity of legal system collaboration and harmonization.

The impact of cultural disparities, linguistic obstacles, and jurisdictional discrepancies on the understanding and implementation of legal frameworks in cross-border scenarios is also examined. The report suggests methods for resolving these issues, such as agreements for international collaboration, linguistic assistance, and cultural training.

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Finally, the study looks at how corporate governance, market competition, investor confidence, and the stability of the financial system are affected more broadly by cross-border bankruptcies and mergers. It highlights how crucial it is to have strong legal frameworks to handle these ramifications and offers suggestions for attorneys, companies, and legislators involved in international trade.

Overview of Cross–Border Insolvency and Mergers

As a consequence of the rapid development of technology, commerce, and the business world, a relationship that extends beyond national boundaries will eventually be established between nations and corporations. As a consequence of this, there has been a rise in the number of multinational organizations that have arisen. At the present time, practically every nation has commercial relations that go beyond the confines of a single law for the most part. There exists a clear connection between having a presence in multiple countries and having creditors and debtors located in a number of places. This is because of the direct link that exists between the two. The insolvency process, which requires the simultaneous application of a number of different laws and procedures, is made more difficult as a result of this element. Regarding the degree to which the domestic laws and the foreign rule that refers to insolvency are compatible with one another, there is a topic that needs to be taken into consideration.

What is Cross-Border Insolvency? [2]

The condition that is referred to as cross-border insolvency, which is also referred to as international insolvency, takes place when an insolvent debtor has creditors and/or debtors in more than one jurisdiction, which indicates that they are located in different countries. During the process of domestic insolvency proceedings, it is the responsibility of the Insolvency Professional to carry out a number of phases. These stages include the identification of the debtor's assets, the identification of credits, and the assessment of the amount that is owing to them. After receiving clearance from the Adjudicatory Authority, the claims are settled according to the priority rule.

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[2] Overview of Cross Border Insolvency in India, https://amlegals.com/an-overview-of-cross-border-insolvency-in-india/#, Last visited 7th April 2024.

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In the vicinity of this time period, the Insolvency Law Committee on Cross-Border Insolvency (ILC) of the Ministry of Corporate Affairs (MCA) conducted an evaluation of the implementation of the Code. To address the problems that are associated with cross-border insolvency in India, the International Law Commission (ILC) recommended in its report that the existing insolvency framework should be reevaluated and that the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, 1997 (Model Law) should be adopted. Both of these recommendations may be implemented. This was done due to the fact that the existing structure for insolvency administration does not comply with any of the Global Standards.

Throughout the course of the past several decades, there have been a number of banking crises that have taken place all over the world. As a result of these crises, there has been an increase in awareness and grasp of the elements that contribute to the bankruptcy of banks and other financial institutions, as well as the difficulties, potential hazards, and costs that are involved with such insolvency. As a result of this, the majority of countries are beginning to recognize, as of today, the significance of the development of appropriate policies and of the effectiveness of the legal, institutional, and regulatory framework for the treatment of insolvent financial institutions within their respective national boundaries. This is a growing realization that has occurred as a consequence of this. However, a large number of the recent insolvencies of financial institutions, such as the BCCI and the Barings insolvencies, have also been characterized by a strong cross-border dimension. This is the case for a number of the insolvencies. As a result of the fact that the insolvent firm may have installations and assets, as well as creditors and debtors, located in a number of different countries, an extra layer of complication is added to a situation that was already troublesome. This occurs in the context of international insolvency.

Over the course of the past few years, a number of international financial institutions have been paying attention to cross-border insolvency. This is due to the fact that, on the one hand, there has been an increase in the level of commercial and financial activity that occurs across

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international borders, and, on the other hand, there are general territorial limitations of national insolvency laws.[3]

The increasing global commerce and investment activities are seen in the rising instances of insolvencies that happen beyond national boundaries. However, national bankruptcy laws have generally been unable to keep pace with this development and sometimes lack the required resources to handle cases involving overseas transactions. This often leads to ineffective and conflicting legal strategies, which impede the rescue of financially troubled businesses, fail to support the fair and efficient handling of cross-border insolvencies, hinder the protection of the insolvent debtor's assets from being wasted, and prevent the full value of those assets from being realized.[4]

UNICITRAL Model Law on Cross-Border Insolvency

It is helpful to have an awareness of the current international norms and the many sources of law that play a role in this sector before analyzing existing insolvency law regimes and reform initiatives that are relevant to international insolvency difficulties. This is because it is important to have this information before considering reform projects. Regarding this matter, it is possible to differentiate between the following categories:

(i) international treaties and conventions;
(ii) other international rules and model laws;
(iii) the unique situation of the European Union;
(iv) private international law;
(v) recognized principles of law in the field of cross-border insolvencies; and
(vi) comity of law.

International treaties and conventions

Insolvency treaties between countries have a rather long history,[5] despite the fact that the majority of international treaties negotiated to resolve such conflicts are bilateral or involve

[3]"For an overview of the efforts of international organisations addressing the topic of cross-border insolvency, see Group of Thirty, Reducing the risks of international insolvency (2000)".
[4] "Guide to enactment of the UNCITRAL Model Law on cross-border insolvency', A/CN9/442 (December 1997), at para 13."
[5]"For example, Verona and Trent concluded a treaty in 1204 that governed the transfer of a debtor's assets, and Verona and Venice reached an agreement in 1306 which sanctioned the extradition of fugitive debtors. For more details, see Philip R Wood, Law and practise of international finance - principles of international

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very few countries. This is because of the numerous problems that can arise as a result of insolvency laws that are in conflict with one another in different jurisdictions. For example, Wood's "Principles of International Insolvency" contains a list of international insolvency treaties. This list can be found in the book. Based on such an inventory, it is evident that none of the current treaties or conventions have a geographical reach that is sufficiently broad to handle the issues that are covered in this report. There are just a few examples of multilateral treaties that have a somewhat more extensive reach, such as the Nordic Bankruptcy Convention of 1933 and the Montevideo and Bustamente Conventions with reference to Latin America. These are the only examples that can be cited.

It is possible that the reason for this limited scope is due to the fact that insolvency policies are given a significant amount of priority in particular nations, which in turn leads to challenges in reconciling the legislative decisions that are made with regard to insolvency legislation in the societies that are concerned. For instance, Wood defines the Nordic Bankruptcy Convention as "a good example of a bankruptcy convention between countries that share similar attitudes to insolvency policies and, as a result, have confidence in the suitability of each other's legal systems based on their similarities."

The UNCITRAL Model Law and other international rules

There are very few examples of insolvency rules that have been implemented on a global basis, with the significant exception of the recent acceptance of the new EU framework on insolvency. This is the only notable exception. In the year 1997, the United Nations Commission on International Trade Legislation (UNCITRAL) established a model legislation that was referred to as the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law). Among the laws that are considered to be among the most prominent instances of such laws is this particular statute.[6] Another example is the Cross-Border Insolvency Concordat, which was authorized by the Council of the Section on Business Law of the International Bar Association (IBA) in September 1995. This document was referred to as the Cross-Border Insolvency Concordat. [7]The numerous concerns and

insolvency (1995), p 291.”

[6]“The UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law at its 30th session in Vienna, Austria, in May1997”.
[7]“For details concerning the Cross-Border Insolvency Concordat, see Leonard (1996) 24 International Business

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problems that arise in the context of cross-border insolvency are addressed by both of these projects, which offer solutions that are both adaptable and practical.

The UNCITRAL Model Law is an example of the kind of law that a specific nation would want to want to adopt, as its name suggests. It explicitly aims to "provide mechanisms for dealing with cross-border insolvency cases in order to promote cooperation between courts in different jurisdictions, legal certainty for investors, fair and efficient administration of cross-border insolvency proceedings and facilitation of the rescue of financially troubled enterprises. "A substantive unification of insolvency law is not attempted by the Model Law, which recognizes and acknowledges the variations that exist across national procedural legislation. Following is a list of the solutions that are provided by the Model Law:

- granting access to the courts of the enacting state for the person who is running a foreign insolvency action (often known as a "foreign representative") and allowing the courts of the enacting state to evaluate what relief is necessary for the most effective resolution of the insolvency;
- the determination of the circumstances under which a foreign insolvency case ought to be granted "recognition," as well as the potential repercussions of such recognition;
- provisions for the establishment of a transparent system for the right of foreign creditors to initiate or take part in an insolvency case in the state that is implementing the legislation;
- allowing courts in the state that is implementing the law to work together with foreign courts and foreign representatives participating in an insolvency action in a more efficient manner;
- granting permission to courts in the state that is implementing the legislation and individuals who are running bankruptcy proceedings in the state to seek assistance from other countries;
- providing for court jurisdiction and establishing standards for coordination in situations when an insolvency proceeding in the state that is adopting the law is taking place concurrently with an insolvency proceeding in another state; and

Law 2 or 3 and (1997) 6.I.I.R. 127 or Barratt (1996) 24 International Business Law 208".

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- setting guidelines for the coordination of relief that is awarded in the state that is adopting the legislation in favor of two or more insolvency processes that are taking place in other jurisdictions involving the same debtor."[8]

In addition to this, it includes a clause that allows for the possibility of excluding from its purview particular insolvency regimes that apply to certain entities, such as banks or insurance firms.[9] As a result, the UNCITRAL Model Law does not have a specific provision that addresses insolvency processes that involve financial institutions. In addition, it has been mentioned in the comments section of the UNCITRAL Model Law that the need for specific regulation on the winding-up of credit institutions may be due to the fact that the competent authorities are required to take action that is particularly prompt and cautious in connection to such companies.[10]It is possible that this could be construed as a warning that it might not be able to satisfy the requirements for prompt adjudication that are presented by the financial markets. In the event that the voluntary exclusion provision is not implemented, financial institutions would be subject to the general rules on insolvency that are outlined by the UNCITRAL Model Law in jurisdictions where it has been approved.

The UNCITRAL Model Law, developed by the United Nations Commission on International Trade Law, tackles various issues, including the issue of granting foreign representatives and creditors access to the courts. In relation to this issue, it is stated that a foreign administrator is allowed to avail themselves of the courts of the state that is enforcing the law, and it also allows the courts in the state that is passing the legislation to ascertain the potential remedies that are accessible. Moreover, a well-defined system is implemented regarding the entitlement of foreign creditors to commence or take part in bankruptcy proceedings in the jurisdiction that is enacting the law. Furthermore, the Model Law provides guidelines on the recognition of procedures completed in foreign countries and the corresponding consequences of such recognition. Provisions are put in place to facilitate cooperation with foreign courts and representatives, granting the courts and competent authorities in the adopting state the power to request assistance from other nations.[11]

[8]"Paper by J Sekolec, 'The UNCITRAL Model Law on Cross-Border Insolvency', in M Giovanoli and G Heinrich (eds) International bank insolvencies - a central bank perspective (1999), pp 338f".
[9] Article 1 (2) of the UNCITRAL Model Law.
[10]"Article-by-article comment on the UNCITRAL Model Law, Article 1 (2)".
[11]"Articles 25-27 of the UNCITRAL Model Law.

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Additionally, there are regulations governing the coordination of simultaneous bankruptcy proceedings occurring in the state where the law is being enforced and proceedings occurring in another jurisdiction. This section aims to provide principles for coordinating relief granted in a state that is enacting legislation in support of several insolvency processes occurring in other states involving the same debtor. Furthermore, the Model Law includes a clause that allows for exceptions to be granted to the fundamental principles in certain specific circumstances. Exceptions can be granted in relation to secured claims, set-off, and the enforcement of rights in rem, among other matters.[12]

In the UNCITRAL Model Law, issues concerning the selection of applicable law are not addressed to the same extent as they are in the new EU legislation in the field of cross-border insolvency[13]which will be explained in further detail below. On the other hand, the Model Law establishes a distinction between the typical processes that take place in foreign countries and those that are considered to be "main" proceedings. The identification of a foreign process as a main proceeding (that is, a foreign proceeding that takes place in the country where the debtor has its center of principal interests)[14] has the potential to influence the form and breadth of the relief that is granted to the foreign representative.

Another instance of international regulations is the Cross-Border Insolvency Concordat, formulated by the International Bar Association (IBA). This document serves as a guide to help insolvency practitioners who are dealing with simultaneous legal actions involving the same debtor in many jurisdictions. Instead of expecting insolvency practitioners to begin from the beginning and attempt to create a unique agreement that satisfies their respective courts regarding the coordination of the two sets of proceedings, the Concordat establishes a few fundamental principles that can be adjusted as needed to fit the specific circumstances. The Concordat offers a clear and readily available foundation for debate during the initial phases of the process. Empirical evidence has demonstrated that specific categories of issues are prone to arise in circumstances involving simultaneous restructurings or liquidations.[15]

EU Insolvency Regulation

[12] Article 20 (2) of the UNCITRAL Model Law".
[13]"The Insolvency Regulation (EC) No. 1346/2000 of 29.5.2000, the Winding-up Directive for insurance undertakings 2001/17/EC of 19.3.2001 and the Winding-up Directive for credit institutions 2001/24/EC of 4.4.2001".
[14] Article 2 (c) of the UNCITRAL Model Law
[15] Smart, Cross-border insolvency (1998), p 7

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In addition, the new legal regime on insolvency inside the European Union is an essential collection of newly approved legal laws that expressly address cross-border insolvency issues that are applicable within an area that is comprised of multiple countries combined. Given that this new European cross-border bankruptcy regime was approved within the existing legal and institutional framework of the EU, it is obvious that the Regulations of the European Union (EU) reflect a distinctive case that cannot be compared to earlier attempts at international rulemaking. In spite of the fact that the legislative structures of the EU are well-established and that there is an obvious need to manage cross-border insolvencies across the EU, this initiative was difficult to finalize and was under consideration for more than a decade before it was finally founded. After all was said and done, these efforts resulted in the passage of three legal acts that pertain to the insolvency of various categories of legal entities.

A regulation on insolvency proceedings has been adopted to cover legal entities other than credit institutions, insurance undertakings, investment firms, and collective investment schemes. Additionally, two directives have been adopted concerning the winding-up and reorganization of insurance undertakings and credit institutions. Both of these directives pertain to the subject of insolvency proceedings., a Despite the fact that bankruptcy laws will remain, in general, lie under the jurisdiction of the member states, these recently implemented EU-wide legal acts will bring about the mutual recognition and coordination of insolvency processes at the national level.

The private international law regime of each nation is responsible for determining the extent to which insolvency proceedings that take place in outside the country are recognized. With the implementation of the new EU insolvency regime, which will include the Winding-up Directive for credit institutions, the member states of the European Union will be required to establish a uniform regime for banks and other entities operating within the member states of the EU. This regime will include rules that are clear and unambiguous regarding jurisdiction and the law that will be applicable. This makes it possible for a single insolvency proceeding that takes place in one of the member states (the home member state, as specified in the Directive) to be recognized and enforced across the entirety of the European Union. When compared to countries that are not members of the European Union, the principles that are outlined in the private international laws of the various EU member states can continue to be

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applicable. However, it is reasonable to anticipate that these principles will be impacted by the implementation of the new EU regime in the respective member state.

Judicial Recognition of Cross-Border Insolvency[16]

The following is a collection of significant international case laws about the determination of COMI for resolving issues of cross-border insolvency:

- ***Eurofood IFSC Ltd. Case, 2006***

Important details identified in this particular case-

- A company's COMI is typically assumed to be located in the State where its registered office is located. The Court believed that this presumption could only be refuted in the event that there were objectively demonstrable factors that persons doing business with the company might determine, proving that its administration was carried out somewhere else. On the other hand, the onus of proof was with those who wanted to refute the assumption.
- According to the European Court, a court must verify that it has jurisdiction (i.e., that COMI is within its territory) before initiating main proceedings in order to maintain the integrity of the system. If it does so, however, the principle of mutual trust requires that the courts in other Member States acknowledge and accept the earlier decision.
- A fair legal process is essential, so the court reasoned that the Irish court would be justified in rejecting recognition of the Italian proceedings in cases where the liquidator's fundamental right to be heard in the Italian proceedings had been flagrantly violated, thereby constituting a clear violation of the rule of law in the Irish proceedings.

- ***InteredilSrl v FallimentoInteredilSrl [2011] ECR I-09915 (20th October 2011)***

Important points recognized under this case –

- The location of the company's central administration, which is established by objective factors that can be verified by outside parties, must be given more weight for determining COMI.

[16] Manasi Lad-Gudhate, ACS,Cross Border Insolvency, https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf,

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- The "registered office presumption" cannot be refuted in cases where the firm's management/supervisory bodies and registered office are located in the same location as the management decisions made by the company (in a way that is verifiable by third parties).
- The presence of company assets and the existence of contracts for the financial exploitation of those assets in another Member State cannot be regarded as sufficient to rebut the "registered office presumption" in cases where a company's central administration is not located in the same location as its registered office. This is unless it is possible to demonstrate that the company's actual center of management and supervision, as well as the management of its interests, is located in that other Member State.
- If the firm relocates its registered office prior to filing a request to initiate insolvency proceedings, its new registered office will be assumed to be at the company's COMI.

REGULATORY FRAMEWORKS FOR M&A

In India, the procedures for merging and combining companies are directed by the court and necessitate approval from the National Company Law Tribunal (NCLT) for implementation, resulting in a lengthy process. In certain instances, fast-track mergers can occur between specific types of companies (such as small companies, start-ups, or a holding company and its wholly owned subsidiary) without going through the NCLT process. However, the Central Government must grant approval for these types of mergers. Furthermore, the Cross Border M&A Regulations establish the regulatory structure to support foreign merger transactions in India. Any merger or acquisition (M&A) deal that meets the requirements outlined in the Cross Border M&A Regulations will be considered approved by the Reserve Bank of India (RBI). A certificate, signed by the managing director, whole time director, and company secretary of the involved companies, confirming compliance with these regulations, must be submitted to the National Company Law Tribunal (NCLT). Furthermore, it is important for the parties involved to guarantee compliance with the Foreign Exchange Regulations based on the residential status of the resulting entity, whether it is an Indian or foreign entity.

The Cross Border M&A Regulations provide a definition for a 'cross-border merger' as a 'merger, amalgamation, or arrangement' between an Indian company and a foreign company, following the standards outlined in the Companies Act. Nevertheless, the applicable clauses

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in the Companies Act, in conjunction with the regulations, solely address 'mergers and amalgamations' and do not explicitly specify a 'arrangement'. It seems that while the Cross Border M&A Regulations consider the possibility of 'arrangements', they may not be allowed under the Companies Act when it comes to an Indian firm and a foreign corporation.[17] Nevertheless, the regulators have not provided any explicit clarification on this matter. Furthermore, the Insolvency and Bankruptcy Code (IBC) allows for the inclusion of provisions in a resolution plan that promote the restructuring of a corporate debtor, such as through mergers, amalgamations, and demergers. This is done to encourage effective and proactive strategies that aim to maximize the value of the company. Hence, the Insolvency and Bankruptcy Code (IBC) offers acquirers the chance to engage in the resolution process and take advantage of assets or corporate debtors that are currently undervalued.

Furthermore, depending on the industry sector(s) that “the acquirer and the target fall under, additional sector-specific regulations may become applicable to a typical merger and acquisition transaction in India. These regulations include the Banking Regulation Act of 1949, the Insurance Act of 1938, the Mines and Minerals (Development and Regulation) Act of 1957, the Drugs and Cosmetics Act of 1940, and the Telecom Regulatory Authority of India Act of 1997. These regulations apply to transactions that involve Indian companies that are operating in the relevant sector. In the case of highly regulated industries like banking and insurance, the relevant sector-specific regulators, such as the Reserve Bank of India (RBI) and the Insurance Regulatory and Development Authority of India (IRDA), establish guidelines for businesses that operate within the concerned sector. These regulators may require prior approval to be sought for the acquisition of shares, businesses, or assets from companies that operate within such industries. The Foreign Exchange Regulations also prescribe certain sector-specific conditions, and foreign direct investment (FDI) in those sectors should be in compliance with those prescribed conditions. For example, foreign direct investment (FDI) in the telecom services industry is permitted at a maximum of one hundred percent, provided that the telecom regulator's licensing and security conditions are also observed”[18].

[17] A. (2023, July 12). *Regulation of Cross-Border Mergers and Acquisitions in India, UK and USA - Enhelion Blogs*. Enhelion Blogs. https://enhelion.com/blogs/2023/07/12/regulation-of-cross-border-mergers-and-acquisitions-in-india-uk-and-usa/

[18] *Mergers & Acquisitions Laws and Regulations | India*. (2024, April 23). GLI. https://www.globallegalinsights.com/practice-areas/mergers-and-acquisitions-laws-and-

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In order to allow for the merger and amalgamation of a foreign company with and into an Indian company, as well as vice versa, the Ministry of Corporate Affairs ("MCA") issued a notification on April 13, 2017, regarding Section 234 of the Companies Act, 2013, as amended (the "Companies Act") and Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, as amended (the "Companies Merger Rules"). In addition, on March 20, 2018, the Reserve Bank of India (abbreviated as "RBI") issued a notification on the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, as modified (abbreviated as "FEMA Merger Regulations"): the purpose of this notification was to remedy the deficiencies in the existing framework from the point of view of foreign exchange.

Some of the Most Important Provisions of the FEMA Merger Regulations

From the perspective of the FEMA Merger Regulations, a cross-border merger is defined as "any merger, amalgamation, or arrangement between an Indian company and a foreign company in accordance with Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016 notified under the Companies Act, 2013." An additional classification of cross-border mergers has been established by the regulations. These classifications are as follows: (i) inbound mergers, in which the resultant firm is an Indian company; and (ii) outbound mergers, in which the resultant company is a foreign company. Any merger that is carried out in accordance with the FEMA Merger Regulations will be considered to have received prior approval from the Reserve Bank of India (RBI) for the purpose of Rule 25A of the Companies Merger Rules, provided that the following conditions are satisfied (in the event that any of these conditions are not satisfied, prior approval from the RBI will be required)[19]:

regulations/india/#:~:text=returns%20after%20listing.-,Regulatory%20framework%20for%20M%26A%20in%20India,of%20all%20companies%20in%20India.

[19] Menon, R., Mehra, S., & Khurshid, R. (2024, February 27). *Mergers & Acquisitions Laws and Regulations India 2024* International Comparative Legal Guides International Business Reports. https://iclg.com/practice-areas/mergers-and-acquisitions-laws-and-regulations/india

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THE FOLLOWING IS A SUMMARY OF SOME OF THE IMPORTANT LEGAL UPDATES IN M&A IN INDIA[20]:

A. Changes to the Indian merger control regime, including the following: Under the Competition (Amendment) Act, 2023 (also known as the "Amendment Act"), the Competition Act has been amended to include a number of significant amendments. The following is a list of some of the most significant modifications that were included in the Amendment Act and the Draft Regulations (which will be specified further down) but have not yet been put into effect:

   i. The establishment of a threshold for the deal value: As a result of the introduction of a new "deal value" threshold, transactions that meet the following criteria will be required to be notified to the Competition Commission of India (CCI): (A) the deal value of any transaction involving the acquisition of control, shares, voting rights, or assets of an enterprise, merger, or amalgamation exceeds INR 20 billion (approximately USD 240,084,200); and (B) the target enterprise has "substantial business operations in India." Transactions that are otherwise eligible for the de minimis exemption (also known as the small target exemption) but that exceed the deal value level will be required to be informed to the CCI. This is a crucial point to keep in mind. Each and every valuable consideration, whether it be direct, indirect, or deferred, is included in the definition of the "value of transaction" that is provided by the Amendment Act. In order to capture transactions in the digital and infrastructure space that would otherwise be able to take use of the de minimis exemption, this level has been established. These types of company models are not particularly wealthy in terms of assets or turnover, but they do have strong technological capabilities, valuable innovations, or substantial investments in the real estate industry. In addition, the Competition Commission of India (CCI) has released the draft

[20] *Mergers & Acquisitions Laws and Regulations | India*. (2024, April 23). GLI. https://www.globallegalinsights.com/practice-areas/mergers-and-acquisitions-laws-and-regulations/india/#:~:text=returns%20after%20listing.-,Regulatory%20framework%20for%20M%26A%20in%20India,of%20all%20companies%20in%20India.

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Competition Commission of India (Combinations) Regulations, 2023 (the "Draft Regulations") for public feedback. The purpose of this publication is to offer clarity on a variety of topics, including the parameters for determining the "value of transaction" and "substantial business operations in India." Despite the fact that the Draft Regulations are meant to take the place of the existing combination regulations, they do not include any transitional measures for transactions that have been signed but have not yet been closed before the final regulations are put into effect.

ii. A modification to the understanding of the term "control": For the purpose of determining whether or not a transaction is required to be reported to the Competition Commission for a substantive evaluation, the concept of "control" as outlined in the Competition Act is pertinent. The current definition of control has been replaced by the Amendment Act, which has also brought it into alignment with the decisional practice of the CCI. According to this revised definition, the ability to exercise "material influence" on the management, affairs, or strategic commercial choices of a company is regarded to be exercising control over the entity. In light of the fact that the Competition Act (or the Amendment Act) does not include a definition of the phrase "material influence," a conclusion regarding this matter will be made on an individual basis.

iii. The transaction of shares obtained through stock exchanges and the utilization of open offers: Through a sequence of transactions on a regulated stock exchange, the Amendment Act allows for the execution of the following:

- an open offer;
- an acquisition of shares;
- an acquisition of securities convertible into other securities.

All of these operations must be completed prior to receiving clearance from the central securities commission. This derogation, however, is subject to the following conditions: the transaction in question must be reported to the CCI within thirty calendar days of the date on which the first shares or securities were acquired; and the acquirer must refrain from exercising ownership or

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beneficial rights or interest in the shares or convertible securities in question until the CCI gives its approval to the transaction. In the meantime, however, the acquirer has the ability to:

- take advantage of economic gains;
- dispose of the shares or securities that were bought; or
- exercise voting rights in relation to liquidation and/or insolvency procedures, provided that the acquirer does not exert any influence over the target, either directly or indirectly.

iv. Deemed approval and a decrease in the timescale for the implementation of a combination: Any business that intends to enter into a combination that satisfies certain specified conditions or is otherwise not exempted under the Competition Act is required to submit a notification to the Competition Commission of India (CCI). Within thirty calendar days of receiving notice, the Competition Commission of India (CCI) is required to formulate its prima facie opinion on whether a transaction is likely to cause an appreciable adverse effect on competition. If the CCI fails to do so, the combination will be deemed to be approved, and the CCI will not be required to pass a separate order. This is in accordance with the Amendment Act. The previous timeframe for review, which consisted of 210 calendar days, has been lowered to 150 calendar days, and the CCI is unable to prolong this requirement. In addition, the schedule for review has been shortened.

v. Provisions pertaining to gun jumping have had their scope broadened as a result of the Amendment Act, which included provisions pertaining to merger control. At the moment, businesses are subject to penalties for gun-jumping in situations in which the parties involved have either completed a reportable transaction without informing the CCI or completed a notified transaction prior to the approval of the CCI. An additional element has been included by the Amendment Act, which states that the CCI has the authority to levy a penalty in situations where businesses fail to give the necessary information that is sought by the CCI during the process of determining whether or not a transaction that was not notified has in fact been reportable. In addition, the Amendment Act stipulates that the CCI has the authority to impose penalties

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on parties for non-disclosure that can amount to up to one percent of the deal value. This provision is in accordance with the anticipated implementation of a deal value threshold.

B. The Indian data privacy regime underwent a significant development on 11 August 2023 with the enactment of the Digital Personal Data Protection Act, 2023 (DPDP Act) by the Central Government. This Act aims to regulate the processing of digital personal data, which refers to data about an individual who can be identified through that data. The Act seeks to strike a balance between recognizing an individual's right to protect their personal data and the lawful processing of such data for legitimate purposes. Although the DPDP Act has been passed, it has not yet been implemented. Once implemented, the DPDP Act will supersede the current data protection system in India, which consists of Section 43A of the Information Technology Act, 2000 and its associated regulations. The DPDP Act aims to regulate personal data without establishing hierarchical classifications of such data, such as sensitive personal data or essential personal data. More precisely, the DPDP Act will regulate particular processing operations that occur within the borders of India. It would also regulate the processing of digital personal data outside of India, if this processing is related to any activity of providing goods or services to individuals in India. Therefore, organizations must do an evaluation of the specific personal data they handle, the purpose for which they use it, and the methods they use to get such data. Corporations must possess such determination in order to comprehend the compliances they must do. Once a determination has been made, corporations that meet the criteria of being 'data fiduciaries' (meaning they control how personal data is processed) will be required to fulfill several new obligations. These include giving notice and obtaining consent for processing personal data, ensuring that the data is used only for the intended purpose and is not retained for longer than necessary, respecting the rights of individuals (including the right to have their data erased, updated, and corrected), informing individuals in the event of a data breach, and providing an effective mechanism for addressing complaints

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C. Revision to the procedure for expediting mergers: Section 233 of the organizations Act outlines a streamlined process for merging certain types of organizations. The options include:

- two tiny firms;
- two newly established firms;
- a newly established firm combined with a small firm; or
- a parent company with its fully owned subsidiaries.

The Ministry of Corporate Affairs (MCA) has implemented the Companies (Compromises, Arrangement and Amalgamations) Amendment Rules, 2023, which include the following modifications to the process:

- Objection time frame: Previously, there was no defined timeframe for the Registrar of Companies (RoC) and the official liquidator to present any objections or recommendations on the program to the Central Government. Under this modification, both the RoC (Registrar of Companies) and the official liquidator are required to report any concerns or suggestions they may have regarding the merger plan within 30 days after receiving it.
- If no objections are received, the Central Government has the authority to issue a confirmation order within 15 days after the 30-day period has ended. Nevertheless, in the event that no confirmation order is issued within a period of 60 days from the date of receiving the scheme, the scheme will be considered as accepted. Similarly, if objections are received and the Central Government fails to issue a confirmation order or file an application with the NCLT within 60 days of receiving the proposal, the scheme would be considered authorized. Before the modification, the provision for deemed approvals was not included in the system. Therefore, this amendment is a positive development in terms of ensuring transaction certainty and reducing the time it takes for approvals.
- Public companies can now list their securities on foreign stock exchanges. This provision, under Section 23 of the Companies Act, allows certain classes of public companies to issue securities for the purpose of listing on approved

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stock exchanges in eligible foreign jurisdictions. This provision will be effective from 30 October 2023. Although the clause was put into effect in 2020, its enforcement has only recently begun. Consequently, these public firms will have the freedom to list their securities on international stock exchanges in the future.

c. The MCA has implemented the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023. These rules mandate that all private companies (excluding small companies and Government companies) must convert their physical securities into a dematerialised format within 18 months after the end of the financial year on 31 March 2023. This conversion must be completed by the latest date of 30 September 2024. Furthermore, any private firm seeking to issue or repurchase stocks must ensure that the securities held by its promoters, directors, and key managerial staff have been converted into electronic form before making such an offer. Before the modification, the required dematerialization requirement solely applied to public corporations.

D. Additional disclosure duties for firms that are listed in regard to specific agreements which include: According to the SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2023 (the "SEBI LODR Amendment 2023"), the Securities and Exchange Board of India (SEBI) has introduced a new Regulation 30A under the SEBI LODR. This regulation mandates that a listed entity must disclose all agreements that directly, indirectly, or potentially have an impact on the management or control of the listed entity, or that impose any restriction or create any liability upon the listed entity. The agreements must be entered into by a number of parties, including shareholders, promoter group entities, related parties, key managerial personnel, or employees of the listed entity (or of its holding, subsidiary, or associate company), among themselves or with the listed entity or with a third party, solely or jointly, regardless of whether the listed entity is a member of the SEBI. It will also be necessary to give any information regarding the rescinding or amending of such agreements. On the other hand, agreements that are entered into by a listed entity in the normal course of business will not be required to

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be declared, unless the agreements in question have an impact on the management or control of the listed entity either directly, indirectly, or potentially, or by their purpose and effect. Even agreements that were in effect as of the date of notification, which was July 13, 2023, will be subject to this disclosure requirement when it has been implemented.

E. Additional requirements for shareholder approval for listed corporations include the following: The items that are listed below have been recently added to the list of matters that will require the approval of shareholders through the use of a special resolution (i.e., a majority representing three-fourths of the total number of shareholders voting). This is in accordance with the SEBI LODR Amendment 2023.

- Restrictions that are unique to shareholders: Once every five years from the date that such rights were granted, shareholders will be required to provide their approval for any special rights that are granted to any shareholder(s) beginning on July 15, 2023. Additionally, any special rights that are already in place will be subject to approval by the shareholders during a period of five years beginning on July 15, 2023 onward. However, the issuance of special rights to a financial institution or a debenture trustee (who becomes a shareholder of the listed firm as a consequence of the underlying lending/debenture contract) has been excluded from this need. There is a reasonable assumption that rights that are typically unavailable to ordinary shareholders should fall under the jurisdiction of the SEBI LODR, notwithstanding the fact that the word "special rights" has not been defined in the SEBI LODR.
- The sale, lease, or disposal of an undertaking of a listed entity that happens outside of any scheme of arrangement: From this point forward, any sale, lease, or disposal of the entire or substantially the entire undertaking of a listed entity will be required to have the prior approval of its shareholders through the use of a special resolution. It has been made clear that the only circumstance under which a special resolution of this kind will be put into effect is if the number of votes cast by the "public shareholders" in favor of the resolution is greater than the number of votes cast by those same public shareholders against the resolution. Since this is the case, the votes that were

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cast by shareholders of the listed corporation who are not public shareholders (i.e., promoters or promoter group entities; or associates) will not be included when determining the outcome of the resolution. Any public shareholder who is a party (directly or indirectly) to such a transaction is prohibited from voting on such topics. This restriction applies to both direct and indirect parties. The following conditions, however, will not be met in the event that the disposal in question: (a) is in favor of a wholly owned subsidiary whose accounts are consolidated with the listed firm in question.

Therefore, any subsequent dilution of the listed entity's shareholding in such a fully owned subsidiary will trigger prior shareholders' approval; and (b) is by virtue of a covenant under a contract with a financial institution or debenture trustee. This is because the dilution of the listed entity's shareholding will be below 100%. Before this change, Section 180(1)(a) of the Companies Act only allowed for the requirement of a special resolution, which meant that even the parties who were interested in the transaction were permitted to vote on the matter. The SEBI LODR Amendment 2023 has thus brought about the implementation of a more stringent framework for the sale, lease, or disposal of an undertaking that is owned by a listed business.

F. Different interpretations of the word "change in control" in regard to intermediaries include the following: On January 17, 2023, the Securities and Exchange Board of India (SEBI) (Change in Control in Intermediaries) (Amendment) Regulations, 2023 were notified to amend or insert, as applicable, the definition of 'change in control' across several regulations issued by the SEBI. These regulations are applicable to a variety of intermediaries, such as merchant bankers, debenture trustees, investment advisors, depositories and participants, and alternate investment funds. The purpose of these regulations is to streamline the process of determining whether or not an intermediary has undergone a change in control. In accordance with the regulations, a change in control of an intermediary will be construed by reference to the following: (i) the definition of 'control' under the Takeover Regulations, in the case of a listed entity; and (ii) the definition of 'control' under the Companies Act, in the case of an unlisted organization. In situations that do not involve a body corporate, the term

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"change in control" will be interpreted to mean any change in legal structure, ownership, or controlling interest (that is, a direct or indirect interest of not less than fifty percent of voting rights or interest).

The Limited Liability Partnership (Significant Beneficial Owners) Rules, 2023, sometimes known as the "LLP SBO Rules," are as follows:

- Following the implementation of Section 90 of the corporations Act in 2018, the Ministry of Corporate Affairs (MCA) implemented a system that allows for the identification and disclosure of significant beneficial owners (also known as "SBOs") concerning corporations. Limited liability partnerships (also known as "LLP(s)") were included in the ambit of Section 90 of the Companies Act, which was extended by the Ministry of Corporate Affairs (MCA) by a notification dated February 11, 2022. The firms (Significant Beneficial Owners) Rules, 2018 (also known as the "Companies SBO Rules") were introduced by the Ministry of Corporate Affairs (MCA) in order to apply the SBO framework with regard to firms. However, no such rules were developed in reference to limited liability partnerships (LLPs). With regard to limited liability partnerships (LLPs), the MCA has notified the LLP SBO Rules on November 9, 2023, in order to fill this vacuum in the SBO framework. Similar to the Companies SBO Rules, the LLP SBO Rules outline, among other things, the following: (i) the criteria to determine whether or not an SBO is associated with an LLP; and (ii) the compliance obligations for limited liability partnerships (LLPs) with regard to their SBOs, including the requirements for the maintenance of registers and the reporting of information.

CONCLUSIONS

Companies, legal experts, and politicians all confront significant challenges when it comes to the complications of mergers and bankruptcies that occur across international borders. This occurs due to the fact that the environment of global business is continuously undergoing change and development. In view of the fact that the world is becoming more interconnected, it is very essential to have a good understanding of the legal frameworks that govern these activities in order to support international economic transactions in a manner that is both

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effective and efficient. This comparative legal analysis is being conducted with the intention of examining the challenges that are involved with mergers and insolvencies that occur across international borders. This sheds light on the varied techniques that are taken by different countries as well as the repercussions that these approaches have for the stakeholders who are affected by them.

When it comes to insolvency that occurs across international borders, one of the most fundamental hurdles is the lack of harmonization that exists between the laws of different countries. Because there is a lack of harmonization, there are jurisdictional issues that are in conflict with one another, as well as procedural uncertainty. The interests of domestic creditors are usually given priority under traditional bankruptcy regimes, which causes issues for the settlement of insolvencies involving global firms. This is because domestic creditors are more likely to have a position of priority. New developments, such as the UNCITRAL Model Law on Cross-Border Bankruptcy, have been established in recent years with the purpose of easing the process of collaboration and coordination between various jurisdictions. Establishing a structure that allows for the recognition and enforcement of bankruptcy procedures that are carried out in other countries is the means by which this objective is realized. The adoption of such instruments represents a step forward in addressing challenges linked to cross-border bankruptcy; nonetheless, the success of these mechanisms is dependent on the willingness of individual governments to execute and enforce them in a uniform manner. This is the case despite the fact that the adoption of such instruments indicates a step forward.

Additionally, the landscape of cross-border mergers is characterized by a patchwork of regulatory regimes that oversee corporate restructuring and consolidation. This is the case because of the nature of the terrain. When compared to the climate of domestic mergers, this is a striking contrast. Other nations enforce stringent regulatory standards, which poses obstacles to the efficient handling of commercial transactions. This is despite the fact that some jurisdictions offer streamlined processes for cross-border mergers, while others do not. The Cross-Border Mergers Directive of the European Union is one example of a harmonisation policy that aims to make it simpler for businesses to undertake transactions across international borders. This is accomplished by establishing a standard framework for businesses that are participating in activities within the European Union. The landscape of

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cross-border mergers continues to be affected by distinct legal traditions and regulatory approaches, notwithstanding the fact that this is the case. Consequently, the parties concerned are forced to overcome hurdles that are becoming increasingly difficult to navigate from a legal and procedural standpoint.

There are major examples of successful cross-border insolvency proceedings and mergers that demonstrate the potential benefits of international cooperation and coordination. These examples are notwithstanding the challenges that have been presented. The relevance of international cooperation and coordination is illustrated by the instances presented here. Collaboration among stakeholders, which may include creditors, debtors, and insolvency practitioners, can lead to outcomes that are more effective and maximize value for all parties involved. This is because the efforts of stakeholders can increase the efficiency of the process. In addition, advancements in technology and communication have made it simpler to exchange information and to arrange complex transactions that take place on a worldwide scale. The parties have been able to overcome geographical barriers and simplify activities that take place across international borders as a result of this.

Having said that, there are still significant legal and practical challenges that need to be addressed, which underscores the requirement of ongoing conversation and collaboration between policymakers, practitioners, and academics at all levels of the organization. Bankruptcy and merger transactions that take place across international borders continue to encounter substantial problems, including as jurisdictional issues, forum shopping, and the adoption of foreign judgments. These are just some of the primary factors that contribute to the difficulties that we are facing. The panorama of international business is further complicated by the impact of geopolitical developments, such as the Brexit and trade battles between major economies. This adds yet another layer of complexity to the worldwide corporate scene. Because of this, it is necessary for stakeholders to become used to the constantly shifting regulatory settings and geopolitical realities.

One must have a detailed understanding of the several legal frameworks and regulatory regimes that control the processes of cross-border insolvency and mergers in order to successfully negotiate the legal boundaries that are associated with these procedures. Although harmonization initiatives and international agreements offer appealing avenues for

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collaboration and coordination, these avenues need to be supplemented with practical solutions that address the specific challenges that stakeholders face when operating in a global economy. This is because these avenues create attractive opportunities for collaboration and coordination. By promoting conversation and collaboration among different jurisdictions, politicians, and industry stakeholders, we can move towards a legal framework that is more consistent and predictable, which will make it easier for businesses to conduct transactions across international borders and will encourage economic expansion on a global scale. At the end of the day, the success of the mergers and bankruptcies that take place across international borders is dependent on our ability to adapt to a world that is growing more interconnected. When it comes to addressing the challenges that come with passing over international company frontiers, legal innovation and cooperation are absolutely necessary in modern globe.

SUGGESTIONS

The recommendations that were made:

- For the purpose of enhancing the procedures for cooperation and coordination, it is recommended that countries be encouraged to establish international agreements and to develop best practices for cross-border insolvency and merger practices. The implementation of international treaties will be the means by which this objective will be achieved.
- Courses of Study and Instruction: The provision of educational and training programs for legal practitioners, policymakers, and industry stakeholders is of utmost importance. The purpose of these programs is to increase awareness of the legal complexities that are associated with international transactions and to advocate for the most efficient methods for navigating these complexities.
- It is important to make investments in the integration of technology and digital platforms in order to facilitate international transactions. This can be accomplished by increasing transparency, expediting processes for due diligence, and enhancing communication and collaboration among various parties. The implementation of technology will be the means by which this objective will be achieved.

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- Acting as an Advocate for Policy: Act as an advocate for policy reforms that attempt to harmonize cross-border insolvency and merger rules in order to reduce the amount of legal uncertainty and generate an environment that is more favorable to international corporate transactions.
- One of the most important aspects of stakeholder engagement is the promotion of conversation and collaboration among various stakeholders, including creditors, debtors, insolvency practitioners, regulatory authorities, and policymakers, with the goal of addressing common challenges and locating practical solutions for crossing cross-border legal boundaries.
- When it comes to the topic of cross-border bankruptcy and mergers, it is essential to promote research and innovation in order to develop new methodologies, tools, and approaches for the purpose of resolving complex legal challenges and encouraging efficient and successful international commercial transactions. This is because it is important to encourage research and innovation.
- An illustration of capacity development would be the provision of financial assistance to projects in developing countries with the objective of enhancing their legal frameworks and institutional capabilities in order to effectively manage situations involving mergers and insolvencies that occur across international borders.
- Participating in global advocacy projects is one way to raise awareness about the necessity of international cooperation and coordination in encouraging economic growth and stability in a world that is becoming increasingly interconnected. This can be accomplished by participating in global advocacy activities.

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