VOLUME 6 | ISSUE 4 MAY 2026 ISSN: 2582-7340

VOLUME 6 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CROSS-BORDER MERGERS UNDER THE COMPANIES ACT, 2013: A CRITICAL ANALYSIS OF SECTION 234, THE NCLT SANCTION PROCESS, AND THE EMERGING REGULATORY CHALLENGES

- Madhvika Mehra[1]

Abstract

However, as globalization continues to affect companies, restructuring has increasingly become international and involved mergers and acquisitions as a means of achieving growth. Mergers across international borders give various firms the chance to enter new markets and obtain technological know-how, among other advantages. It is in recognition of the importance of creating a regime that will allow for international corporate restructuring that India has put in place a regime for cross-border mergers through section 234 of the Companies Act, 2013.

Prior to the Companies Act 2013, there was nothing specific in regard to the mergers between Indian and foreign companies in the earlier system of Indian company law. Mergers could only be carried out between Indian companies within the existing regime of firms Act 1956. One important amendment which enables the merger of Indian and foreign companies with prior RBI approval is Section 234 of the Companies Act 2013.

However, even with all these reforms implemented in order to encourage mergers and acquisitions in India, there are many legal and regulatory barriers which need to be crossed by any enterprise intending to merge or acquire another firm. These include complications of overlapping regulations among other obstacles, problems of taxations, valuation issues, and compliance with foreign laws. All these can create serious impediments in the process of a transnational merger. Moreover, given the current global economic scenario and increasing globalization trends, there is a necessity for implementing an efficient regulatory framework.

[1] Student at Amity University, Noida

This research critically evaluates the existing legal framework on cross-border mergers under the provisions of the Companies Act, 2013. This research focuses on analyzing the efficacy of the existing legal framework, regulatory hurdles, and issues arising in the area of cross-border merger operations. Moreover, the study also evaluates international practices and suggests recommendations to make the Indian regulatory framework more effective.

Keywords: Cross-border Mergers, Companies Act, Inbound Mergers, Outbound Merger, Globalization, Regulatory Framework, Foreign Company, Transnational Merger, IBC, Reserve Bank of India, National Company Law Tribunal.

Introduction

The Companies Act, 2013 has a special place in the history of Indian corporate law. It is not merely an update to the earlier Companies Act, 1956. Instead, it completely rewrites the rules for starting, managing, governing, and reorganizing companies in India. One of the biggest changes in the 2013 Act is the creation of a legal framework for cross-border mergers. This is a first in Indian company law. Before this Act, Indian companies could not merge directly with foreign companies, and foreign companies could not dissolve into Indian entities through a court-approved legal process. It was not just complicated; it was impossible under the earlier rules.

For over fifty years, the Companies Act, 1956 has shaped Indian corporate law. At the time of its creation, India operated under a closed economy and its engagement with the global economy was very limited in that it was heavily controlled with respect to foreign investments and also did not provide for statutory mergers of Indian companies with foreign entities. Provisions related to corporate restructuring and mergers contained in the Act, particularly section 391 to 394, were intended to address only domestic transactions. Consequently, courts, including the High Courts of Bombay and Calcutta, interpreted such provisions to apply only to corporations incorporated in India. Thus, courts have ruled that a foreign corporation may not participate in a compromise or arrangement under the Companies Act, 1956. Although such interpretations are consistent with the legal provisions contained in the Act, they create an enormous disconnect between the demands of an increasingly globalized Indian corporate sector and the statutory framework that governs Indian corporate transactions.

The economic liberalisation that occurred in India since 1991 has radically changed the country's corporate landscape. The dismantling of the licence raj and opening of Indian markets to foreign competition and investment; the abolishment of exchange controls on the current account; and the gradual liberalisation of the capital account under the Foreign Exchange Management Act (FEMA) of 1999, opened the way for Indian companies to think, act and compete internationally. Several of the world's largest Indian conglomerates have acquired significant foreign companies in the past few years, while many other international multinationals have increased their presence in India through subsidiaries, joint ventures and strategic partnerships. In particular, the information technology sector, the pharmaceutical industry and financial services have become globally competitive, with substantial foreign direct investment and many Indian companies now competing internationally. Due to this changing environment, by mid-2005, the need for an efficient and legally secure mechanism for cross-border corporate combinations, which complied with the international standards, was one of the most commonly cited deficiencies in the structure of Indian corporate law.

The Expert Committee that is responsible for drafting new company regulations indicates that they have recognized that international and foreign businesses will want to merge and operate together in a global marketplace. The Expert Committee recommends that the new company law include a section that permits businesses in India to complete their international activities through mergers, on the same basis and terms as businesses in all other major countries. The recommendations made by the Expert Committee regarding cross-border merging have now become law and are found in Section 234 of the Companies Act, 2013 and in Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. These two documents form the backbone of the cross-border merging process in India.

Section 234 and Rule 25A are both important beyond their technical nature. Symbolically, their implementation demonstrates India's view that the corporate restructuring laws governing India need to match those of countries on the global stage so that they can compete against companies in those countries for international growth and consolidation. Practically, these provisions also provide a clear and legally secure way for one company to merge into another through a court-approved process; specifically, an Indian company can merge into a foreign company or vice versa with all the assets and liabilities of the merging company's entity transferred automatically to the surviving company of the other entity. These are outcomes that were not possible under the Companies Act of 1956 and would have required indirect contractual arrangements at a significant cost, complexity, and uncertainty.

Section 234 of the Companies Act 2013 and Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules 2016 have a significance that goes far beyond their immediate technical content. Symbolically, they represent India's recognition that the statutory regime for corporate restructuring requires reform to permit a level playing field for Indian and foreign companies operating in a globalised economy; that is, Indian companies should be able to access the same structural mechanisms for international expansion and consolidation as their foreign competitors in the USA, UK, Singapore, and the EU. Practically, these provisions allow, for the first time, for a legally certain process through which a foreign company can dissolve itself and merge into an Indian company by way of a court-approved process, or vice versa, and the assets and liabilities of the Indian merging company will automatically vest in the foreign surviving company. The 1956 Act did not enable these types of outcomes, and contracting companies to effectuate these mergers through other means has been both prohibitively expensive and complex, while carrying substantial risk of uncertainty.

The primary purpose of this study is to not only to provide a description of the law, but also to critically assess its merits and identify areas that require clarification or enhancement in order for India's cross-border merger regime to achieve its phenomenal potential for facilitating global corporate integration.

Historical Background: From Companies Act, 1956 to Companies Act, 2013

There were no specific provisions in the Companies Act of 1956 for merger activities taking place across borders. Even though there was an existence of Section 394, which provided that companies could be reconstructed and amalgamated, it was held by the court that the said section would apply only to companies established under the said act and not beyond. According to the High Court, which was authorized to make a scheme of compromise and arrangement under the said act, a foreign company cannot participate in the scheme of Section 391/394.[2]

As a consequence of the jurisdictional limit imposed by the 1956 Act on mergers of foreign entities, cross-border mergers which involved companies from India could not be carried out using the provisions for statutory merger under the 1956 Act. Those individuals who were interested in producing a result economically equivalent to a statutory merger had to look for alternative means to achieve the same end, like a combination of contractual transactions, transfer of property, exchange of shares, and so forth.

Section 234: The Enabling Provision

Section 234 of the Companies Act, 2013 provides the foundation for international mergers. When the section came into existence, it had limited jurisdiction since it covered mergers and amalgamations between a company registered in India and a foreign company based on certain conditions to be made by the Central Government. Nevertheless, the Central Government was supposed to formulate the conditions only after seeking clearance from the Reserve Bank of India that had the power to determine the kind of foreign companies Indian firms could merge with.[3]

For the proper implementation of Section 234, therefore, it was important to lay down rules relating to it. For that purpose, Rule 25A of 2016 Rules (Companies (Compromises, Arrangements and Amalgamations)) was brought into effect on 13 April, 2017. Rule 25A of 2016 Rules can be summarized as follows: "Provided that if any foreign company receives clearance from the RBI, it would become possible for such foreign company to be amalgamated with the company formed under this Act or

[2]*See, e.g., In re Parke Davis and Company, AIR 1959 Bom 491; In re Remo General Agency Ltd., (1976) 46 Comp. Cas. 389 (Cal.).*
[3]*Companies Act, 2013, § 234(1).*

vice versa." As per the plan of amalgamation, it can be stated how the payment would be made in cash or Depository Receipts or both to the shareholders of the merging companies.[4]

A number of features relating to Sections 234 and Rule 25A need to be examined. The first aspect is that of its scope. Under Section 234(1), foreign companies eligible for conducting cross-border mergers will be those notified by the Central Government. This provision was made to facilitate the inclusion only of mergers among companies from countries where there exists a relationship between their laws with India's. Yet, no such notification has been made as yet by the Central Government.

The second condition is that of RBI prior approval. As per rule 25A, RBI's prior approval had to be obtained in every merger case where foreign entities were involved, whether inbound or outbound mergers. The new FEMA cross-border merger regulations of 2018 have relaxed the rigidity of RBI's prior approval condition.

In addition, there are considerations regarding the modes of consideration. According to Rule 25A, it is clearly stated that as regards the consideration paid for the cross border merger, cash, depository receipts (American or Global), or a combination of both could be made. This is pertinent in instances where the holders of shares in the merged company reside in nations where shares in foreign Indian companies are impractical.

Chapter XV: The General Framework for Mergers and Amalgamations

Section 234 functions within the larger context of Chapter XV of the Companies Act, 2013, which deals with compromise, arrangement, and amalgamation. It is necessary to comprehend the provisions of Chapter XV in order to fully understand the procedural aspects of cross-border mergers.

Section 230: Schemes of Compromise and Arrangement

---

[4] *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 25A*

Such an agreement would always receive approval from the National Company Law Tribunal through Section 230. The statutory agreement known as the scheme of compromise and arrangement entails that the firm undertakes restructuring of its capital and/or debts, or both, through approval by the NCLT as well as the creditors/shareholders. However, in instances where there is widespread acceptance of such an agreement, Section 230 is usually interpreted alongside Section 232, especially in cases of mergers and amalgamations abroad.[5]

Section 232: Mergers and Amalgamations

Section 232 lays down the detailed procedures that must be followed during the process of merger or amalgamation of Indian firms. Section 232 mandates the drawing up of a draft plan for the merger or amalgamation, making an application before the NCLT, giving notice to the concerned regulatory bodies (RBI, SEBI, Income Tax department, and Competition Commission of India, as applicable), holding meetings of the shareholders and creditors, and securing the approval of the NCLT. Section 232 also mandates that the plan include certain mandatory provisions, such as those regarding dissatisfied shareholders and workers.[6]

The section on cross-border mergers needs to be interpreted in light of sections 232 and 234, as well as rule 25A. The procedure mentioned under section 232, when viewed from the perspective of a cross-border merger, is almost entirely applicable, taking into account the modifications and further conditions as provided for under rule 25A and the FEMA regulations.

Section 233: Fast Track Mergers

Under Section 233, there exists a fast-track process applicable to mergers involving certain types of firms (holding companies and wholly-owned subsidiary firms, and mergers among small firms within the purview of the Act). The fast-track process, which does not require the approval of the NCLT and offers a streamlined process before the Regional Director, cannot be invoked in cross-border mergers, which have

[5]*Companies Act, 2013, § 230.*
[6]*Companies Act, 2013, § 232.*

been specifically excluded from Section 233 because foreign firms are not included in the definition of 'company' under the Act.[7]

Rule 25A: Specific Requirements for Cross-Border Mergers

The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 25A lays down certain additional conditions that must be fulfilled for cross-border mergers along with those specified in Sections 230 to 232. These conditions can be stated as under.

First, the scheme for the merger or amalgamation of the foreign company with the Indian company should be in conformity with Section 234 of the Companies Act, 2013. According to Rule 25A(2), if the transferee company is a foreign company, then Sections 230 to 232 of the Companies Act, 2013 would apply.[8] This implies that, in the case of an outbound merger, all procedural aspects mentioned under Sections 230 to 232 would have to be complied with by the Indian company despite the foreign company being the surviving company.

Secondly, Section 25A(3) provides that in a case where the transferee company is an Indian company (inbound merger), then it will have to seek prior approval of the Reserve Bank of India before making an application under Sections 230-232. The requirement for prior RBI approval in relation to such transactions has however been changed through the provisions of FEMA Cross Border Merger Regulations, 2018.[9]

Thirdly, according to Rule 25A, it is necessary that the scheme of the merger should be such that the consideration for the merger should be paid only in cash or depository receipts or in both of them. It is not possible under the provisions of Rule 25A for the scheme to include the consideration in any other form (for example, shares of a foreign company, unless it is through depository receipts).

The NCLT Sanction Process

[7] *Companies Act, 2013, § 233(1). See also Companies Act, 2013, § 2(20) (definition of 'company'), which limits the term to companies incorporated under the Act.*

[8] *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 25A(2).*

[9] *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 25A(3); Foreign Exchange Management (Cross-Border Merger) Regulations, 2018, Reg. 4*

There are various stages in the sanctioning process for cross-border mergers through the NCLT, and each of them leaves room for regulatory oversight, stakeholder protests, and procedural setbacks. It is imperative to have detailed knowledge of the entire process for such mergers.

Stage 1: Application for Directions

The first step of the procedure, in this case, will include an application for orders under Sections 230, 232, and 234 of the Act which asks the NCLT to summon meetings of the parties in order to get their approval for the merger plan. Also, along with the application, there is a need for the submission of the following documents: Draft Scheme, Audited Balance Sheets of all parties involved, Valuation Report, Explanation by the Board as to why the Merger Plan has been proposed.

The immediate next step would be to notify the appropriate authorities, such as the Reserve Bank of India, Securities and Exchange Board of India for listed companies, Income Tax authorities, and Competition Commission of India. These authorities usually have four weeks at their disposal to offer any comments, objections, or suggestions on the scheme proposed. This is perhaps the most crucial step in the NCLT procedure in case of cross-border mergers as these authorities get an opportunity to highlight concerns related to foreign exchange laws, taxation, and competition.

Stage 2: Convening and Conduct of Meetings

If directions are issued by the NCLT, the company must conduct meetings separately for each class of stakeholders who have voting rights for the purposes of the scheme of arrangement. In addition to other documents, the notice for such meetings shall also include a scheme of arrangement, an explanatory memorandum detailing the mergers and reasons for such schemes, a valuation report, and the board report. If cross-border mergers take place, the explanatory memorandum shall also need to include details of regulatory clearances, such as FEMA clearance, along with any restrictions on voting rights of foreign stakeholders receiving shares or consideration in the Indian firm.

Approval for such an arrangement would be required from majorities in number and value of shareholders attending the meeting. It would be a way of safeguarding the interests of the minorities.

Stage 3: Petition for Sanction

After the necessary approvals by the statutory majority in the specified meetings, the company will then need to make an application to the NCLT for sanctioning the scheme. Any objections raised by dissident members (minority shareholders, creditors, etc.) will be taken up in such a hearing before the NCLT. The procedure is subject to the supervision of the NCLT through its judicial authority: it does not endorse the decision reached by the majority but makes its own independent determination on the reasonableness, legality, and public interest aspects of the proposed scheme.

It is common knowledge that the NCLT can impose certain conditions on the scheme in approving it. In the event of a merger across borders, the NCLT can impose certain conditions regarding the protection of the dissenters' rights, protection of the employees, FEMA, and also security for the creditors. The NCLT could even reject a scheme outright if it feels that the scheme is not in the best interest of the stakeholders.[10]

Stage 4: Filing of Certified Copies and Effectiveness

After approval of the scheme by the NCLT, the company needs to register a certified copy of the order with the Registrar of Companies. The effectiveness of the merger comes into existence on registration of the certified copy, except for cases where the scheme itself mentions a particular date for effectiveness. In case of cross-border mergers, effectiveness depends not only on satisfying the FEMA conditions but also on fulfilling certain conditions set forth by the foreign country's regulatory authority.

---

[10] *See, e.g., In re Larsen and Toubro Ltd., (2004) 120 Comp. Cas. 523 (Bom.); In re Sterlite Industries (India) Ltd., (2003) 115 Comp. Cas. 18 (Mad.).*

Role of the Central Government

The decision to determine the type of foreign companies with which an Indian Company may amalgamate for cross-border mergers will rest with the Central Government of India under Section 234(1) of the Companies Act, 2013. However, as stated above, no such notifications have been made yet by the Central Government of India. Without any such notifications from the Government, cross-border mergers continue to take place with any foreign company without considering the country of operation of that company.

The MCA, however, on its website and in response to some of the queries asked by interested parties, has issued general instructions with regard to the interpretation of Sections 234 and 25A of the Companies Act. Nevertheless, no such comprehensive instructions have been provided by the MCA with respect to cross-border mergers. There are numerous areas of ambiguity that arise because of the lack of appropriate instructions, which have been considered as one of the key reform areas for the industry.

Interface with the Insolvency and Bankruptcy Code, 2016

The interface between the cross-border merger process in the Companies Act and the Insolvency and Bankruptcy Code, 2016 (IBC) is another challenging issue that has remained untouched by Indian law so far. The IBC makes provisions for the insolvency resolution process for a corporate person, financial creditors, and operational creditors, along with liquidation. Whether the process of cross-border mergers can be used to resolve the issue of insolvency for an Indian entity or whether an insolvent foreign entity can merge itself with an Indian entity while insolvency proceedings are pending is indeed a difficult question to answer.[11]

Section 29A of the IBC excludes certain entities from proposing resolutions, and this section too could be applicable in business combinations in cases of bankruptcy. This could apply in cases where the foreign company seeking business combination with the Indian company itself finds itself financially struggling, or where the person

[11]*Insolvency and Bankruptcy Code, 2016, §§ 6–77 (Corporate Insolvency Resolution Process)*

running the foreign company is covered under Section 29A of the law.[12] So far, no judicial pronouncement exists about how both legislations complement each other, and only those involving domestic cases have been reported so far.

Despite the inclusion of some parts of the UNCITRAL Model Law for Cross-Border Insolvencies in Part III of the IBC, which is yet to be notified, the lack of a comprehensive regulatory regime in relation to cross-border insolvency adds another layer of uncertainty to this domain. It is one such important area that the present research dissertation highlights as an important concern that needs attention.

Conclusion

The Companies Act framework for cross-border merger, as discussed, marks a considerable advancement in legislation compared to the state of affairs under the 1956 Act. The introduction of Section 234 and Rule 25A marks an important development that has brought clarity in the area and harmonized Indian law on this aspect with those of many other countries. However, there exist some problems within the present scheme, as has been pointed out above.

First, the lack of a notification by the Central Government regarding the classes of foreign companies eligible under Section 234 leaves a loophole in the interpretation of this section. Though the practical implications of this loophole have not been felt much since cross-border mergers can be assumed to involve all foreign companies, except those that are specifically restricted from doing so, the uncertainty left by this provision may pose some risks to the parties to cross-border mergers. Second, the time required to seek the approval of the NCLT in domestic mergers, which ranges between six months to one and a half years, poses a major obstacle for cross-border mergers where promptness is essential. Lastly, the lack of procedures in cross-border mergers has forced the NCLT to formulate ad hoc procedures for each case.

[12] *Insolvency and Bankruptcy Code, 2016, § 29A.*