

## HUMAN RIGHTS CONCERNS AFFECTING CROSS BORDER Mergers AND ACQUISITIONS – CONTEXTUAL OVERHAUL

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### Abstract

On October 20, 2016, a Report of United Nations dealing extensively with the right to freedom of peaceful assembly and of association in the workplace was tabled in the General Assembly during its 71<sup>st</sup> session. The Report reiterated among other things that the labour rights are synonymous to the human rights and it is therefore important that the workers ought to be provided a workplace where they can exercise these rights to the fullest extent. It is only when the labour rights are exercised effectively that the workers will be in a position to enjoy other broad spectrum of economic, social, cultural and political rights. The Report points out that there is a threat on the workers' rights at both national and international level. Even though the Universal Declaration of Human Rights contains a number of important labour clauses yet their application to the real-world scenario is another thing. A number of jurists hold that since the labour right provisions find their place in an important human rights document such as the Universal Declaration of Human Rights, therefore they need to be dealt with as human rights. For the contemporary human rights jurisprudence, UDHR stands out as a definitive and formative text by setting a scheme for the pursuit of human rights worldwide. Some of such important rights include but are not limited to freedom of association, protection against child labour and discrimination at work. Two important issues affecting workers that stem from cross border mergers and acquisitions are firstly pertaining to the impact that it has on the employment and secondly regarding the representation and participation of workers. When a merger takes place between two or more entities, sometimes there is a change in the nature of the resultant entity and this results in loss of employment and therefore hampers the rights of the workers/labourers/employees. Here it is important to note that though there may not be a total employment loss yet there is some employment loss. The issue at hand is more or less similar to the problems faced during the domestic merger and acquisitions yet the cross-border merger and acquisition result in more grave challenges and the factors responsible for this are national culture, regulatory practices and business systems.

**Keywords** – Cross border M&A, Human Rights, International Labour Organisation, Labour Rights, Companies Act, 2013.

### INTRODUCTION

The pace at which cross border merger and acquisitions (M&A) deals take place has been exponential in last many years. This commercial activity is not only confined to the developed countries but even the developing countries are extensively involved since it helps in cutting costs and improving commercial flexibility.<sup>2</sup> The present paper studies the impact that cross border M&A has on the growth and well-being of the employees and workers particularly in present day and age. Incidence of cross border M&A and their consequential results for the acquiring firms have always been impacted by the labour market regulations. The sheer variation in the legislations pertaining to labour and employee rights across different countries influences the viability of the cross-border M&A deals.<sup>3</sup> A research conducted<sup>4</sup> with a sample of 50 countries shows that the firms generally benefit with substantial returns when they conclude a deal with a company from a country with weak labour legislations in comparison to their own domestic labour legislations. Here some of the important points that pop up are firstly with regard to the level to which the labour legislations influence the direction of the deals and secondly, why do the companies prefer countries with weaker labour legislations at the expense of the labour rights violations. There is an impending urgency in understanding these issues because the twin concepts of employment and economic growth are intertwined with them.<sup>5</sup> The Companies Act, 2013, though a beneficent piece of legislation is completely silent when it comes to rights of the workers/employees involved in cross border mergers and acquisitions. The law on cross border M&A has been fairly laid down in Section 234 of Companies Act 2013 and corresponding Rules and Regulations, yet there still exists a certain amount of ambiguity that needs to be addressed for smooth functioning of cross border M&A deals. The UK Merger

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<sup>2</sup> Michal Rusinski, World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development, 9 Pol. Q. Int'l Aff. 132 (2000).

<sup>3</sup> Charles M. Miller, United States Immigration Planning for Cross-Border Mergers and Acquisitions, 27 San Diego L. Rev. 831 (1990).

<sup>4</sup> Aleksynska, M, M Schindler, Labor market regulations in low-, middle- and high-income countries: A new panel database, IMF working paper, No. 11/154.

<sup>5</sup> Rose Levine, Chen Lin, Cross-border acquisitions and labour regulations, <https://voxeu.org/article/cross-border-acquisitions-and-labour-regulations> (Last visited on 25.10.2019).

Regulations, 2007<sup>6</sup> and EU Merger Regulations also help us in understanding the issue at hand, but a great deal of legislative steps need to be taken to make the present laws in India and at international level sensitive to the conditions of workers and other employees.

### LABOUR RIGHTS ARE HUMAN RIGHTS – RELEVANCE AND VIOLATION

On October 20, 2016 a Report was released during the 71<sup>st</sup> session of the General Assembly and the Report dealt with the freedom of peaceful assembly and association as the rights to be enjoyed in the workplace.<sup>7</sup> The special rapporteur Maina Kiai in this report reiterated that whenever there is a augmentation of the corporate power, it always takes a toll on the labour rights. Though a number of international instruments cast an obligation on the multinational corporations to fulfil their duties of promoting the worker rights yet the same were never accomplished owing to the strength and influence of the multinational corporations.<sup>8</sup> The labour and worker rights issues are important in present times than ever and these rights need to be protected even more in the present world scenario. Globalisation which is necessary evil, brings with it, voluminous growth, leading to complex international supply chains, migration of mass labour and creating an informal economic structure worldwide.<sup>9</sup> Sadly, the workers that are driving these economic structures are kept excluded from any type of protection offered by the legal structures and hence they lack not only union protection but also capacity of collective bargaining.<sup>10</sup>

The scale of labour right violation is at a peak and worst when it comes to informal sector which includes the women and migrant workers. Global supply chains are equally to be blamed for this.<sup>11</sup> The above-mentioned report highlights among other things migrant rights violation, the unfair *kafala* system practiced in the Gulf states, the harsh USA policy of H2 guest worker visa and how the women in UK are forced into low wage and low status jobs in those segments of the society that are legislatively least protected. The 71% gender wage gap is telling of the bleak scenario wherein the women are put through most of the work that is unpaid facing not only verbal but also physical and sexual abuse including sexual harassment or rape at workplace.<sup>12</sup> There is suppression of the rights of the workers nationally and internationally to make the things sordid. In 2012 even the ILO employers' group contended that there existed no right to strike as mandated and protected under the Convention 87. The states have failed in ensuring and protecting the worker rights such as the freedom of assembly.<sup>13</sup> Gross worker rights violations such as banning independent unions in Saudi Arabia and China are rampant. The report pinpoints how the US has been doling out incentive to both Nissan and Volkswagen to continue with union free set up. Olympic Committee and FIFA have also been rebuked for their abject failure to secure worker rights during the 2016 Rio Olympics and Qatar World Cup. Another beneficent legislative measure that has succumbed to the corporate greed is Corporate Social Responsibility (CSR). With the introduction of CSR, a multibillion-dollar industry was indirectly created to cater to work in this domain, which unfortunately turned out to be ineffective and banal.<sup>14</sup> CSR was modelled to be voluntary compliance tool but failed to achieve a fraction of the intended purpose.<sup>15</sup> This was totally opposite to the several negotiated and binding agreements with the trade unions such as the Bangladesh Accord. In the end the Report puts forth pertinent recommendations to the key stakeholders such as the trade unions, ILO, UN, civil society, states and business houses. The Report urges the States to ratify and implement the important documents such as the ILO Conventions 87 and 98 and other regional documents at international and regional level. It casts a duty on the countries to ensure that the labour rights are exercised across the spectrum by everyone no matter what their immigration status was or what sector or work they were involved in. There is a positive obligation on the corporations to pledge that key labour rights such as the right to strike, to form trade union and right to

<sup>6</sup> The Companies (Cross-Border Mergers) Regulations 2007.

<sup>7</sup> Labour Rights are Human Rights, at <http://www.industrial-union.org/labour-rights-are-human-rights-un-report>, (Last visited on 23.10.2019).

<sup>8</sup> Introduction: Labour Rights, Human Rights, 137 Int'l Lab. Rev. 127 (1998).

<sup>9</sup> G. England, Codes of Labour Rights: Some Canadian Pointers, 39 Int'l & Comp. L.Q. 557 (1990)

<sup>10</sup> Michelle Flaherty, Trends in Human Rights Damages: Courts, Statutory Tribunals and Labour Arbitration, 20 Canadian Lab. & Emp. L.J. 355 (2017).

<sup>11</sup> Rebeka Novak, The Costs of the Violation of the European Convention on Human Rights, 2016 Jogi Tanulmányok 218 (2016).

<sup>12</sup> Donald C. Jr. Dowling, A Guide to Employment Issues in Cross-Border Mergers and Acquisitions, 12 Bus. L. Int'l 317 (2011).

<sup>13</sup> Charles M. Miller, United States Immigration Planning for Cross-Border Mergers and Acquisitions, 27 San Diego L. Rev. 831 (1990).

<sup>14</sup> Benedict Sheehy, Understanding CSR: An Empirical Study of Private Regulation, 38 Monash U. L. Rev. 103 (2012).

<sup>15</sup> Vibe Garf Ulfbeck; Katerina Peterkova Mitkidis; Alexandra Horvathova, To Pursue or Not to Pursue CSR and Sustainability Goals, 2017 NJCL 1 (2017).

participate in collection action and bargaining be safeguarded.<sup>16</sup> Reprising activists and busting of the unions should be avoided. Labour rights hence should be acknowledged as a core mandate by the human rights organizations and civil society alike. The Report echoed in the sentiment that the Unions have a role that not only take measures for the disenfranchised workers but also for the informal and migrant workers. For this purpose, the UN needs to assimilate the labour rights with the different programs it offers so that it guarantees that the workers' rights are guarded in all of the tendering and lending.<sup>17</sup> Finally, it is central to the entire discourse that revolves around the fight to recognise both human rights and labour rights as inseparable. Labour rights as human rights have been put through a lot of attack recently across the world and therefore it is the duty of the trade unions as well to work towards their protection since they are regarded to be in the front line of defence.<sup>18</sup>

### THREE EFFECTS OF CROSS BORDER MERGERS ACQUISITIONS ON EMPLOYEES/WORKERS - A CATALOGUE OF DISHARMONY

It is possible to identify three different effects that cross border mergers and acquisitions have on the employees or workers or their representatives. These include the nationality effect, acquisition effect and the multinational effect.

#### 1. The General Acquisition effect -

Cross border mergers and acquisitions result in newer investments that help in upgradation of exiting assets and the acquisition of the newer ones. The purpose for taking recourse to cross border M&A is to diversify and augment the manner in which the assets are made use of.<sup>19</sup> In some cases, the operation of the companies is reduced or ceased altogether. It can be succinctly said that the general acquisition effect is a glaring characteristic of mergers and acquisitions at both domestic and international level.<sup>20</sup> Researches across the globe have highlighted to the fact that a majority of cross border M&A result in substantial redundancies and are manifest in deals that take place in economies regardless of they being developed or developing.<sup>21</sup> A particular sector where the adverse after-effects of cross border M&A are quite visible is the financial sector. The adverse effect in the financial sector is marked by large scale job losses. An apt example, to substantiate is the deal between British American Financial Services and Zurich Insurance. This merger resulted in job loss of 1600 in the British operations. Similarly, even the oil sector has had to face the heat of cross border M&A deals which lead to redundancies. The merger between British Petroleum and Amoco in 1998 resulted in loss of 6000 jobs worldwide and majority of job cuts occurred in Britain.

#### 2. The Multinational Effect

The second upshot of the cross-border mergers and acquisitions on the industrial relations can be distinguished as the multinational effect. The managements that run the multinationals generally employ the policy of "divide and rule" in relation to the representatives of the workers globally.<sup>22</sup> The same is done by using the performance of the subsidiaries before making any investment decisions. This is a growing trend adopted by the decision makers in most of the multinationals so as to the keep a lid on the resistance that generally crop up among the worker or the employee unions at the plant level.<sup>23</sup> The process of linking the performance to the investment decisions is known as "coercive comparison". The multinational effect is created when by virtue of cross border M&A deal and a multinational is created out of two companies whose previous existence was based solely at national level. The new identity is thus created and multinational effect is attributed to both the parties for the first time. In case a multinational company acquires a national firm, then in such a case the acquired

<sup>16</sup> Nora Jakob; Rab Henriett; Andrea Judit Szollos, Effect of Labour Law Regulation on the Employment Relations Based on the Connection between Social Rights and Labour Market, 25 Lex ET Scientia Int'l J. 7 (2018).

<sup>17</sup> Jose Joao Abrantes, Labour Contract and Fundamental Rights, 80 Bol. Fac. Direito U. Coimbra 613 (2004).

<sup>18</sup> Keith Ewing, Rights and Immunities in British Labour Law, 10 Comp. Lab. L.J. 1 (1988).

<sup>19</sup> Yiqing Yin, Antitrust Law in Cross-Border Mergers and Acquisitions Practices, 8 Creighton Int'l & Comp. L.J. 4 (2017).

<sup>20</sup> Lydia Lebon, Cross-Border Procurement Problems and Transnational Entities, 9 Italian J. Pub. L. 310 (2017).

<sup>21</sup> Jerald D. August, Mergers and Acquisitions of Closely-Held Corporations (Outline), 64 Ann. Tax Conf. i (2018).

<sup>22</sup> Andrew B. Dawson, Modularity in Cross-Border Insolvency, 93 Chi.-Kent L. Rev. 677 (2018).

<sup>23</sup> Ariel Ezrachi, The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control, 36 Geo. Wash. Int'l L. Rev. 433 (2004).

party becomes privy to this effect.<sup>24</sup> However, if a multinational firm acquires or merges with another multinational firm, the scope and commercial viability of the merged firm is comparatively greater than that of the two firms that merged in the first place. This results in augmenting the multinational effect. A recent instance of the same is the multinational effect created by virtue of the international mergers that took place in UK wherein Rover was acquired by BMW in the year 1994. Pursuant to the acquisition, there was pressure to not only cut costs but also increase the flexibility. The German parent company also made comparisons that were explicit amongst the British and the German plants. BMW, subsequently also issued commercial threats that the Longbridge production plant would be closed to ensure the agreement of the unions regarding updated working policies and practices and other 2500 redundancies.

### 3. The Nationality Effect

Nationality effect is another impact that the cross-border M&A has on the workforce. A number of claims have been made by the writers regarding globalisation and the consequential patterns of cross border M&A deals between companies of different countries.<sup>25</sup> Yet, there exists a subtle difference in the business models upon which the company's function. Once such domain is of corporate governance and control where the disparity is noticeable. Financial institutions including the stock markets and the banks differ greatly when it comes to their characteristics and roles. They also differ across legal systems in different countries.<sup>26</sup> A typical example, to put it succinctly is that the hostile takeovers are more common in certain legal systems and nearly impossible in others. The nationality factor is relevant to the present discussion since the companies coming from different nationalities are governed and financed by different systems and hence the nature of management is also subjected to varied sort of pressure.<sup>27</sup> Anglo-Saxon system and the Continental European system are one such example to put things in perspective. While short term orientation is created under the Anglo-Saxon system focussing on financial results; the Continental European system focusses on giving greater freedom to the management to meet long-term goals of exponential market share growth. Thus, the impact that is created when a domestic company is acquired by a foreign firm is affected to a great extent by the nationality of the acquirer.<sup>28</sup> The nationality effect is exemplified by the different approaches regarding the industrial relations pursued by the multinational companies in different countries.<sup>29</sup> American firm going ahead with acquisitions in Britain emphasise on such acquisitions for better financial reporting and their policies against white collar crimes plaguing labour unions. For example, majority of the local electricity companies in Britain are dominated by the American firms. Similarly, the German companies involved in acquisition of the British firms are considerate about certain important points: long-term approach augmenting and complementing planning and investment; demonstrating evidence of partnership and cooperation in the management of the workforce and investment of resources in their training. A number of multinationals coming from Germany such as Continental and Hoechst are run following this approach and the same illustrates the importance of this approach in present times.

#### LABOUR RIGHTS UNDER CROSS BORDER M&A (INTERNATIONAL CONTEXT)

A number of international documents set the standards to shed light on right to work being a fundamental right and the same is protected by various conventions that have been drafted to bring about clarity on this subject. Right to work, right to equal pay for equal work and providing just and favourable wage has been embodied in Article 23 of Universal Declaration of Human Rights (UDHR).<sup>30</sup> Article 24 of the same document further secures to every person right to rest and leisure with reasonable restrictions being imposed on the number of working hours including certain public holidays with pay. The International Covenant on Economic, Social and Cultural Rights (ICESCR) by virtue of Article 6 and 7 goes a step further in developing these rights by shaping its essential corollary i.e. just and favourable conditions of work.<sup>31</sup> The Convention on the Elimination of all Forms

<sup>24</sup> Niek Zaman, Cross-Border Mergers in Europe, 8 Eur. J.L. Reform 123 (2006).

<sup>25</sup> Niek Zaman, Cross-Border Mergers in Europe, 8 Eur. J.L. Reform 123 (2006)

<sup>26</sup> Kurt E. Markert, Antitrust Aspects of Mergers in the EEC, 5 Tex. Int'l L. F. 32 (1969).

<sup>27</sup> Jeffrey A. Rosen, The Explosion in International Mergers and Acquisitions, 71 A.B.A. J. 70 (1985).

<sup>28</sup> Adebayo G. Adaralegbe, Mergers in the International Petroleum Industry; Legal Aspects on the Operations of Petroleum Development Companies in Nigeria, 21 J. Energy & Nat. Resources L. 325 (2003).

<sup>29</sup> Eleanor M. Fox, Application of the Clayton Act to International Mergers, Acquisitions and Joint Ventures, 50 Antitrust L.J. 477 (1981).

<sup>30</sup> Brian Brooks, The Reform of Labour Laws: An International Comparison, 29 U.N.S.W.L.J. 22 (2006).

<sup>31</sup> Mutaz Qafisheh, The Interplay between International Human Rights and Labour Rights in Palestine, 9 J. Islamic St. Prac. Int'l L. 121 (2013).

of Discrimination Against Women (CEDAW) under Article 11 casts a duty on the States to work towards creating an atmosphere wherein any sort of discrimination against the women is negated in the field of their employment.<sup>32</sup> Article 32 of United Nations Convention on the Rights of the Children (CRC) lays down the conditions that regulate the work conditions of children ensuring that they are protected from not only the exploitation but also from any work that has the potential of inhibiting with their development, both in terms of their mental health and education. In the domain of the labour rights protection, it is relevant to the present discourse to acknowledge the work of International Labour Organisation (ILO).<sup>33</sup> The Constitution of ILO envisages that the labour should not be treated as a commodity or article of commerce.<sup>34</sup> In this direction, a number of Conventions have been adopted by the ILO that embody the principle of right to work: ILO 100 deals with equal remuneration, ILO 122 concerns employment policy, ILO 111 enlists the provisions of discrimination and ILO 142 stresses on Human Resources Development. ILO Conventions also guard important rights dealing with trade union rights and prohibition of forced labour. Pertinent among them are: ILO 87 and ILO 98 dealing with freedom of association, ILO 29 and ILO 105 dealing with Prohibition of forced labour, ILO 138 providing for minimum age and ILO 182 envisaging elimination of the worst forms of child labour.<sup>35</sup>

Speaking particularly about the employee rights when it comes to cross border mergers and acquisitions in order to make sure that the employee participation was not negated, European Union Cross-border Mergers Directive 2005/56/EC was introduced that focuses exclusively on worker rights.<sup>36</sup> This EU Merger Directive aimed at ensuring that the participation rights of the workers did not diminish during the time period the deal was going on. It was further agreed that the reason for introducing the law was to respect and grant the employees from the companies to be merged certain level of participatory rights that they would have enjoyed under their respective domestic laws.<sup>37</sup>

#### LABOUR RIGHTS UNDER CROSS BORDER M&A (INDIAN CONTEXT)

The Companies Act, 1956 after being in existence for more than five-and-a-half decades is now replaced by Companies Act, 2013. The enactment has positively impacted the working of companies in India. It is only with the passage of time that one can see how well the provisions of the new legislation turn out to be.<sup>38</sup> A comprehensive analysis of the various provisions of the Companies Act, 2013 should be done to ascertain the strengths and weaknesses of the Act.<sup>39</sup> The research proposal focuses on one of the new developments that have been brought about by the Companies Act, 2013 i.e. development pertaining to the issue of outbound cross border mergers and acquisitions. The coming into force of Section 234 is a milestone step taken in the domain of business laws as prior to it, permission was accorded to inbound mergers only and now even outbound mergers have been accorded sanction. This has forged new avenues for the companies incorporated in India who now have the option of outbound mergers and achieve exponential growth by taking recourse to consolidation, acquisitions or internal restructuring.<sup>40</sup> Though in India we do have a number of legislations that expressly deal with rights of the employees but there exists a certain amount of ambiguity with regard to employee rights when it comes to cross border mergers and acquisitions. Section 234, along with its Rules and Regulations deal with the concept of cross border mergers and acquisitions, yet the same is not adequate to deal with the subject of employee or worker rights and the same needs to be addressed.

<sup>32</sup> William Gould, *The Rights of Wage-Earners: Of Human Rights and International Labour Standards*, 1979 *Acta Juridica* 86 (1979).

<sup>33</sup> Aurora Voiculescu, *Labour Standards in International Supply Chains: Aligning Rights and Incentives*, 1 *BHRJ* 375 (2016).

<sup>34</sup> Rachel Fleming, *Leveraging International Legal and Human Rights Mechanisms: Efforts to End Forced Labour in Burma/Myanmar*, 5 *SOAS L.J.* 15 (2018).

<sup>35</sup> Shuhong Yu; Malik Zia-ud-Din, *International Trade Agreements and Their Relation to Core Labor Standards*, 11 *J. Pol. & L.* 33 (2018).

<sup>36</sup> Mathias M. Siems, *The European Directive on Cross-Border Mergers: An International Model*, 11 *Colum. J. Eur. L.* 167 (2004).

<sup>37</sup> Jurgen Hartmann, *EU Makes Progress on Cross-Border Mergers*, 16 *Int'l Tax Rev.* 65 (2005).

<sup>38</sup> Sarah Alvy, *India's Companies Act of 2013: A Governance Shift into the Sunlight*, 2 *Indon. J. Int'l & Comp. L.* 187, 222 (2015)

<sup>39</sup> Afra Afsharipour; Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 *U.C. Davis Bus. L.J.* 175, 230 (2013)

<sup>40</sup> Rishabh Shroff, Manu Varghese, *India finally notifies Cross Border Merger Regulations*, <https://corporate.cyrilamarchandblogs.com/2018/04/india-finally-notifies-cross-border-merger-regulations/>, (Last visited September 1, 2019)

**IMPACT OF LABOUR REGULATIONS ON CROSS BORDER MERGERS AND ACQUISITIONS -  
CONCLUDING REMARKS**

The determinants of cross border mergers and acquisitions such as the financial and corporate governance, have been explored and well documented by the researchers worldwide. These researches reveal that the incidence and the trajectory of cross border mergers and acquisitions are shaped by market forces such as the exchange rates and fledgling stock market valuations. Research reveals that in countries with robust corporate governance systems tend to be much more involved in engaging in cross border M&A deals in other countries. Unfortunately, the research on laws, regulations and the policies that shape labour markets are meagre. The importance of studying these laws stems from the fact that they not only strengthen but complement the incidence of cross border mergers and acquisitions. It is therefore important to evaluate the degree to which the countries protect the citizens employed by the multinationals and secure the unemployed by virtue of the laws governing cross border mergers and acquisitions. Therefore, the need of the hour is to have a comprehensive legislation at international and national level to deal with the intricacies involved with employee/worker rights in cross border mergers and acquisitions.