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BLUE OCEAN STRATEGY — A NEW THEORY

DILIP M SARWATE*

MANAGEMENT INNOVATIONS

Management literature is full of innovative thoughts, tools and techniques. Since the time Fredrick W. Taylor came out with his theory of Scientific Management in 1890s, a large number of management thinkers have come out with several new tools and techniques. It is difficult to say which are the greatest as each one decides this on the basis of their utility.

Gary Hamel, the thinker who gave us the principle of Re-engineering, in one of his recent articles has identified twelve Innovations¹ that shaped Modern Management. His list is given below:

- Scientific management (Time & motion studies)
- Cost accounting and variance analysis
- The commercial research laboratory (the industrialization of science)
- ROI analysis and capital budgeting
- Brand management
- Large scale project management (PERT/CPM)
- Divisionalization
- Leadership development
- Industry consortia (Multi company collaborative structures)

- Radical decentralization (Self organization)
- Formalized strategic analysis
- Employee driven problem solving (Quality Circles, Kaizan)

One can add several other tools, which are proving of immense use to entrepreneurs and professional managers. I would like to add to the list some more tools as given :

- Core competency
- Balance Score Card
- Emotional intelligence
- Competitive intelligence
- Knowledge management
- Intrapreneurship
- Theory X, Y & Z and many others

Now comes one more new theory for the use by the management world.

THE BLUE OCEAN STRATEGY

Authors W. Chan Kim and Renee Mauborgne, both faculties at INSEAD, France, the second largest B-School in Europe have come out with a new approach. An article, which appeared in Harvard Business Review of October 2004, was published as a book². This article makes an effort to offer the gist of the book.

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1 Gary Hamel 'The Why, What and How of Management Innovation' Harvard Business Review February 2006

2. W. Chan Kim & Renee Mauborgne Blue Ocean Strategy: How to create uncontested market space and make competition irrelevant, Harvard Business Press, February 2005

The Red Ocean versus Blue Ocean

Red ocean : Represents all the industries in existence today- the known market space. The industry boundaries are defined and accepted and the competitive rules of the game are well understood. The companies try to outperform their rivals in order to grab a greater share of existing demand. The space gets more and more crowded. Some of the peculiarities of Red Ocean are given below :

- Well explored and crowded with competitors
- Need new ways to cut costs and grow revenue (Through outsourcing, value engineering)
- Take away market share from competitors (Offer incentives)

For Red Ocean strategy, there are many advocates. Those who have made impact and their work is acknowledged below:

- Corporate Strategy by H. Igor Ansoff
- Competitive Strategy by Michael Porter
- Key factors of Success by Kenichi Ohmae
- Core competency by C.K. Prahalad
- Balance Score Card by Robert Kaplan

It must be admitted that the word Strategy comes from Military background. It is all about red ocean competition. It is about confronting an opponent and driving him off a battlefield of limited territory. Competitive advantage is at the helm of strategy.

Blue Ocean : Denotes all the industries not in existence today- the unknown market space, untainted by the competition. Here the demand is created rather than fought over. There is ample opportunity for growth that is both profitable and rapid. Some of the peculiarities of Blue Ocean strategy are referred below :

- Give rise to completely new industries
- From within a red ocean, alter the boundaries of an existing industry
- Look for untapped market space, swim for open waters

- Look for opportunities for highly profitable growth
- Focus on big picture and not only on numbers
- Go for value innovation
- Aim at utility, price and cost position
- Create and capture new demand

SOME ILLUSTRATIONS

One can identify several new products and services, which were developed by companies world over. They were unique to the market. The authors argue that this was the Blue Ocean strategy they came out with. They include:

- Entertainment electronics- Sony Walkman, Flat TV's
- Mutual funds
- Cellular telephones
- Biotechnology
- Express package delivery – Federal Express
- Coffee bars- Star Bucks
- Home videos
- e-Bay-consumer to consumer selling
- Hybrid passenger cars- Toyota and Honda

I would like to add to this some more new products, which have emerged only in last five years or so. One will not be surprised if every year several more will be seen in the markets world wide. They include:

- Child restraints (Baby car seats)
- e-Learning
- Digital books (Stephen King)
- Optic fibers
- I-pod
- Animation films (Shrek, Cars)
- Mortgage Mantra (Internet based software for buying property)
- Fuel cells

A COMPARISON

In order to understand the difference between the Red Ocean strategy and Blue Ocean strategy, a comparison is inevitable.

Red ocean strategy

- Compete in existing market space
- Beat the competition
- Exploit existing demand
- Make the value/cost tradeoff
- Align the whole system of a company's activities with its strategic choice of differentiation or low cost

Blue ocean strategy

- Create uncontested market space
- Make competition irrelevant
- Create new demand
- Break value/cost trade off
- Align the whole system of a company's activities in pursuit of both differentiation and low cost

SIX STEPS FOR BLUE OCEAN STRATEGY

- Reconstruct market boundaries. Strategically examine your industry's key competitive drivers
- Focus on the big picture and not merely the numbers. Consider the competitive environment through your customer's eyes so that you stay focused on what matters to them
- Reach beyond existing demand. Do not just focus on your current customers. Look for your potential customers
- Get strategic sequence right. Technological innovation does not guarantee marketing success. The technology must be made relevant to customer and provide value
- Overcome key organizational hurdles
- Build execution into strategy. Link engagement, explanation and expectation with the actual process of

developing the strategy. Executing a blue ocean strategy will require a trust among your team.

SO WHAT IS NEW IN BLUE OCEAN STRATEGY?

As it normally happens, whenever some one comes with a new theory, the other scholars take a critical review of the same. Some feel that it is something new. An original work, which is a contribution to knowledge. Several others tear the theory apart. It happened to C. K. Prahalad with his theory on *Core Competency*.

Blue Ocean Strategy also had mixed reactions. While few politely opined that it is a new approach worth paying attention, many others ruthlessly tore it apart. The common terminology that is used is that it is 'old wine in new bottle' !

The main focus of criticism was on the following lines:

- There is nothing like a Blue Ocean The Blue ocean soon becomes Red
- Ocean. That means, the opportunities attract competitors
- Strategy is King. There cannot be a Strategy unless there is competition. Hence, it is all about Red Ocean
- The authors gave hardly a page out of 254 pages on Marketing. Every organization is looking for Market Intensification strategies, which include,
 - More consumption
 - New users
 - New usage
 - New geographical markets
 - New applications
 - Product innovation – Maximization or minification
 - Remember, its not mere R&D, but Marketing R&D

WHAT IS IN IT FOR COMPANY SECRETARIES?

A Company Secretary plays different important roles. He is a member of a company's Strategic Management team. He can put to

use the concept of Blue Ocean Strategy as follows:

- He can look for new market opportunities on his own or through strategic alliances. For this purpose, he could be involved in conducting the *Techno Economic Feasibility Studies*.
- He can encourage product innovation keeping in view the Intellectual Property Rights.
- He can come up with a Competitive Strategy, which will not infringe the Competitive Act.

— Aim at creating excellence as viewed from the eyes of all stake holders.

— Enforce Corporate Governance.

— Invest in Competitive Intelligence on global markets.

— Create a Competitive Advantage for their Company.

Finally, as Confucius, the Chinese philosopher had said ' the essence of knowledge is, having it, is to apply it'.

INTELLECTUAL PROPERTY RIGHTS — AN INTERNATIONAL PERSPECTIVE

ABHIJIT MUKHOPADHYAY*

STRATEGIES FOR MANAGEMENT

In today's scenario, the importance of managing the intellectual property cannot be over emphasised. With the new knowledge economy and globalisation spreading fast, the need for its effective management has increased manifold. Protection of the intellectual property rights (IPR) is becoming a major concern for the global corporations. This is mainly due to the infringement cases being faced by the companies either in their own territory or outside. Fortunes are being spent to protect and guard IPR.

Owners of the IPR are devising newer strategies to safeguard their rights. The fundamental steps that are required to be taken lie in registration of the IPR in different countries and their subsequent protection against infringement. They become critical specially when the number of registrations are large and the companies face cross-border infringements.

Managing diverse registrations in countries around the world itself requires enormous planning and co-ordination. Where the number of registrations get spread in countries across the world, it may not be possible to do the registrations centrally and usually IPR lawyers are appointed in different countries to do the registrations and maintain/renew them on a regular basis. Managing the lawyers world wide becomes quite critical and it is possible to appoint a law firm to co-ordinate with the lawyers responsible for maintaining the IPR in respective countries. It is quite easier for a

company to manage its world wide registrations through a centralised law firm who in turn manages lawyers world wide. This may be an expensive proposition but it is worthwhile to apply this for peace of mind. It is also possible to run a corporate watch service centrally whereby publication of similar or near similar new applications can be monitored through the computer system and if necessary, these applications can be objected to. This of course comes with a price.

It is important to establish a budget for managing the IPR related matters. This includes new registrations, renewals and anticipated cost for protecting the IPR.

LICENSING ARRANGEMENT

Quite often a company appoints its own distributor or agent to market products in a foreign country. It is quite normal to execute a trademark licensing agreement (LA). This agreement is meant to protect the licensor of trademark against possible misuse of the licensor's mark by the distributor while marketing the licensor's product. Usually an agreement of this nature includes the following:

(a) *Identification of trademark*

Specific trademarks covered under the LA should be specifically defined.

(b) *Product*

The product on which specified trademark can be used requires

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identification. This should also include the way packaging is to be done and the place where the trademark will appear.

(c) *Territory*

The territory where the product will be sold with the trademark is to be indicated.

(d) *Quality Control and Procedures*

Under this the licensee is prohibited from sub-licensing its right of using the trademark within its territory. This also ensures quality control in so far as the product quality is concerned.

(e) *Royalty*

Details of royalty payment from the licensee to the licensor are to be mentioned here. Whether the payment is with or without tax requires clarity.

(f) *Confidentiality*

Under this, the licensee is required to maintain confidentiality of information relating to the product trademark.

(g) *Term and termination*

Duration of the licensing arrangement features here.

(h) *Undertaking*

This is an obligation undertaken by the licensee not to divulge any patented information of the licensor's product.

(i) *Indemnity*

The licensee has to indemnify the licensor against all claims that may be imposed on the licensor for wrongful use of the trademark by the licensee. The licensee is also required to inform the licensor in case of any infringement of the registered trademark.

(j) *Representation*

This normally covers the warranties given by the licensor relating to its ownership of its trademarks.

(k) *Governing Law and Settlement of disputes*

These are normal provisions. However, in case of cross-border trademark

licensing arrangement, jurisdiction is an important criterion.

(l) *General clauses*

This will cover clauses on assignment, notice, force majeure and other usual matters. The most important provisions in the LA are provisions relating to protection of the licensor's trademark by the licensee as well as specific undertaking by the licensee against non-use of the licensor's trademark other than what has been agreed upon. These days the grantor of the trademark is also insisting that the licensee should not attempt to either register the trademark in its own name or in a near similar fashion or attempt to use the trademark in its website. Under the laws of the European Union (EU), it is possible for a company operating in the EU to use the trademark of another company, but this use should be restricted to only for sale of the products of the owner of the trademark. There should not be any mala fide intention while using the trademark. What constitutes mala fide intention depends on the facts and circumstances of each case. Normally it is possible to use the trademark of another company by an entity selling the former's product even without being appointed as the distributor. However, as said earlier, it should be ensured that such use is not manipulative nor is intended to give an impression to the outside world that the distributor is the owner of the trademark. Later in this article several classic judgements of the European Court of Justice have been highlighted.

TRADEMARK PROTECTION – AN EUROPEAN PERSPECTIVE

Generally, country-wise specific international registration of trademark is available. Individual registration is possible after complying with the local/domestic trademark regulations and the requirements associated with it. In case of trademark infringement, steps are required to be taken to defend the registration in the country where the

infringement takes place. Unless a registration exists, it is not possible to defend unless the concept of 'Most Famous Mark' can be proved. The problem of registration is that it is quite expensive to register trademarks in so many countries around the world. The solution lies in the creation of a unified system of registration whereby a mark, if registered in a particular country automatically gets registration and corresponding protection in other countries. Unfortunately in Asia there is no such system of unified registration. In Africa, there are certain countries where unified registration is possible. However the maximum benefit for unified registration and protection is visible in the EU. The Community Trademark (CTM) Regulations to this effect have been issued by the EU. The details are as follows:

CTM Regulations

- (a) European Council under the EU has issued comprehensive Regulations (with 143 Articles under XIII Titles) on the CTM on 20th December, 1993.
- (b) As per the Regulations, a trademark registered under the CTM scheme shall have equal effect throughout the EC.
- (c) An office for Harmonization in the Internal Market (Trade Marks and Designs Office) has been established to deal with the CTM registrations.
- (d) The following natural or legal persons may be proprietors of CTM registrations:
 - nationals of EU states; or
 - nationals of non-EU states not parties to the Paris Convention but who are domiciled or have their real/effective industrial/commercial establishments within the EU or in a state which is a party to the Paris Convention; or
 - nationals who are not covered as above, but who accord nationals of EU complete IP protection.
- (e) CTM registration confers on the proprietor exclusive rights to use the marks throughout the EU and prevents

all third parties from using the marks without consent from the proprietor. However, it does not prohibit a third party from using in business its own name/address/ goods description/origin etc.

- (f) If CTM is not used in the EU within five years following registration, it shall be subject to sanctions as per the Regulations.
- (g) CTM can be licensed for goods / services throughout the EU.

CTM – Filing of Application

- (a) CTM applications can be filed:
 - at the Office; or
 - at the central industrial property office of a Member State of the EU or at the Benelux Trade Mark Office. Such Office will forward the applications to the Office within two weeks of filing.
- (b) Each application will be accompanied by relevant fee.
- (c) Date of filing shall be the date on which documents are filed with the Office/ Benelux Office/ central office of the Member State, where filed.
- (d) The applicant shall enjoy the right of priority from the date of filing of such application.
- (e) CTM applications will be examined by the Office in terms of criterion for registrations. If not found appropriate, applications will be returned.
- (f) On examination, applications will be published for inviting oppositions, if any and if no oppositions are received within three months of publications, registrations are granted.

CTM – Duration

- (a) CTM registrations are valid for ten years from the filing dates.
- (b) These can be renewed for another ten years.

CTM – Appeal

- (a) If registration is refused for whatever reasons, an appeal can be made before the Board of Appeal (BOA).
- (b) Time limit of appeal is two months from the date of communication of refusal.
- (c) If admissible, the BOA shall examine the appeal and decide it.
- (d) Actions may be brought against the decision of the BOA before the Court of Justice within two months from the date of decision of the BOA.

CTM – Rules

- (a) European Commission (Commission) has issued elaborate Rules (100 Rules under XII Titles) on 13th December, 1995.
- (b) These rules cover:
 - application procedure;
 - opposition procedure;
 - registration procedure;
 - renewal;
 - license;
 - surrender of marks;
 - community collective marks; appeals etc.
- (c) Commission has also issued Regulations on 13th December, 1995 (11 Articles) detailing fees payable for various purposes as follows:
 - basic fee on each registration (euros 975);
 - fee when application approved (euros 1100);
 - fee for each class of goods exceeding three for individual mark (euros 200);
 - collective mark application fee (euros 1675);
 - opposition fee (euros 350);
 - individual mark renewal fee (euros 500);
 - additional fee for belated renewal

(25% of renewal fee with cap of euros 1500);

— appeal fee (euros 800).

(d) Payment can be made in cash/cheque/bank transfer in the Office.

(e) Date of receipt is actual receipt date.

CTM – Appeal Procedure

- (a) Commission has prescribed detailed Rules on appeal procedure before the BOA in the Office.
- (b) These Rules (14 Articles) are effective from 5th February, 1996.
- (c) Composition of the BOA will be decided by an Authority constituted under the appeal procedure.

MADRID AGREEMENT AND PROTOCOL

Madrid Agreement came into effect in 1891. It enables the member countries to have a central framework for registration of trademarks. This system is administered by the World Intellectual Property Organisation (WIPO) in Alicante, Spain. Presently 72 countries are members of the Madrid Agreement. This Agreement has become more attractive and useful with the entry of Madrid Protocol in 1996. This Protocol boosts a membership of 62 odd countries. It has been strengthened further with the joining of the USA in 2003 and the EU in 2004. Undoubtedly these inclusions add to the system world's two largest commercial markets.

The Madrid system allows trademark owners to use a trademark held in their home country as a basis to file for trademark rights in other member countries. It is a simple system whereby only one application is to be filed with the WIPO. This is a cost effective method because only one application fee is payable and there is no need to translate the details of the applications into other languages. There is automatic registration if the trademark office of a designated country fails to refuse registration within 12 to 18 months.

As said earlier, this is really a cost effective method not only in terms of savings that may be generated for filing one application, but it also avoids the necessity of engaging lawyers

in all the countries which is otherwise required. Once the mark is registered, its renewals/ assignments/changes are being dealt with through the WIPO. The other advantage of this system is that it is possible to get registration and protection simultaneously in 62 odd countries.

Is the Madrid Protocol very effective? While the USA and the EU have joined the system, there are many other significant countries that remain absent specially in South America and Asia.

In order to make the Madrid system available, the applicant has to show that it has a real and effective commercial or industrial establishment within the home member country. However, it may be mentioned here that for US trademark owners, using a US application as a home registration may not be that attractive. This is because normally US trademark authorities do detailed examination before allowing any home registration. It is because of this reason many believe that both the US and the CTM should be designated as extension countries rather than home countries.

Given below are the details of application under the Madrid Protocol:

Madrid Protocol Provisions

- (a) Protocol relating to the Madrid Agreement concerning the International Registration of Marks was signed in Madrid on 28th June, 1989 (16 Articles). However, it came into force in 1996.
- (b) An application for registration of marks can be filled with the Office of a Contracting State by the following:
 - national of a Contracting State or
 - where such applicant is domiciled or
 - where it has a real and effective industrial or commercial establishment.
- (c) All applications are to be made in specified format. These have been prescribed in the Common Regulations (revised) effective from 1st April, 2004.

- (d) The applications must indicate the goods / services and classes of registrations established by the Nice Agreement concerning the International Classification of Goods and Services. Application for colour registration is possible.
- (e) The purpose of application is to secure protection in the territory of the Contracting Parties by obtaining registrations in the register of the International Bureau of the WIPO.
- (f) The International bureau of WIPO will register the marks provided they conform to the Common Regulations under the Madrid Agreement (41 Rules under 9 Chapters).
- (g) Protection in all Contracting States will depend upon the desire of the applicants which can be done either at the time of filing of application or later after following certain formalities contained in the Common Regulations.
- (h) If no refusal is made, such mark will enjoy territorial protection.
- (i) Protection of marks cannot be refused by any Contracting State merely because it does not allow registrations under all cases applied for.
- (j) International Bureau of WIPO will provide registration copy on payment of fees and can also undertake search.
- (k) Validity of registration is ten years subject to renewal for another ten years.
- (l) Fees for International Application and Registration may be fixed by the office of origin of application. Registration of a mark at the International Bureau of WIPO comprises of a basic, supplementary fee for each class of registration and complementary fee for extension of protection in Contracting States.
- (m) Any international registration can be converted in to a national registration.
- (n) This Protocol has unlimited duration.

CTM v. Madrid Protocol (MP)

- (a) CTM registration will cover 25 countries whereas the Protocol can provide registration and protection in 62 odd countries.
- (b) In case of CTM, a successful opposition by a party in the EU can form the basis of rejection of application.
- (c) If opposition cannot be settled by discussions, an application can be converted into national application.
- (d) In case of the Protocol, it is possible to face opposition in a single State, but that will affect application only in that State.
- (e) To file the Protocol application, filing a 'home' application is required and the Protocol application will follow from the home application.
- (f) The Protocol application will fail if home application is not finalised within 5 years.

Presently, we are witnessing a boom in applications being filed with WIPO. In 2004, around 30,000 international applications were made under the Madrid Protocol. Germany was the largest user in 2003 with 5000 international registration applications followed by France (4000) and Switzerland (2000). At the end of 2003, some 412,000 international trademark registrations belonging to over 134,000 holders were in force, equivalent to about 4.9m national registrations. Heading the legal table of companies using the system in 2003 were Henkel (Germany), Novartis (Switzerland) and Sanofi (France), with pharmaceutical and electronic companies heavily represented in the top 20.

As mentioned earlier, the Madrid Agreement on trademarks was adopted in 1891. Its original members were France, Belgium, Switzerland and Spain. The Madrid Protocol came into force in 1996. It has introduced more flexible rules and made Spanish the third language recently.

SOME INTERESTING EUROPEAN CASES

- (a) Recently the European Court of Justice (ECJ) in Luxembourg has issued a

landmark ruling that a colour per se can be registered as a trademark. The case, *Liberal Groep v. Benelux-MerkenBureau* revolved around an attempt by Dutch telecommunications group Libertel to register the colour orange as a trademark in Holland. After refusal of its application, the case was appealed to the Supreme Court in The Hague, which in turn referred a number of questions under the EC Trademark Directive to the ECJ for a preliminary ruling under Article 234 of the EU Treaty.

Article 3 of the EU Trademark Directive states that a trademark shall not be refused registration if, before the date of application and following the use which was made of it, it has acquired a distinctive character. The key question for the ECJ was, can Article 3 apply to a colour, and if so, in what circumstances can a colour possess a 'distinctive character'?

The ECJ examined this issue in detail, and while it determined that on the face of it, a colour 'possesses little inherent capacity for communicating specific information' and is 'commonly and widely used to advertise without any specific message', it was not inconceivable that a colour could acquire an element of brand recognition. It could therefore, in certain circumstances, serve as a 'badge of origin' for goods and services. However, the ECJ has imposed very tight restrictions as to when a colour can be registered as a trademark.

Firstly, the colour must be represented graphically in a 'clear, precise, self-contained, equally accessible, intelligible and objective' way. In practice, this means that international identification codes for the precise shade must be used to register. Secondly, the colour must have acquired distinctiveness under Article 3, which means that realistically, it is unlikely that a colour would be regarded as having a 'distinctive character' where it had not

built up sufficient 'prior use' in the public domain. Finally, and crucially, the colour can only be registered where it does not conflict with public policy by 'unduly restricting the availability of colours for other trades who offer sale of goods or services of the same type'.

- (b) In *Davidoff & Cie SA v. Gofkid Ltd.*, plaintiff, Davidoff & Cie SA ("Davidoff"), used the registered trade mark DAVIDOFF in, inter alia, Germany for an array of luxury goods. Defendant, Gofkid Ltd. ("Gofkid"), used the mark DURFFEE, displayed in a manner allegedly mimicking the DAVIDOFF mark, for an array of luxury goods, including at least some of the same goods as sold by Davidoff (e.g, cigarette and cigar accessories). Davidoff failed, both at trial and on appeal, in an infringement action based upon allegations of likelihood of confusion.

As part of its appeal, however, Davidoff sought relief under the Enhanced Protection Provisions as enacted into German law, alleging violation of the well-known DAVIDOFF mark by use of a similar mark for identical or similar goods even in the absence of likelihood of confusion. The German Court referred the matter to the ECJ for a preliminary ruling under Article 234 of the EU treaty.

The ECJ did not limit its analysis to the literal language of Article 5 (2), of the EU Trademark Directive, but rather analysed the provisions within the context of the entire Trade Mark Directive. Concluding that it would be illogical to extend a lesser degree of protection under the Trade Mark Directive to a mark with reputation against uses of identical or similar goods or services than the degree of protection accorded such marks against uses for dissimilar goods or services, the ECJ held that the Enhanced Protection Provisions should be interpreted as entitling Member States to provide specific protection for registered trade marks with a reputation

in cases where a later mark or sign, which is identical with or similar to the registered trade mark, is intended to be used or is used for goods or services identical with or similar to those covered by the registered mark.

- (c) In *Adidas-Salomon AG v. Fitnessworld Trading Ltd.*, the Plaintiff Adidas-Salomon AG ("Adidas") was the owner of a registered Benelux design trade mark ("Three stripes Mark") for a wide array of clothing. The Defendant Fitness Trading Ltd ("Fitnessworld"), sold fitness clothing in the Netherlands under the mark PERFECTO; certain of the PERFECTO clothing products also bore "a motif of two parallel stripes of equal width which contrast with the main colour and are applied to the side seams of the clothing" ("Two Stripes Motif"). Adidas brought a civil action alleging, *inter alia*, that Fitnessworld infringed the Three Stripes Mark under the Enhanced protection Provisions as enacted into Benelux law through use of the Two Stripes Motif because Fitnessworld's conduct was likely to confuse the public, thus allowing Fitnessworld to take advantage of the Three Stripes Mark's reputation and impairing the exclusivity of that mark.

The Dutch Hoge Raad der Nederlanden ("Dutch Court") referred the matter to the ECJ for a preliminary ruling under Article 234 of the EU Treaty. The ECJ held that the protection conferred by the Enhanced Protection Provisions is not conditional on a finding of a degree of similarity between the mark with a reputation and the sign such that there exists a likelihood of confusion between them on the part of the relevant section of the public. It is sufficient for the degree of similarity between the mark with a reputation and the sign to have the effect that the relevant section of the public establishes a link between the sign and the mark. The fact that a sign is viewed as an embellishment by the relevant section of the public is not, in itself, an obstacle to the

protection conferred by the Enhanced Protection Provisions where the degree of similarity is none the less such that the relevant section of the public establishes a link between the sign and the mark.

- (d) In *S.A. Societe LTJ Diffusion v. Sadas Vertbaudet SA*, plaintiff, *S.A. Societe LTJ Diffusion* ("LTJ"), used the registered trade mark ARTHUR for clothing in France. Defendant, *Sudas Vertbaudet SA* ("SV"), used the registered trade mark ARTHUR ET FELICIE for children's clothing. LTJ alleged, *inter alia*, that SV infringed LTJ's registered mark ARTHUR because SV was using the allegedly indistinct mark ARTHUR ET FELICIE for identical goods (i.e., clothing). The French Tribunal de Grande Instance de Paris ("French Court") referred the matter to the ECJ for a preliminary ruling under Article 234 of the EU Treaty. In its response to the French Court, the ECJ observed that because Article 5(1)(a) of the EU Trade Mark Directive as well as the corresponding registerability provisions of Article 4(1)(a) of the Directive, confer essentially "absolute protection" against third party use of identical marks for identical goods or services, the term "identical" must be interpreted strictly. Such strict interpretation, however, did not require

literal interpretation of "identical". Rather, "identical" should be interpreted to serve the underlying policy objectives of the Trade Mark Directive (e.g., to allow, without the possibility of confusion, the use of trade marks to distinguish the goods and services of one person from those of another).

In each of the above cases, the ECJ rejected literal interpretation of the Trade Mark Directive and other pertinent Community Trade Mark laws in favour of interpretation intended to implement the underlying policy objectives embodied in such laws. This policy-based approach to interpretation is welcomed by trade mark owners which should greatly enhance the protectability of invaluable registered trade marks, as well as safeguarding the consuming public against deceptive and injurious third party trade marks usages within the EU.

BOTTOMLINE.....!

It is needless to say that in today's knowledge economy and ever expanding globalisation regime, management of intellectual property rights has become a critical issue. Not only is it expensive in terms of financial outgo, but mis-management of intellectual property rights may cause enormous losses to the companies in the form of loss of their most valuable asset.

EXPLOITING INTERNATIONAL OPPORTUNITIES — UNDERSTANDING GLOBAL ECONOMY

N K JAIN*

India is an emerging economy in the context of the WTO and in spite of the undesirable situation that prevails in the negotiations under the DOHA Round cheerleading the economic globalisation appears to be the role India has to play. This signifies a crucial role for Indian Company Secretaries in the context that the ICSI envisions itself as a global leader in developing professionals specializing in corporate governance.

Emerging economies that have entered as signatories of the WTO aim at accelerating the rate of growth and development. India, for example, has made out a national message “India: Fastest Growing Free Market Economy—15 years, 6 governments, 5 prime ministers, 1 direction, that is 8% GDP growth”. For this purpose emerging economies need resources, finances, technology and training. These aspirations call for growth in trade and investment and proffer professional opportunities in abundance. In reality there is no definition or use of the term emerging economy under the WTO.

In the Subsidiaries and Countervailing Measures Agreement under the WTO, three categories of developing countries are defined and are allowed special and differential treatment. Least Developed Countries with GNP of less than US\$ 1,000 per year listed in Annex VII of the SCM Agreement are exempted from prohibition on export subsidies. With respect to import substitution subsidies, LDCs have

eight years and other developing countries listed in the Annex VII have five years to phase out such subsidies. Members in transition to market economy are given a seven-year period to phase out prohibited subsidies.

Direction of Trade Statistics published by the IMF in 2005 gives percentages of trade among countries by their development status over the last five decades. The Table is reproduced below:

	1948	1998	2001
Developed to Developed	46	53	40
Developed to Emerging	22	18	22
Emerging to Developed	22	18	26
Emerging to Emerging	10	11	12
	100	100	100

Analysis of the above trends tells us that a majority of world trade has been among similar country categories rather than among more traditional lines of comparative advantage based on large-scale national differentiation. In the post-WTO global economy, the main impetus of modern integration is to expand commercial networks and capture value-added through domestic and international diversification [David Roland-Hoist, Jean-Pierre Verbiest and Fan Zhai—“Growth and trade Horizons for Asia: Long-Term Forecasts for Regional Integration, November, 2005]

* Secretary & CEO, The ICSI. This article is a revised version of the paper presented at ICSI-ICPSK Joint Conference in Nairobi held on June 28, 2006. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.

WTO—ITS FUTURE

Possibly a majority of the members of the WTO are unhappy over the lack of delivery of the promises of the Uruguay round and the manner in which the organization itself is functioning.

Developing countries [emerging economies] feel that they have been short-changed, forced into trade liberalization patterns that have had de-industrializing effects and created agrarian crises, even as the promised benefits of increased market access in agricultural commodities and textiles have been denied to them.

The spirit of the Agreement on Agriculture and of the Agreement on Textiles has been breached not only in the small print of these agreements but also in the implementation. Developing country governments also feel hemmed in and their citizens feel exploited, by the range of new rules that affect non-trade policies within the country, including those related to intellectual property.

Even developed countries are less than enthusiastic about the multilateral process, which makes complete domination difficult and does not allow for even more aggressive opening up of markets of other countries. The US has treated WTO rules and decisions with a degree of contempt when these do not suit its government, even while it had used it as an instrument of pushing for trade liberalization in its favour.

Both the US and the EU are voting with their hands signing a plethora of bilateral and regional trade agreements outside the scope of the WTO. Such deals now cover 70 per cent of world trade.

The most massive trade liberalization the world economy has ever experienced after the Uruguay Round has been accompanied by no commensurate increase in trade flows! In the period after the signing of the Uruguay Round Agreement and after the formation of the WTO [that is 1995 onwards] world trade experienced no greater trend of growth and possibly even greater volatility compared to the previous decade.

WORLD BANK STUDY

The World Bank published a study regarding Domestic Regulation and Global Movement of Skilled Professionals (draft for discussion) in June 2006. The suggestions that the study makes are interesting for professionals who want to globalise their services, particularly in the context that the framework of WTO is taking time to actualize in many respects:

- At the multilateral level, India should leverage MRAs concluded by the US, EU, Canada, Australia and other trading partners with others through the MFN route. At the bilateral level, India should negotiate MRAs in its various FTAs and Economic Cooperation Agreements.
- An impediment to Mutual Recognition Agreements (MRAs) could be multiplicity and heterogeneity of standards within India. There is hence a need to reform our own regulations. One way suggested is to have dual or multiple standards: one standard for foreign recognition and another for domestic purposes.
- India should draw and secure National Treatment commitments in all sectors specially in Mode 4.
- Horizontal disciplines on Domestic Regulations under Article VI: 4 of GATS should be negotiated and put in place as early as possible. In particular, fairness and objectivity in evaluation of competence and recommendations for remedial action to fill the qualification gaps between US and India should be ensured. Transparency in the requirements for Indian professionals abroad should also be ensured.

The Study also makes us professionals sit up and take note of the following.

“Changes in demographics and patterns of investment in human capital are creating considerable scope for international trade in professional services. As populations in rich countries age, developing countries are seeing an increase in the proportion of working-age people. At the same time, the richest countries

are investing proportionally less than middle-income countries in engineering and technical human capital. These changes in endowments are creating shifts in comparative advantage that are reversing conventional views on “who can sell what to whom”.

This shows there are exceptional opportunities in waiting for Indian Company Secretaries. For this purpose, the Institute is already taking steps to enter into Mutual Recognition Agreements with parallel institutes from other countries. It is also impressing upon the Government of India as well as counterparts Institutes in countries with which Indian Government is entering into Free Trade or Comprehensive Economic Cooperation Agreements, the need to recognise and grant freedom to Company Secretaries.

LESSONS FROM WTO

The functioning of the WTO itself has come in for severe criticism. Two of the Ministerial meetings—at Seattle and at Cancun—failed to come to any agreement at least partly because of developing country members’ disgust at the heavy handed manner in which the secretariat sought to impose its will [largely reflecting the US-EU positions], influence the discussions and avoid democratic decision-making.

Aileen Kwa and others have exposed the infamous “green-room” discussions of WTO negotiations, in which small groups of developing countries have been “persuaded” or forced to accept decisions they had initially opposed.

Even the Disputes Settlement Procedures have become another hurdle, especially for small developing countries who find them extremely expensive, cumbersome and unduly prolonged.

Clearly there is much to reform in both the process of negotiations and in the functioning of the WTO. The WTO itself instituted a special commission to look into these matters, focus on institutional issues, and provide recommendations to reform the way the organisation works and how decisions are made.

The Report of the Commission titled “The Future of the WTO”, Geneva, WTO, 2005

however justifies and defends not only the entire set of principles on which the trade negotiations have been so far based, but also the clearly problematic working of the WTO. Being headed by Peter Sutherland, the first Director-General of the WTO and currently Chairman of two international conglomerates of finance and industry—Goldman Sachs International and British Petroleum, the Commission’s Report is not unexpected. It also included in its eight members the most vociferous advocates of free trade the Indian economist Mr Jagdish Bhagwati.

The report argues the “green room” meetings with limited access are both appropriate and necessary, notwithstanding their undemocratic nature.

It is an axiom for the Commission that trade does inspire growth and growth will combat poverty. This is accepted so uncritically that the evidence on recent de-industrialization and associated lack of employment in developing countries is simply not considered. “The WTO is about providing opportunities—it does not provide guarantees nor does it provide all the conditions for participation in the global economy.” The Report says. “The WTO constrains the powerful. No doubt that is why the share of the MNCs in global trade has increased dramatically over the past decade, and concentration of all major spheres of economic activity has accelerated greatly. In any case any shortcomings are not because of the WTO system but because individual member countries are unable to use the manifold benefits. If people are suffering as a result of trade liberalization and increased patent-based monopolies, it is their own fault.”

About loss of policy autonomy of governments and the increasing interference of the WTO rules in domestic economies, the Report feels that in the context of the WTO, the complaint over sovereignty is a red herring. It is misplaced because, as the Report says “the governments can now apparently reclaim control at the multilateral level!”

The Report condemns preferential trade agreements—except, the EU and NAFTA, which are supposed to be all right because they apparently encourage a more positive attitude to multilateralism!

The PTAs of developing countries such as Mercosur are seen as undesirable because they only involve trade diversion. They are looked upon as stumbling blocks to multilateral process.

WTO gives Special and Differential Treatment [SDT] to developing countries. The Report opines that SDT is based on two wrong assumptions, viz,—[1] that demands for reciprocal concessions from developing countries are inappropriate because of different effects of trade liberalization in all cases; [2] that the markets of developing countries are so small as to be insignificant and so concessions do not really matter.

Actually, the Report argues the markets in developing countries have actually grown and there are strong benefits of liberalization in all cases. The Report suggests that SDT mechanisms require further study and research.

The Generalised System of Payments [GSP] for developing country exports has encouraged industrialization in these countries. But the Report concludes that the GSP has had little positive effect.

In short the Report calls for continuation and even acceleration of indiscriminate trade liberalization without concern for its impact on employment and economic activity, no controls on unilateralism by the strong members, especially the US, no protection from the monopolies created by the working of the TRIPS agreement. It calls for formalizing the unequal and undemocratic manner of functioning of the WTO.

INDIAN SCENARIO

As an emerging economy under the WTO, study of India's position and policies for attracting greater resources, investments, technology and trade need a closer look.

Although S&P rates India below investment grade, at BB+ for long-term lending and B for short-term lending, foreign institutional and direct investors have shed their reluctance to profit from the India story. Net capital inflows at \$ 14.7 billion in April-December 2005 were made up of portfolio investment (\$8.2 billion), direct investment (\$4.7 billion), NRI deposits

(\$1.1 billion) and short-term credit (\$1.7 billion). Excluding the India Millennium Deposit redemption, external commercial borrowings have been placed at \$4 billion and net capital inflows at \$20.2 billion by the RBI [Hindu Business Line, April 21, 2006]

Reforms launched in India in early 1990s began a gradual shift towards capital account convertibility. Foreign natural persons except non-resident Indians (NRIs) are prohibited from investing in financial assets in India. But such investments were permitted by foreign institutional investors (FIIs) and Overseas Corporate Bodies (OCBs) with suitable restrictions.

ROLE OF FOREIGN INSTITUTIONAL INVESTORS

The Report of the Committee on Liberalisation of Foreign Institutional Investment [Lahiri Committee Report] points out that initially the idea of allowing FIIs was that they were broad-based, diversified funds, leaving out individual foreign investors and foreign companies. The only exception were the NRI and OCB portfolio investment through the secondary market, which were subject to individual ceilings of 5% to prevent a possible takeover. Individuals were left out because of the difficulties in checking on their antecedents, and of their lack of expertise in market matters and relatively short-term perspective. OCB investments through the portfolio route have been banned since November 2001.

In February, 2000, the FII regulations were amended to permit foreign corporates and high net worth individuals to also invest as sub-accounts of Securities and Exchange Board of India (SEBI)-registered FIIs. Foreign corporates and high net worth individuals fall outside the category of diversified investors. FIIs were also permitted to seek SEBI registration in respect of sub-accounts for their clients under the regulations. While initially FIIs were permitted to manage the sub-account of clients, the domestic portfolio managers or domestic asset management companies were also allowed to manage the funds of such sub-accounts and also to make application on behalf of such sub-accounts. Such sub-

accounts could be an institution, or a fund, or a portfolio established or incorporated outside India, or a broad-based fund, or a proprietary fund, or even a foreign corporate or individual. So, in practice there are common categories of entities, which could be registered as both FIIs and sub-accounts. However, investment in to a sub account is to be made either by FIIs, or by domestic portfolio manager or asset management company, and not by itself directly.

In view of the recent concerns of some unregulated entities taking positions in the stock market through the mechanism of Participatory Notes (PNs) issued by FIIs, the issue was examined by the Ministry of Finance in consultation with the Reserve Bank of India (RBI) and SEBI. Following this consultation, in January 2004, SEBI stipulated that PNs are not to be issued to any non-regulated entity, and the principle of “know your clients” may be strictly adhered to. SEBI has indicated that the existing non-eligible PNs, will be permitted to expire or to be wound-down on maturity, or within a period of 5 years, whichever is earlier. Besides, reporting requirement on a regular basis has been imposed on all the FIIs.

The following entities, established or incorporated abroad, are eligible to be registered as FIIs:

- (a) Pension Funds
- (b) Mutual Funds
- (c) Investment Trusts
- (d) Asset Management Companies
- (e) Nominee Companies
- (f) Banks
- (g) Institutional Portfolio Managers
- (h) Trustees
- (i) Power of Attorney holders
- (j) University funds, endowments foundations or charitable trusts or charitable societies.

Besides the above, a domestic portfolio manager or domestic asset management company is now also eligible to be registered as an FII to manage the funds of sub accounts.

The FIIs can also invest on behalf of sub-accounts. The following entities are entitled

to be registered as sub-accounts: i) an institution or fund or portfolio established or incorporated outside India, ii) a foreign corporate or a foreign individual.

FIIs registered with SEBI fall under the following categories:

- (a) *Regular FIIs* – those who are required to invest not less than 70 per cent of their investment in equity-related instruments and up to 30 per cent in non-equity instruments.
- (b) *100 per cent debt-fund FIIs* – those who are permitted to invest only in debt instruments.

Forward cover in respect of equity funds for outstanding investments of FIIs over and above such investments on June 11, 1998 was permitted. Subsequently, forward cover up to a maximum of 15 per cent of the outstanding position on June 11, 1998 was also permitted. This 15 per cent limit was liberalized to 100 per cent of portfolio value as on March 31, 1999 in January 2003.

Like in other countries, the restrictions on FII investment have been progressively liberalized. From November 1996, any registered FII willing to make 100 per cent investment in debt securities were permitted to do so subject to specific approval from SEBI as a separate category of FIIs or sub-accounts as 100 per cent debt funds. Such investments by 100 per cent debt funds were, however, subject to fund-specific ceilings specified by SEBI and an overall debt cap of US\$ 1-1.5 billion. Moreover, investments were allowed only in debt securities of companies listed or to be listed in stock exchanges. Investments were free from maturity limitations.

From April 1998, FII investments were also allowed in dated Government securities. Treasury bills being money market instruments were originally outside the ambit of such investments, but were subsequently included from May, 1998. Such investments, which are external debt of the Government denominated in rupees, were encouraged to deepen the debt market. From April, 1997, the aggregate limit for all FIIs, which was 24 per cent, was allowed to be increased up to 30 per cent by the Indian

company concerned by passing a resolution by its Board of Directors followed by a special resolution to that effect by its General Body.

While permitting foreign corporates/high net worth individuals in February, 2000 to invest through SEBI registered FII/domestic fund managers, it was noted that there was a clear distinction between portfolio investment and FDI. The basic presumption is that FIIs are not interested in management control. To allay fears of management control being exercised by portfolio investors, it was noted that adequate safety nets were in force, for example, (i) transactions of business in securities on the stock exchanges are only through stock brokers who have been granted a certificate by SEBI, (ii) every transaction is settled through a custodian who is under obligation to report to SEBI and RBI for all transactions on a daily basis, (iii) provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (iv) monitoring of sectoral caps by RBI on a daily basis.

In 1998, the aggregate portfolio investment limits of NRIs/PIOs/OCBs and FIIs were enhanced from 5 per cent to 10 per cent and the ceilings of FIIs and NRIs/OCBs were declared to be independent of each other.

Aggregate FII portfolio investment ceiling was enhanced from 30 per cent to 40 per cent of the issued and paid up capital of a company [March 01 2000]. The enhanced ceiling was made applicable only under a special procedure that required approval by the Board of Directors and a Special Resolution by the General Body of the relevant company. The FII ceiling under the special procedure was further enhanced [March 08 2001] from 40 per cent to 49 per cent. Subsequently, the FII ceiling under the special procedure was raised up to the sectoral cap in September 2001.

In addition to the above restrictions, there are also sectoral caps on Foreign Direct Investment.

Caps can be of three types:

- (i) a separate cap on FDI,
- (ii) a separate cap on FII, and

- (iii) a composite caps on FDI and FII combined together.

Separate caps on FDI and FII, in turn, can be of five types:

- (I) ban on both FDI and FII (e.g. lottery business, gambling and betting),
- (II) non-zero separate caps on both FDI and FII ([e.g., DTH-broadcasting]), [DTH has composite ceiling with a sub-ceiling for FDI at 20 per cent]
- (III) a composite non-zero cap on FDI and FII (banking, insurance, telecom,),
- (IV) ban on FDI with a non-zero cap on FII (e.g., Terrestrial broadcasting FM, retail trading), and
- (V) ban on FII with a non-zero cap on FDI (e.g. print media).

The Steering Group on Foreign Direct Investment had earlier given six reasons for imposition of caps and bans on FDI, viz, National Security; Cultural and Media; Natural Monopolies; Monopoly Power; Natural Resources, and Transition Costs.

Bouts of liberalization of FII regime have coincided with pressure on foreign exchange and balance of payment fronts, for example, in the aftermath of 1991 crisis and around the 1997 East Asian crisis. At present, there is no balance of payments problem and hence the Lahiri Committee has dwelt upon advantages of liberalising FII investments.

Although, these liberalizations of FDI in India are continuing, the Government is also formulating the **National Security Exception Bill** to put a close watch on FDI from undesirable countries and sensitive sectors. The Bill proposes to assess the security threat and its consequences. Several countries have similar provisions to scan FDI-related security issues. Company Secretaries need to be aware of such legal provisions in various countries when they advise on multi-national investments from India or abroad.

FIIs have a greater appetite for equity than debt in their asset structure. Pension fund in the UK and US had 68% and 64%, respectively,

of their portfolios in equity in 1998. Thus, opening up of the economy to FIIs is in line with the accepted preference for non-debt creating foreign inflows over foreign debt. Because of this preference for equities over bonds, FIIs can help in compressing the yield-differential between equity and bonds and improve corporate capital structures.

Institutional investors promote financial innovation and development of hedging instruments. Because of their interest in hedging risks, they are known to have contributed the development of zero-coupon bonds and index futures. The increased competition in financial markets and improve the alignment of asset prices to fundamentals. They have good information and low transaction costs.

As professional bodies of asset managers and financial analysts, FIIs enhanced competition and efficiency of financial markets. Equity market development aids economic development. By increasing the availability of riskier long term capital for projects, and increasing firms' incentive to supply more information about themselves, FIIs can help in the process of economic development [Demigrtic-Kunt, A. and R. Levine (1996): "Stock Market Development and Financial Intermediaries: Stylized Facts", World Bank Economic Review, Vol. 10, pp. 341-69.]

FIIs contribute to better understanding of firms' operations and improve corporate governance. The corporate governance movement has institutional investors at its core. There is some evidence that institutionalization increases dividend payouts, and enhances productivity growth. As experts in corporate governance Company Secretaries need to play a valuable role in international financial sector.

FIIs inflows carry, on the other hand, the fear of management takeovers and potential capital outflows. The Committee on Liberalisation of FII Investments points out that all takeovers are governed by SEBI Regulations and sub-accounts of FIIs are deemed to be "persons acting in concert" with other persons in the same category unless the contrary is established. Further, reporting

requirements have been imposed on FIIs and Participatory Notes cannot be issued to unregulated entities abroad. Hence, the fear of management takeovers may not be real. Thus, if there are domestic regulations that effectively prohibit institutional investors from taking management control, no country may fear management takeovers by FIIs.

FII inflows are regarded as "hot money", because of the herding behaviour and potential for large capital outflows. Herding behaviour, with all the FIIs trying either only buy or only sell at the same time, particularly at the time of market stress, can be rational [Bikhchandani, S and S.Sharma (2000): "Herd Behaviour in Financial Markets", Working Paper No. WP/00/48. International Monetary Fund, Washington DC, 2000].

With performance related fees for Fund Managers, and performance judged on the basis of how other funds are doing, there is great incentive to suffer the consequences of being wrong when everyone is wrong, rather than taking the risk of being wrong when some others are right. Value at Risk models followed by FIIs may destabilize markets by leading to simultaneous sale by various FIIs. Extrapolative expectations or trend chasing rather than focusing on fundamentals can leave to destabilization.

Hence what is required is adequate institutional safeguards. Yet, across the board relaxation for FII investments considerably enhances the attractiveness of the country for foreign portfolio inflows.

ROLE OF RISK MANAGEMENT

Financial Risk Management is an integral part of global equity investments. Successful risk management requires keeping abreast of the markets, company fundamentals as well as client relationships. The same concepts can be applied on macro level for managing risks to the economy.

Financial Risk is managed by calculating both market and credit risk. Market risk is the potential impact of changes in the market for traded instruments. Thus, if the market moves against your positions, finance takes a hit. Market risk is one that cannot be diversifies

away. It reflects the possibility for the future earnings to be affected by the change in market price, due to movements in interest rates or exchange rates.

Credit risk assesses the Financial and business risk involved in investing in particular companies. Relevant factors include company's competitive position within its industry, strategic direction, management quality and financial profile.

Risk management refers to analyzing exposure to risk and determining how to best handle such exposure.

A definitive generic description of risk management originated in Australia and New Zealand. It is set out in the Australian and New Zealand Standard 4360:2004. The core of the risk management process is set out in five stages:

1. Establish the context
2. Identify risks
3. Analyse risks
4. Evaluate risks
5. Treat risks

The risk management job needs skills such as communicating with trading risks about their risk strategies and preparing management reports on risk. It is essential to stay calm under pressure and pay close attention to detail. It is too risky to lose your cool, especially in dealing with high risk matters.

Working within either market or credit risk requires strong quantitative analytic abilities to review, assess and make decisions based upon your analysis of large amounts of information. This requires taking an interest in markets and how they move, as well current events – anything that can cause the market to fluctuate.

That apart, other capacities that are required are – creativity and problem solving; ability to work under pressure; strength in numeric skills; ability to do a great deal of financial modeling and company-specific analysis; time management and an ability to work as a team.

Risk management for investing involves analyzing and assessing trades in virtually all major financial markets including equities, fixed income, commodities, structured credit, mortgage backed securities, and interest rate derivatives.

GARP, Generally Accepted Risk Principles, is explained in a dated report on www.riskreports.com.

I envisage that Company Secretaries can play a specific role in risk management in their quest for leadership in corporate governance.

INDIAN BOND MARKET

Presently, an attempt is on by the government and financial sector regulators in India to set up the local market for corporate bonds. There is a plan to operationalise a modern and efficient trading platform for corporate debt on the lines of the existing system for trading in government securities and money market instruments. There is also an initiation of other measures like introduction of repurchase agreements (repo) in corporate paper to boost trading in secondary markets, besides encouraging more issuers and widening the investor base for primary issuance. A start is expected to be made with the announcement of an electronic order-matching system, which would be purely quote-driven. The authorities are considering to utilize the option of a module of the Negotiated Dealing System, where government securities, repo transactions and money market instruments are traded for corporate debt. This could mean using the same clearing and settlement facilities provided by the Clearing Corporation of India, which guarantees all trades. The other option is for market participants such as banks and institutions to set up a trading platform or to allow exchanges to offer such a facility. The National Stock Exchange does offer such a quote-driven system but it is yet to take off.

At present, the Indian corporate bond market has a limited number of issuers and investors such as banks and institutions who hold the paper until maturity. The market is highly illiquid and primary issuance is usually through private placement with institutional investors. Companies have to go through the public offering route if the number of investors

aggregates 50 or more. The government, RBI and SEBI have agreed on the framework for broadening the corporate debt market. While the local equities and government securities markets have developed over the past decade, the corporate bond market – both primary and secondary- has lagged far behind. Widening of the local market for corporate debt has become imperative with growing disintermediation and the investment needs of Indian companies. As the current Statutory Liquidity Ratio threshold of 25% is lowered after Parliament approves amendments to the Banking Regulation Act, it would be necessary to broaden the investor base away from captive investors such as banks. Banks in India may also be nudged to list their issues, especially for their Tier II capital and to sell down their issues to retail investors. With more Indian corporates seeking to expand overseas and given the rising credit off take, it is reckoned that banks would not be able to meet the potential demand for funds. Infrastructure development also needs long term funds, which calls for a focus on the debt segment of the market. Only a well-functioning corporate debt market can provide term-finance to infrastructure building. From the regulator's point of view, the reliance of corporate borrowers on banks for funds sparks off worries relating to asset liability mismatch. Mr. M K Venu and Shaji Vileraman point out in the Economic Times of 17 April 2006 that banks raise money for lending with an average tenure of three years and then on-lend it for longer maturities. The **R.H. Patil Committee** on corporate bond market has suggested several measures including uniform stamp duty, introducing repo in corporate debt, bond insurance to protect against default, launching of exchange-traded interest rate Futures, uniform TDA rules and preventing fragmentation of issues. All this will be necessary to reduce reliance of corporates for funding on banks. Prime Database has reported that of Rs. 553840 million at debt, which was privately placed, only Rs. 101910 million was accounted for by private companies.

Indian policymakers have not yet fully opened Indian rupee-denominated debt to foreign investors. That policy perhaps needs

a review if interest of global investors were to be generated in the local currency emerging market debt. Following are the reasons that suggest the Indian policy needs a review.

As of April 10, 2006 overseas institutional investors had cumulative investment of \$ 202 million in Indian debt securities as compared to the hefty figure of US \$ 45 billion that have been poured into Indian stock markets by the foreign institutional investors. The huge difference is due to the policy of not opening the local currency debt for overseas investors.

International interest in local currency Indian bonds is low in absolute terms as well as in comparison to Indian stock purchases by overseas institutional investors. It is also nowhere near the government ceiling on foreign investment in local currency debt. The Finance Ministry recently increased this limit by 56 per cent to \$ 3.5 billion broken into \$ 2 billion for investment in government securities and \$ 1.5 billion for corporate bonds.

As at December 31, 2005, India had \$ 17 billion of foreign currency debt. This figure is 30 per cent more than Indian exports in 2004. Comparatively, this percentage is quite comfortable when we consider the external debt-to-export ratio of 300% Brazil had in 1995.

To enable portfolio diversification by foreign institutional investors in emerging markets, local currency debt provides an attractive, complimentary investment to traditional external dollar-denominated emerging market debt. The India government can, therefore, decide to allow rupee-denominated debt to become a globally acceptable product. Andy Mukherjee of Bloomberg reports that Standard and Poor's rates long-term rupee debt at BB+, one level below investment grade, which is the same for Brazil's local currency-denominated external debt.

India's current year's maturing foreign currency debt is \$ 8.9 billion. This is more than adequately covered by the Reserve Bank's \$ 152 billion foreign exchange reserves. Mr. Andy Mukherjee points out that although India's current dollar liabilities are manageable. They may not always remain so. Indian companies are expanding rapidly, acquiring business

globally. The local corporate bond market is almost non-existent; Indian companies are therefore taking on foreign currency liabilities. The government is also making it progressively easier for companies to borrow abroad. "At the same time, by restricting access to the rupee bond market to overseas investors, authorities are repressing the domestic financial system. They are also pushing local banks to take on hard-currency liabilities from Indians living overseas to supplement banks' meager lending resources".

Presently, the Finance Ministry is seeking participant's consent to remove the mandatory requirement that banks invest 25 per cent of their deposits in approved government securities. "Once that happens, it will become even more important for the (Indian) authorities to find potential buyers of Indian public debt. Right now, local banks are the biggest investors in Indian government bonds".

The RBI is also introducing some of the long pending reforms in the Indian bond market. For instance, the RBI will finally bring in the "when-issued" market, which would allow trade of government securities even before the auction. This was announced in the annual policy of RBI for 2006-07. "when-issued" market is the forward market in government securities. It opens before the auction and remains open during and after the auction. S Bikhchandani, P Edsparr and C Huang of Anderson Graduate School of Management, University of California find that traders in the when-issued market take into account the fact that when-issued prices might reveal, at least partially, their private information. In particular, the change in when-issued prices on auction days after the auction closes but before the announcement of the auction results, is significantly related to the information innovation contained in the auction. [<http://repositories.cdlib.org>] They compare when-issued prices at the auction time with the winning prices in the auction. Both the auction and when-issued market on the day of the auction are markets for forward contracts with three days to maturity, so no adjustment is needed to make the comparison ["The Treasury Bill Auction and the When-Issued Market : Some Evidence", August 30, 2000].

The trends in the financial sector noted so far are pointers to the stiff learning curve Company Secretaries can hope to jump and climb further to realize the dream that they will play a creative role in value-adding corporate governance.

INTERNATIONAL FINANCE

Exploiting professional opportunities in emerging economies of the WTO environment calls for a reasonable grip on intricacies of international finance as well as international economics [read, "political economy"] by professionals like Company Secretaries.

Apart from testing and exemplifying empirical hypothesis in the context of the Indian economy that will guide other emerging economies to draw lessons for themselves, this Paper also attempts to analyse concepts and developments in international political economy and international finance. It also looks at and hopefully provides insights into the relationships between emerging economies group and developed economies group(s) under the WTO.

IMF ROLE

Today, economists are facing an odd question: Has the spirit of internationalism been ebbing recently? When they founded IMF, Maynard Keynes and Harry Dexter White saw the need for rules to govern international exchange and flows and for an impartial arbitrator to point out when those rules were being violated. There was then the spirit of internationalism. The IMF was conceived at the 1944 Bretton Woods Conference with the prime objective of facilitating "the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income.

The Fund was to promote exchange rate stability and to avert competitive exchange depreciation. This required the Fund to exercise "Firm Surveillance" over the exchange rate policies of members so that they avoid manipulating exchange rates or the international monetary system "to prevent adjustment or gain an unfair competitive advantage over other members."

The Fund was also set up to work as a sort of credit union to lend to countries that suffered adverse external shocks. It could help countries correct balance of payments difficulties by providing temporary financing to limit the impact on economic activity at home and abroad. This would mitigate the country's incentives to export its problems to the rest of the world. In fact, the Fund's financing would be conditional on policies that would limit or avoid such effects.

Statistics show that since the beginning of the Fund's activities, the world trade has grown from 10% of world GDP in 1960 to almost triple in 2005. World GDP has itself grown at an average rate of 3.5% annually during this period.

Mr. Raghuram G Rajan, Economic Counsellor and Director of Research, IMF, in his **2006 Krasnoff Lecture** delivered at Stern School, New York University, said:

"Even as the world has become more interconnected through trade and finance, even as the Fund's members have become more successful, the spirit of cooperation that prevailed amongst the members at the time of the founding of the Fund, seems to have waned....."

"Industrial countries recovered from their post-war weakness. They rebuilt their capability to undertake policy analysis. And the system of capital controls and fixed but adjustable exchange rates broke down.....Most industrial countries moved to floating exchange rates. This move, coupled with their political stability and strong institutions, ensured that private capital markets would be a reliable source of finance. As a result, industrial countries stopped borrowing from the Fund...as late as 1975, nearly half of Fund lending was to industrial countries, but by late 1980s, it was zero.

"This had two important consequences. The first was that with little gain from the vetting of their policies by the larger Fund membership, important industrial countries started forming groups outside the Fund, with serious policy discussion and economic cooperation taking place within these groups.

The most prominent avatar [incarnation] of this is G-7. While not denying the global benefits of frank policy dialogue and coordination within the group, an unfortunate consequence has been to diminish the relevance of the multi-lateral discussion that takes place within the Fund.

"The second consequence was that the Fund itself was divided – between industrial country creditors who would never borrow and held the weight of the shareholding, and potential debtors who had to subject their policies to multi-lateral advice either within the context of (a) Fund – supported policy programme or for fear that they might otherwise lose access to Fund resources in their times of need....."

"Most recently, some emerging markets have built up their foreign reserves to such an extent that they are unlikely to need Fund resources at least in the short-term. Given the precedent set by the industrial countries, these "advanced" emerging markets are not keen to be seen heeding Fund advice, though, many of them value it privately—— Unlike industrial countries, these advanced emerging markets still have structural vulnerabilities."

The surveillance by the IMF focuses on the sustainability of the country's policies and their external effects. The surveillance is likely to be most effective when countries use it as a basis for constructive give and take, and not as a means of censoring each other. As industrial countries recognize they are affected by policies in advanced emerging markets like BRIC (Brazil, Russia, India and China), they want to be able to influence those policies. But the advanced emerging markets no longer need funding. They are unwilling to be lectured to. At the same time, they too want influence over the policies of the industrial countries, for these have serious external effects.

The Fund needs to re-engage both the groups to enable multilateral dialogue. For it alone has the most universal membership. Hence it will be more effective dialogue. But the obvious countries to reengage first will be the advanced emerging markets, for these markets still have vulnerabilities—such as

underdeveloped financial sectors. Although they have substantial build-up of reserves, the underlying imbalances may reverse the situation in future. As these reserves of the advanced emerging markets fall they may want to re-engage with the Fund, but on their own terms. They will be open to some kind of insurance from the Fund, but will be wary of the creditor-biased conditionality. Some industrial countries do not want to offer automatic access for fear of encouraging lax policies or moral hazard. With advanced emerging markets more engaged, perhaps industrial countries may also see more value in the Fund as a forum for dialogue, and the spirit of internationalism will be rekindled once more.

Coming to FDI through stock markets, it will be interesting to see how India's FII Investment Policy evolved. According to the Report [2004] of the Committee on Liberalisation of Foreign Institutional Investment set up by the Government of India, Ministry of Finance, the evolution took place as follows:

India embarked on a gradual shift to wards capital account convertibility with the launch of the reforms in the early 1990's. Although foreign natural persons—except Non Resident Indians—were prohibited from investing in financial assets, FIIs and overseas Corporate Bodies with suitable restrictions were permitted such investments. Ever since FIIs were first allowed to invest in all the securities traded on the primary and secondary markets, including shares, debentures and warrants issued by companies which were listed or which were to be listed on stock exchanges in India and in the schemes floated by domestic mutual funds, the holding of a single FII or all FIIs, NRIs and OCBs in any company were subject to the limit of 5 per cent and 24 per cent of the company's total issued capital, respectively. Furthermore, funds invested by FIIs had to have at least 50 participants with no one holding more than 5 per cent to ensure a broad base and preventing such investment acting as a camouflage for individual investment in the nature of FDI and requiring Government approval.

Initially, the idea of allowing FIIs was that they were broad-based, diversified funds, leaving out individual foreign investors and

foreign companies. The only exception was the NRI and OCB portfolio investments through the secondary market.

There is an economic equilibrium issue to FDI. Let's take Indian example. For the Indian economy, the Current Account deficit (CAD) has reached a record high of \$ 13 billion in the first half of 2005-06, higher than 1991 levels [when Indian economy was in deep debt crisis] of \$ 9 billion for the entire year.

The recent projections by the Economic Advisory Council pegs the CAD to 2.9% of the GDP in 2005-06, and 3.1% of GDP in 2006-07.

An open macro-economy equilibrium is reached when national savings equal domestic investment plus net exports of the country. When a country falls short of domestic savings it has to borrow the savings of foreign countries, which is reflected in the BOP as capital account surplus or CAD.

Robert Mundell defined the impossible trinity in international macroeconomics. Capital mobility, fixed exchange rates and interest rate autonomy, the three components, cannot coexist simultaneously, he pointed out.

The announcement that the Indian rupee is moving towards free convertibility has attracted criticism. The critics have claimed that full convertibility or capital mobility and freely floating exchange rates are inimical to India's interests. The critics have referred to Britain's crisis in 1992 and Asian crisis in 1997.

The criticism appears to be wrong because, firstly, capital mobility and free-floating exchange rates are not joint policy issues. One can exist without the other. Secondly, the crisis in Britain erupted when policy makers understood the axiomatic inviolability of the impossible trinity. Thirdly, the Asian crisis was craftily brewed by central banks that dodged the impossible trinity.

Mundell has shown that the effects of monetary and fiscal policy in an open economy depend upon capital mobility. In particular, he has highlighted the importance of exchange rate systems. Under floating exchange rates, monetary policy is a powerful tool; fiscal policy is powerless. [G Ramachandran, Hindu Business Line]

Under fixed exchange rates, fiscal policy is effective.

He showed that autonomous monetary policy in the hands of the central bank would be necessary to support floating exchange rates and unhindered capital mobility.

Europe's exchange rate mechanism aimed at fixed exchange rates and stable interest rates. Britain walked out of the ERM because it knew that the impossible trinity could not be violated. She regained interest rate autonomy, retained capital mobility and regained floating exchange rates. This explains why Britain is a non-euro country.

The impossible trinity does not apply to pegged exchange rates. Pegged exchange rates are not fixed exchange rates; they are not floating exchange rates either.

Hence, many Asian economies saw pegged rates as the perfect tool to fool the impossible trinity. They could have capital mobility, control over exchange rates, and control over monetary policy and interest rates.

With autonomous monetary policy, the exchange rate is on autopilot. With fixed exchange rates, the monetary policy is on autopilot. With pegged rates, nothing is on autopilot.

By appearing to wield control over both exchange rates and interest rates, Asia's central banks seduced as well as calmed investors.

But they did not disclose that fatal conflicts between monetary policy and exchange rate policy could occur. Monetary base under pegged rates includes the domestic and foreign components. Therefore, balance of payments crisis could occur. This is exactly what happened in 1997.

Asian economies that had a prolonged maintenance of pegged exchange rates could not use their monetary tools in a steady and gradual manner to cool off their overheating economies. They pretended that interest rates would be kept low. Thereby they pretended that their currencies would not be weakened or devalued. The pretensions dropped. Interest rates went up. Currencies devalued.

India does not harbour any such pretensions. The rupee is not pegged. Therefore, it appears that India's transition to full convertibility and floating exchange rates will be smooth.

The above discussion hints that Company Secretaries need to understand the issues around full convertibility of the rupee in order to help clients generate value through the international financial flows.

MONEY SUPPLY

There appears to have arisen a strong difference between the American School and the European School about the role of money supply [M3] in monetary policy thinking. In a conference that was held in Frankfurt to honour Otmar Issing, chief economist of the European Central Bank, most participants agreed that central banks still need to watch money supply growth. This was on March 16-17, 2006. Precisely a week later, U S federal Reserve stopped publishing M3, its broadest measure of money, claiming that it provided no useful information. An odd thing is that standard academic models used by most economists ignore money altogether. Inflation instead simply depends on the amount of spare capacity in the economy. Nor does the money supply play any role in monetary policy in most countries, particularly, America. Yet Milton Friedman's dictum that "inflation is a monetary phenomenon" is still borne out by the facts. In the long run, countries with faster monetary growth had higher inflation. Then why is it that central banks, except ECB, are paying so little attention to money?

Over short periods, the link between inflation and money supply is fickle because the demand for money moves unpredictably. Besides, financial liberalization and innovation have also distorted measures of money, making monetary targeting unworkable. But it would be difficult to conclude that money does not matter. Rapid money growth has always been followed by rising inflation or asset price bubbles.

The ECB's monetary policy strategy has two pillars: an economic pillar, which uses a wide range of indicators to gauge short inflation

risks, and a monetary pillar as a check on medium-to-longer term risks. The monetary pillar has attracted much criticism from outside the ECB; it is often dismissed as redundant. Mr Issing has justified the pillar as a defence against asset bubbles, which are always accompanied by monetary excess.

According to The Economist it may be precisely wrong time to dismiss monetary aggregates: in these days of asset price booms and imbalances, their informational content may be becoming more, not less, valuable.

CONCLUSION

Global economy is integrating under the WTO. It is in the interest of that emerging economies that they seek higher participation in global trade and higher investment inflows

into their systems. This calls for an understanding as well as an expertise in international finance flows through institutional investors, FDI, Hedge Funds, Mutual Funds, international securitisation and Commodities and Equity Markets. The message is loud and clear. Globalisation requires integration. Integration requires the courage to give up traditional ways of economic behaviour. The new economic way of life under the WTO calls for a mastery over international economic and financial dynamics if emerging economies are to prosper while simultaneously eradicating poverty and pockets of adversity in their midst. It is the professionals like Company Secretaries who can bear the brunt of leadership in this milieu and provide creative good governance among corporates of emerging economies.

ENVISIONING FUTURE CORPORATE LAWS

V K AGGARWAL*

INTRODUCTION

Economic processes underway in most parts of the world are bringing about a transformation in national settings and the potential role of law. Economies are more open, foreign investment has become more welcome, and the state is no longer expected to be the dominant actor in economic development. As a result of the transformations in the national economies and technological changes, the world economy is generally much more complex than before. The entry of many countries into freer world trade, the creation of new financial markets, and the explosion in technology, especially information technology and biotechnology have resulted in greater integration of the world economy. Improving the rule of law is no longer seen as a matter of finding a simple recipe that will work everywhere. The new dynamics requires that the theoretical rationale and practical approaches for law and development be reconsidered.

In order to realise the promises of 21st century, the individuals, businesses and governments need to embrace a culture of creativity, experimentation and openness to change. The interaction between the evolution of technology and the development of economy has always been an important dimension of human history, from the Iron and Bronze Ages to modern times as well. The transition from the agricultural economy to knowledge economy provides the most pertinent illustration of the profound implications which the full diffusion of

technologies can have on structures, work relations, settlement patterns, economic and political power configurations, and also on behaviour patterns and value systems. The industrial society of today, characterised by mass production, mass consumption and mass communication is in many ways a complex incarnation of the technologies of the 20th century. But the profound change in economic and social structures have undoubtedly provided the conditions to enable the transition to a new paradigm.

Looking at technology developments there seems to be a broad range of new technical breakthroughs and in all probability the next ten years or so from now, the main driving force for economic transformation will be information technology. A decade from now, information technology will in all probability have penetrated every aspect of human activity. Once again, the interaction between the evolution of technology and the development of economy will have led to profound changes particularly with regard to people interaction with business, society and Government including the interaction between businesses, business and regulatory authorities, as well as governments, interaction between and among the regulatory authorities and so on.

Computer-enabled electronic commerce would in all likelihood modify significantly current ways of doing business. Anyone with a computer and Internet access would benefit from the enlarged choice and the competitive supply on the global market place. It would also lead to modifications in value chains - some could be dismantled, and others re-

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BACKGROUND

assembled. Most importantly, there would be a process of dis-intermediation. Many intermediate agents between producers and consumers would be compelled either to change their role or disappear.

There would also be major implications for businesses, Government and regulatory authorities. In business, there may be a strong tendency towards bi-polarisation of company structures — a trend towards very big global players on the one side, and very small, highly specialised companies on the other. In business and government, many foresee the end of the traditional hierarchical command and control structures. These may be increasingly replaced by horizontal networks and co-operative teams, providing members with greater freedom and responsibility in decision-making.

Given the kind of evolution described in preceding paragraphs, it is relatively easy to envision the future corporate laws as facilitating economic activities. So it would not be enough to have state-of-the-art legal rules or other norms on paper, what would therefore be required for an effective market based knowledge economy is to ensure that legal systems and processes protect property rights and facilitate economic opportunities. A key principle would be to provide equality and predictability under the law and provide basic rules and processes to allow new entrants to build legitimate business relationships and take economic risks.

It is in this backdrop that an attempt has been made in this article to examine the process of corporate law reforms undertaken so far and to envision the shape, structure, and processes of future corporate laws on the presumption that information technology would not only provide the impetus but also lead the process of economic and social change.

Realm of Corporate Law

The Constitution of India lays down the basic norms governing various aspects of finance, trade, commerce and business. The realm of corporate laws in India encompass various laws dealing with business and business transactions. Company Law deals with management and administration of companies from incorporation to winding up. Sick Industrial

Companies (Special Provisions) Act deals with revival and rehabilitation of sick companies, SEBI Act and SCRA deal with securities related aspects of companies, IDRA deals with setting up of industrial undertakings and industrial licensing, Foreign Exchange Management Act ensures proper management of foreign exchange transactions, Intellectual Property Laws ensure the grant and protection of intellectual property rights. Likewise Competition Act allows promotion of competition in market and prevention of anti-competitive practices. The list is long to include Contract Act, Partnership Act, Indian Trust Act, Stamp Act, Negotiable Instrument Act etc.

CORPORATE LAW REFORMS – VISION FOR FUTURE

As a consequence of increasing interconnectedness and interdependence, the structures of national governance are all for change in the course of globalisation. The quest for more mobility and efficiency have compelled the nations to open up their borders and allow globalisation to expand and grow, however, within the national governance system. As globalisation requires a national governance system to conform to global norms, the agenda for market oriented reforms process encompasses legislative reforms, complementing and supplementing the policy orientations to meet the desired objectives of the whole process.

With the initiation of economic reforms process in July 1991, the Government has initiated the process of Legislative Reforms to suit the changing policy orientation and to fulfill its obligations under WTO. In the process, the Government enacted various new laws and amended existing legislations to provide a conducive economic and corporate legal environment.

The discussion in the following paragraphs provides an overview in selected corporate laws and an elaboration of conditions that will shape the laws.

COMPANY LAW

Company Law, an ever evolving subject, has undergone major transformation in the last

decade. The impetus for such transformation came from the worldwide move towards market oriented polices and from disquieting features of globalisation, resulting into focused attention on need for Good Corporate Governance. The advancements in information technology and influence of faster means of communication over corporate operations have also provided impetus for such transformation. In other words, the paradigm shift witnessed in the global economy and corporate sector the worldover, have cumulatively presented various issues that have triggered debate and become important factors for initiating changes in Company Law in our country and abroad.

The company law reforms process which was started in India with the setting up of Working Group on Redrafting of Company law in 1996 continued apace with the introduction of several Amendment Bills and consequent amendments in the Act in the year 1999, 2000, 2002 and 2006.

In 2004, a fresh exercise for bringing a new Company Law on the basis of a broad based consultative process by releasing a Concept Paper for public debate was initiated by the Government. The Concept Paper was widely debated and several suggestions were received from trade and industry, professional institutes, govt. departments, industry federations as well as professionals themselves. With a view to put the various proposals contained in the Concept Paper and the suggestions received thereon to a merited evaluation, to address the changes taking place in the national and international scenario and to enable timely adoption of internationally accepted best practices, the Ministry of Company Affairs constituted an Expert Committee under the Chairmanship of Dr. J J Irani. The Committee worked on the underlined philosophy that in a competitive and technology driven business environment, great autonomy of operations and self-regulation must be matched with enhanced responsibility on the part of the corporate sector. The Committee submitted its Report to the Ministry of Company Affairs on 31.5.2005. At the forefront, the Report took an insight into the background of Company Law and laid down the basic approach of new company law. It is

expected that the Bill for new company law will be placed in the Parliament shortly.

As part of keeping the various procedural aspects of company law in tune with developments in information age, the Ministry of Company Affairs launched MCA-21 a major e-Governance project facilitating easy and speedy filing and processing of statutory forms with the Registrar of Companies. This e-governance initiative aims at making available to corporate entities and professionals an easy and secure online access to corporate information, at any time and from any where, leading to enhanced efficiency, transparency and effectiveness in the management and administration of businesses.

The reforms in company law in other jurisdictions both developed and emerging economies are also undergoing apace in response to the changing paradigm, similar to those which have provided impetus for company law reforms in India. UK company law being close to our's, it is worthwhile to ascertain the approach being adopted in UK to visualize directions of company law reforms.

UK White Paper on Company Law Reform Bill, 2005 recognised that shareholders are the lifeblood of companies of every size, and recommends the promotion of wide participation of shareholders, ensuring that they are informed and involved, as they should be. The White paper requires the decisions to be made based on the longer-term view and not just immediate for returns. The White Paper recommends that the concept of Enlightened Shareholder Value be embedded in the statute by making clear that directors must promote the success of the company for the benefit of its shareholders, and this can only be achieved by taking due account of both the long-term and short-term, and wider factors such as employees, effects on the environment, suppliers and customers.

A statutory statement of directors' duties be introduced to clarify their responsibilities and improve the law regulating directors' conflicts of interest.

The prohibition on provisions which prevent auditors from limiting their liability, while

delivering further improvements in the quality of the audit be relaxed.

The rights of proxies be enhanced and be made easier for companies to enfranchise indirect owners of shares.

The requirement for paper share certificates be removed and facilitating the use by companies of e-communications where their shareholders want this.

The Takeovers Directive that will facilitate takeover activity in the EU through improved shareholder protection and access to capital markets be implemented.

Recognising that the vast majority of UK companies are small and the company law has been written traditionally with the large company in mind the White paper recommends to reset the balance and make the law easier for all to understand and use. In the context, the White Paper adopted a "Think Small First" approach and recommended

- separate and better-adapted default articles for private companies.
- simplify decision-making for private companies, for example providing for decisions to be taken by written resolution;
- update company financial and narrative reports;
- simplify the rules about company share capital in particular for private companies;
- implement some aspects of the European Transparency Directive;
- introduce a power to allow the law to be restated where necessary in future to make it accessible.

In addition to the changes in the law, the White Paper says that the Government will ensure that there is appropriate advice and guidance available to users of company law, particularly smaller firms and their advisors, so that all can understand the options available to them and the requirements placed upon them.

In respect of setting up of a company, White Paper recommends that unnecessary

burdens on directors be removed and to preserve Britain's reputation as a favoured country in which to incorporate. In this regard the White Paper assures

- that the requirement on most directors to disclose publicly their home address and;
- the requirement for a company to have authorised share capital be removed. It allows a single person to form a public company; and streamline the rules on company names and trading disclosures.

Providing flexibility for the future, the White Paper intends to introduce a new reform power to allow updating and amendment as circumstances dictate, subject to rigorous safeguards for full consultation and appropriate Parliamentary scrutiny. In respect of benefits to business, the White Paper believes that these measures should create improved performance across the economy as whole, as well as reducing direct compliance costs for business and producing cost savings which could amount to some £250m a year.

New Company Law Reforms Bill has since been introduced in UK Parliament in May 2006.

The discussions in preceding paragraphs on reforms in British company law clearly indicate that the future company law would be more user friendly, flexible and cost effective, to allow incorporation, management and administration of companies easier to attract more foreign investments and foreign companies.

GOOD GOVERNANCE AND COMPLIANCES

UNDP Bureau for Policy Development Public Private Partnerships for the Urban Environment defines Good governance as, among others, participatory, transparent and accountable. It is also effective and equitable and promotes the rule of law. A similar definition was adopted by the 1999 World Conference on Governance which declared that good governance required—a system that is transparent, accountable, just, fair, democratic, participatory and responsive to people's needs.

Transparency being closely related to accountability also facilitates the free exchange of ideas that aids divergent thinking. Application of the principles of fairness and justice contribute to ensuring that governance reflects values prevalent in the community and thereby to the stability that is conducive to convergent thinking.

In the context of Good Governance in corporate sector, the compliance with Good Governance norms, which are getting tougher day by day, has become a real challenge for corporates and business. Recent Ernst & Young Corporate Governance Web Survey indicates that corporate governance, while already a critical issue facing large corporations, is becoming more important as companies operate in an increasingly complex regulatory environment.

In the event of recent corporate failures, corporate governance has come under sharp focus. The discussions in the Board rooms now focus on issues of governance, accountability and disclosures; the voice of shareholder activism has never been so loud and of course, media scrutiny has ever remained sharp. The responses of government and regulators have been commendably swift. The US Securities and Exchange Commission was the first to swiftly respond to these challenges and enact Sarbanes Oxley Act with a reach even to the corporations incorporate beyond the borders. This swift response indicated the urgency for SEBI – the capital market regulator in India to put in place the systems to avoid the recurrence of distasteful incidences of corporate failures. In response to this urgency, SEBI implemented clause 49 of the listing agreement on Corporate Governance providing for stricter norms for companies to adhere to.

In view of added emphasis on transparency and accountability, it is worthwhile to mention the views of the participants at Visions for the Future – A Debate on the Narrative Reporting organised by the Association of Chartered Certified Accountants in June 2006. The principles enumerated to guide companies, regulators, investors and stakeholders to improve corporate reporting and accountability

to the benefit of long-term wealth creation, are given below:

- Report on the drivers of value and risk and thereby focus the priorities of senior management.
- Create frameworks which allow companies the flexibility to exercise and then explain their judgment in promoting the success of the company.
- Enable investors to compare the prospects and performance of companies, and thereby focus the financial system on long-term value creation.
- Liberate companies to convey a core narrative which captures, in one place, all the key information and context that is needed to form an overall assessment of the company.
- Without compromising accountability to shareholders, help employees, the community, regulators and all stakeholders to form a picture of the company and what it stands for and better assess all aspects of its performance – financial, social and environmental.

New statutory reporting obligations, coupled with developments arising out of the reforms in Company Law and corporate governance norms will alter the corporate reporting landscape. Issues such as the default in electronic communications will fundamentally alter the means by which a company communicates with its shareholders and other stakeholders. Future developments will be towards more, not less, comprehensive narrative reporting. Structure, content and formats of reports, as well as ways of disclosing information, will change for good. Companies with vision have already begun to explore the potential offered by new reporting environment, defining and demonstrating what best practice reporting means for their marketplace. The greater convergence of financial and non-financial information, in particular, requires stronger communication skills, and the accompanying

reporting framework and structures to accommodate this new reporting dynamics. The challenge for companies will be to develop new ways of reporting that both improve engagement with stakeholders as well as deliver business benefit.

INTELLECTUAL PROPERTY LAW

In the rapidly changing global environment, the importance of the intellectual property has considerably increased. Intellectual property indeed is now one of the valuable assets in commercial transactions. The issues of generation, valuation, protection and management of intellectual property are becoming critically important all around the world. Why is this so? Firstly, we have the phenomenon of increasing dominance of new knowledge economy over the old "brick and mortar" economy. Generation and protection of new knowledge assumes importance in this context. Then there is exponential growth of scientific knowledge. Then there is also the increasing demand for new forms of intellectual property protection as well as access to IP related information. Additionally, there is also the need to address the emerging complexities linked to IP in traditional knowledge, community knowledge and animate objects.

The laws relating to intellectual property in India were contained in Patents Act, 1970, Trade and Merchandise Marks Act, 1958, Copyright Act 1957 and Designs Act 1911. India being a member of the WTO, is under obligation to give effect to the various provisions of the TRIPs Agreement of WTO. The process of harmonisation of intellectual property law in India with international standards has been undergoing for long. The Government with a view to meet the time frame provided under TRIPs agreement, amended the Patents Act in the year 1995, 1999, 2002 and 2005; and the Copyright Act in the year 1994 and 1999. The Government has also enacted following new legislations in the area of Intellectual Property :

- Trade Marks Act, 1999
- Designs Act, 2000
- Semi Conductor Integrated Circuits Layout Design Act, 2000

- The Protection of Plant Varieties and Farmer Rights Act, 2001.
- The Geographical indications of Goods (Registration and Protection) Act, 1999

Software industry being among the most dynamic forces in the knowledge based economy, acts as creative engine that drives innovation and growth. The industry's products and services provide individuals and organizations the tools they need to operate intelligently, efficiently and productively. Consumers, businesses and government have come to expect that the advances in information technology witnessed during the past two decades will continue unabated. In the light of the ever-increasing leaps in functionality, flexibility and affordability that characterize the software industry, the full potential of software, however, can be realized only within a culture that promotes and protects innovation.

Changes in the software industry, including how products are developed, used and commercialized, have also prompted new ways the industry looks to Intellectual Property laws for promoting innovation. One of the changes that have occurred in the last decade is increased reliance on patent protection to complement copyright protection of software.

Today, patents are a key part of virtually every software company's IP strategy. The reasons are simple. Software developers can invest millions and more in developing a single product. Patents ensure that software companies have the opportunity to be compensated for their contributions to advances in their field of technology. At the same time, patent protection enables software developers to license or otherwise share key technologies with customers, partners and even competitors, while still allowing those developers to prevent third parties from freeriding on their innovation. Patent portfolios can also serve other important business-related objectives, such as encouraging dissemination of technology through cross licensing. But the increased reliance of patents has also resulted in a number of practices that can cause disruptions. First, some people have accumulated patent portfolios not to further

innovation and development of new products, but to turn these portfolios into profit centers. In some instances, these patents are used for strictly tactical purposes, never intended for commercialization of inventions.

To ensure that patent protection continues to meet the objective of promoting innovation, the efforts should be made to, limit injunctive relief to cases of clear, irreparable harm; ensure that patent litigation remains a last resort used only rarely, promote high-quality search and examination results by improving the prior art database, and support efforts to promote international harmonization of substantive patent law and to expand work-sharing initiatives among patent offices. In the long term, such action will build patent quality and promote predictability and consistency of results.

Intellectual Property laws are and will remain a key element of promoting innovation and growth in software development. International laws in this area have undergone much positive development over the past 20 years, but we have a long way to go. In this context, Copyright laws need continued attention and updating as pirates migrate to the Internet. Patent laws have become increasingly important for software developers. But adjustments in the patent law are needed to ensure those laws serve the purpose of innovation effectively. Changes need to be made to improve the quality of issued patents and to ensure patents are not misused for tactical purposes, and that the threat of frivolous litigation does not become a drag on investment and innovation. Finally, steps need to be taken at the international level to ensure that laws are effectively enforced, officials have the resources they need, and pirates and hackers cannot search for and hide in places where laws are deficient.

COMPETITION LAW

Another area where the Government is actively engaged in putting in place a contemporary legislation is, competition. The path of free market economy, globalisation of business, growing interaction and intervention among the business across the borders, have created a very complex competitive and volatile

business environment. In an urge to maximize shareholder value and enhance market share, domestically as well as globally, business activities many a times indulge in activities eliminating competition and creating monopolies. Competition law is an important tool for encouraging competition and market efficiency, and prevents and remedies the business actions that constrain market forces, cause economic harm and weaken economic performance. It prevents economic agents in the market from distorting competitive process.

With the increasing globalization of world economic activities and ever greater capital mobility, we have entered an era in which companies choose among countries in search of the optimum business environment. The creation of an attractive domestic business environment has therefore become a crucial task, with more and more countries using tools such as deregulation to develop free and open competitive markets. Developing domestic competition laws is extremely important in order to ensure fair competition in such markets.

Internationally too, with corporate activities having an impact not only on their home countries but also abroad, there is a growing call for worldwide introduction of competition laws as a means of facilitating trade and optimizing resource allocation, and efforts have been launched on both bilateral and multilateral levels. This trend is likely to accelerate geometrically in the 21st century as globalization advances.

Legal framework dealing with competition in India spread over various legislations, besides the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) which is the principal legislation dealing with Monopolistic and Unfair Trade Practices since 1969, other legislations include Consumer Protection Act, 1986, Prevention of Food Adulteration Act, 1954, Standards of Weights & Measures Act, 1976, Packaged Commodities Rules, 1977, Patents Act, 1970, the Customs Tariff (Amendment) Act, 1995 and SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997.

The principal legislation dealing with competitive activities in India is the MRTP Act 1969. However, with the growing complexity

of industrial structure and the need for achieving economies of scale for ensuring higher productivity and competitive advantage in the international market, and a shift in the thrust of the industrial policy the MRTP Act was amended in 1991. The Government also constituted a High Level Committee under the Chairmanship of Shri S V S Raghavan to examine the provisions of the MRTP Act, in the light of international economic development relating to competition law to suit Indian conditions and to propose a modern competition law suitable to the needs of the country, recommended the repeal of MRTP Act and enactment of new Indian Competition Law and establishment of Competition Commission of India.

Based on the recommendations of the Committee, the Competition Act, 2002 was enacted for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. The Competition Commission of India (CCI) was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Supreme Court. Recently, the Government with a view to address various legal issues and to make the Competition Commission of India fully operational on a sustainable basis, introduced the Competition (Amendment) Bill, 2006 in Parliament on March 9, 2006.

It is opined that, the Competition law will be one of the most important corporate laws to discipline the markets and promote competition. The reason being that the advance of information technology and the further evolution of globalization will see the emergence of a world economic environment of a new and different nature. The bulk of added value will be intellectual added value, and networks will carry this smoothly across borders in the form of digitized information. It will become enormously difficult for countries to accurately gauge and control the cross-border movement of this added value, with the result that the concept of borders, will gradually disappear. Consequently, markets will become increasingly integrated, ultimately

leading to the formation of a single world-scale market. The rules needed primarily for the development of the domestic business environment will need to be developed on a global scale toward the facilitation of trade. Such trends will make the worldwide development of competition policy and law increasingly important.

The introduction of competition policy should also be widely advanced on a world level. This will become a necessity because the globalization of the world economy and the reduction of trade barriers would boost the importance of prevention of domestic anti-competitive behavior. Securing competitive conditions in the host country of investment will become more important as companies expand their international investment and develop their business activities offshore. Competition policy will also become vital for the countries absorbing foreign investment as they open their markets to multinational companies.

Accordingly, the concerns of competition authorities with individual cases of anti-competitive behavior will become more international in nature. Moreover, the growing number of international mergers and acquisitions would require closer international cooperation between and among the competition authorities to appropriately addressing the issues arising out of such corporate transactions.

INSOLVENCY LAW

A company has many characteristics of a living being and therefore cannot remain static. It either has to grow or decay; reform or deform; regenerate or degenerate. In a present highly competitive environment some companies may prosper and grow, while some may incur losses and may have to be ultimately extinguished or closed as they become insolvent.

The concept of insolvency indeed is as old as trading on credit and many of the concepts underlining the modern law of insolvency can be traced back to Greek and Roman systems. At the base of all insolvency systems is a desire to distribute the insolvent's assets justly

amongst the creditors. As far as corporate insolvency is concerned the Companies Act, 1956 is the main legislation which provides for law relating to corporate insolvency and inter alia contains the provisions for winding up of companies.

When a company is unable, or unwilling, to meet its contractual obligations to its stakeholders, the contracting parties are allowed to decide whether the contract terms be enforced or be allowed to be breached. In other words, the contracts may have to be renegotiated. The bankruptcy court provides the framework within which such renegotiations can take place. The bankruptcy institution, therefore, must emphasise on the lowering of costs of transactions during bankruptcy procedures.

The bankruptcy procedures indeed are irrelevant if the company does not face financial distress, because the financial distress actually opens up the possibility of a breach of contractual obligations. Accordingly, all aspects of bankruptcy law will have to be restricted to analysis of such situations.

The bankruptcy institution instead of being a decision maker, should play the role of a facilitator in decision-making. It should play the role of an enabler rather than be a judge of what is an acceptable reallocation of existing claims. It must, of course ensure that the negotiating parties voluntarily accept all reallocations. This can be best achieved provided the parties have information, the capability to evaluate alternative propositions and, most importantly, know how the court will settle the dispute if it cannot be voluntarily resolved by the parties.

The Asian Development Bank in its Report on Insolvency Law Reforms in the Asian and Pacific Region identified and enumerated basic standards required to be incorporated in an acceptable Insolvency Law. These standards include -

- An insolvency law regime should clearly distinguish between, personal or individual bankruptcy and, corporate bankruptcy.
- All corporations, both private and state-

owned should be subject to the same insolvency law regime.

- The optimum design of a corporate insolvency law regime should incorporate both liquidation and rescue processes by a 'one law, two system' convertible design.
- A debtor should have easy access to the law by providing simple threshold proof of the basic criterion of insolvency or financial difficulty. A creditor should be required to establish threshold proof of insolvency by evidencing a presumption of insolvency on the part of the corporate debtor.
- If it is determined that a debtor corporation should be liquidated, the powers of the existing management should be terminated and an independent administrator appointed to exercise those powers and to conduct the liquidation.
- In case it is necessary that existing management should, generally continue, subject to the exercise of supervisory power by an independent administrator there should be the possibility, if circumstances require it, of the independent administrator assuming complete power.
- The insolvency legislation should provide for swift and strict time limits for the initial process regarding an insolvent corporation. The court or other tribunal system must be properly resourced to enable the process to be implemented.
- The administration of a corporation in liquidation is a public responsibility and should be viewed as part of the overall regulation of corporations. It is possibly best handled by a specialist government agency, which must be adequately resourced and financed.
- An insolvency law should make proper provision for the involvement of creditors as part of the liquidation or rescue process.
- An insolvency law should clearly define the voting rights of creditors and should prescribe minimum requirements for the

approval of a plan of rescue. Provision should be made for voting by classes of creditors, particularly secured creditors, if the rescue proposal is required to bind such classes. The law should provide protection against manipulation of the voting system and, in particular, should ensure that a court or other tribunal is empowered to set aside the results of voting which are obtained by the exercise of votes of insiders or persons who are related to the corporation, its shareholders or directors. The effect of a vote of the requisite majority of a class should be made binding on all creditors of that class.

- The law should not proscribe the nature of a plan, except in regard to fundamental requirements and to prevent commercial abuse. The law should provide for objective analysis of a proposed plan by an independent adviser. In particular, it should be demonstrated that the proposed result or effect of a plan is commercially sound.
- The law should provide for a court or other tribunal to have a general supervisory role of the rescue process.
- Provision should be made for the possibility that the execution of a plan may require supervision or control by an independent person.
- An insolvency law regime should, as far as possible, preserve the principle of equal treatment for all creditors. Accordingly, the insolvency law should limit the number of priority claims to as few as possible.
- An insolvency law regime should contain adequate provisions relating to avoidance of transactions, which result in damage to creditors or conflict with the principle of equal treatment of creditors of the same class.
- An insolvency law regime should contain provisions for the civil sanction of fraudulent and other like conduct in the

operation and management of a corporation, which causes damage or loss to creditors of an insolvent corporation.

- An insolvency law regime should include provisions relating to recognition, relief and co-operation in cases of cross-border insolvency, preferably by the adoption of the UNCITRAL model law on cross-border insolvency.

The Success of Corporate Laws Lie in Expedient Dispute Resolution

In the wake of fast paced changes in corporate and business scenario coupled with speed of transactions in an increasingly integrating global market, there is an imperative need for adopting equally efficient and efficacious modes of settlement of commercial disputes, such as Arbitration and other Alternative Dispute Settlement (ADR) Modes. The techniques of ADR including arbitration are not alien to the justice dispensing system in India. However, the same has received fillip with the enactment of Arbitration and Conciliation Act, 1996. Further, the amendment to CPC in providing for settlement of disputes outside the court, has made the ADR movement in India more intense and purposeful.

If companies take more efforts for using more precisely drafted contracts, take better measures to ensure that their relationship and reputation are not harmed and all possible disputes are resolved well in time, may be across the table, then not only will ADR succeed in its objective, but also the corporates will benefit as it will reduce litigation costs, it will save time from that litigation and will also help in preserving relationships.

IMPACT OF TECHNOLOGY TO DERIVE FUTURE SHAPE OF CORPORATE LAWS

Envisioning possible implications of technology two or three decades from now calls for a better understanding of the ways in which performance trends interact with society's readiness to embrace economic, social and technical change. In venturing a vision of technological possibilities rather

than simply projecting linear or exponential changes in performance, it is crucial to think not only of how technical improvements lead to the substitution of a new generation of tools for existing ones, but also of how entirely new uses, and indeed new needs, might emerge.

There is a good chance that the advanced power of computing will be used to help people stay in or create new kinds of communities. At a broader level, computer-enabled development of electronic commerce is likely to profoundly modify current ways of doing business. Anyone with a computer and Internet access will be in a position to become a merchant and reach out to customers across the globe, and any consumer will be able to shop the world for goods and services. As a result, new products and services and new markets should emerge, many a traditional role of intermediary could disappear, and more direct relations will probably be forged between businesses and consumers. Indeed, the process of inventing and selling products could be turned on its head, as consumers generate the custom specifications they desire and then seek out competent producers and even other buyers. The Internet as a marketing tool will impact direct sales dramatically. Marketing will evolve considerably and so impact the publishing industry, the industry that supports marketing; the day will come when direct one-to-one marketing over the Net will replace – or at least reduce considerably – bulk shipping of large catalogues that have very low return on investment.

The introduction of market discipline to the social services sector is expected to accelerate the pace of innovation, leading to more rapid economic growth. Global framework conditions are likely to be critically important for four reasons. Continued progress towards a seamless global economic system, with harmonized approaches toward, *e.g.*, intellectual property rights, will probably be indispensable for the effective allocation of investments that underpin both technological advances and the infrastructure needed for socio-economic change. In the commercial realm, both the pressures to compete and the capacity to innovate will be deeply influenced

by the extent of global information transparency regarding everything from prices and quality standards to market place collusion and differences in tax regimes.

CONCLUSION

In the backdrop of the preceding discussion, two things become clear that information technology will set the rules of the game in the context of legislative thinking particularly in the case of business related laws. Intellectual property, competition, insolvency laws besides the Company law will provide necessary legal framework for businesses to act as growth agents for economies. However, what is certain, in this environment which is changing at the speed of light is that those corporate laws that will lag behind the changes, would do more harm to their users than benefit. Therefore, the golden rule for future corporate laws will be the speed at which they accommodate and adapt the dictates of change.

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COMPANY SECRETARIES FIRMS : SUCCESS SANS COMPETITION THROUGH "BLUE OCEAN STRATEGY"

BALWANT KULKARNI *

In the professional life today one always finds oneself or one's professional firm in competition for securing various kinds of professional work, professional recognitions and professional success at multiple levels and in multiple contexts. The competitive onslaught is more a perception, perhaps than a reality. As it is said the best competition is the competition with one's own self and not with others. Comparisons with others are odious and self-decelerating. It is also quite often forgotten, in practical life, that competition is best overcome by collaboration and networking even with the perceived-to-be competitor.

It is in this context that this Paper explores what W Chan Kim and Renee Mauborgne of Harvard, in their recent release, "Blue Ocean Strategy" [Harvard Business School Press, 2005] have said about creating uncontested market space and making competition irrelevant. If Company Secretaries, particularly in practice can follow the new strategy that these authors have discovered out of their research; it is submitted and believed that the success for them will be enormous. Although the research by the authors is woven around companies in business rather than around professional firms engaged in professional services, a discerning reader can find ways to improvise the strategy to suit professional service firms.

Globalisation imposes the challenge of competition, a further intensified competition. It is an opportunity to rediscover your relevance to the world of business and to succeed notwithstanding the ferocity of global

market stage. It forces us to make a difference, to create a profitable organization that builds a future where customers, employees, shareholders and society win.

To improve the quality of our success we need to study what we did that made a positive difference and understand how to replicate it systematically. A quiet thinking on core competencies is necessary vis-à-vis the impact or value-add achieved for the customer. Then a plan can be drawn up for replicating the same for other components of the market.

So far the overriding focus of strategic thinking has been on competition-based red ocean strategies. Red ocean denotes a market space where industry boundaries are defined and accepted, and the competitive rules of the game are known. Here organizations try to outperform their rivals to grab a greater share of existing demand. The market space gets crowded, prospects for profit and growth are reduced. Products become commodities, and cutthroat competition turns the red ocean bloody.

To take a crude example, a hair-cutting saloon in order to out beat competitors adds hair-dyeing services. Then the competing saloon also adds the hair-dyeing services and to have an upper hand also adds manicure services. The first saloon then after adding manicure services also starts providing pedicure services to its customers. In doing this, both the saloons go on adding costs and additional time for the customers in the waiting and do not necessarily add value to the

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services. The red ocean war only increases costs and not necessarily profits and value add to the customers. In such a red ocean if a particular saloon starts providing only and purely hair-cutting services promising customers that they would step out after having had a satisfactory hair-cut in not more than 6-8 minutes, the customers who need only the hair-cut will flock to this shop giving that shop a blue ocean exclusivity. They will save their waiting time while other customers have various services rendered to them. The particular shop will become popular with customers who mean business and are hard-pressed for time; while making the competitors irrelevant and saving costs of adding more and more services this firm can navigate and prosper peacefully in the quiet blue ocean.

It will always be important to swim successfully in the red ocean by out competing rivals. Red oceans will always be a fact of life.

But with supply exceeding demand in more industries, competing for a share of contracting markets will not be sufficient to sustain high performance.

We need to go beyond competing. To seize new profit and growth opportunities, we need to create blue oceans.

Blue ocean strategy challenges us to break out of the red ocean of bloody competition by creating uncontested market space that makes the competition irrelevant.

Instead of dividing up existing—and often shrinking—demand and benchmarking competitors, blue ocean strategy is about growing demand and breaking away from the competition.

Consider this. The Blountville-Arkansas based American retail giant Wal-mart had to wind up its operations in Germany and sell of the business at less than the asset value to Metro, the German retailer. The reason was that it tried to compete with German retail only on the basis of reduced prices and delivery point pampering of customers by helping them pack their purchases. This was done just to set new benchmarks in serving the customer, so that they compare the new retailer in Germany with the existing German competitors.

This was a red ocean strategy aimed at bleeding the competitors, without any real value-add for the customer. The German customers did not like this. Result was huge losses to Wal-mart.

BLUE OCEANS

Blue oceans are defined by uncontested market space, demand creation, and the opportunity for highly profitable growth. Although some blue oceans are created well beyond existing industry boundaries, most are created from within red oceans by expanding existing industry boundaries.

In blue oceans, competition is irrelevant because the rules of the game are waiting to be set.

The dominant focus of strategy work over the past twenty-five years has been on competition-based red ocean strategy. The result has been a fairly good understanding of how to compete skillfully in red waters, from analyzing the underlying economic structure of an existing industry, to choosing a strategic position of low cost or differentiation or focus, to benchmarking the competition.

We need to look at systematic pursuit and capture of blue oceans.

We need to break from the status quo, create a winning future strategy, and execute this fast at low cost. We need a strategy with a creative, non-combatative, approach. There should be emphases on value innovation and stakeholder engagement.

So far its roots in military strategy heavily influence business strategy. The very language of strategy is deeply imbued with bloodshed.

In red ocean terms 'strategy' is about confronting an opponent and fighting over a given piece of land that has never been constant; rather blue oceans have continuously been created over time.

To focus on the red ocean is therefore to accept the key constraining factors of war -- limited terrain and the need to beat an enemy to succeed. This denies the distinctive strength of the business world -- The capacity to create new market space that is

uncontested. Competition based on red ocean strategy has certain assumptions. For example, it assumes that an industry's structural conditions are given and that firms must compete within the given conditions. Academicians call this the structuralist view or environmental determinism [Joe S Bain, 1956, 1959].

A study of business launches of 108 companies found that 86 per cent of the launches were line extensions, that is, incremental improvements within the red ocean of existing market space. Yet they accounted for only 62% of total revenues and a mere 39% of total profits.

The remaining 14% of the launches were aimed at creating blue oceans. They generated 38% of total revenues and 61% of total profits.

As a result of technological advances, in increasing number of industries, supply exceeds demand. Then again, globalisation dismantles trade barriers between nations and regions. Niche markets and heavens for monopoly continue to disappear as information on products and prices becomes instantly and globally available. As supply is on the rise, global competition is on the increase, there is no increase in global demand.

The business environment in which most strategy and management approaches of the twentieth century evolved is increasingly disappearing.

As red oceans become increasingly bloody, management will need to be more concerned with blue oceans than the current cohort of managers is accustomed to.

There is, in reality, no perpetually high performing company. The same company can be brilliant at one moment and wrongheaded at another. Company is not an appropriate unit of analysis in exploring the roots of high performance and blue oceans.

The strategic move and not the company or industry is the right unit of analysis for explaining the creation of blue oceans and sustained high performance.

A strategic move is the set of managerial

actions and decisions involved in making a major market creating business offering.

Companies caught in the red ocean follow a conventional approach, racing to beat the competition by building a defensible position within the existing industry order. The creators at Blue Ocean do not use the competition as their benchmark.

They follow a different strategic logic called value innovation. "Value innovation" because, instead of focusing on beating the competition, they focus on making the competition irrelevant by creating a leap in value for the buyers thereby opening up new and uncontested market space.

Value innovation places equal emphasis on both value and innovation. Value without innovation tends to focus on value creation on an incremental scale, something that improves value but is not sufficient to make you stand out in the market place. Innovation without value tends to be technology driven, market pioneering, or futuristic, often shooting beyond what buyers are ready to accept and pay for.

Creating blue oceans is neither in bleeding-edge technology nor in "timing for market entry". **It involves a high and intense degree of customer oriented thinking that creates value for both the customer and the business entity.**

VALUE INNOVATION

Value innovation occurs only when companies align innovation with utility, price and cost positions. Value innovation is enabled where a company's actions favorably affect both the cost structures and its value proposition to the buyers. Eliminating and reducing the factors an industry competes on, make cost savings. By raising and creating elements the industry has never offered, you can create buyer value. Costs reduce further as a function of time as scale economies creep in due to high sales volumes that superior value generates.

Value innovation does not adopt the structuralist view or the environmental determinism. It is based on the view that market boundaries and industry structures are

not given; industry players can reconstruct them by their actions and beliefs. This may be called the reconstructionist view.

Companies that work along the red ocean strategy race to beat the competition by building a defensible position within the existing industry order [Peter Drucker, 1985]. Creation of blue oceans does not use competition as the benchmark. To create Blue Ocean, you need to follow the strategy of value innovation. Instead of focusing on beating the competition, you focus on making the competition irrelevant by creating a leap in value for buyers and your company, thereby opening up new and uncontested market space.

Value innovation is a new way of thinking about and executing strategy. This results in the creation of a blue ocean and a break from the competition. Value innovation defies one of the most commonly accepted dogmas of competition-based strategy: the value-cost trade-off [Charles W L Hill (1988) and R W White (1986)]. It has been a conventional belief that companies can either create greater value to customers at a higher cost or create reasonable value at lower cost. The strategy is to make a choice between differentiation and low cost.

In contrast, those that seek to create blue oceans pursue differentiation and low cost simultaneously. Thus value innovation is more than innovation. It is about strategy that embraces the entire system of a company's activities [Porter 1996]. Value innovation requires companies to orient the whole system toward achieving a leap in value for both buyers and themselves.

THE PRINCIPLES

The authors delineate six principles of Blue Ocean strategy; these are:

1. Reconstruct market boundaries;
2. Focus on big picture, not the numbers;
3. Reach beyond existing demand;
4. Get the strategic sequence right;
5. Overcome key organizational hurdles;
6. Build execution into strategy.

They lay down the Four Actions Framework for creating blue oceans, by reconstructing buyer value elements in crafting a new value curve:

- Which of the factors that the industry takes for granted should be eliminated?
- Which factors should be reduced well below the industry's standard ?
- Which factors should be raised well above the industry's standard ?
- Which standards should be created that the industry has never offered ?

The first question makes you eliminate factors that companies in your industry have long competed on. Those factors are often taken for granted even though they no longer have value or may even detract from value. Sometimes there is a fundamental change in what buyers value, but companies that are focused on benchmarking one another do not act on, or even perceive, the change.

The second question focuses on whether products or services have been over-designed in the race to match and beat the competition. Sometimes companies over serve customers, increasing their cost structure for no gain.

The third question requires you to uncover and eliminate the compromises your industry forces customers to make.

The fourth question helps you to discover entirely new sources of value for buyers and to create new demand and shift the strategic pricing of the industry.

By pursuing the first two questions that you gain insight into how to drop your cost structure vis-à-vis competitors. Rarely do managers systematically set out to eliminate and reduce their investments in factors that an industry competes on. The result is mounting cost structures and complex business models.

By pursuing the last two questions you get an insight into how to enhance buyer value and create new demand.

Collectively, the four questions allow you to systematically explore how you can reconstruct buyer value elements across alternative industries to offer buyers an entirely

new experience, while simultaneously keeping your cost structure low. The existing rules of competition then become irrelevant. When you apply the four actions framework to the strategy canvas of your industry, you get a revealing new look at old perceived truths.

BUYER UTILITY

In order to arrive at the Blue Ocean idea, Kim and Mauborgne give the sequence of the Blue Ocean Strategy in very clear steps. The sequence is as follows:

1. First is buyer utility. You have to ask: Is there exceptional buyer utility in your business idea? If not you will rethink the business idea.
2. Is your price easily accessible to mass of buyers? If not, you will have to rethink on that.
3. Can you attain your cost target to profit at your strategic price ? If not, rethink on your cost.
4. What are the adoption hurdles in actualizing your business idea ? Are you addressing them upfront ? If not, rethink.

When all these steps are successfully crossed will you arrive at a commercially viable Blue Ocean idea.

The starting point is buyer utility. You have to have an offering unlocking an exceptional utility. There should be compelling reason for the mass of people to buy it. Without this, there is no blue ocean potential to begin with. The authors advise you to park the idea or rethink it until you reach an affirmative answer.

In order to test the business idea for exceptional utility, they give a buyer utility matrix. In it are the Six Stages of the Buyer Experience Cycle and the Six Utility Levers.

The Buyer Experience Cycle, on the horizontal horizon consists of the following six stages:

1. Purchase
2. Delivery
3. Use
4. Supplements

5. Maintenance

6. Disposal

The six Utility levers on the vertical axis are as follows:

1. Customer productivity
2. Simplicity
3. Convenience
4. Risk
5. Fun and image
6. Environmental friendliness.

You must apply your mind to find out at which stage there are biggest blocks to customer productivity; simplicity; convenience; reducing risk; fun and image; and environmental friendliness. This will lead to you discover where are the greatest blocks to utility across the buyer experience cycle for your customers and non-customers. The aim is to check whether your offering passes the exceptional utility test. You then start refining your business idea.

The authors give example of Ford Model T. Before its debut more than five hundred automakers in the US focused on building custom-made luxury autos for the wealthy. In terms the buyer utility matrix, the entire industry focused on image in the use phase, creating luxury cars for fashionable weekend outings.

The greatest blocks to utility for the mass of people, however, were not in refining the auto's luxury or stylish image. Rather they had to do with two other factors. One was convenience in the use phase. The bumpy and muddy dirt roads often prevented finely crafted cars from passing. This significantly limited where and when cars could travel, making the use of cars limited and inconvenient. The second block to utility was risk in the maintenance phase. The cars being finely crafted often broke down requiring experts to fix them and experts were expensive and in short supply.

Model T eliminated these two utility blocks. It was called the car for the great multitude. It came in only black colour and one model, with scant options. In this way Ford eliminated

investments in image in the use phase. Instead of creating cars for weekends in the countryside—a luxury few could justify—Ford's Model T was made for everyday use. It was reliable. It was durable; it was designed to travel effortlessly over dirt roads. It was easy to fix and use. People could learn to drive it in one day.

The buyer utility matrix created by the authors highlights the differences between ideas that genuinely create new and exceptional utility and those that are essentially revisions of existing offerings or technological breakthroughs not linked to value. The aim is to check whether your offering passes the exceptional utility test. By applying this diagnostic, you can find how your idea needs to be refined.

You need to test blocks to utility across the buyer experience cycle for your customers and noncustomers?

- Does your offering effectively eliminate these blocks? If it does not, chances are your offering is innovation for innovation's sake or a revision of existing offerings. Your offering must pass this test, if you are to get out of the red ocean bloody war with lose-lose [instead of win-win] effects.

After creating the exceptional utility, the firm must set the right strategic price. This ensures that buyers not only will want to buy your offering but will also have a compelling ability to pay for it. It is important to know what price will quickly capture the mass of target buyers. The strategic price you set for your offering must not only attract buyers in large numbers but also help you to retain them. An offering's reputation must be earned on day one, because brand building increasingly relies heavily on word-of-mouth recommendations spreading rapidly through the networked society.

Thereafter comes target costing. This addresses profit side of business. To maximize the profit potential of the blue ocean idea, a company should start with the strategic price and then deduct its desired profit margin from the price to arrive at the target cost. This is

price-minus costing and not cost-plus pricing. Beyond streamlining operations and introducing cost innovations, second level companies can pull to meet their target cost is partnering. You should not try to carry out all production and distribution activities yourself. Partnering provides a way for companies to secure needed capabilities fast and effectively while dropping their cost structure. It enables a company to leverage other companies' expertise and economies of scale.

EXECUTING STRATEGY

Conceiving blue ocean ideas is all right. But its execution through the organization poses a number of hurdles. The challenge is steep. Red ocean fighting habits may not show a path to future profitable growth, but they are within the comfort zones of the people in the organization. It may have served the organization well until now. Blue ocean strategy will rock the boat and everyone will feel uncomfortable. This is the **cognitive hurdle**.

The second hurdle is **limited resources**. The greater the shift in strategy the greater it is assumed are the resources needed to execute it. The authors point out that in the organizations they studied, resources were being cut and not raised in implementing the blue ocean strategy.

The third hurdle is **motivation**. You have to motivate key players to move fast and tenaciously to carry out a break from the status quo.

And of course, **politics** is the hurdle everywhere. In many organizations you get shot down before you stand up.

How to triumph over those hurdles is the key to attenuating organizational risk. You must overcome key organizational hurdles to make blue ocean strategy happen in action. A key to do this is to abandon perceived wisdom on effecting change. Conventional wisdom asserts that greater the change, the greater the resources and time you will need to bring about results. The authors give examples of how the hurdle of conventional wisdom was broken in reality.

The authors define three roles for an organization to overcome the hurdles to blue ocean strategy. The first are called 'angels' who are those who have the most to gain from the strategic shift. The second are 'devils', i.e., those who have the most to lose from it. Then there are 'consigliere' that is one who is politically adept but highly insider who knows in advance all the land mines, including who will fight the blue ocean strategy and those who will support it. They suggest that the consigliere must be secured on the top management team.

The authors also give a statement of the fair process that must be followed by and in the organization in achieving the strategic shift. Employees normally see only the negative side of the shift. Their reactions to the new moves are bound to show a lot of misunderstanding. You must, through a series of meetings, openly discuss the declining business conditions and the need for the organization to change its strategic course to break from the competition and to simultaneously achieve higher value at lower cost.

FAIR PROCESS

There are three elements that define the fair process: engagement; explanation; and clarity of expectation.

Engagement means involving individuals in the strategic decisions that affect them. You should ask for their inputs and allow them to refute the merits of one another's ideas and assumptions. Engagement communicates management's respect for individuals and their ideas. If you encourage refutation, you sharpen everyone's thinking and build better collective wisdom. Engagement results in better strategic decisions by management and greater commitment from all involved to execute those decisions.

Explanation means that everyone involved and affected should understand why final strategic decisions are made as they are. An explanation of thinking that underlies decisions makes people confident that managers have considered their opinions and have made decisions impartially in the overall interest of

the company. Explanation also serves as a powerful feedback loop that enhances learning.

Expectation clarity requires that after a strategy is set, managers state clearly the new rules of the game. Expectations may be demanding. Employees must know what standards they will be judged by and the penalties for failure. There should be clarity about the goals of the new strategy; new targets and milestones; precise responsibilities for the milestones.

FOR COMPANY SECRETARIES

After discussing salient features of the Blue Ocean Strategy the authors describe and prescribe, one is tempted, in the context of professional services to quote a saintly advice that reflects the starting point for the blue ocean strategy for professionals like Company Secretaries. The quote reads: "Subdue pride by modesty; overcome hypocrisy by simplicity; dissolve greed by contentment." Competing with oneself and not with others and even networking with competitors is a lesson that can be learnt from Information Technology industry, which is verily a service industry.

Without appearing to lay down any straightjacket prescriptions and confessing explicitly that the blue oceans of modest specializations in services can be discovered only in the matter-of-fact live situations by those who are living therein, a few areas and ideas are listed here. Specialist partners in mega firms of practicing Company Secretaries or small proprietary or partnership firms can apply these ideas. In the context of the multi-disciplinary firms that are in the offing, Company Secretaries partners can apply the following ideas of Blue Ocean:

- Utilising their superior legal drafting skills Company Secretaries can specialize only in drafting the Statement of Facts and Grounds of Appeal before specific Appellate Authorities either in direct or indirect tax areas. They can do this better and faster and compile the entire appellate pleadings to be submitted before, say, Commissioner (Appeals) and Appellate Tribunal in the Income Tax or Indirect Tax areas. The

appearance before the Appellate Authority may be left to other professionals. This professional skill and service can be carried forward into drafting of writ petitions or statutory appeals before the High Court or Supreme Court. The Company Secretary drafting the appeal and petitions before the Court can also deliver the service of briefing the other professional who will argue the case before the Appellate Authority or the Court and support him during the argument.

- A firm of Company Secretaries or Company Secretaries in mega/multi-disciplinary firms may specialise only in preparing and arguing anti-dumping matters before the Anti-dumping Authorities and the Tribunal. The firm may collaborate with Cost Accountants for preparation of the costing database that is required in anti-dumping matters. The mastery of Company Secretaries over anti-dumping law and rules as well as case laws in anti-dumping matters will enable them to do the legal job faster and better, while they rely upon the costing data and certification by Cost Accountants both for the Indian manufacturer/exporter and corresponding foreign exporter/manufacturer.
- Some Company Secretaries may specialize in petitions and argument of the case before Company Law Board only from the corporate side. Others may specialize in these matters only from the shareholder or other petitioner's side. Such specialization will enhance the speed and quality of service and make competition irrelevant.
- They may specialize in FEMA matters and liaising with FEMA authorities

delivering critical services fast and efficiently only in these areas.

- A partner or two from a Company Secretaries firm may specialize only in corporate governance certification under Clause 49 of the Listing Agreement and go on refining and adding value through these services.
- The trust format for holding and investing money of Non-Resident Indians in Indian securities is becoming popular. Some Company Secretaries can specialize in the drafting, filing and managing trust documents assisting the investment advisor in legal matters.

The above, to stress it once again, is only a freethinking and illustrative list of some Blue Oceans for practicing Company Secretaries. In reality, the individuals and partners working in the field have to apply the concepts delineated in this Paper and work out their Blue Oceans themselves. Having zeroed upon respective Blue Oceans through self-thinking and analysis, they can proceed to refine skills and services in the particular areas. After succeeding through patience, hard work and other professional virtues, they can then work for the sustainability of the particular Blue Ocean.

SUSTAINABILITY

The authors recognize that creating blue oceans is not a static achievement. Competitive imitations of blue ocean strategy begin to appear sooner or later. The timing of the company reaching out to create a new blue ocean also becomes relevant.

Inherent in a blue ocean strategy are the barriers to imitation; some operational and some cognitive.

Eventually, however, even such a strategy gets imitated. The company should, therefore, be on its guard in renewing the blue ocean strategy.

ECONOMIC ASPECTS OF CORPORATE GOVERNANCE

V P SHARMA* & M A JOSEPH**

INTRODUCTION

Corporate governance denotes the framework by which companies are directed and controlled i.e. the setting of corporate objectives and the monitoring of performance against these objectives. The Board of directors and management are entrusted with the task of pursuing the objectives that are in the interest of the company and its stakeholders.

In its broadest sense, corporate governance is concerned with holding the balance between economic and social goals and between individual and community goals. The governance framework encourages efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations, and society. The incentive to corporations and to those who own and manage them to adopt internationally accepted governance standards is that these standards assist them to achieve the business objectives and to attract investment. The incentive for their adoption by states is that these standards strengthen their economies and encourage business probity.

The reason why corporate governance has moved higher up the agenda of corporations and countries is mainly attributed to the fact that private capital has become the prime source of funds for investment. Investments to an increasing extent are in the hands of

institutions. They are looking for a spread of risk and reward and in coming to their judgments on the investment, standards of corporate governance have a measurable vital role to play. Another reason why corporate governance has become increasingly relevant is that, with advances in information and communications technology, detailed information about individual corporations and their governance frameworks is now readily available and the public scrutiny of business is correspondingly more intense.

The importance of foreign institutional investors is that they apply the same tests for security and rate of return wherever in the world they place the funds of those for whom they are acting. They are, therefore, a force for governance convergence, a process that has its merits and drawbacks. This convergence raises the corporate governance standards generally, since institutional investors measure on the defined standards the Board effectiveness, transparency, accountability, and financial health of the company.

It is only a limited number of countries that provide investment funds of this kind, important though they are in economic terms. Businesses throughout the world rely on banks, internally generated finance and on capital markets. Nevertheless, the same issues arise for banks and for those who have the responsibility for allocating funds on behalf of others as they do for institutional investors. They have an equal responsibility for the effectiveness and integrity with which the enterprises they are

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financing are being directed and controlled. The upshot is that, whatever their source, funds will flow to businesses around the world which are seen to meet internationally accepted standards of corporate governance.

Corporate governance is a process and not a state. The field is continually evolving. The initial focus is on the way in which individual corporations are directed and controlled. This led to the introduction of national codes of best practice. As the wider economic and social significance of corporate governance became apparent, international guidelines have been formulated to advance its cause more broadly. These guidelines reflected the part in which good governance can play in promoting economic growth and business integrity. The way ahead lies in ensuring that the fruits of good governance, its ability to add value, are widely and wisely shared, thus playing a positive part in the goal of the developed and developing world to alleviate poverty.

CORPORATE GOVERNANCE AND GROWTH

It has always been intriguing to notice why some economies are christened as developed and some others as developing, emerging or transition economies. The distinction is by and large based on the level of per capita income, there is no consensus as to why they are so. Over six billion human beings inhabit planet earth; nearly five billion of them are rooted in so called transition, developing or emerging economies. That is, over 80% of human race shares 20% of the global income. Such wide spread disparity in the endowment, rather in deprivation, is heart-rending. This has provoked the intelligentsia to research into what explains the health of the economies.

Research seems to indicate that though it is difficult to conclude firmly what approaches and programmes can lead to economic advancement, there is a fair degree of consensus about certain approaches / programmes contributing to economic advancement. One major debate – whether market or state can propel economic advancement – is almost settled. A number of empirical studies reveal that, economies with market friendly policies like disciplined fiscal and monetary system, well developed financial

markets experience display long-term growth performance. Evidence is also available to substantiate that reforms, which usher in market friendly policies register improved growth performance. This essentially means that the state and market have to co-exist and complement each other's effort. Neither market nor state alone can ensure a high rate of economic advancement. They need to focus on the areas of their respective core competence for an economy to perform well. The state should provide basic support services such as law and order, conducive legal environment, decent supervisory and regulatory infrastructure, reliable accounting system, vibrant securities market, etc. while the private economic agents carry on economic activities. And if market fails for some reason, the state must step in. In fact, state should make efforts to provide an environment, which can prevent market failure.

The state must lay down the manner of conduct of economic agents so that the activities of the agents create synergy and markets do not fail. If the agents do not on their own volition adhere to such prescribed manners and try to distort market forces to their advantage, the state must have mechanism to prevent such recalcitrant agents from doing so and penalize them adequately so that no agent dares to do so in future. What it means is that the economic agents, for fear of punishment from market or authorities or lure of strengthening their position in market, follow a certain code of conduct, which ensures not only their advancement, but also the advancement of the economy as a whole.

Each economic agent – individual or corporate – adheres to certain standards, ethical or regulatory, while pursuing its objectives. If it follows the standards, while it attains its own objectives, other stakeholders are benefited simultaneously. Since the corporates are the major economic agents and their activities determine the level of output and growth in the economy, it is necessary that while they have freedom to act in the manner dictated by the market, they must perform themselves in a manner that it produces synergy for all other agents in the

economy. Corporate governance is nothing but such conduct on the part of corporates and if corporates follow such conduct, it inevitably leads to better economic performance. If they do not, state intervention is warranted. Hence, economic performance depends crucially on the conduct of economic agents, particularly the corporate sector, and it is supplemented by government intervention when the corporates deviate from standards of corporate governance. The need for corporate governance standards and mechanism to enforce them is more acute in a liberalized market driven economy when the economic agents have a tendency to be guided by market forces only.

The growing discomfort with closed, inward looking, market unfriendly and relationship based institutions and practices has impelled some governments to bring about the momentum to state interference in markets with private incentives, public ownership with private ownership, and protection of domestic industries from competition of foreign producers and investors. Government engagement in economic activity has been scaled down. Domestic markets have been opened to international participation and cross border flows. Tax codes have been rewritten. The price determination and the allocation of resources are propelled more by the market forces rather than state policies. Wherever such reforms have been ardently perused and the economic agents have conducted in a befitting manner, growth has assumed multiplier effect. When the economic activities are increasingly being carried out by corporates, the economic performance is jeopardized if the corporates do not adhere to corporate governance standards. It is the level of corporate governance which can make an economy developed, developing, emerging or transitional.

SECURITIES MARKET AND ECONOMIC GROWTH

Improving corporate governance contributes to the development of private and public markets. Poor governance undermines the integrity of publicly traded securities and discourages the use of public markets as a means to intermediate savings. Poor standard

of governance, particularly the area of transparency and disclosure have been a major factor behind instability in the financial market across the globe. It was noticed during East Asian financial crisis of 1997, where so called "crony capitalism" combined with macroeconomic imbalances interrupted decades of outstanding growth.

The securities market, which reflects the level of corporate governance of different companies in a country, allocates resources to best-governed companies. If the securities market is efficient, it can penalize the badly governed companies and reward the better-governed companies. Hence not only the corporate governance standards need to improve, but also efficiency and efficacy of securities market so that the resources are directed to the deserving companies which can really boost economic performance. The securities market cannot make best allocation of resources if the standards of corporate governance are not followed in letter and spirit.

A number of studies, starting from World Bank and IMF to various scholars, have pronounced robust relationship between the development in the securities market and the economic growth. This happens, as market gets disciplined / developed/ efficient, it avoids the allocation of scarce savings to low yielding enterprises and forces the enterprises to focus on their performance which is being continuously evaluated through share prices in the market. Thus, securities market converts a given stock of investible resources to a larger flow of goods and services.

The securities market provides a bridge between ultimate savers and ultimate investors and creates the opportunity to put the savings of the cautious at the disposal of the enterprising, thus promising to raise the total level of investment and hence of growth. The lumpiness of many potentially profitable but large investments reinforces this argument. These are commonly beyond the financing capacity of any single economic unit but may be supported if the investor can gather and combine the savings of many. Moreover, the availability of yield bearing securities makes present consumption more expensive relative to future consumption and therefore, people

might be induced to consume less today. The composition of savings may also change with fewer savings being held in the form of idle money or unproductive durable assets, simply because more divisible and liquid assets are available.

The securities market facilitates the internationalisation of an economy by linking it with the rest of the world. This linkage assists through the inflow of capital in the form of portfolio investment. Moreover, a strong domestic stock market performance forms the basis for well performing domestic corporates to raise capital in the international market. This implies that the domestic economy is opened up to international competitive pressures, which help to raise efficiency. It is also very likely that existence of a domestic securities market will deter capital outflow by providing attractive investment opportunities within domestic economy.

GLOBALIZATION AND CORPORATE GOVERNANCE

The development of information technology and financial innovations transformed the international financial architecture in the nineties. Capital moved freely and the emergence of transnational corporations was witnessed which have presence in all parts of the globe. The world economy was globalised and nations were trying to seek a pie of new economy by entering into alliances, agreements etc.

Globalisation represents the movement of the four elements of the economy across the national borders and thanks to the information technology this can happen very fast. The first element is physical capital in terms of plant and machinery. The second one is financial capital in terms of money invested in the emerging capital markets and in the form of foreign direct investment. The third is the technology and the fourth is labour.

Since, the emerging economies had abundant natural and human resources and had requisite technical infrastructure, the MNCs targeted emerging economies as potential markets. The opening of economies and advent of MNCs helps the emerging and transition economies in two ways. The

investment made by these companies provides the much-needed resource for development and these companies impart global standards in the emerging economies. Thus, these countries get slowly and gradually integrated into the global economic system and adopting the global practices of an efficient and efficacious governance system.

CORPORATE GOVERNANCE - CONCERNED AREAS

At the level of the firm, the importance of corporate governance for access to financing, cost of capital, valuation, and performance has been documented in a number of countries. Better corporate governance leads to higher returns on equity and greater efficiency. Across countries, the important role of institutions aimed at contractual and legal enforcement, including corporate governance, has been underscored by the law and finance literature. At the country level, various papers have documented a number of differences in institutional features. Across countries, the relationships between institutional features and development of financial markets, relative corporate sector valuations, efficiency of investment allocation, and economic growth have been established. Using firm-level data, relationships have been documented between countries' corporate governance frameworks, on the one hand, and performance, valuation, cost of capital, and access to external financing, on the other.

While the general importance of corporate governance has been established, knowledge on specific issues or channels is still weak in a number of areas. These areas include the following:

Corporate Governance of Banks : This has been identified to be different than that of corporations, but in which ways is not yet clear—besides the important role of prudential regulations, given the special nature of banks. Clarifying this topic will be the key, as banks are important providers of external financing, especially for small and medium-size firms. Separately, in many countries banks have important corporate governance roles, as they are direct investors themselves or act as agents for other investors. And creditors,

including banks, can see their credit claim change into an ownership stake, when a firm runs into bankruptcy or financial distress. In recent years, Basel Standards are in force to implement corporate governance in banking industry world over. The Core Principles for Effective Banking Supervision was developed by the Basel Committee on Banking Supervision to provide the international financial community with benchmarks against which the effectiveness of bank supervisory regimes can be assessed. The need for strengthening the supervision of banks has been stressed as a major priority since it is now widely recognized that weaknesses in banking systems have been the cause of financial crises in many countries over the last decade. Thus, the Core Principles, which have been endorsed and are being implemented by a vast majority of countries, have become the most important global standard for prudential regulation and supervision.

The Basel Core Principles comprise 25 basic principles, which are regarded as minimum standards that need to be in place for any supervisory system to be effective. They relate to 7 main areas of supervision namely: pre-conditions for effective banking supervision; licensing and structure; prudential regulations and requirements; methods of on-going supervision; information requirement; formal powers of supervisors; and cross-border banking. The Basel Committee continues to take the lead in coordinating banking supervisory policies and practices globally.

Institutional Investors : The role of institutional investors is increasing throughout the world and their role in corporate governance of firms is consequently becoming more important. In many countries, institutional investors have purposely been assigned little role in corporate governance, as more activism was considered to risk the company's fiduciary obligations. Furthermore, the governance of the institutional investors themselves is an issue, as they will not exercise good corporate governance without being governed properly themselves. Moreover, the form through which more activism of institutional investors can be achieved is not clear. For example, institutional investors typically hold small stakes in any individual firm. Some form of coordination is

thus necessary, on the one hand, on the other, too much coordination can be harmful, as the financial institutions start to collude and political economy factors start playing a role.

Enforcement : How can enforcement be improved in weak environments ? How can a better enforcement environment be engineered? More generally, what factors determine the degree to which the private sector can solve enforcement problems on its own, and what determines the need for public sector involvement in enforcement ?

State-owned Firms : What is the role of commercialization in state-owned enterprises? Are there special corporate governance issues in cooperatively owned firms ? How do privatization and corporate governance frameworks interact ? Are there specific forms of privatization that are more attractive in weak corporate governance settings ? What are the dynamic relationships between corporate governance changes and changes in degree of state-ownership of commercial enterprises ?

Family-owned Firms : Such firms predominate in many sectors and economies. They raise a separate set of issues, related to liquidity, growth, and transition to a more widely held corporation, but also related to internal management, such as intrafamilial disagreements, disputes about succession, and exploitation of family members. Where family-owned firms dominate, as in many emerging markets, they raise system wide corporate governance issues.

Impact on Poverty Alleviation : There are few studies on the direct relationship between better corporate governance and greater poverty alleviation. While the general importance of property rights for poverty alleviation has been established, the specific channels through which improved corporate governance can help the poor have so far not been documented. This is in part because much of the corporate governance research has been directed to the listed firms. However, much of the job creation in developing countries and emerging markets comes from small and medium-size enterprises. Different corporate governance issues arise for these firms. These require different approaches, which so far have not been studied in detail.

Dynamic Aspects of Institutional Change : Little is known about the dynamic aspects of institutional change, whether change occurs in a more evolutionary way during normal times or more abruptly during times of financial or political crises. In this context, it is important to realize that enhancing corporate governance will remain very much a local effort. Country specific circumstances and institutional features mean that global findings do not necessarily apply directly to each and every country and situation. Local data need to be used to make a convincing case for change. Local capacity is needed to identify the relevant issues and make use of political opportunities for legal, and regulatory reform. As such, the progress with corporate governance reform depends upon local capacity, in terms of data, people, and other resources.

CONCLUSION

Corporate governance in the 21st century is the system of checks and balances which

ensures that business entities act in a socially responsible way in all their endeavours, while maximizing shareholders' value and desirable rate of economic growth for the economy. Better corporate governance leads to higher return on equity, optimal allocation of resources and greater efficiency.

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COMPETITION ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

DR. S K DIXIT*

Thomas Edison – American inventor and entrepreneur, once said, “the value of an idea lies in the using of it”. Intellectual Property Rights have become a significant factor in both creating and using ideas that are translated into knowledge and inventions to promote innovation and economic growth. With the advent of an increasingly knowledge-based society, grant of intellectual property rights ensures that innovators and creators have sufficient incentive to bring their works to market and to build on the innovations and creations of others for the benefit of society. As innovation and creativity are essential for sustainable growth and economic development following core conditions enable innovation and encourage economic growth:

- Strong standards and effective enforcement of intellectual property rights,
- Vigorous competition and contestable markets,
- Open trade and investment in a stable economic environment,
- Strong and sustainable fundamental research and development infrastructure,
- Sound policies and mechanisms to promote interface between science and innovation,
- Efficient and transparent regulatory systems, and
- Ethics and the rule of law.

Intellectual property protection is one of the central public policy considerations of

knowledge based industries and global markets. Rapid changes in key technological, economic and social drivers underscore the importance of intellectual property as it provides an increasingly critical legal and policy instrument for encouraging innovation, stimulating investments needed to develop and market new innovations, and diffusing technology and other knowledge in economically and socially beneficial ways.

New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create wealth. Adequate protection of intellectual property plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy. In this context, intellectual property becomes a valuable asset that firms can use strategically to lessen or prevent competition.

Private property rights are the foundation of a market economy. Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate in the marketplace for it, thereby rewarding the owner of the property. Owners of intellectual property, like owners of any other type of private property, profit from intellectual property laws that define and protect owners’ rights to exclude others from using their private property.

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Intellectual property laws create legally enforceable private rights that protect the form and/or content of information, expressions and ideas. By entitling exclusive rights, the intellectual property laws provide an incentive to pursue scientific, artistic and business endeavors which might not otherwise be feasible. Intellectual property laws confer exclusive rights on holders of IPRs and entitle them to prevent unauthorised use of their intellectual property rights. Accordingly, intellectual property laws confer on holder of the intellectual property the right to unilaterally exclude others from using that property. It allows the IPR holders to maximize its value through trade and exchange in the marketplace. This claim on the rewards flowing from intellectual property enhances the incentive for investment and future innovation.

The principle underlying competition law is that the public interest is best served by competitive markets, which are socially desirable because they lead to an efficient allocation of resources. Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering economic benefits. Market power refers to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time.

Intellectual property law and competition law are therefore two complementary instruments that promote economic efficiency. While Intellectual property laws provide incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression, Competition laws may be invoked to protect these incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms or distorts competition in a given market.

Since the right to exclude, which is the basis of intellectual property rights, is necessary for efficient, competitive markets, the enforcement of the Competition Law rarely

interferes with the exercise of this basic right. However, enforcement action under the Competition Law may be warranted when anti-competitive conduct of the owner of intellectual property creates, enhances or maintains market power so as to cause appreciable adverse impact on competition.

CONCEPT OF INTELLECTUAL PROPERTY

The concept of intellectual property is not new as renaissance in northern Italy is thought to be the cradle of the Intellectual Property system. A Venetian Law of 1474 made the first systematic attempt to protect inventions by a form of patent, which granted an exclusive right to an individual for the first time. In the same century, the invention of movable type and the printing press by Johannes Gutenberg around 1450, contributed to the origin of the first copyright system in the world. Towards the end of the 19th century, inventive new ways of manufacture helped trigger large-scale industrialization accompanied by rapid growth of cities, expansion of railway networks, the investment of capital and a growing transoceanic trade. New ideals of industrialism, the emergence of stronger centralized governments, and nationalism led many countries to establish their modern Intellectual Property laws. At this point of time the international Intellectual Property system also started to take shape with the setting up of the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. Therefore, the premise underlying Intellectual Property throughout its history has been that the recognition and rewards associated with ownership of inventions and creative works stimulate further inventive and creative activity that, in turn, stimulates economic growth.

Over a period of time and particularly in contemporary corporate paradigm ideas and knowledge have become increasingly important parts of trade. Most of the value of high technology products and new medicines lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold

because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value – for example brand-named clothing or new varieties of plants. Therefore, creators are given the right to prevent others from using their inventions, designs or other creations. These rights are known as intellectual property rights. They take a number of forms, for example book, paintings and films come under copyright; inventions can be patented; brand names and product logos can be registered as trade marks; and so on.

Intellectual Property Rights have gained prominence in global economic policymaking over the last one and half decade most notably after establishment of WTO and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) which lays down minimum standards of intellectual property protection to be provided by WTO member countries. In this context developing countries have made a commitment to implement TRIPs. To maximize their net gains, these countries need to take advantage of the flexibility built into TRIPs. There are several areas of flexibility within TRIPs that provide the potential for developing countries to maximize benefits by promoting access to technology and preventing anti-competitive practices. Countries can also use compulsory licensing, allowed by TRIPs under some circumstances, to control anti-competitive behaviour that results from IPRs or in national emergencies, such as public health crisis.

ECONOMIC VALUE OF INTELLECTUAL PROPERTY

It is generally agreed that knowledge and inventions have played an important role in economic growth of countries. This can be seen in the economic development achieved by some countries in the 1990s. Additionally the growing importance of intellectual property and the new pattern of global trade provided impetus for forging a connection between intellectual property policies and trade law and led to the inclusion of the TRIPs Agreement as

one of the agreements in the framework of the multilateral trade negotiations under the Uruguay Round. The influence of importance of intellectual property is also reflected in the maximisation of shareholder value by knowledge-intensive industries.

Intellectual property assets thus received importance as a measure of corporate viability and future performance. This may be exemplified by the fact that in 1982, some 62 percent of corporate assets in the United States were physical assets, but by 2000, the figure had shrunk to a mere 30 percent. At the beginning of 1990s, in Europe intangible assets accounted for more than a third of total assets. As early as 1992, in the Netherlands intangible assets accounted for more than 35 percent of total public and private investments. A recent study shows that, on an average, 40 percent of the value of a company is not shown in any way in its balance sheet. This is perhaps the reason why intellectual property is sometimes referred to as a “hidden value. However, whether hidden or expressly valued, it is now clear that intellectual property is a significant contributor to economic growth and corporate competitiveness.

Intellectual property indeed is now one of the valuable assets in commercial transactions, be it intellectual property licensing, joint ventures, foreign collaborations, manufacturing, purchase or distribution agreements, or mergers and acquisitions. Licenses to use patents, copyrights and trademarks, are often combined with transfer of know-how and are increasingly an important term in technology transactions. These licenses provide royalty revenues to the owner of the intellectual property, and distribute products and technologies to licensees who might not otherwise have had access to them. In such transactions, the licensees may also gain rights to create improvements or derivative works and to develop their own intellectual property assets, which can then be cross-licensed or licensed to others. This creates a very productive cycle of innovation and invention and adds to the revenues of companies. The Price Waterhouse Coopers in 1999 found that the global intellectual property licensing market totalled more than US\$100 billion, up from

US\$50 billion in 1990. Intellectual Property assets are used not only in business transactions, but are also traded in their own right such as online exchanges for the evaluation, buying, selling, and licensing of patents and other forms of intellectual property. The buyers and sellers of intellectual property manage their intellectual property as financial assets just as investors in stocks, options and other financial instruments.

INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION

The World Development Report, 2002 pointed out that in developing countries competition laws and policies in general do not address monopoly abuse of Intellectual Property Rights. A survey of competition laws in developing countries indicated that only 5 out of 33 countries prohibit IPR agreements that restrict competition, compared with 9 out of 21 industrial countries. The lack of capacity to enforce competition laws also constrains the ability to control restrictive practices. Unless developing countries rapidly establish adequate competition frameworks and regulatory institutions that also address monopoly abuse of IPRs, it is possible that increasing IPR protection could result in welfare losses from monopoly behaviour. In this context, it is worth mentioning that the Competition Act, 2002 takes care of intellectual property rights.

It is therefore, amply clear that Intellectual Property Law and competition law are both necessary for the efficient operation of the marketplace. Intellectual property laws provide property rights comparable to those of other kinds of private property, thereby providing incentives for owners to invest in creating and developing intellectual property and encouraging the efficient use and dissemination of the property within the marketplace.

Similarly, competition law is intended to enhance consumer welfare by promoting competitive markets and consumer choice. Intellectual property laws are also intended to enhance consumer welfare, as businesses are encouraged to innovate and invest in new technologies leading to improved products and

lower prices. Brands enable consumers to choose the products they value, which encourages competition among brand owners. The promotion of a competitive marketplace through the application of competition law is thus consistent with the objectives underlying intellectual property law.

Accordingly, competition and intellectual property law are closely linked, as intellectual property law rewards innovation by granting exclusive rights, the competition law ensures that companies do not restrict freedom to compete or exploit market power with anti-competitive consequences. However, from the traditional point of view, the situation may be different for those companies whose intellectual property assets give them a strong position in a given market to the extent enabling them to restrict the competition in that market. But it is now accepted that, since they do not necessarily, or even very often, create legal or economic monopolies, intellectual property laws do not necessarily clash with competition laws because the goods and services produced using intellectual property compete in the marketplace with other closely-substitutable goods and services.

In most instances, competition and intellectual property laws can be seen as complementary, seeking to promote innovation to the benefit of consumers and the economy. However, in situations where intellectual property owners are in a position to exert substantial market power or to engage in anti-competitive conduct, the conflict between the two becomes apparent. In these instances, owners of intellectual property rights seek to extend the scope of the right beyond that intended by the intellectual property Law. The key issue in such situations therefore, is to find out an appropriate balance between intellectual property and competition laws.

The challenge for competition authorities in such situations is, how to minimize the anti-competitive effects of Intellectual Property Rights while respecting their existence and the societal goals they are meant to promote.

In this context, it is important to mention that most competition laws contain exemptions or exceptions designed to ensure that they

do not negate rights explicitly granted by respective intellectual property laws. However, the fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Competition law is in particular applicable to agreements whereby the owner of intellectual property rights licenses another undertaking to exploit intellectual property rights.

In the increasingly knowledge-based economy, it is almost certain that competition authorities confront issues involving Intellectual Property Rights, and eventually have to take action to check the abuse of those rights. Determining the scope of IPRs is usually not a task assigned to competition authorities, but competition authorities certainly play an important role in determining the extent of market power associated with IPRs, ensuring that such power is not excessively compounded or used as leverage and extended to other unrelated markets. Hence, competition law has a role in limiting monopolistic abuses related to the exercise of IPRs, by preventing companies holding competing intellectual property rights from engaging in anti-competitive practices. The Competition Authority applies the general provisions of the Competition Law when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights.

COMPETITION ISSUES IN INTELLECTUAL PROPERTY LICENSING

Typically intellectual property is one of the components in a production process and derives value from its combination with complementary factors. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through reduction of costs and introduction of new products. Such arrangements also increase the value of intellectual property to developers of technology. By potentially increasing the expected returns from intellectual property, licensing increases the incentive for its creation and thus promotes greater investment in research and development.

In majority of cases, licensing is pro-competitive because it facilitates the broader use of a valuable intellectual property right by third parties. If an intellectual property owner licenses, transfers or sells the IP to a company or a group of companies that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the competition authorities may seek to challenge the arrangement under the appropriate provisions of the Competition Law. However, in assessing whether a particular licensing arrangement involves competition issue, the competition authorities the worldover examine whether the terms of the arrangement serve to create, enhance or maintain the market power of either the licensor or the licensee and thereby reduce competition substantially or unduly relative to that which would have likely existed in the absence of such arrangement.

Thus, Licensing arrangements raise concerns under the competition laws if they are likely to affect adversely the prices, quantities, qualities, or varieties of goods and services either currently or potentially available. Licensing agreements which, directly or indirectly, restrict the ability or incentive of any of the parties, to carry out independent R&D, may also have anti-competitive effects, because such agreements can reduce potential competition in the technology and innovation markets, which would have existed in the absence of the agreement.

RESTRICTIVE PRACTICES UNDER INTELLECTUAL PROPERTY LICENSING

The term restrictive practice signifies non-governmental measures used by companies to strengthen their position in a given market. In the context of IPRs, these practices can hamper or distort competition in given market. Competition and anti-trust laws deal with such business practices and prohibit them when it is established that they have the effect of distorting or preventing competition in a given market.

The concept of unfair competition has been also recognised under the Paris Convention for the Protection of Industrial property which

comprises not only infringement of industrial property but also all other acts which adversely affect the business relations of a person. The provisions of the Paris Convention contain a broad stipulation that any act of competition contrary to honest practices in industrial and commercial matters constitutes an act of unfair competition. These provisions affirm the foundation of fair competition as being honest practices or good morals and set out three kinds of acts which are deemed typically unlawful in international trade and therefore, must be prohibited.

UNCTAD Code of Conduct on Transfer of Technology under Chapter IV has also recognised some practices as restrictive practices. In India, the Monopolies and Restrictive Trade Practices Act, 1969, the Patents Act, 1970 and Competition Act, 2002 prohibit the use of restrictive practices in business agreements.

KINDS OF RESTRICTIVE PRACTICES

As discussed above, restrictive trade practices under the guise of intellectual property licensing can always be corrected by competition authorities. Following are some of the restrictive practices mainly used in the intellectual property licensing agreements.

1. Restrictions after expiration of Industrial Property Rights or Loss of Secrecy of Technical Know-how

The expiration of the term of patent in an intellectual property licensing agreement signifies that the knowledge and invention covered by such patent enters into public domain and any interested party can use such patent without any obligation. Where the supplier of the technology imposes any restriction after the expiration of the term of intellectual property rights, such restriction is deemed to be the restrictive trade practice.

The real problem arises in the case of package licensing, where the restrictions or payment obligations are artificially prolonged beyond the life time of the main patent by referring to the expiry of the last improvement patent

or by basing restrictions on patents actually not exploited by the licensee. The problem may also arise when the secret know-how loses its secret character before the expiration of the agreement.

2. Restrictions after Expiration of Arrangements

The use of such clauses in intellectual property licensing will generally oblige licensee to pay royalties during the entire duration of manufacture of product or the application of the process involved, without specifying any time limit. Sometimes these clauses also contain restrictions to be continued even after the expiration of the agreement, for example, restrictions on competition, restriction on Research and Development activities and specially, the obligation of the licensee to keep secret and not to make use of the confidential information even after the expiration of the life of the arrangement.

3. Restrictions on Research and Development

Such restrictions generally involve limitations on the research and development policies and activities of the licensee. The use of such clauses affects directly or indirectly the possibilities for the technological development capabilities of the licensee. Such provisions also restrict the freedom of licensee to undertake its own Research and Development programmes. These restrictions also cover such provisions which are in direct competition with Research and Development activities of the licensor.

The restrictions on Research and Development activities of licensee company have also been declared as restrictive practice under the UNCTAD Code. The provisions of the code identified such clauses as restricting the licensee from undertaking R&D activities directly to absorb and adapt the transferred technology to suit local

conditions or restriction on initiation of R&D programmes in connection with new products, processes or equipment.

4. Non-Competition Clauses

The Non-competition clause in intellectual property licensing includes the restriction on freedom of licensee company to enter into arrangements to use or purchase the competing technologies or products not furnished or designated by the company supplying technology. These clauses directly or indirectly affect the acquiring company's capability of competition. Some of the non-competition clauses which may have direct effect, oblige the licensee company not to manufacture or sell competing products or not to acquire competing technology. Non-competition clauses which may have indirect effect, oblige the licensee not to cooperate with competing enterprises or to pay higher royalties if it sells or manufactures competing products.

5. Tie-in Arrangements

Tie-in clauses in an intellectual property licensing requires the licensee to obtain raw materials, spare parts, intermediate products for use with licensed technology, only from the licensor or its nominees. These clauses also oblige the licensee to use personnel designated by the licensor. The main reason behind the use of tie-in clauses by the licensor seems to be based on the fact that it wants to preserve an exclusive right to supply necessary processed or semi-processed inputs, to maintain quality control, and to expand their profit margin.

The tie-in clauses generally result in a monopoly control of the supply of equipment and other inputs by supplying enterprises, leading to "transfer pricing", "transfer accounting" or "uneconomic output". By virtue of this exclusive position, the licensor charges higher price than for comparable equipment and other inputs

that could otherwise be obtained elsewhere. The use of tying clauses not only affects production costs through the overpricing of inputs but may have important indirect effect on the import substitution, export diversification and growth efforts of licensee.

6. Export Restrictions

Export restrictions may include conditions restricting or prohibiting the export of products manufactured by the transferred technology. These conditions restrict the export of such products to certain markets or permission to export to certain markets and requirement of previous permission for exports.

The restrictions having direct impact involve complete restriction on the export of products. In some cases the licensor imposes restrictions on licensee as to prohibit or permit the export to one or more specified countries or areas. These restrictions may also include prohibition or permission to export only specified goods.

Indirect export restrictions cover a wide range of restrictions. Amongst others, the important indirect export restrictions include the prior approval of licensor to export the goods manufactured by the imported technology, including the requirement of primary responsibility for the domestic market or higher royalties on output designated for export. Such restrictions also require the licensee to export its product on predetermined prices or quality control. In some other cases obligations are imposed to sell its product exclusively to the licensor or to export only through licensor or its designated agents.

7. Price Fixing

Price fixing clause in an intellectual property license involves the practices where the licensor reserves the right to fix the sale or resale price of the product manufactured by the imported

technology. The price-fixing clauses may cover the price determined by the licensor on goods produced with the help of transferred technology. Price-fixing may also involve horizontal price cartels between several technology suppliers or several technology recipients.

8. Restrictions on Field of Use, Volume or Territory

Restrictions on the field of use authorises licensor to restrict the use of the technology or reserve some uses of technology for self-exploitation or exploitation by third parties. The practices concerning the volume restrictions may consist of minimum production requirements or maximum output. The volume of production may also be controlled by higher royalties to be paid beyond a certain production quota or to produce by manufactured goods in a prescribed package with a certain weight. Therefore, such type of restrictions on the production may prevent the licensee company from producing enough for export.

The volume restrictions are generally used by the licensor to preserve its competitive position in a given market. Moreover, where the protected technology covers manufacturing rather than product itself, the licensee's capability to compete in world market with the transferred technology may actually be hindered by the volume restrictions.

While licensing restraints such as territorial or field-of-use limitations appear restrictive of competition, they may in fact serve pro-competitive ends by promoting licensing, and thus the dissemination and more efficient exploitation of the technology. Licensing agreements containing such restraints do not normally fall within the scope of Competition law infringements because such restraints may not be viewed as restrictions of competition as such.

9. Grant-back Provisions

The grant-back provisions provide for flow of technical information and improvements to the licensor. These provisions oblige the licensee company to transfer to the licensor of technology, free of cost, any invention or improvement made in the imported technology. The grant-back provisions may be characterised as 'unilateral', 'exclusive or non-exclusive'.

A unilateral grant-back provision establishes unilateral flow of technical information or improvement by licensee without any reciprocal obligation of the licensor. Therefore, such provisions oblige the licensee to provide to the licensor all future improvements made in the technology, on unilateral basis. While in the case of an exclusive grant back clause, though the licensee may be allowed to freely use the invention and improvement developed by it, yet the licensee is prohibited from transferring or licensing the same to the third party. Such clauses restrict the right of the licensee to license or transfer the invention developed through its own R&D activities.

The main reason behind the inclusion of grant-back provision appears to be rooted in the free of cost grant-back. Generally, the grant-back is not remunerated and thus, licensor has the advantage of securing access to all improvements made by the licensee. In this situation, the licensor receives the improved technology without sharing its risk or contributing in recipient's financial burdens. Therefore, these provisions constitute an abusive use of the licensor's dominant position and deprive the licensee of any possibility of improving its competitive position in the given market.

There are often pro-competitive reasons for including grant back provisions in an intellectual property licensing, and these generally do not pose competition concerns, especially

where they are non-exclusive in nature. They may, however, have an adverse impact on competition, where they substantially reduce the incentives of the licensee to engage in R&D and thereby reduce innovation.

10. Exclusive Sales and Representation Arrangements

Such practices prohibit the freedom of the licensee company not only to organise its own distribution system, but also prohibit the licensee company from entering into exclusive sales or representative contract with any third party, other than the licensor or a party designated by the licensor. In other words, licensee company becomes handicapped and dependent on the licensor's distribution channels.

SAFEGUARDS AGAINST UNFAIR COMPETITION UNDER MULTILATERAL AGREEMENTS

A number of multilateral agreements in the field of intellectual property deal with unfair competition in intellectual property transactions.

The Paris Convention for Protection of Industrial Property provides for efficient protection against unfair competition. Article 17 of the Berne Convention for the Protection of Literary and Artistic Works makes clear that the Convention does not prohibit the application of national administrative control - this formulation may apply to competition laws. The Paris Convention allows the grant of compulsory licences to prevent abuses resulting from the exercise of the exclusive rights conferred by patents.

WTO agreement on Trade-related Aspects of Intellectual Property Rights expressly recognise the role of competition policy in ensuring that IPRs promote economic growth and innovation. Article 40.2 of the TRIPS agreement provides that "*Nothing in this Agreement shall prevent members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition*

in the relevant market". It allows member countries "to adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices ... in the light of the relevant laws and regulations of that member ...". The repression of anti-competitive practices associated with IPRs is therefore assigned to national competition laws and policies.

In this context, the need for international cooperation has also been emphasized under TRIPs agreement. In particular, consultations among member countries are envisaged, *inter alia* through the supply of publicly available non-confidential information. In this regard, Article 8 stipulates that appropriate measures consistent with the provisions of the Agreement may be needed to prevent the abuse of IPRs or practices which unreasonably restrain trade or adversely affect the transfer of technology.

Article 40 affirms the right of member countries to specify in their legislations licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having adverse effects on competition in the relevant market and to adopt, consistently with other provisions of the Agreement, appropriate measures to prevent or control such practices which may include, for example, exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing. This article also includes a provision under which a member state seeking competition policy action against a firm under the jurisdiction of another member state can seek consultations with that member, which is required to cooperate through the supply of relevant publicly available non-confidential information and confidential information, subject to domestic law and to agreements for safeguarding confidentiality of such information.

Article 31 of TRIPs agreement lays down conditions limiting the use of patents without authorization of the IPR holder, including both uses by Governments or by third parties i.e. through compulsory licenses. However, certain exceptions from these conditions are made if the unauthorized use is permitted in order to remedy a practice determined to be anti-

competitive after judicial or administrative process.

OECD OBSERVATIONS ON COMPETITION AND INTELLECTUAL PROPERTY RIGHTS

The OECD Directorate for Financial and Enterprise Affairs Competition Committee in its document titled Intellectual Property rights, published under its series of publications entitled Competition Policy Round Tables (January 2005) made following observations on interface between competition policy and intellectual property rights —

- (1) Competition policy and intellectual property policy are interdependent and affect each other in important ways.
- (2) Competition agencies should not become involved in the IP-granting process itself, but nevertheless they can undertake a variety of measures to promote a greater consideration of competition issues by IP agencies during their IP approval procedures.
- (3) Competition agencies should consider publishing a set of guidelines describing how they will analyse licensing agreements and other conduct involving intellectual property.
- (4) When evaluating licensing arrangements, it is advisable for competition authorities to determine whether the parties relationships are vertical or horizontal.
- (5) When evaluating grant-back obligations, it is advisable for competition authorities to distinguish between severable and non-severable improvements.
- (6) Patent pools, like most licensing arrangements, are usually beneficial to competition. They may, however, occasionally reduce or eliminate it. When evaluating patent pools, it is advisable for competition authorities to determine whether the pooled technologies are complementary and essential.
- (7) An "anti-commons" problem does not seem to be a problem at present in the biotechnology industry, but the conditions that could cause one to develop do exist.

- (8) There is some disagreement about whether unilateral refusals to license IP should ever be deemed anti-competitive and, if so, how to remedy them.
- (9) Most OECD countries recognise some version of a generally accepted principle that using a patented invention for purely experimental purposes is not patent infringement.
- (10) The nature of the biotechnology industry creates unusual challenges for IP agencies, which have been criticised for issuing biotechnology patents too freely. Too many patents, in turn, may lead to the unnecessary creation of market power and a slowdown in innovation.
- (11) The nature of the biotechnology industry also presents competition agencies with substantial challenges and implies that an extra measure of caution may be warranted when contemplating intervention.

INTELLECTUAL PROPERTY AND COMPETITION : INDIAN POSITION

As mentioned above, the laws dealing with restrictive trade practices in India

are contained in Patents Act, MRTP Act and Competition Act. The relevant provisions of these legislations are discussed below :

THE PATENTS ACT, 1970

The Patents Act, 1970 under Section 140 and 141 deals with avoidance of certain restrictive conditions, and determination of certain contracts, respectively. Section 140 makes it unlawful to insert in any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or in licence to manufacture or use a patented article; or in a licence to work any process protected by a patent, a condition the effect of which may be -

- (a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit him from acquiring or to

restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any article other than the patented article or an article other than that made by the patented process; or

- (b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or
- (c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use any process other than the patented process; or
- (d) to provide exclusive grant back, prevention to challenges to validity of patent and coercive package licensing.

Section 140(2) provides that a condition of the nature referred to in clause (a) or (b) or (c) above shall not cease to be a condition merely because the agreement containing it has been entered into separately, whether before or after the contract relating to the sale, lease or licence of the patented article or process. In proceedings against any person for the infringement of a patent, it shall be a defence to prove that at the time of the infringement there was in force a contract relating to the patent and containing a condition declared unlawful by section 140. However, it will not be applicable to the plaintiff who is not a party to the contract and proves to the satisfaction of the court that the restrictive condition was inserted in the contract without his knowledge and consent, express or implied.

The provisions of Section 140 shall not affect a condition in a contract by which a person is prohibited from selling goods other than those of a particular person; validate a contract which, but for this section would be

invalid; and affect a condition in a contract for the lease of, or license to use, a patented article, by which the lessor or licensor reserves to himself or his nominee the right to supply such new parts of the patented article as may be required or to put or keep it in repair.

Section 141 provides that any contract for the sale or lease of a patented article or for licence to manufacture, use or work a patented article or process, or relating to any such sale, lease or license, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract has or have ceased to be in force, and notwithstanding anything to the contrary in the contract or in any other contract, be determined by the purchaser, lessee, or licensee as the case may be, of the patent on giving three months, notice in writing to the other party.

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

Section 33 dealing with registrable agreements relating to restrictive trade practices, provides that every agreement falling within one or more of the following categories shall be deemed to be an agreement relating to restrictive trade practices and shall be subject to registration namely :-

- (i) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (ii) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (iii) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (iv) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon

- between the sellers or purchasers;
- (v) any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of, dealings;
 - (vi) any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
 - (vii) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;
 - (viii) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;
 - (ix) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
 - (x) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
 - (xi) any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;
 - (xii) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;
 - (xiii) any agreement to enforce the carrying out of any such agreement as is referred above.

This section also empowers the Central Government to specify by notification for the time being as being one relating to a restrictive trade practice, pursuant to any recommendation made by the Commission in this behalf.

The provisions of this section have also been made applicable to agreements making

provision for services. However, an agreement falling under the categories specified in section 33 does not require registration, if the same is expressly authorized by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement.

COMPETITION ACT, 2002

The Competition Act, 2002 prohibits an enterprise or association of enterprises or person or association of persons from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) declares such anti competitive agreement to be void. Thus the Act reduces the whole agreement as 'void' if it contains anticompetitive clauses having appreciable adverse effect on competition. The Act also specifies conditions the presence of which shall be presumed to have an appreciable adverse effect on competition.

Section 3(3) provides that following kinds of agreement between any person or enterprise or association of enterprises or practice carried on, or decision taken by them, including "cartels", in relation to identical or similar trade of goods or services, to be presumed as having appreciable adverse effect on competition which –

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and
- (d) directly or indirectly results in bid rigging or collusive bidding.

It has been clarified that any agreement entered into by way of joint ventures shall not be prohibited by Section 3(1) if such

agreement increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services.

In terms of Section 3(4) of the Act, any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including - tie-in agreement; exclusive supply agreement; exclusive distribution agreement; refusal to deal; resale price maintenance; shall be treated as an agreement in contravention of section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

In any case, Section 3 entitles a person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his intellectual property rights conferred upon him under the following legislations :

1. The Copyright Act, 1957
2. The Patents Act, 1970
3. The Trade Marks Act, 1999
4. The Geographical Indications of Goods (Registration and Protection) Act, 1999
5. The Designs Act, 2000
6. The Semi-Conductor Integrated Circuits Layout-Design Act, 2000.

However, competition issue may arise where the owner of intellectual property imposes unreasonable restraints under intellectual property licensing agreement.

CONCLUSION

The evaluation of anti-competitive effects of intellectual property licensing is a challenging task for competition authorities. The licensing of intellectual property which on the one hand benefits the competitive process by diffusing innovation and helping innovators to capture their rewards, thereby increasing the incentives for others to innovate as well, can also serve to cartelize an industry or to increase

the market power of a single licensor or to give rise to other anti competitive practices. So the challenge for competition authorities is to determine whether a particular agreement is likely to promote or distort competition.

The role that competition authorities play in monitoring excessive exploitation of market power in connection with the exercise of intellectual property rights is particularly important in the review of the anti-competitive effects of licensing agreements containing exclusivity or restrictive clauses.

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REFORMS IN COMPANY LAW — GLOBAL TRENDS

ALKA KAPOOR*

INTRODUCTION

The company form is a brilliant legal invention. It is a legal person that is distinct from, and greater than, the shareholders, officers and employees who give the company daily life. Little could those who gave birth to this legal fiction have imagined the dominance that companies would come to enjoy in national economies and in global markets.

Not only is the company brilliant in its conception, its success can be attributed to the ongoing endeavour to expand and adapt the initial idea to a world of remarkable changes. The governments the world over recognize the importance of companies as an engine for economic growth. It is widely acknowledged that companies have become the centre of or even the driving force behind the emergence and growth of modern global economy. Therefore, to ensure that companies continue to play their role as an engine for economic growth, there is an international drive to review, reconstruct and recognise the law governing companies so to ensure that corporate activities function within a modern, and forward looking regulatory framework that supports and sustains the economic growth.

The reform in Company law is in varying stages in several countries besides India viz. United Kingdom, Australia, Canada, Hong Kong, Singapore, Malaysia and South Africa. The driving forces behind company law reform, throughout these countries, are much the

same: each jurisdiction recognizes the need for stronger corporate governance and seeks to address the implications of globalization and international competition, the rapid growth in the number of shareholders of companies as well as their increased sophistication, the emergence of new industries and the developments in the financial markets and in modern technology.

Growing emphasis on good corporate governance, corporate social responsibility and good corporate citizenship is predominantly influencing company law reforms the world over. Simultaneously, Company Law reforms the world over are focusing on transparency through enhanced disclosures and increased accountability on the part of corporate management while at the same time providing a flexible regime for small and medium businesses. Modernization of company law has in fact become a part of the drive to facilitate enterprise, enhance the attractiveness of the country as a preferred destination to do business and foster business competitiveness. The overall objective is to achieve a simple, consolidated and accessible company law. Additionally, the reforms aim at cutting back on overly regulatory intervention thus providing companies with operating flexibility to function in conformity with changing environment.

The litmus test lies in the harmonization of company law with that of global standards so as to achieve global competitiveness.

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BACKGROUND

COMPANY LAW REFORMS IN UNITED KINGDOM

Company Law in U.K. is currently undergoing major reform under the Company Law Review (CLR), which seeks to modernize the legal framework in which companies operate. In 1998, the Government commissioned an independent Company Law Review Group, comprising experts, practitioners and business people to take a long-term fundamental look at core company law and to see how it could be brought up to date. The CLR conducted a thorough review and assessment and provided the essential blue print in the form of a Report in 2001. As a response to the final Report of the Company Law Review, the Government brought out White Paper on Company Law 2002, introducing which the then Competition Minister, Melanie Johnson stated "Our current company law is creaking with age and needs to modernize and reform. A thorough overhaul is needed to make the law clear and accessible".

The White Paper 2002 evoked huge response. Taking into consideration, the suggestions received, the Department of Trade and Industry again released the UK White Paper on Company Law, 2005 which contained draft of the Companies Bill, and invited views. Consequently, New Company Law Reform Bill has been introduced in Parliament in May, 2006 for discussion and approval.

New Company Law Reform Bill

Introducing the Bill, Lord Sainsbury, Parliamentary Under-Secretary of State at DTI, reviewed the history of company law in Great Britain and said how important it is "to constantly update company law in response to changes in the way companies do business".

On the Bill, Alun Michael, Minister for Industry and Regions said, "The Company Law Reform Bill is the result of extensive collaboration between all those with an interest in company law. I believe that our proposals on narrative reporting represent consistent and balanced policy in light of our recent consultations and our discussions with interested parties".

"Our aim has always been to encourage meaningful strategic, forward looking information to assist shareholder engagement while avoiding disproportionate burdens on business, in line with our better regulation agenda".

The Bill introduces wide ranging reforms in a number of areas which have an impact on directors, auditors and shareholders of private, public and quoted companies and is expected to come into force in Autumn 2006 or Spring 2007 (except the provisions relating to takeovers which are likely to come into force earlier).

The Bill reflects many of the recommendations of the Company Law Review Group which reported on the modernisation of company law in 2001. The Bill also reflects the consultation process which followed publication of a White Paper in March 2005.

The Bill has four key objectives:

- to promote shareholder involvement in companies and long term investment culture;
- to make company law easier to understand and use, particularly for small companies i.e. adoption of 'think small first' approach;
- to make it easier to set up and run a company and to preserve the UK's reputation as a favourable jurisdiction in which to incorporate;
- to make it easier to amend company law so that it can best reflect the requirements of the evolving business environment.

To achieve these aims, the Bill amends and restates many of the provisions of the Companies Act 1985. It also codifies case laws in certain areas. The most significant changes proposed under the Bill are outlined below:

DIRECTORS

Codification of directors' general duties

At present, directors' general duties are derived from the common law and equity. They are not set out in statute. The law on directors' duties is complex. As a result, many directors

either are not fully aware of their duties or do not understand what is required to satisfy them. The duties of directors' as codified under the Bill include -

Duty to act within powers

Directors are under a duty to act in accordance with the company's constitution and to exercise their powers only for the purposes for which they were conferred.

Duty to promote the success of the company

This duty has two elements:

- (i) a director must act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole;
- (ii) in doing so, the director is required to take into account the following factors:
 - (a) the likely long term consequences of any decision;
 - (b) the interests of the company's employees;
 - (c) the need to foster relationships with customers, suppliers and others;
 - (d) the impact of the company's operations on the community and the environment;
 - (e) the need to maintain a reputation for high standards of conduct;
 - (f) the need to act fairly as between members of the company.

Duty to exercise independent judgment

A director must exercise independent judgment and should limit his discretion unless acting in accordance with an agreement duly entered into by the company or in a way authorised by the company's constitution.

Duty to exercise reasonable care, skill and diligence

A director must exercise reasonable care, skill and diligence. A director will be expected to display a higher level of skill than is reasonably expected of him or her, and the skill he or she actually possesses. The more

skilled and knowledgeable a director becomes, the more the law expects of him or her.

Duty to Avoid conflict of interest

A director must avoid a situation in which he or she has, or may have, a direct or indirect conflict of interest with the company. The duty is not infringed where:

- (i) the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- (ii) the matter has been authorised by the directors.

This second limb is new. Under the existing rules the conflict requires shareholder approval. However, under the proposed Bill, the duty is not infringed if a conflict is authorised by the Board of directors. The board of a public company may authorise conflicts only if the company's articles of association allow it to. For public companies this is an "opt-in" rule, i.e. the directors can only authorise conflicts without reference to shareholders if the company's constitution specifically permits it.

Duty to declare interest in transactions

The existing rules requiring directors to declare any direct or indirect interests in transactions involving the company have been restated, excepting interests which cannot reasonably be regarded as likely to give rise to a conflict.

Duty not to accept benefits from third parties

A director must not accept a benefit from a third party conferred by reason of (i) his being a director, or (ii) his doing (or not doing) anything as a director.

New procedure for derivative claims by shareholders for breach of directors' duties

Under the common law, it is possible for a shareholder to bring an action on behalf of the company for breach of directors' duties in certain circumstances. This is known as a derivative claim. At present, it is very difficult for shareholders to bring derivative claims.

The Bill places the common law rules on derivative actions onto a statutory footing for the first time, with new rules to allow

shareholders to bring claims on behalf of the company where the board does not take appropriate action. However, these claims can only be enforced for negligence, default, breach of trust by the directors and require the permission of the court before they can be brought.

The Bill also contains safeguards to protect companies against abusive claims.

ACCOUNTS AND AUDITORS

Clarification of provisions relating to accounts and reports

The Bill amends and restates the provisions of the Companies Act 1985 relating to accounts and reports. The most significant of changes proposed are:

- a reduction in the time limit for companies to file their annual accounts- for private companies the time limit has been reduced from 10 months to 9 months after the end of financial year; and for public companies it has been reduced from 7 months to 6 months after the end of financial year;
- new requirements for quoted companies to publish their annual accounts and reports and preliminary results on a website.

Limiting auditor liability

The Bill permits a company to limit its auditor's liability by entering into a "liability limitation agreement" with the auditor, to be approved by the company's shareholders. An agreement can only apply to the audit for one year and limit an auditor's liability to an amount that is "fair and reasonable in all circumstances". If an agreement purports to limit an auditor's liability to a lesser amount, it takes effect as if it limits the auditor's liability to the amount that is fair and reasonable.

CAPITAL MAINTENANCE AND SHARES

The Bill contains a number of provisions aimed at simplifying the existing law in this area, particularly for private companies. These include:

Abolition of prohibition on private companies giving financial assistance

The Bill abolishes the prohibition on private companies giving financial assistance for the purpose of acquiring shares in itself. However, a private company that is a subsidiary of a public company will still be prohibited from giving financial assistance for the purpose of acquiring shares in its parent public company.

The prohibition remains on public companies giving financial assistance.

New capital reduction procedure for private companies

The Bill introduces a simplified procedure for capital reduction by private companies. Under this new procedure, a private company may reduce its share capital by passing a special resolution supported by a solvency statement from the directors.

New rules on redemption of redeemable shares

At present, the terms and conditions for redemption of a company's redeemable shares must be set out in its Articles. The Bill replaces this regime with provisions that allow the directors of public and private companies to determine the terms and conditions of redemption of redeemable shares if they are authorised to do so by shareholders' resolution or under the company's Articles.

Other related matters

Other changes introduced by the Bill with respect to share capital include:

- abolishing the requirement for companies to set a maximum authorised share capital
- introducing a simplified procedure allowing companies to "redenominate" their share capital (ie convert it from one currency to another).

TAKEOVERS

The Bill contains provisions implementing the European Takeover Directive.

Since 1968, takeovers in the UK have been supervised by the Panel on Takeovers and

Mergers. The Panel administers the rules contained in the non-statutory City Code on Takeovers and Mergers. To bring the UK takeover regulation at par with requirements of the European Union (EU) Takeover Directive, the Bill places the takeover regime on a statutory footing for the first time.

In summary, the Bill empowers the Panel to:

- make rules on takeovers
- make rulings and give directions, and to enforce them through the courts
- impose sanctions on those who breach the rules on takeovers.

The Bill also creates new criminal offences for breaches of the rules about bid documents (i.e. offer documents prepared by bidders and responses from target companies).

MEETINGS AND RESOLUTIONS

Extraordinary resolutions and elective resolutions will be abolished. There will be only ordinary, special and written resolutions. Private companies may pass resolutions either as written resolutions or at meetings. Public companies must hold meetings.

Written resolutions will no longer need every member to sign them and will be effective if signed by members holding sufficient votes to pass the resolution at a meeting.

It will no longer be necessary to serve copies of written resolutions on the auditors.

OTHER ISSUES

Changes to general company administration provisions

The Bill introduces a range of measures relating to company administration particularly of private companies keeping in view the stated intention of reducing the regulatory burden on private companies.

The measures proposed are as below:

- There will be separate model Articles for private companies. These will be shorter and simpler than the existing Table A model Articles.
- A company's objects will be taken to be unrestricted unless they are

expressly restricted (and any restrictions will be set out in the company's Articles).

- Private companies will not need to hold an AGM unless they choose to do so.
- All resolutions of private companies will be capable of being passed in writing except resolutions to remove a director or auditor.
- Private company written resolutions will no longer require unanimity (an ordinary resolution will be capable of being passed in writing by simple majority of the total voting rights of eligible shareholders and a special resolution by a 75% majority).
- A company will be able to change its name by special resolution or by any other means provided for in its Articles.
- If shareholders approve, companies will be able to communicate with them electronically.

New Procedure for Amending Company Law

To ensure that company law remains up-to-date and best reflects the requirements of the evolving business environment, the Bill introduces measures to allow company law to be changed by a special type of secondary legislation. Subject to certain restrictions and appropriate consultation with interested parties, "company law reform orders" will be capable of being used to amend primary legislation "in relation to companies".

REFORMS IN SINGAPORE'S COMPANY LAW

The Companies Act of Singapore was first enacted in 1967. It has been subjected to numerous piecemeal amending legislations effected from time to time. In view of technological advancements, globalisation and the regional economies undergoing massive changes, the Government saw that a major revamp of the Companies Act was due.

Hence, the Company Legislation and Regulatory Framework Committee (CLRFC) was formed in December 1999. It was asked to modernise Singapore's company and business regulatory framework and to recommend one which will promote a competitive economy.

The Committee delivered its final report in early October 2002 and all its 77 recommendations were accepted by the Government. Since then the Singapore Companies Act has been amended three times to give effect to the recommendations of the CLRFC, the major being Amendment Acts of 2004 and 2005.

SINGAPORE COMPANIES AMENDMENT ACT 2004

The major reforms introduced in the Singapore Company Law, by the Amendment Act 2004 (CA 2004) include the following:

Limited Partnership and Limited Liability Partnership - New Business Structures

Two additional business structures, namely limited partnerships and limited liability partnerships, have been introduced to widen the range of business vehicles in Singapore. The introduction of these structures in Singapore will give market players more options in deciding how they want to structure their businesses.

Incorporation and Maintenance Simplified for Private Companies

Several measures have been implemented to lower the costs of doing business in Singapore and to create a conducive business environment for entrepreneurs. Corporate maintenance requirements for private companies have also been simplified as below:

- One-director private companies: To encourage more entrepreneurs, the incorporation requirement for private companies has been relaxed by allowing one-director private companies. The single director and shareholder can be the same person.
- Statutory audit requirement: The statutory audit requirement for dormant companies and exempt private companies ("EPCs"), has been removed, subject to appropriate safeguards.

Companies need not prepare consolidated accounts if not required to do so by Singapore Financial Reporting Standards (FRS)

The Companies Act requires that statutory accounts be prepared in accordance with FRS.

FRS 27 *Consolidated Financial Statements and Accounting for Investments in Subsidiaries* exempts wholly-owned and virtually owned (90% or more of the voting power) subsidiaries, regardless of their parents' countries of incorporation, from preparing consolidated accounts provided that (i) their parents publish consolidated accounts, and (ii) for virtually-owned subsidiaries, they have obtained the approval of their minority interests.

Under the "improved" FRS 27, the exemption from preparing consolidated accounts has been extended to subsidiaries with less than 90% of voting power, provided certain conditions (e.g. informing other owners about the subsidiary not presenting consolidated financial statements and they do not object to it) are met.

Directors accorded protection for reasonable reliance on advice and information from professionals and experts

Directors may rely on reports, statements, financial data and other information prepared or supplied, and on professional or expert advice given by any of the following persons :

- an employee of the company, whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- a professional adviser or an expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence; and
- any other director or any committee of directors upon which the director did not serve in relation to matters within that other director's or committee's designated authority.

Notwithstanding that, such reliance is warranted only if the director (i) acts in good faith, (ii) makes proper inquiry where the circumstances necessitate the need for inquiry and (iii) has no knowledge that such reliance is unwarranted.

Public companies to review the fees, expenses and emoluments of their auditors

Public companies shall undertake a review of the fees, expenses and emoluments of their auditors if the total amount of the fees paid to the auditors for non-audit services in any financial year exceeds 50% of the total amount of fees paid to the auditors in that financial year. The outcome of the review shall be sent to all persons entitled to receive notice of general meetings of the companies.

This requirement does not prohibit the provision of non-audit services by the auditors but serves to ensure that the independence of the auditors are not compromised during the process.

Statutory reports and other documents can be distributed electronically

With CA 2004, statutory reports can now be electronically distributed to members of the company. Similarly, notices of meetings and other documents can be electronically transmitted to members, officers or auditors of the company.

The member, officer, or auditor must however agree to the method of electronic transmission, which could take the form of either:

- sending the notice or document using electronic communications to the current e-mail address of the recipient; or
- publishing the notice or document on a website which is accessible by the recipient.

Other amendments

Other amendments in CA 2004 include:

- Companies are statutorily conferred with all the powers of a natural person. The *ultra-vires* doctrine is abolished, except in specified circumstances;
- Entrenching provisions, which limit the majority rights, may be included in the memorandum and articles of companies;

- Companies are no longer required to display their names outside their offices;
- Companies are no longer required to notify the Registrar of their intention to close their register of members;
- Investors are deemed to have direct relationship with issuers for a wider range of securities;
- Trust assets of Central Depository (Pte) Limited (CDP) are statutorily shielded from CDP's creditors in the event of insolvency.

SINGAPORE COMPANIES AMENDMENT ACT 2005

The Companies Amendment Act, 2005 (CA 2005) is effective as of January 30, 2006 and incorporates changes primarily to the share capital and the capital maintenance regime including:

- abolishing par value (nominal value) for shares and authorised capital;
- making transitional provisions for all companies with a share capital;
- allowing companies to give financial assistance to third parties in specified circumstances;
- allowing companies to reduce their share capital without a court order;
- allowing redemption of redeemable preference shares out of capital or profits;
- allowing companies to buy back shares out of capital or profits;

The key changes introduced are discussed below in brief :

Solvency statement

Under the new section 7A, the requirement of a solvency statement has been introduced. The solvency statement will include the directors' opinion that:

1. with regard to the company's situation at the date of the statement, there is no ground on which the company could then be found to be unable to pay its debts;

2. the company is able to pay its debt at the end of 12 months from the date of the solvency statement. If the company intends to commence liquidation within 12 months from the date of the solvency statement, this period extends to the end of 12 months from the date of commencement of liquidation; and
3. the value of the company's assets is greater than its liabilities (including contingent liabilities) at the date of the statement and immediately after the transaction.

The solvency statement must either be in the form of a statutory declaration by directors, or accompanied by a report from the auditors of the company that the statement is not unreasonable given all the circumstances.

Redemption of redeemable preference shares

The existing Companies Act provides that any redemption of redeemable preference shares must be made out of distributable profits. Under CA 2005, redemption of such shares can be funded out of capital if the directors sign a solvency statement.

Authorised share capital

Currently, all companies are required to state their authorised share capital in the memorandum and articles of association. The concept of authorised share capital and the associated legislative requirements have been removed by CA 2005.

Share buy-back

At present, share-buy-back must be made out of a company's distributable profits. CA 2005 introduces provisions that allow share-buy-back to be funded out of distributable profits as well as capital as long as the company is solvent.

Treasury shares

At present, repurchased shares must be cancelled and the amount by which the company's issued share capital is diminished on cancellation of the shares repurchased

must be transferred to a capital redemption reserve.

A new section introduced in CA 2005 provides that repurchased shares may be cancelled or otherwise held by the company in treasury (as 'treasury shares'). While held in treasury, their voting and other rights, including dividend rights, are suspended.

The number of shares that can be held as treasury shares is limited to 10% of the total number of shares of the company. Further, any gains derived from the disposal of treasury shares will not be distributable to shareholders.

Other procedural changes not affecting the financial statements

Capital reduction process that does not require court sanction

At present, a company may only reduce its share capital according to the procedures set out, which involves the passing of a special resolution and confirmation by the court. An alternative capital reduction process has been introduced in CA 2005 that requires shareholders' approval by special resolution as well as a solvency statement by all directors of the company. No court sanction is required. However, the company must meet publicity requirements as prescribed. The capital reduction process is also susceptible to creditor challenge in court.

No solvency statement is required if the reduction of share capital is solely by way of cancellation of any paid-up share capital which is lost or unrepresented by available assets.

Situations where a company may provide financial assistance for the acquisition of its shares

Companies are prohibited from providing financial assistance in connection with acquisitions of its shares or shares of its holding company.

Amendment Act introduces new exceptions to the prohibition. Companies are allowed to provide financial assistance to third parties in connection with acquisition of the company's shares or shares of its holding company if the amount of financial assistance does not exceed

10% of the aggregate of the total paid-up capital and reserves of the company. Before financial assistance is granted, a solvency statement by all directors of the company must be made.

Simplified merger and amalgamation process that does not require court sanction

At present, companies may only be amalgamated following court approval of the amalgamation. However, CA 2005 provides for a voluntary amalgamation process without the need for a court order.

COMPANY LAW REFORMS IN HONG KONG

Way back in 1984, a Standing Committee on Company Law Reform (SCCLR) was formed in Hong Kong to advise the Financial Secretary on amendments to the Companies Ordinance and other related ordinances.

The SCCLR's Report, which was published in February 2000, made 62 recommendations for reform. These have been divided into four phases, namely Phases I to IV, for follow-up action.

All the recommendations in Phase I were enacted into law through the Companies (Amendment) Ordinance 2003. Some of the recommendations in Phase II (corporate governance-related) and III (non-corporate governance issues) were included in the Companies (Amendment) Ordinance 2004.

To give effect to the remaining suggestions, in Phase IV, the Companies (Amendment) Ordinance 2005 was issued in October 2005 which has come into effect from January 1, 2006.

A brief of the changes made through the three ordinances is enumerated below:

HONG KONG COMPANIES (AMENDMENT) ORDINANCE 2003

Amendments affecting Shareholders and Shareholders' Rights

For single member companies:

- One member present in person or by proxy shall be a quorum of a meeting of the company.

- Terms of an oral contract shall be set out in a written memorandum within 7 days after the contract is made by a company with its sole member who is also a director unless the contract is entered into in the ordinary course of business of the company.

For enhancing shareholders' rights:

- Removal of director shall be by ordinary resolution, i.e. the proposal is to be accepted by a simple majority (more than 50%) of those members present and entitled to vote at the general meeting. A related special notice shall be required.
- The memorandum and articles of association of the company shall have effect as a contract under seal between (a) the company and each member; and (b) between a member and each other member. This is to enhance the personal right of member to sue to enforce the terms of the Memorandum and Articles of Association.
- Member(s) who hold(s) not less than one-fortieth of the total voting rights or not less than 50 members holding shares on which there has been paid up an average sum of not less than \$2,000 per member is/are entitled to requisition for a resolution to be considered at the company's general meeting. This is to reduce the threshold for shareholders' proposals and facilitate the shareholders to express their views.
- Right of dissenting shareholders of public company with respect to certain alterations in the memorandum of association to resort to court have been removed.

Amendments affecting Directors, Officers and Auditors

- Statutory definition of "shadow director" included as – "a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act".

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- Directors shall be vicariously liable for acts and omissions of their alternates. This is to clarify the agency relationships between a director and his alternate.
 - Expansion of provisions regarding prohibition of loans to directors to include modern forms of credit.
 - Having a sole director shall be permitted for private companies.
 - A person may be nominated as “Reserve Director” by private company with one member who is also the sole director.
 - The sole director shall not also be the secretary of the company.
 - The private company having only one director shall not have as secretary a body corporate, the sole director of which is the sole director of the private company.
 - Company may insure/indemnify directors, officers and auditors against liability in specified circumstances.
 - Winding up provisions:
 - Amount of minimum debt for which a petition for winding up may be presented increased from \$5,000 to \$10,000.
 - The time limit for delivery of certificates of shares, debentures and debenture stocks by a public company reduced from 2 months to 10 business days.
 - Integrated Companies Registry Information System (ICRIS) to be implemented through a 2-phase program:
 - To establish a fully computerized system for filing, processing and disseminating information.
 - To enable faster data entry and electronic searching by public.
 - To provide fast, inexpensive and high quality services to public.

Simplified Procedures and Technical Amendments

- Company limited by guarantee with a share capital no longer allowed.
- Court approval regarding the reduction of capital shall no longer be required where the reduction consists of a re-designation of the par value to a lower amount, subject to satisfaction of certain conditions.
- The requirement for a company to enter the occupations or descriptions of members of company in the register of members removed.
- Amendment of charge registration system.
 - Certificate issued by the Registrar to no longer state the amount secured by the charge.
 - Application for release of charges shall be made under specified form to be accompanied by required evidence.

HONG KONG COMPANIES (AMENDMENT) ORDINANCE 2004

Companies (Amendment) Ordinance 2004, introduced major reforms in prospectus regime besides aiming at modernizing the registration regime of companies.

Amended prospectus regime

Safe Harbours

The Amendment Ordinance introduces various safe harbours by exempting certain offers from the prospectus requirement. The exempted offers include the following:

- an offer in respect of which the total consideration payable does not exceed HK\$5 million;
- an offer to not more than 50 persons;
- an offer to “professional investors” including banks, financial institutions, insurance companies and high net worth individuals;
- an offer made in connection with an invitation to enter into an underwriting agreement;
- an offer in connection with a takeover

or merger or a share repurchase in compliance with the Codes on Takeovers and Mergers and Share Repurchases;

- an offer of shares in a company to any or all of the shareholders for no consideration or as an alternative to a dividend or other distribution to all shareholders of a particular class;

The exemptions above apply to documents offering shares in or debentures of companies incorporated in or outside Hong Kong.

Awareness Advertisement

The Amendment Ordinance expands the range of extracts from or abridged versions of prospectuses which may be lawfully published by way of advertisement. For instance, it is permissible to publish an “awareness advertisement” which must contain the following particulars:

- a statement that the advertisement is issued by the company to which the advertisement relates;
- a warning statement that potential investors should read the prospectus before deciding whether or not to invest in the shares or debentures; and
- a statement that the advertisement does not constitute an offer or an invitation to induce an offer by any person to acquire, subscribe for or purchase the shares or debentures.

“Dual Prospectus” Structure

The new law permits successive offers of securities made by the same issuer or group of issuers on substantially the same basic information, terms and conditions. Under the Amendment Ordinance, a prospectus may consist of more than one document, i.e. a programme prospectus and an issue prospectus, each of which may be updated and amended by an addendum. The “programme prospectus” contains such relevant information as the issuer of the document thinks fit (but excluding the price, or any formula for calculating the price, of the shares or debentures to which the prospectus relates). The “issue prospectus” contains relevant

information as is not already contained in the “programme prospectus”. The programme prospectus is valid for 12 months from the date of issue or until the publication of the next annual report and accounts of the issuer, whichever is the earlier.

Removal of Regulatory Discrepancies

A number of regulatory discrepancies between Hong Kong companies and overseas companies are removed by the Amendment Ordinance. These amendments include:

- a Hong Kong company whose shares are listed on the Hong Kong Stock Exchange is no longer required to send a copy of a prospectus to all its shareholders; and
- the prospectus of overseas companies offering securities for sale or subscription are subject to the requirements that are substantially the same as those applicable to Hong Kong companies.

HONG KONG COMPANIES (AMENDMENT) ORDINANCE 2005

The primary purpose of this Amendment Ordinance is to broaden the meaning of subsidiary under the Hong Kong Companies Ordinance, to enable Hong Kong incorporated entities to comply fully with the International Financial Reporting Standard (IFRS) based financial reporting standards adopted in Hong Kong.

Extending the definition of subsidiary to “subsidiary undertakings”

The Amendment Ordinance introduces a new concept of a “subsidiary undertaking”, with “undertaking” being defined as:

- a body corporate;
- a partnership; or
- an unincorporated association carrying on a trade or business, whether for profit or not.

Thus, the term “subsidiary undertaking” includes both those entities currently regarded as subsidiaries and other controlled non-corporate entities which are currently excluded

from the definition. The Amendment Ordinance also introduces a corresponding new term "parent undertaking".

New test concerning the right to exercise dominant influence

An additional test has been included to assess the existence of a parent subsidiary relationship. The test is whether one entity (the parent) has the "right to exercise dominant influence" over another entity (the subsidiary). It states that an undertaking shall not be regarded as having the right to exercise dominant influence unless it has a right to give directions with respect to operating and financial policies of another undertaking, with which the directors are, or a majority of the directors is, obliged to comply, whether or not they are for the benefit of that other undertaking. The existence of this right establishes a parent subsidiary relationship.

Modified test to determine who controls the Board of Directors

The control over the composition of the board of directors of an unincorporated undertaking shall be determined by reference to the fact as to who can control the majority of the voting rights exercisable by the directors, rather than by reference to the appointment of the majority of the directors. As with the "right to exercise dominant influence" test, this test is consistent with the accounting concept of having the power to control the decisions of the board.

New provisions concerning the requirement to give a true and fair view

The Amendment Ordinance has new provisions which strengthen the requirements for the entity to produce financial statements, either at a company level, or at a group level, which give a true and fair view. However, as a practical measure, it is provided that Directors should provide extra disclosure and/or may depart from the Companies Ordinance requirements if this is necessary in order for the financial statements to give a true and fair view.

Thus, directors may depart from Companies Ordinance requirements to the extent that the

departure is necessary for the financial statements to show a true and fair view. This will facilitate compliance with Hong Kong Financial Reporting Standard (HKFRSs) at all times, irrespective of whether the lawmakers have kept pace with the latest developments in IFRSs and HKFRSs.

REFORMS IN PAKISTAN'S COMPANY LAW

The corporate sector in Pakistan is regulated primarily by The Companies Ordinance, 1984 ("the Ordinance"). The Ordinance was promulgated to "consolidate and amend the law relating to companies and certain other associations for the purpose of healthy growth of the corporate enterprises, protection of investors and creditors, promotion of investment and development of economy and matters arising out of or connected therewith".

In the past twenty two years, since the Ordinance was promulgated, the Pakistan economy, particularly the corporate sector, has considerably evolved and expanded. Two significant developments in this regard are (a) the growth of non-banking finance companies and (b) the introduction of single member companies. The Ordinance had been amended *inter alia* in 1991, 1999 and 2002/3 to cater to these and other developments. However, these amendments had been piecemeal and narrowly focused, often resulting in an overlap in the provisions of the Ordinance.

It was, therefore, felt necessary to carry out a holistic examination of the Ordinance in order to assess: (a) the relevance of its objectives in the current economic environment; (b) the adequacy of its provisions, not only for the achievement of its avowed objectives, but for the creation and maintenance of a liberal, deregulated and efficient corporate sector; (c) its capacity to allow for the balanced growth of corporate enterprises, particularly small and medium enterprises; and (d) the extent of its harmonization with international best practices.

To undertake this essential exercise, the Securities and Exchange Commission of Pakistan ("the SECP") established the Corporate Laws

Review Commission (“the CLRC”) in November 2005 under the able leadership and guidance of a retired Chief Justice of Pakistan and comprising, *inter alia*, eminent members of the legal, business and accountancy community, to examine, assess and ultimately amend the Ordinance or to draft a new law for the regulation of the corporate sector, as might be necessary.

Against this backdrop, the CLRC has issued a Concept Paper in May, 2006 which aims to formulate a conceptual framework for the development and regulation of the corporate sector in Pakistan.

The recommendations made by CLRC, which are open for public debate and views, are summarized below :

Classification of Companies

The law may continue to classify companies as public (whether with limited or unlimited liability) and private. However, the cap of 50 members in respect of private companies may be removed and the category of public unlisted companies may be abolished. The factors distinguishing small, medium and large companies may be provided in the law and the test for determining the category within which a company falls may also be specified.

Relationship between Companies

This area has been given special consideration by the CLRC. It is strongly recommended that the formation of groups of companies may be encouraged and corresponding changes be made in tax laws (by way of providing incentives) and in the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 to facilitate such groups. It is further recommended that companies may not be considered as associated with each other simply by virtue of a single common director and instead the UK model of dominant influence be adopted.

Formation and Conversion of Companies

It is recommended that the administrative procedures for the formation of a company may be streamlined and simplified and e-filing be allowed in addition to traditional filing. Any

party aggrieved in this regard, may file objections with the SECP within a specified period. It is further recommended that companies may be allowed to convert from one form to another with minimum procedural requirements and the method prescribed in the UK Reform Bill may be adopted in this regard.

Raising and Maintenance of Capital

It is recommended that the requirement of authorized capital may be abolished. Although the CLRC recognized the objections to the concept of par value, raised particularly in the Jenkins Committee Report 1964, it recommended that the concept may be retained given its universal acceptance. However, the procedures for issuance of shares at a premium or at a discount may be streamlined in order to facilitate the corporate sector. Further, companies may be allowed reasonable autonomy in determining the rights attached to their equity and other instruments and putting into place the necessary checks and balances.

Management and Governance

The most significant recommendation in this area is the incorporation of the concept of directors’ fiduciary duties as well as the business judgment rule, which would allow directors to enjoy immunity from court intervention in respect of decisions which they have taken in the best interests of the company. In order to introduce greater flexibility in the exercise of directors’ powers, it is further recommended that the application of this rule may be extended to the exercise of directors’ powers beyond their meetings (i.e. in committees of directors, etc.). In addition, small companies (selected or identified according to a criteria prescribed in law) may be allowed to determine matters through “elective resolutions”.

Audits, Accounts and Corporate Disclosures

In this regard the CLRC has recommended that the power of the SECP to penalize companies for offences in relation to books of accounts may be reassessed. The requirements of disclosures may be amended and made more meaningful for public companies, whereas they may be relaxed for private and small companies.

It is further recommended that accounts of all listed and unlisted companies may be prepared according to International Accounting Standards.

Prevention of Mismanagement and Oppression

In order to minimize oppression of the minority shareholders, it is recommended that the jurisdiction to hear complaints filed by members of a company against oppression and mismanagement should be with the SECP rather than the High Court. It is further recommended that requirement of minimum share capital holding for making a complaint should be reduced from 20% to 10%.

Mergers and Acquisitions

Taking the view that the facilitation of mergers and acquisitions is instrumental in enabling groups of companies to form and for business to achieve economies of scale, the CLRC has recommended that contractual mergers may be allowed subject to the subsequent approval of shareholders (by special resolution). Any aggrieved party may file his or her objections before the SECP within a specified time. It is further recommended that acceptable methods of valuation may be identified and aggrieved parties may be given an opportunity to approach the SECP in this regard as well.

Restructuring and Liquidation

Placing equal emphasis on rehabilitation of companies besides their speedy winding up, CLRC has recommended that both subjects may be included in the core company law. It also recommended that the procedures for winding up may be streamlined, simplified and made more expeditious.

Regulation and supervision

In respect of offences, the CLRC has endorsed the recommendation of the Irani Report whereby companies may adopt a system of self regulation with penalties to follow if the system fails to deliver. It has also endorsed the recommendation that offences in relation to which investigations may be carried out may be specified in the law. However, the CLRC has not favoured the formation of special

tribunals to hear company matters. Rather, it has recommended that a balance may be struck between the powers of the SECP and the High Court in order to ensure that only the more complex matters are referred to the High Court. The CLRC has also recognized and endorsed the usefulness of ADR methods for dispute resolution.

Summing up

Not only the countries discussed in preceding paragraphs, but several other countries are also in the similar process of review of their Company Law. The reform and revision of the basic legal framework for corporate entities is seen as an essential measure to achieve sustainable economic reform and relates to simplification of registration process for companies, specifying directors' duties, providing a flexible regime for small and private companies, making stringent disclosure norms for companies with larger public interest, enhancing shareholder democracy, simplification of audit requirements for small companies, recognition of e-communication and e-recording, and making the whole process compatible so as to meet future needs, challenges etc.

In tune with the international developments, the Government of India has also taken up a massive exercise for a comprehensive revision of the Companies Act 1956 on the basis of a broad based consultative process. As a first step in this process, a Concept Paper on Company Law drawn up in the legislative format was exposed on the electronic media so that all interested could not only express their opinion on the concepts involved but may also suggest formulations on various aspects of Company Law. This laudable step evoked considerable response.

Subsequently, the proposals contained in the Concept Paper and suggestions received were put to merited evaluation by an independent Expert Committee viz. Dr. J.J. Irani Committee. The objective of this exercise is perceived as the desire on the part of the Government to have a simplified compact law that would be able to address the issues arising out of changes taking place in the national and international scenario, enables adoption

EMERGING TRENDS IN CAPITAL MARKETS — THE VISION FOR FUTURE

SONIA BAIJAL *

INTRODUCTION

The securities market allows people to do more with their savings, ideas and talents than would otherwise be possible. The people's savings are matched with the best ideas and talents in the economy. The securities market providing linkage between the savings and the preferred investment across the entities, time and space, mobilizes savings and channelises them through securities into preferred enterprises. It also enables all individuals, irrespective of their means, to share the increased wealth provided by competitive enterprises. The securities market allows individuals, who can not carry an activity in its entirety within their resources, to invest in that activity carried on by an enterprise and share the fruits of profit generated by such company. It also provides a market place for purchase and sale of securities and thereby ensures transferability of securities – a basis for the joint stock enterprise system. Infact, the existence of the securities market satisfies the needs of the enterprises for capital and of investors for liquidity, simultaneously.

The liquidity the market confers and the yield promised or anticipated on security encourages people to make additional savings out of their income and earnings. The availability of various financial instruments to park money in the securities market helps people to diversify risks among many enterprises, thereby increasing the likelihood of long term overall gains.

CAPITAL MARKETS – EMERGING SCENARIO

The capital markets the world over in general, and in India particularly, have come a long way with the speed and efficiency becoming their hallmark. The advances in information and communications technology have reached the centre stage in capital market transaction. Trading platform has become automatic, electronic, anonymous, order-driven, nation-wide and screen-based. The multitude of market participants trade with one another anonymously and simultaneously across the system and the information is flashed on real time basis. Transparency is ensured in respect of dissemination of information, price and quantum of the order. Today, a trading member can execute the order from the computer terminal. An investor need not wait for a fortnight or more, for getting crossed cheques or crisp notes for the sale proceeds of securities. The trading cycle has been shortened to T+2. Inconvenience of physical custody and transfer, tedium of intimating change of address and problems of bad delivery, late delivery, non delivery and the risks of forgery and frauds have virtually disappeared. Today, scrips in the market are dematerialised and are trading in dematerialised form.

The robust risk management systems at the stock exchanges, has made the Indian capital market at par with global standards in terms of transparency, efficiency and safety. Corporate bonds and Government Securities used to be traded via telephone exchange are now trading on the stock exchange.

* Assistant Director, The ICSI. The views expressed are personal views of the author and do not necessarily reflect those of the Institute.

BACKGROUND

CAPITAL MARKET IN INDIA – PERFORMANCE, SPREAD AND STRUCTURE

The Indian capital market has outperformed many in the world. More importantly, the primary market too has perked up. The depth and liquidity of the market and its absorbing capacity has been undisputedly proven during the course of time. The performance of capital market can be gauged from the fact that during the last one year, Indian capital market has been regaining its buoyancy. Globally recognised economic fundamentals of the country and widely perceived robustness of the Indian Capital Market system have gradually restored the confidence of the investors, both domestic and international, to a substantial degree. During the last one year, the sensex has risen to its historic peak crossing 12,000-mark.

The population of 2 crore share owning individuals in India, through independent estimates by the Society for Capital Market Research & Development and SEBI-NCAER Survey shows the deep and wider spread of investors. From the structure point of view, SEBI's registered market intermediaries include two National level exchanges namely, Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) and 21 regional exchanges with fully electronic trading platforms. At the end of March, 2005, about 9000 companies were listed on stock exchanges, the trading platform of the stock exchanges was accessible to 9128 brokers, 13684 sub-brokers from over 400 cities in the same period. The number of foreign institutional investor was 685, custodians 11, depositories 2, Merchant Brokers 128, Bankers to an issue 59, Underwriters 59, Debenture Trustee 35, Credit Rating Agencies 4, Venture Capital Funds 50, Foreign Venture Capital Investors 14, and Mutual Funds 39. Indian capital market has the required infrastructure in place and has two world class stock exchanges for trading, clearing and settlement systems, well functioning depositories and a credible system of experienced credit rating agencies. Over and above, it has the required skilled manpower coupled with availability of the best technology.

India has in place an efficient and effective legal framework to provide for regulatory

oversight and investor protection. It has a fairly developed financial sector segment of the market which is reasonably free of controls. It also has quite a few corporate entities who could take advantage of the bond markets for its requirement of financial resources.

TECHNOLOGICAL DEVELOPMENTS – TO BE THE DRIVING FORCE

The developments in capital markets around the world witnessed during the last decade have been attributed to influence of information and communications technology. The internet has significantly improved transparency in the capital markets, by enabling the information to be available to a far wider range of people and in greater depth at low cost with no notable time lags. A closer look at the implications of the internet on capital market transparency shows that the internet has dramatically widened the number of well informed market participants, in contrast to pre-internet period when real time capital market information was available to only a comparatively small number of people.

It is all due to information technology that the investors can now have access to securities prices and other information of relevance to their investment decisions practically anywhere in the world from even mobile terminals. The internet has also increased connectivity – as investors now have immediate access to information from all the major capital markets in the world. They can track current developments in investment vehicles on both their domestic and the international capital markets. The capital market transparency has thus assumed a global dimension. The internet has thus become a pivotal instrument of capital market information, analysis and communication, assuming an important business-policy and customer-related dimension for financial services and capital market operations.

The dramatic progress in information and communication technology is fuelling the global networking and integration of previously separate segments of capital markets. With liberalisation and deregulation of the capital markets in developed countries and the globalisation, the emerging capital markets have

gained sustained momentum. With the advent of internet data flows, the commercial transactions and investments have been independent of time and space. It has made the capital markets delocalised, enabling participants to take part in securities trading around the world and round the clock without being physically present at the respective trading centres. Another consequence of the increasing global networking of capital markets is that markets are now sectoral rather than national. Investors are gearing their investment decisions to global industry trends rather than national markets.

SHIFTING STOCK EXCHANGE TRADING SCENARIO

The technological revolution has greatly altered securities trading in recent years. Electronic business has enjoyed a triumphant advance in the nerve centres of securities trading the world over. Automation is visibly rendering the exchange trading halls empty. With some notable exceptions, stock exchanges are becoming less and less places of personal encounter, where brokers and dealers close trades by open outcry. The stock markets are thus turning into a virtual bourse detached from any one physical location, in which operators participate irrespective of their location. In view of these emerging trends, the future trends in capital markets may be summarised as follows :

- The future of securities trading would lie in electronic platforms, while floor trading systems are seemingly destined for extinction.
- The new trading platforms would undoubtedly keep the traditional stock markets on their toes, to boost their efficiency.
- The new electronic facilities would capture market share from the traditional marketplaces by attracting order flows with the use of sophisticated technology and user-friendly services.
- The consolidation of trading platforms to culminate into a single, common, global trading platform with maximum

concentration of liquidity, cannot be ruled out in long term.

- The technological implications for the capital market as a whole may induce the blurring of distinction between banks, technology companies, stock markets and investors, as many of them might be offering trading platforms and use them as well.

CAPITAL MARKET REGULATION AND SUPERVISION

The technological revolution has raised entirely new questions of capital market regulation and supervision. The most important among the challenges for capital market regulators is to continue to secure market integrity and to ensure that the supervision does not hinder the emergence and operation of new trading systems. Capital market regulators have to ensure that all providers offering the same functionality and service are subject to the same regulation, as well as enjoy the same freedom of action. Providing level playing field for providers of similar services would be imperative for capital market regulators.

Today, the important factor is not the concentration of market places but market integration through high transparency standards.

The technological revolution has triggered the need for new approaches to securities supervision. As the cyberspace knows no boundaries, the national approaches would not suffice and international approaches would be required to deal with capital markets of the future. The emergence of a single regulator for capital markets cannot be ruled out. A single overseer could remove overlapping jurisdictions, improve the efficiency and flexibility of supervision and create a uniform framework.

CAPITAL MARKETS – VISION FOR FUTURE

As mentioned in the preceding paragraphs, the Capital Markets, across the globe, are undergoing profound, unprecedented and fast-paced changes. Technology has revolutionized the processes and the information explosion has sparked off remarkable changes in the way

the world has been operating. Though organizations, their competencies and product portfolios are expanding and going global, their profit margins are shrinking, competition is intensifying and becoming more and more complex and tougher by each passing day. Change has become the order of the day. Indeed, the intensity and speed of change in the market place is rendering everything redundant at an amazing speed. Unambiguously, the long standing and accumulated expertise have become irrelevant in the new paradigm. Amidst the waves of change, market participants are left with no choice but to change and reposition. As the future looks non-linear, discontinuous and unpredictable, the road map for future capital markets could be about innovation and new creations, as summarised below –

- (1) There are lot of initiatives towards making financial markets more transparent, competitive, efficient, efficacious, and cost effective. It has now been established that an exchange driven environment offers better values in terms of price discovery, transparency, and competitiveness. The evidences from across the globe suggest that with this thinking crystallizing, more and more products are joining the trading platforms. There is enormous potential in many more products coming to the trading platforms of the exchanges and therefore, the phenomenon of expansion of the exchange traded products seem to continue in future. Once this transformation becomes reality, the trading at stock exchanges would not remain limited to securities but would include everything tradable.
- (2) As the exchanges are in the business of providing liquidity to the market place through a transparent and efficient mechanism, their success would be determined by their competencies and strategies to position themselves in the future. Therefore, the integration, amalgamation, mergers of exchanges would be a reality in the near future. If the changes that are taking place in capital markets around the world are

any indicator, there would be only two or three stock exchanges serving the markets and building a competitive edge. Similar activities could also be envisioned in other parts of the world, initially leading to emergence of regional stock exchanges. This seems possible keeping in view the move towards integration of regional financial systems and common currencies.

The process of corporatisation of stock exchange would create a different business model and the future could witness listing of stock exchanges, the process of which has already been begun.

- (3) As the clearing and settlement of trade matters most to the parties to transactions, it remains one of the most crucial link in the whole value chain. The separate clearing corporations / houses are now a matter of history and academic interest only. They are no longer relevant today. As mentioned earlier, all types of products/ financial instruments would be traded on stock exchanges in near future, the clearing and settlement mechanisms would also undergo a major transformation. They could, in near future, operate at the planetary level managing risks across economies, markets, segments. The speed with which global integration is taking place, the integration of clearing corporations and emergence of a few clearing corporations to serve the entire world cannot be ruled out.
- (4) Technology is helping market players redefine the way they have been operating in the market. The concept of tele-banking, electronic money transfer, anytime banking, etc. were not known a few years ago. Innovations in home loan, personal loan, insurance products and mutual fund schemes suiting to the needs of individuals were unheard of in the recent past. Accordingly, the emergence of a complex business environment, would require more complex financial products as a strategic solution to the business specific situations and the specific

business situations. Thus, financial innovations would become an ubiquitous phenomenon. In fact the future holds a tremendous amount of creativity and innovation in markets for financial products/instruments.

- (5) Mr. Greenspan, former Chairman of Federal Reserve, once said that the Asian crisis would have been less severe if East Asia had a functional capital market in general and a bond market, in particular. The existence of a deep and liquid corporate debt market could make emerging economies less vulnerable; especially to volatile capital flows. This statement reflects the importance of debt market. The development of a corporate bond market has become even more crucial especially, in view of the decline and disappearance of development financial institutions and the need for raising large amount of resources for infrastructure development.

As the establishment of corporate bond market requires huge infrastructure and investment, the possibility of emergence of Asian Bond Market holds good for the future.

- (6) The markets, across the globe, would presumably continue to be redefined, reinvented and reconfigured on a persistent basis. Similarly, regulatory environment would also continue to be innovative to keep pace with the dynamically changing business and market conditions.

The law cannot remain static and has to change to remain effective and relevant. The laws or regulations formulated to deal with particular situations cannot remain effective in different situations. They cannot deal with the complexities of the new age business environment. Therefore, in the era of information revolution across the globe, regulatory regime needs to be proactive, productive, enterprising, forward looking and evolutionary in nature. In view of present legislative thinking across the globe, there are

strong possibilities that the legislations and regulatory regimes would be more preventive than prohibitive, encourage private-public partnerships and would be driven by problem solving approach than being reactive and adversarial. A shift in legislative approach from regulation to facilitation would be the hallmark of capital market regulation and supervision.

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MULTISKILLING : THE GLOBAL IMPERATIVE

ARCHANA KAUL *

INTRODUCTION

The rapid pace of technological innovation and intensified competition have expanded the role and responsibilities of the professionals to a great extent. In fact, the pace of technology revolution has exceeded all expectations. Professionals who will be driving the destinies of the corporates in this fast paced competitive economy have to gear up themselves to be agile to suit changing conditions in markets as well as in technology. They have to perform multifarious jobs so as to gain a competitive edge and achieve excellence in the profession. It is being speculated that the next twenty years will see huge changes in technology and hence in the business and working environment in which professionals have to work.

VARIOUS ATTRIBUTES/SKILLS

It is a must for professionals to possess certain abilities to be robust enough to withstand and facilitate change. In fact, experts from time to time have pointed out various attributes/skills that a professional must possess to achieve success in the changing environment. These inter-alia include: (i) *Technical skills* which means knowledge and proficiency in activities involving methods, processes and procedures in technical areas; (ii) *Human skills* i.e. the ability to work with people and lead them; (iii) *Conceptual skills* i.e. the creative ability to first conceive the model in your mind and then to construct a proto type; (iv) *Design skills* which are basically innovative, are important for those who are doing pioneering work like researchers, infotech

engineers, scientists etc. and (v) *Analytical and problem solving skills*. Analytical and problem solving skills are perhaps the most emphasized skills which professionals should possess because every problem represents an opportunity for the skilled professional.

Apart from the abilities mentioned above, the changing scenario calls upon a professional to be an expert in his discipline and simultaneously to have the capacity to deliver value by application of other disciplines through collaborative communication.

GROWTH OF THE SERVICE SECTOR

With the rise of the service sectors, the need for good professionals is intensifying. The rise of the service sectors has been one of the most dramatic economic developments of the past few decades changing the structure of economic activities in industrialized, middle-income and low-income countries alike. These sectors have become the dominant source of employment in the wealthier countries, often accounting for over 60% of all jobs. Much recent employment growth has been in knowledge-intensive work that is undertaken by professionals and managerial personnel. Figures from Australia, Canada, Ireland, Japan, the United Kingdom and the United States, for example, reveal that projected employment growth of professional and technical staff, and administrative and managerial personnel outstrips that of all other occupational groups for the last decade of the twentieth century.

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NEED FOR MULTISKILLING

Talent is strategic advantage in today's market place. Nurturing exceptional talent and efficiently deploying human resources are two of the most effective ways in which companies distinguish themselves from their competitors. Warning bells of talent famine are ringing loud and clear. Quality people are no longer available in plenty, easily replaceable and relatively inexpensive. The gene pool for leadership people is not vast. We have to grapple with the paradoxical scarcity among the apparent plenty of qualified job seekers.

The new knowledge-intensive jobs that have been created call for higher skill levels and a richer skill mix than ever before. In technically sophisticated business services, such as accounting, management consulting and computer software, support personnel typically account for less than a third of the total workforce. The structural changes occurring in service sector enterprises have directly affected the roles, responsibilities and career paths of managerial personnel and professionals. The breakdown of old pyramid-type structures and the emergence of flat, flexible organizations have led to the compression of management layers and the outsourcing of a number of professional and technical services from independent contractors. These trends have all tended to blur the distinction between professional and managerial personnel and other workers. These new multifunctional jobs call for a wider array of professional skills. Multi-skilling is seen as the new norm. Managers and other single-specialty professionals increasingly see multi-skilling as a necessary element in career advancement. In fact, multiskilling has now become a requisite for value added services and competitive edge.

It is pertinent to point out that the service industries differ from other industries like manufacturing and agriculture principally in the fact that they create economic value without creating a tangible product. Their "products" may include such intangibles as convenient access, information, advice, strategic planning, management, financial instruments, or simply customer satisfaction. Many of these

intangibles account for much of the value addition in sectors like banking, finance and insurance, business and legal services, accounting and auditing, information processing, advertising and business consultancy. Increasingly, such service functions comprise a significant segment of employment in industry as well. New jobs generated in the service industries are clearly split into those which are knowledge-intensive and those which are not. Knowledge workers and others with highly developed skills have in large measure been able to grasp the opportunities offered by the rapidly changing and increasingly competitive business environment.

India has a young population. Just 7% of Indians are above the age of 60. In 25 years time only 12% will be above 60. India will continue to be young and will see a swelling workforce. India has a large pool of scientific, technical and professional talent. The educational and professional infrastructure built in the past has served her well so far. India's professional has proven creativity, adaptability and a spirit of initiative. But, there is no room for complacency. It is true that India's young people are an enormous reservoir of talent. But someone has to equip them, train them, motivate them and provide them with opportunities.

This casts a huge responsibility on policy makers, educational institutions and business leaders. HR professionals can make them discharge this responsibility. To be able to do so, we have to be cognisant of fundamental changes in HR functions. HR no longer relates merely to packages and perks, incentives and facilities. It involves unshackling the latent energies of people. It involves generating the impulse for setting new benchmarks and then exceeding them.

WHAT IS MULTISKILLING

In common parlance, multiskilling means "training of employees in a variety of skills so that they can be used for several different tasks". But as stated earlier, in the changing global competitive environment multiskilling calls upon a professional to be an expert in his discipline and simultaneously to have the

capacity to deliver value by application of other disciplines through collaborative communication.

A more common definition of multiskilling is where labour organisation is structured so that workers possess a range of skills appropriate for use on a project or within an organisation.

The ambit of multi-skilling is very broad. In order to understand this concept let us explore the various concepts that are related to the aspects of multi-skilling. When applied in an organisation multi-skilling provides workers with the opportunity to develop different skills, knowledge, competencies and experiences; which will contribute towards development of the individual and towards better service delivery in the organisation. Multi-skilling is the umbrella term which includes job rotation, job enrichment, cross training, on-the-job training and succession planning.

MOTIVATIONS FOR MULTISKILLING

There were two common motivations for the development of multiskilling in Wales and Germany. The main reasons the firms developed multiskilling were, firstly, the impact of new quality assurance methods, such as the ISO 9000 quality standard series and, secondly, organisational restructuring within the enterprise. Such restructuring assumes differing forms in the two nations. In Germany, organisational downsizing and rationalisation of production facilities were the main drivers, resulting from recession and redundancies. The opposite was more common in Wales, where the concern was to spread the total skill base more evenly throughout the workforce.

Mention should be made that with increasing competitive pressures, many Australian organisations are achieving improved workplace performance through new ways and forms of work. Multiskilling being one of them.

ADVANTAGES OF MULTISKILLING

In the changing scenario, multiskilling offers a number of advantages to the professionals aspiring to achieve excellence in their professional career. Some of the following advantages may be specifically taken note of:

(a) *Flexibility*: Multiskilled professionals are able to perform a large number of tasks

and they can fill the gap of other required managerial personnel thereby increasing workforce flexibility.

(b) *Communication*: Knowledge of multifarious tasks/functions can increase the understanding of other tasks and improve co-ordination.

(c) *Positive effects on innovation*: The processes of improving innovative concepts are easier because of the individual 'multi' knowledge.

(d) *Employment security*: A multiskilled professional apprehends less employment threats if skills become obsolete because of new technology.

(e) *Project efficiency*: Through the increased level of multiskilling, work can be reorganised so that it can be performed most efficiently. Multiskilled professionals carry projects through, sometimes all the way from start to finish often taking 'project ownership'.

(f) *Management effectiveness*: Multiskilling is most valuable in the areas of management. Here it affects the reduction of product completion time (e.g. reduced subsequent production line delays), the decrease of project planning time (e.g. only one employee has to learn the details of the project), and the cutback of administration costs (e.g. faster completion of pay claims and materials billing).

It may be pointed out that the running of a business is often considered to be the domain of non-technically qualified executive. The understanding of high finance, strategy legal and all other things, corporate is usually associated with executives of professional background. But this is not true. A recent study of top companies in the UK established that 34% of Chairmen and 43% of CEOs had a technical background. Two of the best known CEOs, John Browne of BP and Jack Welsh of GE, are both engineers. Nevertheless another survey found that, in the UK, company directors with an professional qualification outnumbered engineers by six to one.

PROBLEMS AFFECTING MULTISKILLING

There are certain basic and practical problems that affect multiskilling. Basic problems are difficult to overcome and include limits on human skill retention and the difficulty of maintaining a multiskilled workforce from a management and financial viewpoint. Practical impediments as it has been observed include the organisational requirements, production management structure, resistance to change, qualifications requirements and the acceptance of multiskilling.

MEETING THE REQUIREMENT

In an environment where many organisations can no longer afford the luxury of having specialists in every field there is a need to ensure that individual staff at all levels are capable of undertaking more than one role. In that event the organization has to provide appropriate opportunities to develop new skills and competencies to all its employees in such a way that any such skill enhancement will have a positive effect on operational objectives. Investing in employees should not be just for the sake of training or spending money on staff development. In fact it should be aimed at providing the necessary support and developing people in a structured way to allow them to fully contribute to organisational success. Multi-skilling requires a formation of strategies from different sources to address the diversity of individuals' differences. This continual process needs reviewing and re-energizing.

POSITIVE ATTITUDE

It has been seen that professionals aspiring to be successful and reaching the upper echelons in the organization feel competent to take up any assignment. That doesn't mean they have the specific skills to do the job or know everything about it. That is not the case. What they know is that they have the basic skills to do any task and can learn the specifics of a particular job. As the saying goes *"If you know how to swim, it doesn't matter how deep the water is."* Likewise, it is important for both professionals as well as aspiring professionals to develop such an attitude in their professional

career. It is quite probable that there may not be immediate success, but that should not deter them. Failure is not to be taken as a personal blemish. In fact, their failure is a stepping stone to achieve success. There are countless examples showing how people from junior cadre have touched heights in their professional career. I would like to cite the example of Anne Sweeney, President, Disney/ABC Cable Networks and President, Disney Channel. She worked her way up from an assistant position. She was always anxious to take on new responsibilities, even if it was something she never did before. She says "it is important to always find the unknown exciting." She was always willing to open a door that someone else had not yet opened.

Mention should be made that mere willingness to take up any assignment will not suffice. The willingness should be coupled with a positive approach. Having a positive attitude is one of the most important keys to success. A good attitude towards yourself is believing in yourself. Once you believe in yourself you will respond to things a lot differently and in a way that gets better results.

MULTISKILLING NEEDS OF COMPANY SECRETARIES IN THE GLOBAL ENVIRONMENT

The profession of Company Secretaries, which has established itself as indispensable in the corporate governance process, needs a synergistic approach to promote its growth and marketability in the global market for professional services. The changing paradigm calls for better management of multi cultural environment, faster responses to change, subscription to globally accepted standards of quality and professional ethics and to jettison the processes of yesterdays. As the change is the only certain and constant, Company Secretaries should be adaptive to change and continuously innovate to stay ahead in terms of competitiveness, excellence and performance. The fact that the one third of world population of Company Secretaries is in India, casts on Company Secretaries, a responsibility to assume the leadership role in globalisation of profession of Company Secretaries in the GATS regime.

The Company Secretaries have immense potential in various areas, particularly in respect of services mentioned below :

- Project Planning Services
- Financial Restructuring and Re engineering
- Audits and Certification
- Mergers and Acquisitions
- Legal Services
- Taxation Services
- Management Consultancy Services
- Online Information and / Data Processing
- Public Issue Management Services
- Underwriting and Share Broking Services
- Intellectual Property Rights
- Commercial Arbitraion and ADR

Global changes in the working of corporation create opportunities to add multiple skill sets. The exercise and refinement of such skill sets through rigorous training, observation, introspection and courageous application will enable Company Secretaries to add enormous values to the functioning of companies. Some such sublime skills are listed below :

- Negotiating Skills
- Advocacy Skills
- Marketing Skills
- Management of Cross Cultural Interaction
- Management of People
- Integration of Different Cultural Perceptions and Habits
- Arbitration Skills

In fact, in a fluid business environment newer skills beckon a profession to transgress new learning curves quite frequently. Exposing oneself to newer dimensions of succeeding in professional life is the essence of multiskilling.

CONCLUSION

Achieving excellence in professional career is not an easy task particularly in the changing global scenario where changes are taking place at a rapid pace and the boundaries of the profession are blurring. If professionals are fully equipped in terms of competence and knowledge,

they can encounter the challenges of change that lie ahead in terms of quality of service and professional excellence. Excellence marks your distinction in the profession and then you are destined to be a winner in this ever-changing global competitive environment. Management experts say “winners do things differently”.

Don't adopt “just getting by attitude”. It will not pay. L. Ron Hubbard says “just getting by” is an attitude, many people accept. But it is the attitude of amateurs. Professionals see situations and they handle what they see. They are not amateur dabblers. He advises professionals that anything you do, do it as professional to professional standards. If you have the idea about anything you do that you just dabble in it, you will wind up with a dabble life. There'll be no satisfaction in it because there will be no real production you can be proud of. Develop the frame of mind that whatever you do, you are doing it as a professional and move up to professional standards in it. Never let it be said of you that you lived an amateur life

To conclude, the secret of success lies in making the long and arduous work sweet as fun and joy. The moment you start being happy and happier with your work and effort and enjoy each stage of self-improvement, the success silently follows you, without your realizing it.

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MULTISKILLING OF COMPANY SECRETARIES — NEW NICHES IN TAXATION

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INTRODUCTION

Multiskilling is advantageous for professionals in many ways. Multiskilling increases calibre; fills the gaps in critical skill shortage; makes the organisation perform. It enables adaptation to future challenges and utilisation of hidden talents. This enhances workforce flexibility and enables a company secretary to add value in different aspects of a task.

Multiskilling is an ongoing skills maintenance and review mechanism by which professionals can improve their work efficiency, reduce costs of services, improve quality of services. It indeed imbues amongst the professionals a sense of responsibility to work independently.

Macquarie Concise Dictionary defines the term, "multiskilling" to mean the development of a number of skills from which workers may earn a livelihood. A more common definition of multiskilling among professionals is where the professionals structure themselves in such a manner that they possess or acquire wide range of skills and knowledge appropriate for use on a project or within an organisation that may fall outside the traditional boundaries of their original work area. It does not really imply that the professional acquires or possesses high-level skills in multiple areas like, legal, information technology, engineering, medical, administration etc., but can be an effective and productive contributor to the work output of several different disciplines.

Multiskilling does not aim at affecting or undermining specialisation or super specialisation

in a multidisciplinary firm. It aims at better coordination, synchronisation and mutual value-add from the team work in such a firm.

In today's scenario, 'multi skilling' is essential to withstand competition. Work efficiency can be enhanced most effectively through the increased level of multiskilling. There are many factors affecting multiskilling. These are limits on human skill retention, difficulty of maintaining a multiskilled workforce from a management and financial viewpoint, resistance to change, qualification requirements and acceptance of multiskilling mindset.

NEED FOR MULTISKILLING OR RE-SKILLING OF COMPANY SECRETARIES

Need for multiskilling of company secretaries arose in the wake of changed international practices. Company Secretaries need to re-organize their skills and brand their services to keep pace with these changes.

In the complex world of international direct marketing, experts report that the key to success is working with a partner who has in-depth knowledge of the local market, language and relevant legislations. There are certain examples of professionals who can take their skills, knowledge and expertise to the global marketplace as global niche players. Their skills, knowledge and expertise are transportable, transferable and exportable.

MULTI-SKILLING METHODOLOGIES

It is essential for the company secretaries to be inquisitive in raising awareness about

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BACKGROUND

their services in order to establish their presence in global markets. This can be done either by positioning themselves as experts, at conferences, trade shows, workshops etc. in the areas of their expertise and on recent trends or by joining foreign industry or bilateral trade associations. Participating at various forums at country level as well as at international level can enhance good networking abilities.

Offering to write feature articles on latest trends and new laws or being a regular columnist answering queries on area of expertise can enhance additional skills of the company secretaries. Partnering is one of the preferred modes by which company secretaries can do business in global markets especially if an individual or firm of company secretaries is relatively new to the global market. Companies that set up partnerships and alliances, find that while there are risks, the rewards of partnering outweigh the risks and make way for a worthwhile market entry strategy.

Company Secretaries need to make a constant effort to be world leaders by re-skilling themselves as global leaders giving the service recipients an impression that they are market leaders and are at the peak of their field so that the service recipients carry the impact that they are making the right choice while engaging them. Credibility in company secretaries can be achieved by being committed to their service recipients ensuring them of providing the best quality service. Professionals are rated as per their caliber as well as performance.

Market research methodologies and business opportunity indicators are unique for service firms, often requiring more in-depth and detailed activities, information and intelligence than what is involved in export of goods. Service firms need to fine-tune their skills in networking, marketing and partnering. Service firms are the highest users of technology in their day-to-day operations and exporting activities, especially while delivering services and conducting e-businesses. While working as global market players, company secretaries must inculcate the distinguished qualities like, awareness, good profile, credibility, contacts with industry associations,

knowledge of latest developments in law, marketing skills, ensuring best use of technology including e-business and partnerships.

Company Secretaries possessing clear and blended knowledge of various laws can provide wide range of services in diversified fields through specialist partners. Once they acquire the desired level of competence, the access to large competitively placed players in other countries becomes feasible. Taxation is one such area where company secretaries through their firms can explore new niches for substantive growth of their respective professions.

NEW NICHES IN TAXATION

Taxation in India is undergoing a continuous process of reforms, opening new niches within as well as outside India. The major industrial powers, through the Organization for Economic Cooperation and Development (OECD), which is responsible for international tax treaties, have begun to focus on tax competition in the offshore tax havens.

The term, "niche" means a special area of demand for a product or service. Globally the entrepreneurs look for specialist partners to help in tax harmonization and expanding horizons due to legislative reforms. For example, specialists not knowing what opportunities exist on the other side, how the taxation system works or how their social security entitlements might be affected, shall not be able to take up challenges. Professionals need to pay particular attention to the structure and determine if, the potential partners offer capabilities that would help them transform their tax policies. Initial tax revenue benefits can be reaped from niches extended to geographic areas. Long-term revenue gains can arise from the transfer of capabilities in domestic as well as global businesses. New legislative reforms coming into play in the area of taxation have made diversification in taxation more feasible and capable of creating additional niches.

Multiskilling in taxation may help Company Secretaries in all situations; but how to multiskill or reskill in taxation is the main issue for consideration. They can build capacities for

enhancing value addition by taking up future challenges in taxation. Numerous service areas where Company Secretaries can attain re-skilling in taxation are: Income tax, Central Excise, Customs, VAT, service tax etc. These skills can be developed in order to render various services like, representation services, advisory services, certifying compliances, rebates, reliefs, concessions, deduction for research and development, double taxation avoidance agreements, developing tax efficient structures like trusts, etc.

INCOME TAX

Professionals acting as authorized Representative

Government of India has authorized professionals including Company Secretaries to act as authorised representative of an assessee before the Income-tax authorities. Section 288(1) of the Income-tax Act, 1961 provides that any assessee who is entitled or required to attend before any income tax authority or the Appellate Tribunal in connection with any proceeding under this Act or otherwise than when required under Section 131 to attend personally for examination on oath or affirmation, may, subject to the other provisions of this section, attend by an authorised representative.

Sub-section (2) of Section 288 defines the term, "authorised representative" as a person related to the assessee in any manner, or a person regularly employed by the assessee or any officer of a scheduled bank where the assessee maintains a current account or has other regular dealings or any legal practitioner who is entitled to practise in any civil court in India or any accountant as defined in the Chartered Accountant Act or a person who has passed any accountancy examination recognised in this behalf by the Board or any person who has acquired such educational qualifications as may be prescribed for this purpose. Rule 50 (2A) of the Income Tax Rules, 1962, recognises final examination of the Institute of Company Secretaries of India for this purpose.

MAINTENANCE OF BOOKS OF ACCOUNTS

Professionals can also help their clients in maintaining their books of account and other

documents enabling the Assessing Officer to compute his total income in accordance with provisions of the Income tax Act, 1961. Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, have recognized the profession of accountancy by notifying the profession of Company Secretaries under section 44AA(1) of the Income Tax Act, 1961.

GUIDANCE TO NON-RESIDENTS

Indian income tax laws have special provisions for NRIs. The professionals with their latest knowledge and expertise can advise and guide NRIs about the applicable complex laws and regulations including guidance on other miscellaneous issues apart from what constitutes an 'income' of NRIs, which part of income is taxable and which is not.

Company Secretaries through their firms can guide the NRIs about the provisions of Income tax laws relating to issues like, residential status as all NRIs are not aware of the fact that their income tax liability depends on their residential status and not on their nationality. Advance rulings, investments in India as individuals as well as corporates, filing of returns, claiming of tax refunds on their behalf, appointment of agents for NRI's making of appeals against any ruling by income tax department, if required are the other areas where company secretaries can provide advice to their clients.

Recently, Authority for Advance Ruling, a quasi-judicial body on tax matters has given its verdict on a petition filed by British Gas clarifying doubt about the issue whether a person can be considered non-resident Indian if he travels outside India for more than 182 days in a year while his travel is linked to his employment in India. The Authority held that a person who travels outside India to take up a job is a non-resident and not taxable in India. However, Income Tax Department sought to levy tax on the income of such executives by denying them the status of a non-resident as the person is employed in India and hence not a non-resident. This ruling will have a bearing on the growing number of executives going abroad on foreign consignments of their companies.

Company Secretaries can enlighten their clients about this latest verdict of the

Authority for Advance Ruling by helping them ascertaining their taxable status and provide guidance on various matters like, taxability of income earned by NRIs outside India, salary earned, income from property, profits from business or profession, capital gains and other listed 'sources'.

NRIs engaged in business in India with Indian partners come under 'a business connection', which covers different business activities such as a branch office, a local subsidiary to sell imported products, an agent for buying or selling, running a factory for exports, a financial association between a resident and a non-resident company etc.

Other areas where NRIs can be guided are, payment of tax on interest income from bonds or premium on redemption of bonds or securities, interest on Non-Resident External Bank Accounts in foreign currencies, Non-Resident Non-Repatriable Rupee Deposit Accounts and interest on Savings Certificates.

NRIS INVESTING IN TRUSTS

Recently one new practice is being observed. NRI families from different countries like, Hong Kong, Thailand, Middle East, etc. are hiring professional trustees in India to guide and help them manage their moneys by setting up trusts in India. The money put in these trusts is being invested into Indian Stocks and other assets as, buying stock through trusts is much easier than the portfolio management scheme. This has opened new niche for professionals.

Certain portfolio managers in brokerages and wealth management divisions of large banks also market the trust route to their NRI clients. If NRIs run into difficulties, their wealth can be preserved through trusts where the beneficiaries are also identified.

Company Secretaries can guide NRI's about repatriation of money from NRI bank accounts as per RBI norms and transfer to a trust. Similarly, trust can also repatriate the money, as trusts have more transparent tax structure than a holding company.

NRIs prefer setting up trusts in India than as residents, as they feel offshore trusts are

best possible options to invest their personal wealth.

From tax point of view, Indian Company Secretaries can advise returning NRI's to set up trusts outside India as well as the income accruing from such trusts shall accrue and arise outside India therefore they don't have to pay tax on that income.

DOUBLE TAXATION AVOIDANCE AGREEMENTS

India has been acknowledged as sovereign republic in the preamble to the Constitution of India. Under Entry 14 of the Union List, the matter relating to "Entering into treaties and agreements with foreign countries and implementing of treaties agreements and conventions with foreign countries" have been included. Thus, the exclusive power of the Parliament to make laws with regard to entering into treaties and agreements is all-encompassing and consequently, includes the power to legislate in this regard in the field of taxation of income. This special power has been exercised by the Parliament by enacting Section 90 of the Income Tax Act, 1961.

As per this Section, the Central Government has been empowered to enter into agreements with foreign countries for granting relief in respect of avoidance of double taxation promoting mutual economic relations, trade and investment. Central government has been empowered not only to enter into agreements for the avoidance of double taxation but also for exempting income from taxation.

The issues involved in double taxation includes, international double taxation. The term, "international double taxation" means taxation in more than one country.

Company Secretaries can guide their clients about the effect of entering into these agreements. They can provide their services in this matter by guiding the clients about the liability to tax, when the question of resorting to the agreement would arise etc. For example, when there is no imposition of tax liability under the Act, there is no question of looking into the agreement for avoidance of double taxation. Where any tax liability is imposed then the agreement may be resorted to for

negating or reducing such tax liability. However, in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement shall prevail over the provisions of the Act and shall be enforceable by the appellate authorities and the Court.

WEALTH TAX

Company Secretaries can also provide their services under Wealth Tax Law either by acting as an authorized representative for an assessee before any wealth-tax authority or the Appellate Tribunal.

Under the Wealth Tax Act, there are enough avenues available for Company Secretaries. Section 44 of the Act prescribes that any assessee who is entitled or required to attend before any Wealth Tax Authority or Appellate Tribunal in connection with any proceeding under the Wealth Tax Act, except where he is required under the Act to attend in person, may be represented by a person who would be entitled to represent him before any income tax authority or the Appellate Tribunal under Section 288 of the Income Tax Act. Rule 8 of the Wealth Tax Act prohibits any person not being a legal practitioner, a chartered accountant or a person regularly employed by an assessee from representing the assessee at any proceedings under the Act. This effectively means a company secretary can represent the case of his employer company before wealth tax authorities.

Rule 8A(7) of the Wealth-tax Rules, 1957, recognises a member of the Institute of Company Secretaries of India who is in practice as a company secretary for a period of not less than ten years to act as valuer of stocks, shares, debentures, securities, shares in partnership firms and of business assets, including goodwill.

SPECIAL ECONOMIC ZONES

Special Economic Zones (SEZ's) Scheme was announced by the Government of India in the year 2000 which was later enacted by the Parliament as Special Economic Zones Act in the year 2005. The purpose of this scheme is to provide internationally competitive

environment for exports. Special Economic Zone is specially delineated duty free enclave which is deemed to be foreign territory for the purpose of trade operations as well as Tariffs and duties. The supplies whether in the form of goods or services, made from domestic tariff areas to SEZs are treated as physical exports. On the contrary, supplies made from SEZs to DTA are treated as imports. A SEZ can be established either jointly or severally by the Central Government, State Government or any person for manufacture of goods or rendering of services or for both.

The purpose of this scheme is to promote export of goods and services without the levy of any duties and taxes on goods and services, so that goods move in international markets free of taxes. Section 10AA of the Income Tax Act, 1961 dealing with, special provisions in respect of newly established Units in Special Economic Zones provides a deduction to an assessee, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, of an amount of:

- (i) hundred per cent of profits and gains derived from the export, for a period of five consecutive assessment years and fifty per cent of such profits and gains for further five assessment years and thereafter;
- (ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account for this purpose.

This has opened challenging avenues for the Company Secretaries as an additional area of practice. With their abundant knowledge and caliber Company Secretaries can advise on various entitlements of duty and tax exemptions available to SEZ's e.g.,

1. Customs duty exemption for the goods required by SEZ unit;
2. Exports benefits available namely, DEPB,

- Duty Drawback, Advance Licence, etc. as the supplies made from DTA to SEZ amounts to physical export;
3. Service Tax exemption to SEZ units;
 4. Central Sales Tax exemption for SEZ units and SEZ Developers;
 5. Income Tax exemption to SEZ units for a period of 15 years;
 6. Extension of Income Tax exemption to export of services.
 7. Capital Gains exemption to transfer of undertakings from urban areas to SEZ;
 8. MAT exemption to SEZ Developers and SEZ Units;
 9. Exemption from Dividend Distribution Tax;
 10. Exemption to NRI's in respect of Interest Income accruing from deposits in OBUs.
 11. Permissible FDI's upto 100% for setting up of SEZ units;
 12. Exemption from payment of taxes, duties or cess to goods or services exported out of or imported into or procured from the DTA by SEZ units or SEZ developers.

In the year 2006, with the enactment of Special Economic Zones Rules, 2006, Company Secretaries in Practice have been allowed to act as an authorized representative before the Board of Approval under Rule 61 of the Rules. Rule 61 deals with the "Rights of appellant to appear before the Board" and provided that every appellant may appear before the Board in person or authorize one or more company secretaries to present his or its case before the Board. This recognition has opened new niches for Company Secretaries in Practice.

RESEARCH & DEVELOPMENT

One of the main objectives of the Government of India is to make Indian industry globally competitive. The industrial sectors need to undergo restructuring through technology up-gradation and modernization in order to improve productivity, quality, cost effectiveness and consumer satisfaction in order to survive and remain globally competitive.

There are a large number of foreign investors who are keen to participate in India's growth by making investments in Research and Development. As long as India continues to offer higher-growth-oriented policies for the long term, there would be tremendous inflows from foreign investors. Foreign investors keenly watch the pace of deficit reduction, privatisation and tax reforms, including plans introducing value added tax. Company Secretaries can re-assure the investors that India is committed to reforms in the areas of duty rationalisation, infrastructure creation, opening up of new sectors for investments and relatively better labour policies.

Article 51-A (h) of the Constitution of India lays down certain fundamental duties, which include the duty of every Citizen of India "to develop the scientific temper, humanism and the spirit of inquiry and reform". Fundamental duties are not self executing.

According to McKinsey survey of global executives, around forty four per cent of respondents from large companies preferred to increase their investments in India in the areas like, heavy industry, banking & finance and consumer goods besides Information Technology Sector. Also fifty eight per cent of these global executives felt that India is a huge source of talent and a better destination than China for setting up of Research and Development Units.

Research and development organisations, engaged in the promotion of industries, play a significant role in the industrialisation of the country keeping in mind the socio-economic policies of the government.

It has been recognized that technology upgradation and modernization of existing units are crucial for the survival of industries. Company Secretaries can contribute on strengthening of the testing and calibration facilities so that more and more units compete with international standards and find export markets for their products. It shall be highly appreciable if Company Secretaries can come out with options for linking existing Research & Development Institutions with various facets of industry like, technical training, technology development etc.

There is a great need to create a supportive environment with transparency and easy access to information and other resources by which Company Secretaries can flourish and tender their services efficiently. Company Secretaries can play a vital role in guiding foreign companies investing in research and development activities in India about the available tax incentives like, income tax relief on research and development expenditure, weighted tax deduction for sponsored research, Customs duty exemption, Tax holiday for commercial research and development companies, Customs duty waiver on goods produced based on indigenously developed technologies and duly patented in any one of the countries in European Union and USA or Japan or in both, accelerated depreciation allowance on new plant and machinery set-up based on indigenous technology, price control exemption on domestic research and development based bulk drugs are the other areas where Company Secretaries can provide their valuable contribution.

At this juncture, Indian Company Secretaries are required to be fully equipped and skilled to respond to these challenges. The two issues, which plays vital role in taxation are future planning in the light of globalization of commerce, new regimes brought and the qualitatively different role which governments have to play in bringing about transformation through a judicious mix of market driven and socially relevant economic policies. Keeping these broad aspects in mind, it is important for the Company Secretaries to identify strategic areas and the constraints experienced in the past, and take prospective measures.

CUSTOMS & CENTRAL EXCISE

Increasing liberalisation of the services sector has led to an urgent need for review of indirect taxes in particular. Most importantly, it should be clear to all players what the consequences of taxation are, bearing in mind that indirect taxes are meant to be passed on to the consumer and should therefore in principle not create a burden for businesses.

Under Customs and Central Excise Law, Company Secretaries in practice can act as

authorised representatives before the Customs, Excise and Service Tax Appellate Tribunal and other authorities. [Section 146A of the Customs Act, 1962 read with Rule 9 of Customs (Appeals) Rules, 1982 and Section 35Q of the Central Excise Act, 1944 read with and Rule 12 of the Central Excise (Appeals) Rules, 2001].

VALUE ADDED TAX (VAT)

International Perspective

The combination of large size and role of taxation internationally has resulted in lowering down both overall costs and unit costs as activities start moving in most advantageous locations. If Company Secretaries decides making an early move by exploring today then, they will certainly be able to develop the experience and scale, to be a global tax consolidator tomorrow. At the same time, they need to anticipate the changing tax strategies and consider what sort of services would allow them to build a competitively advantageous position to serve globally. While examining possible combinations, they need to have a clear vision of what new methodology could be followed. Once the professional specialists are clear about idea, they can succeed as a magnet for top talent and become competent to acquire and capture the best tax compliance opportunities.

At certain stage, the issue of tax competition transforms towards advanced economy protectionism with the rich nations seen as a tax cartel maintaining the poverty of poor nations. For instance, the U.S. can itself be seen as a tax haven with respect to its exclusion on taxing foreign income as well as its low income tax rates compared to many nations. It is critical to understand fully their own and their partner's policies in order to develop serving platforms with multi-country scope.

In certain EU countries, it has been felt that the unclear VAT treatment of certain transactions gives local tax authorities a certain freedom in their own interpretation often resulting in double taxation. Tax can no longer be taught or practised with a disregard for international tax and International tax can no

longer be dealt with separately from domestic tax.

Indian Perspective

VAT is one of the most radical reforms, albeit only in the sphere of State level taxes on sale, those have been initiated for the Indian economy after years of political and economic debate aiming at replacing complicated tax structure and do away with the fraudulent practices. It is a State level multi-point tax on value addition which is collected at different stages of sale with a provision for set-off for tax paid at the previous stages i.e., tax paid on inputs. It is to be levied as a proportion of the value added (i.e. sales minus purchase) which is equivalent to wages plus interest, other costs and profits.

VAT liability in India lies on the dealer and is calculated by deducting input tax credit from tax collected on sales during the payment period (say, a month).

Various advantages in the introduction of VAT are to, encourage and result in a better-administered system, eliminate avenues of tax evasion, avoid under valuation at all stages of production and distribution, claim credit of tax paid on inputs at each stage of value-addition. It eliminates cascading effect resulting in non distortion of the business decisions and permits easy and effective tax rates as a result of which the exports can be zero-rated. It ensures better tax compliance by generating a trail of invoices that supports effective audit and enforcement strategies and contribution to fiscal consolidation for the country.

Company Secretaries can guide and help their clients in various ways, namely-

1. Computation of VAT by applying various methods;
2. Procedures to be followed;
3. Applicability of rates of tax;
4. How to obtain registration by the dealers;
5. Exemptions available;
6. Obtaining of credit and Set-off;
7. Assessment;

8. Filing of Returns;
9. Obtaining of Refunds, etc.

Company Secretaries in Practice/Members of the Institute of Company Secretaries of India have now been recognized to act as an authorized representative for the purpose of appearing before VAT authorities under Statutes of various States like, West Bengal, Bihar, Daman and Diu, Goa, Gujarat, Karnataka, Arunachal Pradesh etc.

These States have begun the process of recognizing Practising Company Secretaries and others will follow them soon. These recognitions have opened new niches to the profession of Practising Company Secretaries.

SERVICE TAX

Service Tax is leviable on taxable services specified under Section 65(105) of the Finance Act and the responsibility for payment of tax falls on the service providers who are professionals in their respective fields. Services constitute a larger proportion of the consumption of the rich rather than of the poor as the demand for services is income elastic. Services cover wide spectrum of activities like, architect, management, banking, insurance, hospitality, advertisement, consulting and several under value added services having economic value. Need for levy of Service Tax arose due to steady decline in revenue receipts from customs and central excise duties due to WTO commitments and rationalization of commodity duties. This made the Government of India to initiate an exercise to explore alternative sources of revenue generation keeping in mind the share of services in India's gross domestic product (GDP), which is around 50 percent. Extension of tax base to the service sector resulted in improving the revenue productivity and efficiency of India's domestic tax system. Service Tax was imposed in India in the Year 1994. Levy of service tax forms part of an indirect tax. Professionals are required to pay service tax at the rate of twelve per cent plus cess at the rate of two percent.

Exemption to professionals is available by virtue of Section 93 of the Act. Power to grant an exemption is vested with the Central

Government. By virtue of this power, the Central Government grants exemption from Service Tax by issuing notification in the Official Gazette generally or subject to such conditions, as it may specify in the Notification or by special order under circumstances of exceptional nature to be stated in such order.

There is no exemption from payment of service tax to professionals like, Company Secretaries, Chartered Accountants, Cost Accountants except on representative services which is granted vide Notification 25/2006-ST dated July 13, 2006. Representative services are the services which are provided by aforesaid professionals in their professional capacity, to a client, relating to representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice.

The taxable services provided from outside India and received in India are to be determined by the professionals as per Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

Company Secretaries can guide their clients as to which services shall be deemed as provided or to be provided in relation to an immovable property situated in India. For example, professionals providing taxable services relating to:

- general insurance;
- architect;
- interior decorator;
- real estate;
- commercial or industrial construction;
- site formation;
- clearance;
- excavation;
- earth moving and demolition;
- dredging;
- survey and map-making;
- construction of complexes; and
- auction of property other than under the directions or orders of a court of law or Government,

shall be such services as are provided or to be

provided in relation to an immovable property situated in India. However, where such taxable services are partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder.

Services specified under Section 65 (105) of the Act, except services like, aircraft operator and transport by cruise ship services, be such services as are received by a recipient located in India for use in relation to business or commerce.

Role of Company Secretaries under Service Tax Law extends to obtaining of the registration, payment of service tax, availing of credit of duty of excise paid on any input or any input services under CENVAT Credit Rules, 2004 etc.

Export of goods and the export of services are two different things where professionals can provide their expertise. For example, export of services often involves travel to and from the market, a requirement for work permits and a determination of the condition and availability of communications infrastructure in the target country. Marketing of services internationally means making special efforts aimed at raising awareness, profile and credibility about professional firms and services.

Service exporters need to be aware of the four modes of service delivery, in order to make the best decisions about which is most suited for meeting client needs and expectations. Service firms need to know how to utilize industry associations, trade-oriented organizations and other interested parties and their various service offerings, to help achieve their export objectives.

Export of Services Rules, 2005 which came into force with effect from 15th day of March, 2005 has brought new niches for the professionals. The provision of any taxable service shall be treated as export of service where such service is delivered outside India and used outside India and payment for such service provided outside India is received by the service provider in convertible foreign exchange.

Where any taxable service is exported, the Central Government may, by notification, grant rebate of service tax paid on such taxable service or service tax or duty paid on input services or inputs, as the case may be, used in providing such taxable service and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification. Services taxable under Section 65(105) of the Act, can be exported without payment of service tax.

Company Secretaries can provide their services in respect of export of taxable services where:

1. such services are provided in relation to an immovable property situated outside India;
2. such services as are performed outside India;
3. where such taxable services are partly performed outside India;
4. services are specified under Section 65 (105) of the Act, but excluding certain services like, aircraft operator for international journey in any class other than economic class, transport by cruise ship etc.;
5. services provided in relation to business or commerce;
6. where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India.

ADVISORY SERVICES

Company Secretaries can advise their clients on tax related issues pertaining to individual as well as corporate taxation. Income Tax Act provides various concessions to businesses and the individuals. A Company Secretary in Practice can advise the clients about the ways and means to avail such concessions and do effective tax planning. Further, the Company Secretary shall play an important role in preparing and filling of the

returns of his clients. He shall be of great help to his clients in computation and payment of the advance tax.

Apart from above, Company Secretaries have many avenues wherein they can render their specialized services through their firms. Such services are either rendered to the (i) Regulatory authorities, by sending their comments to such authorities framing or reframing the laws either as new or by way of an amendment to an existing law or by approaching the regulatory authorities as per the requirement of industry and trade as and when desired or (ii) to the assessee, by providing tax consultancy, claiming of exemptions, concessions, rebates, filing of returns, representative services, maintenance of books, records etc.

REPRESENTATIVE SERVICES

Company Secretaries have been recognized to act as an authorized representative before various statutes besides ITAT, CESTAT, VAT authorities namely, Foreign Exchange Management Tax Act, Monopolies and Restrictive Trade practices Act, Competition Commission of India, Company Law Board, Telecom Disputes Settlement and Appellate Tribunal, Securities Appellate Tribunal, Central Electricity Regulatory Commission etc. on behalf of their clients. The objective of these recognitions are to make available professional services of Company Secretaries to represent the small and medium scale companies before the appropriate authorities.

Under Chapter-XIX of the Income Tax Act, 1961, where an assessee is not satisfied with the assessment or reassessment of his income, he may approach the Settlement Commission for settlement of his case by making an application to the Settlement Commission giving all factual information under Section 245D of the Act. Such an application can be drafted and presented by a Company Secretary in Practice before the Settlement Commissioner during the proceedings as he is authorised to represent the assessee before various tax authorities in person.

Under Section 250(2), the appellant or his authorised representative shall have the right

to be heard at the hearing of the case of his client. In such a case, a Company Secretary in Practice shall present the case of his client at the hearing by the Commissioner (Appeals). He can act as a link between an Advocate and the client.

COMPLIANCES

Global practices require a team of professionals to provide the necessary expertise. To facilitate multiskilling for expatriates, the professionals team shall be quite different from the composition of the team required to engage in country-specific tax planning.

The firms of Company Secretaries need to be aware of compliance issues. If one is going to work globally, there is a need to make sure that they are conversant with different regulations to which their professional activities may subject them.

New emerging avenues make the Company Secretaries cautious of reshaping the profession with their long term vision, futuristic thinking and timely planning. Strategies to have long term vision shall help the partners to have value added approach and gain dominance in the market for professional services in directions that have not been projected decades ago. Value added includes multi-disciplinary as well as multifaceted capacity building which in turns demands convergence among competing interests and perceptions. It expects a partner to be expert in his discipline and at the same time to have the capacity to deliver value added by application of other disciplines through collaborative communication.

Most of the commercial and economic laws place the responsibility on the management, viz., the Board of directors for due observance of the provisions of various statutes. The Board of directors, therefore, insist upon the Chief Executive Officer/Company Secretary that all the statutory obligations are duly complied with. The practising company secretary, after the verification of records, can also issue certificate to the satisfaction of the management in this regard.

Under the provisions of various tax laws, it is obligatory on the part of the assesseees

to file numerous returns, pay advance tax on the basis of income calculated by him, deduct tax at source on any payment he makes etc. This requires the assistance and guidance from a professional like, Company Secretary in Practice who can play a crucial role in this regard.

Companies are required to deduct tax at source on various payments like, salary to employees, interest on securities, dividends, interest on borrowings, payments to non-residents, sports persons or sports association, etc. Under Section 201 of the Act, the principal officer and the company is liable for penalty for non-compliance of the provisions unless otherwise able to satisfy the authorities that there was good and sufficient cause for not deducting the tax at source. To avoid such hardships the small or medium size companies can engage Company Secretary in Practice to ensure due compliance of tax laws.

ENHANCED ROLE OF COMPANY SECRETARIES

All countries including India have initiated the process of bringing legislative reforms as a result of which radical changes have been brought in recent years. In the entire process, there emerges an outstanding role for Company Secretaries as channels of growth, who can respond to these legislative reforms with their skills and calibre. They can enlighten, advise the corporate leaders about the implementation of these reforms globally.

In this evolving environment of technology based globalization, where future seems to be unpredictable and yesterday's knowledge gets outmoded soon, there arises a great demand for the professionals to reskill and upgrade their knowledge to face the challenges of tomorrow. There is an imperative need on the part of the corporates and the government, to be more innovative and creative in their approaches while formulating strategies, policies and laws bringing legislative reforms. To have an upper edge on these far reaching challenges resulting from legislative reforms, company secretaries need to gear up themselves and handle the growing volume of reforms with their specialized knowledge and services.

Numerous issues emerging as a result of these reforms which have far reaching impact on the professionals are in the area of corporate taxation, special economic zones, joint ventures, technical collaborations, Value Added Tax, Service tax etc. In this changing and challenging environment, where tax reforms are taking place with a great pace, it has become essential for Company Secretaries to, look into these new emerging areas thoughtfully and re-organize their skills by branding their services in the wake of global practices. They need to be more cautious of interests of their clients and equip themselves with new skills and involve in the process of framing new strategies to face the competition ahead.

Company Secretaries in addition to being the Compliance Officers advise the Corporate Sector on various matters relating to Law, Finance and Management. Recently, legislative changes like, Intellectual Property Laws, Competition Laws, Alternate Dispute Resolution have opened new niches for the Practising Company Secretaries. In the wake of added emphasis on the self regulation in the process of globalization of business, the role of Company Secretaries becomes more vital and challenging one.

The rapidity at which global actions are taking place in corporate sector is remarkable. More and more knowledge is being desired to face the challenging environment and the pace at which it is being circulated, have implications on all professionals in general, especially company secretaries of today. In such a changing and evolving environment, they can provide their expertise and be leaders in order to have an upper edge in the international markets.

The network of professionals in international tax re-structuring can help in greater tax governance by addressing latest developments as well as all aspects of international taxation. They need to be well equipped in order to structure global businesses in a tax-efficient manner, besides locally managing by constructing effective global strategies and managing global structural tax rate. Being enriched in knowledge and abreast of new developments in the international arena that affect international business, the company

secretary specializing in the field of taxation can advise on various issues like:

- foreign companies tax planning;
- income tax treaties;
- tax efficient holding company locations;
- tax efficient supply chain and shared services;
- tax harmonization and regional tax issues under VAT etc.

CONCLUSION

Having laid out all these challenges, the new dynamics of the global economy should be seen as a huge opportunity for the tax professionals to move towards new and higher levels of openness, stability and prosperity. Potential threats of globalization and the emerging dynamic changes can be transformed into opportunities by strong and dynamic professionals at the global, national, and regional levels to ensure that people in developed and developing countries can benefit from the world's increasing interdependence and economic integration.

The foremost requirement of firms of Company Secretaries gaining access to tax competitive environment is to create appropriate teams to face challenges occurring through tax reform process by involving in formation of multiskilling methodologies by strategic alliances with other professionals. To perform well, Company Secretaries need more specialization in the area of taxation than just steady means. They must offer their potential services for the growth and improvement of their existing profession as the trails leading to taxation have been more thoroughly blazed in the path of future growth.

In today's changing scenario, professionals who do not explore new niche areas may end up outdated, as the international markets are emerging towards convergence and national boundaries are becoming less important now. The danger of waiting too long by professionals choosing specialist partners can affect adversely as the attractive ones may quietly jump into the competition leaving others behind.

The professionals who has the abilities of identifying opportunities and resolving the hurdles, can gain competitive advantage by re-skilling in the area of taxation.

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INDEPENDENT DIRECTORS — AN ELEMENT OF OBJECTIVITY IN CORPORATE GOVERNANCE

SHIKHA TALREJA *

INTRODUCTION

World over, Governments and Regulators have expedited the process of reforms in corporate governance to ensure that a conducive, efficient and effective governance mechanism is put in place to allow constituents of reforms process to withstand the convulsions unleashed by the globalization process, in terms of growing competition. As reforms in corporate governance began sweeping the world, the one concept that has ruled the roost is the concept of independent directors. Questions about the role and responsibilities of Independent directors are at the top of any discussion on corporate governance today.

The purpose of induction of Independent directors on the boards of companies is to provide independent objectivity in the decision making process of companies and to instill professionalism. It stems from the perception that outside directors who are in no way connected with the ownership or management of the company or its promoters could help in improving transparency and accountability in the company management. These directors, it is perceived would bring an independent judgment to bear on the Board's deliberations especially on matters of strategy, performance, management of conflicts of interest and standards of conduct.

INDEPENDENT DIRECTORS

The primary objective for the induction of independent directors on the board of companies is to ensure that any action for

wrong doing by the controlling stakeholders is brought under check and also as a value addition on the board of companies. However the question that arises is what exactly constitutes "independence" and to what extent the independent directors are able to do justice to the responsibilities bestowed on them.

As per Webster's New World Dictionary, the word "independent" means:

- (1) free from the influence or control of others; specific
 - (a) free from rule of another; self-governing
 - (b) free from persuasion or bias
 - (c) self-confident or reliant
 - (d) not adhering to any political party (an independent voter)
 - (e) not connected with others; grocer (an independent grocer)
- (2) not depending on another, of, or having an income large enough to enable one to live without working,
- (3) a person who is independent in thinking.

CalPERS, the largest pension fund, codified in its Core Principles and Governance Guidelines, Board Independence as the cornerstone of accountability. The CalPERS suggested that substantial majority of the Board should consist of directors who are independent. In India the CII's Task Force and Kumar Mangalam Birla Committee extensively debated the issue of independent directors. The Kumar Mangalam

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Birla Committee was of the view that the term 'independence' be suitably, correctly and pragmatically defined so that the definition itself does not become a constraint in the choice of independent directors on the Board of companies. The touchstone of the independence is the material pecuniary relationships or transactions of the non-executive directors with the company.

The issue pertaining to independent directors was also considered by the Naresh Chandra Committee. The said Committee gave a due thought to the prevailing scenario in the Indian and international definitions of independence.

The definition recommended by the Committee is not specific in nature but it is more of a code comprising seven points. The definition is more in the nature of an explanation providing negative conditions.

Narayana Murthy Committee also dwelt upon the issue regarding independence of directors and recommended an inclusive definition of independent director. On the basis of recommendation of said Committee the definition of independent director was revised and incorporated in the Revised Clause 49 of listing agreement. The said Clause provides an inclusive definition as to who all could be independent directors. According to said clause independent director is a person who apart from receiving director's remuneration does not have any relationships with the company or its promoters. An Independent director must not be related to promoters or persons in the management or at one level below and should not be executive of the company in the last three financial years. As far as composition of Board is concerned, Clause 49 requires that if the chairman of the Board is non-executive director, then at least one-third of the Board should comprise of Independent directors and if the chairman is executive director then at least half of the Board should comprise of independent directors.

The J J Irani Committee has also articulated the need for and criteria of independence for Board membership purposes. The Committee has proposed that atleast one-third of the Board should comprise of independent directors

irrespective of whether the company has an executive or non-executive Chairman. A significant recommendation of the Committee is in regard to the treatment of institutional nominee directors. The Committee has recommended that nominee directors appointed by any institution or in pursuance of any agreement or Govt. appointees representing Govt. shareholding are not to be deemed as independent directors.

ROLE OF INDEPENDENT DIRECTORS

Independent directors play a key role in the decision-making process of the board as they approve the overall strategy of the Corporation and oversee the performance of management. Independent directors are committed to acting in what they believe to be in the best interest of the Corporation and its stakeholders. Independent Director bring his expertise knowledge from his wide experience and brings external information, know-how and he really adds value to the business to take the company to greater heights. Independent directors being directors in many other companies, are well informed about the international markets, technological development, market related information etc. Further being a member of various forums like Chamber of Commerce and other public forums dealing with the industry, trade and commerce, they are in a position to bring their expertise. Independent directors could effectively and substantively contribute if they are empowered to meet at regularly convened executive sessions without participation of management or employee directors so that they could openly and freely discuss the affairs of the company

PROFILE OF INDEPENDENT DIRECTOR

Independent Directors should be individuals with certain personal characteristics and core competencies. They should have imbibed in themselves abilities for recognition of the Board's tasks, have integrity, a heightened sense of accountability, track record of achievements and the ability to ask tough questions. They should have financial literacy, if not acumen, knowledge of law and judicial happenings, experience, leadership qualities and the ability to think strategically. They should devote adequate time for meetings,

preparation and thinking, marketing and branding literacy; sector expertise, experience of mergers, acquisitions and change management. Mentoring capabilities and independence of mind are other characteristics that need to be imbibed and developed.

It may be noted that independence of mind alone can not become a cliché in the context of Independent Directors. Through training and orientation such a mind needs to be developed, nurtured and made to blossom. Free from fear and favour but subtle, with an understanding of the company, economy and changing global perspective and strategy-savvy, the mind and the ability to act decisively need to be calibrated through orientation and continuous training of independent directors.

SELECTION OF INDEPENDENT DIRECTORS

In the selection of independent directors the company should not look simply for high profile names. The selection and appointment of independent directors should be transparent and on certain standards. Therefore companies should have an independent Nomination Committee which should determine the qualifications for Board membership and should identify and evaluate candidates for nomination on the board. It could be more appropriate, if a Code of Corporate Governance is devised by the company. Such Code should specifically include the qualifications and attributes that the company seeks of an independent director.

There can be no precise mix of qualifications and experience for selection of independent directors. Though there are other factors also, yet specialists in the areas of accounting and finance, technology relevant to the company, corporate management, marketing and industry knowledge etc. could be considered for independent directors. Perhaps, a skill matrix which lists desirable competency versus those presently present on the Board is useful in determining where the hole exists on the Board. Board dynamics are difficult to prescribe as groups of people gather together to make informed decisions about the direction of the company. Although the level of knowledge, integrity and independence necessary to carry out the functions of a director are difficult to

summarize, the behavioral characteristics of a good director should include the attributes of asking the hard questions, working well with others, having industry awareness, providing valuable inputs, ensuring availability when needed, being alert and inquisitive, making contribution to long-term planning etc.

HIGGS REPORT ON ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS

Derek Higgs Report on the role and effectiveness of non-executive directors published on 20 January 2003, lays considerable stress on more demanding and influential role of non-executive directors (NEDs). The major highlights of the recommendations are as follows:

Board

- The board is collectively responsible for promoting the success of the company by leading and directing the company's affairs. A description of the role of the board is proposed for incorporation into the Combined Code.
- The number of meetings of the board and of its main committees should be stated in the annual report, together with the attendance of individual directors. A description should be included in the annual report of how the board operates.
- The board should be of an appropriate size. At least half the members of the board, excluding the chairman, should be independent non-executive directors. There should also be a strong executive representation on the board.

Role of the non-executive director

- A description of the role of the non-executive director is proposed for incorporation into the Code. Guidance is offered for non-executive directors on how to maximize their effectiveness.
- The non-executive directors should meet as a group at least once a year without the chairman or executive directors present and the annual report

should include a statement on whether such meetings have occurred.

- Prior to appointment, potential new non-executive directors should carry out due diligence on the board and on the company to satisfy themselves that they have the knowledge, skills, experience and time to make a positive contribution to the board. Guidance on pre-appointment due diligence is offered.

Senior independent director

A senior independent director should be identified who meets the test of independence set out in the Review. The senior independent director should be available to shareholders, if they have concerns that have not been resolved through the normal channels of contact with the chairman or chief executive. All directors should take decisions objectively in the interests of the company

Tenure and commitment

- A non-executive director should normally be expected to serve two three year terms, although a longer term will exceptionally be appropriate.
- On appointment, non-executive directors should undertake that they will have sufficient time to meet what is expected of them, taking into account their other commitments. If a non-executive director is offered appointments elsewhere, the chairman should be informed before any new appointment is accepted.
- The nomination committee should annually review the time required of non executive directors. The performance evaluation should assess whether non executive directors are devoting enough time to fulfill their duties.
- A full time executive director should not take on more than one non-executive directorship, nor become chairman, of a major company. No individual should chair the board of more than one major company.

INDUCTION AND ORIENTATION OF INDEPENDENT DIRECTORS

In view of the important role the independent directors are expected to play, not only companies should have independent directors but must also ensure that they attend an induction programme before they are taken on the Board of Directors

For the new appointees on company's Boards, the transition experience can be a challenging one. Learning is in real time, with little opportunity for rehearsal. Even the best of selection procedures may not serve the purpose if inadequate attention is given to transitional learning, orientation and capacity building.

Training and orientation is must for independent director as is for serving directors. Such training can accelerate the process at which a director can really contribute to the Board. Very few companies recognize this orientation need. Short duration programmes can be structured in one or more of the following areas:

- Nuances of business of the company;
- Role clarity;
- Accountability & Liability of directors;
- Strategic planning for the organization;
- Regulatory issues;
- Risk management;
- Industry/economy/global developments and perspectives.

Some of the inputs required to perform as independent directors can best be delivered by the company management itself. While some others like role clarity, regulatory issues are more in the nature of general inputs and can best be provided by a specialized Institute for Directors training.

The Higgs Report also highlights the issue of induction and orientation of non-executive directors. Following is the list of recommendations in this regard:

- A comprehensive induction programme should be provided to new non executive directors and is the responsibility of the

chairman, supported by the company secretary.

- The chairman should address the developmental needs of the board as a whole with a view to enhancing its effectiveness. Resources should be provided for developing and refreshing the knowledge and skills of directors.
- The performance of the board, its committees and its individual members, should be evaluated at least once a year. The annual report should state whether such performance reviews are taking place and how they are conducted.
- Supported by the company secretary, the chairman should assess what information is required by the board. Non-executive directors should satisfy themselves that they have appropriate information of sufficient quality to make sound judgments.

The Narayan Murthy Committee also made a non-mandatory recommendation that companies should be encouraged to train the board members in the business model of the company as well as risk profile of the business parameters of the company, their responsibilities as directors and the best way to discharge them.

PERFORMANCE EVALUATION

With ever increasing public scrutiny, media's attention and Govt.'s critical examination of performance of organizations, greater responsibilities and expectations are falling on the shoulders of the members of the Board. There is apparently a growing demand for better corporate governance. Therefore it is vital that boards ensure that they are acting effectively and efficiently. To facilitate this, it is necessary that board have in place appropriate accountability mechanisms. One such method is evaluation of board performance. Performance evaluation is a flexible and dynamic process that includes the act of setting goals and standards for performance.

Performance evaluation of directors has been recommended by certain committees on

corporate governance set up in India and abroad. In India, the Narayana Murthy Committee recommended that the performance evaluation of non-executive directors should be done by a peer group comprising the entire Board of Directors, excluding the director being evaluated and peer group evaluation should be the mechanism to determine whether to extend/continue the terms of appointment of non-executive directors. On the basis of recommendation of said Committee the provision for evaluation mechanism of non-executive directors has been incorporated in the revised clause 49 of listing agreement under the non-mandatory recommendations. Internationally the recommendation of CalPERS is worth noting. CalPERS recommended that each Board should establish performance criteria not only for self (as a collective body) but also individual behavioral expectations for its directors. Minimally these criteria should be addressed at the level of directors, attendance, preparedness, participation and candor.

In respect of independent directors, the following criteria can be used for evaluation of their performance:

- How well prepared and informed are they for Board meetings and is their meeting attendance satisfactory ?
- Do they demonstrate willingness to devote time and effort to understand the company and its business and a readiness to participate in events outside the Boardroom such as site visits ?
- What has been the quality and value of their contributions at Board meetings?
- What has been their contribution to development strategy and risk management ?
- How successfully have they brought their knowledge and experience to bear in the consideration of strategy ?
- Where necessary, how resolute are they in maintaining their own views and resisting pressure from others ?

- How effectively and proactively have they followed up their areas of concern?
- How effective and successful are their relationships with fellow Board members, the company secretary and senior management? Does their performance and behaviour engender mutual trust and respect within the Board?
- How actively and successfully do they refresh their knowledge and skills and are they up to date with:
 - the latest developments in areas such as corporate governance framework and financial reporting.
 - the industry and market conditions.
- How well do they communicate with fellow Board members, senior management and others?

MERE PRESENCE OF INDEPENDENT DIRECTORS NOT ENOUGH

Bringing independent directors is definitely a good move in the direction of a more holistic approach towards good corporate governance. Independent directors have substantive responsibilities as the "investors', advocate" with emphasis on independent thinking, learned debate and objective focus on the needs and interests of the investing community. However, it must be noted that the method for induction of independent directors on the Board is not fool-proof and the success of such an initiative totally depends on the merit of the individual being brought to the Company Board room than anything else. Thus mere presence of directors who are independent in terms of the provisions of law does not mean that there would be checks and balances. What is to be ensured is that these directors think and act independently. Ideally "independence" should refer to independence of mind and the ability to judge a matter objectively, without any prejudice or bias towards any individual's interest.

A critical element of a director being independent is his independence to the management both in fact and perception by

the public. In considering the independence, it is necessary to focus not only on whether a director's background and current activities qualify him as independent but also whether he can act independently of the management. In other words, the independent director must not only be independent according to the legislative and stock exchange listing standards but also independent in thought and action i.e. qualitatively independent. Such qualitative independence will ensure that directors think and act independently without regard to management's influence.

CONCLUSION

Independent directors serve as independent watchdogs serving the interests of company, stakeholders and shareholders. Independent directors endowed with a rich mind and an independent disposition can bring out a much-needed transformation in boardrooms. Corporate India is at a strategic inflexion point in this regard. Future competition is going to be based not only on hard facts of business but mainly on soft factors like corporate credibility and governance standards. That is where the independent directors come-in. Corporate India would do well to adopt a stiffer prescription on independent directors as a wise preparation for a challenging but a rewarding future.

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EXPECTATIONS VIS-A-VIS SATISFACTION — BEHAVIOURAL COMPETENCE OF PROFESSIONALS

SHRUTI K SONI *

'A professional is a person who can do his best at a time when he doesn't particularly feel like it' -

Alistair Cooke.

Only three learned professions were recognized as such at the beginning of the Twentieth century: law, medicine, and theology. However, ours is an age in which occupations ranging from aroma therapy to zymometry claim to be "professions" and their proponents, "professionals." Whether an occupation augments to the status of a profession varies, based upon its underlying principles and the values of its practitioners.

As the *Hayes Committee Report* propounded "*Work done by the professional is usually distinguished by its reference to a framework of fundamental concepts linked with experience rather than by impromptu reaction to events or the application of laid down procedures. Such a high level of distinctive competence, reflects the skilful application of specialised education, training and experience. This should be accompanied by a sense of responsibility and an acceptance of recognised standards.*" (HMSO 1972)

Thus in professional work, there is a considerable amount of creative activity involved, which is incumbent not only in applying specialised knowledge and techniques to resolve problems, but also in framing or identifying the problems in the first place. A professional has to work in contexts where values and conflicts are unavoidable, and where constraints and demands arise from outside the immediate 'job'.

The Great Expectations

'Don't be content by just beating others expectations, beat your expectations as well. And you should expect nothing less but to win'.

- Beau M Jackson

Winning in terms of Corporate Excellence is the key word today and demands not only that every aspect of business is of the highest quality, but also that every activity is changing and improving faster than the competition. The advent of globalization and the diffusion of communications are also having a marked impact on the organizations and the expectations from the professionals associated with them.

An onerous responsibility is cast on the professionals today to set continually new and more demanding standards of themselves. Their success merely sets the benchmark for others, and unless they move their standards forward, always and every time, they may not remain in the front, when tomorrow comes.

The cornerstone of any successful professional turnaround engagement is the ability to manage a client's business expectations. It is an evolving process that begins with first the communication between the professional and the client and involves constant course corrections throughout the life of the engagement. The following paras convey expectations about the behaviors from those who seek to join and pursue the professions.

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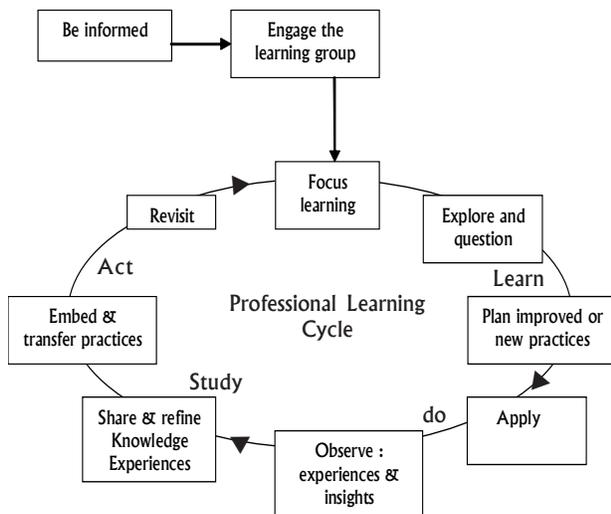
1. Show up, show up on time, show up prepared, show up in a frame of mind appropriate to the professional task and show up properly attired.
2. Accept the idea that on time, prepared, appropriate, and properly are defined by the situation, by the nature of the task, or by another person.
3. Accept that first duty is the ultimate welfare of the persons served by profession, and that ultimate welfare is a complex mix of desires, wants, needs, abilities and capacities.
4. Recognize that professional duties and situations are about completing tasks and solving problems in ways that benefit others, either immediately or in the long term.
5. Place the importance of professional duties, tasks and problem solving above own convenience.
6. Strive to work effectively with others for the benefit of the persons served. This means pursue professional duties, tasks and problem solving in ways that make it easier for others to accomplish their work.
7. Properly credit others for their work.
8. Own responsibility for actions, reactions, and inaction. Do not avoid responsibility by offering excuses, blaming others, emotional displays, or helplessness.
9. Do not accept professional duties or tasks unprepared personally or professionally.
10. Take active responsibility for expanding the limits of knowledge, understanding and skills.
11. Accept directions from those who are more knowledgeable or more experienced and provide direction to those who are less knowledgeable or less experienced.
12. Value the resources required to perform professional duties, tasks, and problem solving.
13. Respect values, interests, and difference of opinions as long as they are not objectively harmful to the persons served.
14. When attempting a task for the second time, seek to do it better than the first time.
15. Accept the imperfections of the world in ways that do not compromise the interests of those being served, or own pursuit of excellence.
16. Form opinions, actions and relations upon sound empirical evidence, and upon examined personal values consistent with the above.

These professional behaviors may not be taught, but they certainly can be learned. Perhaps too often we assume that formal statements of ethics and the actions of more experienced models are sufficient indicators of professional behavior. As a result, professionals are unclear about what is expected of them and when they will be accountable for those expectations. Techniques and strategies to manage the expectations of corporates and clients from professionals and to ensure a collaborative and productive engagement, have been examined in following paragraphs.

MANAGING EXPECTATIONS

Managing expectations begins with an initial understanding of the client's goals and definition of a successful engagement. By exploring a client's desired endgame during the intake process, a professional can tailor the parameters of an engagement to pursue those results effectively and efficiently. During this phase, a professional also benefits by learning about any pressure points or demands of the client. Understanding the scope and goals of an engagement, along with any external controlling factors, facilitates budgeting, staffing, and long-range planning and allows a professional to respond to the central needs of a client's expectations.

The professional learning cycle given hereunder aims at improving professional practices through introducing new practices and making previous practices easier and/or more effective.



(Source : Capacity building through e-learning communities : alignment of purposes, policies and practices. M Robertson, A Fluck and I Webb.)

In short, the professional learning cycle has four steps: Learn, Do, Study, Act and create a positive professional image. As Harvard Business School professor Laura Morgan Roberts says, 'If you aren't managing your own professional image, others are.'

"People are constantly observing your behavior and forming theories about your competence, character, and commitment, which are rapidly disseminated throughout your workplace," she says. "It is only wise to add your voice in framing others' theories about who you are and what you can accomplish."

In order to create a positive professional image, impression management must effectively accomplish two tasks: build credibility and maintain authenticity. When you present yourself in a manner that is both true to self and valued and believed by others, impression management can yield a host of favorable outcomes for you, your team, and your organization. On the other hand, when you present yourself in an inauthentic and non-credible manner, you are likely to undermine your health, relationships, and performance. In other words, a positive image can be carved out by an appropriate professional behaviour and true professionalism.

Professionalism is more about doing than about being. It is a way of conducting oneself including traits such as respect for others, commitment to quality, competence, responsibility and personal integrity (which may or may not directly involve other people), dealing with professional tasks and responsibilities, with the individuals served by the profession, and with relations with other professionals.

Thus, in this changing paradigm, it is imperative for the professionals, especially the company secretaries, to focus on emerging opportunity zones, principle centered professional leadership and above all competence building.

DEALING WITH COMPETENCIES

It is easiest to define competence as "the ability to perform activities upto the standards required in employment, using an appropriate mix of knowledge, skill and attitude". All three aspects must be present if someone is to be effective in the workplace. To improve competence one needs to increase not only knowledge, but also understanding of how that knowledge can be applied; skill in applying it; and the attitude to apply it correctly.

To start with one should aim to assess himself at a broad level, rather than trying to analyse the minute detail of every task. One needs to identify the performance standards which apply to work. Standards may be laid down at international, national or company level, and include quality, safety and environmental standards.

Having defined set of competencies, the next step is to assess one against these. This will give an indication of the ability to perform the current role. We need to examine ourselves against each competence statement and decide what level we think we are operating at. Comparing oneself with others may help here, using colleagues/partners as a benchmark of good practice. Some possible sources of standards may include:

- *External Standards* - those produced by institutions. These are usually free and are often cross-referenced to other standards, allowing one to take

elements from more than one, to build a profile representative of one's individual job.

- *Academic* - curriculum information for formal qualifications can give an idea of expected levels of knowledge and ability.
- *Industry Standards* - many large corporations have their own standards and frameworks for specific jobs or functions. In addition, industry federations have established standards, or are able to provide information or where these can be obtained.
- *Peer Review* - comparison between peers can be a useful indicator of one's expertise level. Networking through institutions is a good way to meet people in similar jobs who may be interested in a mutual exercise.

Boam and Sparrow argue that "Competency-based approaches are not the 'poor neighbour' that sits alongside other strategic approaches to human resource management. They lie at the heart of all other approaches...". Therefore, if the concept of 'competence' is to be of practical use in promoting the development of professional practitioners, and in undertaking assessment for professional qualification, then it must be broken free from all the limitations and prejudices.

EFFECTIVE PROFESSIONAL BEHAVIOUR

Professionals being the people who plan, produce, process or present the products or solutions which client asks for, are advised to do the following:

Respect for others: Courtesy and respect for others are fundamental elements of professional behaviour. A professional should strive to understand the differences among classmates and colleagues, provide fair constructive feedback when asked to evaluate others, contribute equitably in group work, be punctual and avoid disrupting the learning and work environment. Professionals should respect others' expectations of confidentiality and privacy.

Commitment to quality: A professional must aim for the highest possible standard of performance and endeavour to produce work in which he/she can take true pride.

Responsibility: A professional should take responsibility for his/her own progress by being prepared for ventures, meetings and other activities. A professional should also take responsibility for his/her actions with care for consequences that might evolve and how their actions will affect others.

Personal integrity: Professionalism is reflected by the extent to which others can rely. A professional should be such as can be counted on to follow through on commitments, avoid conflicts of interest and bias, and adhere to the rules of society or organizations with which they are involved.

Self-Awareness: Self-awareness means having a deeper understanding of one's emotions, strengths, weaknesses, needs, and drives. People with strong self-awareness are neither overly critical nor unrealistically hopeful. Rather they are honest-with themselves and with others. Self aware people know and are comfortable talking about their limitations and strengths, and they often demonstrate a thirst for constructive criticism.

The professionals may do well to ask the following questions:

- (a) What are my personal and professional qualities that may help me to satisfy my internal and external clients ?
- (b) Should I ask my clients to give me feedback on what I am offering them ?
- (c) How I can manage my personal and professional limitations to delight my clients ?
- (d) Do I get overawed easily by complexities and challenges posed by circumstances of my profession ?

Self-Regulation : Self-regulation in a professional reflects from his/her ability to control or redirect disruptive impulses and moods. Propensity to suspend judgment- to think before acting is a trait one observes in a self regulated person. Trustworthiness and

integrity, comfort with ambiguity, openness to change are a few hallmarks of self-regulation.

A true professional would answer the following queries in positive:

- (a) When you face lack of success, do you step back to consider reasons for failures and objections ?
- (b) Do you successfully fight the temptation to withhold information and thereby build relationship of mutual trust ?
- (c) Are you comfortable with ambiguity ?
- (d) Do you have an ability to say no to impulsive urges ?

Motivation : Intelligent professionals demonstrate a remarkable passion to work for reasons that go beyond money and/or status. They are endowed with propensity to pursue goals with energy and persistence. In other words, they are imbued with a strong drive to achieve optimism- even in the face of failure- and organizational commitment.

The following may be posed before the professionals:

- (a) Do you have passion for work ?
- (b) Do you seek out creative challenges ?
- (c) Do you love to learn and take great pride in a job well done ?
- (d) Do you display an unflagging energy to do things better?
- (e) Do you seem restless with status quo? Are you persistent with your questions about why things are done one way rather than another ?

Empathy : Empathy means thoughtfully considering others feelings along with other factors in the process of making intelligent decisions. Empathy covers abilities to understand emotional make up of other significant people and skills to treat people according to their emotional reactions. Hallmarks of empathic professional can be seen in his/her expertise in building and retaining talent, cross cultural sensitivity, and service to internal and external clients.

Following questions can be useful for understanding one's disposition towards empathic work style:

- (a) Do you seek to sense and understand view points of your significant customers?
- (b) Do you listen well?
- (c) Do you know when to push for better performance and when to hold back?

Social Skills : "Social skill is not just a matter of friendliness. Social skill is friendliness with a purpose: moving people in the direction you desire". Social skill reflects through your proficiency in managing relationships and building networks. It is also your ability to find common ground and build rapport with significant people. A professional can check out his repertoire of social skill by responding to following questions:

- (a) Do you have in your telephone diary a large number of people who are not professionals? Do you interact once in a while with them ?
- (b) Do you chat very regularly with colleagues/people who may not be directly connected to your 'real' profile/ job ?
- (c) Do you send greeting cards to people you may not be interacting with on regular basis ?
- (d) Do you succeed in persuading people quite easily?
- (e) Can you recall quite easily names of people (their background and interest areas etc.) you meet after a long interval?

An objective appraisal of the aforesaid action points can enable a professional to be effective in true letter and spirit.

END NOTE

It may be reiterated that professional expertise or competency is earned out of continuous, strenuous endeavours and experience. This hard earned professional knowledge of an individual should not be confined to one particular region. Professional service must be made available to anyone,

anywhere and at any time. The objective of globalisation of professional services is fulfilled only when a service seeker, wherever he may be, is able to obtain the type of services he requires, from a professional of any region of the globe. This calls for constant updation of subject matter, professionalism, dynamism, wide contacts, broader perspective, uncompromising quality of service and above all, self-evaluation.

Indian professionals, therefore, have to create an atmosphere which helps to make India a centre of productivity, delivering international quality services at a competitive cost. It must be recognised that only efficient and vibrant professionals can compete in the global market. To be internationally competitive, Indian professionals must be able to stand up and be counted amongst the best professionals in the world. There is a need to develop specialisation of the highest order, so that Indian specialists can match, if not better, their counterparts in other jurisdictions. It is, therefore, incumbent on us, the professionals, especially Company Secretaries, to become self propelling force and update their knowledge to levels of international competitiveness.

To conclude, the changing needs and expectations of the corporate sector, in the context of rising wave of liberalisation and globalization are the immediate challenges for professionals which need to be faced with tenacity, resilience and full vigour.

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STRATEGIES FOR COMPETITIVENESS OF COMPANY SECRETARIES

DEEPA KHATRI *

INTRODUCTION

The changing business landscape with growing emphasis on good corporate governance and compliance, demands quality professionals and service providers. Business is no longer what it used to be a decade back or so. Deep changes are taking place in terms of size, complexity and expectations. As the global integration intensifies; the changes will deepen further with each passing day. The proposed opening of professional services, arrival of new technologies and vastly different geo-political realities make it imperative for professionals to assess core competencies and build upon them, not only to seize the opportunities but to benefit from them within the country as well as beyond the national territory, so as to become professionals with global presence in true sense.

In the wake of proposed liberalization of professional services, Company Secretaries are expected to show higher degree of professionalism in services than ever before. The existing commitment of the members of Company Secretaries profession needs to deepen. In order to withstand the pressures of globalisation and competition from multinational professional firms it is essential to upgrade and keep up the quality of the professional services. The continuous updation and sharpening of professional knowledge, skills and expertise is a key determinant in maintaining competitive edge in a fast changing environment.

The vision is long and high; the path is clear and concrete; the action is full and sure

and the targets are ever heightening. In this context, an attempt is made in the following paragraphs to briefly discuss the services rendered by Company Secretaries to the corporate sector, challenges faced by them and the strategies to meet those challenges.

THE COMPANY SECRETARY - A MULTI SKILLED PROFESSIONAL

As the principal officer of the company, the Company Secretary is a vital link between the Company, the Board of Directors, shareholders and governmental and regulatory agencies. Being a business manager and an important adjunct in corporate management hierarchy, the Company Secretary acts as a confidant of the Board of Directors; takes part in the formulation of long-term and short-term corporate policies; maintains statutory books and records and ensures compliances with legal and procedural requirements under various enactments for effective corporate governance. His duties involve advising the Board of Directors on the ramifications of the proposals under its consideration. As a corporate development planner, he identifies expansion opportunities, arranges collaborations, amalgamation, mergers, acquisitions, takeovers, divestment, setting up of subsidiaries and joint ventures within and outside India. He looks after the entire secretarial functions which include preparing agenda, convening, conducting and preparing minutes of meetings of Board of Directors, ensuring timely transfer and transmission of shares, shareholders, Annual General Meetings, Inter-departmental meetings and meetings with

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BACKGROUND

foreign delegations, financial Institutions, regulatory authorities, etc.. Being responsible for successful implementation of all aspects of corporate governance, the Company Secretary endeavors to minimize the company's liabilities and strengthen its stability.

Company Secretaries can also act as Company Secretaries in Practice. Company Secretaries, whether in employment or practice, are two facets of the same coin. His area of service inter-alia includes advising and assisting on foreign collaborations and joint ventures abroad, advising and assisting on corporate restructuring, appearance before regulatory authorities, advising and assisting on arbitration and conciliation, intellectual property rights and WTO, issue of certificates under various statutes.

CHALLENGES BEFORE THE COMPANY SECRETARIES

WTO and Indian Professional Services

The World Trade Organization (WTO) was established for the promotion of world trade on fair and equitable basis. The preamble of the WTO Agreement recognizes the importance of equating the increase in living standards, full employment, expansion of demand, production and trade in goods and services with the optimal use of the world's resources for sustainable development.

The *General Agreement on Trade in Services (GATS)* came into existence as a result of the Uruguay Round of negotiations establishing the WTO. The main object of GATS is to create a credible and reliable system of international trade rules to ensure fair and equitable trade in services. It aims at stimulating trade and development by seeking to create a predictable policy environment wherein the member countries voluntarily undertake to bind their policy-regimes relating to trade in services.

The WTO has divided all services into 12 sectors, which are further divided into 161 sub-sectors. The main services sectors are-Business services (including professional and computer services), Communication services, Construction and Engineering services, Distribution services (commission agents,

wholesale and retail trade and franchising), Education services, Health services, Tourism and travel services, Recreation, cultural and sporting services, Transportation services, and Other services.

India has a large pool of well-qualified professionals in the information technology, education, audiovisual, accountancy, architectural, construction, engineering, health and consultancy services. Moreover, India has comparative advantage over other member countries in supply of these professional services. Services exports grew by 71 per cent in 2004-05 to US\$ 46 billion, and 75 per cent to US\$ 32.8 billion in April-September, 2005. In 2004-05, software service exports grew by 34.4 per cent to US\$ 17.2 billion and by 32 per cent to US\$ 10.3 billion in the first half of 2005-06.

India has considerable export potential in many services due to its skilled, low-cost manpower and demand-supply imbalances in many developed countries. It has carved out a niche for itself in the global market for software, construction, engineering, health, telecommunication and financial services. India has also developed potential for cross-border exports of various IT-enabled services and back-office activities like processing, billing, call handling, medical transcription, tele-medicine, tele-education and a variety of on-line and outsourced services.

For India, the preferred mode of supply of services is Mode 4 "presence of natural persons", Indians visiting abroad for short duration for providing services. In addition, India is also interested in providing services in Mode 1 "cross - border", electronically and Mode 2 "consumption abroad" by soliciting customers visiting India. The developed countries have, however, imposed a variety of restrictions, including visa restrictions, lack of recognitions of Indian qualifications, nationality and residency conditions, need-based tests and commercial presence requirements in host markets.

Duties and Responsibilities to grow even wider and more complex

The duties of and expectations from the company secretary continue to grow. The

seriousness of their role makes it essential for them to keep up-to-date with changes and new developments and to understand their implications across a wide range of business activities. There are a large number of offences in company law and other laws, which can lead to company directors being fined along with the company secretary; serious cases can result in a custodial sentence.

A company's reputation is one of its most prized possessions in pursuit of sustained growth. It is essential that this asset is not undermined by breach of the law or failure to follow best practice. The company secretary must ensure that legislations are not infringed, that regulations are adhered to, that compliance is full and up-to date at all times and that areas of potential risks are identified and dealt with. This is all in addition to running a smoothly operating structure that looks after its directors, shareholders and investors.

Commitment to Professionalism

Everyone wants to become a "professional" these days or to work in a professionally managed organisation. While being professional may be a virtue, what exactly is implied by being a professional is often found lacking in individuals and companies. In fact, some family owned companies have higher professional standards than so-called professionally managed companies. Many people still think that one can become a professional simply by acquiring a degree and many companies have the mistaken belief that they can claim to be professional by hiring a certain kind and number of professionals.

Professionalism indeed is an attitude towards work rather than anything else and it has to be acquired over a period of time. It is also the only way to survive in today's competitive world. Being a professional means more than simply acquiring a degree. It means being true to your chosen profession and trying to excel in any job assigned to you. Sometimes it means simply doing what is right. Among the meanings of the word 'professional' in the dictionary, there are two meanings, which are connected with the way one works. One is something that is related to a job or profession, while the other denotes well-trained person

or a person who is good at one's work. To be a professional, therefore, implies that a person is good in his job and can be depended upon. Clearly, it is easy to be a professional in the first instance. If one does anything over and over again, one becomes professional of some sort. The second implication, however, is more difficult. It is easy to do a job, but to do it well with commitment, zeal and dedication, is professionalism.

Competition

Company Secretary in practice has to face the competition not only from the fellow professionals but also from other professionals and consulting firms, nationally and globally. Professionals are stepping towards achieving high esteem and outstanding quality of services in India, now the goal ahead is to make its position and recognition global. In view of the current competitive environment and potential for growth of the service sector, where Indian companies would be competing for specialized man-power globally, requirement of knowledge and expertise of international practices is indispensable. In such a global competitive scenario, there is need for capacity building through setting up of mega firms to compete with global service providers.

Quality of Service

Services industry faces a special challenge: Meeting customer needs while remaining economically competitive. There can be no substitute for high-quality service. In Company Secretaries profession, excellence is the hallmark of success in a competitive environment. Competitive advantage rests with those professionals that successfully provide customer (Board of directors, shareholders, government, investors and other regulatory authorities) value through the most efficient use of technology and latest knowledge.

The performance can be judged and enhanced to the required level of excellence only by evaluation by a competent professional. The professional is therefore required to periodically review and evaluate the quality, sufficiency of systems, procedures and practices, so that excellence in their performance is maintained. Quality professionals can play vital role in keeping

their companies and clients improving bottom-line performance.

New Developments - E-Governance

MCA-21 Project will move the operations in ROC offices from paper-based to paperless environment. The professionals have to help the government in its noble endeavour and for the purpose, it is necessary to popularise the e-filing under MCA-21 by enlightening the company managements and other stake holders in proper perspective.

No change is easy. In the initial stages nearly all corporates will require guidance on this new initiative. While the MCA-21 project is laudable, every company might not be having the necessary infrastructure to do e-filing. While making a big leap into the digital era from a classic paper based system, it is a challenge to introduce a system so complex and such an exercise is not very easy. There are certain issues that still need to be innovatively addressed - Stamp duty is one such issue. The new amendments made in the Stamp Act are expected to help address this with use of appropriate technology.

The induction of a large number of Banks authorized to collect MCA payments and acknowledge the same in a timely manner into the MCA21 system is another challenge. The participating Banks will acknowledge MCA collections through electronic means within a day and this would need adapting their core banking software applications to include the acknowledgement facility. The standardization that needs to be achieved and the conformance by these Banks is a non-trivial exercise.

Digital signatures is another new area that needs to be tackled. Though digital signatures have been previously used for specific application such as Customs, this will be the first time when digital signatures will be used on such a large scale - by directors of companies, practising professionals, representatives of financial institutions besides MCA employees themselves. The process of issuance and renewal of digital signatures would have to be made easier.

HOW TO MEET THE CHALLENGES

GATS and Market access to Professionals from Developing Countries

In the context of market access to professionals from developing countries, there is need for negotiations in following areas:

1. Liberalization of movement of professionals of the developing countries by (a) eliminating discrimination by developed countries through the use of Economic Needs Test (ENT); (b) exemption from social security contributions by the developed countries in respect of professionals of developing countries; (c) administering a transparent and temporary work visa regimes by the developed countries for professionals of developing countries; (d) specific sectoral commitments by the developed countries in line with the requirements of developing countries; and (e) mutual recognition of professional qualifications by the developed and developing countries.
2. Allowing developing countries to offer professional services under Mode 4 rather than Mode 3 because they do not have adequate financial resources for setting up branch offices.
3. With overseas investors and joint ventures seeking new opportunities in India, there is a need for an appropriate service infrastructure for attracting and sustaining higher level of foreign direct investment. It is high time that the professionals from different disciplines are allowed to join hands to provide world-class services and compete on merit with multinational professional firms.

At the present juncture, the most critical factor for Indian professionals is how best to pool resources and create mega firms for serving global clients. The Indian professionals have to face this reality and gradually build their own brand in the domestic and international market.

Brand Building as a Unique entity/Quality

Quality is age-old concept, and has been perceived in a number of ways. However, the

concept has evolved over time to include – Perfection, Consistency, On time delivery, Compliance with policies and procedures, Doing right first time, Total customer service and satisfaction, Uncompromising standards and high achievement, Excellence or superiority

Not going into technical details summarized below are some of the definitions propounded by world famous quality gurus-

- Improving the products and services by reducing the uncertainty and variation.— *Dr. Deming,*
- Fitness for use.—*Joseph Juran, American quality exponent*
- Conformance to requirements. i.e. clearly stated requirements are to be met.—*Philip Crosby*
- Providing the customers with innovative products and services that satisfy their requirements.- *Xerox, the world famous copier-company.*

Proper training, knowledge and application of appropriate information technology are key factors for superior performance. Company Secretary in practice has more responsibility to impart proper training to his employees and trainees in providing excellent customer service. The training includes learning of tools and techniques of problem solving. World class companies are now practicing six sigma quality levels. The standard should be zero defect i.e. no defect at all in the service.

Measure Performance

For ensuring that the service quality is excellent, it is necessary to measure and analyze the performance. Progressive companies are doing surveys to get the objective feedback from internal and external customers. The results received are used again to plan, do and check the things and do them differently, if required. By adopting quality culture, company secretarial department can contribute to the organizational excellence and enhancing the Company's image. Practicing Company Secretaries can enhance their service levels by adopting these principles.

Updation

To sustain growth and momentum, there is need to all move ahead step by step retaining goodwill, image and reputation. As competent professionals, it is imperative to keep abreast of new developments taking place on an ongoing basis at the global level, updating knowledge base constantly and acquiring newer skills and expertise for long term survival. It is an indisputable fact that every individual, professional or an Institution can progress and prosper in a competitive and complex environment only on the strength derived from the past, taking into consideration the prevailing situation in proper perspective and planning for further growth and development on a systematic and scientific basis anticipating the emerging trends of the future.

The fast changing technological developments, competitive business environment, globalisation of trade and opening of economy with international commitments for free flow of products, processes, services, ideas and creation of an acceptable foreign investment climate all will lead in the years to come further liberalisation of the economy and enactment of newer legislations and/ or amending existing statutes as appropriate. Slowly but steadily the move is towards an interdependent world and professionals in times to come good would require to understand and interpret not only local laws but also every aspect connected with international trade and finance.

E-Governance : a boon to companies as well as professionals

No change in easy and MCA recognizes this need by not only providing services through the established resources like website and Physical Front Offices (PFOs) but also establishing partners in the form of Practising Company Secretaries by giving them opportunity to open Certified Filing centres (CFC). The professionals may accept remuneration as per market-determined forces, for the service so offered and it must be seen as an opportunity. It is hoped that Company Secretaries will create an opportunity for themselves.

In the initial stages nearly all corporates will require guidance on this new initiative. The members must immediately take on this initiative to become the guiding force for facilitating the companies such that the profession of Company Secretaries is recognized as the knowledge resource whenever any corporate requires assistance on e-filing and other related matters.

The MCA-21 portal will be a boon to companies, investors, professionals and officials who interact with the Ministry of Company Affairs. To enable easy adoption of the portal, various service providers have designed a range of easy to use services for the requirements of various types of users.

Once all the changes envisaged under MCA-21 project are put in place, it would prove a boon as it will help to Business enabled; to register a company and file statutory documents quickly and easily, to public; to get easy access to relevant records and get their grievances redressed effectively, to Professionals; to be able to offer efficient services to their client companies, to Financial Institutions; to find registration and verification of charges easy, to MCA; to ensure proactive & effective compliance of relevant laws and corporate governance, to Employees; enabled to deliver best of services.

Other Suggestions

While it will be very difficult to visualise how an individual professional can acquaint oneself in a competitive and complex business environment, nevertheless one can make a broad set of general strategies as to how to move towards meeting the challenges of the future. The general strategies in this regard should include - a) Develop the skills and abilities not only pertaining to every facet of legal function but also on administration and management functions. b) The professionals should be capable of playing twin roles effortlessly one as a core specialist and

another as an integrationist having a capacity to adjust and interact with any one within and outside the organisation c) The professional should pay more emphasis and attention on quality of service rather than quantum of service maintaining utmost trust and confidence d) Professionals should strive and attain core competency in other areas.

CONCLUSION

No doubt the profession has climbed the ladder of excellence and made its presence felt among the community of professionals, but the changing paradigm requires the professionals to be adaptable, pragmatic, ethical and highly professional for maintaining competitive edge in a volatile environment. It is, therefore, vital for Company Secretaries members to build upon broad range of areas by updating themselves in terms of changing regulatory ambience, understanding the contemporary developments and honing professional as well as technical skills. Company Secretaries should no longer be complacent with the familiarity and core competency in local regulations, but should make constant efforts towards achieving greater understanding of the legal framework, business usage and business culture prevalent in other countries. This indeed will help in keeping competitive in global market for professional services.

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COMPLIANCE OF COMPETITION LAW : A TOOL FOR GOOD CORPORATE GOVERNANCE

VINAY KUMAR SANDUJA*

Empirical research confirms that companies with demanding governance standards show significantly higher market valuations. A recent study by McKinsey and the World Bank establishes that large international institutions are willing to pay a 13 % premium for German companies with good corporate governance. Another empirical study shows that Companies with excellent governance performed on average 8.5 % p.a. better than companies with poor governance. A governance index consisting of 91 companies from the German stock exchange has shown an average additional return of 12% p.a. between the best and poorest performing companies in the period 1998 – 2002.

So, Governance is an important concept in the ever changing dynamic business environment. It is a significant driver of economic growth.

Corporate Governance however, requires robust document management, collaboration, training, certification, and records management, functionality in an integrated, secure, single-repository environment. The environment needs to create the framework for establishing compliance proof points, enabling effective information dissemination, and assessing and mitigating corporate risks. It also needs to be able to adapt to the inevitable and often radical changes to governance requirements. Achieving compliance is an increasingly complex practice and due-process procedures require that organisations recognise a suitable control

framework on which to base all of their compliance efforts.

A series of events over the last two decades have made the issues of compliance and corporate governance a central concern for not only the international business community and financial institutions but for India Inc. as well.

These events costing investors billions of dollars have also contributed to increased shareholder activism and competition for investment. Investors, especially institutional investors, are now looking for well governed companies and require evidence to prove that companies are run on sound business principles and practices that minimize the possibilities for mismanagement. In the nutshell, the investors seek out companies that have sound corporate governance structures and compliance programmes.

FACTORS HIGHLIGHTING NEED FOR GOOD CORPORATE GOVERNANCE

One reason, mentioned earlier, is the proliferation of scandals and crises. As also mentioned, the scandals and crises are just manifestations of a number of structural reasons why corporate governance has become more important for economic development and a more important policy issue in many countries. The private, market-based investment process underpinned by good corporate governance is now much more important for most economies than it used to be. Privatization has raised corporate

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governance issues in sectors which were *hitherto* under the control of Government.

The technological progress, liberalization, opening up and integration of financial markets, and other structural reforms—notably, price deregulation and the removal of restrictions on products and ownership have made the good governance not only more important, but more complex too.

COMPLIANCE VIS A VIS CORPORATE GOVERNANCE

In recent times, there has been a paradigm shift in many economies in the way corporate governance, compliance, and business ethics are approached. It is a shift that continues to be driven by demanding performance expectations, increasing stakeholder demands and growing public scrutiny. New levels of accountability, which come not just from new laws and regulations, but also from the expectations of a broader stakeholder group, have elevated the concerns at board level of ensuring that effective, robust and reliable compliance tools are in place and being utilised.

Regulatory compliance and reporting needs to be viewed as a natural extension of the governance responsibility thrown on top management and corporate boards. Compliance indeed ensures that good corporate governance is aligned with the company's business objectives and risk management strategies and is thereby adding real value to the organisation. Ultimately, the goal is to ensure that the compliance with the spirit as well as the letter of the law, is embraced in every corner of the business.

A key focus of the Corporate Governance Codes is to promote an organizational culture that encourages ethical conduct and compliance with the law. Those managing the compliance program should exhibit a "commitment to compliance with ethics and the law."

The most important aspect of compliance management is the creation of a compliance-conscious environment at every level of the company and the education and training of employees to avoid engaging in any activities that might raise legal compliance concerns.

Recognizing the need to respond immediately if a potential compliance problem is detected, companies strongly encourage their employees to report questionable activities immediately to their supervisors or the relevant departments.

Various Companies establish a Compliance Committee that performs its duties under the Corporate Governance Codes. The Company's commitment to compliance with law is made explicit in the Activity Guidelines that form part of their Corporate Mission Statement.

COMPETITION AND CORPORATE GOVERNANCE

Competition among firms may be more effective in ensuring good governance than any other mechanism. It has been argued that competition in product markets is a very powerful force for ensuring good corporate governance. A number of studies have provided detailed evidence of the effect of competition on performance. The evidence in the management literature points out that competition leads to more efficient decision making structures in firms. The higher the level of competition, the higher is the level of growth in productivity.

Corporate governance problems are less severe when competition is already high in real factor markets. The importance of competition for good corporate governance is true in financial markets, as well. The ability of insiders, for example, to mistreat minority shareholders consistently can depend on the degree of competition and protection. If small shareholders have little alternative but to invest in low-earning assets, for example, controlling shareholders may be more able to provide a below-market return on minority equity.

Without effective competition, it is not possible to build a culture of good corporate governance. The firms under restricted competition generally lack the incentives to use financial and operational resources efficiently. They also often possess considerable market power, which enables them to earn excess profits and wield influence to tilt public policy in their favor. Sound competition policy helps firms focus on

efficiency, reduces price distortions, lowers risk of misguided investments, promotes greater accountability and transparency in business decisions and promotes better corporate governance.

Where competition is intense and global in scope, more companies realize that corporate governance makes good business sense. Investors seek out firms that run the business efficiently, treat shareholders equitably and comply with high standards of disclosure, beyond the statutory requirements. By applying good governance, a firm can earn a good reputation and efficient access to finance, which in turn enhances their ability to compete. In effect, good governance becomes an instrument of competitive strategies. Ultimately, the key role of competition is to enhance economic freedom. It provides opportunities for entrepreneurs to compete on economic merits.

COMPETITION LAW AND COMPLIANCES

“People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”. **Adam Smith, The Wealth of Nations**

The existence of competitive markets is an important external control on companies forcing them to be efficient and productive. The lack of competitive markets discourages entrepreneurship, fosters management entrenchment and corruption and lowers productivity. For this reason, it is crucial that laws and regulations establish a commercial environment that is fair yet competitive. The need for competition law, especially those laws which aim to detect, prevent and prosecute anti competitive behaviour, becomes relevant. Free and fair competition among corporations is a fundamental market requirement that underlies all economies. Most countries that adhere to and promote market economic principles enact competition laws to prevent unfair and disruptive trade practices by individual firms. India has made substantial efforts to promote competition by enacting The Competition Act, 2002.

Given today's rigorous competition enforcement environment, a robust competition compliance programme is an absolute must for a corporation doing business in multiple jurisdictions. In an era of global competition, voluntary compliance with competition laws is becoming a global standard led by the world's most prominent international corporations. This is due to the growing recognition that breach of competition laws brings about managerial burdens rather than market benefits to individual companies. Corporations are thus obliged to firmly build up a business philosophy of abiding by established rules of fair market competition.

Business community needs to be fully aware that while unfair business practices may bring about short-term profits to individual corporations, in the long run they in fact become less competitive. Genuine business competitiveness is demonstrated through fierce competition in individual markets, and only competitiveness that survives market competition can sustain itself in the long term. Business community should not overlook the fact that voluntary observance of competition rules not only benefits corporations themselves but also benefits the entire economy by enhancing its external creditworthiness.

In recognition of these facts, it becomes essential that all companies strive for voluntary observance of fair market discipline, and in the process help lay a cornerstone for a mature culture of corporate compliance. Voluntary compliance may be defined as ensuring that corporations meet the requirements of competition-related laws, norms, and standards at their own initiative.

It is in the interest of everybody in the company - its directors, officers, employees and shareholders – to implement and maintain a robust compliance program. If it works, it could save the company and individuals from a sea of troubles. The benefits of compliance may be difficult to put a figure on, but they are invaluable. Even if it fails to deter maverick employees, a state of the art program can confer advantages in any proceedings, including a substantial reduction of the penalty. The establishment and diligent implementation of a compliance program may help protect

directors from personal liability in actions brought by shareholders and other law suits.

It goes without saying that prevention is always better than cure. When businesses fail to have a compliance program, or when it is ineffective, they are essentially relying on others to bring that failure to their attention. It is far better when companies discover a breach first and act to rectify the problem, rather than the competition authorities bringing the breach to the company's attention.

All businesses have a duty to act lawfully, but there are more practical reasons why compliance with competition law is particularly important. On a broad level, the main aim of competition law is to ensure that markets remain competitive. Compliance ensures that this aim is achieved to the benefit of both business and consumers. At an individual level, businesses that comply with the law could avoid the various consequences of non-compliance.

IMPORTANCE OF COMPETITION COMPLIANCE PROGRAMMES

A competition compliance program may be defined as a system consisting of procedures, policies and training to help reduce the risk of an organisation breaching the Competition Law of a country.

The competition compliance programme may be best characterised as an in-house awareness programme; its main thrust is aimed at creating an awareness amongst company employees who have external contacts i.e. customers, suppliers, competitors, or even perhaps regulators.

An effective compliance programme, that minimizes the risk of breaching the laws, is an indispensable tool for managing business practice risks. These risks include the risk of breaching the law and the consequent imposition of heavy company fines, personal fines on individual officers. The cost of proceedings with the high cost of litigation and legal fees and consequential monetary claims by aggrieved consumers are additional risks that must also be considered. These factors, together with the cost of cancelled promotions, management distraction and use

of human resources and the likely adverse publicity occasioned by proceedings and damage to business reputation are possible outcomes of failing to ensure that business practices are competition compliant.

Negative publicity can dissuade customers from dealing with a business, thereby reducing profit margins. Substantial sums of money may also have to be spent to counteract the negative publicity and the images created in the public mind. The human resource costs involved in a breach of the law are significant and relate not only to staff diversion from core business issues, through time spent in locating information and collating it in order to answer regulators, inquiries, but also to the human impact of employee stress on productivity.

DESIGNING AND IMPLEMENTING COMPETITION COMPLIANCE PROGRAMME

The essential starting point for the design and implementation of an effective compliance programme is a sound understanding of the laws. Advisors and corporate officers must familiarize themselves with the laws so that they are able to : understand the broad ambit of the provisions; have sufficient knowledge to recognize those circumstances where professional advice is appropriate and warranted; and integrate the legal obligations into the way in which the institution does business.

As every business is unique, different companies require different steps to ensure compliance with competition law. These depend on a range of factors, including the size and nature of the business, and the frequency of contact of employees with their competitors. Businesses which are able to significantly affect the market in which they are operating or which have large market shares, may be more vulnerable to allegations of abuse of their strong position in the market. Their agreements are also more likely to have an appreciable adverse effect on competition in the market. Employees or directors of a business who have regular contact with competitors on a business or social basis may run a higher risk of colluding.

A compliance programme therefore provides a formal internal framework for ensuring that

businesses, i.e., the management and individual employees, comply with competition law. It may include such elements as training to raise awareness of the law, the use of checklists to ensure compliance by individual staff with company policies, recording systems to document any permitted contacts that employees have with competitors, and independent reviews of agreements, behavior and staff to monitor ongoing compliance. It can also help identify actual or potential infringements at an early stage, enabling the company to take appropriate remedial action.

When considering whether it is necessary to implement a compliance programme, companies should bear in mind that if they do commit an infringement, financial penalty may be reduced where they can show that they have taken adequate steps to achieve compliance. The larger the business and the greater the risk of infringement, the more likely it is that adequate steps will include the introduction of a compliance programme. As a starting point it is helpful to assess the extent to which competition law will affect the business and the risk of committing an infringement. In case the risk of infringement is high, more elaborate measures are likely to be required to ensure compliance. Further, if employees understand competition law, they will also be able to recognize when the business is a victim of anti-competitive agreements or conduct, and be better-placed to protect the business interests by making a reasoned complaint to the Competition authority.

As the consequences of infringement can be serious, it is in interests of business to ensure that business complies with the law. A compliance programme must be capable of meeting the changing requirements of business and must make efforts as part of the regular evaluation process to ensure that the compliance programme continues to be relevant.

ADVANTAGES OF COMPLIANCE PROGRAMME

Business benefits : An effective compliance program that embeds a culture of compliance throughout the organisation can be a business enhancer offering positive benefits to business. A superior knowledge of the risks faced by the

organisation and of the measures in place to guard against those risks can provide a company with a competitive advantage. When staff are aware of their rights and obligations customer service will improve and staff will also be more alert and better able to deal with unlawful conduct that the company may be subjected to. A company can obtain value from good governance and compliance, develop a better culture, prolong its life and maintain its reputation, and may avoid or reduce the negative effects of litigation and regulatory intervention.

Reputation & Goodwill : Companies that contravene the Competition law may suffer damage to their reputation, unravelling years of careful marketing and brand development. In the era of information age it is more difficult to escape events that in the past were consigned to fading memories and dusty library shelves. Information on past misconduct by companies can now be retrieved at the stroke of a keyboard.

Mitigation of penalties : In the event of Competition authorities instituting proceedings, the verifiable presence of a compliance programme and culture, and its successful implementation, can be scrutinised by the courts when the quantum of penalty is determined.

PREREQUISITES FOR A SUCCESSFUL COMPETITION COMPLIANCE PROGRAMME

There is no standard programme that can apply in all cases. However, there are certain general features that must be included as a minimum in any programme if it is to work effectively. These features provide a framework around which business should build the programme. Exactly how business does this depends on the particular requirements of business. Therefore, the contents of a compliance programme must be tailored to the business specific requirements. The general guidelines for devising a Compliance programme are given below :

Commitment to Compliance Programme

The Commitment of all levels of management to the integrity of compliance

programme is one of the prerequisites for its success. There has to be a genuine and clearly articulated culture of compliance within the Company. A good competition compliance programme is part of an integrated risk management strategy. Businesses must get the commitment of senior management to the development and implementation of a compliance policy. Commitment must be driven from the top or a Compliance Committee of the Board who should take direct responsibility for implementation. Adequate resources – human, financial and technical must be provided for compliance programme to be successful.

Senior management support must be visible, active and regularly reinforced. This element can be achieved in a number of ways, including:

- a personal message to staff from the most senior individual in the organisation stating their commitment to the programme,
- referring to the policy in the company's mission statement or code of behaviour and ethics,
- making adherence to the programme one of the overall objectives of the organisation, or
- designating a particular member of the board or senior management team to take on overall responsibility for ensuring that the compliance programme is functioning correctly and to report at regular intervals on how it has operated.

Compliance Policy and Ethics

A compliance ethic includes ongoing educational programmes and the imposition of disciplinary and corrective measures when breaches occur. The main principles of the compliance policy need to be set out in simple and plain language that is easily understood. An effective policy could include seeking a written undertaking from employees and directors to conduct their business dealings within the compliance framework and taking disciplinary action against employees/directors whose actions resulted in an infringement of the law. The relevant procedures should give

employees avenues to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law.

An effective compliance policy should contain at least the following elements:

- an overarching commitment to comply with competition law
- placing a duty on all employees and directors to conduct their business dealings within this overarching policy and seeking a written undertaking from them to this effect, and
- a commitment to take disciplinary action against employees/directors who intentionally or negligently involve the firm in an infringement of competition law, this is essential if the programme is to be taken seriously.

Involvement and Training of Employees

The company should have an active training program that includes in-person instruction by knowledgeable professional having expertise in corporate governance and compliances. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of competition violations, both for the company and the individual employee.

Training sessions should be tailored to the specific area of activity. Sales personnel may need to have a particular awareness of pricing issues; similarly senior executives in regular contact with competitors in trade associations or other industry meetings should be made well aware of the permissible limits.

The training could be also offered as part of the induction programme for new staff and on a regular basis thereafter to reinforce the compliance message and keep staff updated on any changes in business practices and the law.

While training is important, it is not sufficient to assure compliance with the competition laws. To achieve that goal, a company must have a proactive compliance department that is dedicated to practicing

preventive law. The company's lawyers should regularly attend management meetings and visit the company's facilities so that employees know whom to call if they have a question or a problem.

Continuous Review and Improvement

Businesses should ensure that compliance systems represent current best practices. The system must remain relevant, comprehensive and effective. Evaluation is essential as a means of ensuring that the compliance programme is working properly, as well as to identify and address areas of potential risk. Evaluation could take the form of testing individual employees' knowledge of the law, policy and procedures. Adherence to compliance policy could also be used as one of the criteria against which an individual's and department's performance is appraised. The evaluation process should be carried out as openly as possible to indicate to employees that their conduct is constantly subject to review against the terms of the compliance programme. The regular evaluation process should ensure that the compliance programme continues to be relevant to the company's business.

Effective Implementation

A competition compliance programme should be effectively implemented and promoted through appropriate policies and procedures.

EFFECTIVE COMPETITION COMPLIANCE PROGRAM - SEVEN COMMANDMENTS

1. Compliance standards and procedures should be established to be followed by employees and other agents that are reasonably capable of reducing the prospect of violations;
2. Specific individuals be assigned overall responsibility to oversee compliance with such standards and procedures;
3. Discretionary authority should not be delegated to individuals who might engage in illegal activities;
4. Standards and procedures should be effectively communicated to all employees and others agents through

training programmes or by disseminating publications explaining in a practical manner what is required;

5. Reasonable steps should be taken to achieve compliance with standards, e.g. through monitoring, auditing and reporting system;
6. Standards should be consistently enforced through appropriate disciplinary mechanisms;
7. All reasonable steps should be taken to respond appropriately to the violations if detected and prevent similar offences.

COMPLIANCE OF COMPETITION LAW- GLOBAL PERSPECTIVE

Competition authorities the worldover help businesses understand the benefits and responsibilities associated with the Competition Act. They assist small business to avoid violation of the Act and give them the knowledge to respond effectively if they become the target of misrepresentation, misuse of market power, or unconscionable conduct by larger companies. The Competition authorities encourage businesses to think of compliance of Competition Act as an important management tool for good business practice that can lead to success and profitability.

Competition authorities of the respective countries publish a range of material on Competition Act, including detailed guidelines explaining how the Competition authorities will apply and enforce its powers under the Competition Act; information leaflets, which are a basic guide to different aspects of the Act and the rules. These guidelines contain detailed instructions as to how the Competition authorities intend to enforce the Act and deal with particular issues. In this context, the position in select countries is given below :

UNITED KINGDOM (U.K)

The Office of Fair Trading (OFT) responsible for enforcing the Competition Act in U.K, have designed several quick guides to inform businesses about how it applies competition law. Some guidelines provide an overview of the law while the other cover specific areas.

Comprehensive information is available in a number of detailed competition law guidelines published by the OFT in conjunction with the sector regulators. These guidelines, offer general advice to businesses on what they can do to encourage compliance with the law within their organisation. In addition, it describes the four basic elements that should be there in a compliance programme as a minimum, if the compliance programme is to be effective. Furthermore, a business that has taken adequate steps to achieve compliance but has nonetheless committed an infringement may receive a reduction in the amount of financial penalty imposed. What constitutes adequate steps varies from business to business. In addition to powers conferred on OFT under the Competition Act 1998, the sector regulators continue to have powers under the sector specific legislations. In certain circumstances they may use these powers to order a business to submit a compliance programme.

UNITED STATES OF AMERICA (U.S.A)

The Antitrust Division of the U.S. Department of Justice shares responsibility with the Bureau of Competition of the Federal Trade Commission for enforcement of Antitrust laws in USA.

The Antitrust Division and the FTC have published extensive guidelines for compliance of the federal antitrust laws. The guidelines for collaborations among competitors for horizontal mergers and acquisitions, and for non-horizontal (or "vertical") mergers are important. When taken together, these guidelines provide significant guidance as to how the Agencies are likely to approach a variety of antitrust issues. The guidelines also provide insight into the analytical processes utilized by the Agencies in determining whether to undertake an antitrust challenge. Factors central to the different analyses throughout the guidelines include pre-collaboration/merger market power the impact of a given collaboration/merger on the market and subsequent market entry by other market participants, as compared to any efficiencies which must be gained as a result of the collaboration/merger.

SINGAPORE

The Competition Commission of Singapore (CCS) has been entrusted the responsibility of enforcing Competition Act in Singapore. Information on how the CCS assesses business conducts and practices that contravene competition law can be found in various guidelines. The CCS encourages businesses to self-assess their risk of infringing competition law before deciding on how best to ensure compliance. Businesses may find it useful to refer to indicative checklist of behavior as a starting point. If a business assesses that it runs a risk of infringing competition law, it may wish to seek professional advice on the appropriate measures to mitigate the risk.

ROLE OF PROFESSIONALS IN COMPLIANCE OF COMPETITION LAW

Competition authorities the worldover encourage companies to seek advice from compliance professional with experience in competition law like company secretaries to assist them design, implement and maintain a compliance program. Even the most consistent and clear guidelines from the regulator cannot on their own develop a culture of compliance in any organisation. It is the task of compliance professional to fit regulatory goals into organisational norms.

Company Secretaries can assist the companies to design and implement an effective competition compliance program by:

- advising on, and reviewing, existing compliance program, or developing and implementing a new compliance program, including preparing a compliance manual particularly addressing issues likely to arise for the organisation;
- conducting staff training on compliance issues;
- reviewing companies compliance line of reporting;
- reviewing company website from a compliance perspective;
- reviewing the effectiveness of company compliance program to encompass changes to legislation etc.

CONCLUSION

The preceding discussion makes it amply clear that free and fair competition enhances good corporate governance and compliance of competition law works as a tool for good corporate governance. The non compliance of competition law has similar effect on reputation and performance of a company, as the absence of good corporate governance.

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of internationally accepted best practices as well as provides adequate flexibility for making changes to law in response to the requirements of ever-changing business models. In short, to provide India with a modern Company Law that meets the requirements of a competitive economy.

The Government is now in the process of drafting a Bill in New Company Law.

Epilogue

It is increasingly being recognized that the framework for regulation of corporate entities must facilitate companies to operate in a national and global context, encourage good corporate governance and enable protection of interests of investors, employees, creditors as well as boost economy as a whole. In the competitive and technology driven business environment, while corporates require greater autonomy of operation and opportunity for self-regulation with optimum compliance costs, there also is a need to bring about transparency through better disclosures and greater responsibility on the part of corporates and managements for improved compliance.

In recognition of the fact that the primary purpose of any law is to facilitate the public and bearing in mind the current international style of legal drafting, an ideal law for the corporate sector should be clear, concise and comprehensible. It is desirable that the law is a "core company law" i.e. regulating the "entity" (irrespective of its corporate structure and size) rather than its "activity" and providing the basic principles governing all aspects of the operation of corporate entities within a single, comprehensive framework.

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