PROFESSIONAL EXCELLENCE AND VALUE ADDITION — MUTUAL CAUSAL RELATIONSHIP

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With reference to the primeval cause, the philosophy tells us that the cause and effect relationship is inscrutable. Which is the cause of which, or the effect of which is a question beyond explicability. Yet the primeval cause and effect, that is its creation, holds a mutual, inalienable relationship. This perplexity of inscrutable relationship is the beauty of the Creator and His creation. Professional excellence and value addition to business, perhaps, share the same relationship. Whether value addition leads to professional excellence or professional excellence leads to value addition to business may therefore remain a mystical unanswered question.

Value creation is a process. Like in any other creation, the creator needs to bring the value out of her through enormous transformation. To take a cue from Angie Watkins [TOI, July 29, 2007]:

"It is like a caterpillar that eventually metamorphoses in to a beautiful butterfly. All of God's creations, and professionals are the preferred ones i believe, have the ability to turn into beautiful butterflies.

"But not all God's creations will become beautiful butterflies. Why is that? A caterpillar does not allow itself to be free from self. Whether it is through weakness or fear, a caterpillar must break free from what is holding it back by realizing it can become a butterfly.

"A butterfly is free from the restraints of self. A butterfly has to grow out from self and now seeks to love others with all the love it has while a caterpillar is still seeking to be loved by others. Unfortunately, many caterpillars do not know they have the ability to become butterflies and so remain in their cocoon until they die.

"Come out of your cocoon and be the butterfly you were always meant to become. Learn to know who you are by having a truly honest relationship with yourself. Grow out of any negativities that may be wedged into your mental and spiritual capabilities.

"Low selfworth, fear, mistrust, insecurities, sin and unbelief will keep you from discovering the natural and true person you really are."

THE VISION

The Institute's vision is to be global leader in developing professionals specializing in corporate governance. Corporate governance, without in any way undermining the importance of compliance, is a creative process. Whether you look at corporate governance applying the Agency Theory; Stewardship Theory; Stakeholders Theory or Sociological Theory, corporate governance is corporate performance. Performance is essentially adding value and creating a strong chain of continuous value addition in multiple dimensions.

The creative aspect of corporate governance possesses several daunting challenges especially in the context of globalisation of corporate affairs. Without its being creative and impeccably value-additive, how can governance in a company enable it to ....

— Give employees a world-class environment to work and learn

— Give them a high quality of life and wealth creation opportunities

— Replace obsolete technology regularly to remain at the cutting edge

— Emphasize on quality by benchmarking against the best processes in the world

— Commit itself to business ethics and corporate compliance ?

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DISCIPLINES

As specialist in corporate governance, Company Secretaries need to continuously own the responsibility that the corporate sector creates a governance culture that is able to generate wealth in a sustainable, ethical and socially beneficial manner. Value addition and value creation are not mere buzzwords. Today they have become disciplines. Customer centric culture and customer orientation are the primeval causes. The linkage between the causes and the resultant value is a process that involves continuous creativity. Creativity comes handy when we give a go-by to deductive logic and vertical thinking and adopt lateral thinking, reverse logic and, above all, orient ourselves to customer centric thought and action. Value may not be generated by a thought or behaviour that is rooted in selfishness and self centric trepidation. A release from oneself, a drive to come out of the restrictive personal or professional cocoon, unleashes creativity and value generation process.

VALUE

Value must necessarily be quantifiable and quantified. Value is either an accretion to an asset or to an asset generating capacity or an income or an income generating capacity that is added to the business. The asset may be intangible or tangible. An intangible asset is difficult to perceive, let alone to develop, sharpen and to bring it into being. It is also difficult to measure and quantify an intangible value. The difficulty is further intensified because services, especially professional services like those of Company Secretaries create intangible value. It is, therefore, essential that Company Secretaries do learn to ascertain the opportunities to identify, process and bring into existence intangible assets or income generating streams for the companies they are working for either in employment or in practice. Some professional services rendered by Company Secretaries may yet be amenable to be directly linked to a quantifiable benefit that accrues to the corporate. The examples are registration of a company, procurement of a license, registration of a patent, tax planning and tax saving. Yet the value must be unlocked from those services and professional time booked on an assignment by carrying out hard search for the value generated. In fact by proper planning, communication and co-creation of value before the booking of the professional time on an assignment, the professional will be able to create a sound platform for generation and acceptance of value generated through his professional work.

CHAMPIONING THE CAUSE

It is better that a Company Secretary regards herself as a champion for generating business value that is well defined, crystallized and anticipated in a given situation. This will enable him to take and seize the initiative, take the responsibility for carrying it through and thus ensure that the plan of action and implementation chosen by him has really added value that has been accepted and anticipated right from the beginning by those who matter. Now, this requires and presupposes thorough and updated knowledge, un-learning and de-learning a lot in order to imbibe the latest expected in a given situation and the mastering of skills, hard and soft.

With globalisation many opportunities and variety of openings are arising for adding value to business processes. Because of globalisation business are integrating, networking and collaborating even amidst competition. In fact cooperation is overtaking competition even where both are catering to the same market space. Information and communication technologies have especially contributed to bringing about this change of attitude and approach. This change of scene has created wonderful avenues for adding value to business only if the professional decides to live on the edge and reduce the space he is occupying by refusing to un-learn, de-learn and re-learn.

A champion is essentially made of a different material. Shorn of any negativities like diffidence, complacency, cheerlessness, heavy-footedness, low self-worth, low targets, lack of concentration, unwillingness to change, jealousy, etc., he is, first, a self-leader and works to be a leader of leaders. Championing is a continuous process, hard, harsh and yet heartening if pursued in the right earnest. And yet, in today's world a professional must master this process. Earning soft skills, communication skills, interpersonal skills, presentation skills, marketing skills and many others are the way to mastering the championing process. A little bit of mathematics and algebra, graphics and flow-charting, power point and flash, and a lot of cheer, enthusiasm, hard work, discipline and methodicity will earn the professional an initiation in to the championing process. It also requires thinking small and acting fast; asking questions and thinking results; staying fresh and stretching to grow; be creative and colouring outside the lines. All these and many more according to one's capabilities, inclinations and skills will give the professional the necessary ground-start to climb up the professional ladder for championing business value.

STAGES

Creation of business value goes through several distinct stages. Identification and clear definition of opportunity to create value is the first stage. Yet it is preceded by an analytical and methodical study of a given business process or a given business objective. These skills of analysis and method in study need to be developed first. A huge amount of reading, observation, passionless and objective listening help the development of these skills. The development of lateral thinking, objective brainstorming, reverse analogy are the techniques the Company Secretary needs to master for this purpose. After identifying and defining the opportunity the Company Secretary needs to share the definition with the client and needs to discuss it in order to obtain his willing concurrence. The persuasive interactive skills come handy for this purpose.

After the opportunity is crystallized, the professional must work on developing the process of realizing the value hidden in the opportunity that is defined and shared. A number of organizational skills and team building help the development of this process as well as its implementation. The cost benefit analysis must proceed continually along the implementation of the process of realizing value. Benefits must be maximized while costs are minimized yet not at the altar of the loss of benefits or augmentation of the benefit.

As the process begins, obstacles are bound to arise. Here the patience, the perseverance, the humility of breaking the “Not-Invented-Here” syndrome will help the Company Secretary to tide over such obstacles and distractions. The attitude of converting obstacles in to value adding opportunities may also help. To give an example, when the sub-prime mortgage crisis hit the American economy and while there was a general feeling that the adverse effect on American economy and companies would affect the business of Indian software and BPO companies in America, the Infosys thought otherwise. It found that precisely because of that crisis American companies would try to find less costly off-shoring opportunities and Infosys would get more business; and still it decided that it should reduce its reliance on the American market that gave it 63% of its business to scale it down to 50% in order to enable it raise its rates 2 to 4% while diversifying to other markets. Many times obstacles come as opportunities in disguise. One’s thinking is the guide to one’s destiny.

COMPLIANCE MANAGEMENT

Corporate laws, corporate processes, corporate procedures, corporate regulatory work are all core domain of Company Secretaries. As crystallized commonsense of the corporate sector and corporate regulators, this vital domain is the wherewithal of Company Secretaries. Yet the master is always in the process of hard and meticulous learning, which is a never-ending process. A real master is humbler than a tentative student. Mastery is always elusive just like the pearls of mercury dropped on the floor. Hence, to keep up the mastery on the domain of core competency the regular practice in corporate laws and corporate secretarial practice through a scientific corporate compliance management will unleash great value for business.

Compliance, as is repeatedly observed, is not merely a tick-box exercise. To be truly understood it requires a systems approach and a systems thinking. It is not merely an exercise of finding faults and discovering shortcomings in observing compliance with the multifarious legal requirements and regulatory dictates. Compliance management should not, therefore, be a traditional management exercise that identifies problems and seeks solutions; identifies shortcomings and works towards causal relationships to remove the causes and remedy the shortcomings; locates errors of omission and commission and rectifies, through new steps, the omissions and reverses the errors of commission. Such a system of management, in the words of Peter Senge [The Fifth Discipline – published by Currency Doubleday] “has destroyed our people….The job of management in education, industry, and Government should be the optimization of a system”. Compliance management therefore, requires, as said earlier, a systems thinking or systems approach in order to maximize benefits and avoid achieving short-term benefits at the cost of long-term dis-benefit.

The postulates of systems thinking, as described by Peter Senge, are as follows:

1. Today’s problems come from yesterday’s solutions
2. The harder you push, the harder the system pushes back in
3. Behaviour grows better before it grows worse
4. The easy way out usually leads back in
5. The cure can be worse than the disease
6. Faster is slower
7. Cause and effect are not closely related in time and space

8. Small changes can produce big results—but the areas of highest leverage are often the least obvious
9. You can have your cake and eat it too—but not at once
10. Dividing an elephant in half does not produce two elephants
11. There is no blame.

Just to explain the last postulate of systems thinking, the thinking points out that we all tend to blame someone else—the competitors, the press, the changing mood of the market place, the Government—for their problems. Systems thinking shows us that there is no separate "other"; that you and the someone else are a part of a single system. The cure lies with your relationship with your "enemy".

When applied to compliance management, systems thinking or systems approach bring creativity in to the so-thought mundane corporate legal and regulatory compliances. Only such creativity will enable Company Secretary to unleash value and bring in to being the value addition to business.

Systems thinking, when applied to Corporate Compliance Management, gives a wider perspective to the usually imagined tick-box exercise that plays a very limited and, at times, an irritating role. A mechanical approach to compliance management assumes a holier-than-thou role for the Company Secretary. It may lead to a pontificating role on the part of the compliance officer and a guilty role for those who are supposed to be compliant. This creates a dichotomy, which is an anathema to systems thinking. A true professional who wants to add value deliberately shuns such a pontificating role, for it creates only a broken organization that pitches egos against egos and leads to deceleration in value.

For corporate compliance management to become a value adding exercise, Company Secretaries need to imbibe systems thinking and ensure that the compliance management work becomes creative. Information technology is a tool and, as such, has an important yet limited role to play in corporate compliance management. Modern compliance management necessarily depends upon the use of information and communications technology to enrich and expedite the processes involved in compliance management. Company Secretaries need to also master the information and communication technology tools.

CALIBRATING COMPETENCIES

Competencies are innate or acquired and developed capabilities to add value. Competencies that do not add value, or create value but either lie dormant or derogate value, or fail to add value even when put into action, are not worth their salt. Hence they need constant calibration. Such calibration is driven either by the change dynamics that surround the competencies or by the changing expectations of those who demand the exercise of such competencies.

It is first necessary to identify, measure and take stock of available competencies and of the competencies that can be acquired and developed. Identification of competencies should lead to a clear understanding and appreciation of the available competencies through an interactive process, if such competencies are to be used for adding economic value to a business. These are kinds of strengths that are available to be put into effective use for the purpose of creating or adding value. But one should appreciate that many competencies are latent and unrealized. It is here that the professional needs to introspect and think hard so that a path is visualized to work upon, to bring such possible competencies to the fore. While available and identifiable competencies require constraint sharpening to create an edge, the latent and unidentified competencies need to be brought to the fore.

CHANGE-DRIVEN

When calibration of competencies is change driven, it is an enormous task for it is difficult to quantify, understand and estimate the extent and speed of change. One needs to be on top of the change. Since change itself is dynamic and therefore, difficult to behold calibrating competencies to take care of the change appears to be an impossible task. But for a confident professional impossibility is non-existent. Tougher the challenge, tougher is his attitude and resolve to overcome the challenge. Drawing from the divine dance of change, stratagems are designed to calibrate competencies to meet and beat the expectations of those who matter.

There, where available competencies fall short, networking comes to help to meet the temporary or permanent shortfall. In the multi dimensional challenges that obtain today, if multi-tasking does not prove sufficient, multi-disciplinary networking is the right solution in the professional world.

New areas of professional work, new challenges, new opportunities and fluid circumstances throw up better avenues to calibrate competencies, acquire new competencies and support them by development of new skills for rendering value through professional services. Professional symposia, conferences, workshops, training programmes and soft skill development are some of the methods for such calibration and Company Secretaries need to go through all such exercises to keep competitive and in demand for value addition.

GLOBAL DIMENSIONS

Globalization, glocalization and think-global-act-local are not mere catch phrases today. Economies of the world are integrating faster than expected. One needs to understand a lot and derive tremendous lessons from the following short list of great global acts by India Inc:

Dishman Pharma & Chemicals taking over Solutia Inc, $74.5 million; Jain irrigation Systems taking over 3 US Companies in Agro products, irrigation & manufacturing; GHCL taking over Best Manufacturing Group of US, $35 million; Gitanjali Gems taking over Tri Star Worldwide, $48 Million & Samuel Jewellers, $44 million; Jubilant Organosys taking over PSI NV of Belgium; Wockhardt taking over Negma Laboratories, $265 million; Ranbaxy taking over RPG Aventis; Tata Tea taking over Tetley; Suzlon Energy taking over Hanson Transmission of Belgium; Reliance Infocom taking over Flag Telecom of US; Asian Paints taking over Berger International in Singapore; Apollo Tyres taking over Dunlop of South Africa; Mphasis BPL taking over Princeton Consulting in UK; Patni Computers taking over Cymbal Corp in USA; Tata taking over Corus; Hindalco taking over Mount Garden Copper Mines, Australia; Tata Steel taking over Carborough Downs Coal project in Australia; Gujarat NRE Coke taking over Resource Pacific Holdings in Australia; ONGC Videsh along with Sinopec of China taking over Omimex of Texas.

Not an exhaustive list, yet an indicative list that gives the initiatives and forays of India Inc. into corporates abroad, this list makes one stand up to acknowledge what opportunities are being created for Company Secretaries. When such takeovers happen, the ball is set rolling in to different areas of corporate work. Every corporate department and function have to stretch and strain to keep pace with the work culture, compliance culture, behavioural change, cultural shocks, technology absorption and other multifarious aspects of situational fluidity. That is what creates special and undreamt of opportunities for Company Secretaries and other corporate professionals.

Company Secretaries must muster courage, vision and necessary sophistication in their attitudes and work culture in order to grab the vast and multiple opportunities that can be milked out of these phenomena. The uniqueness of a professional career is that the professional has to be both a mentor and a mentee or stooge of himself. In other words, she has to be the teacher and the taught, the guru and the disciple, in order to develop the competencies and skills required in the globalized corporate world. She has to develop the following attributes that Sunil Unny Guptan lists in his book "Mentoring" [Response Books Publications], namely:

1. Investment in learning and development
2. Success orientation
3. Altruism
4. Heightened self-awareness
5. Technical expertise in the chosen field
6. Focused approach / goal clarity
7. Communication skills
8. Empathy and sensitivity
9. Relationship skills
10. Conceptualization skills

To talk only about the conceptualization skill, "this is the one skill that normally lurks along the fringes, but is, in the case of the mentor, crucial to the work he has taken on. This is the ability to put things in perspective, evolve a pattern and concept out of the clutter of happenings, issues, behaviours etc. This has a very strong foundation in the ability to hold together a large number of divergent aspects of various things and see patterns and commonalities in them, to put them in some form of order, and in a sense create a concept out of them. This makes for approaching similar or comparable situations with better preparedness and familiarity."

It helps him understand and grasp the significance of apparently unconnected things and lead a more fruitful life, understanding how the various pieces fit into the bigger picture.

"Wider exposure to the ideas and thinking of the people with this particular skill, keeping an open mind, having the curiosity and inquisitiveness to explore, and trying to work out the rationale behind happenings goes in to building up conceptualization skills. This is one skill that takes long to acquire, but once acquired it is there to stay."

Even listening is an active activity. It involves in itself a repertoire of subtle skills: patience, understanding, awareness and clarity about the cues and messages, providing feedback. Effective listening and observation are crucial for developing the sophistication expected for adding value in the global context in which corporates operate today.

Globalization requires the professional accept increasing responsibility and to work towards that. Sunil Unni Guptan quotes Mother Teresa, "Give till it hurts". Increasing value addition at a lesser cost demands that professionals keep on increasing their value through up-to-date knowledge and skill inputs to themselves. When a professional does that, the entire company may start valuing him, at least to some extent, as a mentor and look for him advise. That is what calls for continuous investment in learning and development. This requires humility that comes with the belief that oneself can be a learner who can muster unbridled openness widening one's mental horizons with mind rooted to reality and practical possibilities. Such an attitude in the professional creates a positive energy and acts as a positive contagion.

CONCLUSION

It is said that excellence is exceeding all expectations. It is also said that anything that comes easy comes wrong. As professionals, Company Secretaries know that to do it well, to achieve success and to excel the excellence, client orientation, value addition and self -development are crucial factors. But well done is better than well said and all glory comes from the daring to begin. Today's times are challenging, corporates and clientele are demanding; the constant clamour is for value addition and value creation. It is only the essential values in life that lead to creation of economic value. It is truer for the professional than for anyone else. Yet ingenuity plus courage plus work equals miracles. Putting your heart into whatever you do creates positive energy and positive results for others too. A thinking head on the shoulders and a sensitive heart within helps one to mentor oneself into greater heights of achievement, enhancing self-worth, adding value and being recognized as a champion of excellence.

INDIAN ACQUISITIONS ABROAD — ROLE OF PROFESSIONALS IN CHANGING PARADIGM

V K AGGARWAL*

Indian companies, over the last decade, have been gradually gearing up to spread their reach in other jurisdictions to become transnationals. India Inc. is not only scaling up the size of its overseas acquisitions, but there have been several instances of Indian companies buying out companies abroad that are far larger in size compared to them.

World Investment Report, 2006 recognises that "India dominates the list of leading Transnational Corporations (TNCs) from South Asian Region. With the increased openness of the economy since the mid-1990s, Indian firms have begun to go global. In several industries - software and IT services, Pharmaceuticals and biotechnology, hotels and hospitality, automotives and other branded products - they have diversified their operations and investments across the world. Although most Indian outward FDI stock is still in manufacturing, overseas investment in software and IT services has grown rapidly along with Pharmaceuticals. Large Indian companies in industries such as steel and chemicals have also begun to internationalize by acquiring upstream companies".

ACCENTURE SURVEY

Accenture and the Economist Intelligence Unit in the first half of 2006, surveyed senior executives in North America, Europe and Asia on their mergers and acquisitions (M&A) activities and their experiences in integrating companies. Similar survey was also administered to 156 executives based in India during the fourth quarter of 2006.

Of the total respondents in India, 40% were senior-level. About 64% were from companies that had global annual revenues of US$100m or more and 36% had revenues of US$lbn or more. 45% executives mainly played roles in strategy and business development and 42% in general management. Their companies were from a wide range of industries, including financial services (25%), IT and technology (21%) and professional services (13%).

Key findings of the survey and their comparisons with the North America/Europe and Asia presents the following picture :

M&A is becoming more important as a growth strategy. When asked to estimate the percentage of their company's total global revenue growth that has come from M&As in the last three years, only a quarter of respondents said that it was 20% or more. But when asked to forecast what would happen in the next three years, 57% of respondents said that this amount of growth would come from M&As. About 74% of the respondents had made an acquisition, and of these, 54% reported that the most recently acquired companies were domestic. In fact, 67% agreed that they find cross-border acquisitions generally more difficult than acquisitions in the domestic market. Far more domestic deals were conducted by Chinese (98% of respondents) and Japanese (84%) companies recently. In contrast, companies surveyed from North America and Europe conducted more cross-border acquisitions (58% of those who conducted M&As) recently.

Nevertheless, respondents from India said that companies in their industry will be driven to conduct cross-border deals in the next five years mainly to guarantee the profitability of the business (58%), to meet corporate strategy targets (52%) and to diversify the company's know-how (48%). This was similar to the results from the other countries.

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Most Indian companies have a clear M&A strategy. About 71% of the Indian executives said that they have a clear strategy for the markets they want to enter and 40% said that they have identified specific target companies. Similarly, 77% of the respondents from western countries made similar statement. However, they were less confident given that only 18% stated that their company had identified targets. In complete contrast, only 13% of Japanese executives said that their company had a clear strategy and only 3% were sure that specific targets were identified.

US, India and the UK - Top M&A Markets : When asked which countries would be of greatest interest for M&A activity in the next three years, Indian respondents most often expected a deal in USA followed by UK and Brazil. The most popular response by Western executives was also the US. The Chinese executives were most interested in a domestic deal, followed by USA, Brazil and Canada. Japanese respondents showed most interest in their domestic market, followed by other Asian markets (China and Thailand) and India.

Regulations and Local Management Integration : Respondents from Indian companies cited legal and regulatory compliance and local management integration as the top two challenges for making cross-border acquisitions. These issues also topped the list of major concerns for Western executives, but they also included conducting due diligence. Japanese respondents also said that management integration was a challenge, but most problematic was conducting due diligence.

Due Diligence : Respondents in India said that the most critical element for a successful domestic or cross-border M&A transaction is conducting due diligence. This was also one of the top responses for Western executives, but the most popular was orchestrating and executing the integration process. Chinese executives believed that the most important element was to develop an M&A strategy.

Organisational Structure and Cultural Issues : Organisational structure and cultural issues were found to determine the success of integrations. To ensure successful integration of a domestic company, establishing clear organisational structure and accountabilities was most frequently viewed as critical (by about 43% of respondents in India). For integrating a cross-border company, 33% stated that addressing cultural issues was critical. These views were also shared by Western executives.

PARADIGM SHIFT

The year 2006 would be seen as most exciting year in the history of corporate India. It was a year when Indian companies went shopping across the globe and acquired a number of strategically significant companies. Indian outbound deals, or global merger and acquisition valued at USD 4.3 billion in 2005, crossed the USD 15 billion mark in 2006 and it is estimated, it could breach the USD 35 billion level in the year 2007.

In the first half of the year 2006, for the first time ever, the total value of outbound deals exceeded that of inbound deals. In the first nine months of 2006, Indian companies announced 115 foreign acquisitions with a value totaling $7.4 billion registering roughly a seven-fold increase from 2000.

DRIVERS OF CHANGE

A combination of factors is responsible for this paradigm shift in outbound merger and acquisition activities in India. Major among others include -

PROFITABILITY AND THE COST ADVANTAGE

One of the attributes of the booming economy is that the incomes of Indian companies in some sectors have grown phenomenally, enabling them to have access to significantly more capital than in the past. Additionally, many companies do not have much debt and hence, their capacity to borrow is better. They can borrow sizeable amounts of cash, which can be deployed for acquisitions. Finally, the cost effectiveness of Indian companies is the key driving factor that helps to ensure value for dollar for the global consumer.

WILLINGNESS TO TAKE ON RISK

Indian companies are high on organic growth and are increasingly going global because home markets do not have the scale or the resources to allow them to deliver the levels of shareholder value and competitive advantage they aspire to achieve. Today, Indian companies are willing to take on a greater degree of risk than before. The companies are now realizing the benefits that taking on additional and calculated risk can bring. The financial strength is also contributing to the confidence of Indian companies to take calculated risk.

CHANGING REGULATORY ENVIRONMENT

Regulatory changes in India, resulting from market oriented policies being pursued since 1991, have made it easier for companies to go for overseas acquisitions. It has played the role of a facilitator in realizing the global ambitions of the Indian corporate sector. As foreign exchange reserves have grown, the RBI has progressively relaxed the controls on outbound investments making it easier for Indian companies to acquire or invest abroad. A number of amendments to the RBI guidelines have effectively raised permissible investment limits and streamlined processes.

The emerging paradigm reflects that India Inc. is going to dominate international business scenario by achieving truly global character. This will require our professionals particularly Company Secretaries to attune themselves to contribute to the global vision of corporate India. The expectations from professionals may be gauged from the article. "Global Corporation" authored by Dr. J J Irani. He observed that a corporation, to be considered truly global, must possess certain key attributes. It must have a global reach; it must be instantly recognisable in global markets; it must have global finance at its disposal and it must be staffed by representatives of a global population. Its products should have global appeal and it should meet the aspirations of global communities. Its stakeholders too should be a global community. Unless all these criteria are fulfilled, no organisation can claim to be a global corporation.

It must be remembered that globalisation is not just the sum of individual parts; it is not enough for a few companies in the group to demonstrate global competitiveness. The whole corporation must display a global presence. There are other things that distinguish a truly global corporation. There must be a seamless movement of people, processes and technology across all the locations in which the corporation operates. There can be no geographical or racial boundaries. Each part of a global corporation must have access to the other units across the globe. There must be a feeling of belonging to the greater whole.

The advantage of a truly global corporation is its ability to move its products, monies and its skilled people quickly and efficiently to those areas where they are most required at a given moment of time. Another advantage is the leveraging of financial strength across geographical boundaries. The availability of appropriate finances at the right location and time is a tremendous advantage for multinationals and crucial in making a corporation globally successful. Investments in one region might require a considerable outlay of money and if that region cannot provide it, the global corporation has the advantage of leveraging its financial strength from other areas of the world where it has already built up reserves.

Being a global entity involves having employees, assets, manufacturing facilities and marketing offices in multiple countries overseas. A company is dependent on the overseas economy when it becomes a global company.

The product quality and pricing of a company must be competitive with those of global players. A company can call itself globalised only when it meets competition both inside and outside the country.

Leveraging the nation's comparative advantage of knowledge, Indian companies have grown through acquisitions, built best-in-class competency and become large-scale players. These companies have been growing organically and also inorganically, through strategic overseas acquisitions which give them access to new technology and proximity to new and lucrative markets.

ROLE OF PROFESSIONALS IN CHANGING PARADIGM

The results of Accenture survey which indicates towards cross border ambitions and strategies and the critical issues and Dr. J J Irani's prescription of a global corporation, clearly present a road map for professionals to prepare for changing paradigm. We have seen that the mergers and acquisitions (M&A) today is a growing route for businesses to expand globally. Therefore, Company Secretaries need to be aware of the laws in various jurisdictions. In international M&A, companies play in a jurisdiction where they are not too familiar with local regulations and socio-political issues. The due diligence process is very different and cultural issues are also significant.

Another major factor is the environmental risk. If an Indian company acquires a domestic company, it knows provisions of the environmental pollution laws to comply with. But if an Indian company acquires a company in the US, it becomes important to learn more about environmental laws. The viability of the project can be affected by environmental issues. Issues of tax and transfer pricing also becomes critically important before engaging in business overseas. Thanks to advancements in information technology and getting knowledge has now become easy. Now any one can access the government website and download the relevant law and other information.

Different Scenario : The business and regulatory environment in India differs from the environment in other jurisdictions. Each country has its own set of regulatory framework in terms of legal and judicial system, tax regime, social and cultural peculiarities and business dynamics. There are very few jurisdictions having similar conditions of doing business. This infact requires professionals to have wider perspective and understanding of not only legal and regulatory environment, but also social and cultural conditions of country(ies) in which a company wishes to expand its reach and operations.

Essential Factors : There are a number of factors which may not be important in the case of domestic M&As, become critical in international acquisitions. For example, violation of environmental laws may not be taken very seriously in one country while in others there may be very stringent penalties including closure of a production facility for even minor environmental violations. This necessitates a very comprehensive environmental due diligence exercise that has to be adhered to in an international acquisition.

Objective of Acquisition : The factors that need to be focussed in an acquisition is to understand the strategic objectives of the acquisition. The Accenture survey clearly points out that most Indian companies have a clear M&A strategy. About 71% Indian executives said they have a clear strategy for markets they want to enter and 40% said that they have identified specific companies. Setting clear objectives indeed helps prepare a check list and undertake exercise due diligence exercise accordingly.

Team of Experts : It is important for an acquisition to be successful that a team of experts with complementary skills and knowledge is put together to help in the jurisdiction in which the acquisition has been made. There should also be an investment banker to guide in structuring the transaction and evaluating the target, and a local professional who is familiar with the jurisdiction and understands the legal nuances, a tax expert, a finance expert, an environmental specialist, a manufacturing expert, an industry expert, etc.

Researching Target Company : A key factor in a merger and acquisition deal is the research involved on both the target company and its country. In this exercise internet can be of great help as it may provide most of the information necessary in such transactions. This would help company to be familiar with the country's legal/ tax environment, economic system and other issues, even before the exercise begins.

It is important that most of the companies which are up for sale prefer international competitive bidding. The bidding process is dictated either by the target company or its promoters. The company fixes a date and a time for conducting the due diligence and keeps the data ready in a data room. In this process one may require interpreters in the data room as the documents may not always be in English. With technology advancements and the increasing number of cross border deals, targets have been making documents available to potential bidders through a 'virtual data room'. With the password protected internet link one can conduct an online due diligence sitting in his office.

Time is the essence : The time is of great importance in a Merger and Acquisition transaction, as the same is driven by timelines set by the target company and their investment bankers. So adhering the specified timeline becomes an essential ingredient of a successful M&A transaction. On the other hand, in the event of failure to abide by timelines, competing bidders will have the advantage of a head start.

Due Diligence : Due diligence, a critical factor in mergers and acquisitions is the process of examining all aspects of a company including manufacturing, financial, legal, taxaction, IT systems, labour regulatory as well as issues relating to Intellectual Property Rights, the environment and other factors. The due diligence process is undertaken to investigate and evaluate a potential company for acquisition purposes. It helps acquiring company to determine whether it is worth pursuing a target and at what price.

As far as legal due diligence is concerned it covers contractual documentation, litigation, ownership of movable, fixed and intangible assets like patents, trade marks, brand names and other intellectual property rights, etc. It also looks at any contracts on which there could be onerous covenants or which may become infructuous by reason of change in control of the target following the acquisition. All these aspects could significantly impact the valuation of the target company.

The due diligence report aims at factoring all critical issues impacting the decision on valuation of the target, becomes the basis for negotiating and providing in the transaction documentation comprehensive representations and warranties - where the target company or its promoters provide indemnity for their representations and warranties. It may, however, be noted that issues that cannot be immediately resolved before closing the deal are put under what is called as 'Conditions Subsequent' and certain percentage of the purchase consideration is held back in an escrow account and released only when those conditions are met by the target company or its promoters.

Valuation of Target : The valuation of the target is decided only after the due diligence exercise is completed and the valuer has considered how the findings impact the valuation. It may be noted that the tentative figure which one may have in mind based on the financials of the target evaluated in accordance with internationally accepted norms of valuation, usually changes significantly once the due diligence findings are factored in. This is the point when acquiring company know the actual value of the target company — whether the cash flow is sustainable in the future; assets are legally held in the name of the company; major liabilities and contingent liabilities etc.

The exercise becomes difficult if the target company has a presence in several countries. In such situations one needs to rely on local experts in each jurisdiction to get the flavour of local regulatory and tax issues and to factor them into the valuation exercise as well as in the contractual documentation to protect one's interests. The varying accounting standards in different jurisdictions is another challenge in valuation process, as the different countries adopt different accounting standards for accounting treatment of different items, this poses a significant challenge in ascertaining the true value of the target company.

Regulatory Approvals : A cross-border merger and acquisition transaction requires regulatory approvals not only in India but also in the jurisdiction in which the target company is located. However, in western countries, competition related issues such as whether the proposed acquisition would lead to market dominance by the acquirer, are of paramount consideration in approval of merger and acquisitions.

In the United States and European Union, the anti-trust laws are very stringent. One requires approval from the Federal Trade Commission or the Department of Justice for any acquisition in the US and from the European Commission for any target in EU. In most jurisdictions where the target company has business presence, it requires pre-merger notification. In India also the pre-merger notification has been made compulsory by the Competition (Amendment) Bill, 2007 already passed by the Lok Sabha.

Further, European Commission examines in great detail whether the acquisition would lead to a distortion in market competition. The acquisition of corus by TATA and Arcellor by Mittal Steel are recent examples.

Human and Cultural Factors

Accenture Survey points out that for integrating a cross border company, 43%, respondents found addressing cultural issues as critical. The real challenge, after an acquisition is, therefore, the integration of the two companies. That is why the integration should be given a focused attention. There should be a focus on aligning the acquired company's processes through the business excellence model.

Human Factor

Studies on post-acquisition performance have primarily been a centre of interest of researchers in strategy, economics and finance. The identified factors of performance variations have usually ranged from the industry match (complementary of assets, similarities of markets and products, synergies in production, strategic orientation, etc.), pricing policy, financing and size of the operation and type of the transaction, bidding conditions, etc.

By contrast to quantitative measurements from finance and economics, the research, which has focused on the organisational and human side of M&As, has mostly dealt with identifying factors that might have played a role in the integration process of the merging entities and led to successful outcomes. Despite the absence of a direct causal correlation, several dimensions have been identified as having an important impact on M&A performance, these include psychological, cultural and managerial factors, knowing that the human factor covers at the same time employees and managers of the companies.

Psychological Factors : A large part of the existing research has looked at the psychological effects of M&A on employees. Scholars have pointed out the strong impact that the operations could have on employees, in particular the resulting increase in stress and anxiety due to changes in work practices and tasks, managerial routines, colleagues environment, the hierarchy, etc. Further, merger and acquisitions often introduce an environment of uncertainty among employees about job losses and future career development. It has been pointed out that stress and insecurity may lead to employee resistance to change, absenteeism and lack of commitment to work and the organisation. Employee resistance prevents the building up of a well functioning organisation and constructive cooperative environment. Lack of work commitments have a negative impact on individual and organisational performance measured in terms of productivity, quality, and service. Moreover, a relationship between organisational and financial performance has also been identified which may have consequences for the market value of company.

On the other hand, it has been argued that satisfied employees are presumed to work harder, better, and longer with higher productivity records. Even though a direct relationship between job satisfaction and corporate performance remains to be established with certainty, it appears that lower job satisfaction is a cause of higher absenteeism, which, in turn is shown to have a negative influence on organisational performance.

Cultural factors

Cultural differences look like playing both ways. Although distant cultural environments make the integration process harder, the lack of culture-fit or cultural compatibility has often been used to explain M&A failure. Cultural differences have also been considered a source of lower commitment to work, making co-operation more difficult, particularly from employees of the acquired company. In this regard, scholars have largely given account of the lack of co-operation momentum stemming from a "we" versus "them" attitude, resulting in hostility among employees.

It is, therefore, no surprise that strong cultural differences are usually associated with a negative impact on M&A performance, since the integration process is less easy and deals with higher employee resistance, communication problems, and lower interest in co-operation. Noticeably, cultural clashes are likely to be more prominent in cross-national than domestic acquisitions, since such mergers bring together not only two companies that have different organisational cultures but also organisational cultures rooted in national diversity. The scholars have identified building up of a common culture as essential for the success of merger and acquisitions. Researchers have found that high levels of employees' social identification with the organization's identity results in increased work effort, higher performance, reduced staff turnover and more frequent involvement in positive organisational citizenship.

CONCLUSION

The preceding discussion makes it clear that the canvas of responsibilities of and expectations from professionals, is expanding with every M&A transaction, be it domestic or cross border. The changing paradigm, therefore, casts upon the professionals an onerous responsibility to help corporate India in achieving its global ambitions and to contribute in maintaining 8% plus economic growth.

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PHILOSOPHICAL PROPHESIES ON THE COMING SHAPE OF GOOD CORPORATE GOVERNANCE — THE VALUE CREATING CORPORATION

BALWANT KULKARNI*

CORPORATE SOUL

Philosophy concerns itself with the soul, the highest aim of attainment by a human being. Humans working in the corporates as leaders or managers or employees are no exception. Moid Siddique in his book "Corporate Soul" Response Books publication has researched many philosophical and ethical value systems across the world and across the ancient thought systems to cull out for the corporate world golden messages from sages and saints, corporate leaders and thinkers. This, he has done keeping in full view the modern ethos and behaviour systems of the corporate sector, This article draws huge sustenance from his research findings and prophesies to draw lessons that will enable corporate boards and leaders as well as managers and workers usher in a golden age of good corporate governance in all its aspects and contours. Doing this, it is submitted, is the need of the coming times. The Corporate may thus begin and complete its journey to perfection [and continue the same throughout its precious life], to the Soul.

Andrew Cohen said, "The soul—in most of us, desperately needs to be developed. Too may of us live in a fractured state, deeply divided against ourselves. We exist in a self-generated vacuum of moral ambiguity, where everything is relative and our attention is focused mainly on our emotional state——We need to embrace a kind of fearless vulnerability where our transparency is our strength and the living experience of connection is permanent, unbroken and inescapable."

This inescapable interconnection with the society, ecology and people makes social responsibility an integral part of good corporate governance. In fact, as pointed out towards the end of this article through ITC Chairman's recent speech, social responsibility will lead rather than follow the business objectives of the not-too-distant future corporate.

The Chinese practical philosophy Tao Te Ching reverberates the modern CSR initiatives for the corporate sector and corporate leaders in the following transparent advice:

"The sage does not accumulate for himself. The more he uses for others, the more he has himself. The more he gives to others, the more he possesses of his own. The way of Heaven is to benefit others and not to injure. The way of the sage is to act but not to compete."

In a way, that is what modern leaders say when they talk of business ethics:

Prime Minister Dr Manmohan Singh said, "Corporate Social Responsibility should be defined within the framework of a corporate philosophy which factors the needs of the community and the regions in which the corporate entity functions."

Mr R M Lala, J R D Tata's biographer, is quoted by the Times of India saying, "In the public mind business ethics is mainly connected with financial integrity. Important as that is, the real meaning of the word 'ethics' goes far beyond that. "It is the science of morals in human conduct, a moral principle or code."

TOI also quotes Travis Engen, CEO of Alcan, "We know that the profitable growth of our company depends on the economic, environmental and social sustainability of our communities across the world. And we know it is in our best interests to contribute to the sustainability of these communities."

Peter Robinson, CEO of Mountain Equipment Co-op. says, "Ethics is the new competitive environment", while Niall Fitzgerald of Uniliver says, "CSR is hard-edged business decision. Not because it is a nice thing to do or because people are forcing us to do it…because it is good for our business".

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

If we turn to Chapter 3 of the Bhagwatgeeta we see the following message, "Strive constantly to serve the welfare of the world; by devotion to selfless work one attains the supreme goal in life. Do your work with the welfare of others in mind. It was by such work that Janaka [a sagacious king] attained to perfection; others too have followed this path. The ignorant work for their own profit, Arjuna; the wise work for the welfare of the world, without thought to themselves".

BONSAI MANAGER

There is a well-known pointer of the paradox that nothing that is worth knowing is ever taught. As R Gopalakrishnan writes in his "The Case of the Bonsai Manager", " A manager can develop to his full potential by learning to be intuitive, inclusive and humane—the kind of skills that are not taught. These are also difficult to teach…I have become sensitive to what cannot be taught, e.g., dealing with human nature, the complexities of employee behaviour within organizations, chartering out agenda for change. If a manager has failed to learn those lessons, it proves to be costly. More often than not, managers fail because they have not learnt such things. And these things cannot be taught." The challenges will become graver especially in future as changes that are taking place are incredibly dramatic. "The center of gravity of the world used to be the west. Companies were discrete entities and were run quite independently, not as though they were a part of an interdependent ecology of companies and institutions….[Today] companies and people across borders are interconnected through information, entertainment and employment in ways that could not be imagined earlier." These developments "have changed the fulcrum of leadership skills from thrusting, the dominantly analytical and logical, towards the inclusive, intuitive and humane." They require what Madhukar Sabnavis calls" a move from command and control world to a "connect and collaborate world". " Knowledge and ideas grow when shared and it's important to recognize this and enable it in the working style…. For ideas to grow and flourish, there is a need to move from individuals to teams… In his book 'The World is Flat', Thomas Friedman identifies the emergence of new types of people beyond the creators and the doers. They are collaborators, synthesizers, explainers, leveragers, adapters, personalisers and localisers. These people could add value to teams.—Cultures should foster and enable constructors rather than critics. 'The problem is'…needs to be substituted by 'the possibilities are'. It's a mindset that converts problems into opportunities, sees merits rather than demerits and makes things happen rather than worries about why they cannot happen…We need to go beyond the concept of efficiency and add on the concept of "energy and excitement" into work systems. Standard processes simplify and speed up work systems. However, ideas grow in a world of chaos. In their book ' A Perfect Mess', Eric Abrahamson and David Freedman outline creativity as a benefit of mess. Randomness needs to be encouraged because only by thinking arbitrary can new connections be made and that is what ideas are all about…Ideas come from the mind and the human mind rarely operates linearly in timeframes!"

CHINESE WISDOM

An insight into Confucius' 'Analects' and Lao Tzu's 'Tao Te Ching' will bestow wisdom on corporate leaders in the new age. The two books will virtually counterbalance two modes of human philosophy, reasoning and intuition.

Analects and Tao Te Ching are typical of the Chinese way of thinking. They are written in a dialect of Chinese language which itself is typical and matchless. 'Many of Chinese words can be used as nouns, adjectives and verbs. Their sequence is determined not so much by grammatical rules as by the emotional content of sentences' (Fritzof Capra). Such a dialect takes the finite words to an infinite plane of thought and understanding that other languages can never hope to reach. We are groomed and brought up within the narrow grammatical confines of writing correct English, which takes precedence over emotional expression. Capra discovered that the Chinese sound symbols hold a strong suggestive power. The real intent is not so much to express an intellectual idea, but rather to influence the listener.

Confucius says 'virtue is the root; wealth is the result'. To obtain results you need to trace your way back to the roots. [That is what we discuss subsequently relying upon David Vogel's "Market for Virtues.]

Even things and affairs have their roots and branches, let alone human beings whose moorings are more visible.

To know 'what is first and what is last' will lead us to what the Great Master calls Great Learning.

An organization must be imbued with virtues if it wants to be a happy entity and a great place to work. You first need to address the roots.

Yin and Yang

All too often we try to manage the effects without understanding the 'causes'.

> "The valley of spirit never dies;
> It is the woman, primal mother.
> Her gateway is the root of heaven and earth;
> It is like a veil barely seen.
> Use it; it will never fail" —*Lao Tzu*

Yin and Yang may be considered as Chinese equivalents of power and matter. We discount the value of intangibles that Yin represents. In the new age, this will need to change; the balance will tilt towards Yin virtues. The intangibles will come into sharp focus to bring about a cosmic balance. One must acknowledge the latent truth: the intangibles create the tangibles.

Our management style today is Yang dominated; it is rational, aggressive and masculine. The belief in science is Yang. We never seem to tire of talking about scientific management, rationality and logic. The softer feminine characteristics that are represented by Yin—values, wisdom and virtue – are not the sort of things that aggressive executives have any patience or respect for. It is time that 'Yinism' – which Lao Tzu calls – valley of spirit—is understood and given adequate importance in management affairs and business practices in order to achieve the cosmic balance that is sadly missing today. We must understand the value of feminine virtue and develop a respect for it first. We must focus on what we term the intangible, softer aspects of business.

The harmony between Yin and Yang is Tao. Tao is the cosmos; it is the cosmic truth. The corporate world cannot pretend that it can remain insulated from this universal truth.

Chu-Goku

Chinese Vista considers every human being as Chu-goku, which literally means the center of the universe. Chu-goku enables us to see things in a new perspective.

There is a growing need to achieve the cosmic equilibrium in every sphere of business management, including a balance between the present and the future. Tai Chi gives us the vision to strike the desired balance between today and tomorrow.

Improve the present; create the future. Improve 'what is'; create 'what is not'. It is not easy to improve today, and design tomorrow. We tend to snatch at the future while living in the past without understanding what surrounds us. To keep pace with the future one needs to understand the present first.

The Chinese use a symbol – Tai Chi to represent cosmic balance. Lao Tzu gave this perfect balance a name, a universal law of energy response.

Chinese mysticism draws sustenance from the impulses of Yin and Yang – The feminine and masculine energies that underpin life itself. Tai Chi T'u is the symbol that reflects the cosmic balance between Yin and Yang. The ancient Chinese saw all changes in nature as a manifestation of the dynamic interplay between these two.

The Chinese see the cosmos as a singular, inseparable reality that rests in an inherent duality represented by Yin and Yang. The concept of Tai Chi T'u has deeply influenced western management thoughts and practices. Perfect balance is now a sine qua non for business management as well. Lopsided growth can be extremely harmful.

Yin and Yang are the counterbalancing halves of the ancient Chinese symbol Tai Chi T'u, which represent the sunny and shady parts of a hillock. Yin the shady side, exemplifies feminine values like stillness, receptiveness, yielding, tranquility, repose, calmness, quietude, and other feminine qualities. Yang, the sunny side, typifies masculine values like assertiveness, vigor, movement, courage, and other masculine qualities.

'Yang the strong male, creative power, was associated with Heaven, whereas Yin, the dark, receptive, female and maternal elements, was represented by the earth. The Heaven is above and full of movement, the earth – in the old geocentric view – is below and resting. Thus Yang came to symbolize movement and Yin rest. In the realm of thought, Yin is the complex female, inventive mind; Yang is clear and rational male intellect. Yin is the quiet, contemplative stillness of a sage, Yang the strong, creative action of the king.

Yin is something that Lao Tzu calls the intuitive mind; Yang is what Confucius conceives as the rational intellect. These balancing symbols – Yin/Yang are meaningless unless you can conceptually accept that Yin contains within itself the seeds of Yang and *vice versa*. When Yin reaches its climax, it retreats in favour of Yang; when Yang reaches its apogee, it wanes in deference to Yin.

This basic belief has given the Chinese courage and confidence in stressful times. Equally, it has moulded their character so that they become cautious and modest in times of success. They draw strength from Buddha, Buddha's doctrine of the golden mean in which both the Taoists and Confucians believe. 'The sage', says Lao Tzu, 'avoids excess, extravagance and indulgence'. The Chinese consider the unity that lies behind Yin and Yang as Tao and see it as a process that ensures the interplay of their diverse energies.

Chinese wisdom is both holistic and balanced. Business management, however, lacks a holistic approach and balanced growth. Global management theories have sparked a culture that tends to respect masculine virtues represented by Yang and have tended to give short shrift to the feminine qualities represented by Yin. We idolize assertion over submission, vibrations over tranquility, logic over intuition, digital logic over fuzzy logic, analysis over synthesis, reasoning over perceptivity, evidence over prudence, competition over collaboration – Yang over Yin, in a nutshell.

Change Dynamics

"Change or perish",..then

"Change and perish…now" —*Moid Siddique*

The Chinese art of Wu Wei is all about change dynamics. There are certain things in life that we must allow to occur without intervention. There are many lessons that are relevant for the corporate world. When we turn impatient and try to make things happen, we sometimes hamper the process and destroy the product. Manifestation needs no intervention. It follows the law of rhythm. Flower buds bloom with a smile at dawn when the dew drops plant their subtle kiss. One must learn passion and fantasy from Nature—and that is the art of Wu Wei!

You cannot rush change. In the new age, several companies have perished because their Chief Executive Officers have tried to manage change without understanding the underlying paradoxical 'change dynamics' – the dynamic stability. The ancient art of Wu Wei is akin to dynamic stability.

The corporate world is on the cusp of a new epoch. Our memory of the past is weak and we cannot 'remember' our future.

If management is about people, it can never be a science. Dealing with people and getting the best out of them is an art, not a science. Business management is most unpredictable – the only certainty is uncertainty. Unfortunately, what has happened is that the small slices have hogged all the attention. Work-study, job-evaluation, ergonomics and value engineering are just a few small slices of a big pie. But losing sight of the big picture, corporates overemphasize these small slices. Good corporate governance should look at the big picture and mould corporate practices from that perspective.

Business leaders have always followed an exclusivist approach to deal with situations or find solutions. When considering a problem, they adopt an either/ or approach; they look for mutually exclusive solutions. They tend to see everything in black and white. They are blind to the grays that lie in between. Increasingly, they will need to adopt an inclusive approach; they will have to learn to appreciate the power of 'and'.

Aristotle, whose reflective contributions to human thought are inexpressible, has unwittingly caused an indeterminate deprivation to society, and, in turn, to the world of business management by strongly advocating the either/or logic – this or that. This has crippled man by making him unable to appreciate the intellectual vagueness of the inclusive 'and'.

'Aristotelian logic is simply concerned with the formal properties of an argument, not its factual accuracy', explained Lotfi Zadeh. The Aristotelian logic espouses three laws, which are basic to all logical thought; the law of identity (A is A), the law of contradiction (A cannot be both A and not-A), and the law of the excluded middle (A must either be A or not-A).

Digital logic is binary : the central idea is simple. At the bottom of binary logic rests a true/false dualism. Fuzzy logic, on the other hand, works on a different plane!

Cosmic truth is a continuum. It cannot be sliced into nano, pico or atto seconds. Unfortunately, man always strives to bring some semblance of order into what he sees as a chaotic world. So, he starts by dicing up his world into components; he hangs labels on them and pigeonholes the lot.

The trouble with this approach is that the cosmic world does not allow itself to be pigeonholed quite so easily. There is a large amount of vagueness that exists and it is difficult to categorize these ineffable elements because we comprehend so little, and yet we sense that they do exist.

Do you produce melody by just hitting the keys on a piano? Or does it include the infinitesimal sounds of silence that nestle between the octaves? Melody includes the space between the musical notes.

The great note sounds muted; the great image has no form, says a sage. Greatness is vague! *Clarity comes from vagueness.*

We live in a world that is impatient with anything that cannot be easily identified and labeled. *It is so much so that we prefer to be precisely wrong than vaguely right!*

FUZZY LOGIC

We need to realize that vagueness is strength, not a weakness, even in management matters! It creates greater space and openness so that other elements can emerge. It often gives vent to thoughts that are buried. Normally, our mindset is not attuned to haziness or fogginess. Clarity, even if it is a mirage, appeals to our minds. Fuzzy logic drives home the truth that clarity cannot be segmented; it cannot be divided and pigeonholed.

It is not going out of the port but the coming in that determines the success of a voyage. The success of fuzzy logic lies in its application. It is used to automatically optimize the operation of a washing machine by sensing the load size, fabric mix and quality of detergent. It is also used to control elevators, operate household appliances, cameras, automobile systems, smart weapons, etc.

The cosmos is indivisible; true knowledge is a continuum. The edges of truth are always hazy.

Fuzzy logic is based on hidden assumptions. Fuzzy logic took root in Japan. The Japanese were the first to seize upon fuzzy logic because vagueness is more central to their lives and they become aware of it more quickly. The Japanese practice vagueness. They make use of ambiguities in everyday speech. They tend to make indistinct sentences even when they know the exact answer. If asked, "How many yen do you have in your wallet?", a Japanese may say, "About 10,000", even if he knows he has exactly 10,000. Thus, when speaking English, the Japanese say "I think" more often than native speakers. The Japanese sentences commonly trail off into a but or a however, leaving the listener to infer the reservation. The term 'maa' means "well, more or less", and speakers employ it when they disagree with the listener but do not want to say so outright.

Seeing the invisible is as important as hearing the unheard. Zen philosophy, which is laced with fuzzy logic, believes space is not empty – it is full with nothingness. 'Buddha was the first Fuzzy Theorist', claims Bart Kosto. The Japanese as well as Chinese have embraced Buddhism.

The Buddhist sects of Japan and China are based on the practice of meditation. Adherence to scriptural doctrine is rejected. 'Yogacara', the consciousness school of Buddhism held consciousness as real, but not its objects. From it developed the 'wall-gazing' as a modern management technique to inspire creativity.

Zen teaches sudden enlightenment or satori, i.e., suddenly seeing one's original nature or the self. Zen regards it as the Buddha. This teaching dates back to the illiterate master Hui-neng of the 7th Century AD. 8th and 9th centuries, regarded as the golden age of Zen, developed unique style of oral instruction, including the non-rational elements such as the 'koan'. Koan is a subject given for meditation. It consists of paradoxical statements such as the following:

'Leaves falling;
Lie on one another;
The rain beats the rain".

'We were parted many thousands of Kalpas ago, yet we have not been separated for a moment. We are facing each other all day, yet we have never met".

'Difficult and easy complete each other;
Long and short form each other;
High and low fulfill each other;
A 'set' and a 'complement' make each other.

'You can make the sound of two hands clapping. Now what is the sound of one hand?'

'What was your original face – the one you had before your parents gave birth to you?'

With hard concentration, koans can only be understood, but cannot be explained in the figure of a language.

Vagueness stems from a continuum; infinity is extremely vague! The cosmos, which has been expanding, is getting fuzzier with the passage of time. How do you comprehend, or explain, or clarify it with logic?

Vagueness is cosmic and, therefore, it ought to be strength and not a weakness.

Hui Shi, a Zen follower who studied Lao Tzu and Chuang Tzu once said "Going to the state of Yue today, one arrives there yesterday. Time is relative. Today is the yesterday of tomorrow, as yesterday is the yesterday of today. Actually speaking, time is eternity and is indivisible. Organisation that is built over time cannot therefore be considered a divisible identity. Struggle to establish its identity is thus futile, or, at least, meaningless. Corporate amalgamations, mergers and restructurings indicate this cosmic reality. Lao Tzu said 'The Tao that can be told is not the eternal Tao'.

There lies the secret of effective corporate leadership of tomorrow. Silent, humble, serving, people-first kind of leadership, that alone will ensure good corporate governance in the future.

Biblical accounts tell us that Christ was always humble before his people. He always believed in humility and participation. He even washed the feet of his apostles. He never believed in the hierarchical superiority. He was, perhaps, a better manager of men than most of the high-paid executives of today. He treated everyone with respect that won him his or her unquestioned loyalty.

'Let the greatest among you become the youngest, and the leader is one who serves'; said Christ. That's why success will go to bottom-up management, empowerment, and inspirational and hierarchy-less organizations.

Once Prophet Mahammed described the traits of some of the prophets and angels. Michael: 'A carrier of God's pleasure and forgiveness'. Abraham: 'Sweeter to his people than honey itself'. Jesus: 'If you punish them they are only your servants; and if you forgive them, you are the All-wise and Almighty. The leadership beliefs in corporate governance may differ from leader to leader yet, 'forgiveness is nobler than inability to pardon'.

Whenever Christ said, 'Love your enemies'; his meaning was certainly not that one should become a devoted lover of his enemies. He meant that instead of exciting in oneself feelings of anger, hatred or revenge, one should develop the feeling of togetherness. This is an exceptional lesson for corporate leaders. In an era of cutthroat competition, where each one of our peers represents a threat, we often forget that we alone cannot get the work done. The business organization that will succeed in the new age will be the one that is able to foster teamwork and networking.

Business management is no longer about beating the competition by fair or foul means. Now, it is all about cooperation and collaboration with your competitors. Coexistence and interdependence are clearly foreseen. How long will you beat the opponent? How long will you blunt your competitor's potential? How long will you play games with those who are trying to gain a competitive edge over you? One can change the business scenario by putting this wisdom of cooperation into practice—decide the segments, collaborate and increase the market share instead of fighting with each other to grab a greater share of a market pie that is presumed to be finite. The future will witness more collaboration and competition will recede. 'Grow and let grow', that is the credo that businesses need to adopt to derive better dividends than devising devious stratagems to outfox your opponents in the anxious desire to beat off competition. If the Competition Authority objects, the collaborators will have to meticulously establish that because of the collaboration, consumers are going to benefit. It will no longer be enough to beat your competitors with fair means. Christ always taught that one should develop the feeling of forgiveness or forbearance. In the world of business, forgiveness or forbearance creates space and scope for growth in the heart and in the mind. It is always easy to punish and condemn an employee, but it is the belief in human potential that allows us to give the people a second chance. We should condemn mistakes, errors or faults, not the doer. A manager is like an expert surgeon who cuts out the malignant tumour and saves the patient. If the patient dies on the operation table, what acclaim does the surgeon deserve? This simple wisdom eludes today's cutthroat corporate world.

The Bible talks of kindness, humility, sacrifice and forgiveness. These values are perhaps not much practiced in the business world. Our ability to show kindness, make sacrifices and forgive mistakes has been greatly diminished in an era where the increasing demand from consumers for reliable products and services allow little room for error.

However, businesses are run by people and there will be errors at all levels; in decision making, in devising products and services, and in dealing with clients and consumers. Corporates need to ably balance the demands of the marketplace with the need to nurture the human resources within the organization. The corporates that succeed will be able to nurture the talent within the organization and this will be possible when they adopt the best practices in the realm of the human resources development. This will entail the need to foster human values – and that is where the spiritual teachings come in. For better corporate governance, it will be increasingly necessary for leaders to show kindness, display humility, make sacrifices and be able to forgive mistakes made by the juniors.

Moid Siddique then turns to the proclamation in the Geeta to bring home the above point to the corporate world, the secret of attainment of Godhood. He quotes "He who sees Me everywhere and sees everything in Me, he never gets separated from Me, nor do I get separated from him".

Learning Organization

Better corporate governance demands a learning organization. An organization that learns through utmost humility, reading, observation, inquiry and science. A Qur'anic verse prays "O my Lord! Give unto me more knowledge". Confucius declared in 6th century B.C. in China, 'To be fond of learning is to be near to knowledge'. The very beginning of Quar'anic revelations to the unlettered Prophet Mohammad' was with the word, 'Iqra', meaning 'Read'. Thus, the first revelation extolled the power of the pen and shook the unlettered—Prophet. The Islamic economic system stands for exploitation-free economy in a compassionate society. Both exploitation and undue profit are strictly prohibited in Islamic economic order. Wealth should not be concentrated in the hands of a few individuals; wealth should not be left idle but used as productively as possible. A proper balance should be maintained between materialism and spiritualism, and between economic and humanitarian objectives. The important lesson for corporate leaders as for workers and managers, in the words of Ahl Sunnah is that "The best of men are those who are more useful to others". Prophet Mohammed said, "Your employees are your brothers whom Allah has made your subordinates. So he, who has his brothers under him, let him feed them with what he feeds himself and clothe them with what he clothes himself ….

Mr. Akio Morita, the leader of Sony Corporation, Japan, in his autobiography emphasizes the importance of people orientation in a familial atmosphere in the following words:

" We also said this: "The road of a pioneer is full of difficulties, but in spite of the many hardships, people of Sony always unite harmoniously and closely because of their joy of participating in creative work and their pride in contributing their own unique talents to this aim. Sony has a principle of respecting and encouraging one's ability—the right man in the right post—and always tries to bring out the best in a person and believes in him and constantly allows him to develop his ability. This is the vital force of Sony.

"Our idea was that people were at the heart of what we were trying to do. As we looked around at Japanese corporations we saw that very few companies were doing what we were, because the personnel departments acted like gods, assigning people and moving them around and molding people to jobs.

"I have always made it a point to know our employees, to visit every facility of our company, and to try to meet and know every single employee. This became more and more difficult as we grew, and it is impossible to really know the more than forty thousand people who work for us today, but I try. I encourage all of our managers to know everybody and not to sit behind a desk in the office all day. I enjoy showing up at a factory or a branch office and chatting with people when I can. Not long ago I found myself in downtown Tokyo with a few extra minutes in my schedule, and I noticed a small office of Sony Travel Service. I had never been there, and so I just walked in and introduced myself. "I came here to show my face," I said. "I am sure you know me by seeing me on TV or in the newspaper, so I thought you might be interested in seeing Morita in the flesh." Everybody laughed, and I went around the office chatting with the staff, and in those few minutes we all felt good about our sense of shared effort. On a visit to a small Sony lab near Palo Alto one day, our manager, an American, asked me if I would pose for some pictures and I said I would be happy to. Before the hour was over, I had posed with all thirty or forty employees and I said to the manager, "I appreciate your attitude. You understand the Sony family policy."

Mr. Morita casts a spell of doubt on the philosophy developed at the Harvard School of Business and the American clamour for quick materialistic results from business operations. He says, "Management, despite the work at Harvard Business School and others and the increasing number of holders of advanced degrees in business administration, is an elusive thing that cannot always be judged by next quarter's bottom line. Manager can look good on the bottom line but at the same time may be destroying the company by failing to invest in the future. To my mind, the performance of a manger is measured by how well that manager can organize a large number of people and how effectively he or she can get the highest performance from each of the individuals and blend them in to a coordinated performance. That is what management is. It does not start from the bottom line of balance sheet, which can be black one day and red, the next, no matter what you do. If you are attracting a larger number of people to follow you willingly and with enthusiasm to contribute to the success of the company, the bottom line will take care of itself……… By saving money instead of investing it in the business you might give profit on a short-term basis, but in actual fact, you would be cashing in on the assets that had been built up in the past. To gain profit is important, but you must invest to build up assets that you can cash on in the future."

Coming back to the Prophet, about female employees he advised, "Do not overburden your unskilled female employee in her pursuit of living, because if you do so, she may resort to immorality; and do not overburden a male subordinate, for if you do so, he may resort to stealing. Be considerate to them. It is incumbent upon you to provide them good and lawful food."

Once a companion asked the Prophet what virtue was. 'That which brings peace to your mind and tranquility to your soul,' replied the Prophet. And what was vice, he was asked. 'That which makes your heart flutter and throws your soul into perturbation', replied the Prophet.

Virtuousity

Virtuous leadership is perhaps what is required in the new millennium. Siddique says, "In the cut-throat world of business, we might be tempted to dismiss such a concept. But the truth is that as individuals we all have an innate sense of right and wrong. Our inner self or our soul is disturbed when we have deviated from the right path. When we speak of virtuous leadership, we are discussing the inner balance that must exist when we make decisions.

On people management, the Quran talks of faith and trust in one's people. The Prophet was proud of his companions and always reposed faith in their competence. "My companions are like stars, whichever of them you follow, will guide you", he said.

When one examines the stories and anecdotes about Prophet Mohammed, it becomes clear that he was not in favour of building power centres. He believed in 'companionship' rather than followership.

Your position never gives you the right to command. It only imposes on you the duty of so living your life that others can receive your orders without being humiliated; said Dag Hammarskjöld, former U N Secretary General. It is good advice for corporate leadership in the context of good governance. Collaboration will be the leadership style of tomorrow. Good leaders of tomorrow will tend to see people as colleagues, companions or partners, but certainly not as followers, let alone 'subordinates'.

The Qur'an also underscores the need for humility and dignity in a leader 'do not treat people with scorn, nor walk proudly on earth: Allah does not love the arrogant and the vainglorious. It cautions mankind to desist from arrogance and harshness – and speak in humility. 'Lower thy voice, moderate thy pace, for the harshest of sounds, without doubt, is the braying of the ass'.

Most importantly, it advises on the value of making the right decisions in the long run and the need to avoid hostility as far as possible.

Siddique advises us not to mock at values for they lead us to the path of Supreme Truth. Kahlil Gibran had said, 'Strange that we all defend our wrongs with more vigour than we do our rights'.

Corporates need to recharge themselves by living values, learning from everyone and every incident. With corporate governance coming on top of agenda, **Total Ethics Management (TEM)** is rightly emerging as industry's newest buzzword. Siddique quotes Mr. Anil Sachdev of the TEM movement in India who explains: 'How does TEM help the bottom line? The logic is simple – business ethics is pro-profit because it reduces transaction costs in the economy and is good for the firm as well as for the stakeholders. For instance, in the export market, the man who delivers on time and keeps his commitments is the one who gets the repeat order. The negation of ethical values in business in real terms works out to 10 to 20 per cent drop in performance.

Negativities enter even a successful corporation unknowingly and become habits. As Mr Jagdish Sheth points out in "The Self-Destructive Habits of Good Companies", on their way to success huge companies have unintentionally acquired certain bad habits, which might lead to their downfall. With fast success a big company becomes arrogant and complacent. Many renowned companies are treading this path, as they cease to be modest and learning as they initially were. It is not true that good companies are invincible. The life expectancy of corporations, Sheth observes, has been declining since the 1970's. Today the average age for big companies is less than 10.5 years. "I used to think that competition destroys good companies. Strangely, I found that that's not true: companies destroy themselves", says Sheth. " The vast number of companies succeed by accident—being at the right time at the right place. And then they begin to take more credit for themselves and that leads to arrogance…At General Motors Alfred Sloan created a culture of arrogance. Today both Wal-Mart and Microsoft have gone down the same route, concludes, Sheth. Once arrogance sets in, the company becomes abusive on customers, suppliers, employees and the community at large. It starts dictating terms to trade partners and end customers and suppliers…. Success breeds complacency. Complacency usually comes when you are a monopoly—because you have no competition. The company gets into no-one-can-beat-me syndrome. It gets out of the natural harmony with various stakeholders, failing to stoop and to conquer.

R Gopalakrishnan writes in his book—In the world of business, you are in harmony with nature when your actions are motivated by values. When you seek power or control over other people, you waste your energy. When your actions are motivated by values, your energy multiplies and accumulates. There are three components of this Law of Least Effort. First, acceptance that the things are the way they are at this point of time, second, without blaming others, take responsibility to change things for the better: third and last, avoiding defensiveness of your view, view your past actions.

Make the trend your friend! Count on your natural instinct for values.

Values are the vortex of the spiral. We need to live with chaos and uncertainty, to try to be comfortable with it and look for certainty where we won't get it. However, we should remember that our journey is towards the vortex, the calm eye of the centre.

The greatest mistake leaders can make is to assume that results alone matter, and that morality and goodness have gone out of style.

The great and more satisfying thing in life is a sense of purpose beyond oneself. Aristotle had advised centuries ago that to keep an open mind, bend your mind in the opposite direction first, as a carpenter might do with a piece of wood before using it. R. Gopalakrishnan lists the factors that enhance intuition:

— Receiving information—sensing, seeing, hearing, smelling

— An open mind including a belief in the power of intuiton

— A strong desire to achieve or overcome, and a positive attitude

— Attempt to remove oneself from the outside world

— Willingness to take risks, supported by commonsense.

Top performance in the arts and sports—as well as in management—comes out of the instinctive brain, not out of the 'sensible, analytical and rational brain'. The normal mode of action takes place in the analytical brain. At the moment of performance, which is usually stressful, the highest part of your brain is not your friend. You cannot rely on the analytical brain; you have to rely on your instinctive brain…Philosophers have long recognized this. That is why, when complex issues arise, philosophers prescribe immersion and contemplation, whereas psychologists and academics prescribe analysis. As modern psychologists would state it, immersion would lead to contemplation, which should lead to happiness—in management, indeed in life as a whole. Management magazines make a hero out of the quick-thinking decisive leader. In reality, particularly with complex problems, it helps to slow down deliberately, and to reflect and contemplate. This helps managers build more confidence in their intuition and recall lessons when they have to make decisions without full information…The art of contemplation is far more difficult to teach, learn and practice.

"The analytical type is uniquely human—how to develop options, choose from among them and act on one thoughtfully. The human brain can receive external stimuli, it can evaluate, analyze multiple angles and figure out which is the best option. People with a strong data-driven mind are interested in the realities and facts that their senses have picked up explicitly. People operating in this mode and with this kind of mind tend to be best with detail, they prefer solid routines and process, they emphasize targets and plans, and they trust authority and experience. This is the mindset that all societies that coach their people to develop.

"The instinctive type includes the survival variety, for example, how to escape danger; or the emotional variety of like or dislike; or the type that comes out of past experiences almost without thinking about it. People with an intuition driven mind are more interested in the possibilities than in the predictions, they like to listen to what comes from the unconscious, and they emphasize vision and purpose and are less driven by process and routine.

"This is illustrated by the different behaviour of an animal compared to that of a man in an experimental situation. A squirrel can only receive a stimulus and respond without logic or analysis at that point of time. It cannot anticipate a future problem, let alone respond to it. So if a squirrel runs across a narrow platform towards a food source, it will do so irrespective of whether the platform is at ground level or at a height of 100 feet. It will still run across without a concern about falling off from a height.

"Human distinctiveness lies in the possession of an analytical brain. If the narrow platform is at ground level, the instinctive brain says "Go" and the analytical brain agrees. However, if the platform is raised to a height of 100 feet, the analytical brain will point out the dangers of running across the narrow platform at such a height and dissuade the instinctive brain form saying 'go'. The consequence is that while the squirrel may still run across, the human being is unlikely to scamper across the same platform."

Adding Value

"As soon as a manager feels that he is in zone of comfort, he might start to think of how to get the next variation of experience. Variations of experience disturb the equilibrium of the environment in which the manager works. The new experience and environment cause the manager to retain his curiosity to learn afresh, and inculcate a sense of humility about how little he really knows. It is this combination of curiosity and humility that fosters in the manager the attitude of being in a continuous development mode. …. Among the most important tasks of leaders is to disturb the comfort of the known and to actively embrace and tackle the discomfort of the unknown."

Mr Nassim Nicholas Taleb in his latest "The Black Swan—The Impact of the Highly Improbable" [Allen Lane] also echoes the message: Acquiring knowledge is not about knowing more things. It is more about knowing precisely how much one does not know. Pushing frontiers of knowledge is tantamount to increasing the set of things you are sure you do not know. From "I think I know", you move to "i am certain i do not know this part of what i thought i knew". The significance of such approach to knowledge is that you have a whole new way of approaching the decision-making process in an uncertain world. You stop making decisions relying on what you "think" you know but start thinking taking decisions to cover yourself regarding what you do not know. The main point of the book is that the world is driven by rare events. Hence the law of averages and the Gaussian bell curve, which deal with events around the hump of the curve, do not help us to predict change.

Jeffrey Rayport appeared for an unusual zoology exam. The students were presented with what appeared like a stuffed bird, covered almost fully with a cloth. All that the students could see were spindly legs, claws and an inch or so of feathers hanging out of the sides of the cloth covering. They had four hours to write their views on the bird, its migratory pattern, its mating habits and a whole host of such details.

As he became a professor of business later, Rayport realized that charting the course of a business or a career under extreme conditions of uncertainty is not like writing an exam about a stuffed bird you cannot see. R Gopalakrishnan then quotes Raport as saying, "Don't squander the chances to make a difference in the world because of the comfort of inaction…listen to your passions…and then do something truly great."

"In simple words, this is the ability to grasp a context, see an unstructured issue within that context, and think up unusual, even experimental solutions which might solve that problem. It also means converting an adversity into an opportunity. It is an attitude thing.

And then, quoting a Harvard research study, "Be thankful for the troubles of your job. They provide about half your income. Because if it were not for the things that go wrong, the difficult people you have to deal with, and the problems and unpleasantness of your working day, someone could be found to handle your job for half of what you are paid. It is a fact that there are plenty of big jobs waiting for men and women who aren't afraid of the troubles connected with them."…Facing such challenges head-on helps a manager grow from strength to strength. That is what helps value addition. That is what brings forth the creative side of corporate governance and ensures effective corporate leadership. Consider the following thoughts of an industry leader in India, the ITC Ltd.

Market for Virtues

In his speech at the 96th Annual General Meeting of ITC Ltd, Mr Y C Deveshwar quotes Mr David Vogel from Mr Vogel's "Market for Virtue" in trying to drive home the point that good corporate governance will be led by corporate social action rather than being a drag on it.

"CSR is sustainable only if virtue pays off. The supply of corporate virtue is both made possible and constrained by the market…while there is a place in the business system for responsible firms, the 'market for virtue' is not sufficiently important to make it in the interest of all firms to behave more responsibly."

It is sometimes argued that the "reputational asset" that CSR attains is an adequate reward in itself, and therefore does not need any further market incentives. However, a the present stage consumer, such a reputational asset has so far not led to any significant consumer support, persuaded sizeable investor interest, or resulted in meaningful preference in Government policies. Therefore, given the ambivalent market response, CSR initiatives, by and large, tend to attempt the minimum, often defined by compliance to regulations, and do not ignite creativity and innovation to accelerate social benefit.

There are also appreciations amongst many that investing in CSR would put them at a disadvantage *vis-à-vis* their competitors who do not choose to carry such social overheads.

It should be possible to initiate market forces that make CSR a crucial component of shareholder value creation. This will create new competitive forces that drive responsible corporate action. CSR will then be defined by market forces. It will not be inspired by corporate conscience alone. "The key to corporates sustaining a meaningful strategy for constructive social action therefore lies in the ability to create strong market drivers that incentivise CSR."

Civil regulation, pressure groups, government regulation and public policy drive CSR, but they tend to deliver bare minimum intervention and may stifle corporate creativity and innovation and a sense of competition to deliver. "A perceptible augmentation of social capital will take place when market drivers spur innovation and a sense of competition to deliver CSR in ways that positively impact financial results. CSR initiatives then become a part of the balance sheet deliverables, are quantified by the market and provide direct incentive to the company to enhance socially responsible behaviour."

The present thinking is that the triple bottom line or "People, Planet and Profit" bottom line captures an expanded spectrum of values and criteria for measuring organizational success; economic, environmental and social. With the approval of the UN ICLEI (Local Governments for Sustainability is an international association of local governments and national and regional local Government organizations that have made a commitment to sustainable development) Triple Bottom Line Standard for urban and community accounting in early 2007, UN Standards also apply to natural capital and human capital measurement to assist in measurements required by TBL, e.g., the eco budget standard for reporting ecological footprint.

It will be necessary to develop compelling market driven forces, which would give positive reinforcements to corporates to focus on TBL performance. This will energize innovation by companies thus making CSR an integral part of the marketing mix and a competitive differentiator.

Mr. Deveshwar suggests that the most potent force that can trigger a complete rethink of corporate strategy and bring about transformational change lies in the power of consumer franchise, consumers also including other market participants including Government – both as a buyer and regulator, investors, employees, job seekers and others. An enlightened consumer by exercising a choice in favour of socially responsible enterprises can unleash a powerful force of incentives.

Consumer performance will spur massive movement in corporate innovation to integrate business goals with the building of societal capital.

CSR can also emerge as a distinctive market differentiator and help position progressive companies more strongly in the market place. This would result in higher gains to the company and its shareholders with increase in revenues and goodwill. Companies will vie for consumer spend by positioning CSR as a compelling value proposition. "Where consumers go – investors will follow. Investors will increasingly find such socially responsible companies attractive". Augmentation of social and natural capital will result from competition amongst CSR exemplars. This will create a sustainable future.

Mr. Daveshwar suggests a substantial ramp up in consumer education so that they are made aware of the power they possess to transform society and bring in enduring social change.

Industry can contribute to building societal, ecological and natural capital by championing a sincere commitment to a vision that embraces contribution to society as a key component of business strategy. It can move towards voluntary disclosure of Triple Bottom Line performance in the company's Annual Report verified by independent reputed third party organizations. Companies can also attain CSR Sustainability Trust marks and display the same on their products and services.

CHAMPIONING BUSINESS EXCELLENCE

SUTANU SINHA*

"The greatest danger for most of us is not that our aim is too high and we miss it, but that it is too low and we reach it - Michelangelo

J R D Tata, the father of India's Industrial Resolution articulated business excellence as "Nothing worthwhile is ever achieved without deep thought and hard work. One must think for oneself and never accept at their face value slogans and catch phrases to which, unfortunately, our people are too easily susceptible;

One must forever strive for excellence, or even perfection, in any task, however small, and never satisfied with the second best;

No success or achievement in material is worthwhile unless it serves the needs or interests of the country and its people and is achieved by fair and honest means;

Good human relations not only bring great personal rewards but are essential to the success of any enterprise"

This articulation of business excellence is more relevant and rewarding today in the context of economic globalization. Enterprises are increasingly adopting Business Excellence Models for sustained growth and competitive advantage. Customer Satisfaction through sustained value addition constitutes the single largest component in any of the Business Excellence Model. The Corporate blueprints for growth are, therefore, becoming synonymous with strategies for Customer Satisfaction.

One of the major yardsticks in determining excellence therefore centers around customers. Growth of Corporation is traditionally ensured by going back to the customer over and over again for their confidence. At the same time confidence of other stakeholders can not be ignored. In the process a champion enterprise searches for best practices for creating real value to all its stakeholders.

CUSTOMER / CONSUMER ORIENTATION

Traditionally businesses have been used to in dealing with customer dissatisfaction (read Complaints), contend with Customer ire etc. This led to the belief that the absence of complaints (or dissatisfaction) signifies achieving Customer Satisfaction.

With increasing competition, now enterprises are slowly realizing that Customer Satisfaction is essentially a complicated mix of hardware (technology, product, price, quality etc.) and software (attitude, responsiveness, deliverance, communication etc.) on one hand, and a curious mix of facts and perceptions on the other.Customer Satisfaction in today's context demands businesses not only to provide the customer with quality product and service but also to make customer in believing that he has genuinely got a good product and service. Customer Satisfaction has thus become a dynamic issue for businesses and determines efforts one has to make on a continuous basis.

Satisfaction or dissatisfaction is a person's feelings of pleasure or disappointment resulting from comparing perceived performance (or outcome) of a product or service in relation to his or her expectations. The Satisfaction as a function of perceived performance and expectation can be read as:

(a) Performance < Expectation -> Customer dissatisfied

(b) Performance = Expectation -> Customer satisfied

(c) Performance > Expectation-> Customer delight

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

Any enterprise always pursue to reach Zone (c) above.

Customers or consumers may be segregated into three segments, viz.

— Hard core loyals	:	Those who buy one brand all the time .
— Split loyals	:	Those who buy two or more brands
— Shifting loyals	:	Those who have shifts their purchase preference from one brand to another

It is success of an enterprise to convert **split loyals** and **shifting loyals** into **hardcore loyals** and that enterprise becomes the champion.

In order to identify and focus on customer satisfaction an enterprise needs to:

- Benchmark
- Identify areas of customer perceived value addition
- Identify customer segments and
- Make proper strategy and planning

Benchmarking can provide very enlightening piece of information as it helps in comparing one's products and services with "the best in the class" as perceived by the customer. It may be classified into following three categories :

(i) Internal – By comparing the same functions done by various divisions within the company.

(ii) External – By comparing with the best among the competitors.

(iii) Functional – By comparing with the best in the Industry

Enterprises should also make serious attempts to find out what are the areas of customer perceived value addition in respect of product, quality, technology, corporate itself and personnel. A market consists of a large identifiable group of customers. A corporate must identify segments of its diverse customers who differ in their needs, buying attitudes and habits.

Based on the target group as per customer segregation, an enterprise must formulate its strategies and plan its future investment so as to achieve maximum customer satisfaction which will in turn help the company to survive, grow and excel in the competitive market scenario.

CUSTOMER DELIGHTS

Organizations have Visionaries (generally promoters), leaders and managers to steer organization in pursuit of customer delight. Following are some of the fundamentals of customer delight:

- People talk about bad service not about adequate service and those should be considered seriously for future strategies.
- Enterprise is required to be focused externally.
- Employees should be fully empowered to delight customers.
- Everybody should constantly look for better ways to delight the customers.
- Knowing customers and their expectations is a must.
- There should be an ongoing process to monitor how delighted the customers are.
- Business policies and plans should be customer oriented and regularly updated.
- Building long term relationships with customers are keys to success.
- Creativity in every activity can have the biggest impact.
- Treat every customer the way they want to be treated.

It is ten times more expensive to acquire a new customer than to keep a current customer. Customers are primarily lost due to indifference, not due to dissatisfaction.

As the customer delight makes an organization champion, following are the key determinants in customer delight:

- Champion – the ability to win others over
- Empathy – the ability to understand the mood of others
- Discipline – the ability to work systematically and consistently
- Command – the ability to control a situation through communication

— Responsibility – the ability to own a problem until it is solved

RE-ORIENTATION OF THE ORGANIZATION IN THE QUEST FOR EXCELLENCE

Visionaries are champions

Vision is the art of seeing things invisible to others
- Jonathan Swift

Organizations are driven by vision, i.e., what for they operate, survive and sustain in the society. Vision steers an enterprise and navigates it to set goals or objectives properly.

A vision statement guides the enterprise toward defined goal whereas a mission statement guides current, critical, strategic decision. Mission plays as the building block for an overall strategy and development of more specific functional strategies.

Vision and mission identifies the scope of its operations in product/ service and market terms, and reflects its values and priorities,

It is a source of direction for its people. A well defined vision and mission therefore spells out direction, focus, policy, meaning, challenge, and passion of an enterprise lucidly. It is a stepping stone in the strategic planning process.

Effective vision and mission statement is a great asset to an enterprise. When everyone is working together in a defined manner to fulfill Vision of the enterprise, success becomes eminent.

EXAMPLARY VISION AND MISSION STATEMENTS AND CORE VALUES

I Indian Oil Corporation

Vision

A major diversified, transnational, integrated energy company, with national leadership and a strong environment conscience, playing a national role in oil security& public distribution.

Missions

To achieve international standards of excellence in all aspects of energy and diversified business with focus on customer delight through value of products and services, and cost reduction.

To maximise creation of wealth, value and satisfaction for the stakeholders.

To attain leadership in developing, adopting and assimilating state-of- the-art technology for competitive advantage.

To provide technology and services through sustained Research and Development.

To foster a culture of participation and innovation for employee growth and contribution.

To cultivate high standards of business ethics and Total Quality Management for a strong corporate identity and brand equity.

To help enrich the quality of life of the community and preserve ecological balance and heritage through a strong environment conscience.

Core Values : *Care; Innovation; Passion; Trust*

II. Infosys

Vision

"To be a globally respected corporation that provides best-of-breed business solutions, leveraging technology, delivered by best-in-class people."

Mission

"To achieve our objectives in an environment of fairness, honesty, and courtesy towards our clients, employees, vendors and society at large."

Core Values : *Customer Delight; Leadership by Example; Integrity and Transparency; Fairness:*

Pursuit of Excellence: A commitment to strive relentlessly, to constantly improve ourselves, our teams, our services and products so as to become the best

III. ITC

Vision

Sustain ITC's position as one of India's most valuable corporations through world class performance, creating growing value for the Indian economy and the Company's shareholders

Mission

To enhance the wealth generating capability of the enterprise in a globalizing environment, delivering superior and sustainable stakeholders value.

Core Values *: ITC's Core Values are aimed at developing a customer-focused, high-performance* *organisation which creates value for all its stakeholders:*

Trusteeship; Customer Focus; Respect For People; Excellence; Innovation; Nation Orientation

Mr Sam Walton (1918-1992), the founder of Wal-mart, the top most Fortune 500 Company of the year once said that -

"The secret of successful retailing is to give your customers what they want. And really, if you think about it from your point of view as a customer, you want everything: a wide assortment of good-quality merchandise; the lowest possible prices; guaranteed satisfaction with what you buy; friendly, knowledgeable service; convenient hours; free parking; a pleasant shopping experience."

Today, driven by their leader's vision, Wal-Mart has grown to become a worldwide household name.

Another success story of Vision driven Strategies was USA's first Space expedition to Moon. On May 21, 1961 J F Kennedy, shared his Vision on USA's space research with Congress and public by saying that

"I believe this nation should commit itself to achieving goal, before this decade is out, of landing a man on the moon, and safely returning him to earth."

On July 20, 1969 Neil Armstrong became the first human to set foot on the moon.

CHAMPIONS ARE CAPABLE TO MANAGE RISKS

"Risk that is built into the very nature of business and cannot be avoided. …" - Peter Drucker

Identification, assessment and control of risk are continuous process for any successful enterprise. Risks can be broadly categorized as hazard risk, financial risk, operational risk and strategic risk. The risk for a business enterprise is inherent in the process of strategy implementation or at operation level or in statutory compliance processes. It may be at corporate level or a Strategic Business Unit (SBU) level or even in associates or subsidiaries. Organizations should have Enterprise Risk Management (ERM) system to address risk zone aptly.

However, risk assessment is a foremost task for championing business excellence. Once assessed, it should be properly reported and the apex body like Board or Board Committees should be involved in developing mechanism for mitigating risk through 'capability development' or by modifying organization processes and systems. This is applicable to both internal as well as external risks.

Risks can be priorities in the following way:

Impact of Risk	High Impact – Low Likelihood **(B)**	High Impact – High Likelihood **(A)**
	Low Impact – Low Likelihood **(D)**	Low Impact – High Likelihood **(C)**
	Likelihood of Risks	

[Source : Turnfull Committee Report, Institute of Chartered Accountants, London.]

ERM can be successful if after assessment, enterprise undertake following measures simultaneously after prioritization of risk elements –

1st – Elimination or modification of operations suitably

— By undertaking elimination process, entire risk can be avoided. For example, by abandoning a whole operation whose risk likelihood is very high (Zone A in above model) or by replacing a hazardous process organization can mitigate risk.

— By applying safe technology, trained human recourses or changing the processes of operations risks can be minimized

2nd – building sound financial strength to mitigate impact of any unforeseen occurrence

— Financially sound organizations can sustain the sudden unforeseen occurrence having financial severity where as sick organizations cannot.

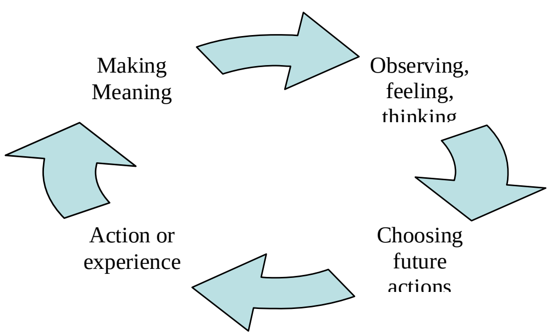
3rd – use of insurance or financial instruments like derivatives to transfer the risks.

— Through this process activities which create risk can be contracted out to others or the responsibility to pay for any losses are transferred.

A business has to manage a variety of risks in order to safeguard the assets and protect stakeholder's interest. Nowadays smart business enterprises perceive positive aspects of risk and have proved that there are usually greater returns for greater risks provided they are best utilized to their advantage. One such example is carbon emission trading. Manufacturing companies which are able to reduce their emission below assigned level, trade excess permits to other and convert risk into gain.

KNOWLEDGE BASED LEARNING ORGANIZATIONS ARE THE CHAMPIONS

A learning organization integrates information and applies it to changing needs. The process of learning consists of gaining new information and increasing understanding in order to do things better. It comprises doing, reflecting, conceptualizing and planning. Doing refers to actions whereas Reflecting denotes making observation about the event. Conceptualizing is the process of interpreting events and creating mental models or concepts. Planning is the phase where behaviour is adjusted by making plans for future events or experiments and Learning occurs in a cycle.



Corporate Learning Cycle

Transformation of functional organization of late 19th and early 20th century into divisional organization after World War I and from matrix type to networked organization subsequently compelled organizations to become learning organization in order to meet needs of diversified group of stakeholders spread throughout the globe.

Organization Learning happens in two ways, i.e., single loop learning like routines and chores whereas double-loop learning covers a larger perspective that involves evaluation and modification of the goals or objectives, as well as design of the path or procedures of an organization. For example, Business Process Re-engineering (BPR), workflow planning, identifying best practices are double-loop learning, which brings excellence.

In a learning organization Knowledge is strategically valued. Knowledge building process includes customers and stakeholders. Organizations are more organic than mechanistic and its Knowledge management strategies are more human centered than technology driven. There are easily communicated maps or frameworks that orient people to knowledge and encourage to self organize around knowledge competencies or expertise. People have ready access to the information and knowledge they need and they are encouraged in their personal efforts to acquire and apply knowledge.

The approach encourages expansion across all modes of knowledge. Flexibility, open communication, an orientation towards change and encouraging developing and sharing knowledge are the main criteria. There are a number of famous knowledge corporations which championed Knowledge Management for their prosperity and progress and the number is growing.

ACTIVITIES KNOWLEDGE ENHANCING

— Shared and creative problem solving

— Implementing and integrating new methodologies and tools

— Formal and informal experimentation and

— Pulling in expertise from outside.

More and more companies have started using lens of core competencies to help focus on their identified areas of knowledge, expertise and performance capabilities.

INNOVATORS ARE CHAMPIONS

Innovation means denying existing conditions, or changing the existing order of things , or values or systems" – Professor Hidaki Yoshihara of Kobe University, Japan

Innovations are changing the facets of society and business the world over.

It is the outcome of learning process which creates new value that can bring a turnaround situation for an enterprise. Outcome of any successful innovation changes the face of an organization. Impact of innovation is also significant on the society, which can be seen from some of the following indicative records from the history of innovations:

1876 Alexander Graham Bell and Thomas Watson exhibited an electric Telephone

1895 Wireless telegraph by Guglielmo Marconi

1903 Orville Wright and Wilbur Wright flied the first motor driven airplane

1908 Henry Ford developed the assembly line method of automobiles

1926 J L Baird invented Television

1947 First supersonic flight

1958 Chester Carlson presented the first photocopier suitable for office use.

1969 APRANET commissioned by Department of Defence, USA for research into net-working

1974 Bill Gates and Paul Allen wrote a version of BASIC for the Altair computer and started a company called Microsoft Corporation

1977 Apple II, the first home computer by Steve Jobs and Steve Wozniak.

1981 IBM introduced the IBM PC

1984 Domain Name System (DNS)

1987 ISO 9000 published

1991 World Wide Web (WWW) released

2000 ISO 900 revised; Global Compact established by UN Secretary-General

Process of innovations throughout the world continues

SUSTAINABILITY – PRINCIPLES OF GLOBAL IMPACT

United Nation has prescribed following nine principles of the Global Compact. These are –

(1) supporting and respecting the protection of international human rights within their sphere of influence

(2) ensuring their own corporations are not complicit in human rights abuses

(3) freedom of association and the effective recognition of the right of collective bargaining

(4) the elimination of all forms of forced and compulsory labor

(5) the effective abolition of child labor

(6) the elimination of discrimination in respect of employment and occupation

(7) supporting a precautionary approach to environmental challenges

(8) undertaking initiatives to promote greater environmental responsibility and

(9) encouraging the development and diffusion of environmentally friendly technologies

Scouting for new innovative product, technology, process or system compels enterprises to change their work approach totally and now after introduction of Global Compact all innovations need to be sustainability compliant.

Innovative approaches *vis-à-vis* tradional planning may be mapped as follows:

Innovative approaches	*Traditional planning*
Concurrent Planning	**Sequential Planning**
All functional supply chain processes resulting in synchronized and globally optional solutions for the entire supply chain; Enterprise resource planning etc.	A series of functions from Master Scheduling to Rough - Cut Capacity Planning, followed by Materials and Capacity Requirements Planning. Due to their serial nature, plans are disconnected and lack coherency and synchronization.
Greater Visibility	**Local Optimization**
Plans are created by considering the impact on all resources throughout the supply chain	Plans are localized to each resource or functional group ignoring their impact throughout the entire supply chain.
Accurate Supply Chain Representation	**Limited Supply Chain Representation**
Modeling techniques provide a more accurate representation of a company's supply chain operations, placing less reliance on approximations and improving manage-ment decision support.	Traditional planning approaches use gross approximations of manufacturing's reality, such as fixed lead times and standard queue sizes.
Constraint-Based Planning	**Infinite Planning**
Resource constraints of all types throughout the	Traditional approaches result in unrealistic plans

Innovative approaches	Traditional planning
supply chain are identified and managed for maximum throughput.	because they consider material and capacity separately - and assume these resources infinite.
Bi-Directional Change propagation	**Uni-Directional Change Propagation**
The impact of a change is propagated both upstream and downstream, so that affected materials and operations are immediately adjusted, and the impact of the change is mitigated.	A change occurring anywhere in the planning series requires a new iteration starting at the beginning of the planning process.
Speed	**Multiple Iterations**
Concurrent, memory-resident planning technology enables vast improvements in speed, resulting in faster responsiveness to changing business conditions.	Sequential and disconnected planning requires multiple iterations, delaying important planning information, and resulting in plans that rarely reflect the current operational status and are of limited use.

The challenges for transformation leaders lie in anticipating and adapting to change through innovations and generations of creative ideas to carve out new opportunity.

The organization needs to recognize innovative champions. It should empower employees to take risks, encourage employees to learn from their mistakes. It calls for innovative explorations, creating trust, and making it safe to think and dream. Organization should recognize innovation and give rewards to the wildest ideas. An innovation must not only be invented but implemented.

VALUE CREATION FOR REAL VALUE ADDITION

An organisation is a sum-total of various processes (Divisional level), sub-processes (departmental level) and activities (unit level). In order to sustain, enterprises must ensure that their business processes, sub-processes and activities and ultimately, their products and services are perceived as valuable by the customers. To accomplish this, organizations have to re engineer their processes and redesign their product/service cycle-time rapidly.

All the processes, sub-processes and activities of an enterprise can be segregated into following three segments:

— *Real value-added activities (RVA)* : which transform inputs into outputs and are perceived as valuable by the customer, for example fabrication, assembly, packaging etc.

— *Business value-added activities (BVA)* : which are installed by management and deemed necessary to support, control, and monitor internal business function but have little or no perceived value to the customer. Scheduling, marketing, invoicing, and record keeping are these types of activities.

— *Non value-added activities (NVA)* : process steps that contribute to neither customer satisfaction nor improved business operations. NVAs increase cycle time and add costs rather than value. Examples include inspections, rework, excessive transit, waiting, and storage.

An ideal organization should try to maximize its RVA, minimise its BVA and eliminate NVA through business process reengineering (BPR). This business process reengineering is the fundamental rethinking and radical restructuring of business processes to achieve breakthrough improvements specially on improving efficiency. A few well-known examples of successful cycle-time reduction/compression include Indian Railways online ticket booking/cancellation system, P&T's innovative delivery system etc.

The advantages of the business process re-engineering are:

(a) *Increased productivity* - as output per unit of time increases, thereby improving overall productivity.

(b) *Price premiums* : customers perceive products and services provided in less time as more valuable.

(c) *Reduced risk* : by producing products and services faster, firms can rely on shorter forecasts, which are likely to be more accurate than longer-range forecasts.

(d) *Increased market share* : consumers tend to have more confidence in responsive suppliers and tend to reward them with their business.

(e) In addition to the obvious benefits of being "first to market," organizations have realized extreme competitive advantages by offering compressed process cycle times to customers.

It may be noted that BPR is not a one time exercise; it should be a continuous process on the basis of changes or apprehended changes in the business environment. The more an organization is adaptive to changes, the more success it can deserve.

In order to implement such Change Process, initiative in Human Resource Development (HRD) plays challenging role to meet the Organisation's Goal under changing environment.

It is observed that a substantial part of the operational costs are wasted on rework, repair, excess inventory, free replacement, cost of communication and co-ordination. Planned improvement actions can prevent such poor quality costs and lower COQ significantly. In fact, some leading world organizations have estimated that their profits would increase substantially, without any additional business, if their poor quality costs (Cost of Non-conformance) could be eliminated. The impact of savings by lowering COQ on the organizational bottom line has been shown in the following figure :

In the above diagram, it is shown how HRD Initiative is integrated. This is important to synchronize organic and mechanistic processes towards achieving Excellence.

QUALITY BUILDS CONFIDENCE

The organizations, to survive and grow, must maintain their cost competitiveness and at the same time ensure that the quality of their products and services are at par with, if not better than, the best in their respective industries.

Organizations strive to reduce cost and increase competitiveness. It is essential to measure the return on quality in an organization and how this impacts the bottom line. By measuring cost of quality enterprises can add substantial value. Cost of Quality (COQ) has two components, i.e., (a) Cost of Non-conformance (CONC) - the cost of not doing things right at the first time (e.g., scrap generation , rework involved in repair/rectification, replacement ,customer complaints etc.) and (b) "Cost of Conformance" (COC) – Cost of doing things right the first time (e.g., process control, self-inspection and test, preventive maintenance, training on quality etc.).

Implementation of Quality system leads to tangible results in terms of cost reduction, improved productivity, higher sales volume and improved profitability. Further, organisation can convince and win the customer confidence with solid evidence of their improvement efforts in ensuring higher quality in order to differentiate themselves in the competition and maintain customer satisfaction and loyalty. Every rupee saved through solution of poor quality problems is converted into earnings. Every rupee saved has a direct impact on the bottom line of the organization. Once a robust quality system is established, the organization can confidently concentrate its pursuit for step up activities.

Excellent enterprises are not only meticulous about their product or service quality but also about quality of processes, systems and their human resource. In this direction many business enterprises adopt quality tools like Total Quality Management (TQM), six-sigma etc. However, ultimate goal remains universal, i.e., Customer satisfaction.

EXCELLENCE THROUGH RESTRUCTURING

Rearrangement of investments (assets) or financing structure for a company through conscious Management action with a view to drastically altering the quality (substantially, sensitivity to risks) and performance is one of the major tool to achieve outstanding results.

Restructuring may be external or internal. There may be asset based (portfolio or investment) restructuring like acquisition of business (divisions)/ companies, merger or Amalgamation, asset Swaps, divestiture of business/companies, demerger or spin off. Similarly financial restructuring like share buyback, capital reduction, debt to equity conversion, restructuring in maturity pattern of debt or other debt restructurings may also have significant impact on the performance of the enterprise.

Internally an organization can undergo restructuring through closure of units non-viable units, redundancy programmes etc. or it can undergo organisational restructuring through decentralisation, delayering, product /market based divisionalisation etc.

Previously enterprises followed linear path for expansion, both horizontal and vertical. There was no such compulsions for restructuring due to lack of competition (protected and assured markets), very little shareholder expectation of yield and little threat of punitive creditor action.

But now, big business houses prefer acquisition route for entry into new market. There is increased competition in both domestic as well as international market. Customers expectation and competition compels enterprises to reduce cost. Simultaneously, capital Market is becoming more matured and getting polarized between performers and non-performers.

In the process of restructuring enterprises should be focused in order to have synergy and cost effectiveness. The motives or objectives vary from enterprise to enterprise. Following are the examples of such restructuring exercise :

(a) HLL – Brooke Bond – Lipton – Ponds In order to have Organisational renewal and strategic repositioning.

(b) Goodnight - Banish Jet - In order to have Growth, expansion, elimination of competition

(c) Whirlpool – Kelvinator - In order to have Quick low risk entry into new markets

(d) Sandoz – Ciba – Novartis - In order to have market share

(e) Tata Tea – Tetley - In order to have Strategic control over backward /forward linkages

(f) Nicco Battery - Nicco In order to avoid financial difficulties - Restructuring may be made through asset swap, demergers or divestitures

(g) Nicco - Batteries In order to exit from non-core business

(h) Telco - Heavy Earth Moving and other divisions into subsidiaries - In order to avoid cross subsidization

(i) Grasim - Cement division of Indian Rayon In order to bring about sharper Management focus.

(j) India Polyfibres – Raymonds Synthetics – Reliance) In order to stop cash losses

(k) In order to avoid inability to meet fund the growth needs of a business

(l) In order to make conglomerate into stand alones – to add value where conglomerate discounts prevailed.

(m) In order to Split group of companies like DCM Group, Reliance etc.

In many a cases, organizations excels through restructuring route. Recent purchase of CORUS by Tatas or acquisition by Arcelor Mittal Group are the live examples of such success.

BUSINESS EXCELLENCE THROUGH SUSTAINABILITY

An organization can achieve success through many routes. Following are the most common routes to success:

— Step by step Development and growth. (e.g. evolution of Tata Group)

— Innovation / Turnaround (e.g. Microsoft Windows)

— Restructuring (e.g. ArcelorMittal)

In reality, many organizations follow hybrid rout which may be any combination of any or all of above .

CONCLUSION

Today, good corporate governance and sustainability are not only two major keys in the way of corporate excellence but are two major preconditions for success.

Confidence of stakeholders builds strong foundation for organization to succeed whereas acceptance by the society ensures its sustainability. For example, one of the Indian origin global business house Arcelor Mittal, in its mission statement on sustainable development say that-

"ArcelorMittal is committed to Sustainable Development. That means building a stable, global institution - one with the resources to deliver the products our customers want and create sustainable value for all our stakeholders, including the communities in which we operate" …

"Responsible business practice sits at the heart of our strategy. We operate in a wide variety of countries, from the developing to the most developed. We recognise that the decisions we make impact not only our employees and the wider communities in which we work, but also suppliers, governments and investors."

Similarly, Microsoft founder Mr. Bill Gates said that–

"Microsoft's mission is to enable people and businesses throughout the world to realize their full potential. One way we fulfill our mission is by developing innovative software that transforms the way people work, learn, and communicate. Another way is by using our resources and expertise to help expand social and economic opportunities in communities around the world. …"

Similar voice was also echoed by the Chairman and Chief Executive Officer of General Motors who said –

"General Motors is committed to sound corporate citizenship in all aspects of our business. Above all, we know that maintaining a strong company will help ensure our continued commitment to the communities in which we live and work, and to the social interests we have identified as important to our business and our stakeholders…. "

It is evident from the preceding discussion that the Business has realized that in the long run good governed companies, committed not only to its stakeholders but also to the communities where they operate, will sustain.

In the quest for excellence and sustainability, the professionals have critical role to play in such holistic business mission of the sustainability through good governance.

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CORPORATE SOCIAL RESPONSIBILITY — A TOOL FOR SUSTAINABILITY

V P SHARMA* & M A JOSEPH**

Hon'ble Prime Minister Dr. Manmohan Singh while presenting a ten point social charter sharing his vision on the responsibility of Indian corporate for sustainable and inclusive growth, pointed out, "Indian industry must rise to the challenge of making our growth processes both efficient and inclusive. This is our endeavour in Government. It will have to be yours too and I seek your partnership in making a success of this giant national enterprise. If those who are better off do not act in a more responsible manner, our growth process may be at risk, our polity may become anarchic and our society may get further divided. I invite corporate India to be a partner in making ours a more humane and just society".

INTRODUCTION

Societies, all across the globe are adopting a more balanced approach to sustainable development and the business are contributing positively to help societies to achieve the objectives of sustainable development. Businesses are voluntarily going beyond legal obligations to embrace social and environmental spheres. Voluntary in nature, international and inter-governmental organizations have taken Corporate Social Responsibility initiatives like UN 'Global Compact', OECD Guidelines for Multinational Enterprises', or the 'Global Reporting Initiative'. Key points discussed in this article include, as to how effective are CSR instruments; to what extent do they really contribute to sustainable development, their global dimensions and other related issues.

CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility (CSR) is a tool used by business and industry to align operations with social and environmental values. Although there remains no definitly definition of CSR, it is generally viewed as: the voluntary commitment and action undertaken by a corporation, over and above compliance to existing legal requirements, to behave in an ethical manner to address both its own competitive interests and the wider interests of society. CSR focuses on benchmarking the success of a company's performance on social, environmental and financial indicators, known as the triple-bottom-line. CSR Europe 2003 articulated *"CSR as a powerful way of making sustainable competitive profit and achieving lasting value for the shareholder as well as for stakeholders. CSR and reporting thereof is a win- win opportunity, not just for companies and for financial investors but for society at large"*.

Today, corporate social responsibility is the soul of every business to become the password not only to remain competitive but to ensure sustainable growth. More importantly, CSR is the point of convergence between various initiatives aimed at ensuring sustainable socio-economic development of the community.

The World Business Council for Sustainable Development has described CSR as the business contribution to sustainable economic development. Building on a base of compliance with legislation and regulations, CSR typically includes "beyond law" commitments and activities pertaining to:

— corporate governance and ethics;

— health and safety;

— environmental stewardship;

— human rights (including core labour rights);

— sustainable development;

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— conditions of work (including safety and health, hours of work, wages);

— industrial relations;

— community involvement, development and investment;

— involvement of and respect for diverse cultures and disadvantaged peoples;

— corporate philanthropy and employee volunteering;

— customer satisfaction and adherence to principles of fair competition;

— anti-bribery and anti-corruption measures; and

— accountability, transparency and performance reporting.

CORPORATE SUSTAINABILITY

The term 'corporate sustainability' is used in an attempt to convince corporations to become more attuned to their stakeholders. Corporate citizenship, corporate social responsibility, good corporate governance, the ethical organisation and now corporate sustainability are the terms used to signify corporate contribution to society.

The notion of sustainability was originally thought of as development that seeks to be continuous amid worries that existing development will be resource constrained by the carrying capacity of earth's natural resources and eco-systems. The term sustainability first came to widespread acceptance in the Brundtland Report in 1987 where it was defined as "development that fulfills the needs of the present without limiting the potential for meeting the needs of future generations". At that time the concept and study of sustainable development had hardly left the domain of environmentalists and ecologists.

More recently, the term 'sustainability' has grown to encompass social and economic components as well as its historical work on the environment. This has developed into the notion of corporate social responsibility which is to create progressively higher standards of living, while preserving and enhancing if possible, the profitability of the corporation, for its stakeholders both within and outside the corporation.

In fact corporate social responsibility and corporate sustainability are two sides of the same coin. CSR defines the social responsibilities of a corporation which, if implemented, will lead to the corporation being sustained. Corporate sustainability has moved away from purely environmental issues to encompass both social and economic concerns.

Sustainability is interchangeably used for the term "sustainable development". It can be defined as a "strategy" by which businesses and communities approach growth, economic development, or even their daily activities in a manner that either preserves or improves their environment and/or quality of life.

Sustainable development has also been seen as balancing the fulfilment of human needs with the protection of the natural environment so that these needs can be met not only in the present, but in the indefinite future. While the common perception of sustainability focuses on the environmental aspect alone, the field of sustainable development can be conceptually broken into four constituent parts namely, environmental sustainability, economic sustainability, social sustainability and political sustainability.

Sustainable development is applicable to a broad category of activities. As per the United Nations Division for Sustainable Developments, the scope of sustainable development includes: agriculture, atmosphere, biodiversity, biotechnology, capacity-building, climate change, consumption and production patterns, demographics, desertification and drought, disaster reduction and management, education and awareness, energy, finance, forests, fresh water, health, human settlements, industry, information for decision making and participation, integrated decision making, international law, international cooperation for enabling environment, institutional arrangements, land management, major groups, mountains, national sustainable development strategies, oceans and seas, poverty, sanitation, science, small islands, sustainable tourism, technology, toxic chemicals, trade and environment, transport, waste (hazardous, radioactive and solid), and water.

MAJOR DEVELOPMENTS IN CSR

Several factors have converged over the last decade to shape the direction of the CSR activities. Some of the most notable ones include the following :

Increased Stakeholder Activism : Corporate accounting scandals have focused attention more than ever on companies' commitment to ethical and socially responsible behavior. The public and various stakeholders have come to expect more of business. Increasingly, they are looking to the private sector to help with myriad complex and pressing social and economic issues. There is a growing ability and sophistication of activist groups to target corporations they perceive as not being socially responsible, through actions such as public demonstrations, public exposes, boycotts, shareholder resolutions, and even "denial of service" attacks on company websites.

Proliferation of Codes, Standards, Indicators and Guidelines : New voluntary CSR standards and performance measurement tools continue to proliferate, adding to an already complex landscape. The recent U.S. accounting scandals have created another surge of standards development in an already crowded field.

Accountability Throughout the Value Chain : Over the past several years, the CSR agenda has been characterized in large part by the expansion of boundaries of corporate accountability. Stakeholders increasingly hold companies accountable for the practices of their business partners throughout the entire value chain with special focus on suppliers, environmental, labour, and human rights practices.

Transparency and Reporting : Companies are facing increased demands for transparency and growing expectations that they measure, report and continuously improve their social, environmental and economic performance. Companies are expected to provide access to information on impacts of their operations, to engage stakeholders in meaningful dialogue about issues of concern that are relevant to either party and to be responsive to particular concerns not covered in standard reporting and communication practice.

Convergence of CSR and Governance Agendas: Of late, there has been a growing convergence of the corporate governance and CSR agendas. An increasing number of corporate governance advocates have begun to view companies' management of a broad range of CSR issues as a fiduciary responsibility alongside traditional risk management. In addition, more and more CSR discussions have begun to stress the importance of board and management accountability, governance, and decision-making structures as imperative to the effective institutionalization of CSR.

Growing Investor Pressure and Market-Based Incentives : While religious and socially responsible investors have been pressuring companies on their social, economic, and environmental performance for around three decades. CSR is now more and more part of the mainstream investment scene. The last few years have seen the launch of several high-profile socially and/or environmentally screened market instruments. This can be seen in the context that mainstream investors increasingly view CSR as a strategic business issue. Many socially responsible investors are using the shareholder resolution process to pressure companies to change policies and increase disclosure on a wide range of CSR issues, including environmental responsibility, workplace policies, community involvement, human rights practices, ethical decision-making and corporate governance.

Advances in Information Technology : The rapid growth of information technology has also served to sharpen the focus on the link between business and corporate social responsibility. Just as e-mail, mobile phones and the Internet speed the pace of change and facilitate the growth of business, they also speed the flow of information about a company's CSR record.

GLOBE SCAN CSR SURVEY 2004

A 2004 GlobeScan CSR survey of more than 23,000 individuals in 21 countries suggests that the public expects more from the corporate sector:

In industrialized countries, trust in domestic (49 per cent) and global companies (38 per cent) was lower than that of non-governmental organizations (68 per cent), the United Nations (65 per cent), national governments (52 per cent) and labour unions (50 per cent).

While more recent surveys, including the 2007 Edelman Trust Barometer show a rise in public trust in business, trust in CEOs remains low. For their part, CEOs see the importance of sustainability and CSR. According to the 10th PricewaterhouseCoopers Annual Global CEO Survey, 81 per cent of CEOs surveyed (between September and December 2006) agreed or agreed strongly with the statement: "My company's development programme focuses increasingly on equipping leaders to take a role in creating a sustainable business environment." A similar percentage of respondents in a U.S. Chamber of Commerce survey conducted in late 2005 agreed that companies need to make corporate citizenship a priority.

CSR—GLOBAL INITIATIVES

United Nations Global Compact

The United Nations Global Compact, which was first launched in 1999 on the initiative of the then United Nations Secretary-General Kofi Annan, calls on the private sector to embrace a core set of ten principles pertaining to human rights, labour, the environment, and anticorruption. These principles have been derived from existing international law. Supported by a small international secretariat and a network of local organizations, the Global Compact acts as a learning forum to facilitate the exchange of experiences and good practice. Based on the level of its use, it is currently the world's most popular multi-stakeholder CSR initiative.

OECD Guidelines for Multinational Enterprises (OECD)

In June 2000, the OECD issued its revised Guidelines for Multinational Enterprises containing non-binding principles and standards for responsible business conduct with the aim of promoting economic, environmental and social progress. It is the most important government-backed CSR code and covers such diversified areas as disclosure, employment and industrial relations, human rights, the environment, anti-bribery measures, and taxation and consumer interests.

International Labour Organization (ILO)

The ILO, a UN specialized agency comprising governments, employers' and workers' organizations has adopted, since its inception in 1919, on a tripartite basis an International Labour Standards (ILS) covering a wide range of rights at work, including the rights of indigenous peoples. These instruments are the basis of most other social initiatives. The ILO has given special attention to multinational enterprises by adopting the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. This declaration is a global commitment designed to guide governments, employers and workers in areas of employment, training, working conditions and industrial relations. The ILO has also adopted the Declaration on Fundamental Principles and Rights at Work, which focuses attention on the core labour rights dealing with child labour, forced labour, non-discrimination and freedom of association and collective bargaining. This key document has become the basis for the majority of social initiatives, including the labour principles of the UN Global Compact.

International Finance Corporation (IFC)

The IFC is a member of the intergovernmental World Bank Group of organizations. Its mission is to promote sustainable private sector investment in developing countries. The IFC's new Environmental and Social Standards of IFC came into force in April 2006, replacing previous guidelines. The new standards define the roles and responsibilities of IFC and its client companies. These include, Policy on Social and Environmental Sustainability; a Disclosure Policy defining IFC's obligations to disclose information about itself and its activities; and an Environmental and Social Review Procedure, which gives direction to IFC officers in implementing the Policy on Social and Environmental Sustainability and reviewing compliance and implementation by private sector projects.

Equator Principles

The IFC was also closely involved in the creation of the Equator Principles, an initiative of private financial institutions to set down common social and environmental principles for the management of project financing. The revised Equator Principles are fully consistent with, IFC's environmental and social "Performance Standards," which ensure that there is one consistent standard for private sector project financing for all adhering banks and institutions.

DRIVERS OF CSR

Many factors and influences have led to increasing attention being devoted to the role of companies and CSR. These include:

Sustainable development : United Nations' (UN) studies and many others have underlined the fact that humankind is using natural resources at a faster rate than they are being replaced. If this continues, future generations will not have the resources they need for their development. In this sense, much of current development is unsustainable—it can't be continued for both practical and moral reasons. Related issues include the need for greater attention to poverty alleviation and respect for human rights. CSR is an entry point for understanding sustainable development issues and responding to them in a firm's business strategy.

Globalization : With its focus on cross-border trade, multinational enterprises and global supply chains—economic globalization is increasingly raising CSR concerns related to human resource management practices, environmental protection, and health and safety, among other things. CSR can play a vital role in detecting how business impacts labour conditions, local communities and economies, and what steps can be taken to ensure business helps to maintain and build the public good. This can be especially important for export-oriented firms in emerging economies.

Governance : Governments and intergovernmental bodies, such as the UN, the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO) have developed various compacts, declarations, guidelines, principles and other instruments that outline norms for what they consider to be acceptable business conduct. CSR instruments often reflect internationally-agreed goals and laws regarding human rights, the environment and anti-corruption.

Corporate sector impact : The sheer size and number of corporations, and their potential to impact political, social and environmental systems relative to governments and civil society, raise questions about influence and accountability. Even small and medium size enterprises (SMEs), which collectively represent the largest single employer, have a significant impact. Companies are global ambassadors of change and values. How they behave is becoming a matter of increasing interest and importance.

Communications : Advances in communications technology, such as the internet and mobile phones, are making it easier to track and discuss corporate activities. Internally, this can facilitate management, reporting and change. Externally, NGOs, the media and others can quickly assess and profile business practices they view as either problematic or exemplary. In the CSR context, modern communications technology offers opportunities to improve dialogue and partnerships.

Finance : Consumers and investors are showing increasing interest in supporting responsible business practices and are demanding more information on how companies are addressing risks and opportunities related to social and environmental issues. A sound CSR approach can help to build share value, lower the cost of capital, and ensure better responsiveness to markets.

Ethics : A number of serious and high-profile breaches of corporate ethics resulting in damage to employees, shareholders, communities or the environment—as well as share price—have contributed to elevated public mistrust of corporations. A CSR approach can help to improve corporate governance, transparency, accountability and ethical standards.

Consistency and Community : Citizens in many countries are making it clear that corporations should meet the same high standards of social and environmental care, no matter where they operate. In the CSR context, firms can help build a sense of community and shared approach to common problems.

Leadership : At the same time, there is increasing awareness of the limits of government legislative and regulatory initiatives to effectively capture all the issues that CSR address. CSR can offer the flexibility and incentive for firms to act in advance of regulations, or in areas where regulations seem unlikely.

Business Tool : Businesses are recognizing that adopting an effective approach to CSR can reduce the risk of business disruptions, open up new opportunities, drive innovation, enhance brand and company reputation and even improve efficiency.

SIGNIFICANCE OF CORPORATE SOCIAL RESPONSIBILITY TO SUSTAINABILITY OF BUSINESS

The significance of CSR to sustainability of business in its multiple dimensions can be better understood in terms of following :

(1) *Reduction in Operating Costs* : CSR initiatives reduce operating costs dramatically. For example, many initiatives aimed at improving environmental performance-such as reducing pollution that contribute to global climate change or reducing use of agrochemicals - also lower costs. Many recycling initiatives cut waste-disposal costs and generate income by selling recycled materials. In the human resources arena, flexible scheduling and other work-life programs that result in reduced absenteeism and increased retention of employees often save companies money through increased productivity and reduction of hiring and training costs.

(2) *Boost in Brand Image and Reputation*: Customers often are drawn to brands and companies with good reputations in CSR-related areas. A company considered socially responsible can benefit both from its enhanced reputation with the public as well as its reputation within the business community, increasing a company's ability to attract capital and trading partners.

(3) *Increased Sales and Customer Loyalty* : A number of studies have suggested a large and growing market for the products and services of companies perceived to be socially responsible.

(4) *Higher Productivity and Quality* : Company's efforts to improve working conditions, lessen environmental impacts or increase employee

involvement in decision-making often lead to increased productivity and reduced error rate. For example, companies that improve working conditions and labour practices among their suppliers often experience a decrease in merchandise that is defective or can't be sold.

(5) *Attract and Retain Employees* : Companies perceived to have strong CSR commitments often find it easier to recruit and retain employees, resulting in a reduction in turnover and associated recruitment and training costs. Even in difficult labour markets, potential employees evaluate a company's CSR performance to determine whether it is the right "fit".

(6) *Reduced Regulatory Oversight* : Companies that demonstrably satisfy or go beyond regulatory compliance requirements are given more free reign by both national and local government entities. In U.S.A., for example, federal and state agencies overseeing environmental and workplace regulations have formal programs that recognize and reward companies that have taken proactive measures to reduce adverse environmental, health and safety impacts. In many cases, such companies are subject to fewer inspections and paperwork, and may be given preference or "fast-track" treatment when applying for operating permits, zoning variances or other forms of governmental permission.

(7) *Access to Capital* : The companies with strong CSR performance have increased access to capital that might not otherwise have been available.

CORPORATE RESPONSIBILITY AND SUSTAINABILITY - A CORPORATE VIEW

Companies from all over the world are increasingly being expected to practice "social responsibility" or good "corporate citizenship" , accepting some accountability for societal welfare. It is the responsibility of corporations to develop and implement sustainable practices. This is because sustainability is not only good for the society, it could be good for the company's bottom line if strategically developed and implemented.

1. Consumers Demand for Sustainable Policies

Consumers are increasingly demanding that corporations develop sustainable policies. According to 2005 survey by the Global Market Institute, Americans are quick to identify polluting companies as "socially irresponsible" and make their purchasing decisions accordingly. The poll, which involved 15,000 online customers in the U.S. and 16 other countries, also found that American consumers between the ages of 18-29 are more likely to spend more on organic, environmentally preferable or fair trade products than other age groups.

2. Sustainable Development

Many large companies have embraced the concept of sustainable development, even though some critics think this is more for public relations purposes as opposed to a genuine concern for sustainability.

Buying into Carbon Reduction : The Carbon Trust in the U.K. has introduced a new approach to raising awareness and giving consumers information called "carbon product labeling." For instance, the retail giant, Tesco, has committed to carbon labeling for a wide range of its products. Companies participating in the Carbon Trust scheme make a commitment to not only report, but also to reduce, the carbon impact of their products. Failure to do this over a two year period, the label will be withdrawn by the Carbon Trust.

Survey of Eastern European Companies : The World Bank recently undertook a study of what corporations in Countries of Eastern Europe (CEE) including Estonia, Latvia, Lithuania, Serbia and Poland, thought about CSR. The World Bank survey showed that many corporate executives in the CEE think that it is the responsibility of companies to ensure environmental protection as well as other CSR values including behaving ethically, addressing stakeholders' concerns, and being transparent. The most significant barrier for adopting sustainable development policies, the survey found, was "perceived overall cost." The corporate executives surveyed agreed that to promote greater adoption of sustainability, there should be government incentives to overcome costs, empowering local governments (not national governments) to help address issues, and providing national recognition when good sustainable practices are identified. One thing that stood out was that sustainable development in the CEE was spearheaded by private, often multinationals that are expanding their operations consistent with their best strategic interests.

Stages of Responsibility : While sustainability is becoming increasingly accepted in business circles, many firms are still not proactive in their approach to sustainable development. One widely used model identifies three main stages of corporate environmental responsibility or sustainability.

(a) *Pollution Prevention* : The focus here is on "minimizing or eliminating waste before it is created". For example, Dow Chemical Corporation has adopted a wide-ranging program called Waste Reduction Always Pays (WRAP). WRAP holds that it is more efficient and cost effective to prevent pollution instead of trying to treat it at the "end of the pipe." The company now saves an average of over $20 million annually since implementing the program.

(b) *Product Stewardship* : Managers focus on "all the environmental impacts associated with the full product life cycle of a product". This ranges from the design of a product to its eventual use and disposal.

(c) *Clean Technology* : This is the most advanced stage in which businesses develop innovative, new technologies to support sustainability. For example, DuPont, has developed a new range of sustainable products using biotechnology and nanotechnology. Some of these new products include fabric from corn and solvent-free automobile paint. DuPont expects to generate 25 percent of its revenue from renewable resources by 2010, up from 14 percent in 2003. Research studies have identified three factors that push companies along the continuum from lower to higher levels of sustainable activities. These factors include a chance to gain competitive advantage, a desire to gain legitimacy or approval by both the public and government regulators, and a moral commitment to ecological responsibility.

LEVERAGING CSR FOR SUSTAINABILITY

CSR and sustainability initiatives help to manage the risks and capitalize on the opportunities created by sustainable development. There are three general phases organizations go through as they seek to adopt CSR for sustainability as a key organizing principle for their overall business strategy.

(i) *Data and Information Phase* : Understanding of key international standards, performance expectations and guidance documents related to CSR, and knowledge of trends and stakeholder expectations in the area of CSR helps to:

— Document the key ecological, economic and social factors affecting the organization;

— Understand how these trends and the shift to more sustainable forms of production and consumption will affect the business;

— Analyse customer requirements; information on stakeholder expectations on performance; competitor positioning; and regulatory and technological trends.

— Develop approaches to stakeholder engagement to enable organization to identify and address concerns early on in capital investment and product development decision-making processes.

(ii) *Interpretation Phase* : Having established a solid information base, the interpretation phase aims at:

— Further evaluating risks and opportunities to determine which are the most relevant and immediate;

— Showing the relationship of CSR/ sustainability to the overall value proposition of the company in a clearly articulated business case;

— Beginning the process of understanding how sustainability considerations can be integrated into the overall business strategy of the organization; and

— Engaging senior management on the development of an implementation strategy and framework.

(iii) *Implementation Phase* : Once the direction is set, a roll-out of the vision and implementation strategy across the various levels of the organization must occur. This is supported by the integration of sustainability into core business processes. This phase aims at:

— Developing pilot projects and case studies to demonstrate and communicate the business value of sustainability and CSR across the organization;

— Developing management systems or integrating environmental and social factors into existing management systems;

— Training and capacity building in core business functions – sales, product development, procurement, capital investment procedures etc.

The goal of implementation is to embed sustainability into the culture of the organization so that all key decisions take into account appropriate economic, social and environmental performance factors. Organizations that do this successfully automatically have a built in feedback loop that ensures that they are attuned to changing expectations.

SUSTAINABILITY AS A COMPETITIVE ADVANTAGE

Sustainable companies are likely to have a competitive advantage over other firms in same industry who fail to develop sustainable programs.

Sustainable companies tend to have a competitive advantage in four main areas.

1. *Cost Savings* : Most companies that reduce pollution and hazardous waste, reuse or recycle materials, and operate with greater energy efficiency can reap significant cost savings. For example, Herman Miller, the office furniture company, goes to great lengths to avoid wasting material. It sells fabric scraps to the auto industry for use as car linings; leather trim to luggage makers; vinyl to the supplier to be re-extruded into new edging; burnable solid used for a specialized boiler that generates all the heating and cooling for the company's main complex at Zeeland. It ends up making money from "waste" that it used to pay for it to be disposed.

2. *Product Differentiation* : Some companies have been able to different their brands by making a commitment to sustainability. Companies have developed a reputation for delivering sustainable products and services and this has attracted environmentally conscious customers. This approach, sometimes called "green marketing" has been employed by companies like Home Depot that sells only sustainably harvested wood. In 2000, the green market was estimated as being 10-12 percent of consumers.

3. *Technology Innovation* : Companies that have sustainable policies tend to be technological leaders, as they seek imaginative new methods for reducing pollution and increasing efficiency. In many cases, these companies are able to come out with new, innovative products that out-pace most of their competitors.

4. *Strategic Planning* : Companies that embrace sustainability must adopt sophisticated strategic planning techniques to allow managers access to a full range of the firm's effect on the environment. Most companies use complex auditing and forecasting techniques that help the firm anticipate a wide range of external influences, not just ecological influences on the firm. Proactive environmental management can help business not only promote sustainability but also become more competitive in the global marketplace. Embracing sustainability can therefore be a good way of moving a company from "a red ocean" into "a blue ocean." Going green might become a "blue ocean strategy."

CSR AS AN INTERACTIVE PROCESS

CSR is generally presented in the form of concrete actions. However, the studies show that CSR is essentially a process. This process aims to create value and is implemented by a diversity of stakeholders, who will interact and develop strategies to achieve their objectives.

Stakeholders : CSR involves a large number of stakeholders. The number of stakeholders involved change according to the issue. The contracts may be formalized and the representativeness of the partners recognized. Inside the company a long tradition of dialogue and negotiation has been established over the years, while outside the company a search for continued partnership has developed. The stakeholders can be defined as groups or individuals who either influence or are influenced by a company's activity – in a positive or negative sense. The number of stakeholders and their type of involvement will vary according to the nature of the issue and their legitimacy, desire or capacity to act. They can also change over time.

Although the stakeholders interact within a certain framework, the relationships that bind them together are never completely fixed. Their attitudes and strategies change as different dynamics are put in place. To lend structure to the variety of groups and individuals, a distinction between different categories can be made:

for example, those who are involved in the social dialogue and those who are not; those who have a direct stake in the enterprise (primary stakeholders) and those who are only indirectly involved (secondary stakeholders); those who can express themselves (social stakeholders) and those who cannot – e.g. the environment or the future generations (non-social stakeholders).

Management : CSR initiatives are primarily, but not necessarily exclusively, a matter for management. It maintains control over the decisions. Although CSR includes a dialogue with all stakeholders, the company strategy and the underlying decisions remain the responsibility of the management, which occupies a central place. The management will act either out of conviction or strategy. This involvement can date back to the creation of the company or can be initiated at some point in the company's history. Further, management acts in anticipation of or in reaction to events. It includes, for example, the wish to share more information with employees or their representatives at an early stage, to enable them both to prepare for future changes and to contribute to developing the relevant systems.

Worker representatives : The CSR studies demonstrate that worker representatives tend to go along with the initiative rather than leading it. It is also found that worker representative involvement is weaker when it comes to local community and the environment.

Workers : Workers can be involved in the CSR process, either through decisions or incentives from management or their representatives, or through their own decisions. Workers tend to be involved in particular in the local community. This can take different forms, for example, volunteering. In this case, the worker will dedicate one part of his or her working time to a specific project and the employer will usually pay part or all of the time used.

Public authorities : Public authorities, whatever their level, are concerned by CSR in three ways: As a promoter of CSR: public authorities can contribute, for example, to creating a common framework, providing incentives or fuelling the debate. As a stakeholder, public authorities can be affected by initiatives taken by companies. Depending on the situation, they can either opt for a passive attitude or an active role. As an employer, public authorities can learn lessons from CSR for themselves.

Local community : The term 'local community' can be seen from three different angles. From an administrative perspective, local community could refer to the administrative unit the company is working with. A multinational, for example, with its European head office in Brussels and branches in the Member States could consider the European institutions as part of the local community for the Brussels office and the national institutions the local community for its national branches. From a corporate perspective, the local community could also be understood and delineated as the community where the enterprise operates. Finally, local community can be seen from a 'cluster' perspective. Clusters are local networks of firms and the supporting infrastructure of institutions and organisations that interact.

Suppliers : The importance of the suppliers is particularly highlighted through the issue of subcontracting. The relationship that links a company and its suppliers frequently reflects a balance of power. In this context, the onus is on companies to check if and to what extent their suppliers are acting in a responsible manner. Their role in the process is crucial.

Consumers : The influence of buyers of goods and services produced by companies is potentially high. It is regularly referred to as the power they can exercise on the companies. However, due to asymmetry in the information gathered and in levels of technical knowledge and their capacity, desire and traditional inclination to mobilise, the studies show that the influence of consumers can vary greatly from real to virtual situations.

PROMOTING CONVERGENCE AND TRANSPARENCY OF CSR PRACTICES

CSR relates to a very wide range of company activities. This is particularly the case when an enterprise operates in several jurisdictions and has to adapt its activities to the specific situations in these countries. This diversity has helped to create an impressive richness of voluntary enterprise initiatives, which often include innovative elements, but also implies challenges, namely the transparency and comparability.

Transparency is a key element of the CSR debate as it helps businesses to improve their practices and behaviour. Transparency also enables businesses and third parties to measure the results achieved. CSR benchmarks against which the social and environmental performance of businesses can be measured and compared are useful to provide transparency and facilitate an effective and credible benchmarking. The interest in benchmarks has resulted in an increase of guidelines, principles and codes during the last decade. Not all of these tools are comparable in scope, intent, implementation or applicability to particular businesses, sectors or industries. As expectations for CSR become more defined, there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties. Several market-driven international multi-stakeholder initiatives are emerging, which work towards convergence and transparency in the area of CSR. Increased convergence and transparency would however be desirable in the following fields:

— Codes of Conduct,

— Management Standards

— Accounting, Auditing and Reporting

— Labels

Codes of Conduct

The increasing public interest in the social and environmental impact and ethical standards of industry has moved many companies, in particular those of the consumer goods sector, to adopt codes of conduct relating to labour issues, human rights and the environment.

Codes of conduct are innovative and important instruments for the promotion of fundamental human, labour and environmental rights, and anti-corruption practices —especially in countries where public authorities fail to enforce minimum standards. However, it should be underlined that they are complementary to national, and international legislation and collective bargaining, and not a substitute to them. The biggest challenge related to codes is to ensure that they are effectively implemented, monitored and verified.

Management Standards

Faced with a widening range of complex issues in areas such as labour practices and supplier relations, with implications across their organisations, businesses, regardless of sector, size, structure or maturity, would benefit from the inclusion of social and environmental issues into their daily operations. In this context, CSR management systems — like Total Quality Management systems allow enterprises to have a clear picture of their social and environmental impacts help them to target the significant ones and manage them well.

Accounting, Auditing and Reporting

In the last decade, more and more companies have started to publish information on their social and environmental performance. 'Triple bottom line' reporting of economic, social and environmental indicators is emerging as good practice. At this stage, flexibility may ensure that reporting is appropriate to each individual business. However, a greater consensus on the type of information to be disclosed, the reporting format, the indicators used and the reliability of the evaluation and audit procedure would allow for a more meaningful benchmarking and communication of companies' performance within particular sectors and for businesses of similar size. The guidelines developed by the Global Reporting Initiative (GRI) are a good example of a set of guidelines for reporting which could be the base of such consensus.

Labels

Information should be accurate and accessible to be useful to consumers. As consumers express a growing preference for socially and environmentally responsible products and services, access to relevant information about the social and environmental conditions of production is crucial to help them to make informed choices. Such information is available in different forms and from different sources, including claims made by the producer, information from consumer organisations and third party verified labels. Adherence to commonly agreed criteria for making and assessing social and environmental claims of a self-declaratory nature contribute to improving the effectiveness and credibility of these claims. Both the ethical and fair-trade movements are now aligning themselves under common initiatives aiming at developing transparent and verifiable criteria for labelling and certification.

IMPLEMENTATION OF CSR

The implementation of corporate social responsibility differs from company to company. The company's size, sector, culture and the commitment of its leadership plays an important role in the implementation of socially responsive initiatives. Some companies may focus on a single area, to the environment, or community development, while others may integrate a CSR vision into all aspects of their operations. Some of the key strategies that companies can use in implementing CSR policies and practice, are given below :

Mission and Vision Statements : If CSR is to be regarded as an integral part of business decision-making, it merits a prominent place in a company's mission and vision documents as they provide insight into a company's values, culture and strategies for achieving its aims. The mission or vision of a socially responsible business frequently specifies that it will engage in ethical and responsible businesses practices, and seek to make decision that balance the needs of key stakeholders, including shareholders/owners, employees, customers, suppliers, communities and the natural environment.

Cultural Values : A number of companies now understand that corporate social responsibility cannot flourish in an environment where innovation and independent thinking are not welcome. In a similar vein, there must also be a commitment to close the gap between what the company says it stands for and the reality of its actual performance. Goals and aspirations should be ambitious, but care should be exercised so the company says what it means and means what it says.

Corporate Governance : Many companies have established ethics and/or social responsibility committees of their boards to review strategic plans, assess progress and offer guidance on emerging CSR issues of importance. Some boards that do not have such committees have the full board considering issues of corporate social responsibility.

Management Structures : The goal of a CSR oriented management system is to integrate corporate social responsibility concerns into a company's values, culture, operations and business decisions at all levels of the organization. Many companies have taken steps to create such a system by assigning responsibility to a committee of the board, an executive level committee or a single executive or group of executives who can identify key CSR issues and evaluate and develop a structure for long-term integration of social values throughout the organization.

Strategic Planning : A number of companies are beginning to incorporate CSR into their long-term planning processes, identifying specific goals and measures of progress or requiring CSR impact statements for any major company proposals.

General Accountability : In some companies, in addition to the efforts to establish corporate and divisional social responsibility goals, similar attempts are being made to address these issues in the job descriptions and performance objectives of as many managers and employees as possible. This helps everyone to understand how each person can contribute to the company's overall efforts to be more socially responsive.

Communications, Education and Training : Many companies now recognize that employees cannot be held accountable for responsible behavior if they are not aware of its importance and provided with the information and tools they need to act appropriately in carrying out their job requirements. Such companies publicize the importance of corporate social responsibility internally, include it as a subject in management training programs, and provide managers and employees with decision-making processes that help them achieve responsible outcomes.

CSR Reporting : Companies have now come to recognize the value of assessing their social and environmental performance on a regular basis. Annual CSR reports can build trust with stakeholders and encourage internal efforts to comply with a company's CSR goals. The best reports demonstrate CEO and senior leadership support; provide verified performance data against social, environmental and economic performance indicators; share "good" and "bad" news; set goals for improvement; include stakeholder feedback; and many times are verified by outside auditors.

Use of Influence : Some socially responsible companies recognize that they can play a leadership role in influencing the behavior of others, from business partners to industry colleagues to neighboring businesses. They understand that ultimately it is in everyone's best interests to have as many companies as possible honoring the requirements and expectations of corporate social responsibility.

SUSTAINABLE MANAGEMENT IN PRACTICES

Although most companies are still at the first stage of sustainability, there are already some noticeable characteristics that point to a genuine desire to be sustainable. Lawrence and Morell have identified the following structures, processes and incentives as being characteristic of companies with good sustainable programs.

Top Management Commitment to Sustainability: Companies with a strong sustainability program are likely to have their top executives committed to sustainability. Most give their environmental or sustainability managers greater authority than they are likely to have in other firms, and some companies even have a vice president for environmental affairs who reports directly to the CEO. These environmental or sustainability managers often supervise extensive staffs of specialists and coordinate the work of managers in many areas including research and development, marketing, and operations.

Line Manager Involvement : Many companies with sustainable programs involve their line managers and workers directly in the process of change. For example, the Park Plaza Hotel in Boston have had their employees make suggestions and implemented sustainable practices such as energy-efficient windows, refillable bottles of soap and shampoo, etc.

Codes of Environmental Conduct : Many of the companies put their commitment to sustainability in writing, often in the form of a code of conduct or charter that spells out the firm's sustainability goals. A study of European companies found that companies with well communicated policies were likely to have their employees come up with creative proposals for sustainability.

Cross-Functional Teams : Another organizational element of companies with effective sustainable programs is that they make use of ad hoc, cross-functional teams to solve issues related to sustainability, including staff from different departments. When confronted with an issue, various teams are likely to pull together key players with the skills and resources to get the job done, wherever they are located in the corporate structure.

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ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION— AN AREA OF PRACTICE FOR COMPANY SECRETARIES

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INTRODUCTION

In the context of growth of international trade in goods and services, advent of information and communication technology that turned the universe into a small village, the easiness of global movement of money and capital in the form of investment, and agreements relating to technology transfer construction, international trade, air and sea cargo, insurance and banking, disputes arising therefrom assume great importance. Most businesses, traders and contractors prefer the Arbitration and other Alternative Dispute Resolution (ADR) processes for speedy resolution of their commercial disputes, as against the court oriented justice dispensing system.

The popularity of arbitration and other ADR methods as a mode of settling disputes is due to the fact that arbitration is regarded as speedier, more informal and cheaper than conventional judicial procedure and provides a forum more convenient to the parties who can choose the time and place for conducting proceedings and the procedure for settlement of disputes.

The Atrbutraion and other ADR processes such as mediation/conciliation or negotiations being informal in nature, professionals such as Company Secretaries can very well undertake and perform the role of an arbitrator or mediator since the procedures are driven by the convenience of the parties, and do not involve court oriented procedural technicalities. This can be a potential area of practice for Company Secretaries owing to their professional knowledge, expertise and understanding of legal, commercial and financial aspects of businesses. This article attempts to explain the concept of arbitration and other related concepts and provides a systematic analysis of ADR processes and pre-requisites for an ADR practitioner, in order to help them to act as Arbitrator and Mediator.

Concept of Arbitration

Arbitration can be defined as the determination of a matter in dispute by the award of one or more persons called arbitrators. Halsbury defines "arbitration" as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court.

An equivalent in the old Indian system for arbitration is Panchayat. In India arbitration has a very ancient heritage. Indian civilization expressly encouraged the settlement of differences by Tribunals chosen by the parties themselves. In the Western world also arbitration has a very long history. The Greeks attached particular importance to arbitration. Submission of disputes to the decision of private persons was recognised also under the Roman law known by the name of compromysm (compromise). Arbitration was a mode of settling controversies much favoured in the civil law of the continent. The attitude of English law towards arbitration has been fluctuating from stiff opposition to moderate welcome. The common law courts looked jealously at agreements to submit disputes to extra-judicial determination.

Concept of International Commercial Arbitration

International contracts are those entered into between the parties belonging to different states which are sovereign entities. As such, each party is subject to the jurisdiction of the State and the Court of that state of which he is a national. There is no law governing

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such international contracts binding on both the parties except in so far as made by the parties for themselves by means of an agreement. The established method by which the parties agree to the resolution of differences between them arising out of such international contracts is arbitration. Such arbitration is firstly international and then commercial.

International commercial arbitration takes place every day in different parts of the world and usually proceeds in accordance with the rules agreed to by the parties or laid down by the arbitral tribunal, without any obvious reference to any outside system of law. The existing system of International Commercial Arbitration involves international treaties, as well as national laws of different countries. The law which governs the arbitral proceedings may not be the law applicable to the substantive matters in issue. Moreover, the proper law of contract may not necessarily be a given national system of law, it may be international law, or a blend of national law and international law etc. However, the system of law which governs recognition and enforcement of arbitral award may also be different from that which governs arbitral proceedings themselves.

Elements of International Commercial Arbitration

International commercial arbitrations are those which satisfy two basic criteria, i.e., different nationality of parties and international character of the transaction. UNCITRAL Model Law on International Commercial Arbitration under Article 1(3) enumerates the basic ingredients of international commercial arbitrations, as follows :

An arbitration is international, if :

(a) the parties to an arbitration agreement have at the time of conclusion of that agreement, their place of business in different states; or

(b) one of the following places is situated outside the state in which the parties have their place of business —

 (i) the place of arbitration if determined in or pursuant to, the arbitration agreement;

 (ii) any place where a substantial part of the obligations of commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The Model Law clarifies that the term commercial in relation to international commercial arbitration covers matters arising from all relationships of a commercial nature, whether contractual or not. The commercial nature of relationship includes, but not limited to, any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail and road.

International commercial arbitration under section 2(f) of the Arbitration and Conciliation Act, 1996 has been defined as "an arbitration relating to disputes arising out of legal relationships; whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is :

(i) an individual who is national of or habitually resident in any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

Concept of Alternative Dispute Resolution

The development of Alternative Dispute Resolution (ADR) has its principal origins in the dissatisfaction of people with the way in which the disputes are traditionally resolved. One of the motivations for ADR is commonly said to be the empowerment of the individual. Under the traditional process, dispute resolution is generally in the hands of lawyers, who use procedures and reasoning to resolve the issues for the parties, whereas, ADR processes tend to help with the empowerment of individuals giving them responsibility for the resolution of their own issues.

Back in 1980s, the American experts and executives alike heralded alternative dispute resolution as a sensible, cost effective way to keep corporations out of Courts and away from kind of litigation that devastates winners almost as much as losers. Thus, the concept of resolving disputes through mediation or conciliation, in a different form under the title Alternative Dispute Resolution was developed in the United States to avoid increasing cost and complexity of litigations.

Consequent to the success of ADR in United States, the acceptance of ADR processes extended to many countries. Generally, the range of disputes covered under ADR includes commercial -and civil matters, labour disputes, family and divorce and public policy matters.

Development of Law of Arbitration in India

The concept of arbitration was not unknown to ancient India. Dharamshastras and Smritis refer to popular courts which were practically arbitration tribunals. The family disputes were decided by the head of the family or the elders. Disputes between persons belonging to a business or profession were decided by the guilds of persons engaged in the same business or profession. So also the disputes between members of a particular community relating to social matters were entrusted to eminent persons of the community. These were all adjudicatory bodies not constituted by the king and therefore resembled arbitrators and umpires. The medieval India witnessed emergence of panchayats which exercised tremendous influence and binding authority within the territory in which they operated.

The modern trend of arbitration witnessed its emergence in the Arbitration Act of 1940 which consolidated and amended the law relating to arbitration as it prevailed then. It repealed the arbitration provisions contained in the Second Schedule to the Code of Civil Procedure, 1908. The Act broadly dealt with following three kinds of arbitration, namely

(i) arbitration without intervention of court,

(ii) arbitration with intervention of a court (where there is no suit pending), and

(iii) arbitration in suits.

The Act embraced within its ken all arbitrations including statutory arbitrations. However, the Act did not deal with foreign awards. There were three Acts holding the field, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 to cover the entire field of domestic and international arbitration.

The trend towards settling the matters otherwise than by contest is clearly noticeable in several legislative enactments. To illustrate, the Hindu Marriage Act, 1956 mandated the court in the first instance, before processing to grant any relief under the Act, in every case where it is possible so to do, to make endeavour to bring about the reconciliations between the parties. Some of the High Courts have gone to the extent of holding that failure to comply with the said provision resulted in vitiating the proceedings. Order XXXII-A was introduced in the CPC by the Amendment Act of 1976 casting a duty on the court in suits relating to matters concerning the family to make an endeavour to assist the parties in arriving at a settlement.

Kinds of Arbitration

Ad-hoc Arbitration : When a dispute or difference arises between the parties in course of commercial transaction and the same could not be settled by friendly negotiation in form of conciliation or mediation, in such case ad-hoc arbitration may be sought by the conflicting parties. This arbitration is agreed to get justice for the balance of the un-settled part of the dispute only.

Institutional Arbitration : This kind of arbitration involves a prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions, such differences or disputes will be settled by arbitration as per the provisions of the agreement.

Statutory Arbitration : It is mandatory arbitration imposed on the parties by operation of law. In such a case the parties have no option but to abide by the law of land. It is apparent that statutory arbitration differs from above mentioned two types of arbitration because (i) The consent of parties is not necessary; (ii) It is compulsory Arbitration and (iii) It is binding on the Parties as the law of land; For Example: Section 31 of the North Eastern Hill University Act, 1973, Section 24,31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provisions, which deal with statutory arbitration.

Domestic or International Arbitration : Arbitration which occurs in India and has all the parties within India is termed as Domestic Arbitration. An Arbitration in which any party belongs to other than India and the dispute is to be settled in India is termed as International Arbitration.

Foreign Arbitration : When arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration

DEVELOPMENT OF ADR IN INDIA

The techniques of Alternative Dispute Resolution (ADR) are not alien to the justice dispensing system of India. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well known to ancient India. Long before the king came to adjudicate on disputes between persons, such disputes were quite peacefully decided by the intervention of the Kulas (family or clan assemblies), Srenis (guilds of men following the same occupation), Perishads (assemblies of learned men who knew law) and such other autonomous bodies. There were Nyaya Panchayats at grass roots level before the advent of the British system of justice.

The Law Commission in its 124th Report on *the High Court Arrears - A Fresh Look* and the 129th Report on *Urban Litigation - Mediation as Alternative to Adjudication* emphasized the desirability of the Courts being empowered to compel parties to a private litigation to resort to arbitration or mediation.

The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various Courts of urban areas. The Report pointed to a huge arrears of cases pending in Sessions Courts, Magisterial Courts, cases in Civil Courts of Original Jurisdiction and the Appellate side. Special attention was given to house rent / possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, following four distinct modes were considered :

(i) Establishment of Nagar Nyayalaya with a professional Judge and two lay Judges on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure;

(ii) Hearing of cases in Rent Courts by a Bench of Judges, minimum two in number, with no appeal but only a revision on questions of law to the district Court;

(iii) Setting up of Neighbourhood Justice Centres involving people in the vicinity of the premises in the resolution of dispute; and

(iv) Conciliation Court system now working with full vigour in Himachal Pradesh.

In respect of suits involving disputes as to inheritance, succession, partition, maintenance and those concerning wills, which are generally blood relations, the Law Commission recommended that Conciliation Court system must be made compulsory by an effective amendment to the Code of Civil Procedure on the lines of Rule 5B, order XXVII. Rule 5B of order XXVII of the CPC makes it obligatory for the Court in a suit against the Government or public officer, to assist in arriving at a settlement in the first instance.

In respect of all other kinds of suits, it was recommended that an attempt should be made at the pre-trial stage by the lawyers of respective parties for a reasonable settlement of the dispute through negotiations and that in case the dispute is not resolved, litigation may be resorted to but in that case the matter should be referred to the Conciliation Court and if such Court finds that its persuasion to the parties to go in for an amicable settlement has failed, the party who was recalcitrant and unjust in approach must be fined with heavy costs.

In the field of criminal cases, Law Commission recommended, the reintroduction of the system of Honorary Magistrates who should be drawn from amongst the retired personnel of the judiciary. Such Honorary Magistrates should be empowered to do any work which a Stipendiary Magistrate can undertake and they should takeover all the old cases.

The recommendation of Law Commission regarding service related matters was that State Government must take steps for setting up State Administrative Tribunals under the Administrative Tribunals Act, 1985.

The Law Commission in its 126th Report on *Government and Public Sector Undertaking Litigation* recommended that the Central Government should issue a binding directive to the Public Sector Undertakings regarding reference of disputes *inter se* between them or between them on the one hand and the Government on the other, to arbitration. The introduction of conciliation procedure in Writ matters, and the establishment of the Grievances' Cell to deal with disputes and complaints of employees of Public Sector Undertakings and the Government in regard to service matters and reference to compulsory arbitration of issues involving law points in certain eventualities was also recommended by the Law Commission.

Justice Malimath Committee on Alternative Modes and Forums of Dispute Resolution endorsed the recommendations made in the 124th and the 129th Report of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the Courts to compel the parties to a private litigation to resort to arbitration or mediation, requires to be filled up by necessary amendment. The conferment of such power on Courts would to a large extent result in reducing not only the burden of trial Courts but also of the revisional and appellate Courts, since there would be considerable divergence of work at the base level and the inflow of work from trial Courts to the revisional and appellate Courts would thereby diminish.

Following the recommendations made by Justice Malimath Committee, and Law commission in its 129th Report and the Committee on Subordinate Legislations (11th Lok Sabha), the Code of Civil Procedure (Amendment) Bill, 1997 was introduced in the Parliament keeping in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice might not be delayed. After the assent of the President the Amendment Act came into effect on July 1, 2001. The Code of Civil Procedure (Amendment) Act, 1999 inserted a new section 89 providing for settlement of Disputes outside the Court and also inserted Rules 1A, 1B and 1C to Rule 1 of Order 10.

Code of Civil Procedure

Section 89 gives importance to mediation, conciliation and arbitration. This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok Adalath or other methods enumerated in that section itself.

Alternate Dispute Resolution in Modern India

Labour Law **:** The first avenue where the conciliation has been effectively introduced and recognized by law was in Labour law, namely Industrial Disputes Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management.

Family Law **:** The other area where Alternate Dispute Resolution was recognized in India is in family law. Section 5 of the Family Court Act provides for the Government to require the Association of Social Welfare Organisations to hold the family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counselors to effect settlement in the family matters. Further section 9 of the Act imposes an obligation on the Court to make effort for settlement before taking evidence in the case. In fact the practice in family Court shows that most of the cases are filed on sudden impulse between the members of the family, spouse and they are being settled in the conciliation itself. To this extent the alternate dispute resolution has got much recognition in the matter of settlement of family disputes. Similar provision has been made in Order XXXII A of Code of Civil Procedure which deals with family matters.

Legal Services Authority Act **:** The other legislation, which has given more emphasis on the alternate dispute resolution, is the Legal Services Authority Act 1985.

MODES OF DISPUTE RESOLUTION PROCESSES

All dispute resolution processes (traditional and alternative) have been divided into three primary categories: negotiation, mediation and adjudication. These categories are further divided into six categories: negotiation, mediation, the judicial process, arbitration, and the administrative and legislative processes. This effectively amounts to a sub-division of adjudication into its constituent parts. These primary dispute resolution processes, which are not limited to ADR but include both traditional and alternative procedures, are as follows:

Negotiation is the way in which individuals communicate with one another in order to arrange their affairs in commerce and everyday life, establishing areas of agreement and reconciling areas of disagreement. Negotiation has been defined as "the process we use to satisfy our needs when someone else controls what we want." Most disagreements are dealt with in one way or the other by negotiation between the principals themselves; relatively few involve legal intercession.

Negotiation tends often to be a practical skill learnt pragmatically by personal experience. There are, however, various theories of negotiation, as well as many different individual styles and approaches.

Adjudication, as a generic term, is a dispute resolution process in which a neutral has and exercises the authority to hear the respective positions submitted by the disputants and to make a decision on their dispute which is binding on them.

Litigation, the process is administered through the Courts and the neutral adjudicator is a judge, district judge, or other official appointed by the Court to undertake this function.

Arbitration, the neutral is privately chosen and paid by the disputants and/or the procedure regulating the dispute follows arbitration rules which may be statutory or imposed by an arbitral organisation.

Administrative or statutory tribunals, the adjudication follows certain specific statutory requirements, such as establishing rent levels, compensation awards, social security benefits or a range of other matters through tribunals and appeal tribunals.

Expert Determination, the parties appoint an expert to consider their issues and to make a binding decision or appraisal without necessarily having to conduct an enquiry following adjudicatory rules.

Private judging, the Court refers the case to a referee chosen by the parties to decide some or all of the issues, or to establish any specific facts.

Mediation is a process by which disputing parties use the assistance of a neutral third party to act as a mediator-a facilitating intermediary-who has no authority to make any binding decisions, but who uses various procedures, techniques and skills to help the parties to resolve their dispute by negotiated agreement without adjudication.

Conciliation is a term used interchangeably with mediation, and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator role, and the other (conciliation) involving a more facilitative mediator role; but there is no consistency in such usage.

Hybrid Processes, each of the primary processes (litigation, arbitration or mediation) can be used in its own right without adaptation. In addition, by drawing elements from the primary processes and "tailoring" them, an ADR practitioner can devise a permutation of procedures and approaches which fit all the nuances of the parties' needs and circumstances without being constrained by prescribed rules. For example, it may be appropriate for the practitioner to have informal discussions with the parties, arrange for certain facts, or technical questions to be investigated, and then allow each of them to present their respective cases informally to one another before resuming further attempts at settlement. This and any other permutation of requirements can be met by devising a sequence of procedures specifically designed for that dispute and those parties.

Certain common combinations of usage of the primary processes have been developed and known as hybrid processes, which include :

Mini-trial can be seen as a form of evaluative mediation, or an abbreviated non-binding arbitration, followed by negotiation and/or mediation.

Med-arb involves commencing with mediation, and if this does not result in the dispute being resolved, continuing with a binding arbitration.

The neutral fact-finding expert involves an-investigation by a neutral expert into certain specific issues of fact, technicality and/or law, and thereafter, if required, a mediatory role, and eventually participation in an adjudicatory process, if required.

Early neutral evaluation requires a neutral evaluator to meet parties at an early stage of a case in order to make a confidential assessment of the dispute, partly to help them to narrow and define the issues, and partly to promote efforts to arrive at a settlement.

Court-annexed arbitration, requires statutory introduction into the Court system, and which, depending upon the model adopted, may be binding or initially non-binding, and may or may not provide for a re-hearing by a judge under certain circumstances. The Code of Civil Procedure (Amendment) Act, 1999 provides for Court-annexed ADR processes.

Mediation and hybrid process generally provide a framework of informal procedures in which a neutral assists the disputing parties with information gathering, clarifying and narrowing issues, facilitating dialogue, negotiation, smoothing out personal conflicts, identifying options, testing the reality of views, risk assessment, impasse resolution and in some cases non-binding evaluation as an aid to reaching agreement.

The Arbitration and Conciliation Act, 1996

The need for a new legislation was perceptibly felt in the year 1977 when the matter was referred to the Law Commission for its examination. In November, 1978 the Law Commission in its Seventy Sixth Report made several recommendations. However, the matter remained pending when the Thirteenth Law Commission was entrusted with further examination of the recommendations.

The need and reasons for the new Act may be classified into two, i.e., the reasons external to the Act and the reasons internal. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the model law on international commercial arbitration. Earlier in 1980, UNCITRAL Conciliation Rules had been adopted. The General

Assembly of the United Nations recommended both the model law and conciliation rules for adoption by all the countries in the field of international commercial arbitration and conciliation. Based on the UNCITRAL Model Law the Government enacted Arbitration and Conciliation act, 1996 with certain modifications. Thus, the new Act is a long leap in the direction of globalization.

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognises the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimises the supervisory role of Courts. A significant feature of the Act is the appointment of arbitrators by the Chief Justice of India or Chief Justice of High Court. The Chief Justice may either appoint the arbitrator himself or nominate a person or Institution to nominate the arbitrator. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

The Act has been divided into four Parts and contains three Schedules. Part one deals with Arbitration (Section 2 to 43); Part two deals with enforcement of certain Foreign Awards (Section 44 to 60); Part three deals with conciliation (Section 61 to 81); and Part four contains supplementary provisions (Sections 82 to 86). Similarly schedule one contains provisions relating to convention on the Recognition and Enforcement of Foreign Arbitral Awards; Schedule two deals with Protocol on Arbitration Clauses and Schedule three contains provisions relating to Execution of Foreign Arbitral Awards.

CONCILIATION/MEDIATION PROCESS

Preliminary Communications and Preparation

The parties, before meeting the mediator/ conciliator may require to have some preliminary communications with the conciliator or with the institution arranging the conciliation. Once the conciliator has explained the process and has dealt with any queries or reservations which the parties may have, it will be easier to spend time meeting separately with each party. However, pre-meeting communications should be limited to procedural matters, venue, timetable for the conciliation, documents, information required, formulation of a preliminary programme for obtaining summaries of the parties in respective cases and contentions. At this stage of the conciliation process the conciliator should ensure that all necessary parties attend the conciliation. Where corporate or institutional parties are involved, their representatives need to have authority to negotiate and reach agreement.

Meeting with the Parties

The initial joint meeting generally involves the conciliator making an opening address to the parties, and explaining the principles, procedures and ground rules of the conciliation

The mediator/conciliator may also consult the parties about the preparation of an agreed agenda or the agenda may be formulated by the mediator personally, as working guidelines. The structure of mediation process and approach towards issues are the implicit part of the mediator's management function and authority.

Presentation/Statements by the Parties

The parties, at this stage of the process, present their case before the conciliator. The manner of presentation depends upon various factors, including whether it is the party or the representative or agent doing so; individual personality, style, skills and strategy; the nature and complexity of the issues; and the emotional factors involved. Most ideally, the presentation should be clear and well reasoned and explain their claims or grievances and impart the facts and any technical issues precisely.

Section 65 of the Act contains provisions regarding the submission of statements describing nature of dispute and the points at issue.

The mediator/conciliator may during the presentation, raise questions to help clarify or amplify relevant aspects. After the presentation is made, the mediator may allow parties to ask questions of clarifying nature only. The mediator should exercise his authority and judgement to ensure that discussions do not degenerate into hostile exchanges which might make the process more difficult.

Relevant Information

Submission of information relevant to the dispute is an important part of the process. Information that is required for the purpose may include non-contentious facts about the parties and the background to the dispute may be obtained from an initial referral form or from statements of facts furnished by the parties. Relevant documents, including copy of pleadings or affidavits where adversarial proceedings are under way, may be obtained by the mediator from the parties. The conciliator/mediator may also request parties to submit statements comprising identification of the issues and the respective contentions of the parties and technical information, which may include expert opinion, legal opinions, valuations, assessments of damages and other specialised data.

Facilitating Negotiations

This is the substantive phase of the process where the conciliator/mediator helps the parties to communicate with one another, either directly or in joint session, or indirectly through separate meetings, and facilitates their negotiating with one another with a view to narrowing their differences and eventually resolving their dispute. During the negotiations, the mediator/conciliator can encourage and help the parties to generate and consider their options, and develop them into viable course of action. In most cases the parties themselves should suggest options, but the mediator can often add to these suggested options. The development of options is an intrinsic part of the problem solving approach which characterizes mediation. Section 72 of the Act provides that each party may submit to conciliator suggestion for settlement. The mediator can also help the parties to understand one another more clearly by presenting their perceptions in a way which the other can comprehend and by correcting any distortions or misunderstandings.

The conciliator/mediator is required to use various skills at all levels of the proceedings,but especially during negotiating process. The skill of the mediator is an important ingredient in the mediation process. It is usually necessary for mediator/conciliator to undertake specific skills training courses to develop and adopt those skills to ensure that they are appropriately used.

A mediator should, in addition to the usual facilitative role, also adopt some element of evaluation of the issues. The object of any evaluation is not to sit in judgement in the matter but to facilitate realistic negotiations by helping the parties to reassess their respective positions and prospects of success in the event of adjudication, particularly where there is deadlock.

The mediation may continue for consecutive days if necessary, until the parties reach an agreement or decide to adjourn or abandon the mediation. In some cases, the mediation may be conducted at agreed intervals, for example, weekly or fortnightly with agreed action being taken between meetings.

Deadlock/Impasse Strategies

Deadlock or stalemate is a situation where the parties find themselves unable to extricate. When negotiations come to a halt due to specific differences which seem irreconcilable and the mediation seems set to terminate, the mediator should try some appropriate strategies to help the parties back onto the negotiation table. Mediators need to devise strategies specifc to the deadlock. Where there is any blocking issue, it may help to suggest that the parties refer it to an expert for a non-binding opinion while the mediation is pending. In this context, the Act contains reference to expert advice under section 78. The expert could, in a suitable case be asked to attend a mediation meeting to answer questions and to help the parties through their difficulty.

The mediator can help parties by identifying and normalizing differences of perception. If the parties cannot find a long-term solution to their differences, they can be suggested to formulate short term agreements and to review the position after a particular period of time. Where the parties remain stuck, adjudication may be necessary and appropriate. This is the prerogative of the parties.

Termination of Mediation/Conciliation

Mediation may be terminated where all the issues have been totally resolved or the parties may have resolved some issues and decide to take the others into a different ADR forum or process. The parties or any of them can also terminate the mediation even though some or all of the issues are unresolved. The mediator himself may consider the continuance of mediation in a appropriate case and may decide to terminate it. Section 76 of the Act enumerates grounds for termination of conciliation proceedings.

Recording of Settlement Agreement

At the conclusion of the mediation/conciliation proceedings, the mediator/conciliator has to consider as to whether a written record of the outcome is needed. If the mediation ends without any of the issues being resolved, there may be no need to record anything in writing, though in some cases the parties may nevertheless wish to have an informal written summary of the mediation, providing information which might be useful to them in subsequently trying to narrow down issues and in facilitating any future bilateral negotiations.

Where there is a complete or partial resolution of the issues a written agreement is required to record the matters resolved. Section 73 of the Act provides that if the parties reach agreement on a settlement of the dispute they may draw up and sign a written settlement agreement. If requested by the parties the conciliator may draw up, assist, the parties in drawing up the settlement agreement. After signing of agreement by the parties the conciliator authenticates the agreement and furnishes a copy to each of the parties. The agreement signed by the parties and authenticated by conciliator is binding on the parties and shall have status and effect of an arbitral award and shall be enforceable as decree of Court.

The document signed by the parties at the conclusion of the mediation/conciliation may either record the principles of their agreement and/or the key points. As a general rule, it is usually appropriate and important that the document should be precise, simple and clear to avoid subsequent misunderstanding and disagreement.

Costs of Conciliation

After termination of conciliation proceedings the Conciliator fixes the cost of proceedings and gives written notice to the parties. Section 78(2) of the Act specifically defines the 'costs' as reasonable cost relating to fee and expenses of conciliator and witnesses and expert advice requested by the conciliator with the consent of the parties. The costs also include the cost charged by the institution for appointing conciliator or arranging administrative assistance to facilitate the conduct of the conciliation proceeding in accordance with section 64 or section 68 of the Act.

Deposits by the Parties

The conciliator, at the initiation of the proceedings may direct the parties to deposit an equal amount as an advance for the costs which may be incurred. Even during the proceedings he may direct a party to deposit supplementary amount. In this context section 79 of the Act empowers the conciliator to suspend the proceedings or declare in writing the termination of conciliation proceedings, if the deposits, as directed by the conciliator, have not been paid in full by both the parties within a period of thirty days.

Accounts

Under section 79(4) of the Act the conciliator is under obligation, upon the termination of proceedings, to render accounts to parties about the deposits he had received during the proceedings and also return the unexpended balance, if any, to the parties.

Post Conciliation Role of Conciliator/Institution

Generally, the termination of the mediation/conciliation and the recording of the settlement agreement signifies the conclusion of the mediator's role. However, it is possible that the mediator or the ADR institution which arranged the mediation may be asked by the parties to function in relation to the implementation of the settlement terms. The parties may wish the mediator or the ADR institution to act as a stockholder in relation to fund to be released on agreed terms or to hold documents pending the implementation of the settlement. The parties may also agree that any dispute which may arise in the course of execution of settlement agreement will be referred to mediation.

PRE-REQUISITES FOR ADR PRACTITIONER

An ADR practitioner is employed by the disputing parties to act as catalyst for better communication and problem solving. The conciliator is a person permitted by the parties to assist and empower them to reach their own lasting settlement. Therefore, the position of an ADR practitioner requires fundamental abilities to act as such.

(i) Building Trust

Engaging an ADR practitioner by the parties to assist them in reaching a settlement does not necessarily imply at the outset that the parties trust the conciliator or the process. Hence one of the most important ability required of him is to earn the trust of the parties.

The building of an atmosphere of mutual respect and trust in the conciliation process, conciliator and between parties, is the key to successful conciliation. The openness and honesty of the parties enhances the chances of the success of conciliation. Since the openness requires trust, the building of trust depends upon his ability, competence, consistency, integrity and neutrality at every stage of conciliation process.

(ii) Impartiality and Neutrality

There are following two absolute pre-requisites for a valid conciliation process.

(a) *Impartiality*

The ADR practitioner must ensure that he has no interest in the ultimate outcome of the conciliation, because he is never a biased person. And it is required of him that he reinforced impartiality by his behaviour at every stage of the process.

(b) *Neutrality*

Neutrality refers to the ADR practitioner's behaviour and attitude during the whole process and the relationship between him and the parties. The indication of any relationship between him and any of the parties disqualifies him from accepting the role of conciliator. The neutrality during the process requires him to ensure that equal treatment is always accorded to the parties.

However, neutrality does not deny the ADR practitioner to have personal opinions, which are inevitable. Hence, an impartial attitude and the ability to be neutral denotes that he is able to separate his personal views about the dispute and its outcome from the viewpoints of each of the parties and is able to concentrate exclusively upon assisting the parties towards settlement without overtly favouring one over the other. In this context it may be said that the consistant display of neutrality goes a long way in encouraging parties to move towards an agreement, as it helps create an environment of mutual trust, clarity and non-defensiveness.

(iii) Control of the Process

ADR practitioner must have ability to exercise control of the process at every stage. The control requires him to strike a balance and allow parties the freedom to fully express their case, associated feelings and preserving conducive atmosphere for negotiations. Although it is required of the him not to jump in to stop aggressive interactions between the parties, particularly at the initial stages, yet there may be situations when parties are displaying such hostile behaviour that prevent them from moving any further towards settlement, in such situations he is required to act very tactfully by bringing the parties back on the settlement track.

(iv) Flexibility and Adaptability

Acting as ADR practitioner is not at all an easy task and to accomplish this task, he has to be adaptable and flexible. The adapatability in relation to conciliation process requires him to adapt appropriately to changing events and act suitably. There is no straight jacket formula to be followed in an ADR process as it can be customized by the ADR practitioner to fit the needs of the participants.

MODEL CODE OF CONDUCT FOR ADR PRACTITIONER

The model standards contained in this code of conduct are intended to apply to all types of ADR processes. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

Preface

This model code of conduct for ADR practitioner is intended to perform three major functions: namely (i) to serve as a guide for the conduct of ADR practitioner to inform the mediating parties; and to promote public confidence in ADR practitioner. as a process for resolving disputes. The standards contained in this Model Code of Conduct are offered with the hope that this will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation/conciliation

Self-Determination : An ADR practitioner shall recognize that ADR processes are based on the Principle of Self-Determination by the Parties.

Self determination is the fundamental principle of ADR process. It requires that the ADR process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from ADR process at any time.

Impartiality : An ADR practitioner shall conduct the ADR Process in an Impartial Manner.

The concept of ADR impartiality is central to the ADR process. An ADR practitioner mediates only those matters in which she or he can remain impartial and evenhanded. If at any time he/she is unable to conduct the process in an impartial manner, he/she is obligated to withdraw.

Conflicts of Interest : An ADR practitioner should disclose all actual and potential conflicts of interest reasonably known to him/her. After disclosure, he/she may decline to mediate unless all parties choose to retain him. The need to protect against conflicts of interest also governs conduct that occurs during and after the completion of ADR process.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The ADR practitioner has a responsibility to disclose all actual and potential conflicts that are reasonably known and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, he may proceed with the ADR process. If, however, the conflict of interest casts serious doubt on the integrity of the process, the he/she should decline to proceed.

An ADR practitioner therefore must avoid the appearance of conflict of interest both during and after the ADR process.

Competence : An ADR practitioner should undertake ADR process only when he/she has the necessary qualifications to satisfy the reasonable expectations of the parties.

Any person may be selected to undertake ADR process provided that the parties are satisfied of the qualifications. Training and experience, however, are often necessary for effective ADR proceedings. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to act effectively.

Confidentiality : An ADR practitioner shall maintain the reasonable expectations of the parties with regard to confidentiality.

The reasonable expectations of the parties with regard to confidentiality should be met by the ADR practitioner. The parties' expectations of confidentiality depend on the circumstances of the case mediation/ conciliation and any agreements they may make. He should not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

Quality of the Process : An ADR practitioner should act as the fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.

An ADR practitioner should work in a manner as to ensure quality of to ensure a quality process and to encourage mutual respect among the parties. A quality of process requires a commitment by him to diligence and procedural fairness. There should be adequate opportunity for each party to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate the proceedings.

Fees : An ADR practitionershould fully disclose and explain the basis of compensation, fees, and charges to the parties.

The parties should be provided sufficient information about fees to determine if they wish to retain the services of the ADR practitioner. The fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise, the time required, and the rates customary in the community.

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COMPLIANCE OF COMPETITION LAW : AN ESSENTIAL ELEMENT FOR GOVERNANCE COMPETITIVENESS AND SUSTAINABILITY

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INTRODUCTION

Competition is a complex and technical subject which does not lend itself to easy summary or concise clarification. Of late, with globalisation and opening of the markets, it has become a subject of great practical importance. It involves the establishment and development of concepts, legal principles and policies for the benefit of consumers. The principles and policies are applied to a wide range of private agreements and arrangements, which commercial undertakings enter into for themselves or with each other.

In the absence of a generally accepted definition of the phenomenon of competition, it has to be regarded as the object fostered and protected by competition policy and law. OECD-World Bank in its report *"A Framework for the Design and Implementation of Competition Law and Policy"* defines the competition as a situation in a market in which firms or sellers independently strives for the buyers' patronage in order to achieve a particular business objective, for example, profits, sales or market share.

COMPETITION VIS-À-VIS GOVERNANCE, COMPETITIVENESS AND SUSTAINABILITY

A number of empirical studies found a positive relationship between competition and innovation, productivity and economic growth. UK White Paper on *A World Class Competition Regime* pointed out that vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. A review of cross-country literature suggests that there is a positive association between GDP growth and level of competition. Many empirical studies of select industries in OECD countries suggest that competition enhances productivity at industry level, generates more employment and lowers consumer prices. The experts through an endogenous growth model, show that competition has a positive effect on growth and pro-competitive policy environment is positively associated with long term growth.

Report of the Working Group on Competition Policy has pointed out that the issue of governance is becoming increasingly crucial as the markets are expanding beyond national boundaries creating trans-national corporations having cross-border transactions. The issue of corporate governance which is a sub set of governance is not just limited to the internal affairs of the company but its wide implications for the shareholders, the lenders and the employees have come into the limelight. The cascading effects of the failure of corporate governance are felt beyond the industry and the economy.

Shyam Khemani & Leechor Chad in *Competition Boost Corporate Governance*, observed that "The dark cloud of recent financial turmoil in several developing and emerging market economies has a silver lining. There is now a better appreciation of corporate governance and its role in national economies. Corporate governance is increasingly considered essential encouraging investor confidence, improving the quality of investment decisions, preventing a buildup of excess capacity and fostering the resiliency of the corporate sector. Much of the attention, however, is focused on the firms and the regulations that protect shareholder rights and govern the conduct of managers and directors. However, attention needs to be also given to the

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environment in which business is conducted, including the degree of competition among firms, entry and exit rules, and the openness of the economy. This type of business environment has a major impact on firms' incentives to seek out and implement competitive practices and strategies. Unfortunately, the competitive business environment essential for fostering good corporate governance is not generally in place in many countries facing economic and financial stress". He further adds that in effect, good governance becomes an instrument of competitive strategies". The quality of corporate governance and the degree of competition also seems to have a positive correlation. In a market structure, where firms face weak competitive pressures and the profits and prices are predictable, the firms have little or no incentive to use resources efficiently.

Report of the Working Group on Competition Policy while summing up its findings on this point said that competition is needed for a culture of good corporate governance to thrive. Competition policy helps bring out efficiency, reduce price distortions, lower the risk of poor investment decisions, promote greater accountability and transparency in business decisions, and lead to better corporate governance. The Report also emphasised that the competition law and policy is a tool towards better governance since it advocates lesser control and discretionary powers in the hands of Government functionaries. At the level of the enterprises, compliance with competition law is akin to good corporate governance. Corporate governance, as normally understood, is ethical conduct within the internal environment of the company. Similarly, compliance with competition law is akin to ethical conduct in the external environment of the company, principally in the market place.

The preceding discussion makes it amply clear that free and fair competition enhances good corporate governance and in this context, 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.

EVOLUTION AND DEVELOPMENT OF COMPETITION REGIME IN INDIA

There are evidences to establish that vibrant and effective competition is one of the key elements of a successful economy. It delivers significant benefits to consumers and encourages the efficient use of resources. Enterprises can compete to attract their customers by offering better products, and services at reasonable prices. The competitive process provides incentive for businesses to continually improve, enhances economic growth and ultimately provides a higher standards of living for all.

In recognition to the benefits of promoting competition in the wake of globalization of markets and market oriented policies, large number of countries have taken initiatives either to enact new competition law or modify the existing ones to suit the changing market conditions. The number of countries with modern competition law has grown to more than hundred.

India, since attaining independence in 1947, adopted and pursued command and control policies, and enacted Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) to prevent the concentration of economic power to the common detriment; to control monopolies; and to prohibit monopolistic and restrictive trade practices. In the wake of new industrial policy adopted by the Government in July 1991 far reaching changes were brought about in the MRTP Act and the need for new competition law was recognised.

Subsequently, the process of formulating new competition law in India found its origin in Finance Minister's Budget Speech in 1999 followed by setting up of High Level Committee on Competition Policy and Law. The submission of the report by the Committee in 2000 led to introduction of the Competition Bill, 2000 in Parliament and enactment of Competition Act, 2002. The basic purpose of competition law is to ensure that markets remain competitive to the benefit of both businesses and consumers.

The Competition Act, 2002 seeks to:

(1) Prohibit anti-competitive agreements (including cartels) which determine prices, limit or control or share markets or result in bid rigging, etc which causes or is likely to cause appreciable adverse effect on competition within India.,

(2) Prohibit abuse of dominant position through unfair or discriminatory prices or conditions (including predatory pricing) limiting or restricting production or development, denying of market access, etc.,

(3) Regulate combinations, (i.e., mergers, acquisitions, etc.) that cause or are likely to cause an appreciable adverse effect on competition.

In other words, sections 3, 4, 5 and 6 are the essence of Competition Act, 2002 and deals respectively with prohibition of anti-competitive agreements, abuse of dominant position and regulation of combinations.

The Government introduced in Lok Sabha the Competition (Amendment) Bill, 2007 on August 29, 2007 after withdrawing the Competition (Amendment) Bill, 2006.

Enforcement of Competition Act, 2002

Overall responsibility for the implementation and to carry out the objectives of the Act, has been cast on Competition Commission of India (CCI), which includes initiating inquiry and imposing penalty in relation to violations of the Act. In terms of Section 18 of the Act, a duty has been cast on the Commission to eliminate practices having adverse effect on competition; to promote and sustain competition; to protect interests of consumers and to ensure freedom of trade carried on by other participants, in markets in India. Section 18 also empowers the Commission to enter into any memorandum or arrangement, with the prior approval of the Central Government, for the purpose of discharging the duties and functions with any agency of any foreign country.

As mentioned above, the mandate of Competition Commission of India (CCI) is to carry out the objectives of the Competition Act, 2002. In this context, it is important to note the objectives of the Competition Act, 2002 is, as explained in its preamble, to provide, keeping in view the economic development the country, for the establishment of 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."

COMPETITION ACT, 2002 – TOUCH STONES

I Appreciable Adverse Effect on Competition

Competition Act, 2002 uses the term "Appreciable adverse effect on Competition" at various places. Substantive provisions relating to prohibition of anti-competitive agreements and regulation of Combinations provides for determination of appreciable adverse effect on competition for determining whether there is a violation of section 3 or section 6 respectively.

Term "Appreciable adverse effect on competition" has not been defined under the Act. However, the Act provides for various factors which must be taken into account by Competition Commission of India in determining whether there has been appreciable adverse effect on competition.

Section 3 provides that any agreement which causes or is likely to cause an appreciable adverse effect on competition within India shall be void. While inquiring as to whether an agreement is void or not in terms of section 3, theAct requires Competition Commission to determine whether an agreement has an appreciable adverse effect on competition under section 3, and to give due regard to all or any of the specified factors, namely –

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Section 6 of the Act provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void.

While inquiring as to whether a combination causes or is likely to cause an appreciable adverse effect on competition, the Act under section 20 (4) requires that Competition Commission to have due regard to all or any of the specified factors, namely,

(i) actual and potential level of competition through imports in the market;

(ii) extent of barriers to entry into the market;

(iii) level of combination in the market;

(iv) degree of countervailing power in the market;

(v) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(vi) extent of effective competition likely to sustain in a market;

(vii) extent to which substitutes are available or are likely to be available in the market;

(viii) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(ix) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(x) nature and extent of vertical integration in the market;

(xi) possibility of a failing business;

(xii) nature and extent of innovation;

(xiii) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(xiv) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

II Relevant market

The inquiry into anti competitive agreements, abuse of dominance, regulation of combination requires delineation of the relevant market. In other words, determination of the relevant market is critical to the matters pertaining to anti competitive agreements, abuse of dominance and regulation of combinations. The Act stipulates as to what constitutes relevant market, and provides parameters to be taken into account by the Competition Commission while determining relevant market.

In terms of section 2(r), the term relevant market has been defined to mean the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Thus, relevant market may comprise of relevant product market or the relevant geographic market or both.

In this context "relevant geographic market" as defined under section 2 (s), means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. Act also defines the "relevant product market" under section 2(t) to mean a market comprising all those products or services which are regarded as inter changeable or substitutable by the consumer, by reason or characteristics of the products or services, their prices and intended use.

For determining the "relevant product market", section 19 (7) requires Competition Commission to consider the specified factors, namely :

(a) physical characteristics or end-use of goods;

(b) price of goods or services;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialized producers;

(f) classification of industrial products.

Relevant geographical market is the second element to be taken into account in determining the relevant market. It may be described broadly as the area in which sellers of a particular product or service operate. The relevant geographical market may be limited, for example, to a small city, state, country or it may be the whole international market.

For determining the "relevant geographic market", section 19(6) requires Competition Commission to consider the specified factors, namely :

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumers preferences;

(h) need for secure or regular supplies or rapid after sales services.

SUBSTANTIVE PROVISIONS UNDER THE COMPETITION ACT, 2002

ANTI-COMPETITIVE AGREEMENTS (SECTION 3)

The provisions relating to anti-competitive agreements, contained in section 3 of the Act prohibits such agreements or practices, or decision taken which causes or is likely to cause an appreciable adverse effect on competition within India.

It is important to note that in order to apply the provisions of section 3 prohibition there must be an agreement in terms of section 2 (b) of the Act.

In this context it is worth mentioning that in *Registrar of Restrictive Trade Agreements v. W H Smith & Sons , (1968) 3 All ER 721*,the court observed, "people who combine together to keep up prices do not shout it from the house tops. They keep it quiet. They make their arrangements in the cellar, where no one can see. They will not put anything into writing nor even into words. A nod or wink will do.

Section 2(b) defines an agreement as to include any arrangement or understanding or any action in concert, whether or not such agreement, understanding or action, is formal or in writing or intended to be enforceable by legal proceedings.

Section 3 requires the agreement to be related to (i) production, (ii) supply, (iii) distribution, (iv) storage, (v) acquisition or (vi) control of goods or (vii) provision of services.

The provisions of section 3 applies to agreements entered into by, (i) enterprises or association of enterprises; or (ii) person or association of persons; or (iii) between any person or enterprise.

Agreements under section 3 would be analysed on the basis of Rule of Reason and Rule of presumption. In this context, section 3(4) provides inclusive list of agreements amongst enterprises or persons at different stages or levels of production chain in different markets, which will be determined under Rule of Reason for ascertaining whether the agreement causes or is likely to cause appreciable adverse effect on competition within India. However, in terms of section 3 (3), certain agreements shall be presumed to have an appreciable adverse effect on competition. Therefore, such agreements will be determined on the basis of Rule of Presumption.

Types of Anti-competitive Agreements

For the purposes of ascertaining as to whether an agreement is anti-competitive in terms of section 3, i.e it causes or is likely to cause an appreciable adverse effect on competition within India, agreements can be categorized as "horizontal" and "vertical" agreements. Though the Act does not use the term "horizontal" and "vertical" agreements, it may be pointed out that the agreements of the kind mentioned under section 3(3) are Horizontal Agreements and would be presumed to have appreciable adverse affect on competition. Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market. Being at the same stage of the production chain implies that all the parties to the agreement are either producers, or retailers or wholesalers. In other words, Horizontal agreements are agreements between actual or potential competitors.

The kind of agreements mentioned under section 3(4) of the Act are vertical agreements and would be analysed under Rule of Reason. Vertical agreements, are agreements between enterprises that are at different stages or levels of the production chain and, therefore, in different markets. In other words, vertical agreements are agreements or concerted practices between two or more enterprises (each of which operates, for the purpose of the agreement, at a different stage of the production or distribution chain) which affect the conditions under which the parties can buy, sell or re-sell certain goods or services.

Jurisdiction of Competition Commission in Relation to Anti-competitive Agreements

Section 19 of the Act, dealing with inquiry into certain agreements and dominant position of enterprise, empowers the Competition Commission to inquire into any agreement entered into by any enterprise or association of enterprises or person or association of persons 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 affect on competition within India.

The Commission has been empowered to make such an inquiry either on its own motion or on receipt of a complaint[1], accompanied by prescribed fee, from any person, consumer or consumer association or trade association; or a reference made to it by the Central Government or State Government or a Statutory Authority.

Examination of Anti-competitive Agreements

Section 3 declares an agreement void, if such agreement provides agreement causes or is likely to cause appreciable adverse effect on competition in India.

As noted above appreciable adverse effect on competition has to be determined in relation to relevant market in India. Thus, determination of relevant market is the first step in the examination of anti-competitive agreements.

1 Competition (Amendment) Bill, 2007 proposes to substitute "receipt of a complaint" by the words"receipt of any information, in such manner" to enable the Commission to inquire into any alleged contravention on receipt of any information instead of receipt of a complaint.

Rule of Presumption

As stated earlier, the agreements specified under section 3(3) shall be presumed to have appreciable adverse effect on competition and thus the burden of proof shall lie on the enterprise or person against which the charge is levelled. The agreement under section 3(3) relates to :

(a) directly or indirectly fixing the prices;

(b) limiting or controlling production, supply, markets, technical development, investment or provision of services;

(c) sharing or allocation of geographical area of market, customers or in any other similar way; and

(d) directly or indirectly resulting in bid-rigging or collusive bidding.

In terms of explanation to section 3(3) bid rigging signifies any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

Cartels' have also been included in the category of agreements, which shall be presumed to have appreciable adverse effect on competition. The term 'Cartel' is explicitly defined in the Act to include association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or , trade in goods or provision of service.

Rule of Reason

Apart from agreements mentioned under section 3(3), all other agreements are to be evaluated on the basis of Rule of Reason, which involves a factual inquiry into overall effect of agreement on competition. Rule of Reason entails an inquiry and may vary in focus and detail depending on the nature of the agreement and market circumstances.

Under the Rule of Reason, the central question to be examined would be as to whether the relevant agreement is likely to harm competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what would likely to prevail in the absence of that agreement.

List of types of agreements mentioned under section 3(4) is inclusive and includes

— *Tie-in arrangements*, which include any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

— *Exclusive supply agreement*, which include 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.

— *Exclusive distribution agreement*, which include any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

— *Refusal to deal*, which includes 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.

— *Resale price maintenance*, which includes any agreement to sell goods on condition that the prices to be charged on the resale 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.

Efficiency Enhancing Joint Ventures

Efficiency enhancing joint ventures have been exempted from the application of Rule of Presumption under section 3(3). But such joint ventures are not exempt from the application of section 3(1), hence, can be examined under the Rule of Reason.

Intellectual Property Rights

Section 3 (5) recognises the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under IPR statutes as specified under the Act. It may be pointed out that the Competition Commission may exercise its jurisdiction under the Act where unreasonable conditions have been imposed by the owner of intellectual property rights. In other words, intellectual property rights are excluded from the purview of the Act but if the owner of intellectual property rights imposes unreasonable restrictions then cognizance can be taken by the Competition Commission.

The expression "reasonable conditions" has not been defined or explained in the Act. By implication, unreasonable conditions that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. This may happen when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices.

Exports

Section 3 of the Act recognises the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. Rationale for not subjecting exports to section 3 prohibition appears to lie in the fact that the effect of such exports will fall outside India and gathering data and other information may not be possible

ABUSE OF DOMINANT POSITION (SECTION 4)

Section 4 dealing with abuse of dominant position is one of the most important provisions of the Act. In terms of section 4, the Act does not prohibit mere possession of dominant position, but only its abuse, thus recognizing that a dominant position may have been achieved through superior economic performance. Section 4, therefore, only applies to abuse of a dominant position, and does not restricts enterprises[2] from holding and maintaining a dominant position or striving to achieve the dominant position.

As mentioned above, section 4 restricts an enterprise from abusing its dominant position. In this context, it is apt to note the definition of the term enterprise.

The term 'Enterprise' has been defined under section 2(h) of the Act to mean a person or a department of the Government, who or which is or has been engaged in any activity, relating to production, storage, supply, distribution, acquisition or control of **articles** or goods or provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries whether such **unit or division** or subsidiary is located at same place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Terms 'Activity', 'a unit or division', 'article' occurring under the definition of enterprise have also been clarified by section 2 (h) by way of explanation wherein the term 'Activity' includes profession or occupation. Similarly the term 'article' includes a new article and service includes a new service. Similarly, term 'a unit or division' includes a plant or factory established for production, supply, distribution, acquisition or control of any goods or any branch or office established for provision of any service.

In considering whether there is or has been an abuse of dominance, the Competition Commission has been empowered to conduct a detailed inquiry of the relevant markets concerned. Section 4(2) enumerates conditions/circumstances, the presence of which may render a dominant enterprise liable for abuse of its dominance.

Essential Elements of Dominance

In order to attract the provisions of section 4 an enterprise must be shown to be in dominant position in the relevant market.

Term "dominant position" has been defined under explanation (a) to section 4 to mean a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to —

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

It is pertinent to note that dominant position of an enterprise is to be determined in the context of the relevant market and to assess whether an enterprise is dominant, Competition Commission is required to determine relevant market as the market with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

2 The Competition (Amendment) Bill, 2007 proposes to prohibit the abuse of dominant by an enterprise or group. It further proposes by way of Explanation (c) to section 4 that the term "group" shall have the same meaning as assigned to it in clause (b) of the explanation to section 5.

Determination of dominant position

For the purposes of determining dominant position of an enterprise, Competition Commission is required to give due regard to factors listed under section 19 (4) such as market structure and size of market; market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprise, or sale or service network of such enterprise; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector enterprise or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; social obligations and social costs; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; any other factor which the Competition Commission may consider relevant for the inquiry.

Abuse of dominant position

Section 4(2) provides circumstances the presence of which may be treated as abuse of dominant position by an enterprise[3] . The circumstances under section 4(2) leading to abuse of dominant position may be classified under two categories, e.g. (i) Exploitative Abuses, such as unfair or discriminatory conditions or prices and (ii) Exclusionary Abuses such as denial of market access. Here, it is pertinent to note that the list of abuses mentioned under section 4(2) are exhaustive and not merely illustrative.

Competition Commission is required, while determining abuse of dominance, to take into account factors enumerated under section 4(2) of the Act which are discussed below:

(a) *Imposition of unfair or discriminatory conditions*: In terms of section 4(2)(a), an enterprise would be considered to have abused its dominant position, if such enterprise – directly or indirectly imposes unfair or discriminatory condition in purchase or sale of goods or service; or if such enterprise directly or indirectly imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

(b) *Imposition of limitations or restrictions* : In terms of section 4(2)(b), an enterprise would be considered to have abused its dominant position, if such enterprise - (i) limits or restricts production of goods or provision of services or market therefor; or (ii) limits or restricts technical or scientific development relating to goods or services to the prejudice of consumers.

(c) *Indulging in practice(s) denying market access*[4] : In terms of section 4(2)(c), an enterprise would be considered to have abused its dominant position, if such enterprise indulges in practice or practices resulting in denial of market access.

(d) *Making contracts subject to unconnected supplementary obligations* : In terms of section 4(2)(d) an enterprise would be considered to have abused its dominant position, if such enterprise makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(e) *Using dominance in one market to enter/protect other market* : In terms of section 4(2)(e), an enterprise would be considered to have abused its dominant position, if such enterprise uses its dominant position in one relevant market to enter into, or protect, other relevant market including relevant product market.

Jurisdiction of Competition Commission in Relation to Abuse of Dominant Position

Section 19 of the Act dealing with inquiry into certain agreements and dominant position of enterprise, empowers the Competition Commission to inquire into any abuse of dominant position by enterprise[5] which falls under any of the clauses (a) to (e) of section 4 (2), mentioned above.

3 *Supra* note 2

4 The Competition (Amendment) Bill, 2007 proposes to insert the words "in any manner" after the word " access" in clause (c) of section 4 (2).

5 *Supra* note 2.

The Commission has been empowered to make such an inquiry either on its own motion or on receipt of a complaint[6], accompanied by prescribed fee, from any person, consumer or consumer association or trade association; or a reference made to it by the Central Government or State Government or a Statutory Authority.

REGULATION OF COMBINATIONS (SECTION 5 & 6)

Regulation of Combinations is one of the core provisions of Act. Substantive provisions relating to regulation of combinations are contained in section 5 and section 6 of the Act. Combination for the purposes of the Act has been defined under section 5, whereas regulation of combinations is provided under section 6. A breach of section 6 pertaining to regulation of combinations occurs where a combination as defined under section 5 has the effect of causing appreciable adverse effect on competition in the relevant market in India.

The combination in terms of section 5 denotes that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, which are above the certain prescribed size in terms of assets or turnover.

Section 5 provides certain size-related thresholds and only an acquisition, acquiring of control[7], merger, or amalgamation above these thresholds is covered by the definition of combination. The threshold is Rs.1,000 crores in terms of assets or Rs.3,000 crores in terms of turnover in India, being the assets[8] or turnover[9], as the case may be, jointly of the parties to the combination. In the case of enterprises having assets or turnover within and outside India, the threshold is US$ 500 million of assets or US$ 1,500 million of turnover. In case the combination involving a group[10] of enterprises, the corresponding threshold is Rs.4,000 crores of assets or Rs.12,000 crores of turnover in India, or in the case of enterprises having assets or turnover within and outside India, US$ 2 billion of assets or US $ 6 billion of turnover.[11]

Thus, combinations below the specified thresholds are beyond the jurisdiction of the Commission insofar as regulation of combinations is concerned. Section 20(3) provides that these thresholds are subject to periodic

6 *Supra* note 1.

7 "Control" for the purposes of the Act includes controlling the affairs or management by – (i) one or more enterprises, either jointly or singly, over another enterprise or group; or (ii) one or more groups, either jointly or singly, over another group or enterprise.The control may be either by one or more enterprises over another enterprises or a group or one or more groups singly or jointly over another group or enterprise.

8 Value of the assets would be determined on the basis of the value of assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, after deducting therefrom any depreciation. Section 5(c) provides that the value of the assets would also include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, geographical indications, design or layout design or similar other commercial rights, referred to in section 3(5) of the Act.

9 In terms of section 2 (y) of the Act turnover includes value of goods or services.

10 "Group" for the purposes of the Act means two or more enterprises, which, directly or indirectly, are in a position to – (i)exercise twenty six per cent, or more of voting rights in other enterprise; or (ii) appoint more than fifty per cent, of the members of the board of directors in other enterprise; or (iii)control the management or affairs of the other enterprise". In the case of a "group", turnover of the group would be aggregated. In the case of "merger" or "amalgamation" turnover of the resultant entity would be computed to determine whether the size of the enterprise exceeds the prescribed threshold limit. For the purpose of determining group under the Act, it is important to note that it will include subsidiary companies.

11 The Competition (Amendment) Bill, 2007 proposes to substitute item (B) in sub-clause (i) and item (B) in sub-clause (ii) of clause (a) of section 5 to provide for a local nexus for combinations involving foreign entity and an Indian entity. A threshold value of local assets and operations in terms of asset value of at least rupees 500 crores and turnover of atleast rupees 1500 crores, is proposed for operations in India in addition to the existing global asset or turnover limits provided in the Act.

revision by the Central Government so as to account *inter alia* for inflation and exchange rate fluctuations.[12]

Section 6 of the Act dealing with regulation of combinations provides that any person or enterprise entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void.

However, in terms of Section 6(4), provisions relating to regulation of combinations does not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided to facilitate raising of fund by an enterprise in the course of its normal business. Under section 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file with the Competition Commission in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

In terms of section 6 (2), any person or enterprise, who or which proposes to enter into any combination, to give a notice of forming a combination to the Commission[13] , in the prescribed form, together with the fee prescribed under regulations. Such intimation should be submitted within seven days[14] of –(a) approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be; (b) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

12 The Competition (Amendment) Bill, 2007 proposes to add sub-section (*2A*) providing that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under section 31, whichever is earlier.

13 The Competition (Amendment) Bill, 2007 proposes to make pre-notification compulsory.

14 The Competition (Amendment) Bill, 2007 proposes to enhance this time limit to thirty days.

Jurisdiction of Competition Commission in Relation to Regulation of Combination

Competition Commission has been vested with the jurisdiction in relation to regulation of combination in situations, if[15] the parties who wish to enter into any combination, give a notice of forming a combination to the Commission, in the prescribed form together with the fee prescribed by regulations under section 6 (2), or it can *suo motu* take action against the combinations, if the commission has reason to believe that combination will cause appreciable adverse effect on competition in relevant market in India.

COMPLIANCE OF COMPETITION LAW

There has been a paradigm shift in the way compliance, corporate governance and sustainability are approached. New levels of accountability, arising from the expectations of a broader stakeholder group, have elevated the concerns at board level of ensuring that effective, and reliable compliance systems and processes are in place and being utilised.

Compliance ensures that good corporate governance is aligned with the company's business objectives and risk management strategies thereby adding to the sustainability of organisation. The most important aspect of compliances 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 activities that might raise compliance concerns.

There are more practical reasons as to why compliance with competition law is particularly important. On a broad level, the basic purpose of competition law is to ensure that markets remain competitive and its compliance ensures that this aim is achieved to the benefit of both businesses and consumers. At an individual level, businesses that comply with the law could avoid the serious consequences of non-compliance.

Compliance with competition law, rules etc. may relieve an enterprise of serious consequences of non-compliance in terms of:

— Inquiry by Competition Commission

— Hefty financial penalties.

— Agreements being unenforceable, and void.

— Adverse publicity.

15 *Supra* note 12

— Loss of reputation and goodwill

— Damages.

— Possibility of being sued for damages

The message is clear that a well devised competition compliance programme can be of immense benefit to all enterprises irrespective of their size, area of operation, nature of products or services and also to companies, their directors and key corporate executives in avoiding monetary fines, civil imprisonment, beside loss of hard-earned reputation.

The benefit of setting up a competition compliance programme is that it can perform the role of a watchdog on the various anti competitive practices resorted against an enterprise by its suppliers of goods and services, the competitors, the trade association, its own dealers/ stockists and their associations, as it can facilitate timely remedial action. The competition compliance programme may also help enterprises to track from time to time various laws, statues, rules, regulations, policies of Government to which it is subject to.

In an era of global competition, voluntary compliance with competition law 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 law 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. 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.

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 law, 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, the Competition Commission may take a lenient view 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 may 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 Commission. As the consequences of infringement can be serious, 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. The prescription of behavioral standards under the compliance programme not only prevents officers and employees of an enterprise from unconsciously violating the competition laws, but at the same time, relieve the employees of the fear that accompanies breach of Competition law.

ROLE OF COMPANY SECRETARIES

Competition authorities, the world over, encourage companies to seek advice from professional experts in compliance of competition law to assist them in designing, implementing and maintaining an effective compliance program. It is in this context, the Company Secretaries are the most suitable professional to play a wider role in compliance of competition law. Company Secretaries are the professionals, who have expertise in providing total compliance solutions and imbibing good corporate governance practices in the veneer of company strategy, formulation, implementation and other aspects of company policies as a coherent whole.

As a compliance officer, a Company Secretary can assist the companies in designing, implementing and monitoring an effective competition compliance program by:

— developing and implementing a 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.

Company secretary is a knowledge professional with a compliance bent of mind and analytical approach. They are not only conversant with the technicalities and provisions of the corporate legal areas but are highly specialized professionals in the matters of procedural and practical aspects involved in the compliances enjoined under various statutes and the rules, regulations, bye-laws and guidelines made thereunder. This is within his core competence that the area of compliance belongs to him.

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CORPORATE COMPLIANCE MANAGEMENT —
THE SYSTEMS APPROACH TO LEGAL COMPLIANCES

ALKA KAPOOR*

A cloud masses, the sky darkens, leaves twist upward, and we know that it will rain. We also know the storm runoff will feed into groundwater miles away, and the sky will clear by tomorrow. All these events are distant in time and space, and yet they are all connected within the same pattern. Each has an influence on the rest, an influence that is usually hidden from view. One can only understand the system of a rainstorm by contemplating the whole, not any individual part of the pattern.

Business and other human endeavors are also systems. They, too, are bound by invisible fabrics of interrelated actions, which often take years to fully play out their effects on each other. Since we are part of that lacework ourselves, it's doubly hard to see the whole pattern of change. Instead, we tend to focus on snapshots of isolated parts of the system, and wonder why our deepest problems never seem to get solved. Systems thinking is a conceptual framework, a body of knowledge and tools that has been developed over the past fifty years, to make the full patterns clearer, and to help us see how to change them effectively.

Without a systemic orientation, there is no motivation to look at how the disciplines interrelate. By enhancing each of the other disciplines, it continually reminds us that the whole can exceed the sum of its parts.

For example, vision without systems thinking ends up painting lovely pictures of the future with no deep understanding of the forces that must be mastered to move from here to there. This is one of the reasons why many firms that have jumped on the "vision bandwagon" in recent years have found that lofty vision alone fails to turn around a firm's fortunes without systems thinking, the seed of vision falls on harsh soil.

But systems thinking also needs the disciplines of building shared vision, mental models, team learning, and personal mastery to realize its potential. Building shared vision fosters a commitment to the long term. Mental models focus on the openness needed to unearth shortcomings in our present ways of seeing the world. Team learning develops the skills of groups of people to look for the larger picture beyond individual perspectives. And personal mastery fosters the personal motivation to continually learn how our actions affect our world.

The systems thinking or systems approach, also applies to the arena of legal compliances. The tools of systems thinking can make a difference to the way the companies view and ensure compliance of several legislations, thereby leading to good governance.

THE REGULATORY FRAME WORK

Companies are governed by a complex web of laws, regulations, voluntary codes, industry codes, and corporate policies. Compliance with these intricate regulations, mandates and policies is not an easy task. Maintaining ongoing compliance is even more difficult due to continuous changes, amendments and overlaps. Inability to comply with the regulations can lead to large penalties or even temporary suspension of operations. Hence, compliance is about protecting an organization's license to operate - lack of which introduces a substantial financial and operational risk to an organization. Besides, even a single mistake in compliance can expose executives to law suits, fines and even imprisonment.

On an average around 120 laws (Central, State, Municipal) apply to a manufacturing company and the directive *'ignorrantia legis non exusat,* (ignorance of the law is no excuse) is the sword that dangles dangerously over businesses.

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Most corporate compliance officers are challenged to find compliance solutions that can scale across corporate compliance offices and also manage regulatory and compliance initiatives within respective operational and departmental areas. This article highlights the elements of an effective compliance programme; the importance of selecting the right compliance platform which can scale across different Acts, rules and regulations issued by the Government including International Standards like Sarbanes-Oxley, OSHA etc.; the systems approach to compliance management; as well the role of Board of Directors and professionals in ensuring compliances.

"Compliance has evolved from an isolated quality initiative within a department to an enterprise level challenge. The shift requires new organizational models, new processes and controls, and a new approach to the technology. In the past, point systems were adequate to address isolated compliance efforts, but as the number and scope of compliance requirements grows isolated efforts become a business risk and increase costs."

- AMR Research

WHAT IS COMPLIANCE ?

In recent past, there have been a large number of cases of corporate frauds such as Enron, Worldcom and Tyco among others. These frauds, which eroded investors' wealth within days, paved the way for a reconstituted and reinvigorated system of checks and balances to protect the investors and restore public confidence in capital markets. Corporate Governance measures, risk assessment / mitigation by applying controls and complying with the laws of the land including the guidelines laid down by the governing legislations is referred to as Compliance – commonly known as Governance Risk Management and Compliance (GRC).

WHAT ARE REGULATORY ACTS OF COMPLIANCE IN INDIA AND ABROAD ?

Plethora of Acts, rules, regulations and guidelines govern corporates in India, major of them being, corporate and economic laws viz. Companies Act, MRTP Act (Competition Act), I(D&R) Act, FEMA; Securities Laws viz. SCRA, SEBI Act; Labour and Industrial Laws etc. Further, Corporate Governance is a major compliance regime governed by Clause 49 of Listing Agreement of stock exchanges.

The United States has a well-established history of legislation and regulations aimed at protecting shareholders and other stakeholders from corporate misconduct viz. the U.S. Federal Sentencing Guidelines for Organizations instituted in 1991, the False Claims Act of 1986, the watershed decision in 1996 by the Delaware Chancery Court regarding Caremark International, Inc. and finally, the Sarbanes-Oxley Act (SOX). Additionally, Internal Control - Integrated Framework, a report of the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in 1992, also recognizes an organization's ethics and compliance program as a critical element of a good control environment.

WHAT IS COMPLIANCE MANAGEMENT OR COMPLIANCE SOLUTION ?

A tool, which helps companies comply with provisions of various governing legislations as well as rules, regulations and guidelines issued thereunder, is a Compliance Solution. Essentially, a compliance solution should allow a company to define, monitor and manage its processes and internal controls, provide extensive reports and documentation facilities, have immediate data and status availability, and provide tools for auditing various processes and controls. A compliance solution should be easy-to-use for CEOs, CFOs and process owners. In short, it should help organizations institutionalize risk management and ensure continuous compliance.

A compliance solution also monitors the effectiveness of various controls applied to mitigate risk. For example, SEBI has made it mandatory for companies in India to comply with the Clause 49 of listing agreement, which is a huge task if done manually. A compliance solution automates the entire process and makes it easier for companies to comply with the stipulated regulations. Further, it helps organizations institutionalize this process and facilitates continuous compliance quarter after quarter.

In a technologically advanced age that we are living in, organisations and enterprises are under constant pressure to perform well and provide top class goods and services to their customers. Compliance solution has become a part of Total Enterprise Solution.

Benefits of Compliance Management or Compliance Solution

Compliance with the requirements of law through a compliance management programme can produce positive results at several levels:

— Companies that go the extra mile with their compliance programs lay the foundation for the control environment referred to in several laws being enacted in various countries.

— Company officials who observe the law are more likely to avoid stiff personal penalties, both monetary and imprisonment. Further, GRC system ensures that right person is held responsible for the wrong doing.

— Companies that embed positive ethics and effective compliance management programme deep within their culture often enjoy healthy returns through employee and customer loyalty and public respect for their brand, both of which can translate into stronger market capitalization and shareholder returns.

Globally, some of the regulatory authorities provide penalty discounts for minor incidents of non-compliance that do occur, in the case of companies which have sound GRC systems, besides offering simplified licences and permitting use of a label or mark certifying high level of compliance.

Since 1991, in USA, the companies that create, communicate, enforce, and promote effective compliance programs, as defined by the U.S. Federal Sentencing Guidelines for Organizations, have been given favorable treatment by the Department of Justice, even when misconduct by employees in their organizations has been proven. The resultant savings, in terms of mitigated fines, has totalled hundreds of millions of dollars.

Clearly, the benefits of implementing and maintaining an effective ethics and compliance program far outweigh its costs. Not only does the compliance management protect investors wealth but also helps the business in running successfully with any potential risk being addressed in a timely and accurate manner.

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

The U.S. Federal Sentencing Guidelines for Organizations provide a clear framework for corporate compliance programs. According to these Guidelines, the key elements of a program should include:

— Standards and procedures to prevent criminal conduct.

— Oversight by high-level person(s) (e.g., Chief Compliance Officer).

— Care in delegation of substantial discretionary authority to individuals (e.g., background checks).

— Effective communication of standards and procedures.

— Reasonable steps to achieve compliance (e.g., reporting systems, help line).

— Consistent enforcement of disciplinary mechanisms.

— Appropriate response after detection of an offence.

The underlying process for compliance management is nearly the same for every regulation:

— Use of assessments, audits, inspections or incoming complaints to identify non-conformance.

— Identification of the non-conformance which needs remedial action.

— Providing a mechanism for defining, tracking and implementing corrective actions to address non-conformance.

— Use of change control techniques such as document management or training to ensure that the corrective action is implemented.

— Providing visibility into the entire process through reporting and dashboards.

ROLE OF INFORMATION TECHNOLOGY

A critical component of an effective compliance program is the ability to monitor and audit compliance in a "real time manner." Yet, as companies cross geographical and industry boundaries, it is becoming harder to perform this role in the traditional manner. As a result, companies are increasingly seeking technology solutions.

The next generation of enterprise-wide compliance and quality applications leverage the latest technology to provide offline access and email-based application access capabilities. As a result of these two new access capabilities, organizations can ensure across-the-board use of the compliance and quality applications, rather than use of informal mechanisms to interact with the business processes that are regulated.

THE SYSTEMS APPROACH

"Lots of companies have separate compliance programs for every regulatory regime. As regulatory

regimes proliferate, a comprehensive compliance program keeps regulations from depressing earnings"

— Gartner

A well-designed compliance management programme has abilities to perform the following key functions across the enterprise:

1. *Compliance Dashboard* : The compliance programme must provide a single enterprise-wide dashboard for all users to track and trend compliance events. All compliance events should be easily viewed interactively through the enterprise compliance dashboard. External auditors, internal auditors, compliance officers can use the dashboards to make decisions on the compliance status of the organization.

2. *Policy and Procedure Management* : A well-designed document management system forms the basis of managing the entire lifecycle of policies and procedures within an enterprise. Ensuring that these policies and procedures are in conformity with the ever-changing rules and regulations is a critical requirement. The creation, review, approval and release process of the policy documents and SOPs (Standard Operating Procedures) should be driven by collaborative tools that provide core document management functionality.

3. *Event Management* : The compliance management system must have ability to capture and track events, cases and incidents across the extended enterprise. Compliance officers, call center personnel, IT departments, QA personnel, ethics hotline should be able to log in any adverse event across the enterprise, upon which the necessary corrective and preventive actions (CAPA) are initiated. Creating a single system of record for all compliance events across regulations provides the opportunity for offering an integrated compliance dashboards.

4. *Rules and Regulations* : A well-designed compliance management solution must offer capabilities for organization to continuously stay in sync with changing rules and regulations. As soon as there are regulatory changes, the various departments should be notified proactively through "email based" collaboration. This process critically enables the organization to dynamically change their policies and procedures in adherence to the rules and regulations. While tracking a single regulation may be manually feasible, it becomes an error-prone task to track all local, state, and central regulations including those taking place across the globe. A well-designed Compliance management programme offers up-to-date regulatory alerts across the enterprise.

5. *Audit Management* : Audits have now become part of the enterprise core infrastructure. Internal audits, financial audits, external audits, vendor audits must be facilitated through a real-time system. Audits are no more an annual activity and corporations must be prepared to offer appropriate audit capabilities. Appropriate evidence of internal audits becomes critical in defending compliance to regulations.

6. *Quality Management* : Most organizations have internal operational, plant-level or departmental quality initiatives to industry mandates like Six-sigma or ISO 9000. A well-designed compliance management program incorporates and supports ongoing quality initiatives. Most quality practitioners would agree that compliance and quality are two sides of the same coin. Therefore, it is critical to ensure that compliance management solution offers support for enterprise-wide quality initiative.

7. *Training Management* : Most compliance programs often require evidence of employee training. Regulations like Clause 49 of Listing Agreement and Sarbanes-Oxley Act, stress on employee training. In USA, lack of documented training can lead to fines and penalties. Often the compliance office has to work closely with the HR organization to facilitate employee training. Well-designed compliance programs require a well-integrated approach to e-learning and training management.

8. *Compliance Task Management* : Organizations must plan, manage and report status of all compliance related activities from a centralized solution. Automated updates from the various compliance modules should provide for up-to-the-minute status reporting that could be viewed by the board of trustees, corporate compliance officer, entity compliance coordinators, quality offices and others as designated.

COMPLIANCE SOLUTIONS

In this age of information technology and outsourcing, where corporate solutions are available at every step and in respect of every matter, there are several companies offering 'compliance solutions'. Companies like Deloitte & Touche, Newgen Compliance Manager, FRS Global, Profitstars, Gale-Force Solutions Inc etc. offer corporate compliance solutions.

As an illustration, the Deloitte and Touch offers the following five phase approach as compliance management and solution:

Five-Phase Approach

Our five-phase approach for assisting you in creating or enhancing an ethics and compliance program may encompass the following activities.

Phase One - Risk/Cultural Assessment

Through employee surveys, interviews, and document reviews, we can help you validate your culture of ethics and compliance at all levels of the organization or establish a baseline for change. Our report and recommendations will detail observations and identify gaps between your current practices and benchmarks as outlined in the U.S. Federal Sentencing Guidelines for Organizations framework, the Sarbanes-Oxley Act, SEC and the major stock exchange rules, and other applicable laws and regulations. From these assessments will emerge a detailed work plan?

Phase Two - Program Design/Update

In this phase, we help you create guideline documents that outline the reporting structure, communications methods, and other key components of the code of ethics and compliance program. This encompasses all aspects of the program, from grass roots policies to structuring board committees that oversee the program; from establishing the mandatory anonymous complaint reporting mechanism—i.e., compliance and ethics help line or whistleblower hot line—to spelling out the specifics of the code of ethics in a way that is easily understood by everyone at all levels of your organization.

Phase Three - Policies and Procedures

We help you develop or enhance the detailed policies of the program, including issues of financial reporting, antitrust, conflicts of interest, gifts and entertainment, records accuracy and retention, employment, the environment, global business, fraud, OSHA, political activities, securities, and sexual harassment, among others.

Phase Four - Communication, Training, and Implementation

Even the best policies and procedures are useless if they are not institutionalized— they must become part of the fabric of your organization. We can help you clearly articulate, communicate, and reinforce not only the specifics of the program, but also the philosophy behind it, and the day-to-day realities of it. In this way, your key stakeholders and other personnel are more likely to embrace the program and incorporate it into their attitudes and behaviors.

Phase Five - Ongoing self-Assessment, Monitoring, and Reporting

The true test of your ethics and compliance program comes over time. How do you know in one year or five that both the intent and letter of the law are still being observed throughout your organization? How does the program—and your organization—adapt to changing legislation and business conditions? As your organization evolves—for example, through mergers and acquisitions—will the program remain relevant? The cultural assessment, mechanisms, and processes that we help you put in place today, including employee surveys, internal controls, and monitoring and auditing programs, can help you achieve sustained success.

To move further, the five core components of Newgen Compliance Manager are :

"Process Management

The Process Management component enables organization to manage the processes for which the risks have to be assessed and controls are to be applied.

Risk Assessment

The Risk Assessment component performs tasks like identifying risk attributes, association with the established processes and continuous updation of these risks.

Controls

Once the risks have been assessed and categorized, the need arises for applying appropriate controls to mitigate these risks. The Controls component enables organizations to do that by associating controls to identified risks, calculating the mitigation cost, assessing the residual risk and determining the effectiveness of the controls.

Auditing

The Auditing component enables organization to set auditing responsibilities and schedules.

Monitoring

The Monitoring component enables organization to track the compliance status of the processes by generating reports like status of internal control, status of internal processes, status of gross and residual risk, audit schedules, etc.

COST OF COMPLIANCE

A World Bank study of micro-firms in Mexico found that the average micro-firm owner faces regulatory costs that consume 17% of revenues. Because of the costs of compliance, micro-firm owners tend to operate in a way that avoids the need for compliance. While few governments have collected data demonstrating a link between costs of compliance and failures of compliance, studies from many OECD countries confirm that compliance costs are generally higher for SMEs, suggesting that there is a higher risk of compliance failure in this segment. Consequently smaller firms are generally perceived to have lower compliance rates. Complexity, inaccessibility, and incomprehensibleness of regulations affect small business compliance rates. Many studies show that small businesses cannot keep up with the volume of regulations and regulatory guidance that is produced by many regulatory agencies.

Further, corporates in general perceive legal compliance, substantive and procedural, as mundane activity involving costs without any tangible benefits.

What corporates fail to realise is that while compliance at a cost, the cost of non-compliance is also compliance huge like cancellation of business licenses, huge fines or even imprisonment, erosion of public opinion and stakeholder's confidence, which could cripple a company.

COMPLIANCE WITH SPIRIT OF LAW (ETHICS)

In the context of corporate governance, compliance means obeying the law. Ethics is the intent to observe the spirit of law—in other words, it is the expressed intent to do what is right. In the wake of recent corporate scandals, a program that strongly emphasizes both ethics and compliance is good business.

The Sarbanes-Oxley Act of 2002, along with related mandates by the Securities and Exchange Commission and new listing rules instituted by the major stock exchanges including India, raise the ante for ethical behavior and effective corporate compliance programs. Public companies and their senior executives and board members may be held accountable—personally accountable in the case of the executives and board members—not only for the financial reporting provisions of the legislations, but also for the aspects pertaining to ethics and corporate compliance. Companies and their leadership that adhere both to the letter and the spirit of the law can achieve substantial benefits.

An ethical compliance management programme ensures that the mechanisms are in place to provide early warning of deviations from guidelines and regulations. It is essential to create or expand a culture of trust, enthusiasm, and integrity - critical attributes that can produce measurable results in terms of productivity, employee satisfaction, customer satisfaction, and, ultimately, brand equity.

THE CULTURAL ASSESSMENT – A CRITICAL STEP

One of the biggest risk factors for companies today revolves around culture. If employees, the eyes and ears of the company, are afraid to raise issues or challenge management, the company is doomed.

If management does not listen to employees, they place themselves at grave risk. For the purpose, the management must answer these questions:

- Do rank-and-file employees understand the tone set by senior management?
- Do they know, without a doubt, that the organization's culture encourages ethical behaviour at all levels?
- Can employees throughout the organization describe the company's code of ethics?
- Do employees in all areas of the organization ask questions and express concerns?
- Do the employees believe that the mechanisms are in place to allow them to voice opinions without fear of retribution?

A cultural assessment is the first step in answering these and other critical questions. The benchmarks that result from the assessment process become the foundation for an ethics and compliance program, as well as a solid control environment, which can withstand scrutiny and propel the company to new heights of success.

ROLE OF BOARD OF DIRECTORS

This is an extraordinarily challenging time for a Board Member as he faces an unprecedented level of personal risk and liability and weighty performance pressures from private equity investors, shareholder activists, investor groups, regulators and other stakeholders.

As mentioned above, the legislations and regulations designed to restore investor confidence today, require renewed engagement of senior executives and the Boards in the compliance monitoring and reporting process. Boards are being forced to revisit their broader responsibilities for management oversight, regulatory compliance and strategic guidance. New senior executive positions are being added: Chief Governance Officers, Chief Compliance Officers and Chief Risk Officers.

Today, an enlightened. Board of directors realises it must take action to enhance the necessary organisational frameworks, structures, processes and information to help create enterprise value. Doing so often yields new insights into the transparency, accuracy, timeliness and reliability of business information. The challenge to this involves integrating processes and metrixs used to monitor adherence to legislations with those used to monitor organisational performance.

For the purpose, Boards need to ask critical questions that go a long way towards fulfilling their oversight responsibilities. Some of these questions might include:

— Is there a process for management and the Board to address issues that arise from any level of the organization?

— Does an effective reporting mechanism exist ?

— Is management willing to take action on reports?

— Are employee surveys conducted to determine awareness of and willingness to participate in the ethics and compliance program ?

— What is the culture and "tone at the top" regarding ethics ? Is the employee's view of the tone in alignment with senior management's?

— Is the reward system aligned with the ethics and compliance program objectives ?

The answers to these and other questions can raise the Board's awareness of the alignment between the company's intent to comply with its code of ethics and applicable laws and the company's practices. Such awareness and understanding can significantly reduce the company's and its Board's exposure to government actions and stockholder litigation. Besides, through effective executive and Board leadership, companies can restore or enhance their focus on integrity and ethics, leverage compliance efforts to improve business, and better monitor their company against the letter and spirit of laws and regulations.

ROLE OF COMPANY SECRETARIES

Corporate Compliance Management can add substantial business value only if compliance is done with due diligence.

A Company Secretary is the 'Compliance Manager' of the company. It is he who ensures that the company is in total compliance with all regulatory provisions. Corporate disclosures, which play a vital role in enhancing corporate valuation, is the forte of a Company Secretary. These disclosures can be classified into statutory disclosures, non-statutory disclosures, specifies disclosures and continuous disclosures. Clause 49 of Listing Agreement spells out elaborately on various aspects of disclosures which are to be made by the company such as contingent liabilities, related party transactions, proceeds from initial public offerings, remuneration of directors and various details giving the threats, risks and opportunities under the heading management discussion and analysis in the corporate governance report which is published in the annual accounts duly certified by the professional. A Company Secretary has to ensure that these disclosures are made to shareholders and other stakeholders in true letter and spirit.

In nutshell, the Company Secretary is the professional who guides the Board and the company in all matters, renders advice in terms of compliance and ensures that the Board procedures are duly followed, best global practices are brought in and the organisation is taken forward towards being the best governed one.

CONCLUSION

Last, but not the least, it is critical for a company to build its compliance solution on a scalable and configurable platform, one which can adapt and change to the regulatory environments, today and in the future. Compliance workflows, tasks, audit processes, financial reporting standards, quality management techniques all change with time. The company's chosen compliance programme must enable it to rapidly adapt to the changes.

Forward thinking corporations that put in place a suitable compliance management programme achieve compliance more productively, they in fact leverage the compliances into building a higher quality organization with good corporate performance.

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DEVELOPMENT OF DEBT MARKET IN INDIA — AN OVERVIEW

SONIA BAIJAL*

The importance of debt market can be better gauged from a statement made by Greenspan, former Chairman of Federal Reserve of USA 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." He opined that existence of a deep and liquid corporate debt market could make emerging economies less vulnerable; especially to volatile capital flows.

A reasonably well developed bond market can supplement the banking system in meeting the requirements of the corporate sector for long term capital investment and asset creation. It can provide a stable source of finance, especially when the equity market is volatile and resource requirements of the corporate entities are large. In the case of India, development of a corporate bond market has become even more crucial especially, in view of the requirement of large amount of resources to meet aspirations of India Inc. and for development of infrastructure of the country.

STRUCTURE OF DEBT MARKET IN INDIA

Debt markets are markets for the issuance, trading and settlement in fixed income securities of various types and features. Fixed income securities can be issued by almost any legal entity like central and state governments, public bodies, statutory corporations, banks and institutions and corporate bodies.

The debt market in India comprises mainly of two segments viz., the Government securities market consisting of Central and State Governments securities, Zero Coupon Bonds (ZCBs), Floating Rate Bonds (FRBs), T-Bills and the corporate securities market consisting of FI bonds, PSU bonds, and Debentures/Corporate bonds. Government securities form the major part of the market in terms of outstanding issues, market capitalization and trading value.

During the year 2005-06, the government and corporate sector collectively mobilized Rs. 2,611,928 million from primary debt market, a rise of 27.49% as compared to the preceding year. About 69.58% of these were raised by the government (Central and State Governments), while the balance amount was mobilized by the corporate sector through public and private placement issues. The turnover in secondary debt market during 2005-2006 aggregated Rs. 26,053,916 million, 13% lower than that in the year 2004-2005.

The trading of government securities on the Stock exchanges is currently through negotiated dealing using members of Bombay Stock Exchange (BSE) / National Stock Exchange (NSE) and these trades are required to be reported to the exchange. The bulk of the corporate bonds, being privately placed, were, however, not listed on the stock exchanges. Two Depositories, National Securities Depository Limited (NSDL) and Central Depository Services (India) Limited (CDSL) maintain records of holding of securities in a dematerialised form. Records of holding of government securities for wholesale dealers like banks/Primary Dealers (PDs) and other financial institutions are maintained by the RBI.

In India, there are four Credit Rating Agencies (CRAs). While RBI prescribes a minimum rating for issue of Commercial Paper, SEBI, which regulates CRAs, has stipulated that ratings are compulsory for all public issues of debentures with maturity exceeding 18 months and the government has stipulated investments by Pension funds only in debt securities that have high ratings.

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DEBT MARKET INSTRUMENTS

Corporate Debenture

A Debenture is a debt security issued by a company, which offers to pay interest in lieu of the money borrowed for a certain period. In essence it represents a loan taken by the issuer who pays an agreed rate of interest during the lifetime of the instrument and repays the principal normally, unless otherwise agreed, on maturity.

These are long-term debt instruments issued by private sector companies, in denominations as low as Rs 1000 and have maturities ranging between one and ten years. Debentures enable investors to reap the dual benefits of adequate security and good returns. Unlike other fixed income instruments such as Fixed Deposits, Bank Deposits, Debentures can be transferred from one party to another.

Debentures can be divided into different categories on the basis of convertibility of the instrument and Security. The debentures issued on the basis of security includes –

- — Non Convertible Debentures (NCDs)
- — Partly Convertible Debentures (PCDs)
- — Fully convertible Debentures (FCDs)
- — Optionally Convertible Debentures (OCDs)
- — Secured Debentures
- — Unsecured Debentures

Fixed Income Products

Deposit : Deposits serve as medium of saving and as a means of payment and are a very important variable in the national economy. A bank basically has three types of deposits, i.e. time deposit, savings deposit and current account.

Fixed Deposit : Fixed Deposits are sums accepted by most of the NBFCs and banks. The amount of deposits that may be raised by NBFCs is linked to its net worth and rating. However, the interest rate that may be offered by a NBFC is regulated. The deposits offered by NBFCs are not insured whereas the deposits accepted by most banks are insured upto a maximum of Rs.1,00,000.

Interest Based Bonds

Coupon Bonds : Coupon Bonds typically pay interest periodically at the prespecified rate of interest. The annual rate at which the interest is paid is known as the coupon rate or simply the coupon. Interest is usually paid half-yearly though in some cases it may be monthly, quarterly, annually or at some other periodicity. The dates on which the interest payments are made are known as the coupon due dates.

Zero Coupon Bonds : A plain bond is offered at its face value, earns a stream of interest till redemption and is redeemed with or without a premium at maturity. A zero coupon bond is issued at a discount to its face value, fetches no periodic interest and is redeemed at the face value at maturity.

Derived Instruments : These instruments are not direct debt instruments. Instead they derive value from various debt instruments. Mortgage bonds, Pass Through Certificates, Securitised Debt Instruments etc. fall under this category.

Mortgage Bonds : Mortgage backed bonds is a collateralized term-debt offering. Every issue of such bonds is backed by a pledged collateral. Property that can be pledged as security for mortgage bonds is called eligible collateral. The terms of these bonds are like the bonds floated in the capital market, semi-annual or quarterly payments of interest and final bullet payment of principal.

Pass Through Certificates : When mortgages are pooled together and undivided interest in the pool are sold, pass-through securities are created. The pass-through securities promise that the cash flow from the underlying mortgages would be passed through to the holders of the securities in the form of monthly payments of interest and principal.

Participation Certificates : These are strictly inter-bank instruments confined to the Scheduled Commercial Banks. This instrument is a money market instrument with a tenure not exceeding 90 days. The interests on such participation certificate are determined by the two contracting banks.

Benchmarked Instruments : There are certain debt instruments wherein the fixed income earned is based on a benchmark. For instance, the Floating Interest rate Bonds are benchmarked to either the LIBOR, MIBOR etc.

Floating Interest Rate : Floating rate of interest simply means that the rate of interest is variable. Periodically the interest rate payable for the next period is set with reference to a benchmark market rate agreed upon by both the lender and the borrower. The benchmark market rate is the State Bank of India Prime

Lending Rate in domestic markets and LIBOR or US Treasury Bill Rate in the overseas markets.

Inflation linked bonds : A bond is considered indexed for inflation if the payments on the instrument are indexed by reference to the change in the value of a general price or wage index over the term of the instrument. The options are that either the interest payments are adjusted for inflation or the principal repayment or both.

Money Market Activities

Call money : Call/Notice money is an amount borrowed or lent on demand for a very short period. If the period is more than one day and upto 14 days it is called 'Notice money' otherwise the amount is known as Call money'. No collateral security is required to cover these transactions. The call market enables the banks and institutions to even out their day to day deficits and surpluses of money. Commercial banks, Co-operative Banks and primary dealers are allowed to borrow and lend in this market for adjusting their cash reserve requirements.

Treasury Bills : In the short term, the lowest risk category instruments are the treasury bills. RBI issues these at a prefixed day and a fixed amount. These include 91-day Tbills, 182-Day Tbills, and 364-day Tbills.

A considerable part of the government's borrowings happen through Tbills of various maturities. Based on the bids received at the auctions, RBI decides the cut off yield and accepts all bids below this yield.

The usual investors in these instruments are banks who invest not only to part their short-term surpluses. These Tbills, which are issued at a discount, can be traded in the market. The transaction cost on Tbills is non-existent and trading is considerably high in each bill, immediately after its issue and immediately before its redemption.

Term Money Market : Inter bank market for deposits of maturity beyond 14 days and upto three months is referred to as the term money market.

Certificates Of Deposits : After treasury bills, the next lowest risk category investment option is the certificate of deposit (CD) issued by banks and Financial Institutions. Allowed in 1989, a CD is a negotiable promissory note, secure and short term in nature i.e. upto one year. A CD is issued at a discount to the face value. The discount rate is negotiated between the issuer and the investor.

CDs are issued by banks and FIs mainly to augment funds by attracting deposits from corporates, high net worth individuals, trusts, etc. The foreign and private banks, especially, which do not have large branch networks and hence lower deposit base use this instrument to raise funds.

Commercial Papers : CPs are negotiable short-term unsecured promissory notes with fixed maturities, issued by well rated companies generally sold on discount basis. Companies can issue CPs either directly to the investors or through banks / merchant banks (called dealers). These are basically instruments evidencing the liability of the issuer to pay the holder in due course a fixed amount i.e. face value of the instrument, on the specified due date. These are issued for a fixed period of time at a discount to the face value and mature at par.

Inter-Corporate Deposits : Apart from CPs, corporates have access to another market called the inter corporate deposits (ICD) market. An ICD is an unsecured loan extended by one corporate to another. This market allows funds surplus corporates to lend to other corporates. As the cost of funds for a corporate is much higher than a bank, the rates in this market remain higher than those in the other markets. As ICDs are unsecured, the risk inherent is high.

Commercial Bills : Bills of exchange are negotiable instruments drawn by the seller of the goods on the buyer of the goods for the value of the goods delivered. These bills are called trade bills. These trade bills are called commercial bills when they are accepted by commercial banks.

INVESTORS IN DEBT MARKET

Investors are the entities who invest in such fixed income instruments. The investors in such instruments are generally Banks, Financial Institutions, Mutual Funds, Insurance companies, Provident Funds etc. The individual investors invest to a great extent in Fixed Income products.

Banks : Collectively, all the banks put together are the largest investors in the debt market. They invest in all instruments ranging from T-Bills, CPs and CDs to GOISECs, private sector debentures etc. Banks lend to corporate sector directly by way of loans and advances and also invest in debentures issued by the private corporate sector and in PSU bonds.

Insurance Companies: The second largest category of investors in the debt market are the insurance companies.

Provident funds : Provident funds are estimated to be the third largest investors in the debt market. Investment guidelines for provident funds are being progressively liberalized and investment in private sector debentures is one step in this direction.

Most of the provident funds are very safety oriented and tend to give much more weightage to investment in government securities although they have been considerable investors in PSU bonds as well as state government backed issues.

Mutual funds : Mutual funds represent an extremely important category of investors. World over, they have almost surpassed banks as the largest direct collector of primary savings from retail investors and therefore as investors in the wholesale debt market. Mutual funds include the Unit Trust of India, the mutual funds set up by nationalized banks and insurance companies as well as the private sector mutual funds set up by corporates and overseas mutual fund companies.

Trusts : Trusts include religious and charitable trusts as well as statutory trusts formed by the government and quasi government bodies. Religious trusts and Charitable trusts range from the very small ones to large ones.

There are very few instruments in which trusts are allowed to invest. Most of the trusts invest in CDs of banks and bonds of financial institutions and units of Unit Trust of India.

Corporate Treasuries : Corporate treasuries have become prominent investors only in the last few years. Treasuries could be either those of the public sector units or private sector companies or any other government bodies or agencies.

The treasuries of PSUs as well as the governmental bodies are allowed to invest in papers issued by DFIs and banks as well as GOISECs of various maturities. However the orientation of the investments is mostly in short-term instruments or sometimes in extremely liquid long term instruments which can be sold immediately in the markets.

In complete contrast to public sector treasuries, those in the private sector invest in CDs of banks and CPs of other private sector companies, GOISECs as well as debentures of other private sector companies. Of late, preference shares of DFIs and open-ended mutual funds have also become popular with these treasuries.

Foreign Institutional Investors : India does not allow capital account convertibility either to overseas investors or to domestic residents. Registered FIIs are an exception to this rule. More than 300 FIIs invest in Indian equities while the number of FIIs investing in Indian domestic debt is less than 20.

FIIs have to be specifically and separately approved by SEBI for equity and debt. Each debt FII is allocated a limit every year up to which it can invest in Indian debt securities. They are also free to disinvest any of their holdings, at any point of time, without prior permission.

Retail Investors : Since January 2002, retail investors have been permitted to submit non-competitive bids at primary auction through any bank or PD.

DEBT MARKET INTERMEDIARIES/PARTICIPANTS

Primary Dealers : Primary dealers (PDs) are important intermediaries in the government securities markets. There were 18 PDs operating in the market at the end of August 2007. They act as underwriters in the primary market, and as market makers in the secondary market. PDs underwrite a portion of the issue of government security that is floated for a pre-determined amount. The underwriting commitment of each PD is broadly decided on the basis of its size in terms of its net owned funds, its holding strength, the committed amount of bids and the volume of turnover in securities.

Brokers : Brokers play an important role in secondary debt market by bringing together counterparties and negotiating terms of the trade. It is through them that the trades are entered on the stock exchanges. The brokers are regulated by the stock exchanges and also by the SEBI.

DEBT MARKET IN INDIA – REGULATORY FRAMEWORK

The Union government and the State Governments have been empowered under Articles 292 and 293 of the Constitution of India to borrow money upon the security of the Consolidated Fund of India and the States within permissible limits. The Constitution also empowers the Union and the State Governments to give guarantees within such limits as may be fixed. The Union Government debt consists of three components,— internal debt, external debt and "other liabilities". Similar debt structure exists in case of State Government also, except for external debt component as States are not supposed to borrow directly from foreign countries/

sources. This system of classification in three components has been adopted by the Ministry of Finance, Government of India, for statistical reporting purposes in line with SDDS (Special Data Dissemination Standard) of IMF.

Internal debt and external debt constitute the public debt of the Union Government and are secured under the Consolidated Fund of India. On the other hand, "other liabilities" of the Union Government form part of the Public Account of India. The Indian Constitution under Article 292 provides for placing a limit on the public debt secured under the Consolidated Fund of India. This does not include "other liabilities" covered in the "Public Account". There is also a similar position under Article 293 of the Indian Constitution with respect to borrowing by the States, wherein the State legislatures have powers to fix limits.

The Reserve Bank of India manages the public debt and issues new loans on behalf of the Union and the State Governments under the powers derived from the Reserve Bank of India Act. It also undertakes cash and liquidity management for the Government of India and State Governments and administers the scheme of Ways and Means Advances.

Internal Debt Management Department of the RBI manages internal debt. This involves auctioning the Government debt from time to time, introduction of new instruments, smoothening the maturity structure of debt, placing of debt at market related rates and improving depth and liquidity of Government securities by developing active secondary market for them. The Public Debt Act, 1944 governs Government debt market. This legislation is proposed to be replaced by a new Government Securities Act in the near future.

Internal debt of the Union Government includes Market Loans, Special Securities issued to RBI and others, Gold Bonds, Compensation, Relief and other bonds, Treasury Bills of different maturities issued to the RBI, State Governments, commercial banks and other parties, WMA, Securities issued to International Financial Institutions, Marketable Securities and Special Union Government Securities issued against small savings. The internal debt is classified into market loans, other long and medium term borrowings and short-term borrowings and shown in the receipt budget of the Union Government.

External debt of the Union Government comprises both long-term and short-term debt consisting of multilateral and bilateral borrowings of Government, borrowings from IMF, etc.

The liabilities other than internal and external debt include other interest and non-interest bearing obligations of the Government such as Post Office Savings Deposits, deposits under small savings schemes, loans raised through Post Office cash certificates, Provident Funds, interest and non-interest bearing reserve funds of departments like Railways, Telecommunications and others and other deposits and advances, both interest and non-interest bearing.

The "other liabilities" of governments arise in government accounts more in the capacity as a banker rather than as a borrower. Hence, such borrowings are shown as part of Public Account and are not secured under the consolidated fund.

The Reserve Bank of India is, therefore, the main regulator for the Money Market. Reserve Bank of India also controls and regulates the G-Secs Market. Apart from its role as a regulator, it has to simultaneously fulfill several other important objectives viz. managing the borrowing program of the Government of India, controlling inflation, ensuring adequate credit at reasonable costs to various sectors of the economy, managing the foreign exchange reserves of the country and ensuring a stable currency environment.

RBI controls the issuance of new banking licenses to banks; the manner in which various scheduled banks raise money from depositors; and deployment of money through its policies on CRR, SLR, priority sector lending, export refinancing, guidelines on investment assets etc.

Another major area under the control of the RBI is the interest rate policy. Earlier, it used to strictly control interest rates through a directed system of interest rates. Each type of lending activity was supposed to be carried out at a pre-specified interest rate. Over the years RBI has moved slowly towards a regime of market determined controls. RBI provides negotiated dealing system which is an electronic platform for facilitating dealing in Government Securities and money market instruments.

Securities and Exchange Board of India

The Securities and Exchange Board of India (SEBI) controls bond market and corporate debt market in cases where entities raise money from public through public issues.

It regulates the manner in which such moneys are raised and ensure a fair play for the retail investor. The issuers are required to make the retail investor aware, of the risks inherent in the investment, by way of disclosure. Being regulator for the Mutual Funds in India

SEBI regulates the entry of new mutual funds in the industry and also the instruments in which mutual funds can invest.

Apart from the two main regulators, the RBI and SEBI, there are several other regulators specific for different classes of investors. The Central Provident Fund Commissioner and the Ministry of Labour regulate the Provident Funds. Religious and Charitable trusts are regulated by some of the State governments of the states, in which these trusts are located.

Co-ordination between RBI and Securities and Exchange Board of India (SEBI) is ensured both at policy level and at operational level. In particular, at policy level, coordination is ensured through a High Level Committee on Capital Markets (HLCC) presided by Governor - RBI, and consisting of Chairman - SEBI, Chairman - Insurance Regulatory and Development Authority (IRDA) and Finance Secretary, Government of India. The Deputy Governor of RBI is on the Board of Directors of SEBI. Further, the Standing RBI – SEBI Technical Committee consisting of officials from RBI and SEBI assists the HLCC at operational level.

Debt Market – Development Process in India

In India, development of corporate debt market has been one area which is most deliberated upon and discussed about. India, has been an exception in regard to many of the shortcomings observed in respect of most Asian countries. India has a legal framework in place 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. It has the required infrastructure in place and has two world class stock exchanges for trading, clearing and settlement systems. The country also has 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.

Government has been making attempts to create a vibrant dynamic and deep corporate debt market in the country. A High Level Committee on Corporate Bonds and Securitization, set up by the Government of India, spelt out measures for developing debt market. Subsequently SEBI's internal group worked out a road map for implementation of a plan for the development of a corporate bond market in India. An internal Group of RBI has also come out with its views on the subject.

SEBI's internal committee has given some thought to an envisaged set up to make a beginning in the corporate debt market. As an integral part of its efforts to promote an efficient, orderly and fair financial market it has suggested setting up of a trade reporting platform for corporate debt to start with and an exchange for bond trading, clearing and settlement. In this regard Internal Committee of SEBI observed that in most countries, the majority of bonds are traded on over-the-counter (OTC) markets which make it difficult to have real time data for price comparisons, trading and analysis. In India, secondary market trading in corporate bonds, like in most other markets, is done over the counter (OTC) between the counterparties directly or through brokers. Once trades are executed, they are reported for information disclosure. In addition, consequent upon SEBI's move, corporate bonds are expected to be traded through the electronic order book system on the exchanges. However, this method has not become popular due to lack of information on prices, non availability of a data base and lack of an appropriate risk free clearing and settlement system in respect of corporate debt instruments.

The Committee observed that the corporate bond market in India did not have any common clearing and settlement infrastructure, in place unlike in the case of the government securities market. In the case of corporate debt market transactions were settled bilaterally. The risk mitigating delivery versus payment mechanism is absent in the case of such bilateral trades. The settlement of trades done on the stock exchanges, however, was undertaken through the associated clearing house/corporation. There was, thus a pronounced need for a compulsory trade reporting to a central authority by all participants along with an organized set up for clearing and settlement.

The High Level Expert Committee on Corporate Bonds and Securitization had recommended that entities be given freedom to set up their own trading-cum-clearing and settlement systems with a view to facilitating OTC deals in corporate debt market. It , however suggested that this could be done in two phases, as under:

— In the first phase, to establish a system to capture all information related to trading in corporate bonds as accurately and as close to execution as possible through an authorized reporting platform. For the purpose, it suggested SEBI to mandate all entities including brokers to report trades to the assigned exchange within a specified period of time. In doing so, care was to be taken to avoid reporting of the same trades by multiple agencies. The information, thus available would be disseminated to the market on a real time basis. SEBI would frame detailed guidelines for setting up of such a reporting plat form.

— In the second phase, as market participants gain experience with trade reporting, online anonymous order matching of trades could be made possible with the help of electronic trading platforms by authorized stock exchanges. Such trading platforms could be set up by the stock exchanges or jointly by regulated institutions and SEBI would frame specific guidelines for the purpose.

As the course of action, SEBI authorized BSE and NSE to set up and maintain corporate bond reporting platforms to capture all information related to trading in corporate bonds as accurately and as close to execution as possible and to permit BSE and NSE to have in place corporate bond trading platforms to enable efficient price discovery and reliable clearing and settlement in a gradual manner. Accordingly NSE &BSE have already set up corporate bond reporting platform to enable buyer/ seller to report corporate bond deals in accordance with the requirements specified by SEBI.

Debt Market – Recent Developments

The face of Indian debt market is changing with Government and RBI interventions and emerging economic development. The Fiscal Responsibility and Budget Management Act has prohibited the RBI from subscribing to Government securities in the primary market with effect from April 1, 2006. This will complete the transitions to a fully market based issuance of Government securities. This process was started in the early 1990s with the introduction of auctions.

The 12th Finance Commission recommended the end of the role of the Central Government as a financial intermediary for the State Governments. This role is effectively ending but for a few transitional arrangements. In the coming years the State Governments' borrowings will be more and more market determined. In the long term, we will witness a vibrant sub-national debt market.

With the growth of the economy above 8% and expected to continue to so in the coming year with a moderate dose of inflation, financial intermediation will have to improve especially in the debt market.

Infrastructure financing and investment in industry will require debt financing for medium to long term to supplement traditional bank financing.

As Government finances both at Central and State levels improve with the growth in the economy, the negative savings rate in the public sector is turning into positive since last five years. The gross domestic savings have been around 30% of GDP on a more or less sustained basis. The combined fiscal deficits are falling enabling the channelisation of financial savings to the private sector. This may create greater demand for debt securities.

An amendment to the Banking Regulation Act has been introduced in the Parliament. This would, if passed, enable the removal of 25 per cent minimum Statutory Liquidity Ratio as and when feasible. The Government Securities Bill (that will replace the Public Debt Act) has been approved by the Standing Committee in Parliament. The passage of the Government Securities Bill will make possible introduction or new instruments like STRIPS. STRIPS is the acronym for Separate Trading of Registered Interest and Principal of Securities. STRIPS let investors hold and trade the individual interest and principal components of eligible treasury notes and bonds as separate securities. STRIPS are popular with investors who want to receive a known payment on a specific future date. STRIPS are called "Zero-coupon" securities. The only time an investor received a payment from STRIPS is at maturity. STRIPS are not issued or sold directly to investors. They can be purchased and held only through financial institution and Government securities brokers.

The current account deficit for India has been widening. This reflects heightened investment activity in the country and hence greater absorption of capital flows. Gross capital inflows have gone up by more than half to $ 227 billion while the net inflows have almost doubled to $ 45 billion. The net inflows through external commercial borrowing have risen more than five fold to $ 16 billion. The Prime Minister's Economic Advisory Council estimates that net FDI will almost double to $ 15 billion, and portfolio flows will grow 76% to $12.5 billion in 2007-08. There are, in fact, some tightening in External Commercial Borrowings area to rein in the Rupee appreciation vis-à-vis the US dollar. The money raised from ECBs is either to be kept abroad until the company actually needs it in India or kept abroad and spent on foreign currency expenditure.

The robust growth in industrial activity has resulted in strong credit growth, which has created strong competition for available resources. It has become incumbent that bond financing supplements traditional bank financing to take care of the growing credit needs of the economy. Resource allocation has to be more efficient.

CONCLUSION

The role of a healthy corporate debt market as a channel that links society's savings into investment opportunities is of vital importance for several reasons. For the issuer, it provides low cost funds.For the investor, there exists a yield premium opportunity in comparison to traditional deposits at banking institutions and increases the investment opportunities in different type of instruments. The basic philosophy of developing a diversified financial system with banks and non-banks operating in equity market and debt market is indeed that it enhances risk pooling and risk sharing opportunities for investors and borrowers.

In many countries, debt market is larger than equity markets. In fact, in matured economies debt market is three times the size of the equity market. Investment in equity being riskier, certain class of investors choose to invest in debt, based on their risk appetite and liquidity requirements. A vibrant debt market thus enables investors to shuffle, reshuffle their portfolio depending upon the expected changes. Debt market, in particular, provides financial resources for the development of infrastructure. Hence, a well functioning debt market becomes significant for all the market participants.

The debt market in India reforms aims at among other things, making available an active secondary market for operation of monetary policy through indirect instruments like Open Market for operations and repos. They can also be viewed as a systematic exercise for the development of the debt market as well as integration of financial market by making it deep, wide and transparent.

It appears that the Indian debt market, and the Government securities market in particular, is at a turning point on account of the various reforms and changes that are taking place in the system. The reforms have been linked to the operational autonomy of the RBI. Stabilization of the monetary policy was the aim. In 1997 there was the abolition of the automatic monetization through the issue of ad-hoc treasury bills. This system was replaced by Ways and Means Advances facility, within limits, to meet temporary cash flow mismatches for the Central Government.

The effect of the reforms over the years shows the complexity and difficulty that is intrinsic to the development of an efficient debt market. The development is not made by the regulator alone. It requires collaboration between the regulator and the market players. It also requires consultation between the two. In India, associations like Fixed Income Money Market and Derivatives Association of India (FIMMD) and Primary Dealers Association of India (PDAI) have helped this process well. There is also in existence an active Public Debt system wherein Primary Dealers have acted as a linking mechanism between the market and the Regulator. The heterogeneity of the market participants, some of whom have brought in to the Indian market the best international technology, risk management practices, know-how of the instruments, especially derivatives has also helped greatly.

Last but not the least the compliances emerged as a pre requisite for healthy development of debt market. Participants must therefore develop compliance management system. To do this they need to have designated compliance professional with specific and individual responsibility for compliance. The compliance management team should have access to the top management and periodically report the status of compliances with top management of the firm.

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LABOUR LAWS COMPLIANCE – A TOOL FOR GOOD CORPORATE GOVERNANCE

ARCHANA KAUL*

INTRODUCTION

The prosperity of any economy largely depends on industry. India has made considerable economic progress since its Independence. Most noticeable are the expansion and diversification of production both in industry and agriculture. New technologies were introduced in many industries. Industrial investment took place in a large variety of new industries. Modern management techniques were introduced. An entirely new class of entrepreneurs have come up with the support system from the Government, and a large number of new industrial centres have developed in almost all parts of the country. A good number of institutions were promoted to help entrepreneurship development, provide finance for industry and to facilitate development of a variety of skills required by the industry as well as agriculture. The Government also followed a policy of encouraging indigenous industries and provide them all facilities and encouragement. We have now a widely diversified base of industry and an increased domestic production of a wide range of goods and services.

THE CHANGING GLOBAL SCENARIO

Over the last decade, globalisation has become a dominant feature of the world economy, as more and more nations are becoming integrated into the global economy through trade and capital flows. Globalization is shaping a new system of international economic relations – be it in the fields of investment, production, trade, finance or technology. The main principles on which the entire theory of globalisation is based are as follows:

— Sustained economic growth, as measured by gross national product is the path to human progress.

— Free markets, without intervention from the Government, generally result in the most efficient and socially optimal allocation of resources.

— Economic globalisation, achieved by removing barriers to the free flow of goods and money anywhere in the world, spins competition, increases economic efficiency, creates jobs, lowers consumer prices, increases consumers' choice, increases economic growth and is generally beneficial to every one.

— Privatisation, which moves functions and assets from government to the private sector, improves efficiency.

— The primary responsibility of the Government is to provide the infrastructure necessary to advance commerce and enforce rule of law with respect to property rights and contracts.

Whether one is sanguine about the results of globalisation or suspicious and apprehensive, one has to accept the fact that we have travelled quite some distance along the road to full-scale globalisation. The current socio-economic scene is no longer what it was when we started on the journey. The parameters set by old perceptions and possibilities, have ceased to exist and inhibit. Today, we see a new era that has been created by the revolutionary advances that have been made in the use of technologies in the fields of transport, communication and 'Information Systems'. Many barriers that the world considered insuperable have disappeared like mist before the rising sun. They no longer provide one with immunity or permit one to live in isolation. Knowledge and information travel fast, giving one a glimpse of what is happening elsewhere and what can happen in one's own area. It is technology that has

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radiated visions of possibilities, generated new hopes and given rise to new dangers and temptations. One cannot be allergic to radical reflection, and the radical revision of confrontationist attitudes and mindsets. Old catechisms have to be given up and we have to respond to or deal with the new situations boldly.

CHANGES IN LABOUR MARKET STRUCTURE

Globalisation has resulted in global division of labour. The huge expansion in cross border capital, trade technology and information flows have become a defining feature of globalisation. The advent of WTO coupled with the lending policies of IMF and the World Bank have resulted in globalisation and privatization. The poor worker in a developing country may be working for long hours but his productivity is low as this worker lacks access to technology and skills. Productivity has become a central issue. Unemployment weakens the bargaining position of the workers and enables employers to hire workers on terms and conditions of work they dictate. Some of the emerging flexible labour categories are – casual and temporary workers, consultants, agency workers, home workers, daily workers, part-time workers and 'badli' workers.

Some recent data compiled by the World Bank collate the level of rigidity of hiring and firing rules in different nations -100 being the score of the highest conceivable rigidity. India is among the most rigid countries with a score of 48. China has a score of 30, Korea 34, Norway 30, Singapore closes to 0.

Source: BBC News, South Asia

LABOUR LAW REFORMS

Of all the economic liberalization reforms, labour market reforms have gained maximum attention. Globalization and Liberalization has forced government to give a serious thought to our labour laws. We have a plethora of labour and industrial laws. Some of them date back to the last decade of the 19th century or the early decades of the 20th century. They have been criticised as being ad hoc, complicated, mutually inconsistent, if not contradictory, lacking in uniformity of definitions and riddled with clauses that have become outdated and anachronistic, in view of the changes that have taken place after they were introduced many years ago.

It is widely argued by many economists that in the open economy and liberalized trade, the country can no longer afford to carry on labour market rigidities. The employers (industrialists) have been vehemently pressing for labour reforms on the plea that these are necessary for making Indian industry globally competitive and for attracting more of foreign direct investment. The existing laws, it is contended by employers, slow down growth and job creation. They say that under the existing labour laws, the churning of new skills is slower, companies lose cost cutting flexibility and ability to bounce out of recession quickly. Further, the employers contend that labour market will become more flexible with the amendments; more workers can be hired legitimately and can ask for better benefits including better work conditions, safety standards, welfare measures and health benefits.

It is argued that more than 100 developing countries have reformed their labour laws in response to competitiveness in the era of globalisation, but India remains among a select few countries with a rigid system of labour protection. Thus, there is a strong need for reappraisal of labour laws in the country. The Second National Commission on Labour has also advocated for the rationalisation of labour laws. The Commission has stated that rationalisation means only making laws more consistent with the context, more consistent with each other, less cumbersome, simpler and more transparent.

It seems to be pertinent to point out that China has drastically changed its system of labour market from a rigid security of employment to one in which labour is extremely mobile. It has greatly helped China in generating employment as well as successfully redeploying workers who were laid off in the process of restructuring of enterprises.

GLOBAL COMPETITIVE ENVIRONMENT AND EFFICIENCY OF INDUSTRY

Mention has been made above of making Indian industry globally competitive. It is absolutely crucial since the present economic scenario is governed by the philosophy of competition. In a regime of competition, this means that every nation has to acquire and retain sufficient competitiveness to be able to survive and prosper in world markets. It has, therefore, become a national necessity to acquire competitiveness. Neither the interests of the poor and unemployed, nor the interests of the affluent can be served without competitiveness. To succeed in this competition, we need the highest degree of efficiency. The progress that any nation makes, depends on the efficiency of its industries and the quality and adequacy of the services it can offer to its citizens. The importance of efficiency and quality is crucial when one has to compete in the global arena with nations that have had a head start over us and are, therefore, in a position of vantage, countries that are far ahead of us in all the indices of economic development. Our industry must be able to compete in the excellence and variety of our products, and the cost at which they are produced. This is a national imperative and, therefore, a matter of common concern to the entire nation.

Competitiveness depends not merely on technology, credit, inputs and managerial skills, but also on the contribution that labour makes. The commitment of the workforce to quality and productivity must therefore, be as high as that of any other partner in production. Such a high degree of commitment depends on a sense of belonging, partnership and commonness of purpose that we are able to impart to workers in every plant and industry. This commitment and the new work culture that it calls for, can be created only when workers feel that they are receiving fair wages, a fair share of profits and incentives, and the respect or consideration due to partners and fellow human beings.

COMPLIANCE AND GOOD GOVERNANCE

In the global competitive environment, compliance has assumed considerable significance. In fact, the thrust is on compliance and good governance. Good governance as expressed through factors like transparency, reliability, predictability and accountability is increasingly seen as a key factor in ensuring national prosperity. To meet the challenges of global competition, good governance is the means to that end. Good governance helps the industry employing large number of workers to achieve congenial relationship between employer and workman and leads to improved employee morale and higher productivity.

The need for compliance with the law has become a critical issue for industry and business organisations. Public interest on compliance is often focussed when either an individual or an organisation doesn't comply and they end up attracting the attention of the regulators and, through this, the media. This is high visibility non-compliance.

Professor Allan Fels A O, has very succinctly summarized the result of lack of a compliance culture and accompanying mechanisms in the following words:

"Non-compliant businesses face a range of regulatory risks including loss of reputation, suspension or cancellation of licence e.g. cancellation of Pan Pharmaceutical Ltd's manufacturing licence by the Therapeutic Goods Administration in April 2003 causing the largest medical products recall in Australia's history; and ASIC's crackdown on the financial services industry caused financial cost and business disruption in defending legal action and in extreme cases, termination of the business".

LABOUR LAWS COMPLIANCE

As stated above, compliance in the global competitive environment has assumed considerable significance. The compliance can be an effective tool for good corporate governance. Corporate governance is a strategy for which legal compliance is an operation plan. Legal compliance is the cornerstone of good corporate governance. The aim of good corporate governance framework is to protect and further the interests of all stakeholders in the corporate body.The labour laws, a major contributory in the economic development of the country, and good corporate governance have assumed added significance in the changing global competitive environment. Compliance of various labour laws is as important for good corporate governance as any other corporate, economic and securities laws. It is important to mention that existing labour laws are applicable to all the sectors, but unfortunately Indian labour for whom these laws have been enacted are not much conversant about these laws. The malice of unfair labour practice and victimization is still at large. Compliance of labour legislations is neglected and nobody treats non-compliance as a heinous crime. That apart, it has been witnessed that no government machinery comes to the rescue of the workers at the time of distress.

The workforce is the foundation of every business and it is therefore essential that business enterprises employing personnel, both in the executive cadre and also those categorized as workers in the context of labour laws are fully aware of the laws and regulations relating to this resource. Further, considering the number and the complexity of various labour laws, independent professional support and objective assurance is essentially required on a prompt and proficient basis to advise on the interpretation of applicable legal provisions in a variety of circumstances to ensure compliance of such laws by the industries and commercial establishments.

BENEFITS OF LABOUR LAWS COMPLIANCE

Before discussing the benefits of labour laws compliance, it is useful to understand the positive benefits of an effective compliance programme to business industries. An effective compliance programme 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 employees are aware of their rights and obligations, customer service improves and the employees become 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, sustain itself for long term and maintain its reputation, and may avoid or reduce the negative effects of litigation and regulatory intervention.

The compliance of labour laws would benefit employees in terms of increased social security, lower absenteeism and congenial atmosphere. Transparency of records will create confidence in the employee and a sense of belonging to the organization. The employer would gain in terms of lower penalty, higher productivity and an increased sense of belonging on the part of workers. The compliance will bring about transparency in operations so essential for industrial peace. Directors of firms/companies will be relieved of penalties and prosecutions. At the same time, the compliance would help the Government in ensuring that the workers have not been deprived of benefits to which they are entitled, thus providing a net for social security. Moreover, the compliance will also help in reducing industrial disputes, which arise due to non-compliance of legal provisions.

LABOUR LAWS COMPLIANCE REPORT BY A PRACTISING COMPANY SECRETARY

Compliance of labour laws can be an effective tool for good corporate governance in industry. This can be achieved by introducing Labour Laws Compliance Report (LLCR) by an independent professional. Such a system of verification of compliance by an independent professional would strengthen the hands of the Government and protect the interests of the industry and save it from penalties and prosecutions.

Labour Laws Compliance Report (LLCR) is a unique concept. Mention should be made that the focus of all other compliances/audits is on financial implications on company/business entity, with little consideration of human values. The scope of Labour Laws Compliance Report would include scrutiny of records of factories, industries and commercial establishments for ensuring compliance of the provisions of applicable labour laws. Further, it will also report compliance or non-compliance of labour laws by these establishments and suggest remedial action.

A Company Secretary being a compliance oriented professional can help avoiding the disputes by making mental set up of the industry to properly implement the labour laws. The educational background, knowledge, training, and exposure that a Company Secretary acquires, makes him a versatile professional capable of rendering a wide range of services to companies of all sizes, co-operative and other corporate bodies, firms etc. He is associated with the planning process, judgement, and compliance of various laws, financial matters, administration of general management and administration of tax laws. A Practising Company Secretary apart from acting as conscious keeper of the company, advises on good governance practices and compliance of corporate governance norms as prescribed under the Companies Act 1956, Listing Agreement with Stock Exchanges and various other laws, rules and regulations.

At present, Labour Commisioner, Deputy Labour Commissioner and Inspectors annually visit the establishment, conduct an examination of the applicable labour laws and prepare a Report. It is possible that the examination conducted by the Officers mentioned above, may or may not be satisfactory as a result of which workers may be deprived of their genuine benefits many a times. It is in this context, a Practising Company Secretary who is an independent, qualified professional having adequate knowledge of labour laws, is competent enough to render value added services in ensuring the compliance of these laws to protect and further the interests of labour, industry and all stakeholders. He can support and advise industries and establishments significantly in improving the level and standard of compliance of various labour laws. The timely inspection, verification, advice and guidance to the industries/ establishments by the Practicing Company Secretaries would help them in early detection of non–compliance thus enabling them to meet the legal requirements in true letter and spirit. The Report prepared by a Practising Company Secretary may be annexed with the Board's Report to appraise the shareholders and be used as a document for all purposes.

CONCLUSION

World economy has been undergoing swift changes in the last three decades in all segments of human activity thus forcing individual countries to fine-tune their economic activity in line with dynamic changes that have been taking place. Industry is not an end in itself. It is a social activity undertaken to meet the needs of society. All economic activity is the result of interdependent interests, and co-operation among the various factors that together constitute the cycle of economic activity. Globalisation has not altered this fundamental; it has underlined its importance for communities that choose to enter the arena of competition.

Policy-makers no longer believe that natural resources hold the key to income, growth, development and prosperity. Now they believe that India would grow into a significant economic power in the world because of its human resources. But without labour reforms, sustainable development and prosperity would elude India. In fact, the world and the world's view of all resources have changed considerably since the time India's labour laws were enacted. Human resources are now recognised as the horses that draw the economy forward. Human resources are now regarded as the horses that 'draw in' natural resources, financial capital and technology. It is time for change. India's new labour laws and regulations should regard human resources as the horses of the economy.

If India wishes to shine better, it has to boost the marketability of its human resources. India's labour laws have to work towards 'drawing in' human resources — entrepreneurial talent and employees — into the market so that natural resources and savings will follow. This will boost the nation's marketable and measurable output and make India shine brighter.

Changes in the legal and regulatory regimes are taking place the world over. The move is towards simple and business friendly laws with stricter penalties for non-compliance. India has witnessed a series of legal and regulatory reforms in various sectors during the last decade. While initiatives in modern legal and regulatory systems are significant components of the new business environment due to the emergence of market oriented competitive system, equally important would be strict adherence to the laws, regulations and rules for effective functioning of the industry and business organisations.

Business enterprises are required to comply with the legal obligations to ensure good governance. Compliance of labour laws by industries and commercial establishments would create transparency, accountability and efficiency across the business enterprises by streamlining interaction and facilitating collaboration within and between the various sections of the enterprises. Accountability and the rule of law require openness in disclosure of information so that performance and compliance to law, can be verified at all levels including the general public.

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ACHIEVING PROFESSIONAL EXCELLENCE FOR KPOs & LPOs

RUCHI SINGHAL*

INTRODUCTION

Globalization has necessitated companies to be cost competitive while being innovative in the delivery of products and services; to engage in greater specialization of their human resources and other assets on a global basis; and in general, to focus on achieving economies of scale and scope.

In the globalised and dynamic business environment, various concepts, issues and methods of doing business have emerged, to challenge the traditional concept of doing business. Since the world has shrinked to become a global village, enterprises compete with each other and strive for the patronage of global customers in order to achieve their business objective, e.g. profits, sales, market share etc.

In this context, it would not be out of place to mention that the current trend in outsourcing has been in response to increased competition, willingness to concentrate more on mainstream activities, to reduce fixed and variable costs, to make processing more efficient, and to concentrate on higher value added activities.

CONCEPT OF OUTSOURCING

The outsourcing phenomenon is generally referred to as a practice of subcontracting of business processes to an outside service provider with the primary aim of reducing operating, administrative, and transaction costs. Outsourcing entails the transferring of an organisation's repeated non-core and core business processes to an outside provider to achieve cost reductions while improving service quality. Outsourcing can take place anywhere and locations are no constraints; hence the outsourcing practices work for the client within the same city, state of the same country or in another country.

When outsourcing takes place across borders, it is termed as offshore outsourcing. It is now an integral part of the modus operandi of businesses to derive benefits, not just from cost savings, but also in terms of overall focus and business development.

Working Process of Outsourcing

Working process of outsourcing varies from project to project, particularly keeping in mind the activity outsourced. However, generally speaking outsourcing process can be dealt as a four step process. Steps are not formal and hence, interlinking of steps may also arise.

The table below illustrates as to how the process of outsourcing actually works:

Phase	*Feasibility Study*	*Month to Outsource*	*Trail Project*	*Outsourcing*
Typical Timeline	4 weeks ⟵⟶	4 weeks ⟵⟶	3 months ⟵⟶	ongoing ⟵⟶
Question addressed	Which process should I outsource, how should I do it & what are the benefits for me/ us?	Who is the best vendor, What is the implementa-tion plan chalked out & how would I prepare my organization and set expectations ?	What works & what doesn't in getting the services/ project delivered?	How do I enhance my outsourcing capability to minimize the benefits in terms of cost, clients & minimize the cost to my organisation?

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

The priority is to recognize the processes and/ or systems which are to be outsourced. At the same time, various ways must be designed to recognize the processes. Many options are available, right from using an external offshore provider to establishing and operating one's own offshore facility. After defining this, the implementation approach and plan may be developed, costs may be determined and the innate benefits and risks can be evaluated.

After receiving the approval to proceed, a vendor is required to provide the offshore facility or one may choose to establish and provide one's own facility system.

THIRD GENERATION OUTSOURCING SERVICES

The business process outsourcing sector has now graduated to the third generation services, or BPO Version 3.0. This is far too complex from what the industry started with. In order to have greater understanding, it is important to note various versions of outsourcing, which are discussed herein below.

Version 1.0 of outsourcing involved transcribing medical records, answering phone calls and data entry. Here, outsourcing was primarily based on cheap labour and cost savings.

In *Version 2.0,* the firms graduated to doing problem solving and decision making tasks such as processing insurance claims, enhancing limit on credit cards etc. Basically it included rule based processing and involved 'lift and shift' kind of operations, focussing on getting better productivity.

While the *Version 3.0* is being incorporated by BPOs, it is still in its infancy. What distinguishes Version 3.0 from the other versions is perhaps that the companies are recruiting experts with upto 15 years of experience with higher billing rates.

Outsourcing Version 3.0: KPOs & LPOs

The new version of outsourcing is marked by activities involving developing structured products for investment banks, using statistical tools based patent valuations, providing actionable legal and engineering reports for products that can be launched in multiple global markets etc.

These activities paved the way for new areas of outsourcing represented by Knowledge Process Outsourcing (KPOs) and Legal Process Outsourcing (LPOs).

Knowledge Process Outsourcing (KPOs)

While the outsourcing of information technology services continues to dominate the trend in the form of Business Process Outsourcing (BPO), companies in various industries have, over the past years, been outsourcing more integral parts of their businesses. Higher-end knowledge work, for one, is increasingly making its way from the U.S. and taking root in countries such as India, in the form of Knowledge Process Outsourcing (KPO). The KPO phenomenon, driven by the success of the BPO trend, is the wave of the future, many say, because India is considered as the main KPO provider, owing to large pool of knowledge professionals in various sectors. As such, a KPO company can bank upon finding a delivery item that possesses the requisite professional skills to support any U.S-based organization in its high-end, knowledge-based services and core processes.

Numerous kinds of services can be provided under the umbrella of KPO. Following is the list of some of the popular KPO Outsourcing Services:

— Data Research and Analytics
— Risk assessment and insurance underwriting
— Medical Content and Services
— Pharmaceuticals and Biotechnology
— Intellectual Property Research
— Animation and Simulation Services
— Learning Solutions
— Writing / Content Development Services
— Training and Consultancy

Legal Process Outsourcing (LPOs)

Legal process outsourcing is the industry in which in-house legal departments or organizations outsource legal work from areas where it is costly to perform, such as the United States or Europe to areas where it can be performed at a significantly decreased cost, primarily India. Legal process outsourcing is a high end industry that has been growing rapidly in the recent years.

But it isn't just cost savings that make the LPO an attractive business prospect for U.S. companies and forward-looking law firms. As is the case with the BPO and the KPO, LPO users can avail of a range of benefits, not least saving time on getting important work done. LPO users can gain more operational efficiencies by focusing on core business activities while having access to a breadth of skills, technology and service offerings, at a reduced cost.

A number of services can be provided under the LPO regime of which the following services in general are the most demanding, which *interalia* include:

— Legal Research

— Document Drafting

— Intellectual Property Research

— Advisory services

— Paralegal Services

— Administrative and Secretarial activities

GLOBAL OUTSOURCING BUSINESS SCENARIO

Outsourcing is the buzzword in today's globalised business environment. In this context, it will be useful to examine estimates for 2005 of global expenditure for outsourcing activities by different sectors (Table 1). While studying and analyzing the table, it must be remembered that most of the global spending is attributed to outsourcing and offshoring decisions by companies in the Organisation for Economic Cooperation & Development (OECD) countries.

Table 1: Global Spending on Outsourcing, 2005

Sectors	*Outsourced Processes*	*Estimated Value (USD Billion) (% share)*
Human Resources	• Payroll administration • Benefits • Training Programmes	$13 (2.9)
Engineering	• Testing and Design of Electronics • Chips • Machinery • Car Parts	$27 (4.9)
Infotech	• Software Development • Tech support • Web site design • IT infrastructure	$90 (16.5)
Analytics	• Market Research • Financial Analysis • Risk Calculation	$12 (2.2)
Customer Care	• Call centres for tech support • Air Bookings • Bill collection	$41 (7.5)
Manufacturing	• Contract production of everything from electronics to medical devices	$170* (31.1)
Finance and Accounting	• Accounts payable • Billing • Financial statement • Tax statement	$14 (2.6)
Logistics and Procurement	• Just-in-time shipping • Parts purchasing • After-sales repair	$179 (32.8)
Total		$546 (100.0)

Note : *Estimate only for electronics

[Source : Adapted from Business Week (2006)]

The above table, amply makes it clear that there will be huge amount of spending in outsourcing business globally, thus corroborating the fact that today's business environment is knowledge driven which in turn reaffirms that the professionals have larger role to play in the success story of corporates in the global dynamic business environment.

The total global expenditure however is likely to be larger as the estimates excludes spending on emerging Knowledge Process Outsourcing (KPO) segments including Legal Process Outsourcing (LPO), intellectual property (IP) research, biotech and pharma research and development (R & D), business and technical analysis, animation and design, writing and content development, and data analytics.

INDIA: THE PREFERRED DESTINATION FOR KPOs / LPOs

India has consistently been ranked as the most preferred sourcing destination by AT Kearney, McKinsey Global Institute (MGI), Forrester, Gartner Inc. from time to time. Currently, more than 50 per cent of the Fortune 500 companies offshore to India. In fact, the success of the BPO model has been the major contributing factor in building Brand India abroad. This sector accounted for 4 per cent of India's GDP and 29 per cent of exports in 2004-05. This is further projected to grow to 7 per cent of GDP and 35 per cent of exports by 2008-09. India's software and services export sales are well on track to meet a target of $60 billion for 2010.

To further support the above argument, Table 2 points out that India is a preferred global destination for outsourcing business. Table 2 also suggests that India has had a degree of success in operating in all sectors and at all levels of business processes, ranging from basic data processing and call centre operations to sophisticated functions like software development, research and design of engineering processes, demand management, mortgage processing, healthcare operations, and banking among others.

Table 2: India and the Major Players in Outsourcing

Company	*Head-quarter*	*Specialty*	*Location*	*Est. Total Revenue, (USD billion)*
Accenture	US	Software Development, Network Support, Finance & Accounting, Human Resources (HR) Procurement, Insurance Operations, General Banking	India, Philippines, Spain, China, Czech Republic, Slovakia, Brazil, Australia	> $5
ACS	US	F&A, HR, Payroll, Procurement. Telecom, Transportation, Healthcare Operations; General Banking, Mortgage Processing	India, China, Dominican Republic, Ghana, Guatemala, Jamaica, Malaysia, Mexico, Spain	$1-$5
Capgemini	France	Software Development	Canada, Mexico, Spain, Poland, India, Australia	$ 1-$5
Cognizant Technology Solutions	US	Software Development, Network Support	India, China, and Canada	$0.5-$1
Convergys	US	Call Centres	India, China, Indonesia, Malaysia, Philippines, Sri Lanka, Taiwan, Thailand, Argentina, Brazil, Colombia, Mexico, Australia, Canada	> $1
CSC	US	Software Development, Insurance Operations, Demand Management	Canada, Bulgaria, Ireland, India, Mexico, Malaysia, South Africa, Spain	> $5
EDS	US	Software Development, Network Support; F&A, HR, Payroll, Demand Management, Procurement, Insurance, General Banking, Telecom, Transportation, Health Care Operations	Canada, Mexico, Brazil, Argentina, India, Australia, South Africa, Spain, Hungary	> $5
HCL Technologies	India	Software Development, Network Support, R&D/ Engineering, Financial Services	India	$0.5-$1
Hewitt Associates	US	HR, Payroll, Procurement	India, China, Philippines, Thailand, Malaysia, Czech Republic, Poland, Hungary, Brazil, Mexico, Argentina, Chile	> $5

Company	*Head-quarter*	*Specialty*	*Location*	*Est. Total Revenue, (USD billion)*
Hewlett-Packard	US	F&A, Payroll, Procurement	India	> $5
IBM	US	Software Development, Network Support, F&A, HR, Payroll, Procurement, Insurance Operations	India, Brazil, China, Mexico, Belarus, Philippines, South Africa, Romania, and Argentina	> $5
Infosys Technologies	India	Software Development, Network Support, Banking, Mortgage Processing	India, Czech Republic, China, Australia	$1-$5
Patni Computer Systems	India	Software Development, Network Support, R&D/ Engineering	India	$0.5-$1
Satyam	India	Software Development, Network Support,R&D/ Engineering	India, China, Hungary, Brazil, Australia	$0.5-$1
SITEL	US	Call Centres	India, Philippines, Brazil, Spain, Mexico, Panama	$0.5-$1
SR.Tele-performance	France	Call Centres	Philippines, Indonesia, Mexico, Brazil, Argentina, Spain	> $1
Tata Consultancy Services	India	Software Development, R&D/Engineering, F&A, Telecom, Transportation, Hospitality Operations	India, Hungary, Brazil, Uruguay, Chile, China	$1-$5
TeleTech	US	Call Centres	India, Philippines, Malaysia, China, Northern Ireland; Spain, Mexico, Argentina, Brazil	> $1
Wipro Technologies	India	Software Development, R&D/Engineering, Demand Management, Mortgage Processing, Transportation Operations, Healthcare Operations, Banking, Mortgage Processing	India, Canada	$1- $5

Notes:

(a) The companies represented here include outfits that do over $500 million in offshore business a year and giants that take in billions through global outsourcing. The ranking is based on the frequency of queries from Gartner's 10,000 clients.

(b) Locations are arranged in order of current importance to the outsourcing company, which may well change in future.

[*Source*: Compiled from data by Gartner Inc.]

Keeping in mind the facts and figures in the table above, it is worth mentioning that Indian companies that can develop domain expertise with clear focus on high-end space, and create a proactive solution oriented and collaborative mindset will have an edge in capturing larger share of this market with high growth potential.

India's relatively abundant skill profile could also work to its advantage in the third wave of outsourcing that is expected to be more skill-intensive, as opposed to the first and second wave, which consisted of mostly labor intensive areas and productivity centered areas respectively.

Scope of KPOs in India

The KPO wave is recent, but already it has gained considerable ground, and experts predict further deepening, as industries such as financial and legal services rely more upon Indian intermediaries. KPOs aim to capture the best in Indian talent available in different fields. According to an Evalueserve report: "India has one of the largest pools of knowledge workers. The supply of skilled labour in India has been increasing at a steady pace. Indian universities churn out 2 million English-speaking graduates every year. Nearly 300,000 engineering graduates are added to the existing engineering labour pool of 2.1 million. As of March 2002, India had 840 business schools, which churned out 85,000 MBAs. In terms of skilled workers, while just over 5,000 IT graduates enter the labour market in Germany and 25,000 in the US each year, 120,000 enter the labour force in India."

Current estimates of the KPO market stand at anywhere from \$1 to \$3 billion. But according to a report by GlobalSourcingNow, the global KPO industry is expected to top out at a whopping \$17 billion by 2010, of which \$12 billion would be outsourced to India (Table 3). A report by Evalueserve also predicts that India will capture more than 70% of the KPO sector by 2010, from the current share of 56%.

In order to have concrete view of the KPO market in the coming years, here is the breakup of KPO services as provided by NASSCOM:

Table 3 : THE 2010 KPO CAKE

How the KPO market will look like in 2010	
Data search, integration & management	5
Biotech & pharma (contract research organisations, lead optimisation, manufacturing processes)	3
Engineering and design	2
Remote education & publishing	2
R&D	2
Animation & simulation services	1.4
Others	1.6
Total	17

(In \$ billion)

Source : Nasscom

Apart from the self explanatory figures mentioned above, it is pertinent to note that the KPO boom is expected to overtake the BPO business, and as the KPO sector grows, over 300,000 new jobs will be created. Further, a report by Forrester Inc. estimates that an additional 35,000 new jobs will move to offshore locations by 2010, while a massive 79,000 more will shift to offshore locations by 2015. Again, nearly 70% of those jobs will be shifted to India.

Scope of LPOs in India

In terms of legal process outsourcing, India can offer high quality skilled knowledge work, such as legal research, preparation of pleadings, docketing, proof-reading, transcription of recorded documents, litigation support, case studies, immigration visa processing, and even law firm marketing. The LPO industry has extremely high growth potential in India, and according to the latest estimates from various sources, it is expected that LPO market may create 79,000 jobs by 2015.

It goes without saying that the LPO trend offers great benefits. India's legal services are affordable, efficient, and above all, skilled. Outsourcing legal work to India costs up to 80% less than the cost of using the services of American law firms.

The law professionals in India are well equipped with analytical and research skills and the ability to write and speak in English. Like the U.S. and the U.K., India is a common-law jurisdiction rooted in British legal traditions and systems. Indian legal training and Appellate and Apex Court proceedings are conducted in English; legal opinions are written in English; lawyers in India are trained with similar rigor and methodologies as those in the U.S. Hence, it can be said that India is best suited to the LPO business paradigm.

Benefits of KPOs/ LPOs to India

It is clear from the preceeding discussion that KPOs/ LPOs are the potential areas for professionals to render their services in the present globalised settings. Following are some of the important points, which in particular makes India the best suited location for KPO and LPO industry. In other words, benefits of choosing India as preferred KPO/ LPO destination by other countries are briefly given below:

— *Cost* : Using an offshore Professional Support Professional/ Lawyer is 30-55% cheaper than using or hiring the services of a USA/ UK based staff.

— *Time* : Time zone differences work in favour of time bound projects. This means that projects get 24 hour attention and may be completed overnight.

— *Language* : There can be no communication gap on account of differences in languages as Indian Professionals are well versed in English including the lawyers as all courts in India function in English.

— *Quality* : The Indian intellect and intelligence is known to the world. The same may be applied to the Indian professional and legal brain.

— *Resource accessibility and elasticity* : The ability to ramp up and down to meet short term requirements without compromising on quality.

— *Relation of legal systems between India and the USA and UK* : Indian laws share an apparent similarity with UK because both follow the Common Law system. As far as the USA laws are concerned Indians have an in-depth knowledge of their laws too.

ROLE OF PROFESSIONALS IN KPO/ LPO PARADIGM

The work to be performed in the Knowledge and Legal Outsourcing Process industry is of a specialised nature. The ideal KPO/ LPO professional should possess good computer skills, be domain specialist, possess a high level of conceptualisation, have the aptitude to manage different database systems and be research-oriented. Additionally, they should be consistent with good english language and writing skills and must hold a professional degree.

In today's competitive worldwide market for legal services, it is pertinent to note that while providing services in context of KPOs/ LPOs, professionals need to keep in mind following considerations, *interalia*: the ability to deliver highest quality, clearly stated service, deep knowledge of client markets and their individual commercial and regulatory standards; acceptance by regulators; and perhaps most importantly, understanding of the client's commercial objectives.

In this context, Company Secretaries have larger role to play in providing KPO/ LPO services, particularly in view of the educational background, knowledge, training and exposure that they acquire, which makes them a versatile professional capable of rendering a wide range of services under the KPO/ LPO paradigm.

Further, Company Secretaries with considerable exposure to trade and industry together with expert exposure in corporate governance hold an advantage over professionals from different backgrounds. In the era of globalization, only the professionals with indepth market knowledge will be better able to serve KPO & LPO clients. This is a field where Company Secretaries have strong and established expertise.

OPPORTUNITIES FOR COMPANY SECRETARIES

Services that can be rendered under the KPO/ LPO regime are enormous. However, for the purposes of captioning the services into broad heads, following opportunities have been highlighted along with specific areas under which such opportunities can be explored by Company Secretaries.

KPOs

Business and Technical Analysis:

— Project planning
— Capital budgeting
— Funds flow management
— Working capital management and control

Financial Market Management:

— Advisor/ Consultant in issue of shares and other securities
— Drafting of various documents related to issue of securities and obtaining various approvals
— Listing/ Delisting of securities
— Private placement of shares and other securities
— Buy back of shares and other securities

Financial data mining and modeling:

— Book keeping and accounting functions taking into account Indian accounting standards, US GAAP and International accounting standards

— Compilation of financial statements

Business and Market Research:

— Preparation of project reports and feasibility studies

— Assessing the financial markets

— Competitive analysis of the industry for various research purposes

— Preparation of agency rating reviews

— Business valuations

Taxation Consultancy:

— Advisory services on tax management and tax planning under various direct and indirect tax laws

— Preparing/ reviewing various returns and reports required for compliance with the tax laws and regulations

Management Information System Analysis:

— System analysis and design

— Developing management information system reports and controls

— Advising on various aspects relating to information technology and e-commerce

International Trade and WTO services:

— Advising on matters related to IPRs under TRIPs Agreement of WTO

— Advising on matters related to anti-dumping, subsidies and countervailing duties

— Advising on Foreign Trade Policy and Procedures

International Investments Services:

— Advisory services with reference to ADRs, GDRs, IDRs, preferential allotments, sale of stake, FDI, debts, exchange traded derivative instruments, mutual funds, money market instruments

— Credit appraisal

— Wealth management

— Compliance with statutory requirements

Insider Trading Regulations:

— Ensuring compliance of takeover regulations and other applicable laws and rules

— Ensuring compliance with Prohibition of Insider Trading Regulations including maintenance of various documents

Corporate Restructuring:

— Advising on valuation and enforcement of mergers, acquisitions, takeovers, leveraged buyouts, joint ventures and foreign collaborations

Corporate Communications:

— Communication with stakeholders, Government and Regulatory Authorities etc.

— Advisory services for Brand equity and image building

Information Technology Services:

— Compliance with cyber laws

— Conducting Board Meetings through video-conferencing and teleconferencing

— Advising on software copyright and licensing

— Maintenance of statutory records in electronic form

— Sending notices to various stakeholders by electronic mode

— Filing of forms/ documents in electronic mode with various statutory authorities

Strategic Management:

— Advisory services in relation to legal structure of the organization

— Business policy, strategy and management

— Formulation of the organizational structure

Insurance Services:

— Advisory services in relation to insurance fund management, insurance marketing, claims management, product development and allied activities

— Risk management in relation to various insurance aspects

— Preparation of relevant papers and documents for ensuring speedy settlement of claims

Risk Management:

— Formulating organisation's risk management policy

- — Establishing relationship among enterprise risk management, performance and value.
- — Ensuring Internal Control Integrated Framework

Banking Services:

- — Credit Appraisals
- — Loan Syndication and Documentation
- — Asset Liability Management
- — Trust Management

Corporate Governance Services :

- — Advising on good governance practices and compliance of Corporate Governance norms as prescribed under various laws, rules and regulations

Corporate Secretarial Services :

- — Promotion, formation and incorporation of companies and matters related therewith
- — Filing, registering documents including forms, returns and applications by and on behalf of the company
- — Maintenance of secretarial records, statutory books and registers
- — Arranging Board/ General meeting and preparing minutes thereof
- — Issuing shares and their transfer and transmission

Secretarial Audit and Compliance Services:

- — Secretarial Audit and Compliance Audit
- — Designing appropriate compliance programmes for ensuring compliance with various laws, rules and regulations, taking into account international best practices
- — Preparation and filing of Annual Return
- — Pre-certification of forms

LPOs

Drafting of Pleadings and Conveyancing:

- — Preparing and processing variety of legal paperwork including court pleadings and correspondence, such as opinions, proceedings, ordinances, contracts, orders, motions, complaints, warrants, commitments, indictments, decisions, requests for investigation, affidavits, briefs, jury instructions, and other documents
- — Preparing legal documents in standardized forms and formats from general information

Intellectual Property (IP) Research:

- — Advising on commercialization, valuation and enforcement of IPRs
- — Advising on legal issues surrounding the rights of ownership of ideas, inventions, patents, copyrights, trade secrets or trademarks
- — Application or registration in respect of the above
- — Drafting of licensing agreements, deed of assignments in respect of various kinds of IPRs

Real Estate:

- — Handling matters related to the production, analysis and negotiation of application for acquisition of conventional mortgage loans and real estate investments
- — Negotiating terms, conditions, interest rates, etc. to obtain a flow of acceptable applications
- — Inspection of property and negotiating final commitment terms and conditions
- — Preparing correspondence on application processing

Legal Document management:

- — Maintaining files of correspondence and legal documents
- — Comparing forms and legal references with reference books to ensure that they are accurate
- — Maintaining records of cases, court calendars, case histories and court dates
- — Maintaining and preparing routine statistical reports

General Legal Administration:

- — Preparing general correspondence, claims, requisitions, personnel forms and other material
- — Transcribing notes, memos, legal documents and minutes of meetings from tape
- — Taking and transcribing oral dictation of notes, memos, legal documents and minutes of meetings

CONCLUSION

There is an international consensus that the talent and knowledge is 21st century wealth. Prosperity, justice and welfare now seem to depend on the creation of high skilled professionals. Outsourcing via KPO and LPO is the destination the professionals are looking at.

The emerging paradigm is opening a host of opportunities for professionals like Company Secretaries to capitalize on by occupying centre stage. Such continuous exploration of scope of practice calls for focused approach to deliver value added services.

It is in this context that Company Secretaries, being knowledge professionals acting as corporate nucleus are best suited to provide range of advice and services to businesses from governance and compliance to transactional and enforcement issues. Further, to reap full benefits of the opportunities that underlie the LPO/ KPO paradigm, it is pertinent for Company Secretaries to keep themselves fully prepared in terms of competence, knowledge and understanding of new trends and developments.

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TRANSFER PRICING IN AN INTERNATIONAL TRANSACTION — A NEW AREA OF PRACTICE

AMIT KUMAR DAS*

OVERVIEW

In the globalized economy multinational corporations (MNCs) having diversified business interests operate in several countries. They usually try to reallocate their resources and business operations. The purpose of such reallocation is to reduce their tax liability. Their modus operandi generally, involves working with prices of factors to play around with fiscal statutes of the countries involved. The objective is to reduce the aggregate tax burden. This article seeks to explain in brief various aspects involved in practicing in this area and also refers to the issues that arise with reference to transfer pricing of intangibles, as Company Secretaries are also especially concerned with intellectual property rights.

Transnational business organizations earning revenues from different countries have tax implications, especially with regard to transfer pricing transactions. Transfer pricing taxation is an upcoming field where competent professionals like Company Secretaries are of great help. Company Secretaries can display requisite knowledge and expertise to deal with transfer pricing taxation mechanism by specializing in this field.

MNCs do show a tendency to shift their revenues to countries having low tax rates or tax exemptions. This may be detrimental to the fiscals of a country from where they shift their revenues. India is a developing country with booming economic growth. However, India does not have the luxury to ignore such practices undertaken by MNCs, which have a negative impact on our domestic tax base. To counter this manipulative practice by MNCs, India has introduced necessary provisions in the Income Tax Act, 1961. The provisions effective have taken effect from Assessment Year 2002-03. Section 92 of the Income Tax Act, 1961 has been amended to that effect. Sections 92 to 92F were introduced from the Assessment Year 2002-03 to deal with transfer pricing transactions.

THE LEGAL JARGON

Several terms are used in transfer pricing transactions. They are like, international transaction arms length price, associated enterprise, uncontrolled conditions, etc. The usage and implication of these terms is being explained later.

As we are aware, in case of any 'business transaction', basic elements like costs, income, interest, profits, etc., get involved. Similarly in international transaction similar elements get involved on a broader scale.

The 'transaction' in case of transfer pricing, must relate to purchase, sale or lease of tangible or intangible goods or services or lending or borrowing of funds (but not in the nature of hawala transactions), having effect on income or profit or losses or assets of an enterprise. Now, 'international transaction' in the context of transfer pricing, is a transaction between two or more 'associated enterprises', either of whom or both of them are, non-residents. Intra corporate transfer of costs, expenses, benefits, etc. either on mutual agreement or otherwise is to be considered as international transaction. The term 'associated enterprise' defined under section 92A of the Income Tax Act, is taken in relative terms. In commercial usage, associated enterprise generally means a subsidiary of the MNC. Sometimes they are called intermediaries. MNCs do take active participation in management of intermediaries in different modes. 'Enterprise' is defined under section 92F(iii) of the Income Tax Act, 1961. It also includes a permanent establishment.

Arm's length price is a price applied or proposed to be applied in a transaction between persons other than

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associated enterprises in uncontrolled conditions [Section 92F(iii) read with Rule 10A]. It is a price arrived at disregarding any influence from associated enterprise. It is like simulated price arrived between parties not associated with each other. However, arm's length price technique would be dispensed with if computation of income results in loss or reduction of income vide section 92(3).

Section 92C read with Rule 10B deals with various methods of calculating arm's length price. Out of the methods stated under Rule 10B of the Income Tax Act, the most suitable method should be used in calculating arm's length price of an international transaction. The suitability will depend upon the nature of transactions entered between associated enterprises or classes of enterprises. An Assessing Officer (AO) under section 92C of the Income Tax Act, can determine arm's length price of an international transaction even after it has been determined by the assessee, only if such Assessing Officer is in possession of material documents and other information which may discount the determination of arm's length price by the assessee. When, more than one arm's length price is determined then arithmetic mean of such prices is taken into consideration.

An A.O. may refer any matter related to calculation of arm's length price of an international transaction to a Transfer Pricing Officer (TPO) with previous approval of the Commissioner. Sections 92 (1) and 92E deal with maintenance of documents and information relating to an international transaction. It also requires a report from an accountant relating to such transaction. Onus lies on the taxpayer to prove that he has taken all care in calculating arm's length price in line with the provisions of the Income Tax Act.

In connection with income earned from abroad, it would be pertinent to note that India has entered into double-tax avoidance agreements (DTAAs) or tax treaties with many countries with a view to avoiding tax being on the same income in two countries, once on receipt (in the foreign country) and then on repatriation (to India). In case of conflict in relation to international transaction between two associated enterprises following the norm of lex situs of Private International Law, the respective domestic laws provisions will prevail. There are penal provisions under sections 271, 271AA, 2713A, 271G and 273B of Income Tax Act, 1961 to ensure compliance by the parties concerned.

TEXTUAL ISSUE

'Transfer pricing' means "the price charged when an article is passed from one part or department of a company to another. There are difficulties when the transfer is across national frontiers, as in the case of transnational companies, since the company may avoid taxes in a high-tax country by under pricing exports from it and over-pricing imports to it, thus shifting profits to countries with lower tax rates"[1].

It "refers to the pricing of goods and services within a multi-divisional organization particularly in regard to cross-border transactions. For example, goods from the production division may be sold to the marketing division or goods from a parent company may be sold to a foreign subsidiary, with the choice of transfer price affecting the division of the total profit among the parts of the company. This had led to the rise of transfer pricing regulations as the Governments seek to stem the flow of taxation revenue overseas, making the issue one of great importance for multinational corporations[2].

According to Enrique McGregor[3], "transfer pricing decisions are made frequently by multinational corporations, when a company transfers goods, performs services or licenses the use of intangible property to an affiliated entity, this transaction is regarded as a sale. The compensation paid in intra company transactions in the transfer price…. Improper management of transfer pricing can lead to the problem of double taxation and costly litigation. Transfer pricing problems arise when governments assert claims to the tax profits earned in the same transaction within each of their respective jurisdictions. It is important for the development of international trade that the rules and principles applied on each side of a transfer pricing transaction be compatible and that the differences that arise in different countries are revolved without significant disruption to the business."

The globalization through bilateral, multilateral and plurilateral treaties among countries has blurred national boundaries. As a result business transactions increased manifold across national borders. Transfer pricing is usually directed towards achieving non-tax business objectives by MNCs through selective business decisions. But in recent times it has become a tool for tax evasion in countries where they have presence where such countries have high tax rates.

Transfer pricing system is a bit complicated in the sense that several factors influence transfer price of an article, especially in international trading. They are performance measurements, capabilities of accounting systems, import quotas, custom duties, VAT, taxes on profits, etc.

Transfer pricing has not been defined in the definition clause of the Income Tax Act, 1961. There is an economics dimension to Transfer Pricing. Theoretically, if Marginal Revenue (MR) is greater than Marginal Cost (MC), output will continue till MC equals MR. Associate enterprise will continue to produce goods or render services till their MC is equal to MR. Under this conditions optimal level of output would be attained.

Multinational Corporations (MNCs) tends to shift their accounting base to low tax countries as stated earlier so as to reduce their overall tax burden. However, most countries enforce tax laws based on Arm's Length principles defined in the OECD (Organisation for Economic Co-operation and Development) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The loss in monetary terms sustained by a country due to such practices by MNCs may be huge. In U.S.A., there is Internal Revenue Code and Regulations for controlling transfer-pricing practices. Section 482 of this Code regulates taxing mechanism for controlling transfer pricing. Any foul play on the part of MNC would cost them huge through penalty provisions. For instance[4] on September 11, 2006, Glaxo Smith-Kline announced that they would be paying U.S. Authorities $3.1 billion in Taxes due from them for improper Transfer Pricing.

The transfer pricing taxation system refers to the taxation provided for in article 9, paragraph 1 of the OECD model convention, which provides:

"Where

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reasons of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly".

The arm's length principle is also provided in article 9 of the United Nations model convention in an identical form. It was endorsed by the United Nations Group of Experts on Tax Treaties between developed and developing countries. The Group recommended that governments should apply arm's length pricing wherever appropriate.

COMPUTATION OF ARM LENGTH PRICE AS PER DOMESTIC FISCAL STATUTES

As per Income Tax Act, 1961 arm's length price as per section 92F is the price applied (or proposed to be applied) when two unrelated persons enter into a transaction in uncontrolled condition.

Transaction includes an arrangement, understanding or action in concert (a) whether or not such arrangement, understanding or action is formal or in writing (b) whether or not such arrangement, understanding or action is intended to be enforceable by legal provisions.

An uncontrolled condition means that condition which is not controlled or suppressed or moulded for achievement of a predetermined result.

Section 92 has to be applied in every such case where International Transaction is involved between two enterprises and price agreed between them is different from arm's length price. Regarding tax adjustments under arm's length principle, OECD Guidelines are to be followed.

Traditional Methods in Computing Arm's Length Price:

(1) *Comparable uncontrolled Price Method (CUP)*

Rule 10B(a) explains this method by following steps as under:

(i) To identify the price in a comparable uncontrolled transaction. "Uncontrolled transaction" is defined in Rule 10A(a). It means a transaction between enterprises other than associated enterprises.

(ii) To make adjustments to account for difference which could materially affect the price in the open market.

(iii) The adjusted price is the arm's length price.

Suppose there are two unrelated corporations. Corporation X and Corporation Y. Corporation X belongs to France having its subsidiary X1 in Luxemburg. X sells Gadgets to X1. Then an external comparable transaction would be sale of Gadgets from another French

Corporation P and then sale on identical terms to another company Q in Luxemburg. An Internal Comparable transaction, would be either between X and Q or P and X1, with regard to trade in gadgets. Here 'Internal' referred to the fact that one of the parties involved in the hypothetical example involving comparable uncontrolled transaction.

(2) *Cost Plus Method (CPM)*

Rule 10B(c) defines this method. The steps are :

(i) The total costs (both direct and indirect) of production to the original supplier to an associated enterprise is calculated;

(ii) Gross profit margin which can be obtained in a comparable uncontrolled transaction is determined.

(iii) To make adjustments to the normal gross profit for transactional and other differences which can materially affect such profit in the open market.

(iv) The sum so arrived is taken at arm's length.

Here, direct costs and indirect costs incurred during production process or services rendered to associated enterprise are allocated to products under standardized practice. Gross profit mark up to cost arising from transfer or provisions of the same or similar property or services or by a over related enterprise, in a comparable uncontrolled transaction which would affect profit mark up. The sum arrived is taken as an arm's length price.

3. *Re-sale Price Method (RPM)*

This method is defined in Rule 10B (b). The steps are:

(i) To identify the resale price to an independent entity after purchasing the property or obtaining the services from an associated enterprise;

(ii) From the resale price, reduce the normal gross profit margin which can be obtained in a comparable uncontrolled transaction.

(iii) To make adjustments for functional and other differences which can materially affect the gross profit.

(iv) The adjusted price arrived at as above will be taken as Arm's Length price.

Under this method, the price at which property is purchased or services obtained by the enterprise from an associated enterprise is or are provided to an unrelated enterprise, is identified. The Resale Price is found by back calculation of transaction coming at the next stage of the supply chain and is determined by subtracting a gross mark-up from the sale price of an unrelated third party, with the appropriate gross margin being determined by examining the conditions under which the goods or services are sold and comparing said transaction to other third party transactions.

4. *Profit Split Method (PSM)*

This is defined in Rule 10B(d). This method can be applied in International Transaction if it involves transfer of unique intangibles and in multiple International Transactions, which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction.

The steps involved are:

(i) The combined net profit earned by the associated enterprises arising from international transaction is determined.

(ii) The relative contribution of each of the associated enterprises to the earning of such combined net profit is evaluated based on the–

(a) Functions performed.

(b) Assets employed or to be employed.

(c) Risk assumed by each enterprise.

(iii) The relative contribution of associated enterprises would be computed on the basis of reliable external market data which indicates the contribution of unrelated enterprises performing comparable function in similar circumstances.

(iv) The combined net profit is then split amongst the enterprises in proportion to their relative contributions as evaluated above.

(v) The profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction.

This method is mainly used in international transaction involving transfer of intangibles or in multiple international transactions which are also inter-connected so that they cannot be observed separately for the purpose of determining the arm's length price of any one transaction.

As stated earlier A.O. can determine arm's length price under a proceeding if he is in possession of material information about an international transaction, under section 92C(3) of the Income Tax Act. However, in other cases value of international transaction should be accepted without further scrutiny as per Circular No.12/ 2001, dated August 23, 2001.

5. *Transactional Net Margin Method (TNMM) : [Rule 10B(1)(e)]*

According to Sampath Iyenger's - Law of Income Tax, Vol.IV, P.6616[5], Transactional Net Margin Method is not necessarily different from what the Assessing Officers are prone to resort to when they find that no account or accounts are produced or are the accounts produced are not reliable. The normal margin of profit that is expected in the line of trade forms the basis of turnover of either purchases or sales, whichever is considered more reliable. The following steps are contemplated:

(i) Net profit margin of the associated enterprise is computed with reference to the sales, or costs or assets employed or any other relevant base.

(ii) Net profit margin that would have been realized, if the transactions were between unrelated enterprises under controlled conditions on the same basis is computed.

(iii) The profit margin as mentioned in item (2), is adjusted for factors relevant for international transactions and materially affecting the net profit as it would have otherwise been in uncontrolled conditions as between independent persons.

CHOICE OF METHOD

According to the same Treatise on Income Tax[6], the main Section and the Rule provide that the method that is chosen should be best suited to the facts and circumstances of each particular international transaction and it should also provide the most reliable measure of arm's length price in relation to the international transaction.

Section 92C(2) provides that the choice has to be made in the manner prescribed under the rules. It further contemplated possibility of more than one "most appropriate method", in which case, arithmetical mean could be adopted. But the reference to 'more than one most appropriate method' which is in superlative tense does violence to the English Language because there cannot be more than one "most appropriate method". What is referred is that there may be more than one appropriate methods both equally tenable.

The following factors are to be taken into transaction:

1. Nature and class of International transaction.
2. The class or classes of associated enterprise and their functions;
3. The availability, coverage and reliability of data necessary, degree of comparability, extent of reliability and comparable uncontrolled price and the assumptions made and reliability of such assumptions. The requirements are of general nature and there are broadly to be read with relevant Income Tax Rules.

Hypothetical Example

Piltel Inc, sells Keyboards of computes to its 100% subsidiary Pvt. Ltd. @$100 per Keyboard. Piltel Inc. also sells Keyboards to another company in India, Z Ltd. @ $150 per Keyboard. Total income of P Ltd. for Assessment Year 2007-08 is Rs.17,50,000 after making payment for 120 Keybaords @ $100 (1$ = 42). P. Ltd. has deducted TDS while making payments to Piltel Inc. In this case Sale to unrelated parry Z Ltd is $150.

Here Arm's Length Price of Keyboard sold to P Ltd. will be $150 per Keyboard by comparable uncontrolled price method.

Income of P Ltd. It will be computed as under:

		Rs.
Income as per Books of Account		17,50,000
Add :	Amount changed by Piltel Inc.[$100 x 120 x 42]	(+) 5,04,000
Less :	Arm's Length Price [$150 x 100 x 42]	(-) 6,30,000
Income (after applying arm's length price)		16,24,000

By virtue of section 92(3), deductions applying arm's length price will not be applicable. Therefore, income of P. Ltd. is Rs.17,50,000.

Regarding Piltel Inc : If business between Piltel Inc. and P Ltd. is on principal to principal basis and not on parent-subsidiary basis, section 9 of the Income Tax Act cannot be involved. The Assessing Officer may refer the computation of arm's length price order section 92C to the Transfer Pricing Officer (TPO) with prior approval of the Commissioner.

According to Charuvedi & Pithisaria's — Income Tax Law[7] , under the new provisions the primary onus is on the tax payer to determine an arm's length price in accordance with the rules and to substantiate the same with the prescribed documentation. Where such onus is discharged by the assessee and the data used for determining the arm's length price is reliable and correct, there can be no intervention by the Assessing Officer. This is made clear by the sub-section (3) of section 92C which provides that the Assessing Officer may intervene only if he is, on the basis of material or information, or document in his possession, of the opinion that the price changed in the International transaction has not been determined in accordance with Sub-sections (1) and (2), or information and documents relating to the International transaction have not been kept and maintained by the assessee in accordance with the provision contained in sub-section (1) of section 92D and the rules made thereunder or the information or data used in computation of the arm's length price is not reliable or correct, or the assessee has failed to furnish within the specified time any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D. If anyone of such circumstances exists the Assessing Officer may reject the price adopted by the assessee and determine the arm's length price in accordance with the same rates. However, an opportunity has to be given to the assessee before determining such price. Thereafter, as provided in sub-section (4) or section 92C, the Assessing Officer may compute the total income on the basis of arm's length price so determined by him".

SCRUTINY CASES

Every person who has entered into an international transaction has to maintain Books of Accounts and documents vide section 92D. Instruction No.3/2003, dated 20.5.2003, was issued for picking up of cases for scrutiny and for reference to Transfer Pricing Officers in cases where the assesses had entered into an International Transaction whose commutative value exceeds Rs.5 crore. However, doubts have expressed regarding expediency in picking up cases for scrutiny to be carried out through computer software. The measures of picking up cases for scrutiny was taken up and was approved by CBDT. The purpose was to ensure that transfer pricing regulations are implemented timely and uniformly.

DOCUMENTATIONS REQUIRED FOR TRANSFER PRICING AS PER INCOME TAX ACT, 1961[8]

The taxpayer (assessee) has to maintain adequate supporting information and documents in respect of all international transactions between associated enterprises. The Transfer Pricing Rule 10D prescribes the information and documents to be kept and maintained under section 92D by persons entering into international transactions. The information/documentation requirements prescribed are exhaustive. A synopsis of the requirements is given below:

(i) Description of ownership structure;

(ii) Names and addresses of and relationships with all associated;

(iii) Nature, terms, quantum and value of each international transaction;

(iv) Business overview of the assessee, and description of business of associated enterprises;

(v) Record of any forecasts, budgets or any other financial estimates for the business as a whole and for each division or product;

(vi) Details of property/service involved;

(vii) Description of functions performed, risks assumed, assets utilized;

(viii) Commercial agreements of transactions with associated enterprises and third parties;

(ix) Record of transactions considered for determining price of the international transaction.

(x) Data collected and analysis performed to evaluate comparability;

(xi) Description of methods considered, selected and applied;

(xii) Details of comparable data used in applying most appropriate method;

(xiii) Assumptions of the associated enterprise potentially relevant to the pricing and tax treatment accorded or likely to be accorded by overseas tax authorities;

(xiv) Any other information/data/document, as is relevant.

The above are primary documentation which shall be supported by certain supplementary documentation viz. Government publications, reports, technical publications, price publications, agreements and contracts, market research reports, correspondence between assessee and associated enterprise.

EXCERPTS FROM NOTES ON CLAUSES TO UNION BUDGET 2001[9]

The Notes on Clauses published while introducing the provisions regarding transfer pricing in the Income Tax Act held in understanding the provisions better. Hence, the related excerpts are reproduced below:

"Clause 44 seeks to substitute section 92 of the income Tax Act, relating to income from transactions with non-residents, how computed in certain cases. It is proposed to substitute the said section by new sections 92, 92A, 92B 92c, 92D, 92E and 92F relating to computation of income from international transactions having regard to the arm's length price, meaning of associated enterprise, meaning of international transaction, computation of arm's length price, maintenance of information and documents by persons entering into international transactions, furnishing of a report from an accountant by persons entering into international transaction and definitions of certain expressions occurring in the new sections.

It is proposed to substitute section 92 by a new section to provide that any income arising from an international transactions shall be computed having regard to arm's length price. It further provides that the cost or expenses allocated or apportioned between two or more associated enterprises shall be at arm's length price.

The proposed new Sections 92A and 92B provide meanings of the expressions "associated enterprise" and "international transactions" with reference to which the income is to be computed under section 92.

The proposed new section 92C provides for computation of arm's length price. The section provides that the arm's length price in relation to international transaction shall be determined by , (a) comparable uncontrolled price method; or (b) resale price method; or (c) cost plus method; or (d) profit split method; or (e) transactional net margin method; or (f) any other method which may be prescribed by the Central Board of Direct Taxes. One of these methods shall be the most appropriate method which shall be applied for computation of arm's length price in the manner as may be specified by the rules to be made by the Central Board of Direct Taxes in this behalf. In case where more than one price can be determined by the most appropriate method, in such case the arm's length price shall be the arithmetical means of such two or more prices. The new section further provides that where during the course of any proceeding for the assessment of income the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that the price charged in the international transaction has not been determined in accordance with sub-sections (1) and (2) or information and documents relating to the international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section 91 of section 92D, and the rules made in this behalf or the information or data used in computation of the arm's length price is not reliable or correct or the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of Section 92D, the Assessing Officer may proceed to determine, after giving an opportunity of being heard to the assessee, the arm's length price in relation to the said transaction in accordance with sub-sections (1) and (2) of this section, on the basis of such material or information or documents available with him".

Apart from the above, section 92D provides for maintenance of documents and relevant information specified by CBDT. These documents can be retained by the Assessing Officer for such period as may be mentioned in CBDT Rules. The Assessee has to furnish any documents if any international transaction entered in course of any proceedings within a period of 30 days reckoned from the date of receipt of the notice. Section 92E states about procuring a report from an accountant during the previous year in the prescribed form and manner.

PENALTIES PRESCRIBED FOR NON-COMPLIANCE INVOLVING TRANSFER PRICING TRANSACTIONS

The following measures would run cumulatively:

(i) For failure to maintain prescribed information/ documents—2% of transaction value;

(ii) For failure to furnish information/documents before Revenue—2% of transaction value;

(iii) For adjustment to taxpayer's income—100% to 300% of tax on adjusted amount;

(iv) For failure to furnish accountant's report-INR 100,000.

Transfer Pricing of Intangibles

Intangibles refer to those things, which cannot be touched, seen or measured quantitatively like other tangible assets but have intrinsic value.

As per OECD Guidelines, 'Intangible Property' includes, "rights to use industrial assets such as patents, trademarks, trade names, designs or models, literary and artistic property rights and know-how and trade secrets" [paragraph 6.2]. The guidelines do not precisely define "intangible property" but list only examples. They do not indicate the outer limits of the definition. The definition of intangible property may go beyond such listed items. Intangible property is an item, which derives its value not from its physical attributes but from its intellectual content. From transfer pricing point of view, intangible property is any property that is not tangible but is nonetheless still clearly property that can be exploited"[10]

Intangibles are one of three types, they are marketing intangibles, manufacturing intangibles and third group caters to the needs of the residuary. OECD Guidelines state, marketing intangibles include trade marks and trade names that aid in the commercial exploitation of a product or service, customer lists, distribution channels and unique names, symbols or pictures that have an important promotional value for the product concerned.

In 2005[11], the Australian Taxation Office (ATO) published a booklet, Marketing Intangibles, to address the key issue of whether the marketing activities of the local distribution give rise to a new marketing intangible or add significant value to an existing marketing intangible that is owned by an overseas related party. The booklet gives examples to show how the ATO will determine an appropriate reward for marketing activities performed by an enterprise using trademarks and trade names which it does not own.

A tax administration may, for example, consider that a local related distributor has developed a marketing intangible by engaging in local sales of the products of its foreign parent company for many years, even though it was using the trade marks and brand names of the foreign parent company. It may be difficult to answer the question whether the distributor has any intangible property, and, if it does, how much. Under what circumstances a local related distributors is considered to have develop a new marketing intangible or to have enhanced an existing marketing intangible in spite of the fact that it does not own the trade marks attached to the products of the foreign parent company that it resells? The answer would depend on the circumstances of the case.

"Another question is in what situation a local related manufacturing subsidiary is considered to have acquired its own manufacturing intangible separately from the manufacturing intangibles that its foreign parent company has transferred to it."

An intangible property can be transferred either by sale or license. But the transferee as well as the time of transfer is important. Usually intangible property can be transferred when it is fully developed. But in exceptional cases, intangible property or properties can be transferred to a related party or unrelated party and it is left with the transferee to complete the R&D work.

There are certain problems related to transfer of intangible property. These may relate to embedded intangibles, package deals, location savings, assignment of employees, foreign government regulations, etc.

Regarding methodologies for measuring arm's length price, OECD Guidelines, are followed in majority of cases. India follows Profit Split Method (PSM) regarding intangibles. USA differs from OECD Guidelines regarding metrologies for Arm's Length Price measurement. They follow either, comparable uncontrolled transaction (CUT) method or, comparative profit method (CPM) residual PSM method or PSM method.

Disputes involving transfer pricing can be resolved through either of the three modes:

(i) Through Court of Law;

(ii) Through Mutual Agreement Procedure (MAP);

(iii) Arbitration.

MAP is the most preferred platform for settlement of transfer pricing disputes, because it has been incorporated in OECD Guidelines.

Arbitration as a mode of dispute settlement is available to the EU countries under the Convention 90/436/EEC of 23 July, 1990 on the Elimination of Double Taxation in connection with the Adjustment of Profit of Associated Enterprises.

PROFESSIONAL SERVICES

Company Secretaries are recognized as authorized representatives to appear before various appellate bodies and statutory authorities like ITAT, CESTAT, VAT, FEMA, CLB, Competition Commission of India, MRTP Commission, Telecom Disputes Settlement and Appellate Tribunal, SAT, Central Electricity Regulatory Commission, etc.

Besides, in case of Settlement of disputes before Settlement Commission, Company Secretaries are able professionals to deal with substantive and procedural aspects before such Commission. In this world of globalization, Company Secretary can be of enormous help not only to clients of the corporate sector but also to entities dealing with IPR Laws. Company Secretaries through hard work and diligence in their work created a niche of their own in the corporate professionalism. They are able to perform multidimensional role in most pressing situations enunciating the rigour and dynamics of modern day corporate professional environment. As competent professionals, company secretaries, armed with reasonable expertise and relevant knowledge can help the clients from both sides i.e., from private clients to authorities, in solving complexities of transfer pricing mechanism.

INTERNATIONAL PRACTICES REGARDING TRANSFER PRICING TRANSACTIONS

United Kingdom

In U.K. transfer pricing legislation spelt out in Schedule 28AA of the Income and Corporation Taxes Act and it applies for accounting periods ending on or after 1.7.1999. The U.K. Practice is consistent with OECD Transfer Pricing guidelines for Multinational Enterprises and Tax Administration. In the U.K. Her Majesty's Revenue and Customs (HRMC) Guidelines regarding intangibles are stated in the code INTM 464070.

United States of America

In USA, section 482 of the Internal Revenue Code (IRS) deals with various facets of transfer pricing. It contains documentation as well as penalty provisions. Most of the U.S. Tax Treaties are in line with Article 9 of the OECD mode treaty. Moreover, mutual agreement proceedings, U.S.A asserts that its transfer pricing regulations are in line with OECD guidelines. Transfer pricing determinations are made through so-called "best method" rule.

Canada

Canadian transfer pricing regulations and Canada Revenue Agency (CRA) generally follows 1995 OECD Guidelines. The transfer pricing rules are contained in Section 247 of the Income Tax Act. Unlike, Indian practice of 'Associated Enterprise', they called them as 'related person', having 'dejure control' of the corporation and not 'defacto control'. CRA explicitly recognizes traditional methods and the TNMM would not be appropriate for the purposes of arriving at arm's length pricing where a highly valuable or unique tangible is involved. Intangible property depreciation is not stated in any statute but it is to be deciphered from customary commercial usages.

Japan

Japan fully endorses OECD Guidelines including arm's length principle and mutual agreement procedure (MAP). They operate transfer-pricing transactions through National Tax Agency (NTA). It clarifies the Intangible property needed examination of the Commissioner's Directive.

Belgium

Arm's length price technique was introduced in Belgium in 2004. Article 9 of OECD Guidelines is reflected in Section 185(2)(a) of the Belgium Income Tax Code. Regarding terminology, a worker or a labour cannot be assigned or viewed as intangible as per Belgian Law.

CONCLUSION

Transfer pricing taxation is a complicated process, which requires careful scrutiny of International transaction encompassing wide gamut of issues associated with it. Through legislative process or under a threat of sub-poena, the fiscal mechanism illustrated under the Income Tax Act, may not be full proof. Moreover, the domestic fiscal provisions should be in tune with the OECD Guidelines so that uniqueness in addressing pressing issues affecting assesses of different places can be fully appreciated. There is also a need for simplifying the concept of taxation of transfer pricing business through fiscal measures. Apart from this, regarding transfer pricing of intangibles, which is mainly related to intellectual issues and Research & Development. It is necessary to make appropriate guidelines as made under OECD. The monitoring mechanism needs to be simplified and made more transparent. The standardization of Rules and Procedures worldwide is a boon towards orderly development of transfer pricing taxation regime.

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ORGANIZATIONAL DNA

SHRUTI BANSAL*

INTRODUCTION

DNA stands for Deoxyribonucleic acid. DNA carries the genetic information that encodes proteins, determines the structure, function and behavior of the cell and enables it to reproduce and perform its functions. DNA is something all living organisms are made of. It is what makes them live and makes them what they are.

To be serious contenders among professionals, who create value or add value, Company Secretary need to develop new competencies. For example: in the field of mergers and amalgamations, it is not only the legal, procedural and valuation skills that matter, the two entities also need to be seamlessly integrated. The culture of two companies that merge or amalgamate are likely to be seminally different. Each organization has its own DNA. Unless, the respective DNAs are diagnosed, it may not be possible to identify and initiate actions that will transform these DNAs into align able cultures. A study of this article is expected to help Company Secretaries to foray into the area of diagnosing the organizational make-up of the company they serve. In calibrating competencies this is a competency that may be added through studious acquisition and development.

BIOLOGICAL DNA VIS-A-VIS ORGANIZATIONAL DNA

Just as the biological world is made up of millions of living, breathing organisms, that are a creation of their DNA, the business realm is also grouping with innumerable organizations, each of whom have their own molecular chains that give them their character, their culture, their inherent values, their goals and finally their competitive edge in the marketplace. Even in a similar environment, Organizational DNA is what differentiates one company from another. This is the reason why some organizations remain on the top of the charts, while others fail, some are high performers and others, with the same set of advantages and aptitudes, are laggards.

The question, how was organizational DNA different from biological DNA, even though they were basically similar, were difficult to observe directly and had an incredible impact on behavior. The biological DNA is inherited at birth, and cannot be changed whereas organizational DNA is created early in life, and can be changed, with some effort.

CONCEPT OF ORGANIZATIONAL DNA

The companies were made to sit up and think when reputed global consultancy firms, Booz Allen Hamilton coined the term "organizational DNA" and defined its concept and approach.

It came to the conclusion that there were some basic rules that decided how organizations behaved based on its various studies and surveys. It discovered that there were these deep rooted elements that determined how companies evolved their policies and practices, their leadership styles, their process, planning and methods of performance measurement and evaluation.

It was these basic, yet hugely powerful frameworks that impacted the motivations, capabilities and behavior of their people. It was these rules, often taken for granted, that companies relied on to hire and promote people, organize their reporting arrangements, establish the relationships between their employees and different units and set up a system of rewards and recognitions.

According to the firm, it was these set of core values, culture and attitude—referred to as organizational DNA—that set companies apart and gave them their

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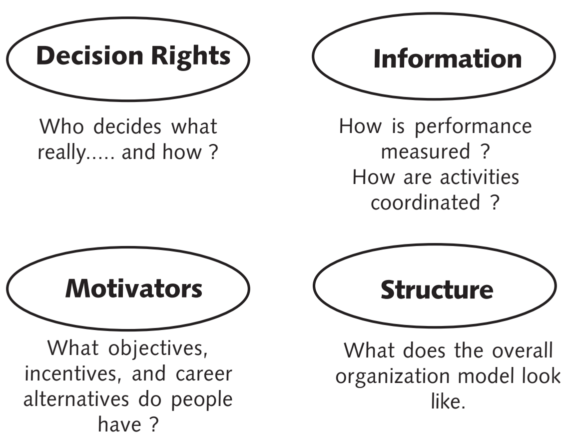
distinctive advantages. While all companies—big and small—had their DNA, it was how this DNA fitted with an organization's business model that determined the company's success.

BUILDING ORGANIZATIONAL DNA: THE FOUR BUILDING BLOCKS

Today, organizations live in a world, where "execution is the key." According to Booz Allen Hamilton, underlying the quest for an execution-driven enterprise is the central issue of how a company designs its organization to execute a strategy and successfully adapt when circumstances change.

Booz Allen Hamilton suggests that execution, an intrinsic part of organizations, is embedded in management processes, relationships, incentives and measurements, that collectively "define the rules of the game,"

The four Building Blocks of Organizational DNA



Source : Booz Allen Hamilton Report

It is therefore important to understand how the traits of an organization define the behavior and performance of the individuals working within them. Just as the DNA molecule is held together by bonds between base pairs of nucleotides whose sequence spells out the exact instruction required to create the unique organism, Booz Allen Hamilton defines the DNA of a living organization to have four bases, that combined in myriad ways, define its unique traits.

Like the four nucleotides that comprise human DNA, there are four basic building blocks in any organization's DNA—decision rights, information, motivators, and structure. These building blocks and the way they combine largely determine how an organization behaves, and whether it can achieve results.

(1) **Decision Rights** : Booz Allen Hamilton describes these as "who decides what ?" How many people are involved in the decision process ? Where does one person's decision making authority end and that of another begin?

The advantage of having clear decision rights is that companies can have wider spans and fewer layers, which translates into lower costs and speedier execution. Clarity in decision rights adds flesh to organizations and makes crystal clear where responsibility lies. At some fundamental level, every individual in an organization is constantly making decisions and managing trade-offs, whether it's how to price a customer quote, which engineering projects to fund given a limited budget, or what phone calls or e-mails to return first. How well and how efficiently they make these decisions largely determines the organization's success in the marketplace. Decision rights—the underlying mechanics of how decisions are truly made—determine how well organizations work, how quickly the right new products/services get to market, and how much the organization spends to get results. Therefore, decision right is the first building block that dysfunctional organizations should address; it's the cornerstone of effective organizational renovation.

(2) **Information** : Poor information is the organizational equivalent of junk food. It clogs communications arteries, bloats the system with empty calories, and fools the body into thinking it's nourished, when, in fact, it may well be on the verge of crisis. The effects of bad information on the other DNA building blocks—particularly decision rights and motivators—are powerful. Without accurate and available information, decision-makers cannot make quick, smart moves in the marketplace, and employees don't receive the recognition—either positive or negative—that their actions merit.

What metrics are used to measure performance? How are activities coordinated? How is knowledge getting transferred from the people who have it, to the people who require it ? How are expectations and progress communicated ?

To make sure quality information is flowing through the organization is the most challenging part for companies. According to business intelligence analysts, companies with the highest shareholder returns are the ones most focused on managing and enhancing communication with their customers, suppliers and employees.

(3) **Motivators** : Here the focus is on what objectives, incentives and career alternatives people have. How people are rewarded financially and non-financially for what they have achieved and what they are encouraged to care about.

Motivators include more than money; they also encompass all of the objectives, incentives, and career opportunities that prompt people to care and achieve. These rewards, both financial and non-financial, can encourage individuals to align their goals with those of the organization and pursue them in earnest…or they can, however inadvertently, stimulate counterproductive behaviors by driving a wedge between self-interest and the good of the organization.

(4) **Structure** : What does an organization's hierarchy look like ? How are the lines and boxes in the organization chart connected? How many layers are there in the hierarchy and how many direct reports do they have?

It is clear that companies have to make structural choices to support their strategies. The idea is to match a company's organizational structure and strategic intent.

Structure is the most visible and obvious of the four Organizational DNA building blocks, and it's where most organizational change programs start. Structure should not be a starting point, however; it should be the logical outcome of the choices made regarding the other three building blocks. While important and potentially crippling if designed poorly, structure is the capstone, not the cornerstone, of most reorganization efforts.

The right people—imbued with the right values, armed with the right information, and motivated by the right incentives—are the driving forces behind a winning organization. The fundamental challenge is to align these building blocks so the individual's self-interest coincides with the organization's agenda.

No building block stands alone; they are interdependent. Therefore, steps taken to modify any or all of the building blocks must be coherent, coordinated, and clear. Tinkering with any one element—say, structure—in isolation is likely to affect the other three in ways that are not intended, and may set the organization back rather than move it forward. Achieving organizational alignment takes different forms from company to company. There is no right answer or universal prescription. The only imperative is that the four building blocks of Organizational DNA work together rather than at cross purposes to solve the organizational puzzle.

THE SEVEN ORGANIZATION TYPES

Based on the four Organizational DNA building blocks there are seven principal types of organizations—four unhealthy, and three healthy:

Passive-Aggressive

"Everyone agrees, but nothing changes."

This is the seething, smiley-face organization. Building consensus to make major changes is not a problem; implementing these changes, however, is next to impossible. Entrenched, underground resistance from field operations routinely defeats corporate initiatives, as line employees assume "this too shall pass."

Fits-and-Starts

"Let 1,000 flowers bloom."

This organization lures intellect and initiative—smart people with an entrepreneurial bent, but who often do not pull in the same direction at the same time. It's a no-holds-barred environment in which a person can take an idea and run with it. But, in the absence of strong direction from the top and a solid foundation of common values below, initiatives either clash and explode or simply peter out. The result is an overextended organization on the verge of spinning out of control.

Outgrown

"The good old days meet a brave new world."

This organization is literally bursting at the seams, having expanded beyond its original organizational model. Because power is closely held at the top, the

Outgrown organization tends to react slowly to market developments and often finds it cannot get out of its own way. If you're in the middle of this organization, you might well see opportunities for sales or positive change, but it's just too hard to run these ideas up the flagpole. The legacy of top-down direction and decision-making is too well entrenched.

Over-managed

"We're from Corporate, and we're here to help."

Burdened with multiple layers of management, this organization is a case study in "analysis paralysis." More confused with the trees than the forest, managers spend their time checking subordinates' work rather than scanning the horizon for new opportunities or threats. Frequently bureaucratic and highly political, this organization frustrates self-starters and results-oriented individuals.

Just-in-Time

"Succeeding by the skin of our teeth…"

Although not always proactive in preparing for change, this type of organization has demonstrated an ability to "turn on a dime" when necessary, without losing sight of the big picture. Just-in-Time organizations have a "can-do" attitude that infuses the office and inspires creative outbursts, frequently real breakthroughs, but it can also burn out the best and brightest bulbs. In the absence of consistent, disciplined structures and processes, this organization's home runs often become "one-hit wonders," rather than a reliable source of competitive advantage, leaving this organization scrambling to stay healthy.

Military Precision

"Flying in formation…"

Everyone knows his or her role and implements it diligently in this organization, creating the overall effect of fluid and consistent execution. The Military Precision organization is hierarchical and operates under a highly controlled management model that allows it to efficiently execute large volumes of similar transactions. It can conceive and execute brilliant strategies–often repeatedly–because it has drilled the organization and run it through every scenario in the manual. However, it does not typically deal well with events not planned for in the playbook.

Resilient

"As good as it gets…"

This is the organization that inspires both awe and envy because everything seems to come so easily to it: profits, talent, respect. Like the popular kid in high school who got all A's and lettered in track, the Resilient organization seems destined for greatness; it fires on all cylinders. Resilient organizations are flexible, forward looking, and fun, and they attract team players. While it may hit a bump in the road—as all companies do—the Resilient organization bounces back immediately, having learned from the experience. The Resilient organization is the healthiest of all the profiles, precisely because it doesn't believe its own press; rather, it is always scanning the horizon for the next competitive battle or market innovation.

RESEARCH FINDINGS

The research conducted by Booz Allen Hamilton firm covered more than 60,000 individuals. Respondents came from companies of all sizes in thirty-four different industries and represented every function and level in the corporate hierarchy. They received profiles from more than one hundred countries.

Total Number of Completed Responses = 50,000

Distribution By Function

Marketing	11%
R&D/PD/Engineering	11%
Sales	11%
Finance	9%
IT	9%
HR	7%
Unreported	7%
Manufacturing	6%
Legal	1%
Other	28%

Total Number of Completed Responses = 50,000

Distribution By Level

Senior Management	25%
Business Unit Staff	17%
Corporate Staff	16%
Line Management	17%
Middle Management	19%
None	6%

These 50,000 data points (and the thousands more they continue to collect) prompt a few general observations about the health of most organizations:

MOST PEOPLE SEE THEIR ORGANIZATIONS AS UNHEALTHY

More than half of the individuals who've completed surveys describe their organizations as "unhealthy" (i.e., Passive-Aggressive, Fits-and-Starts, Outgrown, or Over managed). That's almost twice the proportion who describe their organizations as "healthy" (i.e., Resilient, Military Precision, Just-in-Time). Passive-Aggressive is the most prevalent organizational type.

Organizational DNA Profile Distribution by Type

What is your organization's DNA ?

Strong Execution Profiles = 31%	*Inconclusive = 15%*	*Weak Execution Profiles= 54%*
Military Precision 4% Just in Time 10% Resilent 17%		Passive-Aggressive 27% Outgrown 10% Over-managed 9% Fits-and-Starts 8%

Source : Organizational DNA Profiler- Based on 60,000 responses

ALTITUDE DETERMINES ATTITUDE

Survey results indicate that senior managers are consistently more optimistic in their assessment of organizational health than are their junior colleagues. A similar pattern appears in responses to nearly every question, suggesting a fundamental disconnect between top executives and the rest of their organization.

Organization type by level: Upstairs/Downstairs

Type	*Senior Mgt.*	*Middle Mgt.*	*Line Mgt.*	*Business Unit Staff*	*Corpo-rate Staff*
Resilient	29%	14%	12%	13%	12%
Military Precision	4%	4%	4%	4%	4%
Just-in-Time	13%	9%	9%	9%	9%
Fits-&-Starts	7%	9%	9%	8%	10%
Outgrown	6%	11%	11%	12%	11%
Over-managed	6%	9%	11%	10%	9%
Passive-Aggressive	20%	26%	30%	30%	32%
Inconclusive	16%	16%	14%	15%	13%

Source : Booz Allen Hamiliton Report

ORGNIZATIONAL DNA PROFILER

This was the questionnaire which was used for research. For each question, the answer that best describes the particular organization was selected. The best guess was to be entered if the individual was unsure. Survey results may be reported in aggregate, but all individual responses were to be kept strictly confidential.

STRUCTURE

1. At the middle-management level, the average number of direct reports is...

   O or more

   O 4 or fewer

2. Promotions include lateral moves (from one position to another on the same level in the hierarchy)

   O Agree

   O Disagree

3. "Fast track" employees here can expect promotions...

   O Every 3 years or more

   O Less than every 3 years

DECISION RIGHTS

4. The culture of this organization can best be described as...

   O Persuade and cajole

   O Command and control

5. Important strategic and operational decisions are quickly translated into action

   O Agree

   O Disagree

6. The primary role of senior staff here is to…
   - O Audit the operational departments
   - O Support the operational departments
7. Managers above me in the hierarchy "get their hands dirty" by getting involved in operating decisions
   - O Frequently
   - O Rarely
8. Once made, decisions are often second-guessed
   - O Agree
   - O Disagree
9. Everyone has a good idea of the decisions/actions for which he or she is responsible
   - O Agree
   - O Disagree

INFORMATION

10. Overall, this organization deals successfully with significant and unexpected change in the external environment
    - O Agree
    - O Disagree
11. Important information about our external environment gets to senior staff quickly
    - O Agree
    - O Disagree
12. Field/operating employees usually have the information they need to understand the ultimate impact of their day-to-day choices on the whole organization and its mission
    - O Agree
    - O Disagree
13. We rarely send conflicting messages to constituents
    - O Agree
    - O Disagree
14. Information flows freely across organizational boundaries
    - O Agree
    - O Disagree
15. Field/operating management has access to the metrics they need to measure the key drivers of their mission
    - O Agree
    - O Disagree

MOTIVATORS

16. If the organization has a bad year, but a particular operating area has a good year, the operating area head would get a more significant reward than the head of an operating area that performed poorly
    - O Agree
    - O Disagree
17. Besides pay, many other things motivate individuals to do a good job
    - O Agree
    - O Disagree
18. The individual performance-appraisal process differentiates among high, adequate, and low performers
    - O Agree
    - O Disagree
19. The ability to deliver on performance commitments strongly influences career advancement and reward
    - O Agree
    - O Disagree

DEMOGRAPHICS

20. Total operating budget:

21. Sector:

22. Your position:

23. Your operating area:

24. Your location:

25. How well does your organization achieve its mission objectives ?

26. Please classify your organization:

ORGANIZATIONAL DNA AT WORK IN INDIA

A close look at the performance of Indian companies reveals that the concept of organizational DNA has been understood by them. Increasingly, both large and small enterprises are focusing on how they can align their crucial DNA with their short and long-term business vision, mission and on-the-ground targets.

It is also clear that Indian organizations believe that change is a constant, and the key to success lies in adapting to this change and altering the organizational DNA to keep pace with it.

As Managing Director of HP GlobalSoft, a company that has undergone numerous transformations and transitions, based on its history of mergers and acquisitions, Som Mittal knows about change and coping with it.

According to him, "As you are scaling up and increasing hiring and training, you have to ensure that the values, ethics and culture of the organization becomes a part of the DNA of the new entrants. Of course, it is easier said than done, since it is not just about induction programs, or about putting up charts and giving presentations.

He adds that within HP, they have introduced the concept of "flat dissatisfaction" to make sure there is no complacency among employees.

"Indian companies can therefore break up their organizations and create smaller units that are empowered. These units can make the change, carry it on and cascade it. In this way, they can bring the 'large' and 'small' advantages to their organizations.

Deepak Ghaisas, the CEO of i-Flex, a company that has created significant value for stakeholders, including monetary value, also believes that enterprises have to be ready for change. According to Ghaisas, like Einstein's theory of $E=MC^2$, i-flex has also developed its own equation, $G=MC^2$. In this scenario, if G is growth, then one aspect of "MC" is managing change and the other C is the change itself.

"If you take the product of change—the index to change—and the aptitude to manage change, it will be positive, if both the parameters are positive. The growth will be better. The fact is that managing change is inevitable, it's a constant and will always be there. . If your ability to manage change is not positive, or more than one, you will not be able to deliver positive growth," Ghaisas says.

Interestingly, as business intelligence firm, KPMG, has found in recent studies, change is not just the prerogative of small companies. While the earlier assumption was that smaller companies were nimbler and more flexible, with the "elephants" unable to dance, the studies show that it wasn't so. They indicate that even large organizations have the ability to make rapid changes, and mid-term corrections in their DNA to tune themselves to the dynamic environment.

KEEPING CUSTOMERS AT THE CENTER OF ORGANIZATIONAL DNA

Providing a slightly different take on the "managing change" issue, Edge Zarella, Global IRM Head, KPMG, "talks about how different companies have adopted different strategies to manage change. However, these will only remain excellent documents or strategy and change management programs, if companies do not know their customers—which is where it all begins," he says.

Knowing clients, is where the building of the organizational DNA starts and takes root. Companies need to remain close to their customers and focus on how they are undergoing changes. They should align themselves with the changing needs and requirements of users. This aspect has to be made an important element of organizational DNA. Everything depends on executing strategies and not so much on having the strategies on board.

CONSTRUCTING A SOUND ORGANIZATIONAL AND FLEXIBLE STRUCTURE

Structure, then is another key pillar of company DNA that needs to be built, and as Som Mittal says, "given time to work." The good news according to Mittal is that, there is a fair amount of continuity within industries, with change primarily happening at the level of growth. The organizational structure, therefore has to be geared up to absorb the changes taking place in the newer markets, companies are getting into.

"In this context, companies have to build an organizational DNA that allows them to foray new geographies and manage cross-cultural needs," comments Mittal.

It is possible, for instance for an Indian Infosys to create an Infosys China, provided its structure has the flexibility to adapt to a brand new culture. "You have to adapt to the culture in the countries you are foraying. The Japanese tried to introduce the daily drill at their facilities in other countries but had to discontinue the practice. They had to make changes in their organizational DNA when they went to the US too," Ghaisas says.

It is clear then that organizations have to focus on their one and only building block—their DNA to stay ahead in the market. Armed with a DNA that is flexible and adaptable and with robust decision making, people and information-related processes, they can achieve an unassailable competitive edge and reinvent themselves as and when the markets and their customers require.

DO'S FOR GOOD ORGANIZATIONAL DNA:

The "to-do" list to build organizational DNA:

- Indian companies must build the right structures that are geared up to managing clients, managing relationships and managing projects.
- Leadership has to be ready for change as change is a constant; the ability to adapt to change has to come from the top
- Organizations have to focus on innovation, integration and the speed of execution
- Execution and not just ideas, lies as the center of organizational DNA
- In the face of success, Indian companies must remain humble and not arrogant. This should be a part of their organizational DNA
- DNA should be adaptive and should holistically weave intelligence, decision making capabilities, a collective focus on common goals widely and deeply into its fabric
- Organizational DNA should ensure that each person and unit within a company works smarter and works together.

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