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Managing Partner's message

Dear Readers,

Season's greetings and the very best for the year to come! Welcome to the first issue of 2019.

This issue is preoccupied with the tumultuous events that have occurred in just the last month. First, in **Why do we blame Independent Directors for every corporate fubar?**, we explore how companies really function in the context of the IL&FS crises.

Next, in **The Rafale judgment heralds the return to overarching judicial pacifism**, we step back and contemplate the real implications of a judgment that personifies a very new judicial reluctance to engage in armament acquisition decisions.

Following these two current affairs pieces, we now turn to gaze at the future of India and ask ourselves: **Are lawyers obsolete?**

Happy Reading!

Ranjeev C Dubey
(Managing Partner)

Print Media

Comment-1

Why do we blame Independent Directors for every corporate fubar?

Ranjeev C. Dubey

Given how much money went down in the IL&FS fubar, public outrage against everyone connected with the company was to be expected. That said, the sheer volume of venom that targeted Independent Directors seemed unfair. Does anyone here still think such positions are anything but a well-deserved lifetime achievement award a.k.a. sinecure? Beyond the twitter tantrums lurks the terrifying question that corporate governance asks of our company law: ten years after Satyam, why do we all collectively continue to pretend that this institution of independent directors will serve its intended purpose?

To understand the evolution of this intended purpose, let's start at the very beginning, in a world before 2013. In the scheme of our 1956 Company law, no individual director had either power or responsibility. Executive power was exercised in the collective wisdom of the Board. In 2001, SEBI took the first timorous steps to enforce a stricter norm of fiduciary responsibility by introducing Clause 49 of the Listing Agreement. It could not work for at least two reasons, and it didn't. First, independent directors were defined as people who had no "other material pecuniary relationship" with the company which "in the judgment of the Board may affect independence of judgment of the directors". When conflict of interest is a matter of opinion, you have the perfect inconclusive case. Second, the law let independent directors off the hook except in circumstances where an "offence has been committed by the connivance or is attributable to any gross negligence of the officer" (Sec 21 SCR Act). It's not often you get that standard of evidence into any case.

The era of credible deniability ended with the new company law of 2013. Section 149 now set out a comprehensive definition of who was qualified to be an independent director and Schedule IV created a whole new role for them. Speaking compositely, the new law did four things. First, it identified independent directors as GRC drivers. The upshot of this was that the man who sat on the outside with no money in the company carried the moral burden of the company. Second, it enjoined independent directors to become protectors of minority shareholders, a sort of hostile infiltrator opposing the will of the majority. Third, it asked independent directors to have an independent voice expected to "scrutinise the performance of management in meeting agreed goals and...monitor the reporting of performance". In short, the Promoter was expected to appoint and pay is bitterest critic. Finally, it expected independent directors to hold separate meetings in the absence of both management and promoter nominee directors, and review the performance of the rest of the Board. By definition, you could say that every independent director was asked to spy on the promoter! That's how the law still stands today.

Now, you can see that by definition, independent directors are incapable of performing the role assigned to them and not only because the promoter bankrolls their performance. The problem is compounded considerably by the attitude of the courts. In my 38 years of court experience, I have seen Independent Directors sued aplenty when companies fail to pay statutory dues but I have never seen them receive any substantial empowerment for their core role. This became obvious the very year we legislated the new Company law in 2013. The Tata-Mistry spat broke in late October, and India got to find out if the role of independent directors in corporate governance was quite what the pre-legislation rhetoric projected it would be.

Recall that Indian Hotels, Tata Motors, Tata Chemicals, Tata Consultancy Services and Tata Steel were and remain listed companies. Early in the game, on November 4th, 2013, all six independent directors of Indian Hotels' came out in support of Mistry. The Tatas reacted by claiming that Mistry was trying to deviously take over Indian Hotels amongst others with the support of independent directors. On November 10, the Tata Chemicals' independent directors came out in full support of Mistry because they believed he had done a good job. The company reacted by calling an EGM for December 23rd to remove Mistry and independent director Nusli Wadia from the Board. On November 12, three of six independent directors of Tata Steel came out in support of Mistry. The Tatas reacted by claiming Wadia was galvanising other independent directors to act against the Tatas. The company has called an EGM on December 21st to remove Mistry and Wadia from this Board as well. Shortly thereafter, Nusli Wadia was removed from the Board of Tata Chemicals, Tata Steel and Tata Motors. By early January 2014, the other independent directors had fallen in line. Darius Pandole and Analjit Singh of Tata Global Beverages were the only ones to quit of their own accord.

To get this in context, let us remember that the law wants all independent directors to act in accordance with their fiduciary duties and protect the best interest of the company as they see fit in their individual judgement. Yet, when they did so in the Tata-Mistry spat, the majority shareholder made all manner of alarming allegations putting the independent directors in the awkward position of becoming players in a war that wasn't theirs to fight. If we were to follow the law at that point, it didn't matter what motives these directors had. It's a job the law wanted them to do but when they did, India's most respected business house decided that such independence of judgement is simply unacceptable and moved to have them ejected from the boards. Where did that leave our new corporate governance norms in 2013?

Eventually, the matter found its way to court. NCLT sealed the matter by viewing Mistry from the prism of 'his' shareholding which made removal a matter of 'corporate democracy'. Inevitably, it viewed independent directors through the same prism. It summarized its position thus:

"The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another."

To put it bluntly, keepers of the corporate temple and protectors of the GRC faith became servants of the unwashed millions. At that point, it was already clear that the Independent Director's compliance construct was toast.

My ongoing experience with sub judice case in the years since is pretty much the same. Cut to the present, by way of illustration, a Japanese company has acquired the majority equity in an Indian company and has contracted to acquire the balance equity in the coming years based on a price to be determined by the company's performance in the interim. The exiting Indian shareholder allege the company's performance is being deliberately undermined because the loss of profit in this scheme is considerably lower than the price the Japanese owner will pay for the remaining shares if the company performs at peak. When the majority shareholder shut down an entire business vertical, Independent Directors sat up and protested. Clearly, this was not in the interest of the company though it was doubtless in the best interest of the majority owner. In retaliation, the majority shareholder called a shareholders meeting and purported to remove the Independent Directors. The matter found its way to NCLT. The decision is still some time away but it is already clear that NCTL takes a very majoritarian view of the matter. If the majority of shareholders don't like what the independent directors are doing, why should the courts interfere? To put it bluntly, as far as the law is concerned, "the best interest of the company" has now come to mean the best interest of the majority shareholder. RIP Corporate Governance.

At the end, this is what it comes down to. You want independent directors to control the people who hire them and pay their bills. Independent Directors are treated with kid gloves for so long as they are able to toe the line and keep their mouths firmly shut but should they disagree with the will of the majority, the courts are quick to concur in their ejection. What you get then is the worst kind of hypocrisy. You know independent directors can't discharge their statutory function: you just want them to pay lip service to it so that you can continue to have yourself a corporate world which really has no business but the business of getting on with doing what the majority shareholder wants whatever it takes with no one to ask questions or apply the brakes. When you get hit in the face with a fubar, you always have the fall guys to spit venom at even though you know they were incapable of doing anything. It's a farce.

Comment-2

The Supreme Court's Rafale judgmet heralds the return to overarching judicial pacifism

Ranjeev C. Dubey and Rakesh K. Ojha

Once again, the Rafale judgment on Friday by the Supreme Court, rejecting petitions on Friday seeking an investigation into the government's purchase of 36 fighter jets, reminds us that time in Indian philosophy is circular, not linear! This may be why the pendulum of judicial decision has now swung to the other apogee.

If 2G and Coalgate were the high points of judicial activism, the Rafale judgment heralds the return to overarching judicial pacifism. The irony is that but for the fluff and bling, the circumstances that led up to these milestones were not that different.

To set the context, all these milestones emerged from deals that looked less than squeaky shiny. 2G saw spectrum unfairly being given over cheaply to the select few, inspiring national auditor CAG to create the inventive formulation 'presumptive loss'. At the end of the day, it was about who was making big bucks out of a commercial contract. Coalgate saw the favoured few being given coal mine allotments without due process, now leading CAG to create the equally inventive concept of 'presumptive gain'. Rafale is not that different.

The country may have a presumptive loss in spending too much on too few fighters and handing over a huge presumptive gain to a private Indian company through Offset deals without due process or fairness. Why has the court declined to intervene?

Giving In To The Call Of Conscience

At the outset, the court set out to limit its own jurisdiction by observing that the *parameters of judicial scrutiny"* in administrative decisions "*has to be determined on the basis of considerations that are relevant to such commercial decisions"* Consequently*, "terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or a class of tenderers."* Despite this judicial reluctance, the court still succumbed to the call of its conscience and proceeded to examine each of the three legs of this potential grease-ball stool comprising of (1) the decision making process, (2) the pricing issue and (3) the Indian offset partner. A scrutiny of the limited facts before it did not alter this judicial reluctance.

First, there was the question of decision making. The court circumscribed its own limitation by noting that "*these are contracts of defence procurement which should be subject to a different degree and depth of judicial review*" and that "*we cannot sit in judgment over the wisdom of deciding to go in for purchase of 36 aircrafts (sic) in place of 126."* Well, if you are going to allow a government to purchase 36 of anything for more money than the country would pay for 126 of the same thing on the principle of it, you are really issuing a gate pass to governments to flip all nearly-done deals into lucrative kickback opportunities.

The court's finding on pricing changes nothing of the overriding paradigm in which the judgment is made. Since we are on legal principles, we will ignore the government's misrepresentation that led the court to rely on the fact that "*The pricing details have, however, been shared with the … CAG …..and the report of the CAG has been examined by the Public Accounts Committee".*

On the merit of it, the court examined the comparative price details and its explanatory note, only to decide that "*It is certainly not the job of this Court to carry out a comparison of the pricing details in matters like the present".* This really means that if Bofors makes the best guns or the Malyshav Factory makes the best Battle tanks or Lenovo makes the best computers for defence purposes, then the government can pay any price for it and this is not the court's business.

That brings us to the problem of the Indian offset partner. We will be brief. We now stand advised that in Indian law, so long as a government can restructure a transaction so as to outsource the selection of the offset partner to the seller, all the "presumptive gains" in the world will not persuade the court to second guess the selection of the favoured few.

In the words of the court, "*it is neither appropriate nor within the experience of this Court to step into this arena of what is technically feasible or not."* It is difficult not to be reminded of Pontius Pilate ritually washing his hands when Jesus Christ was brought to him.

Justice Is A Mirage

So, are we fundamentally at issue with this judgment? No, probably not. At the end of the day, as professional lawyers, we are intimately aware that at some level, all laws are arbitrary in where they draw the line. Justice is a mirage. It is certainty of law we seek so that we may appropriately advice our client. Swinging pendulums do not quite inspire the confidence of a stable legal system.

That said, to be fair, perhaps we should acknowledge that the court could not have replicated its activism of 2G and Coalgate because CBI has spontaneously combusted and there was no stick left to beat anyone with. How can you possibly disagree with a plan that pursues the art of the possible?

Comment-2
Are lawyers obsolete?
Ranjeev C. Dubey

The dynamics of the legal market continue to amaze me. India has lakhs of jobless lawyers sitting around exterminating houseflies in district courts around the country. In any random sample, less than 10% make a living wage. As has always been the case,

without a daddy or uncle in the profession, few are likely to beat the headwind. At the same time, cost related entry barriers to legal self-employment are rising.

There was a time you could put up a wooden table under a tree and "set up" a law practice, which is what I did. Today, membership to an entry level database costs Rs. 47,000/- annually. Then there is a computer and a printer and a roof over it! Yet, year after year, new law colleges continue to sprout unseen in the desert sands. What are we going to do with this new tsunami of hopefuls when they hit Law Street?

I am totally clear in my view. In a nutshell, it is a good time to be careful what we pray for because we may just get it. This is why I have stopped telling truly tasteless jokes about killing all the lawyers. Jobs for lawyers around the world are disappearing fast and sooner rather than later, it looks like the lawyers wouldn't need any killing. How did this happen? In two words: Artificial Intelligence!

I am not joking. Look at it from the view point of the services lawyers render. Less than 10% of lawyers in India have flourishing litigation practices. More lawyers than we care to admit make a living providing what are in truth bureaucracy facilitation services. You will find them in Tehsil offices, District level offices, Sub Registrar's offices, offices of municipal authorities, electricity 'nigams', water boards and so forth. They help people with compliance rules, especially in processing the plethora of approvals for which our license permit raj is world renowned. Thanks to AI, a lot of these facilitators are having the rug pulled from beneath their revenue models.

There are two reasons for this. First, administrations around the country are digitizing their services. This means that if you need to check something or investigate a record or find out about a new policy or notification, it's a web address you need, not a service provider. Second, the bureaucracy is progressively taking its application and approval process on-line which means you don't need a fixer in order to interact with a babu. Even the Reserve Bank of India asks you to approach it digitally for the many approvals it dispenses as part of its regulator function.

Gaggles of 'facilitations agents' are losing business. The problem is especially critical in the offices of the Sub Registrars where lawyers wrote up legal documentation and then helped get them registered. Thanks to sophisticated tools now on the web, even property agents have begun to write adequate legal documentation too. Artificial Intelligence is marching resolutely into the very innards of compliance processes in a way that is difficult to resist and as it does, it's running the lawyers out of town!

For my money though, this is the peripheral tip of the problem. Artificial Intelligence is taking a quantum leap in capability, threatening lawyers at all levels. It started with Legal Process Outsourcing, when someone realized that a lot of low end legal tasks could usefully be done cheaper, better and faster employing assembly line production processes. Suddenly, law firms woke up to the fact that Customers began to move

these processes to LPOs. This was completely understandable. Market capitalism operates on constant market expansion and continual cost reduction to maintain profits. No matter what inviolability they attach to themselves, lawyers are subject to the same market forces as other service providers in the market.

Curiously, it seemed at the time that LPOs would continually expand the scope of their operations and progressively cannibalizing law firm revenues. As it turned out, the real threat lay elsewhere. On-line documentation drafting support services showed the way. If a machine can quickly and efficiently deliver a quality contract, it can do the same with a complex court case too.

This should surprise no one. Even back in the mid-1980s, I had standardized my Bank recovery suits to a point where I used 'cyclostyled' format petitions with only a dozen blanks or so I needed to fill. In a world before computers, my key witness affidavits were standardized too. Computer allow for far greater complexity and sophistication. It's only a matter of time before we use products which churn out entire case briefs with supporting documents using basic inputs from the machine operator for even the most complex cases. It seems inevitable that a lot of young lawyers are going to be ejected from the justice machine.

It's going to be the same in the world of corporate lawyers. To illustrate, in the M&A world, the Due Diligence was a tedious but critical process. If you did not understand the key risks of a business, you could never be certain if it was worth buying at any specified price. In this process, teams of lawyers, engineers, accountants and financial experts troll the target's records, looking for vulnerability. Increasingly, more and more of these processes are being given over to algorithms. This is as it should be. If Google can determine with a high statistical certainty what product I will likely buy next, another algorithm can determine what risk is likely to hit a business in the foreseeable future.

I must admit LPOs bothered me not in the least. No matter how abysmal our service standards, I assured myself, LPOs can slice processes all they like but they can't hire smarter people than I can and this is after all a people business. I told myself I don't have to worry till the day someone finds a way to make AI that can 'think', whatever that means. Low and behold, it seems that day is coming our way too.

For me it all started with Ebay's dispute resolution process. The data required to resolve every dispute is finite [was an order placed/paid for/dispatched and delivered?]. The rules are simple too [payment is buyers responsibility, delivery is sellers responsibility]. Ebay holds on to payments till delivery of the goods is confirmed by the buyer. Dispute resolution is simplicity itself. How long is it before machines will be able to handle more complex disputes?

To understand what machines will do in complex disputes, lets break down the process. First there is document discovery, then drafting, then case law research and then filing. What is document discovery but trolling through bundles of electronic documents using key words to determine relevance? What is drafting but the modification of formats using bespoke key inputs? What is case law research but compilation of a legal data base that has been digitized? As for filing, Delhi High Court has turned to E-filing already and doubtless others will follow. The rules that govern the creation of a case are the same as govern the formulation and delivery of a defense of a case.

Now, you could argue that we would still need lawyers to define strategy and figure out how to win the case. Do we? What do we mean when we talk about machines that 'think'? If I want to sell you something, I have to think about what I am going to say that will make you buy it. We call it a USP. I need to know you, your desires and aspirations and your goals. That allows me to figure out a pitch. But machines do it another way. They don't try to understand my mind. They focus instead on my behavior. Thus, if I buy 3 white shirts and a black coat from Amazon, Google makes sure to have such products permanently on display in small advertisements as I surf the web. Algorithms are collating and 'interpreting' my behavior all the time, culminating in making reliable prediction on what I will do in what circumstances. How long is it before algorithms will compile every available piece of information about every judge and determine what kind of case presentation has the greatest chance of getting a favorable judgment? When this day comes to pass, exactly what will a lawyer contribute to the proceedings?

We seem to be heading to a place where we will only need judges who needs to think through the issues and deliver a judgment. Will this be a world where there will be very few lawyers but very many judges? Let's think this through. Ebay's dispute resolution program does not need a human judge. Paypal's dispute resolution program does not need human intervention. Wouldn't our logistic compulsions drive a radical paradigm shift? Given the growing backlog of cases in our courts, how long is it before cases files will be compiled by machines and fed into justice machines where algorithms will determine what would be just in the circumstances?

If this strikes you as outlandish, consider what can possibly be complex about say a medical insurance claim and why you need a human judge to resolve one? The insurance policy is digitized, the insured's medical history is digitized, and the hospital's records are digitized too. How many open issues are there? Someone just needs to write the algorithm.

It's a matter of time before the same principle will apply to the most complex of disputes. As the situation stands today, at the highest level, the Constitution of India is the algorithm on the foundation of which a large population of Apps - also called lawyers and judges - deliver justice to citizens. When the whole process has been programmed and automated, how weird will it be for the Chief Justice of India to be a

main frame computer with a giant data base and a truly amazing ethical framework programmed into its innards. At that point, the only question we would need to ask ourselves is this: Who controls the program? Will it be a collective of 'right minded people', the software programmers, or, like the Skynet in Terminator movies, the Chief Justice of India program would have achieved self-awareness?

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