excellence enablers CORPORATE GOVERNANCE SPECIALISTS
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Expert Expressions
Corporate Governance Demystified

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*At the outset we wish you a very **happy and rewarding New Year**. We step into the Leap year, with fingers crossed that corporate hands will not be in the till. A leap of faith will not hurt. Hope rather than expectation should sustain us.*

Editor

IF WISHES WERE HORSES…

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"Choro kal ki baatein, kal ki baat purani…" While, with the onset of a new year, there might be a tendency to ignore the past, and to attempt to write on a clean slate, it is not only useful, but also necessary, to look back and benefit from the actions of the past. Equally, it is useful to reflect on what might have happened if some of the developments of the previous year had either played out differently, or were earlier in point of time.

For observers of the Corporate Governance scene, 2019 was a very eventful year. As in 2018, a number of large companies came to grief, necessitating episodic regulatory and legal intervention.

The major positive, of the year gone by, was the belated recognition by the Ministry of Corporate Affairs (MCA) that corporates are not necessarily crooks or cheats, or much worse. The distrust which corporates had been subjected to for years had led to an all pervasive punitive regime, almost translating to "guilty until proven innocent".

In September, 2019, a Company Law Committee (CLC) was set up by the Government of India to make recommendations *inter alia* on further re-categorisation of some "criminal compoundable offences" to "civil wrongs" carrying civil liabilities. The Committee was also to "recommend other changes to facilitate and promote ease of doing business and ease of living". In a report that pleasantly surprised the corporate world, the Committee recommended "to rationalise penalties in respect of 46 compoundable offences, while retaining the present position regarding serious non-compoundable offences". Had this report come at the beginning of the year, and had recommendations being implemented forthwith through the ordinance route, the confidence level in boardrooms would have significantly increased, leading to a lesser number of Independent Directors (IDs) opting out. Conspiracy theorists would have us believe that these positive recommendations were made to conserve the population of IDs, which had become an endangered species, so that the revenue model of an "institute" would not get adversely impacted. Meanwhile, we wait with baited breath for the proficiency test.

2019 was also the year in which a large scheduled bank took the banking regulator to court. Others, such as the securities market regulator, have been similarly challenged in courtrooms, times without number. With the Reserve Bank of India (RBI)'s "infallibility" having been questioned, it is entirely possible for banks and NBFCs to take on the regulator if they feel that their legitimate interests are not being recognised. The knowledgeable believe that a constructive conversation between Regulator and the Bank concerned could have resulted in a solution being worked out without judicial intervention.

If RBI found itself in the odd position of being taken to court by a regulated entity, Securities and Exchange Board of India (SEBI) too was not denied its share of excitement. An order passed by SEBI imposing penalties on an auditing firm and its partners was successfully challenged in the Appellate Tribunal which held that SEBI had no powers to take action of this kind and that disciplinary powers resided in the Institute of Chartered Accountants of India (ICAI). The matter is now with the Supreme Court. One is tempted to ask whether a clear understanding of the difference between an entity Regulator and a function Regulator could have avoided all round embarrassment.

The year gone by also witnessed the spectacle of a Board of Directors getting rid of the Promoter Chairman for alleged financial irregularities, including diversion of funds and resorting to irregular acts keeping the Board in the dark. The

irregularities pointed out in the report of the external advisor are far too many to be recounted here. All of this gives rise to the question whether these acts of the Promoter could have been discovered by the Board much earlier than it did, without waiting for the trigger of a bounced cheque to initiate corrective action.

A seeming sense of hubris brought another bank to its knees. With the Banking Regulator pointing out to divergence, and with selective disclosure of an RBI report by the Bank concerned, it was evidently time for some spring cleaning. In an unrelated but an equally significant development, RBI has asked the Bank to examine whether the Chairman of its Audit Committee was "fit and proper", having regard to alleged concealment of material facts. One is tempted to ask whether in such situations, the Regulator should ask the Bank to verify "fit and proper", or when satisfied, itself issue marching orders to the person concerned.

A large housing finance company with multiple subsidiaries was also found out during the year. Inter-corporate movement of funds, without explanation or excuse, and in a relatively non-transparent manner, with the Board of Directors looking on, needed no better illustration. None of this happened overnight. Neither the Auditor nor the Regulator seems to have caught on early enough. Foraying into unrelated and risky ventures, owing in part to fraternal instincts, seems to have pushed this group to the brink. Would an active Board, not beholden to the Promoter, have acted faster and conserved some value?

A major healthcare and financial services group is witnessing unending internecine battles that could put Kilkenny cats to shame. One is at a loss to understand why the stakeholders in this group took so long to intervene and to bring in a totally new leadership team, leaving delinquent individuals to face the music while the corporate entity survived and continued to serve.

A large broking entity decided that the funds of its clients could be used for its own purposes, notwithstanding strict regulatory directions to ensure separation. For a large intermediary that was seen as a strong institution, to conduct itself in this manner struck at the root of confidence that individuals had in institutions and in the system.

No discussion on Corporate Governance can be complete without a reference to the Bengaluru based company that was perceived to be flying the Corporate Governance flag for a long time. With whistleblower complaints alleging inconsistent practices, behind the back of the Board, the company predictably took the high moral ground and claimed that even God could not change its numbers. While Regulators in India and in the United States of America are addressing this matter, we are yet to hear from God whose omnipotence has been questioned!

While the year was winding to a close, came a judgement that raised the mother of all questions. Does the majority shareholder have the unfettered right to run a company in the manner it deems fit? The contention that minority shareholders cannot hold a majority shareholder to ransom, is also finding sufficient support. 2020 should hopefully provide a clear answer to this majority-minority standoff. In love, war and corporate conflict, there is no runners up position.

The year also saw Auditors conclude, perhaps collectively that disclaimers had limitations as defence mechanisms, and exiting was a better option.

As we look to the future, we need to remind ourselves that 20/20 signifies excellent eyesight, but regrettably "sight" and "vision" are not inseparable twins. In the year of the Olympics when humankind strives to be "faster, higher and stronger", should corporates lag behind?

There is one major take-away from 2019. If you have too many verticals, you could, sooner rather than later, end up horizontal.