Covid-19 and Corporate Governance (India): Practical Issues, Implications and New Relief Measures

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ABSTRACT

Purpose: This research aims to study number of practical issues and risk faced by corporates and its implications and new relief measures introduced in relation to Corporate Governance (India) during COVID-19 outbreak. However, their extent and impact will naturally vary with the nature and size of a business.

Design/Methodology/Approach: Exploratory research is used to study and investigate practical issues and implications faced by Corporates regarding Corporate Governance practices in India during COVID19 outbreak.

Findings: COVID 19 Pandemic has impacted not only human but significant commercial impact being felt globally. It has come with inherent commercial risks impacting on business operations due to disruptions to Meetings, Dividend, Liquidity, Disclosure, Capital Allocation, Risk Management and Internal Control. Regulators should allow companies to conduct a hybrid AGM. It has compelled Companies to step up on building their technology infrastructure. Management should review of their share buyback programmes during such financial crisis. Remuneration committee should emphasize on Executive Pay matters. Government has initiated relief measures under Companies Act, 2013 and LLP Act, 2008 and relaxations from compliance with provisions of the SEBI (LODR) Regulations, 2015 due. Major initiative is contribution for COVID-19 is eligible CSR activity and introduction of schemes of Companies Fresh Start and revised the LLP Settlement to provide an opportunity to make good any filing related defaults and make a fresh start on clean slate.

Originality/value: Drawing on such analytical framework, this research provides further directions to amend and inculcate various corporate Governance practices for Government, Regulators, Companies and other stakeholders during such crisis. It also addresses the current policy issues that may have a significant effect on Corporates strategies.

Keywords: *Corporate Governance, Virtual /Hybrid Meetings, COVID19.*

1.0 Introduction

World's economy is a corona patient. Corona virus disease (COVID-19) epidemic has affected many countries and the World Health Organization (WHO) has declared it 'Pandemic'. The WHO more specifically defines a pandemic as "a worldwide spread of a new disease." On March 11, 2020, the WHO officially declared the COVID-19 outbreak a pandemic due to the global spread and severity of the disease. It's possible that the corona virus threat will eventually fade, as the Ebola, Zika, and Severe Acute Respiratory Syndrome (SARS) viruses have in recent years. But even if it does, the next devastating, yet-unnamed outbreak is not so much a matter of "if" but "when." The profound impact of the measures being taken across the globe to contain the spread of the Coronavirus COVID-19 is creating a number of issues for companies. The Indian Government declared lockdown for a period of 21 days with effect from 25.03.2020 in compliance of Order of The National Disaster Management Authority (NDMA) chaired by Hon'ble Prime Minister Shri Narendra Modi, Ministry of Home Affairs (MHA) has issued an Order dated 24.03.2020 under Section 10(2)(l) of the Disaster Management Act, directing the Ministries/ Departments of Government of India, State/Union Territory Governments and State/ Union Territory Authorities to take effective measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country.

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While we are now focusing in India on securing the population from health hazards and on providing relief, especially to the poor, we also need to think long-term - to secure the health of the economy, the viability of businesses, and the livelihoods of people. The Indian Governments and Regulators have passed legislation introducing a series of measures including those relevant to maintaining the good corporate governance of companies. These measures have applied with immediate effect. Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined . In his pioneering research, Gottfried and Donahue (2020) stated that as the global COVID-19 health emergency continues, the economic fallout is escalating as well and it would lead to logistical impediments and shifts in timing and strategy but, importantly, also creates opportunities for savvy investors. Global economic growth has gone into reverse, businesses have started cancelling service to customers, and millions of workers are technically unemployed or fired. It raises the question: what happened to "stakeholder capitalism", the enlightened economic model many companies embraced just months ago? How can it be squared with what we're seeing today? Corporate governance also comprises risk management; therefore, a key professional mandate of management is to ensure that risk is not diversified or spread to the detriment of the institution. Boards of directors are responsible for the governance of their establishments. The governing board is to ensure that management renders services that are appreciable to the stakeholders. Jensen, M.C. (2001) proposed that there should be a system of executing services that strengthen the connection between institutions and their stakeholders through effective communication. It is supported by Davies, M. A. (2012) in his research where he stated that it is the duty of the board to ensure a higher standard of performance and accountability by engaging in practices that foster good governance. Therefore, political and administrative reforms in many countries could directly shape what is to be referred to as good governance, especially in developing countries. Adherence to governance standards brings simplicity and reduction of risk in such institutions through the support of standard protocols, stakeholders, and government. Corporate governance is the system by which organizations are bound for and controlled. It is a configuration of checks and balances (both internal and external to organizations), to make sure that they discharge their duties well and accountable to all stakeholders (Dignam, A. and Galanis, M.,2016). They are also to ensure that establishments deliver their duties in a socially responsible way, in all areas of their business activity (Grayson, D. and Hodges, A., 2017). As we know that the heart of corporate governance is transparency, disclosure, accountability and integrity. Good corporate governance practice is an important element in attracting investors, and investors are willing to pay a premium of up to 25% for a well governed firm (Barton, D. and Wong, S.C., 2004). Todorovic (2013) has inferred that implementation of CG practices such as disclosure, protection of shareholders rights and equal treatment of shareholders can ensure safeguard investments. Drobetz, W. (2004) researched that Good CG lead to increase valuation, increase higher profit, higher sales growth and reduce capital expenditure.

2.0 The Research Methodology and the Course of the Research Process

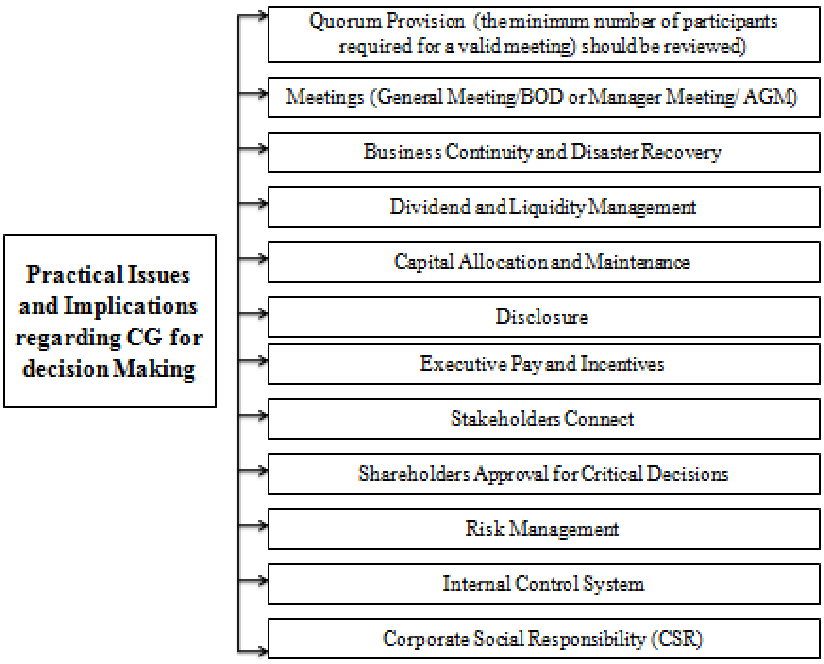
The study is purely based on exploratory research or grounded theory approach aims to study number of practical issues and risk faced by corporate and its implications and new relief measures in relation to Corporate Governance during COVID-19 outbreak. This study used Secondary research methods namely Online research, Literature research and Case study research are carried out during stages of research process to narrow the scope of research objectives and to transform ambiguous problems into well-defined one. Running business in the midst of a pandemic is an unprecedented challenge for business leaders worldwide. The restrictions imposed by many governments all over the world in handling the COVID-19 outbreak raise significant challenges as regards corporate governance. However, their extent and impact will naturally vary with the nature and size of a business, but the approach taken in respect of these issues could be crucial for the particular business to thrive or at least survive this new reality.

3.0 Covid-19 and Corporate Governance (India)

3.1 Practical issues and implications

The rapid outbreak of the corona virus presents an alarming health crisis that the world is grappling with. In addition to the human impact, there is also a significant commercial impact being felt globally. As viruses know no borders, the impacts will continue to spread. In fact, 94 percent of the Fortune 1000 is already seeing COVID-19 disruptions. With the rapidly-developing situation; we are still in the premature stages of understanding the impact that COVID-19 will have. However, some important issues and implications regarding corporate governance practices and standards has been depicted in Figure-1.

Figure 1



Source: Compiled by Researcher

3.2 Meetings

Indian Government's directives of a 21-day lockdown and social distancing to avoid mass gatherings are likely to have an impact on Quorum Provision referred under section 103 of Companies Act,2013(i.e. the minimum number of participants required for a valid meeting). And in turn it would impact on format of Meetings namely General Meeting, B.O.D or Manager Meetings, AGM and NCLT Convened meetings. As in-person company meetings will largely no longer be possible. Hence, Small and Retail shareholders are likely to be the most exaggerated as compared to Institutional investors as they have several platforms to engage with company managements. The failure of not holding shareholder meetings will likely lead to a delay in urgent business transactions and to the adjournment or postponing of AGMs. That means it would lead to material impact on business. Although the board of directors can take all the crucial decisions relating to the working of a company, a set of critical decisions require shareholders' approval including appointment/re-appointment of directors, undertaking related party and inter-corporate transactions exceeding regulatory thresholds, issue of securities, schemes of arrangement, etc. Not obtaining shareholder approval in time might lead to non-compliance with the provisions of law or possibly even failed transactions. The only option for shareholder approval is via the postal ballot (i.e. Voting by post or through any Electronic mode) but subject to certain items of business under section 110 of Companies Act,2013 read with Rule22 of Companies (Management and Administration) Rules.2014.

The major issue related to Closing of Financial Year. The statue state that AGMs are required to be held within six months of the close of the financial year subject to time between two consecutive AGMs cannot exceed 15 months. Financial year for most companies in India closes on March 31, unless the companies have got a separate relaxation of the rules from the Ministry of Corporate Affairs to have another year end keeping in the mind that MNCs typically close their financial year on December 31 to align with global practices. As many of companies have already sent out notices for shareholder meetings where the meetings were earlier scheduled to be held during the lockdown phase, are being postponed. Although most Indian companies do not include such a provision in their Articles of Association (AoA), during such unforeseen times, it is generally possible for a board to decide to postpone a meeting. If postponement is not possible, a company's AOA will likely allow adjournment of a meeting, which will have the same practical effect. The AOAs usually allow meetings to be adjourned either by the chairperson with the consent of a quorate meeting or by the chairperson unilaterally if no quorum is present. Companies can also go with delaying in holding their AGMs. The COVID-19 pandemic may significantly reduce accessibility, communication and physical meetings to conduct statutory audits. It may cause delays to audit-related activities, including the impossibility to conduct on-site audits and inspections, and exercising the relevant access rights.

3.3 Virtual or hybrid AGMs

Among the measures introduced by the Government, certain rules introduce the possibility for the meetings of companies to be held exclusively in digital form without requiring the physical presence of their members8 and will therefore be able to conduct such meetings in a manner that protects the health and safety of their shareholders and board members. It is advocated that companies must allow shareholders to participate via a two-way teleconferencing or webex. Currently, the top 100 companies by market capitalization are required to have a webcast of their AGMs, but this is a one-way transmission. Although the Ministry of Corporate Affairs has allowed board meetings and board committee meetings to be held via video conferencing, it has not extended this to shareholder meetings. The Companies Act, 2013, requires physical quorum to constitute a valid meeting. UK-incorporated listed companies are permitted to hold hybrid (a combination of physical and electronic) or virtual AGMs. The US Securities and Exchange Commission (SEC) has also released a guidance, which permits US-based companies to opt for virtual or hybrid meetings. Allowing companies to hold a virtual meeting, especially for listed companies where the shareholder base is large, is now a necessary requirement for social distancing. The regulators (Mainly SEBI and Ministry of Corporate Affairs (MCA) need to allow companies to do so. The other option would be for companies to conduct a hybrid AGM. A Hybrid meeting allows the attendees to decide whether they'd prefer to attend the meeting in person or online, this could be from the comfort of their home, office or mobile device. Alternative options would be "Postponement of AGM", "Call and adjourn AGM" and "Delay of AGM" if your Articles of Association (AOA) do not permit a hybrid or virtual meeting.

3.4 Business continuity and recovery

During the COVID19 outbreak, most of companies are facing difficulties to maintain business continuity. Most of companies would be facing difficulties from suppliers' end. It means suppliers are incapable to supply components which are crucial to the company's manufacturing or provision of services. In turn it would lead to Business Distress/Financial Distress of Companies. Mehran, H., Morrison, A.D. and Shapiro, J.D., (2011) concluded that If a corporate fail, the fallout can be restricted to the stakeholders. If a bank fails, the impact can spread rapidly through to other banks with potentially serious consequences for the entire financial system and the macroeconomic. Moreover, in case a bank crashes then it does not crash alone, it also takes away the lifelong investment and savings of its entire account holders too. The failure of banks can create huge consequences to financial system of the country concerned as a whole. So, Business continuity is a biggest issue that corporate is facing. Hence corporates should be proactively addressed, especially in light of the duty that directors have to exercise reasonable care, diligence and skill, and this involves assessing and minimizing the risks in similar extreme situations.

3.5 Dividend and liquidity management

Now, another issue surfacing would be regarding dividend, liquidity and working capital requirements during COVID19 outbreaks and lockdown. There are few issues like company recently declared dividends which have still not been distributed or Corporates are currently deciding about dividend distributions. Directors need to consider not only the position of the company when a dividend is proposed but also when it is made. Where the company is no longer competent to pay a dividend, it is advocated that directors should halt any dividend and communicate as appropriate to the market. The assessment of whether a dividend is appropriate should include consideration of current and likely operational and capital needs, contingency planning and the directors' legal duties, both in statute and common law. Bearing the current uncertainty and adverse market conditions in mind, it might be prudent to take a step back and gauge market, public and stakeholder reaction. In this sense it is also important to act in a manner which is in sync with both internal (management, employees etc.) and external sentiment. Liquidity and working capital requirements may naturally come under strain at such time and consideration will need to be given to cash flow management, banking arrangements and refinancing as well as available assistance/incentives including moratoria.

3.6 Capital allocation and maintenance

One of the central pillars of corporate governance is capital allocation, and where companies decide to focus their funding. Over recent years we have seen companies using increasing amounts of cash to re-purchase stock rather than investing in their businesses or bolstering up their balance sheets. In the S&P 500, 50% of all free cash flow is now used to re-purchase stock.

At a time when balance sheets are under immense pressure and companies face significant unexpected costs, including how they dedicate resources to ensuring the welfare of their staff, management should review the appropriateness of their share buyback programmes both at this time and in the longer term. Although there is an expectation that certain sectors will receive government assistance, the most likely outcome for distressed companies will be the use of emergency capital raising through deeply discounted rights issues or placing. In these circumstances, we would like companies to minimize the dilution of existing shareholders by honoring their pre-emptive rights and giving them the right to purchase further shares before others in the market. India has witnessed that few corporates are exploring share repurchase. Fairfax backed Quess Corp is exploring share buyback on 25th March, 2020. Delta Corp to consider share repurchase on 28th March, 2020. Sterlite Technologies approves buyback of shares up to Rs145 crores on dated 24th March, 2020. Motilal Oswal Financial Services okaus Rs150 crore share buyback plan dated 21th March, 2020. Sun pharma has announced Rs1700 crore buyback on 17th March,2020.10 These are buybacks that may give solid assured returns during COVID 19 outbreaks and lock down. It can be seen that all the buyback decisions were announced during the lockdown period and proved that positive reduction in equity would lead to increase in shareholders return.

3.7 Disclosure

Disclosure which is an essential ingredient of CG is the foundation of any structure of CG Bhasin, M. (2012). With respect to regulated entities and companies listed on a regulated market which are subject to various laws and regulations aimed at securing investor protection, adequate disclosure without delay of information which should be made known to the public should remain a top priority. Proactive boards of such companies should thus continue assessing the situation, communicating with regulators and providing public disclosure where it is needed or warranted as new information constantly emerges. Cautious assessments should be made to analyze the extent of the negative impact of COVID-19 related developments and to determine any corrective action that might be needed to mitigate such impact as far as possible, with constant disclosure of significant developments to the general public. In fact, Ministry of Corporate Affairs (MCA) deployed a new simple web-based form w.e.f. 23rd March; 2020 focusing a purely confidence disclosure and building measure to assess the readiness of the companies to deal with COVID-19 threat in India.

3.8 Executive pay and incentives

It is advocated that Companies need to consider as consequence of the COVID 19 outbreaks Shareholders will not generally look favorably on executives receiving pays and incentives following a year where shareholders have lost out, even though the impacts of the virus are non-controllable from Corporate ends.

Remuneration committees (An essential practice of CG) may make adjustments to schemes to permit rewards to executives who exhibit outstanding skill in navigating their company through the hard period ahead.

Close attention should be on individual company circumstances, including whether companies are consistent in their treatment of staff and executives (like self-quarantine).

For companies seeing an exceptional increase in demand for their services like Pharma, as a consequence of the virus and of related government measures, Remuneration committees should treat this as a windfall effect and be prepared to adjust pay downwards if appropriate.

3.9 Risk management and internal control

Corporate governance also comprises risk management; therefore, a key professional mandate of management is to ensure that risk is not diversified or spread to the detriment of the institution. Relocation of staff and the inaccessibility of some business locations may lead to risk management processes and internal controls becoming impracticable or otherwise relaxed. Boards should monitor such changes carefully, introducing alternative mitigating controls where necessary and practicable to support the operation of an effective control environment.

4.0 New Relief Measures and Initiatives during COVID-19 relating to Corporate Governance

4.1 Special Measures under Companies Act, 2013 and Limited Liability Partnership Act, 2008 in view of COVID-19 outbreak, dated 24th March, 2020:

No additional fees shall be charged for late filing during a moratorium period.

BOD meetings stand extended by a period of 60 days till next two quarters i.e. till 30th September as per section 173 of Companies Act,2013

The Companies (Auditor's Report) Order, 2020 shall be made applicable from financial year 2020-21, instead of being applicable from the financial year 2019-20

An additional period of 180 more days is allowed to file declaration for Commencement of Business for newly incorporate companies.

4.1 Spending of CSR funds for COVID-19

It is clarified by the Ministry of Corporate Affairs, that spending of CSR funds for COVID-19 is eligible CSR activity. Funds may be spent for various activities related to COVID-19 under item nos. (i) and (xii) of Schedule VII relating to promotion of health care, including preventive health care and sanitation, and, disaster management. Further, as per General Circular No. 21/2014 dated 18th June, 2014, items in Schedule VII are broad based and may be interpreted liberally for this purpose. It is further clarified that any contribution made to the PM CARES Fund shall qualify as CSR expenditure under the Companies Act, 2013.

4.2 Relaxations from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) due to the COVID -19 virus pandemic

Compliance Certificate under Reg. 40(9) from Practicing Company Secretary on timely issue of share certificates gets extended till may 31st, 2020 (period of relaxation – 1 month).

Relaxation of holding AGM and meeting of Board/Committee(s) as earlier discussed.

Extension of timeline for filings under Regulation 7(3) with 1 month, Regulation 13(3) relating to Statement of Investors Complaint for 3 weeks, Regulation 24A relating to Secretarial Compliance report for 1 month, Regulation 27(2) relating to Corporate Governance report for 1 month, Regulation 31 relating to Shareholding Pattern for 3 weeks, Regulation 33 relating to Annual Financial Results for 1 month.

Relaxation of publication of advertisements in the newspapers under Regulation 47 gets exempted till 15th May, 2020.

4.3 "Companies Fresh Start Scheme, 2020" and "Revised LLP Settlement Scheme, 2020"

In pursuance of the Government of India's efforts to provide relief to law abiding companies and Limited Liability Partnerships (LLPs) in the wake of COVID 19, the Ministry of Corporate Affairs, has introduced the "Companies Fresh Start Scheme, 2020" and revised the "LLP Settlement Scheme, 2020" which is already in vogue to provide a first of its kind opportunity to both companies and LLPs to make good any filing related defaults, irrespective of duration of default, and make a fresh start as a fully compliant entity. It's a one-time waiver of additional filing fees for delayed filings by the companies or LLPs with the Registrar of Companies during the currency of the Schemes, i.e. during the period starting from 1st April, 2020 and ending on 30th September, 2020.

5.0 Conclusions

This research reveals that rapid outbreak of the corona virus first and foremost a human tragedy. It has impacted not only human, there is also a significant commercial impact being felt globally. As viruses know no borders, the impacts will continue to spread. In fact, 94 percent of the Fortune 1000 is already seeing COVID-19 disruptions. COVID-19 pandemic come with inherent commercial risks impacting on business operations due to disruptions to Meetings (AGM,EGM, BOD Meeting and NCLT convened meetings), Administration, Business Continuity , Dividend and Liquidity management, Disclosure, Capital Allocation and Maintenance and lastly Risk Management and Internal Control. Among the measures introduced by the Government, certain rules introduce the possibility for the meetings of companies to be held exclusively in digital form without requiring the physical presence of their members and will therefore be able to conduct such meetings in a manner that protects the health and safety of their shareholders and board members. Regulators should allow companies to conduct a hybrid AGM (i.e. Virtual Meeting). COVID-19 has compelled Companies to step up on building their technology infrastructure. It is imperative that directors and managers are proactive in ensuring the appropriate strategies are put in place to anticipate and to mitigate the potential commercial impacts of a pandemic, and to ensure compliance with their duties and legal obligation. Its duty of Board to make sure that Corporate Governance should not be simply sets of rules or “Check the box” framework. Management should review the appropriateness of their share buyback programmes and proved that positive reduction in equity (i.e. Free cash flow) would lead to increase in shareholders return. Company and its remuneration committee should emphasize on Executive Pay matters as it is very sensitive during COVID 19 outbreak which is stipulated in the introduction of this article. Corporate honchos are worried about well-being of their employees and business. Indian Government has initiated various relief measures under Companies Act, 2013 and Limited Liability Partnership Act, 2008 and announced relaxations from compliance with certain provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) due to the COVID -19 virus pandemic towards Corporate Governance which has discussed earlier of this article. Major two important announcement first spending of CSR funds for COVID-19 is eligible CSR activity covered under Schedule-VII of Companies Act,2013 and Secondly introduced the “Companies Fresh Start Scheme, 2020” and revised the “LLP Settlement Scheme, 2020” to provide a first of its kind opportunity to both companies and LLPs to make good any filing related defaults, irrespective of duration of default, and make a fresh start on clean slate as a fully compliant entity. That added feather towards Ease of doing Business in India. Martin Hirt, Sven Smit, Chris Bradley, Robert Uhlaner, Mihir Mysore, Yuval Atsmon, and Nicholas Northcote (2020) advocated that Corporate need to think and act across five horizons namely “Resolve, Resilience, Return, Reimagination and Reform” to battle against COVID-19. COVID pandemic is considered as a systemic risk which is not controllable from risk point of view. Given these ongoing uncertainties, a recent McKinsey briefing note frames this as a situation calling for a scenario planning approach, and suggests three fundamental planning scenarios, labelled as: “quick recovery”, “global slowdown” and “global pandemic and recession”. Scenario planning is important for both governments and companies, but it remains far from clear which of these scenarios, if any, will prevail. In nut shell, Investors, companies and other stakeholders will need to work together in a constructive way in order to navigate through the current crisis of COVID19.

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