SAMISTHI LEGAL

A REPORT ON

TATA VS MISTRY CASE

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Agenda

1. Background and Objective
2. Analysis
3. Executive Summary
4. Conclusion

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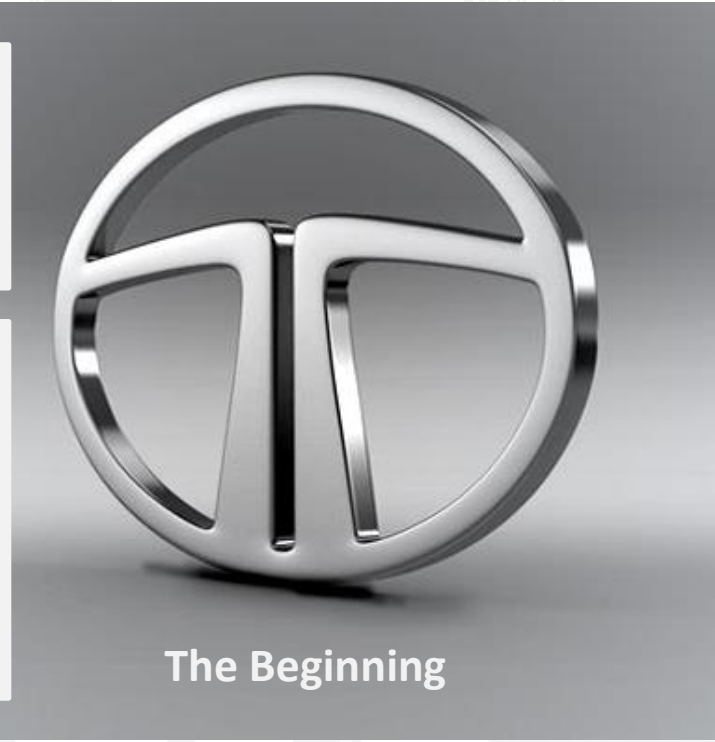
Background

Tata conglomerate is India's largest business group running businesses in seven sectors in more than eighty countries. Tata Sons is the holding company of the Tata Group.

Tata Sons is an unlisted company. Around 66 % of its shares are owned by the various Tata trusts, most importantly Sir Dorabji Tata Trust (27.97%) and Sir Ratan Tata Trust (23.56%). The next major chunk of 18% is controlled by Shapoorji Pallonji Group, whose heir apparent is Cyrus Mistry. ("Mistry")



Background *(Cont'd)*

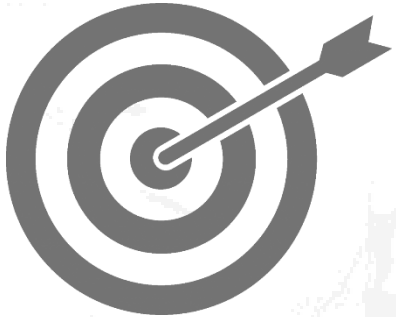
Mr. Mistry was appointed as the chairman of Tata Sons in the year 2011 who was the sixth Chairman of Tata Sons.

In the Board meeting of TATA Sons Limited held on 24th October, 2016, Mr. Cyrus Mistry, was replaced with immediate effect and Mr. Ratan Tata was appointed as the interim Chairman of TATA Sons.

Further, the Board constituted a Selection Committee comprising Mr. Ratan N. Tata, Mr. Venu Srinivasan, Mr. Amit Chandra, Mr. Ronen Sen and Lord Kumar Bhattacharyya, as per the provisions in the Articles of Association of Tata Sons, to choose a new Chairman within four month.

Objective

1. Understanding the Battle
2. Critical Analysis of Legality of Removal
3. Interpretation of statues involved
4. Current status and way forward



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Analysis – Legality of Decision

- There is no provision in Companies Act 2013 ("Act") with regard to position of chairman of a Board. The Rules made under the Act although refer Chairperson, his authority, so on, but they are silent on the subject as to who and how a director becomes chairperson of the Board.

- The Act lays down procedure for electing a chairperson for shareholders meeting. The Chairman of the general meeting shall be appointed as per section 104 of the Act. In terms of the section mentioned herein, the chairman of General Meetings of Shareholders, if any, is created based on the provisions laid down in the Article of Association ("AoA").

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Was The Board Meeting Called Properly

- Under Section 173 of the Act, a seven-day notice should be given to every director at his registered address, however, this notice condition may be exempted if at least one independent director is present in the board meeting or if the decision is ratified by at least one independent director if any.

- From the above it is clear that as per the Act, the board meeting can be called at a short notice. ***Therefore, as far as the Act is concerned, it appears that the Board meeting was called properly.***

- Article 114 of AoA of Tata Sons provide that Notice of Board meeting shall be given. It prescribes minimum 7-day notice to any director resident out of India, it does not prescribe any minimum notice period for director resident in India. ***Therefore, if any of the director is resident outside India, in that case it can be held that the meeting was not called properly.***

Removal of Directors Law and Rights of Director

- As Section 169 of the Act prescribes a procedure for removal of director, the law does not distinguish between independent, non-independent, executive and non-executive directors in so far as Removal of Directors is concerned.

- For the objective of fairness law prescribes the copy of notice to be sent to the director being removed. The law also entitles the director proposed to be removed to make a representation and the representation must be made available to all shareholders. The director also has a right to be heard at the meeting.

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Tata Sons – Alteration of Articles of Association

- **Article 104B** states about nomination of directors by Tata Trusts. Prior to change, the AoA have given power to these trusts to nominate up to 1/3rd directors. The appointment was within the domain of the board, indicating that board had the right to accept or reject the nomination. In the EGM held in April 2014, a clause was added to indicate that "The directors so nominated by the trust shall be appointed".

- This has clearly indicated that the board did not have the right to reject such directors appointed by the trusts any more. Effectively even if a person so appointed was conflicted or may be unwanted, he would still have to be appointed and the board could not do anything with regard to the same. ***We view such rights with shareholder as poor governance practice.***

Tata Sons – Alteration of Articles of Association

- Surprisingly, Mistry side did not criticize the alteration of Article 104B but on the other hand, criticized Article 121 which we found was amended favorably for all shareholders as it diluted the power of nominee directors. Prior to amendment, the Articles required **affirmation of all directors** to any proposal, however, post amendment **affirmation of majority of nominee directors** was required. ***Therefore, we find no reason to criticize this amendment***

- Removal of incumbent chairman is also covered under Article 118 of the AoA. The construction of the relevant clause in AoA is not very clear and is rather confusing, as it states that ***"the same process shall be followed for removal of incumbent chairman"***.

- Does this mean that a search committee will be formed as per the provisions of AoA to remove existing chairperson (seems highly illogical) or does it refer to affirmative votes of all directors appointed by two trusts under Article 104B and 121.

- Note: Tata Sons has omitted to amend Article 118 and align it with the provisions of amended Article 121, which provides for affirmative vote of **Majority of directors** appointed under section 104B.

Conclusion

- It might appear at first hand to be a case of bad governance. However, such a conclusion will be flawed with risk as one is not fully aware of circumstances leading to such a decision.

- Therefore, first it would have to be established that there was a gross breach or violation of AoA and then establish that decision was not in the best interest of the stakeholders at large. While on the face, it might appear to be a governance failure, in fact the circumstance may be such that it might be a case where decision is in best interest of stakeholders. In the worst case, at the most it would amount to a case where AoA provisions were not followed, legal remedy will be to follow the procedure. No law can force that a chairperson should continue despite shareholders and the Board not wanting him to continue.

- **As the appointment contract is not available in public domain, based on logic it can be concluded that Board of Tata Sons was within its legal rights to remove Mr. Cyrus Mistry from position of Chairman and their decision cannot be questioned unless there was any case of:**
  - **Breach of Contract terms**
  - **Not following provisions of AoA-relating to procedure as well as authority related to convening and conducting of Board Meeting and removal.**
  - **Compliance of procedure**

Brand

- There is no room for any doubt that in the current scenario, TATA brand has a lot of value and at the same time there is a risk to loss of value of brand if allegations are proved to be correct. Therefore, there is a need to protect the brand value by effectively countering the allegation by facts and third party certification.

- Connected with the issue is alleged threat by TATA to withdraw brand name and guarantee. We find this as a threat amounting to inflicting wound not only on others but to oneself as well. **Such a step will cause loss of value and majorly hit Tata Sons more than anyone else. Further why to give a threat, if need be, act when time comes. While it is a fact that if in any of the company resolution of removal of Mr. Mistry is defeated, it will be a setback for house of Tata's and signal a break up of Tata's House. Such a step would cause huge value erosion due to multiple factors.**

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Independent Directors Supporting Mistry

- Independent Directors of IHCL and Tata Chemicals unanimously expressed their gratitude for the contribution of Mr. Mistry. Prima facie, it appears that Mr. Mistry has already won the battle, however this does not mark a final victory for Mr. Mistry's in any manner but, Mr. Mistry resigned as Chairman from all Tata Group companies.

- *In our view, the support of Independent Directors of Indian Hotels towards Mr. Mistry was just an outcome of a situation where probably all the Independent Directors were pushed to the wall and their independence became subject to examination.*

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Legal battle

- Mistry filed an appeal in NCLT-Mumbai for Injunction.
- Appeal filed with NCLT under section 241, 242, 244 of Companies Act, 2013 for Prevention of Oppression & Mismanagement.
- NCLT Mumbai decided the main company petition on the point of maintainability and waiver and decided that the main company petition filed by Cyrus Investment Pvt. Ltd & Anr. was dismissed as on 17.04.2017.
- Cyrus Mistry filed an appeal in NCLAT on 21 April, 2017, appealing the order of the NCLT (Mumbai) decision on the waiver and the eligibility criteria.

Executive Summary

- Based on our analysis we do not find any legal issue with the decision of removal per se, however optically the decision does not sound convincing.

- Action of removal (with immediate effect) is disproportionate to the reasons cited, raising doubts and millions of questions. The issue of non-performance, if true, admittedly has been persisting for long therefore, immediate removal does not make sense.

- Latter war between two sides is not helping the cause of stakeholders. While on one hand E-Mail of Mr. Mistry raises some crucial issue, which needs to be effectively addressed or clarified. On the other hand, it questions board decisions to which he and / or IDs were themselves a party. He raises some issues about future write-off which SES finds bordering scare mongering.

Executive Summary *(Cont'd)*

- Reports have appeared about a threat given by Tata's to withdraw its brand name as well as guarantees. SES is of the view that such statement is bit premature. Further did IDs consider this aspect and evaluated the loss of value before backing Mr. Mistry? What makes them support Mr. Mistry ignoring all these concerns which ordinary shareholder has? Why they were silent till now?

- Is opposing dominant shareholder a sign of independence? Is it the right thing?

- NCLT on17 April, 2017, dismissed the petition on grounds of non maintainability and waiver was not granted.

- For the objective of fairness law prescribes the copy of notice to be sent to the director being removed. The law also entitles the director proposed to be removed to make a representation and the representation must be made available to all shareholders. The director also has a right to be heard at the meeting.

Source

- http://www.sesgovernance.com
- http://www.hindustantimes.com/business-news/tata-vs-cyrus-mistry-all-you-want-to-know/story-YCAFlau0p6oEg02ArjPR0K.html
- http://www.livemint.com/Companies/QDKeGSvdnVqZDtIYryjFcK/Why-Cyrus-Mistrys-NCLT-petition-was-rejected.html

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