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2. A documentary on the major issues relating to the concept of stakeholder and the effect this has on the development of governance in the United States and Japan (continued from Issue 08) by Roy Santanu.

SUBLEASE DOSSIER

by Santanu Roy.¹

Sublease in the metropolitan areas like Ballygunge, Alipore, Park Street (all three situate at Kolkata) and the alike are at an all time high and considering the amount of space currently available, the landlords are forced more often by tenants to approve future subleases. Subtenants must take due care and diligence before entering into subleases and landlords should not be reckless when they are accepting future subleases. The landlord and subtenant shall have no express contractual relationship with each other and their rights and liberties against each other will be based on the legal concept known as *privity of estate*, **save** there isn't any contract which has been agreed by the landlord and the subtenant.

In an ideal world, consent to a future sublease by a landlord shall be set forth through a *Consent to Sublease Agreement* which will be executed by

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the landlord, the tenant and the subtenant. In order to protect the landlord, the *Consent to Sublease Agreement* should portray the following basic provisions:

1. Sublease to which the landlord is consenting.
2. Such consent by the landlord to the sublease will not operate to release the tenant, and the tenant will continue to remain fully liable for, all of the tenant's obligations under the mother lease.
3. The premises being subleased.
4. The term of the sublease, at a minimum, including renewal clauses.
5. The subtenant should be in agreement to be legally bound by all of the provisions of the lease to the extent applicable to the subleased premises.
6. The subtenant should give consent to the landlord that, the landlord shall have the right to enforce such provisions directly against the subtenant.
7. The subtenant should indemnify the landlord as required with respect to the subleased premises and comply with the *permitted use/common area* provisions.
8. The subtenant should make it clear that, the landlord's approval to the future sublease is not intended to affect in any manner the obligation of tenant and/or subtenant to obtain landlord's consent to any future sublease or assignment.
9. The subtenant should make it clear that, if any proviso in the sublease conflicts with any proviso/terms/condition in the lease, such proviso/terms/condition in the sublease will not be binding on the landlord.
10. The subtenant should make it clear that, the *Consent to Sublease Agreement* and its execution will not create at any future date any direct rights in favor of subtenant against landlord.
11. It is good practice to have the subtenant specifically agree in the *Consent to Sublease Agreement*.
12. Make it clear that both the tenant and the subtenant will be obligated to reimburse the landlord for any attorney's fees or other costs incurred by the landlord in consenting to the sublease.
13. Contain representations and warranties from the tenant and the subtenant that the sublease describes the entire transaction between tenant and subtenant with respect to the subleased premises.
14. Require tenant and subtenant to indemnify landlord against any claims for

brokerage fees or commissions because of the sublease.

15. State that the provisions in the *Consent to Sublease Agreement* will be binding on tenant and subtenant.

Even though landlords usually have the force they need, to obtain direct contractual rights to enforce against subtenants, subtenants are characteristically at a disadvantage in seeking to establish direct rights against landlords even though the lack of such rights could prove to be grievous to the subtenant. A subtenant's right to possession of the subleased premises, without a direct agreement with the landlord, will terminate the lease between its sublandlord, as tenant, and the landlord is terminated because of the sublandlord's default. Although the subtenant in such case may sue its sublandlord for damages, those rights may be of little value.

A subtenant that expects to make noteworthy leasehold developments to the subleased premises or will otherwise incur significant costs in moving to the subleased premises would like to have the landlord agree in writing to honor the terms of the sublease as a direct lease between the landlord and subtenant if the lease is concluded. In many cases, however, this may be no more than wishful thinking on the subtenant's part, unless the subtenant has something that the landlord wants.

Even if such leverage is lacking, the subtenant should ask the landlord to (1) represent to it that the sublandlord is not currently in default of its obligations as tenant under the lease, (2) notify the subtenant of any future default by the sublandlord under the lease, and (3) give the subtenant an opportunity to cure the default (preferably with respect to the subleased premises only in order to preserve the subtenant's rights). It may also be important for some subtenants to know that the landlord will be obligated to provide certain services to the subleased premises to which the subtenant would not otherwise be entitled (e.g., janitorial services, parking rights, suite signage, or project directory listings). Any such obligations should be set forth in writing that is signed by landlord for the subtenant's benefit.

Although apartment users may love sublease opportunities because of reduced market rents and property managers may abhor subleases because of the competition and work they create, it is essential that each know and document their rights.

End.

A DOCUMENTARY ON THE MAJOR ISSUES RELATING TO THE CONCEPT OF STAKEHOLDER AND THE EFFECT THIS HAS ON THE DEVELOPMENT OF GOVERNANCE IN THE UNITED STATES AND JAPAN.

Roy Santanu²

Continued from Issue 08...

Sliding stakeholder model of U.S.

Probably the worst shattering attack on the stakeholder model of US were in-mergers takeover challenges that came to light during the 1980's. Once the declaration of a takeover is final the prices of stock goes higher, for example RJR/Nabisco.³ Even though a takeover significantly improved the assets of a shareholders, other stakeholders evidently had an impediment in the form of suspension, factory closure, redundancy and streamlining. These activities created a counterattack in the form of anti-takeover laws passed by twenty nine states.⁴

Even after the passing of the anti-takeover laws, Bank of New York tried to takeover Pittsburgh's Mellon Bank. Bank of New York offered 20% premium to market for Mellon's shares.⁵ As Mellon Bank rejected the offer, Bank of New York charged Mellon Bank for neglecting its shareholders. Analysts believe that Mellon Bank stayed away from the acquisition as because its share price rose considerably by 68% over the past two years.⁶

The next thrashing gust of failure in the stakeholder model was downsizing and mergers, which came during the 90's. According to the American Management Association people were losing jobs at an alarming rate of about 3,100 jobs a day. There were normally three main causes for the downsizing of companies: i. Competition from around the globe, ii. Increased productivity & efficiency and iii. To enhance share prices.⁷ Norris states that "There

² *Supra* see note 1

³ Burrough B. and Helyar J, *Barbarians at the Gate* (1990, Harper & Row, New York).

⁴ Meade N. L. et al (eds.), "An Anti-takeover Amendment for Stakeholders" (November 1997) *Journal of Business Ethics* 1651-1659.

⁵ Murray M. and Frank S. E., "Bank of New York Withdraws its Bid for Mellon" (May 21st 1998) *Wall Street Journal* p.A3.

⁶ Reich R. B., "The New Meaning of Corporate Social Responsibility" (Winter 1998) *California Management Review* 8-17.

⁷ American Management Association, *Survey of Downsizing and Assistance to Displaced Workers* (1995, AMA Report, New York).

is no quicker way to get your stock price up than to announce plans to fire a lot of workers."⁸ Researcher Art Boudros could not find any rationalization to sustain the downsizing of *Fortune* 100, and therefore refers to it as the "myth of downsizing".⁹

In mergers also shareholders will be supplemented by the new creation. Like downsizing, merger proclamations are over and over again acknowledged with an increase in the stock worth of the corporations concerned. Approximately about 11 to 15 percent job cuts may be presumed when companies' merge.¹⁰ For example the merger between Chase Manhattan and Chemical Bank presented each of the 12,000 employees a pink slip even though the stock rose by 12 percent.

Japanese Corporate Governance at its boom.

Satisfactory performance of an organization may either direct to autonomy of management's powers or supervising the company by large and stable shareholders.¹¹ When firm performance is reduced, the creditors, and the main bank interfere to start a streamlining sketch by regulating the inadequate board.¹² Kaplan and Minton¹³ are of the view that poorly performing firms are more likely to have a bank executive named in their board of directors than well-performing companies. Whereas Yafeh and Yosha¹⁴ state that, Japanese bank do not play an important role in reshuffling the managerial private benefits of firms, whose performance is satisfactory. The rationale is possibly that banks are chiefly concerned in shielding their outstanding loans, because their equity stakes are undersized in comparison with the size of the debt. For this reason banks get involved only when debt repayment is at jeopardy.

In fact, the Japanese financial system was performing fine without antagonistic takeovers that repeatedly involved expensive legal actions. In between 1960 and 1990 growth rate in Japanese economy was at its peak and almost tripled real incomes during that period. If we compare Japan's huge success of income creation with US, we find that during that particular phase US was able to

⁸ Norris Floyd, "You're Fired (But Your Stock is Way Up)" *New York Times* (September 3rd, 1995) Sect. 4, p.3.

⁹ Boudros Art, "The New Capitalism and Organizational Rationality: The Adoption of Downsizing Programs, 1979-1994" (September 1997) *Social Forces* 229-250.

¹⁰ "Impact of Big Mergers Questioned" *Pittsburgh Tribune-Review* (April 30th 1998) p.B3.

¹¹ Aoki M and Patrick H, *The Japanese Main Bank System: Its Relevance for Developing and Transforming Economies* (1994, Oxford University Press, Oxford).

¹² Berglof E. and Perotti E., "The Governance Structure of the Japanese Financial *Keiretsu*" (1994) 36(4) *Journal of Financial Economics*.

¹³ Kalpan S. and Minton B., "Appointments of Outsiders to Japanese Boards: Determinants and Implications for Managers" (1994) 36(4) *Journal of Financial Economics*.

¹⁴ Yafeh Y. and Yosha O., "Large Shareholders and Banks: Who Monitors and How" (1999) [Unpublished manuscript] - The Hebrew University, Jerusalem.

incorporate an increasing labour force, while employment in Japan declined. It was also not required to tie the reward of management to the share prices and build managerial myopia. The Japanese technique of corporate governance, was not pessimistic to long-term investment. This kind of governance practice led to company growth and spread of market share all over the globe.¹⁵

Change in Corporate Governance of U.S.

When the stock goes up both the CEO and the shareholder benefit.¹⁶ The other stakeholders benefit by the mercy of the management. Michael Useem brought the concept of shareholder wellbeing in the early 1990's.¹⁷ Michael Useem's finding was that Managers were only concerned about the shareholders. This change of managing various other stakeholders rather than concentrating only on stockholders was the process of development of soft laws of corporate governance. For example, The California Public Employees' Retirement System (**CalPERS**) has voted against Apple's board of directors and filed numerous shareholder proposals at other companies.¹⁸ A survey in 1992 of 2,361 Corporate Directors by Wang and Dewhirst¹⁹ found that, all the directors were responsive and had lofty magnitude of patience to answer questions of every stakeholder group in an organization.

Now-a-days businesses understand an extraordinary tempo of environmental change due to factors such as globalization, regulation, speedy makeover & propagation of expert technical skills, capital markets, structure of governance and progress toward 'market-based socioeconomic systems'.²⁰

*"A country's financial success is heightened when it takes into account the needs and interests of its various stakeholders - employees, shareholders, customers and so on - rather than focusing solely on increasing the wealth of its shareholders."*²¹

¹⁵ Hoshi T, "Benefits and Costs of the Japanese System of Corporate Governance" (1997) 26 *Global Economic Review*.

¹⁶ Crystal Graef, "Almost Any Way You Figure It, Executive Pay Remains Irrational" (December 3rd, 1995) *Los Angeles Times* p.D2.

¹⁷ Useem M [Cambridge, MA], *Executive Defense* (1993, Harvard University Press).

¹⁸ "1997 Corporate Governance Targets" *CalPERS News* {<http://www.calpers.ca.gov>} (February 1997).

¹⁹ Wang J. and Dewhirst H. D., "Board of Directors and the Stakeholder Orientation" (February 1992) 11 *Journal of Business Ethics* 115-123.

²⁰ Schneider Marguerite [Email: mschneid@adm.njit.edu], "A Stakeholder Model of Organizational Leadership" (March-April 2002) 13(2) *Organization Science* 209-220.

²¹ Beaver William, "Is the Stakeholder Model Dead?" (March-April 1999) *Business Horizons* 8-12.

Change in Corporate Governance of Japan.

In spite of the noticeable triumph of the Japanese model of corporate governance, in 1990s some worries about its supremacy began to materialize. All firms in Japan didn't continue enduring relationships with their share and debt holders. Ever since the early 1980s many other organizations in Japan have chosen to sponsor themselves through laissez-faire dealings and to have smaller number of secured share holders. The new predilection of the Japanese firms and the deteriorating significance of the banks are noticeably marked. Moreover many Japanese firms found the structure of bank investment combined with stable shareholding to be inadequate.²²

Japanese Banks apply authority on the performance of customers' organization and it is not limited to period of financial distress. This influence is deliberate to serve the bank's interests as a key lender, leading to non-profit maximizing behavior of the company. Banks provoke clients to borrow more than profit maximization would deserve, and pressure patron firms to implement low-risk and low-return speculation tactics, resulting in poor performance of bank-dependent corporations in contrast with self-sufficient companies.²³ Main-bank client firms of Japan invest more in imported know-how than other self-governing corporations. This outlook states that banks choose low R&D expenditure and push firms to invest in imported technology as an alternative. For example, Toyota and Honda (Automobile industry) or Sony (Electronics industry) do not keep close ties with a main bank.²⁴ Allen, Carlin and Mayer have argued that bank investment and control is appropriate for the sponsoring conventional manufacturing industries, but is inappropriate for financing modernization.²⁵

The drift of bank finance may be inappropriate in this age of soaring technology and even if the Japanese system of corporate governance was tolerable in the past, it may no longer be

²² Weinstein D. and Yafeh Y, "On the Costs of the Bank-centered Financial System: Evidence from the Changing Main Bank Relations in Japan" (1998) 52(2) *Journal of Finance*.

²³ Morck R. and Nakamura M, "Banks and Corporate Control in Japan" (1999) 54(1) *Journal of Finance*.

²⁴ Montalvo J. and Yafeh Y, "A Micro-econometric Analysis of Technology Transfer: The Case of Licensing Agreements of Japanese Firms" (1994) 12(2) *International Journal of Industrial Organization*.

²⁵ Allen F, 'Stock Markets and Resource Allocation', in Mayer C. and Vives X. (eds.), *Capital Markets and Financial Intermediation* (1993, Cambridge University Press, Cambridge); Also see: Carlin W. and Mayer C, "Finance, Investment and Growth" (1999) *CEPR Discussion Paper No. 2223*.

satisfactory for the advanced Japanese economy. Now the question of uncertainty is that, if banks are so good at supervising the performance of their client firms, then, how come they cannot convalesce so many of their outstanding loans? Horiuchi argues that the Japanese government sheltered the banks from antagonism, and guaranteed their endurance through the 'convey system'.²⁶ Neither *Amakudari* [Government bureaucrats taking positions on retirement in private financial institutions] improve bank performance, nor were the remunerations of bank supervisors tied to performance. At the same time it led to awful banking practices because banks did not think about taking too much risks and sponsoring poor investment projects.

Banks were constrained in the scale of their performance when organizations became open to fund themselves in domestic and foreign equity & bond markets. Individual reserves were still channeled to the banking system.²⁷ Banks were not accountable of headstrong moral-hazardous behavior, but the shifting patters of corporate finance pointed out that the large Japanese companies are no longer reliant on bank debt like the American equivalents. Therefore there is modest possibility for the persistence of Japan's bank-centered scheme of corporate governance.²⁸ Sakura Bank, the main bank of the Mitsui group, has negotiated merger with Sumitomo Bank,²⁹ DKB-Fuyo-IBJ group merged to survive in the competitive market³⁰ and Sanwa Bank's merger with Tokai Bank and Asahi Bank³¹ adds to the list of antagonism among Japanese banks. The Japanese system of bank-centred corporate governance is one of the reasons of the present macroeconomic crisis in Japan.³²

U.S. stocks and markets have emerged better than the Japanese stakeholders' counterparts during the last decade. One valid reason for the high valuation of U.S. stocks has fairly been due to an

²⁶ Horiuchi A, "Financial Fragility in Japan: A Governance Issue" (1998) *University of Tokyo Discussion Paper F-5*.

²⁷ Hoshi T. and Kashyap A, "The Japanese Banking Crisis: Where did it come from and How will it End?" (1999) *Brookings Papers on Economic Activity*.

²⁸ Hoshi T. et al (eds.), "The Role of Banks in Reducing the Cost of Financial Distress in Japan" (1990) 27(1) *Journal of Financial Economics*.

²⁹ Fair Trade Commission, "Merger between Sumitomo Bank Ltd. and Sakura Bank Ltd." (December 25th, 2000) - Web-link: <http://www2.jftc.go.jp/e-page/press/2000/20001225bank.pdf>

³⁰ 'East Asian Keiretsu' - Web-link: <http://members.cfn.org/~dredmond/keiretsu.html>

³¹ Ostrom Douglas, "Sanwa Bank to merge with Tokai, Asahi Bank" (March 24th, 2000) 12 *Japan Economic Institute (JEI) Report* - Web-link: <http://www.jei.org/Archive/JEIR00/0012w1.html>

³² Morck R. and Nakamura M, "Japanese Corporate Governance and Macroeconomic Problems" [Unpublished manuscript] (1999) *University of British Columbia*.

investment bubble.³³ The crash of 2000-2001 brought down stock valuations worldwide. By May 2001, U.S. stocks lost 16% of their February 2000 peak, Japanese Stock however were falling even more brutally, and lost 20% of their peak.³⁴ During this catastrophe capital tend to be fasten to the U.S. markets rather than running off into even more obscure markets. Neither the shareholders have gained in Japan's stakeholder society ever since 90s, nor the fundamentals of the economy have improved. Also many stakeholder contracts have become corrupt during the recession.³⁵

One of the strong points of the Japanese stakeholder system was the synchronized approach to monetary and fiscal policy. The concept gradually changed when the economy shifted into lower gear during 70s and the Japanese asset bubble burst in the early 90s. By this time fiscal and monetary policies are deadlocked and the economy was in the midst of several structural crisis.

Today, lifetime employment comprises less than 20% of the labour force in Japan. Unemployment is ever-increasing and even old lifetime contracts conked out in the form of early retirements and through political pressure. Bureaucracy scandals are thriving in Japan. Government and law and order are regarded as hopeless in the Dragon country.

In the past the Government was weak and inexperienced so it had a restricted role in the earlier stakeholder setups. Corporations are constantly hoaxing their customer relations.³⁶ For example, Mitsubishi Motor company firstly avoided customer complaints for nearly 30 years, secondly, company's management also mishandled a sexual harassment case in US, and lastly top management unable to improve corporate governance sought alliance with DaimlerChrysler AG.³⁷

³³ Kester, Carl W, "Governance, Globalization and Forces of Change" (October 2000) *Shanghai Stock Exchange Lecture*, Shanghai.

³⁴ Schulz M, "The Return of 'Structural' Monetary Policy? The Case of the Bank of Japan" (2001) *Monetary Macro & Finance Research Group Conference Paper* Queens University, Belfast.

³⁵ Jensen Michael C, "Corporate control and the politics of finance" (1991) 4(2) *Journal of Applied Corporate Finance* 24.

³⁶ Hirotugu S. and Hitoshi A, "The Japanese Corporate Governance System and Firm Performance: towards sustainable growth" (January 2003) *Research Center for Policy and Economy* Mitsubishi Research Institute, Inc. - Web-link: http://www.esri.go.jp/jp/prj-rc/macro/macro14/05mri1_t.pdf

³⁷ "Mitsubishi Motors - Problems and Problems" - Web-link: <http://www.mitsubishisucks.com/mitsubishi-motors.html>

Investment corporations, which were barred by the American occupation armed forces after the Second World War, became lawful again in Japan during 1998. Holding companies could now materialize as new company on the corporate governance panorama, even though they are dubious to become commanding.³⁸ American-style of corporate governance apparatus' have begun to infiltrate Japan. One distinguished example is the altering patterns of white-collar reward. Labour markets are fetching more energetic executives and activities of employees between firms are becoming more frequent. A more prolific market for senior managers is developing, making managerial 'career concerns' a significant feature of Japanese Corporate Governance.³⁹

Another power approaching for transformation, is the partial economic slow-down which has made long-standing cross-sharing arrangements hard to maintain, as organizations from different levels of financial hitches are lured to liquidate their holdings in other firms. To this point the range of equity stakes held by companies for extended periods of time has not been a pervasive trend.⁴⁰ If banks merge to improve from their existing depression, perchance through diversification into financial activities for instance underwriting, then banks might remain powerful players on the Japanese Corporate Governance picture.⁴¹

After the bubble burst in 1991, Japanese banks have only been able to organize 60% of their bad debts. Another factor for the blocked finance is cross shareholdings, but slowly it is diminishing.⁴² Japanese Banks have become vulnerable as because they have lost their function as main banks to key companies. Moreover to unwind jammed credit for small and medium size enterprises, the Fiscal Investment and Loan Program (FILP) started to pull out reserves from national postal savings to the private sector.⁴³ The financial system of

³⁸ Khanna T, "Business Groups and Social Welfare in Emerging Markets: Existing Evidence and Unanswered Questions" (2000) *European Economic Review*.

³⁹ Aoki M, *Information, Incentives and Bargaining in the Japanese Economy* (1988, Cambridge University Press, Cambridge).

⁴⁰ Suzuki K, "Inter-corporate Shareholding in Japan: The Significance and Impact of Sales of Stakes" [Unpublished manuscript] (1998) *London Business School*.

⁴¹ Hamao Y. and Hoshi T, "Bank Underwriting of Corporate Bonds: Evidence from Japan After 1994" [Unpublished manuscript] (2000) *UCSD*.

⁴² "Potential Economic Competitiveness Ranking" (2001) *Japan Centre for Economic Research (JCER)*, Tokyo.

⁴³ Corbett Jenny, 'Changing corporate governance in Japan', in Balling M., Hennessy E. and O'Brien R. (eds.), "Corporate governance, financial markets and global convergence" (1998) 33 *Financial and Monetary Policy Studies* [Dordrecht/Boston/London] 112-136.

Japan is still in a horrific figure and incapable of allocating resources smoothly. Balance Sheets are still in Japan based on historical corporate finance recycle costs, and subject to a wide range of caution. Corporations still have many directors drawn in the management, and the Japanese bureaucratic system is still a close stakeholder setup with a single political party in charge of legislative and governance control for the whole of the decade.⁴⁴ Disclosure and corporate control in Japan are still inadequately not opaque. Therefore Japanese private investors abstain from investing in Japanese capital markets and foreign investors also do not have desirability to invest in such a financial setup.⁴⁵

To be continued in the next issue...

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⁴⁴ Jensen Michael C, 'The modern industrial revolution, exit, and the failure of internal control systems', in Chew D. H. (ed.), *Studies in international corporate finance and governance systems – A comparison of the U.S., Japan and Europe* (1997, New York/Oxford) p.18-37.

⁴⁵ Schulz M, "Shareholder vs. Stakeholder Values – Finance and Economic Change." (2001) *Japanese German Center Berlin Conference Volume* [Shareholder vs. Stakeholder value – The Case of Japan] Berlin.

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Legal Quotations.

Necessity hath no law. Feigned necessities, imagined necessities ... are the greatest cozenage that men can put upon the Providence of God, and make pretences to break known rules by.
Oliver Cromwell.

Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a state make bad laws, they will suffer for it. They will be the first to suffer. Suffering, and nothing else, will implant that sentiment of responsibility which is the first step to reform.
James Bryce.

No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favour.
Theodore Roosevelt.