Recently, I caught up with a classmate from my alma mater, the National Law School, who was visiting London. We spent the evening ruminating over the last two decades we had spent in the legal profession. My classmate bought the first round to celebrate his recent appointment as the global general counsel of a large conglomerate, which includes numerous technology and technology-enabled services companies. The question doing the rounds (along with the drinks!) was whether we would have been better off going to Hogwarts (the School of Witchcraft and Wizardry from the Harry Potter book series) rather than the Law School? Could an Albus Dumbledore-equivalent have equipped us better had we been taught Defense Against the Dark Arts or Divination, rather than three courses of constitutional law or two courses of administration law?

As the discussion progressed, we wondered to what extent a general counsel is required to be a clairvoyant or soothsayer. How often do we get asked to predict a potential risk in the future? The changed role of the general counsel today requires that as the functionary responsible for ensuring stakeholders are fully aware of all risks to the business, we are often required to predict future risks. However, the problem we identified was that lawyers, just like doctors, rely on past events to predict future problems. Just as a doctor would recommend vaccination and inoculation based on their analysis of past symptoms of a disease, similarly the in-house lawyer often uses past disputes, regulatory actions and controversies to predict risks arising in the future.

The key challenge that we identified in the IT and technology enabled business services sector is that there has historically been (a) an absence of litigation, as most controversies and disputes get settled behind closed doors using the efficient governance process prescribed in most IT and business services contracts; and (b) self-regulation and the relative absence of regulatory action has meant that the industry has adhered to its own code of practices. Given these two factors, we agreed that lawyers are constrained in their ability to accurately predict the next controversy or potential risks arising in the world of technology and technology-enabled services. So the question facing the in-house lawyer is: which tea-cup or crystal ball can one gaze into in order to predict the next big storm?

The recent deliberations at the World Economic Forum in Davos produced an interesting line of thought, one that to my mind affects the in-house legal departments of IT and other technology enabled business services companies. The question relates to self-regulation and its effect on the sector.

Some of the largest and most valuable companies in the world today are the technology companies. The technology sector has grown in an environment of laissez faire and as a result of absence of industry-specific regulations, much of the industry today operates largely through: (a) self regulation; and (b) on the basis of contractual obligations undertaken on behalf of their clients. Given the amount of economic activity and commerce generated by these companies (which is similar in scope to the banks), and their corresponding impact on world trade and criticality to the world economy there has been a growing argument that given the banking crisis there should be stronger industry specific regulators to monitor and control these powerful companies and the activities of this sector.

One of the reasons why these technology and IT-enabled business services companies
have grown so tremendously over the last decade is because of their impact on our everyday lives. In many areas these companies have changed the way we live our lives and how business is conducted. Today one is able to order groceries thousands of miles away whilst on holiday at a different location knowing that when the person gets back home they would not need to go on a shopping run: they would probably have already received the groceries at the lowest price through a few clicks. It is well known that consumers today indulge in window shopping, and once they see something that they like they pull out their smart phones to search for a better deal on Amazon and dozens of other apps. Similarly in cities across the world people have stopped struggling, negotiating and begging with licensed taxi drivers to take them to the destination. Apps such as Uber have diluted monopolies through clicks and today drivers in addition to providing you a decent service, go the extra mile to earn positive feedback, which until a few months ago would have been unheard off. However such forces disrupt the existing order and the manner in which business is conducted, which in turn plays into fears and insecurities of many. Recently a controversy erupted in New Delhi, where an Uber taxi driver raped a woman (which would be reprehensible in any context). That led to numerous knee-jerk reactions from regulators wanting to regulate the company (which said it was not a transportation company and therefore not subject to regulation) and that ultimately caused Uber to suspend its services in the Indian capital.

The question for many general counsel in this sector is to consider whether we are a hair-trigger away from the next controversy that could lead to a slew of controls being imposed by powerful regulators and their impact on the industry? The actions or inactions of the weakest link in the industry might trigger a similar slew of regulatory action, similar to what we have witnessed in the banking and finance sector over the last few years.

At Davos, business leaders of large technology companies were warned that they could potentially suffer the same collapse in reputation as some large banks have endured in recent years unless they rapidly change their policies and approaches. The warning was directed at the influential heads of technology companies, such as those in Silicon Valley, who were told that they needed to recognize that self-regulation would not be sufficient to stave off public alarm about issues such as privacy, taxes, anti-trust etc.

In Europe, as in many other parts of the world, there has been a growing acrimony towards several such large technology companies. Amazon, Google and Facebook have come under severe criticism related to taxation, protection of data etc. Google became a target last month for the European Parliament, which backed a motion calling on regulators to consider breaking up the company. The European Commission has reopened the anti-trust probe into the search giant. Uber, the taxi app company, has also faced protests from different groups across Europe.

The banking crisis over the last five years has shown the world that trust in large institutions can diminish very rapidly when market confidence in them deteriorates affecting their ability to raise capital and do business. Recent events have shown, and now regulators are taking the view that, the economic
activities of such large companies could adversely affect the fabric of the world economy, and this could translates to an impact on the common man. The collapse of Lehman Brothers and their fallout has been well documented. The surviving financial institutions and the entire banking sector have been in the glare of the public eye and are subject to significant regulatory oversight impacting the manner in which business is conducted.

Whilst self-regulation has been a common practice up until now the question for general counsel and in-house legal departments of such IT and technology enabled companies is whether self-regulation could end up triggering the downfall of the industry?

With the new data protection directive on the horizon, most in-house teams are trying to grapple with the implication of such potential changes. These rules have been so long in the making that many wonder what shape the final regulation will take. The question also arises whether such regulations will prove to be effective in addressing some of the challenges that the industry currently faces and which going forward is only likely to grow in the future as a trend. However, it is increasingly clear that many of these technology companies who had taken the position that as processors of data the regulatory purview fell on their clients, may well have to amend that position, where they will directly come within regulatory purview.

I am not for once advocating that the industry today needs powerful regulators. However if I were a betting man, I would bet that in the next few years we will witness existing regulators coming up with more regulatory controls and potentially an industry specific regulator in some countries that may want to have a say in how the industry operates. In-house legal departments should brace themselves for such an eventuality.

As the evening drew to a close and we settled the tab, the question that remained unanswered for both of us was - if there were to be an industry specific regulator in the future what would be our attitude? Would the industry regard it as a Lord Voldemort? Or would such a regulator play the role of Professor Snape – a hidden guardian angel of Hogwarts? As we bid farewell to each other, that question remained unanswered. But we left with the realization that what law school did not teach us, the last two decades of Financial Times and Harry Potter may have just done the trick.

Only time will tell!

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