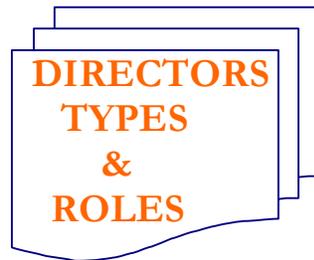


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INTRODUCTION

A company operates through its Directors¹; all the Directors together constitute the 'Board'. A Director is instrumental in ensuring appropriate decisions for the smooth running of the company as may be delegated by the Board from time to time. Directors may be appointed in various capacities for instance, Director, Alternate Director, Executive Director, Non-Executive Director, Independent Director and Managing Director.

A brief analysis of various categories of Directors in India is the focus of this newsletter.

Types of Directors

Under the Companies Act, 1956 (the "Act"), in India, a public company (listed or unlisted) is required to have a minimum of three, and a private company, a minimum of two, Directors². The Board is required to meet at least once every quarter and have at least four meetings in every year³.

Director of a company is a person who occupies the position of a Director. However, it is not so much the designation as the functions and duties that the person discharges that determine whether in fact he is a Director.

Only individuals to be Directors: Only an individual, as opposed to a body corporate, can be

appointed as a Director⁴. This enables a person to be identified who can be held accountable with respect to the operation/s of the company.

Alternate Director⁵ may be appointed, if the Articles so authorize in accordance with the Act, by the Board where a Director (original director) is unable to attend a meeting personally.

The original director should be absent for a period of at least three months from the State in which the meetings of the Board are usually held. The Alternate Director so appointed shall not hold the office longer than permissible to the original director in whose place he is appointed and has to vacate office when the original director returns to the State in which the meetings of the board are usually held⁶. This section greatly facilitates or assists the foreign directors of a company who are unable to travel for the meetings of the Board.

Executive Director contributes to the strategic management of the company's business within the approved framework of the Board. Additionally, he assumes responsibility for strategic planning and governance. While devoting his entire working hours in the company, an Executive Director is also paid remuneration by the company.

Non-Executive Director is not an employee of the company and devotes some time to the

¹ Section 2(13) of the Act - "director" includes any person occupying the position of director, by whatever name called.

² Section 252 of the Act

³ Section 285 of the Act

⁴ Section 253 of the Act

⁵ Section 313(1) of the Act

⁶ Section 313(2) of the Act

company. Usually, the company appoints a professional with vast experience or skills in a particular area as a Non-Executive Director. A Non-Executive Director is basically appointed to provide a view of an impartial outsider to enhance the creditability of the company.

Independent Director as defined in the listing agreement⁷ of Securities and Exchange Board of India (SEBI) includes that every listed company⁸ is to appoint an Independent Director. A Non-Executive Director who, in addition to the other responsibilities, fulfills the following criteria can be termed as an Independent Director. To qualify as an Independent Director, a Non-Executive Director must be someone who:

- does not have any pecuniary relationship with the company, its promoters, and/or its subsidiaries which may affect his independence and neutrality in deciding matters which are crucial for the company;
- should not hold more than two percent of the shares in the company;
- should not be an executive of the company in the preceding three financial years;
- is not a supplier of material goods and services to the company; and
- is not a partner or executive in an audit or consulting firm doing business with the company.

The objective of appointing an Independent Director is to have an unbiased effective management in a listed public company.

⁷Defined in new clause 49 of the listing agreement described in Circular no. SEBI/CFD/DIL/CG/1/2004/12/10 dated October 29, 2004.

⁸ Only applicable to listed companies who have to comply with the requirements of new clause 49 of the listing agreement

Managing Director⁹ is a Director, entrusted with substantial powers of management under the superintendence and control of the Board. A Managing Director (MD) plays a dual role, one of a Director and the other of a MD. A prerequisite of the office of the MD is that he holds the office of a Director.

On the other hand, a Manager¹⁰ who is also a Director and has been entrusted with whole or substantially the whole of the affairs of the company would be an MD as practically there is no distinction between the two, although the Act relies on two separate sections to define a Manager and MD. Hence, a Manager who is also a Director is, in respect of his functions, in no way different from that of an MD. Further, the Act provides¹¹ that a company cannot appoint a MD and a Manager simultaneously.

The distinction between a Manager and MD is in relation to the dual functions held by them, namely, appointment on the Board in addition to the role of managing the whole or substantially the whole of affairs of the company. However, when a Manager has to vacate his office as a Director for any reason, he will continue to fulfill the role of a Manager. But,

⁹Section 2(26) of the Act, a “Managing Director” means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or, by virtue of its memorandum or articles of association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called:

Provided that the power to do administrative acts of a routine nature when so authorized by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management:

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of Directors.

¹⁰ Section 2 (24) of the Act, a “manager” means an individual (not being an managing agent) who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of the company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not.

¹¹ Section 197-A of the Act states- Notwithstanding anything contained in this Act or any other law or any agreement or instrument, no company shall, after the commencement of the Companies (Amendment) Act, 1960, appoint or employ at the same time, or after the expiry of six months from such commencement, continue the appointment or employment at the same time, of more than one of the following categories of managerial personnel, namely: (a) Managing director, (b) manager.

the moment a MD ceases to be a Director he will cease to be the MD¹². Whether a Director can be regarded as a Managing Director of the company would depend on the nature and extent of the duties entrusted to him and again, the designation is immaterial. Thus, if a director is entrusted with managerial functions, he would be in a position of a MD notwithstanding the fact that he may be designated, for instance, as a president or chief-executive officer or chief operating officer.

CONCLUSION

Corporate India is currently experiencing a change in the trend of corporate governance. In contrast to the customary setup of family members holding key positions like that of Directors there is a tendency to appoint external, independent professionals with vast industry experience. With an increasing need to have a sound management setup to safeguard the interest of shareholders, the role of various directors, particularly, Non-Executive and Independent Directors (for listed companies) assumes greater significance.

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¹² A clarification given by the Department of Company Affairs, in their letter no. 8/212(60), dated March 17, 1977 to the Institute of Chartered Secretaries and Administrators India Association, Calcutta.

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