

Distribution of powers between Board of Directors and Shareholders

Company's powers can be exercised by the board of directors and at meetings of members of a company. Except for the powers which are expressly required to be exercised by the company in general meeting, in all other cases the directors can exercise all the company's powers. This division of company's powers has been dealt with Greer L J, in *John Shaw and Sons (Salford Ltd), v. Shaw*, in the following words: "A company is an entity distinct from its shareholders and its directors. Some of its powers may according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles, in

the directors is by altering the articles, or if the opportunity arises under the articles by refusing to re-elect the directors whose actions they disapprove."

The shareholders cannot usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in general body of shareholders. The powers of directors include to issue preference shares, borrow money by mortgaging the company's property and to do acts necessary for the management of the company. The power to sell the assets of the company is vested in the board and if the board thinks that it is not for the interest of the company to sell its assets, it is not bound to do so, notwithstanding a resolution to the contrary in the general meeting.

The directors are the only persons who can bring an action on behalf of the company. They may also compromise a suit in the interest of the company. The directors cannot by contract deprive themselves of the power to control a manager so as to confer powers on him to the exclusion of himself. While the directors are to follow the directions given by the general meeting, they are not bound to act or adopt a particular line of action at the instance of the shareholders. The exercise by the directors of discretionary powers will not be interfered with unless it is proved that they have acted for some improper motive or arbitrarily or capriciously. The following are some of the important powers of the board of directors of companies in India.

Directors

The Companies Act 2013 does not contain an exhaustive definition of the term “director”. Section 2(34) of the Act prescribed that “director” means a director appointed to the Board of a company. Section 2(10) of the Companies Act, 2013 defined that “Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company. The term ‘Board of Directors’ means a body duly constituted to direct, control and supervise the affairs of a company. As per Section 149 of the Companies Act, 2013, the Board of Directors of every company shall consist of individual only. Thus, no body corporate, association or firm shall be appointed as director. Again Section 166 (6) of Companies Act, 2013, prohibits assignment of office of director to any other person. Any assignment of office made by a director shall be void.

As per Section 153 of the Act, every individual intending to be appointed as director of a company shall make an application electronically in Form DIR-3 for allotment of Director Identification

Number to the Central Government along with the prescribed fees. Further, DINs to the proposed first Directors in respect of new companies would be mandatorily required to be applied for in SPICe forms (subject to a ceiling of 3 new DINs) only.

Types of Director

A director so appointed may either be executive director or non-executive director. An Executive Director can be either a Whole-time Director of the company (i.e., one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e., one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). They are generally responsible for overseeing the administration, programs and strategic plan of the organization. Other key duties include fund raising, marketing, and community out reach. The position reports directly to the Board of Directors. In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. A director to the Board may be appointed as

• First Director

Section 152 of the Act provides for the appointment of first directors, accordingly, where there is no provision made in Articles of Association of the company for appointment of first directors then the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed.

- **Resident Director**

Section 149(3) provides that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days during the financial year Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated.

- **Women Director**

Second proviso to Section 149(1) read Rule 3 of Companies (Appointment and Qualification of

Directors) Rules, 2014 following class of companies must have at least one Women Director.

All Listed Companies Public companies with paid up capital of `100 crore or more or with turnover of `300 crore or more. Additionally for listed entities SEBI vide recent notification provides that the Board of directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019 and the Board of directors of the top 1000 listed entities shall have at least one independent woman director by April 1, 2020. The top 500 and 1000 entities shall be determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

- **Alternate Director**

Section 161(2) of the Act empowers the Board, if so authorized by its articles or by a resolution passed by the company in general meeting, to appoint a director (termed as ‘alternate director’) to act in the absence of a original director during his absence for a period of not less than three months from India.

- **Additional Director**

Section 161(1) of the Companies Act, 2013, provides that the articles of a company may confer on its Board Lesson 16 Directors 569 of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. In case of default in holding annual general meeting, the additional director shall vacate his office on the last day on which the annual general meeting ought to held. A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director. Section 161(1) of the Act applies to all companies, whether public or private.

- **Small Shareholder Director**

According to section 151 of the Act every listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed. “Small shareholder” means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

Rule 7 of Companies (Appointment and Qualification of Directors) Rules, 2014 laid down the following terms and conditions for appointment of small shareholder’s director, which are as under: (i) Election of small shareholders’ director: A listed company, may upon notice of not less than (a) One thousand small shareholders; or (b) one-tenth of the total number of such shareholders, whichever is lower; have a small shareholder’s director elected by the small shareholder. A ‘Small Shareholders’ Director’ may be elected voluntarily by any listed company. Thus, a listed company, may, on its own, act to appoint a Small Shareholders’ Director. In such a case, no notice from small shareholder(s) is required.

- **Nominee Director**

Section 161(3) of the Companies Act, 2013, provides that subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company

- **Casual Vacancy**

Section 161(4) provides that If any vacancy is caused by death or resignation of a director appointed by the shareholders in General meeting, before expiry of his term, the Board of directors can appoint a director to fill up such vacancy. The appointed director shall hold office only up to the term of the director in whose place he is appointed. Section 161(4) in the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall subsequently approved by the members in the immediate next general meeting. The person so appointed shall hold office only upto the day upto which the director in whose place he has been appointed, would have held office if he had not vacated as aforesaid. Where a person appointed by the Board vacates his office it is not a case of casual vacancy and cannot be filled by the Board in the place.

- **Independent director**

Section 149(4) read with Rule 4 of Companies (Appointment and Qualification of Directors)

Rules, 2014 provides the rules for companies to have specified number of independent directors.

All listed public companies should have At least 1/3rd of total number directors as independent Directors, Other public companies with paid up capital of `10 crore or more or with turnover of `100 crore or more or with outstanding loans, debentures and deposits of `50 crore or more should have At least 2 independent Directors

However, the following classes of unlisted public company shall not be covered under sub-rule as above (a) a joint venture; (b) a wholly owned subsidiary; and (c) a dormant company as defined under section 455 of the Act. In case a company covered under this rule is required appoint higher number of independents directors due to composition of its audit committee and then they shall appoint such higher number of independent directors. Further if there is any intermittent vacancy of an independent director then it shall be filled up by the board of directors within 3 months from the date of such vacancy or not later than immediate next board meeting, whichever is later. Once the company covered under above sub-rule (i) to (iii) of Rule 4, ceases to fulfill any of three conditions for three consecutive years then it shall not be required to comply these provisions until such time as it meets any of such conditions. The definition of Independent directors is provided in section 149(6).

Disqualifications for appointment of Director- Section 164

Section 164(1) Provides that a person shall not be eligible for appointment as a director of a company, if –

- (a) He is of unsound mind and stands so declared by a competent court;
- (b) He is an undischarged insolvent;
- (c) He has applied to be adjudicated as an insolvent and his application is pending;
- (d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company.
- (e) An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- (f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
- (g) He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
- (h) He has not complied with sub-section (3) of section 152.
- (i) if he accepts directorships exceeding the maximum number of directorships provided in section 165.

Whenever a company fails to file the financial statements or annual returns, or fails to repay any deposit, interest, dividend, or fails to redeem its debentures, as specified in sub-section (2) of section 164, the company shall immediately file Form DIR-9, to the Registrar furnishing therein the names and addresses of all the directors of the company during the relevant financial years. When a company fails to file the Form DIR-9 within a period of thirty days of the failure

that would attract the disqualification under sub-section (2) of section 164, officers of the company specified in clause (60) of section 2 of the Act shall be the officers in default. Upon receipt of the Form DIR-9 under sub-rule (2), the Registrar shall immediately register the document and place it in the document file for public inspection. Any application for removal of disqualification of directors shall be made in Form DIR-10. However, a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2). The disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

Removal of Directors

Under section 169 of the Act, a company may, by ordinary resolution remove a director before the expiry of the period of his office. The provisions of section 169 shall apply regardless of the way in which the director concerned was appointed and notwithstanding anything contained in the articles of the company or any agreement with the director concerned.

Rights and duties of Directors

The duties of directors as contained in section 166 of the Companies Act, 2013 are described as follows

1. Duty to act as per the articles of the company The director of a company shall act in accordance with the articles of the company.
2. Duty to act in good faith A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
3. Duty to exercise due care A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
4. Duty to avoid conflict of interest A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

5. Duty not to make any undue gain A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

6. Duty not to assign his office A director of a company shall not assign his office and any assignment so made shall be void.

Corporate Social Responsibility

India's new [Companies Act 2013](#) (Companies Act) has introduced several new provisions which change the face of Indian corporate business" Companies Act 2013 (Companies Act) has introduced several new provisions which change the face of Indian corporate business. One of such new provisions is Corporate Social Responsibility (CSR). The concept of CSR rests on the ideology of give and take. Companies take resources in the form of raw materials, human resources etc. from the society. By performing the task of CSR activities, the companies are giving something back to the society.

Ministry of Corporate Affairs has recently notified Section 135 and Schedule VII of the Companies Act as well as the provisions of the [Companies \(Corporate Social Responsibility Policy\) Rules, 2014](#) (CRS Rules) which has come into effect from 1 April 2014.

Applicability: Section 135 of the Companies Act provides the threshold limit for applicability of the CSR to a Company i.e. (a) net worth of the company to be Rs 500 crore or more; (b) turnover of the company to be Rs 1000 crore or more; (c) net profit of the company to be Rs 5 crore or more. Further as per the CSR Rules, the provisions of CSR are not only applicable to Indian companies, but also applicable to branch and project offices of a foreign company in India.