



The Liability of Independent Directors

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By [Safir Anand](#) The Board of any company is primarily responsible for shaping the future of the company and a reasonable expectation from the Board is to exhibit diverse actions and perspectives which are in the interest of the company. The Board is accountable to the company and is solely responsible for securing and achieving the vision of the company. However, to balance larger interests of the company, many times, independent directors are inducted to provide objectivity. A company's need for solutions is multidimensional since they have a range of aspects to consider from finance, marketing, and deadlines to risk, reward and cultural and corporate issues. In the present day, when even the biggest of companies are facing limited lifespan of 15 years as leaders and are subject to business model changes, addressing issues of structure, corporate governance, ethics, as well as providing tools that maximise returns on investment is a niche role.

Incorporating intangible thinking into your business development process early is important and a good strategy acts as a catalyst to proliferate growth to create clouds of value, unique value proposition, new business prospects that are unconventional and uniquely place the company as a market leader. The Companies Act, 2013 does lay out the roles and responsibilities of Independent Directors as also the Code of Independent Directors, which provides guidelines, role and functions as also duties of independent directors. The duties of independent directors include:

1. undertake appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company;
2. seek appropriate clarification or amplification of information and, where necessary, take and follow appropriate professional advice and opinion of outside experts at the expense of the company;
3. strive to attend all meetings of the Board of Directors and of the Board committees of which he is a member;
4. participate constructively and actively in the committees of the Board in which they are chairpersons or members;
5. strive to attend the general meetings of the company;
6. where they have concerns about the running of the company or a proposed action, ensure that these are addressed by the Board and, to the extent that they are not resolved, insist that their concerns are recorded in the minutes of the Board meeting;
7. keep themselves well informed about the company and the external environment in which it operates;
8. not to unfairly obstruct the functioning of an otherwise proper Board or committee of the Board;
9. pay sufficient attention and ensure that adequate deliberations are held before approving related party transactions and assure themselves that the same are in the interest of the



company;

10. ascertain and ensure that the company has an adequate and functional vigil mechanism and to ensure that the interests of a person who uses such mechanism are not prejudicially affected on account of such use;
11. report concerns about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
12. act within their authority, assist in protecting the legitimate interests of the company, shareholders and its employees;
13. not disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

The liabilities of independent directors were recently evaluated in proceedings against independent non-executive directors of Tecpro Systems Limited in the Bombay High Court. Criminal proceedings in a cheque bouncing case under the Negotiable Instruments (NI) Act, 1881 were initiated against the independent non-executive directors. However, after an evaluation of the day-to-day role of the independent non-executive directors, the Court observed that "Simply because a person is director of company does not make him liable under the NI Act. Only those persons who are incharge and responsible for the conduct of business of the company at the time of commission of the offence will be liable for criminal action. A director, who was not in charge of and was not responsible for the conduct of the business of the company, at the relevant time, will not be liable for offence by invoking Section 141 of NI Act". The Court also observed that "Non-executive director not being a promoter or key managerial persons shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently." In fact, the Companies Act, 2013 itself provides certain protective measures for independent directors which indicate that an independent director can only be held liable in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. The Court has quashed the criminal proceedings against the independent non-executive directors and has ordered an expedited trial against the rest of the executives. This article was originally published on Mondaq.



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