# Roles, Responsibilities & Liabilities of Independent Directors

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The most important aspect of governance and management is a strong and competent board of directors. Every company must have an effective Board of Directors responsible for leading and controlling the company exercising strategic oversight over the business operations, monitoring management performance and optimizing stakeholder value. An effective Board is critical to good corporate governance and **all Directors owe a common set of duties to the company, in essence to act in good faith to promote the objectives of the company, exercise due and reasonable care, skill and diligence, avoid conflicts of interest, and shun undue gains to self and related parties.** There is no distinction in law between fiduciary duties and other responsibilities of all directors. Infact being a director today requires appropriate attitude and capability and demands time and attention.

Corporate governance codes globally as well as in India introduced the concept of an "independent director" essentially as a sub-set of "non-executive" directors. **The criterion for such independence in these non-executive directors is a stricter filter in terms of pecuniary relationships with the company or its management**. However, defining independence would not guarantee independence of judgment. That has much to do with the choice of directors, the skills that they bring to the board, the roles they play in various committees, quality of information provided to them and a host of other factors.

**Importance of Independent Directors**

A strong element of Independence on the Board is a requirement to basically ensure objectivity in Board Processes with the experience of the Independent Director adding a broader prospective. There are several distinct benefits that an independent board of directors can bring to a company, ranging from long-term survival to improved internal controls.

Independent directors in the board can:

- counterbalance management weaknesses in a company.
- ensure legal and ethical behavior at the company, while strengthening accounting controls and also try to ensure that its results are fairly and accurately reported;
- Ensure that the interests of all shareholders are kept in acceptable balance and in providing an objective view where a potential conflict of interest could arise between various classes of shareholders and stakeholders.
- extend the "reach" of a company through contacts, expertise, and access to debt and equity capital.
- be a source of well-conceived, binding, long-term decisions for a company.
- help a company survive, grow, and prosper over time through improved succession planning through membership in the nomination committee etc.

**ROLE OF INDEPENDENT DIRECTOR**

Corporate Governance principles all over and listing requirements assign tasks that have a potential for conflict of interest to independent directors, examples of these are integrity of financial and non-financial reporting, review of related party transactions, nomination of board members and key executives remuneration.

**Towards shareholders and stakeholders**

The shareholders, especially the minority shareholders, look to independent directors providing transparency in respect of the disclosures in the working of the company as well as providing balance towards resolving conflict areas. *Independent Director should have the will and courage to say no when things are not moving in the interest of the Company and all its stakeholders specially minority shareholders.*

In evaluating the board's or management decisions in respect of employees, creditors and other suppliers of major service providers, independent directors have a significant role in protecting the stakeholders interests.

One of the mandatory requirements of audit committee is to look into the reasons for default in payments to deposit holders, debentures, non-payment of declared dividend and creditors. Further they are required to review the functioning of the "Whistle Blower mechanism" and related party transactions. These, essentially, safeguard the interests of the stakeholders.

**Inputs to the Board**

As members of Board, their role is similar to any other director; independent directors primarily provide inputs to all key –decisions, such as strategies, performance evaluation and risk evaluation, affecting the company.

Significant contribution is expected when matters relating to the committee on which they are members are being discussed. They should ask the right questions in order to satisfy themselves on the integrity of information provided to them.

They should ensure that the Board addresses areas of concern on the running of the company and that these are recorded in the minutes if not resolved.

The Independent Directors should meet at least once a year without the chairman or executive **directors** - and there should be a statement in the annual report saying whether such meetings have taken place. They should also attend AGMs and discuss issues relating to their roles (especially chairmen of committees).

**RESPONSIBILITIES OF INDEPENDENT DIRECTORS**

To execute their role, independent directors, have similar responsibilities to those of other directors. The fiduciary duties of care, diligence and acting in good faith apply equally to independent directors as to other directors. In view of faith imposed on them by various agencies they are more bound to execute their functions with impartiality

It is important that the independent directors should:

a. prepare themselves thoroughly for the meeting
b. be objective in forming sound decisions relating to the company and its business
c. be open minded, free and frank in expressing their opinions and at the same be willing to engage in meaningful debates
d. to constructively challenge the business strategies involving risk elements and ensure that the cost benefit analysis has been properly explained;
e. be committed to decisions made as a Board,
f. continuously seek information both from within and if required outside professional knowledge to keep abreast with the latest developments in the areas of the company's operations
g. be informed on laws and regulations influencing their functioning as directors
h. ensure that compliance mechanisms are in place and periodically review legal compliance reports prepared by the company and independently audited as well as steps taken by the company to cure any taint.
i. utilize the expertise they possess to the good advantage of the company
j. to act in the larger genuine interest of true growth & development of the company.
k. endeavour not to accept Directorship of any other company that competes directly with the business of the Company.
l. function properly according to the spirit of corporate governance as a director on the board and as Member/Chairman across various committees.

The **role** and **responsibility** of an individual director, of course, would depend upon the nature of his directorship, his role as Member of/or Chairman of various committees. **Independent Directors should limit the number of Directorships / Committee memberships across companies such that they have sufficient time to contribute efficiently in these meetings.** An executive director, by very nature has much more functional responsibilities than non executive directors. In law it is their responsibility to ensure compliance with provisions of law failing with they could be held liable as officers in default. **As far as independent directors are concerned, the position of law is nebulous.**

**RIGHTS OF INDEPENDENT DIRECTORS**

To enable Independent Director to effectively contribute they should be able to call upon the Board for due diligence or for obtaining of records or for seeking professional opinion by the Board. They should also have the right to inspect records of the company, review legal compliance reports prepared by the company and in cases of disagreement they should record their dissent in the minutes.

**LIABILITY OF INDEPENDENT DIRECTORS**

In the context of the Bhopal Gas Tragedy verdict the question – What should be the liability of Independent Directors? gains significance. Presently the Companies Act looks at all directors alike with some extra compliances in case of whole time directors and requiring some disclosures by interested directors. Definition of "officer in default" gives a degree of immunity to directors other than the whole time directors

The very basis of separation of non-executive directors from managerial responsibilities should lead to a much clearer definition of accountability for managerial actions. It is recommended that non-executive directors should not be held to account for matters related to the day-to-day management of the company or execution of action plans (which is in the executive domain) and acts of omission or commission related thereto, unless there is proof of prior knowledge or neglect or dereliction in the exercise of due and reasonable care, skill and diligence.

**To determine the liability of independent directors, knowledge test should be applied. If the independent director does not initiate any action upon knowledge of any wrong doing or irregularity which may come to his knowledge or is attributable through Board processes or with his consent or connivance, then such director should be held liable. They must not be held liable for day to day affairs of the company and if they have acted diligently.**

**The Independent Director should insist on in-depth discussions of important items at Board Meetings and they should make sure that the Agenda put before them is informative and gives them sufficient knowledge to enable them to take right and correct decisions. They should function as an effective**

**oversight body and put in place an effective control & compliance mechanism framework with independent audits / opinions and ensure that it is monitored regularly. But of course, implementation of the decisions is the responsibility of the Executive Directors.**

**We have to encourage good independent directors to join the Boards of Companies to contribute in policy making, strategy, governance and not be handicapped with day to day matters.** In the case of very large Companies having large Boards, as an alternative the establishment of a two tier Board, as is common in Europe, has assumed greater significance in the Indian context. Such a large Board can have a **'Supervisory Board'**, as the upper tier Board above the 'Executive Board', with specific duties and functions. The executive, managerial and day to day functions can then to be left to the Executive Board, who are subject to the superintendence of a Supervisory Board.