CHAPTER – III
CORPORATE ADMINISTRATION – AN OVERVIEW

3.1 INTRODUCTION

When a company is registered under the Companies Act, 1956, it becomes a legal entity. It lives like a human being and its death lies in its winding up or on its amalgamation with other company or on its being declared defunct by Registrar of Companies in the office of the Registrar when he has a reasonable cause to believe that the company is not carrying on business or is not in operation or it has not enhanced the paid-up capital as required under Section 3 of the Act.

With all the strapping of a legal person, a company is unlike a living human being. It has no physical existence. It has no eyes to see, no ears to hear, no hands to sign and execute documents, no brain to think and no nerves to communicate among its various limbs. In order to enable a company to live and to achieve its objects as enshrined in the objects clause of its Memorandum of Association, it has necessarily to depend upon some agency, known as Board of directors when they work together as such agency. The Board of directors of a company is a nucleus, selected according to the procedure prescribed in the Act and the Articles of Association, out of the entire mass of its shareholders and even non-shareholders. Members of the Board of directors are known as directors, who unless especially authorised by the Board of directors or the company, do not possess any power of management of the affairs of the company. Acting
collectively as a Board of directors, they can exercise all the powers of the company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

The directors of a company are its eyes, ears, brain, hands, nerves and other essential limbs, upon whose efficient functioning depends, the success of the company. The directors formulate policies and establish organisational set up for implementing those policies and to achieve the objectives as contained in the Memorandum, muster resources for achieving the company objectives and control, guide and direct and manage the affairs of the company.

Prior to the Second World War, the average size of business and trade agency was very small. Virtually every business and trade agency was a one-man show. The owner of the one-man show represented the entire management put together. He used to see, hear, think and act for his business. He was his Purchase Manager, Sales Manager, Stores Manager, Finance Manager and what not. There had been quite hectic economic activities during the war. Price of almost every commodity rose sky high because of scarcity due to increased demands. Therefore, additional jobs were created both in civilian departments and in the defence departments catering to the defence requirements. Quite a few small-scale industrial units and a very large number of industries sprung up. With this development, the normal size of business, trade and industry unit grew and the proprietors engaged outside hands to help them in running their business more efficiently. This was coupled with industrial revolution.
After independence of the country, quite a few British business houses transferred their business organisations to the Indian nationals were also given all possible help and assistance by the Government to set up medium- and large-scale industrial units and establish large business houses and import and export trading houses. For the efficient running of these organisations, the proprietors, who were the sole directors of their respective businesses expanded their management bodies, by associating with them loyal servants, friends and business associates and by hiring the services of certain professionals and experts in various corporate disciplines. With the passage of time, these management bodies came to be known as the Boards of directors on the pattern of English joint stock companies.

The Board of Directors play a pivotal role in ensuring good governance. The contribution of directors on the Board is critical to the way a corporate conducts itself. A board’s responsibilities derive from law, custom, tradition and current practice. In the present times where transparency, disclosure accountability, issues of sustainability, corporate citizenship, globalisation are just some of the concerns that the Boards interlocks, the Boards today have to respond to the explosive demands of the market place. The contribution of directors on the Board of companies is critical for ensuring appropriate directions with regard to leadership, vision, strategy, policies, monitoring, supervision, accountability to shareholders and other stakeholders, and to achieving greater levels of performance on a sustained basis as well as adherence to the best practices of
corporate governance. This two dimensional role of the Board of Directors is cornerstone in evolving sound, efficient, vibrant and dynamic corporate sector alive to the persistent strive for attaining role models of high standards in integrity, transparency, code of conduct, accountability as well as the social responsibility.

With the globalisation and the blurring of the borders, the demands on the board has increased tremendously. Directors, as a body, frame the general policy of the company, direct its affairs, appoints the company officers, ensure that they carry out their duties and recommend to the shareholders regarding distribution of dividend. There are mainly two types of company directors. They are (i) Executive Directors or whole-time directors with their designations as managing directors, executive directors and technical directors and (ii) Non-executive or part-time directors who are professionals and for their livelihood do not depend upon one company but serve on the Boards of directors of a number of companies.

As per clause 49 of the Listing Agreement which deals with good Corporate Governance Practices, every company, to which this clause applicable shall have an optimum combination of executive and non-executive directors with not less than 50% of the Board of directors comprise of non-executive directors. The number of independent directors would depend whether the Chairman is executive or non-executive. In case of a non-executive Chairman, at least one-third of Board should comprise of independent directors and in case of an executive Chairman, at least half of Board should comprise of independent directors.
The executive directors are the directors who have employment stakes in the companies managed by them as their companies provide them all their bread and butter. More often than not they wield substantial powers, enjoy to the maximum possible extent remunerations, perquisites, fees, commissions and allowances as allowed under the Act. The part-time directors get only sitting fee for the Board meetings attended by them, and wield very little or no power.

The Organisation for Economic Co-operation and Development in its principles of corporate governance has stated that:

“Together with guiding corporate strategy, the Board is chiefly responsible for monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interest and balancing competing demands on the corporation. In order for boards to effectively fulfil their responsibilities they must be able to exercise objective and independent judgement. Another important board responsibility is to oversee systems designed to ensure that the corporation obeys applicable laws, including tax, competition, labour, environmental, equal opportunity, health and safety laws.”

A company in the eyes of the law is an artificial person. It has no physical existence. It has neither soul nor a body of its own. As such, it cannot act in its own person. It can do so only through some human agency, i.e., directors.88 “The

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88 Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., (1915) A.C.705. Cairns L.J. observed in Ferguson v. Wilson (1866) L.R.2 Ch. App.77:
company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent”.

Lord Cranworth\textsuperscript{89} observed that “The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting”.

The directors are the brain of a company. They occupy a pivotal position in the structure of the company. They are in fact the mainspring of the company. Nevile\textsuperscript{90} observed that “the Board of directors are the brain and the only brain of the company which is the body, and the company can and does act only through them. It is only when the brain functions that the corporation is said to function\textsuperscript{91}.”

The supreme executive authority in the control of a company and its affairs resides in persons known as ‘Board of Directors’. Section 253 of the Act provides that only an individual, and not a body corporate, association or firm, shall be appointed as director.

Section 2(13) defines a ‘director’ as including “any person occupying the position of director by whatever name called”.

\textsuperscript{89} Aberdeen Rly. Co. v. Blaikie Bros., (1854) 1 Macq. 461.
\textsuperscript{90} Bath v. Standard Land Co., (1910) 2 Ch. 408.
As per Section 252(3), the directors of a company collectively are referred to as the ‘Board’ or ‘Board of Directors’, which is a group of individuals elected by the shareholders to manage the affairs of the company. Company being an artificial person acts only through human beings designated as directors who act as eyes, ears, brain, nerves and essential limbs of the company. The success of the company depends upon the efficient functioning of its Board.

3.2. ROLE OF BOARD

To Establish an Organisational Vision and Mission

Organisation’s activities should be consistent with its stated purpose and effectively and efficiently work towards achieving its mission and be committed to continual quality improvement. Based on the value of quality, openness, integrity, responsibility and accountability, board members and employees should act in the best interest of achieving the organisation’s mission at all times.

Giving strategic direction and advice

Fundamental to the operation of any business is its strategy. Boards are in an excellent position to provide input and advice to the Chief Executive Officer and the top management regarding the company’s strategic direction. They contribute opinions, viewpoints and information that are not always readily available to the company’s management. As the directors are not involved in day-to-day development of strategy they are often in a position to provide an objective and detached view of its potential effectiveness.
**Overseeing Strategy implementation and performance**

Developing a valid strategy is only the first step in creating an effective organisation. The board plays a crucial role in advising, evaluating and monitoring strategy implementation. Boards can best monitor strategy implementation by setting benchmarks to measure progress and by drawing on objective sources of information.

**Developing and evaluating the Chief Executive Officer (CEO)**

The evaluation of Chief Executive Officer and top management team is a very important activity of the board. In the rapidly changing environment, boards need to be proactive in evaluating the performance of CEO and top management team.

**To Ensure the Organisation has Sufficient and Appropriate Human Resources**

The board’s responsibility for the evaluation and development of talent extends beyond the CEO. The Board has to be involved in planning the development of senior management.

The board is responsible for

- Hiring the senior staff person
- Giving direction to the senior staff person, and
- Evaluating the senior staff person.
Ensuring Effective Stakeholder Relations

To serve as a communications link with members and others involved in an organisation. An organisation can accomplish this by informing people of upcoming events, promoting items of interest and providing newsworthy information.

To serve as a communication link with the general public. Promote the organisation’s purpose, goals and objectives, programs and activities before the public to foster awareness, accomplishments and opportunities for involvement.

Risk Mitigation

Directors are expected to identify and manage obstacles that may prevent the organisation from reaching its goals. The whole board must be involved in risk management, particularly around financial matters and legal compliance.

Procuring resources

Financial resources, human resources, technological resources, business relationship are the key resources that are essential to an organisation’s success. Boards play an important role in helping the organisation procuring the resources.

3.3. RESPONSIBILITIES OF BOARD

Responsibilities cast upon Directors are quite onerous and multifarious. The duties of directors are partly statutory, partly regulatory and partly fiduciary. Directors are in fiduciary position and must exercise their powers for the benefit of
the company. Board is responsible for direction, control, conduct management and supervision of the company’s affairs. They have to establish effective corporate governance procedures and best practices and whistle blower mechanism. Ultimate control and management vests with the Board.

The board functions on the principle of majority or unanimity. A decision is taken on record if it is accepted by the majority or all of the directors. A single director cannot take a decision. This is one of the purposes of forming a board. If the power of decision making is given to a single director he might take biased decisions. He may take decisions which benefit him in his personal capacity. The scope of biasness, partiality and favouritisms is eliminated with the concept of the board.

The purpose to have a board in the company is to have directors who are expected:

- To contribute to the business of the company through their knowledge and skills.
- To advise on such matters as need their attention and influence.
- To critically analyse the performance and operations of the company.
- To be able to act as a professional aide.
- To be able to offer their professional expertise in the relevant field.
- To establish sound business principles and ethics.
- To act as a mentor to the management.
The effectiveness of the board depends largely on the leadership skills, capabilities and commitment to corporate governance practices of each individual director. According to Adrian Cadbury, if the company has to make the most of its opportunities, the Board has to be a source of inspiration for the goals it sets. The Board is responsible for the manner in which a company achieves its goals and therefore for the kind of enterprise it is and that which it aspires to become. The responsibility of the board is also to provide leadership in advancing the company’s vision, values and guiding principles. The board is collectively responsible for promoting the success of the company by directing and supervising the company’s affairs. The board’s role is to provide entrepreneurial leadership within a framework of prudent and effective controls, which enable risk to be assessed and managed. The board sets the company’s strategic aims, ensures that the necessary financial, human resources and infrastructure are in place for the company to meet the objectives and review management performance.

3.3.1. Corporate Best Practices

Corporate Governance initiative is based on two core principles. These are:

- Management must have the executive freedom to drive the enterprise forward without undue restraints; and
- This freedom of management should be exercised within a framework of effective accountability.
Any meaningful policy on corporate governance must provide empowerment to the executive management of the company, and simultaneously create a mechanism of checks and balances which ensures that the decision making powers vested in the executive management is not only not misused, but is used with care and responsibility to meet stakeholder aspirations and societal expectations.

3.3.2. Training

An important aspect of Board effectiveness would be appropriate attention to development and training of independent directors on the lines of management development and training. The normal expectation is that independent directors having been invited to join the Board due to their rich background and expertise, may not need any training. As the Board of Directors is primarily responsible for good governance practices, which is quite different from management, it calls for new areas of knowledge and different skills. Training should encompass both a thorough induction programme and an ongoing training and development opportunities for the board members. Since the Board composition is getting more diverse a system of formal training and evaluation is very important to foster trust, cohesion and communication among board members.

Clause 49 of the Listing Agreement in its non-mandatory requirement with regard to training provides as under:

A Company may train its Board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.
3.4. LEGAL POSITION OF DIRECTOR

The position of directors in their relationship to the company is not only as the agent, but they act to some extent, trustee of the company and in the position of trustees, as an employee also. The directors have the following position in the company.

**Director as an Agent:** The general position of the directors in the company is that they represent company in dealing with third party. A company, which is a legal entity, cannot act by itself and it can act only through natural persons who are known as the Board of directors. Therefore, as per the general principles of the law of agency, where the directors enter in to contracts on behalf of a company in the ordinary course, the company will be liable as principal and not the directors. Directors are agents in transactions they enter in to on behalf of the company, though they are not agents for individual shareholders or members.

**Director as a Trustee:** Directors are not trustees in the legal sense as the rules applicable to trustees under the Trustees Act do not apply to directors. But, for the assets and properties of the company, in addition to being agents of a company, the directors also act as trustee because they have to hold the company’s properties with utmost trust and manage the affairs of the company for the benefit of the shareholders primarily. The duties attached to the directors are fiduciary in nature and they have to display good faith towards the company.
**Director as an Employee:** When a director is in the employment of the company as for example as managing director or whole-time director, he will be treated as an employee.92 ‘Managing Director’ is treated as an employee as held by the Hon’ble Supreme Court.93

**Directors as Officers:** For certain matters under the Companies Act, the directors are treated as officers of the company [Sec. 2 (30)]. As such they are liable to certain penalties if the provisions of the Companies Act are not strictly complied with.

**Director is not Servant:** Directors are not servants of the company but are to a certain extent act in the position of managers or managing partners.

### 3.5. COMMITTICES OF THE BOARD

With the globalisation and the blurring of the borders, the demands on the board has increased tremendously. The regulatory requirements are complex and the onus on the Board is immense. In this scenario, the need to delegate oversight to a board committee has become imperative. However, it is to be remembered that even though the board delegates some of the responsibilities to a committee, the ultimate responsibility lies with the board. To enable better and more focused attention on the affairs of the Corporation, the board delegates particular matters to committees of the board setup for the purpose. Committees review items in great

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93 Employees State Insurance Corporation (ESIC) v Apex Engineering (P) Ltd., 1998.
detail before it is placed before the Board for its consideration. These committees prepare the groundwork for decision-making and report at the subsequent board meeting.

In the present day, the regulatory requirements is such that the composition of the Board comprising executive directors and non-executive independent directors is relatively large in number. In additions there are a number of non-executive directors. In such a situation it becomes at times practically difficult to convene board meetings which suit the convenience and other commitments of each director. Committees allows the board to:

- Handle a greater number of issues with greater efficiency by having experts focus on specific areas.
- Develop subject specific expertise on areas such as compliance management, risk management, financial reporting.
- Enhance the objectivity and independence of the board’s judgment.

**Various Committees of the Board:**

The following are the some of the important committees of the Board:

**Audit Committee**

A key element in the corporate governance in the process of any organisation is its audit committee. The battle for the financial statement integrity and reliability depends on balancing the pressures of multiple stakeholders, including management, regulators, investors and the public interest. The
regulatory framework with regard to audit committee is covered under Clause 49 of the Listing Agreement and Section 292A of Companies Act 1956.

**Shareholders Grievance Committee/Investor Grievance Committee**

In terms of Clause 49-IV(G)(iii) of the Listing Agreement, a Board Committee under the chairmanship of a non-executive director shall be formed to specifically look into the redressal of shareholder and investors complaints like transfer of shares, non-receipt of balance sheet, non-receipt of declared dividends, etc.

**Remuneration Committee**

This committee is constituted by the company to determine the remuneration packages of executives for directors/chief executive officers. The role of the committee is to establish overall compensation philosophies, evaluate management performance, recommend compensation for Chief Executive Officer, set compensation for executives, consider industry benchmarks, establish and administer performance goals, establish compensation programme for employees, recommend director compensation, administer employee benefit and incentives plan, administer stock option and other equity-based plans, etc.

**Nomination Committee**

The primary role of the Nomination Committee of the Board is to assist the board by identifying prospective nominee directors and make recommendations on appointments to the board and the senior-most level of executive management below the board. The committee also clears succession plans for these levels.
Corporate Governance Committee

A Company may constitute this committee to develop and recommend the board a set of corporate governance guidelines applicable to the company, implement policies and processes relating to corporate governance principles, to review periodically, the corporate governance guidelines of the company. The committees is responsible for considering matter relating to corporate governance including the composition of board, appointment of new directors, review of strategic human resources decisions, the succession planning for the chairman and other key board and executive position, performance evaluation of the board and its committees and individual directors.

Corporate Compliance Committees

The primary objective of the Compliance Committee is to review, oversee and monitor the company’s compliance with applicable legal and regulatory requirements, policies, programmes, and procedures to ensure procedures to ensure compliance with relevant laws, the company’s code of conduct and other relevant standards.

3.6. BOARD STRUCTURE

3.6.1. Size

The board structure in India is one tier. Section 252 of the Companies Act, 1956 stipulates that every Public Company shall have minimum three directors. In the case of a public company or a private company which is a subsidiary of a public company the maximum number of directors stipulated is 12 (in case of
companies incorporated before 21.07.1951 the maximum number would be determined by the provisions in this regard in its Articles). In case a company wishes to increase the number of directorship beyond 12, it would require the approval of the Central Government. The Listing Agreement does not stipulate on the size of the board.

3.6.2. Composition

Board composition is one of the most important determinants of board effectiveness.

A board should have a mix of inside and Independent Directors with a variety of experience and core competence if it is to be effective in setting policies and strategies and for judging the management’s performance objectively. The potential competitive advantage of a Board structure constituted of executive directors and independent non-executive directors is in its combinations of the depth of knowledge of the business of the executives and the breadth of experience of the non-executive/independent/outside director.

The board chairperson being someone other than the CEO can enhance the board’s independence on the ground that the roles of supervisor and supervised should not be combined.

An aspect of Board structure which is fundamental but is very less visited is that of the Board Size. Board size is also an important determinant of board
effectiveness. The size should be large enough to secure sufficient expertise on the board, but not so large that productive discussion is impossible.

The Board Composition in the Indian context is governed by the Listing Agreement in case of listed companies. Clause 49 of the Listing Agreement mandates as under:

- The Board of directors of the company shall have an optimum combination of executive and non-executive directors with not less than 50% of the board of directors comprising of non-executive directors.
- Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.

The Listing Agreement was recently amended by Securities and Exchange Board of India vide its circular SEBI/CFD/DIL/CG/1/2008/08/04 dated April 08, 2008 which provides as under:

If the non-executive Chairman is a promoter or is related to promoters or persons occupying management positions at the board level or at one level below the board, at least one-half of the board of the company should consist of independent directors.

Disclosures of relationships between directors inter-se shall be made in specified documents/fillings.
The gap between resignation/removal of an independent director and appointment of another independent director in his place shall not exceed 180 days. However, this provision would not apply in case a company fulfils the minimum requirement of independent directors in its Board, i.e., one-third or one-half as the case may be, even without filling the vacancy created by such resignation/removal.

The minimum age for independent directors shall be 21 years.

3.6.3. Board Meetings

As per Section 285 of the Companies Act, 1956, in every company, a meeting of its Board of Directors shall be held at least once in every 3 months and at least four such meetings shall be hold in every year.

Notice of every meeting of the Board of directors of a company shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

The quorum for a meeting of the Board of directors of a company shall be one-third of its total strength (any fraction contained in that one-third being rounded off as one), or two directors, whichever is higher.

Provided that where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength, the number of the remaining directors, that is to say, the number of the directors who are not interested present at the meeting being not less than two, shall be the quorum during such time.
3.6.4. Powers of the Board

In terms Section 291 of the Companies Act, 1956, the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

The Board shall not exercise any power or do any act or thing which is required, whether by this or any other Act or by the memorandum or articles of the company, to be exercised or done by the company in general meeting.

As per the Section 292, the Board of directors of a company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the Board.

- The power to make calls on shareholders in respect of money unpaid on their shares.
- the power to issue debentures;
- the power to borrow moneys otherwise than on debentures;
- the power to invest the funds of the company; and
- the power to make loans:

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company, the powers specified in clauses (c), (d) and (e). The board is required to specify in clear and quantified terms the extent of delegation.

- Powers of the Board is not spelt out in the Listing Agreement.
3.7. DISCLOSURE AND TRANSPARENCY

In terms of Companies Act, 1956 the aspect of disclosure and transparency spans over several sections.

With the e-filing of forms with the Registrar of Companies, The Ministry of Corporate Affairs has put in place a mechanism that is imaginative, technologically savvy and stakeholder friendly. Through the application of Information Technology to the Government functioning in order to bring about Simple, Moral, Accountable, Responsive and Transparent (SMART) Governance, the MCA at moving form paper based to nearly paperless environment.

The filing that a company is required to make under the Companies Act include:

3.7.1. Company Registration

All forms required for the purpose of incorporating companies in India.

3.7.2. Compliance Related Filing

All the statutory filing of e-Forms, whether annually or event based is grouped under compliance related filing services. The filing requirements include the following:

Annual returns by companies having share capital; Annual returns by companies not having share capital; Balance Sheet and Profit and Loss Account;
Return of allotment including details of shares issued for consideration other than cash; Return of buy back of securities, Return of deposits by the company which has accepted public deposits during the year; Return of appointment of Managing Director, whole time Director; Notice of appointment of auditor; Statutory report; Cost audit report.

3.7.3. Change Services

Change services cover matters in respect of Indian companies, especially those pertaining to any change in the capital structure, increase in authorised capital, increase in the number of members, the change of situation of registered office of the company and change of Directors, Manager and Secretary. Foreign companies are required to intimate the Registrar of Companies about the changes in the charter statues or any instrument governing the company, changes in the registered office, principal place of business or the persons appointed as Director, Secretaries and authorised representatives.

3.7.4. Charge management

Companies are required to file particulars for registration of charge created or modified and the satisfaction of charge with the concerned ROC.

3.7.5. Investor Services

An e-Form has been prescribed for complaints with respect to each company. The nature of complaint may relate to any of the following aspects:

Share/Dividend; Debenture/Bond; Fixed Deposits; Miscellaneous.
3.7.6. Provisions Relating to Managerial Personnel

This includes applications pertaining to the following:

**Increase in the number of Directors**

Appointment or reappointment of Managing Director (MD)/Whole time Director (WTD)/Manager.

Fixing/increasing the remuneration or waiving off excess/overpayment to the concerned managing authority.

**Payment of commission to Directors**

Modifications of the terms and conditions for the appointment of Managing Directors, Whole-time Directors and Non-Rotational Director.

**Removing disqualification of directors**

The inspection of public document relating to a company is allowed and can be done online from anywhere on payment of the prescribed fee.

A copy of balance sheet (including the profit and loss account, the auditors’ reports, directors’ Report and every other document required by law to be annexed or attached, as the case may be, to the balance sheet) which is to be laid before a company in general meeting shall, not less than 21 days before the date of the meeting, be sent to every member of the company.
After the balance sheet and the profit and loss account have been laid before a company at an annual general meeting as aforesaid, there shall be filed with the Registrar within 30 days from the date on which the balance sheet and the profit and loss account were so laid.

3.8. QUALIFICATIONS AND DISQUALIFICATIONS OF DIRECTORS

A director must,

- be an individual,
- be competent to contract, and
- hold a share qualification, if so required by the Articles,

Disqualifications of Directors (Sec. 274).

The following persons are disqualified for appointment as directors of a company:

- A person of unsound mind.
- An un-discharged insolvent.
- A person who has applied to be adjudicated as an insolvent and his application is pending:
- A person who has been convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than 6 months, and a period of 5 years has not elapsed from the date of expiry of the sentence:
- A person who has not paid any call in respect of the shares of the company held by him, whether alone or jointly with others, and 6 months have
elapsed from the last day fixed for the payment of the call; an order
disqualifying him for appointment as director has been passed by Court in
pursuance of Section 203 and is in force unless the leave of the Court has
been obtained for his appointment in pursuance of that section; or such
person is already a director of a public company which has not filed the
annual accounts and annual returns for any continuous three financial years
commencing on and after first day of April 1999, or has failed to repay its
deposit or interest thereon on due date or redeem its debentures on due date
or pay dividend and such failure continues for 1 year or more.

3.9. COMPANY SECRETARY

In India, qualified Company Secretaries have been playing a significant role
in the management of affairs of the companies, specifically in the areas of
compliance with various provisions of the laws and regulations affecting the
corporate sector. Apart from employment in the companies, a number of qualified
Company Secretaries have also registered themselves as ‘Practising Company
Secretary’ and are rendering very useful service to the small and big companies in
statutory compliances and by conducting regular secretary audit for certain size of
companies. Every company having a paid up share capital of Rs. 5 crores or more
are required to appoint a qualified person as Company Secretary. A qualified
Company Secretary should be a member of Institute of Company Secretaries of
India headquartered in New Delhi. A company having not less than Rs. 10 lakhs
paid up capital and not required to appoint a full time company Secretary should file with Registrar of Companies, a compliance certificate signed by a practicing Company Secretary.

Section 383A of the Companies Act, 1956 provides for the mandatory appointment of a whole time secretary where the paid up capital of the Company exceeds Rs.5 crores. In case where the capital is less than Rs. 5 crores, the company is required to obtain a secretarial compliance certificate and attach the same to the Directors' Report and file it with the Registrar of Companies.

Statutory declarations of compliance under various other provisions of the Companies Act, 1956 are also to be certified by practising company secretaries. Under the MCA21 e-filing regime several forms (including some, exclusively) are required to be pre-certified by practising company secretaries.

In the case of companies listed on recognised stock exchanges, the annual returns are to be signed by a practising company secretary.

Further, the Securities and Exchange Board of India (SEBI) also recognizes the Company Secretary as the Compliance Officer and the practising company secretary to issue various certificates under its regulations. Further, the practising Company Secretaries are also authorised to certify compliance of conditions of corporate governance in case of listed companies.
The Reserve Bank of India also authorises company secretaries to issue various certificates.

The Institute of Company Secretaries of India, is the premier professional body to develop and regulate the profession of Company Secretaries in India. It was set up by an Act of Parliament in 1980. The profession has its origin in England.

3.10. MANAGERIAL REMUNERATION

Managerial personnel, the expression ‘managerial personnel’ refers to the managing director whole-time/part-time directors, or manager. It excludes executives who are not members of the Board of directors of the company irrespective of salary paid to them. The term ‘whole time director’ has not been defined in the Act. The expressions ‘whole-time director and the director in whole-time employment have been used in Secs. 198 and 309, respectively.

Overall maximum managerial remuneration (Sec. 198)

Remuneration not to exceed 11%. The total managerial remuneration of the directors and the manager in respect of any financial year shall not exceed 11% of the net profit of the company for that financial year computed in the manner laid down in Secs. 349 and 350. The percentage shall be exclusive of the fees payable to the directors for attending the meetings of the Board of directors, or a committee thereof.
Within the 11% limit of the maximum remuneration, a company may pay monthly remuneration to its-managing or whole-time director in accordance with the provisions of Sec. 309 (which deals with remuneration of directors), or manager in accordance with the provisions of Sec. 387 (which deals with remuneration of manager).

Remuneration in case of nil or inadequate profits – previous approval of Central Government required. If in any financial year a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole-time director or manager by way of remuneration any sum (excluding any fees payable to directors) except with the previous approval of the Central Government. This is subject to the provisions of Sec. 269 (which deals with appointment of managing or whole-time director or manager), read with Schedule XIII.

In the event of loss or inadequacy of profits, approval of the Central Government is not required for payment of remuneration if the appointment had been made in accordance with the terms and conditions specified in Parts I and II of Schedule XIII [Sec.269 (2)].

Schedule XIII has been introduced by the Amendment Act of 1988. It deals with the conditions to be fulfilled for the appointment of a managing or whole-time director or a manager and their remuneration.
Calculation of commission (Sec. 199). In case of officers and employees (not being a director or a manager) to whom any commission or remuneration is payable at a percentage of the net profits of the company, the net profits shall also be calculated in the manner laid down in Secs. 349 and 350.

3.11. DEVELOPMENTS IN CORPORATE ADMINISTRATION

3.11.1. Independent Director

Currently the Companies Act, 1956 is silent on the term ‘independent director’. The Companies Bill, 2009 based on the recommendations of the J.J. Irani Committee (2005) has some provisions on it. The term ‘independent director’ has been defined in the Clause 49 of the Listing Agreement that has provisions on independent director. The Confederation of Indian Industry’s Task Force and the Kumar Mangalam Birla Committee extensively debated the issue of independent directors. The Task Force said in its report that “the identities of members of Board crucial to excellence is of course obvious. Equally vital, however, are their individual competencies, experience and track record, which must match the business that the company is in. And a mix of operational managers, who have the insider’s perspective and external professionals, who bring in the outsider’s cool detachment, will provide the collective capability that a Board needs.”

Birla Committee agreed on the following definition of “independence”: “Independent directors are directors who apart from receiving director’s remuneration do not have any other material pecuniary relationship or transactions
with the company, its promoters, its management or its subsidiaries, which in the judgment of the Board may affect their independence of judgment”.

The term ‘independent’ in Clause 49 of the Listing Agreement as under:
The expression ‘independent director’ shall mean a non-executive director of the company director is defined who:

- apart from receiving director’s remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director;
- is not related to promoters or persons occupying management positions at the board level or at one level below the board;
- has not been an executive of the company in the immediately preceding three financial years;
- is not a partner or an executive or was not partner or an executive during the preceding 3 years, of any of the following:
  - the statutory audit firm or the internal audit firm that is associated with the company, and
  - the legal firm(s) and consulting firm(s) that have a material association with the company.
- is not a material supplier, service producer or customer or a lessor or lessee of the company, which may affect independence of the director; and
• is not a substantial shareholder of the company i.e., owning 2% or more of the block of voting shares;

• is not less than 21 years of age.

**Role of Independent Director**

Independent directors are known to bring an objective view in board deliberations. They also ensure that there is no dominance of one individual or special interest group or the stifling of healthy debate. They act as the guardians of the interest of all shareholders and stakeholders, especially in the areas of potential conflict.

Independent Directors bring a valuable outside perspective to the deliberations. They contribute significantly to the decision-making process of the Board. They can bring an objective view to the evaluation of the performance of Board and management. In addition, they can play an important role in areas where the interest of management, the company and shareholders may diverge such as executive remuneration, succession planning, changes in corporate control, audit function, etc.

Independent directors are required because they perform the following important role:

• Balance the often conflicting interests of the stakeholders.

• Facilitate withstanding and countering pressures from owners.
• Fulfil a useful role in succession planning.
• Act as a coach, mentor and sounding Board for their full time colleagues.
• Provide independent judgment and wider perspectives.

**Promoting Independence**

The independence of independent directors is one of the most debated aspects in corporate governance.

Independent of directors is not merely the question of law or regulation. It is not merely a compliance proposition; it has to become a culture if true corporate governance in letter and spirit is to be ensured.

It is not through legislation alone that an effective independence framework of board functioning can be ensured. There should be conscious efforts to promote transparent, objective and independent discussion and decision making by board of directors. The culture of independence should also flow through meetings of the committees of the board.

Further suggestion is that an independent director should, at the individual level, anxiously protect his independent status vis-à-vis the company. He should attend all meetings of the board and the committees with enormous preparation. He should seek sufficient time and opportunity to participate in the discussion in the meeting. He should disclose even doubtful situation of any conflict of interest, while the company should remunerate independent directors appropriately for their services.
A Company Secretary, being a close confidante of the board will also be able to command confidence of individual directors so as to ensure that the culture of independence is promoted at the board and committee meetings and at the level of individual directors.

3.11.2. Director Identification Number (DIN)

Amending the Sections 253 of the Companies Act, 1956 in May 2006 and inserting new Sections 266A to G to the Act have made DIN possible. The Amendment Act provides for the allotment of mandatory Director Identification Number (DIN) for all existing and future directors on company boards. Only a single DIN is required for an individual irrespective of number of directorships held by him. DIN is also mandatory for directors of Indian companies who are not citizens of India (foreigner). But, DIN is not mandatory for directors of foreign company having branch offices in India. Every director is to intimate his/her DIN in form DIN-2 to all companies where he/she is a director and all companies are required to inform the DIN’s of its directors to the Registrar of Companies (ROC). DIN cell based at NOIDA issued around 5 lakhs DIN by May, 2007 and in March 2009, the figure has crossed 9.5 lakhs.

Purpose

With the introduction of the concept of DIN offences committed by the directors will be immediately detected as all the 20 offices of the Registrars of Companies (ROC) have been networked.
Investors will also get the chance to take more informed decision by knowing the top management of the company.

Issuing electronic identification number after verifying the credentials of directors will help the government to keep track of the people who run the companies. It shall help prevent a defaulting director from hiding his past deeds and joining another board. This would also facilitate effective legal action against the directors of such companies under the law, keeping in view the possibility of fraud by companies and the phenomenon of companies that raise funds from the public and vanish thereafter.

3.11.3. Directors Responsibility Statement

The Companies (Amendment) Act, 2000 has introduced a unique provision in Section 217 (2AA) of the Act as per which, the directors have to sign a statement which will form part of the report of the Board of Directors. The statement indicate the following:

Annual Accounts has been prepared in consonance of the applicable accounting standards.

Accounting Policies that are applied by the Directors are consistent and prudent so as to give a true and fair view of the accounts of the company.

Proper and sufficient care has been taken by them for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.
Director’s Responsibility Statement is aimed at highlighting the accountability of the directors with a view to ensuring good corporate governance. It will make the directors accountable to safeguard the assets of the company and to take positive steps in this regard. As per the said amended Section, it appears that the directors have to rely heavily on accounting professionals, whether in house or from outside, in order to get themselves satisfied before signing the statement. As per Section 217(5) of the Act, if any person, being a director of the company, fails to take all reasonable steps to comply with the provisions of Sub-Sections (1) to (3), or being the Chairman, signs the Board’s report otherwise than in conformity with the positions, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to 6 months, or with fine which may extend to Rs. 20,000 or with both.

3.11.4. Small Shareholders’ Director on Board

The Companies Act, 2000 introduced the concept of ‘Small Shareholders on Board’ by inserting Sections 252A. As per the provisions, a public company, having paid-up capital of Rs. 5 crore or more and 1000 or smaller shareholders (holding shares up to Rs. 20,000), may elect small investors representative on the Board. Even though, the appointment of such a director is optional but as a measure of good corporate governance, listed companies have been directed by stock exchanges for implementing this concept. It becomes obligatory for the company to elect representation of small shareholders on Board if there is a demand/notice from the small shareholders.
3.12 CONCLUSION

In today’s era where uncertainty has crept in to such an extent, that running a business is not as simple as it was when the demand for the commodity was easily identifiable, consumer was not much educated, competitors were not playing, social responsibilities was not weighted and technology not ever changing.

Today, it has become imperative to have a board which through its strong ethics, values, independence, wisdom, acumen, perception and insight is able to direct the company towards the road to success.

The board functions on the principle of majority of unanimity. A decision is taken on record if it is accepted by the majority or all of the directors. A single director cannot take a decision. However, every director should provide a creative contribution to the Board by providing objective criticism.