

Director [Sec 2(34)] and Board of Directors [Sec 2(10)]

1. Meaning of ‘director’

The definition under the Companies Act, 1956 was inclusive definition which included any person occupying the position of director, by whatever name called. Under the Companies Act, 2013, it is clearly specified that a person, unless appointed to the Board, cannot be called as a Director. Hence, there can be no shadow directors.

As per clause (b) of section 386 of the Companies Act, 2013, the expression ‘director’ in relation to a foreign Company includes any person in accordance with whose directions or instructions the Board of Directors are accustomed to act.

2. Position of Directors

The position of directors was explained in *Albert Judah Judah v. Rampada Gupta And Anr* [1960 30 CompCas 582 Cal]. as follows:

“The directors are agents of the Company’ [Ferguson v. Wilson (1866) 2 Ch. A. 77 as quoted in *ibid.*]. The Company cannot itself act in its own person, for it has no person; it can only act through Directors and the case is, as regards the Directors merely the ordinary case of principal and agent, for whenever an agent is liable the directors would be liable. In some sense and to some extent, the directors are no doubt in the position of trustees.’ Directors are persons selected to manage the affairs of the Company for the benefit of the shareholders. It is an office of trust, which if they undertake, it is their duty to perform fully and entirely.’ [York and North Midland Ry. Co. v. Hudson, (1845) 16 Beav 485 as quoted in *ibid.*] “The Directors are the mere trustees or agents of the company--trustees of the company’s money and property; agents in the transactions which they enter into on behalf of the company.” [Great Eastern Railway Company v. Turner, (1872); 8 Ch. A. 149 as quoted in *ibid.*]

It is clear that the directors are trustees in a very limited sense. They are liable as trustees for breach of trust, if they mis-applied the funds or committed breach of byelaws. Their position differs considerably from ordinary trustees and it is futile to apply the entire law of Trust and the whole body of rules enunciated by the Court of Equity defining the rights and liabilities of the trustees, to determine the rights and liabilities of a director. The conduct of the directors is to be measured with reference to the character of the undertaking which they are appointed to manage and conduct. In the case of an ordinary commercial company, a director does not commit

a breach of trust when he, in the usual course of business, sells or purchases goods from another company in which the director had interest. He is only liable for breach of trust when he misapplies the fund and misappropriates any assets.”

Directors are often equated with the company under the doctrine of attribution as well.

Board of Directors or Board

1. Meaning of Board of Directors or Board

“Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company;

Clause (6) of section 2 and sub-section (3) of section 252 of the Companies Act, 1956 dealt with the definition of the term. According to clause (6) of section 2, “Board of directors” or “Board”, in relation to a company, means the Board of directors of the company. Sub-section (3) of section 252, the directors of a company collectively are referred to in this Act as the “Board of directors” or “Board”.

A board of directors is a collective body elected or appointed by the shareholders who jointly oversee the activities of a company. Activities of board of directors’ are determined by the powers, duties, and responsibilities delegated to it or conferred on it by an authority outside itself. These matters are typically detailed in the Act, constitution documents like memorandum and articles, resolutions etc. These documents commonly also specify the number of members of the board, how they are to be chosen, and how often they are to meet. However, the constitution and bylaws rarely address a board’s powers when faced with a corporate turnaround, restructuring, or emergencies, where board members need to act as agents of change in addition to their traditional fiduciary responsibilities.

The board or board of directors terms are used interchangeably and the individual Directors are collectively called as Board. The Directors may include either Managing Director or Whole Time Director or involved in the day to day affairs of the Company or non-executive or independent directors or nominee directors. However, the decisions of the Board are binding on the shareholders of the Company except in certain cases where the approval of the shareholders is mandatorily required.

The powers of the board are given in section 179 of the Act and may further be provided through Articles of Association or by the shareholders of the company through a resolution passed in the general meetings.

2. Judicial pronouncement

The Supreme Court of India emphasized the role of the board of directors in *Life Insurance Corporation of India v. Escorts Ltd. & Ors [1985 SCR Supl.(3) 909]*

“A Company is, in some respects, an institution like as State functioning under its ‘basis Constitution’ consisting of the Companies Act and the memorandum of Association. Carrying the analogy of constitutional law a little further, Gower describes “the members in general meeting” and the directorate as the two primary organs of a company and compares them with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the Directors will be answerable to the ‘Parliament’ constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over the Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two - man - companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the Directors the right to exercise all the company’s powers except such as general law expressly provides must be exercised in general meeting. Gower’s Principles of Modern Company Law. Of course, powers which are strictly legislative are not affected by the conferment of powers on the Directors as section 31 of the Companies Act provides that an alteration of an article would require a special resolution of the company in general meeting. But a perusal of the provisions of the Companies Act itself makes it clear that in many ways the position of the directorate vis-a-vis the company is more powerful than that of the Government vis-a-vis the Parliament. The strict theory of Parliamentary sovereignty would not apply by analogy to a company since under the Companies Act, there are many powers exercisable by the Directors with which the members in general meeting cannot interfere. The most they can do is to dismiss the Directorate and appoint others in their place, or alter the articles so as to restrict the powers of the Directors for the future. Gower himself recognises that the analogy of the legislature and the executive in relation to the members in general meeting and the Directors of a Company is an over-simplification and states “to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution.” As already noticed, the only effective way the members in general meeting can exercise their control over the Directorate in a democratic manner is to alter the articles so as to restrict the powers of the Directors for the future or to dismiss the Directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, Directors of their choice and the power to regulate them by a

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resolution for their removal. And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another.

In Shaw & Sons (Salford) Ltd. v. Shaw [1935 2 K.B. 113,] Greer, L.J. expressed : “The only way in which the general body of the shareholders can control-the exercise of powers vested by the articles in the Directors is by altering the articles or, if opportunity arises under the articles, by refusing to re-elect the Directors on whose action they disapproved.”

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.

Premier on Company Law