An Analysis: Board Committee Chairperson and their role at Annual General Meeting

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1.

Section 96 of the Companies Act 2013 , ("The Act") which correspondence to Section 166 of the erstwhile Companies Act of 1956, which among other things requires every company other than a one-man company shall in each year hold in addition to other meetings, a general meeting as its Annual General Meeting (AGM).

Further the section requires that the notice calling the said meeting, should clearly mention that it is an AGM of the Company.

Such meeting is required to be held within a period of nine months from the date of closing of the first financial year and subsequent AGM's to be held within a period of six months, from the date of closing of the financial year.

1. Attendance of Board Committee Chairperson at AGM.

Various statutory provisions contained under the Companies Act 2013 read with Companies (Meeting of Board and its Power) Rules 2014, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR") and Secretarial Standards on General Meeting (SS-2) issued by the Institute of Company Secretaries of India (ICSI) as approved by the Central Government under section 118(10) of the Act deals with matters related to attendance of Board Members and Board Committee Chairperson at the Annual General Meeting.

This article restricts itself to the following Board Committees-

a. Audit Committee;

b. Nomination and Remuneration Committee; and

c. Stakeholders Relationship Committee

2. Audit Committee

A Brief

Audit Committee is one of the most important Board Committee of a Company and an essential component in Corporate Governance.

As per the Kumarmangalam Birla Committee Report of 1999 "Audit Committee is a vital tool of Corporate Governance, which endorses a hierarchy of sound accountability, credibility in financial reporting and promotes confidence of shareholders and investors."

Section 177 of the Act read with Rule 6 of the Companies (Meeting of Board and its Powers) Rules 2014, mandates that the following class of companies shall constitute an Audit Committee-

i. Every listed Company;
ii. All Public Companies with a paid-up capital of ten crore rupees or more;
iii. All Public Companies having a turnover of one hundred crore rupees or more;
iv. All Public Companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

[The paid-up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be as existing on the date of the last audited financial statements shall be taken into account for the purposes of this rule]

Audit Committee its members and its Chairman role in AGM

Tabulation of the Audit Committee members and chairman's profile as provided under the various statues is as under:

Members of Audit Committee

Constitution of Audit Committee	Companies Act 2013	SEBI (LODR) 2015
	S.177(2)	R.18(1)
Minimum Number of Members	3 Directors	3 Directors
Strength of Independent Directors in Committee	Majority	2/3rd of Committee Members
Qualification	Majority of members to be financially literate with ability to read and understand the financial statement	All members to be financialy literate

Chairperson of Audit Committee

Chairperson	Companies Act 2013	SEBI (LODR) 2015	Secretarial Standards (SS-2)
	S.177(2) & S.178(7)	R.18(1)(d)	Cl.4.1.1
Qualification	Ability to read and understand the financial statement	Shall be Financially literate	Nothing Prescribed
Class of Director	Nothing Prescribed	Independent Director	Nothing Prescribed
Attendance at AGM	Himself, or any other committee member authorised by him in this behalf	Shall be present at AGM to answer shareholder queries	Himself or any member authorised in this behalf by him

3. Nomination and Remuneration Committee

A Brief

The main or Key purpose of the Nomination and Remuneration Committee is to assist the Board in ensuring that the Board and Executive Committee retain an appropriate structure, size and balance of skills to support the strategic objectives and values of the firm. And provide the Board a policy relating to the remuneration for the directors, key managerial personnel and other employees.

Members of Nomination and Remuneration Committee

Constitution of Committee	Companies Act 2013	SEBI (LODR) 2015
	S.178(1)	R.19(1)
Minimum Number of Members	Not Less than 3 Non- Executive Directors	All Members shall be Non-Executive Directors
Strength of Independent Directors in Committee	Not less than one-half shall be independent directors	Atleast 50% of the directors shall be independent directors

Chairperson of Nomination and Remuneration Committee

Chairperson	Companies Act 2013	SEBI (LODR) 2015	Secretarial Standards (SS-2)
	S.178(1) & S.178(5)	R.19(2) & R.19(3)	Cl.4.1.1
Class of Director	Any member of the Committee, barring the Chairperson of the Company if he is on the Committee	Independent Director	Nothing Prescribed
Attendance at AGM	Himself, or any other committee member authorised by him in this behalf	May be present at AGM. However it shall be up to the Chairperson to decide who shall answer shareholder queries.	Himself or any member authorised in this behalf by him

4. Stakeholders Relationship Committee

A Brief

Is required to be constituted only in case of Companies having more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year. The chief purpose of this committee is to look into the mechanism of redressal of grievances of such holders (securities or debt holders)

Members of Stakeholders Relationship Committee

Constitution of Committee	Companies Act 2013	SEBI (LODR) 2015
	S.178(5)	R.20(2) & (3)
Minimum Number of Members	To be decided by the Board	To be decided by the Board
Strength of Independent Directors in Committee	Nothing Prescribed	Nothing Prescribed

Chairperson of Stakeholders Relationship Committee

Chairperson	Companies Act 2013	SEBI (LODR) 2015	Secretarial Standards (SS-2)
	S.178(1) & S.178(5)	R.19(2) & R.19(3)	Cl.4.1.1
Class of Director	Non- Executive Director	Non-Executive Director	Nothing Prescribed
Attendance at AGM	Himself, or any other committee member authorised by him in this behalf	Nothing Precribed	Himself or any member authorised in this behalf by him

5. **Combined reading of the above provisions**

Only for listed Companies the attendance of Chairperson of the Audit Committee is mandatory and in case of a public company (of specified categories), the attendance of committee chairperson is discretionary . The same is tabulated as under-

Chairperson	Listed Company	Public Companies (As Catagorised
Audit Committee	Has to Attend	May Attend or Nominate some other memberof the Committee to attend on his behalf
Nomination & Remuneration Committee	May Attend or Nominate some other committee member to attend on his behalf	
Stakeholders Relationship Committee		

6.

The Companies Act 2013 lays down stiff penal consequences in case of violation of the provisions of Section 177 and 178 of the Act as under-

a. Company to be punishable with fine which shall not be less than one lakh rupees, but which may extend to five lakh rupees and

b. Every officer of the Company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less that twenty-five thousand rupees, but which may extend to one lakh rupees. Or with both.

7. Are the offences compoundable?

Since the offence/contravention includes both fine as well as imprisonment, the same is only compoundable with the permission of the Special Court as per Section 441(6)(a) of the Act.

These Special Courts are being established by the Government from May 2016 onwards as per Section 435 of the Act for the purposes of providing speedy trail of offences under this Act.

8. Analysis

The first questions which comes to mind is- How can a Company enforce and ensure a director's attendance at an Annual General Meeting?

The second question which seeks an answer is can a director (Committee Chairperson) be asked to authorise some other member of the committee to attend the AGM on his behalf, incase he decides to not so authorise or the other members are not consenting to the same, what would be the situation then?

The Third pertinent question- for the actions of a director how can the Company/ other officers of the Company be held in default?

The fourth question is who is the Officer in Default in this case?

8.1. Enforcing director's attendance by Board (Section 179)

- The Board does not have any statutory leverage to ensure attendance of directors at the AGM of the Company.
- Further the director is appointed by the shareholders in general meeting. The shareholders may by ordinary resolution remove a director, other than a Section 242 director before his expiry of the period of office after giving him a reasonable opportunity of being heard (Section 169). It is not clear if non-attendance at AGM can be sited as a ground for removal.
- Power of Board as provided under Section 179 of the Act does not include power to remove board members as this would transgress into the domain of the shareholder powers.

8.2. Duties and Responsibilities and vacation of office by a Director (Section 166 & Section 167)

- Section 166 of the Act which deals with duties of a director, and provides that a director shall act in accordance with the Company's articles. Attending AGM's of the Company are not covered under the Section.
- Section 167 which deals with vacation of office of director only deals with absence from board meeting under sub clause(1)(b) of the section. AGM find no mention in this section as well.
- Section 149(8) read with Schedule IV (Code for Independent Directors) which deals with duties of Independent directors, under Clause III (Duties of Schedule IV, the relevant portion is extracted below-

  "……….(5) Strive to attend the attend the Annual General Meeting of the Company…"

Hence from the wording it is clear that it is not mandatory but only discretionary.

8.3. Officer's in Default

Section 2(60) of the Act lists down the list of officers who would be deemed to be in default as under-

1. The working directors (viz. Managing Director, Whole-time Director) ;
2. KMP's (CEO, CFO, Company Secretary);
3. If no KMP's such director or director specified as "OID" by the Board if not, then the Board collectively;
4. any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
5. any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
6. every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
7. in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

8. (Author's Views)

8.1. Conflicting position under Companies Act 2013 and LODR 2015- Catch 29 situation for a Listed Company.

- Attending of AGM's is not mandatory for the directors of the Company under the Companies Act 2013 and only attendance of Audit Committee Chairman under SEBI (LODR) and with no option to delegate. So, there is a conflict in both these provisions.

- For a listed Company

  - if the Audit Committee Chairman is unable to attend due to reasons beyond his control and authorise some other member of the committee to represent him at the AGM it would be violative of Regulations 18(1)(d) of LODR 2015.

  - Similarly, if the Stakeholders Relationship/ Nomination & Remuneration Committee Chairman does not attend the AGM and nor does he authorise some one of his behalf it would play fowl of Section 178(7) of the Act.

8.2. Section 178(7) an isolated and standalone provision

- It seems this Section has been worded without considering the other associated provisions which have substantial and direct bearing, especially Sections 149(8), 166 and 167 of the Act.

- This has created an un-warranted friction and with very severe penal implications on certain officers of the Company and the Company itself, which has no statutory recourse to ensure compliance with the requirements of this section.

8.3. Enforcement through the Articles of the Company

- Taking a que from Section 166(1) of the Act, wherein it is provided that , a director of a company shall act in accordance with the articles of the Company, could it be possible to have a clause in the articles which compels a director to attend the AGM or authorise some one else to attend on his behalf?

  - It may not stand scrutiny for the simple reason that articles and duties of director is subservient to the provisions of the Act and the articles cannot override the Act ? Especially when the act does not cast a mandatory duty on a director to attend the AGM of the Company?

  - Even if we assume that the articles can have such a clause-
    - can a director be compelled to give authorization to another director to act on his behalf at the AGM?
    - What if no director is willing to act on behalf of the committee chairperson?
    - The third scenario could be that, the all the committee directors do not attend the AGM and hence authorization can't be given.
    - The authority holder fails to attend the AGM

Unwitting the Company and its officers would be opening themselves to pecuniary as well as penal consequences for no fault of theirs.

8.4. Re-look at Section 178(8) on the penal consequences.

- Considering the above and the severe consequences as laid down under section 178(8) it may be time to-

  - Relook at the penal consequences and suitably dilute the same or completely do away with.

  - Or the same could be suitably made a part of either Section 166 or 167 and Schedule VI.

  - Penalizing the Company or Officers of the Company, in this situation does not seem to be appropriate, and if any strictures need to be passed, it has to be against the director concerned.

- Lastly there is a need to harmonize LODR to bring it in sync with the Companies Act 2013 due to a peculiar situation which may arise as enumerated in point 8.1 above.