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Resignation of Directors

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This is a well known fact that private companies are less governed as compared to public companies and hence, chances of mismanagement are more in private companies. Generally, private companies are formed by relatives, families and such number of directors are appointed on the Board of the Directors of the companies so as to comply with the minimum requirements of the Companies Act, 1956 **(the "Act").** In most of the cases, private companies, which are family companies and have been formed on principles of quasi-partnerships, have directors representing specific groups. The absence of adequate provisions in the Act and in the charter documents of such private companies with regard to governance of companies often leads to filing of petitions under Section 397/398 of the Act i.e. Oppression and Mismanagement. One of the very common allegations in these matters is illegal removal of directors/ unauthorized removal of directors by showing false resignation letters. Hence, it becomes very important to know when does resignation takes effect in actual and what should be the form of a resignation letter.

Resignations: When Effective?

Section 284 of the Act specifies the manner in which a director can be removed from his post before expiry of his term. Further Section 283 provides certain grounds on which the office of director ceases, however, the Act does not specify any provision relating to cessation from directorship with their own wish and thus the only exit way available to a director is to tender a resignation. Since the Act does not contain any specific provision in this regard, one needs to refer to the Articles of the Association **("AoA")** of the Company. In the absence of any provision in the AoA, the terms and conditions of appointment of a Director can be seen. The Madras High Court in ***T. Murari v.State of Tamilnadu***[1] held that

> *"In the absence of a provision in respect of resignation under the Act or under the articles of association of the company, the resignation tendered by a director or Managing Director unequivocally in writing will take effect from the time when such resignation is tendered."*

However, it is to be noted that director's resignation takes effect only when resignation is accepted by the company in the general or board meeting and not from the date of communication of same by the director, if the AoA of the Company contains specific provision in this regard. Further, the resigning director would also

[1] (1976) 46 Com. Cases, 613 (Mad)

require to fulfil such additional conditions as may be specified in the AoA of the Company. In nutshell, as the Act does not contemplate any provision for resignation, same would be completely governed by AoA of the Company. In absence of any such provision in AoA also, ordinary and common laws shall prevail. In ***S.S. Lakshmana Pillai v. Registrar of Companies***[2] the Madras High Court held as follows:

> *"In the absence of any provision in the articles, the ordinary rule of common law as regards resignation by an officer/agent must be followed viz., intimation by notice given either to the company or to the Board and acceptance of the same by them. Where a resignation states that it is to take effect on acceptance or the Articles so require, acceptance is necessary to end the tenure of office. Where, however, the resignations says that it is take effect immediately, acceptance is not necessary, unless the articles or any provision of law makes it necessary. Any form of resignation, whether oral or written, is sufficient, provided that the intention to resign is clear. It is however advisable that the resignation is in writing and also indicates the time when it is to take effect, so that it may serve as a record of reference in case of controversy. In the absence of any indication otherwise, a resignation takes effect immediately. Resignation will not, however, relieve him from any accountability or other liability which he may have incurred while in office."*

A director resigning at a board meeting should make clear whether the resignation is with immediate effect or from the end of the meeting, as he or she is a party to the decisions of the board up until resignation

In ***S.B. Shankar v. Amman Steel Corporation***[3] the court held that where the resignation letter states that it has to take effect immediately, the date of resignation letter is taken to the date on which the director has resigned. Thus unless the AoA of the Company concerned contain any specific provision about the acceptance of resignation by the Board of Directors of the company, the resignation from directorship takes effect immediately i.e., from the date of the resignation letter.

[2] (1977) 47 Com. Cases 652
[3] (2002) 51 CLA 341

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Notice Period for Tendering Resignation

As mentioned above, the resignation terms are governed by the AoA and/or the terms of appointment of a director. If the AoA or the terms of appointment requires a notice period to be fulfilled, the resignation can take effect only after meeting such requirement of notice period. However, if there is no specific provision in the AoA, a director can resign without giving a reasonable notice as held in the case of ***OBC Caspian Ltd v Thorp***[4].

It is to be noted that in case of voluntary resignation of a permanent director when permitted under the AoA, is not dependent upon its acceptance by the company. The permanent director is entitled to relinquish his office as held in ***Fateh Chand Kad v. Hindsons (Patiala) Ltd***[5]***.***

Form and Content of Resignation Letters

A resignation letter should be addressed to the company or the Board of Directors of the Company. If addressed to a third party, such resignations are not acceptable by the Company[6]. It is to be noted that any form of resignation should specify the intention to resign clearly and the date from which such resignation will take effect, any form of resignation will surely not relieve a director from any accountable or any other liabilities.

Oral Resignations: How Much Effective?

Oral resignation at a board meeting will be effective if that resignation and its effective timing are clear and unambiguous and the resignation is accepted by the other directors present, but it is wise to follow up an oral resignation with written confirmation to the company chairman or to the company secretary or as required by the articles.

An oral resignation given by the resigning director in the general meeting and on acceptance of same by the members, it can be effective and valid even if the AoA of

[4] (1998) S.L.T. 653 (Scot)
[5] (1957) 27 Com Cases 340
[6] *Registrar of Companies v. Orissa Paper Products Ltd*., (1988) 63 Comp cases 460 (Ori)

the Company requires a written notice as held in ***Glossop v. Glossop***[7], This international view has also been affirmed in India in ***State v. Sitaram***[8] by the Patna High Court and by Delhi High Court in ***Mohan Chandra v. Institute of Chartered Accountant***[9].

Effect of Filling of Necessary Forms with Concerned RoC

Section 302(2) of the Act casts a legal obligation on the company to inform the registrar of the companies by filling Form 32 giving particulars of changes, if any, in the office of director. If such a form is filed with the registrar of companies it is a proof of a director ceasing to be a director but, it is not an act to be complied with in order to make resignation valid. Resignations once made, take effect immediately and the concerned ROC is informed formally in terms of provisions of the Act. However, mere non filing of requisite form with the concerned RoC does not invalidate the resignation of a director. The Bombay High Court in ***Dushyant D Anjaria V. Wall Street Finance Ltd***[10] held that

> *".....The resignation of a Director would be effective from the date it was submitted, for the reason that the letter brings out clearly the intention of the person to resign. So far as the formalities like filing up Form 32 and sending it to the Registrar of Companies were concerned, it was for the company to comply with them in conformity with the provisions of Sec. 302 or Sec. 303 of the Companies Act. Where there was delay or negligence on the part of the company in intimating the Registrar about the date of resignation, the Director who had resigned could not be saddled with responsibility and liability for such delay...."*

Liability of Resigning Directors

Section 5 of the Act defines "Officer in Default" mentioning a list of officers who will be prosecuted for any violation or offence under the Act. The list includes 'directors' also. It is pertinent to note that for the purpose of the said section, the default in reference to an officer means the default during his tenure. In other words, if a default is committed when a person was not even an 'officer in default', he cannot be

[7] (1907) 2 Ch 370
[8] AIR 1967 Pat 433
[9] AIR 1972 Del 91
[10] (2001) Comp. Cas. 655 (Bom)

prosecuted and held liable for such default. In the similar way, if it is proved that a director at the time of the contravention was in-charge of and responsible to the company for the conduct of its business, he will be held liable even if resigns afterwards.

Concluding above, a director who has resigned would not be liable for anything that happens subsequently. However, he can still be held liable for any mischief or offence made during his directorship.

In case of ***Pandurang Camotim Sancolarcar V. Suresh Prabhakar Prabhu***[11] it was held that when the articles of association provided that the resignation would be effective from the date it was tendered and when the respondent had raised a defence that he resigned on 6.5.1996, the fact of his resignation was not in dispute, what was in dispute was only the date of resignation. Clearly it was a case where the respondent had resigned on 6.5.1996 and ceased to have any connection with the company. It was held that he was not in charge of the management of the day to day affairs of the company subsequent to his resignation.

The Kerala High Court while dealing with a prosecution case against a Managing Director in ***Achutha Pai V. Registrar of Companies***[12], put additional restriction on resignation of managing directors. In this case, the Managing Director who was prosecuted for default under Section 220 of the Companies Act, 1956 contended that he was not liable as he had resigned before the last date for filing accounts. The court held that a Managing Director combines two capacities, namely, manager and director. Hence, resignation of a managing director becomes effective only when the company accepts the resignation and relieves him from his duties as manager as well.

Resignations by Nominee Directors

It is quite common to appoint nominee directors on a Board of Directors of a Company by lenders. Sometimes, nominee directors are also appointed by another company as its representative pursuant to Shareholders' Agreement or Joint Venture Agreements. The general law pertaining to resignations is that a resignation is effective once it is tendered. However, the nominee directors so appointed by a

[11] (2003) 53 CLA 265
[12] (1966) 36 Com. Cases 598 (Ker)

nominator owe some duties towards the appointing authority and cannot resign from the directorship without consent of the appointing authority. Any appointment or removal of such nominee directors are governed by AoA of the agreement as entered into with the Company. Where nomination is done by an appointing authority, the resignation should be served to the appointing authority and not to the Company. Since the nominees have been nominated by such authority only, they acquire the position of agent of the appointing authority and such agency can be terminated only by service to the principal. Once consented by the appointing authority, the nominee director may intimate company also.

Cases with forged resignation letters

As mentioned above, now-a-days, many cases have seen where forged and fabricated resignation letters have been used to show the illegal removal of directors. These cases are quite common in private companies which are lesser regulated and are quasi partnership kind of companies. Forged signatures are used to oust a group/person from the management of a company. Such practice of using forged resignation letters ultimately leads to taking actions before Company Law Boards (CLB) and other appropriate authorities. Thousands of cases under section 397/398 of the Act are pending with CLBs. Such actions in all cases have been proved to be time consuming and puts heavy cost burden on parties to such dispute. The records available in public domain i.e. records available with the Ministry are updated as soon as any form is filed. So, immediately on approval of a Form 32 filed for removal of directors, the name of the removed director, even if removed illegally with the fabricated signature, will disappear from the records of the company.

Presently, RoC approves all forms intimating the resignations of directors without giving any chance of hearing to the removed director. As like in transfers, obtaining consent of transferor has been made mandatory before registering any transfers, such system and procedure also needs to be put in place so that the removed director gets a chance to put his stand. The Ministry should formulate the process under which the removed director is intimated before removal. Though, with the time, Ministry's efforts in this respect are commendable as intimation of any removal is intimated to directors vide email, however, yet not sufficient. System should be such so as to provide a prior intimation to the directors before approval of any such form in order to enable them to take necessary action within time.

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Conclusion

From the several judicial pronouncements, some of which have been quoted in this write-up, we may conclude that:

1. Resignations are governed by AoA of a Company and if no such provisions are there in the AoA, resignations will be in accordance with the common laws.

2. Resignations are effective only after acceptance of same by the Company in board or general meeting as the case may be. However, resignations may take effect immediately after tendering if so provided by the AoA of the concerned company.

3. Non filing of requisite form with the concerned RoC does not invalidate the resignations.

4. Persons cannot be held liable for any breach or default by the Company subsequent to their resignations from the post of directorships. However, they may be held liable for any default made during their tenure of directorship.

Other relevant articles that may interest you

See our other write up on "Liabilities of Independent Directors" at http://india-financing.com/Article-Liability%20of%20independent%20directors-in%20light%20of%20MCA%20circular..pdf

See article on "Duties and Liabilities of directors in private companies" at http://india-financing.com/Duties_and_%20Liabilities_of_a_Director_in_a_Private_Company.pdf

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