



INDIA

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Seema Jhingan is senior partner and co-founder of Lex-Counsel Law Offices. She has more than twenty-three years of experience advising in areas including mergers & acquisition, education law, defence & aviation, venture capital & private equity, franchising, media & entertainment, software/information technology, general corporate and commercial.

She has substantial expertise in representing legal matters related to collaborative alliances and joint ventures, brand and technology license arrangements, cross-border mergers and acquisitions, corporate structuring, investment and divestment and capital repatriation. Additionally, Seema has been recently recognised as one of India's Most Trusted Corporate Lawyers of 2017 by the Indian Corporate Counsel Association.

LexCounsel is a New Delhi based law firm, with associate offices across India (Mumbai, Bengaluru, Kolkata, Hyderabad, Chennai, Pune and Goa) and a satellite office in New York.

LexCounsel provides comprehensive legal services to both domestic and foreign clients and is recognized as a leading Indian law firm for its work in M&A, private equity & venture capital, labour & employment, telecommunication & IT, education, life sciences and IP, real estate, tax, dispute resolution etc.

Top three things to consider in India with regard to director liabilities / reporting to the board?

- 01. Limited Liability of non-executive and independent directors:** It is important to determine at the time of appointment the exact category of directorship (whether executive, non-executive or independent) depending upon the level of operational involvement in the company.
- 02. Disclosures of Conflict of Interest:** Appropriate and timely disclosures of conflict of interests/related party transactions is imperative to avoid allegations of misuse of position for personal benefit.
- 03. Statutory Liabilities:** Indian statutes may hold a director personally liable for a company's liabilities in certain circumstances – such as for unpaid taxes (if attributable to gross negligence, misfeasance or breach of duty). Other examples include, dishonored cheques under the Negotiable Instruments Act, if attributable to director's neglect/connivance; or for prescribed liabilities under the Companies Act, 2013 such as refund of share application money.

QUESTION 1

How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

As legal counsel to various corporates, our firm not only provides day to day legal/compliance advice, but also actively assists them in implementing risk management processes so as to limit the exposure of senior management and board to future liabilities. Our role becomes even more significant for publicly-listed companies, which invite a much higher level of scrutiny and Corporate Governance compliance.

For instance, we hold workshops and presentations for the senior management of our clients, advising them on issues such as the roles and responsibilities of directors, the possible liabilities and pitfalls facing them under the extant regulatory regime and practical safeguards and processes which can be implemented to mitigate the risks associated with their respective roles.

We advise the Directors to adopt a precautionary approach serving the twin objective of safeguarding the company's interest and ensuring compliance during the decision-making process, while, at the same time, exercising due care and diligence to avoid undue exposure to liabilities.

This approach can include measures such as directors attending meetings regularly; ensuring that any disagreements/dissenting views are appropriately recorded in the minutes; reporting concerns about any unethical behaviour, or actual or suspected fraud or violation of the company's code of conduct or ethics policy.

Directors should also seek professional advice wherever required and engage external agencies if the situation demands it (such as for addressing whistle-blowing issues).

Providing requisite disclosures of interests/conflicts and excusing oneself from participation in proceedings in cases of conflict is critical, as is having a separate compliance team responsible for ongoing and day-to-day compliance, and an internal committee for regular internal audits. Lastly including

indemnity provisions in the letter of appointment and obtaining Directors & Officers Liability insurance is also important.

Since a director may also be exposed to liabilities for non-compliance under certain legislations where liability typically falls on those in charge of the operations, a specific person should be designated.

QUESTION 2

What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Corporate Governance is of utmost importance in every corporate structure for its success, sustainable growth and investor protection. As day-to-day operations are typically undertaken by C-level executives (albeit under the overall supervision and control of the Board), it becomes imperative to implement clear systems of reporting and accountability.

This can be achieved by the demarcation of roles and responsibilities between the C-level executives, and written mandates for each executive setting out his/her respective functions, responsibilities and authorisations.

Formulation of policies for robust internal Corporate Governance codes of conduct for the board, senior management and executives; conflict of interest; information management and security must also be prioritised.

Other important aspects of Corporate Governance include the establishment of systems for periodic and timely reporting and meetings between the C-level executives and the senior management, regular internal audits, the review of risk management systems and suggestions for mitigating measures.

In this digital age, data security breaches can lead to huge financial and reputational implications. General Counsels should encourage a culture of reporting of cyber security breaches together with security breach response planning. Ensuring integration of data security policies with the current practices and requirements of the company's business and ensuring that the employees are aware of the security and privacy policies of the organisation is vital, as the cost of ignoring information security can be considerable.

QUESTION 3

What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Under general common law rules and equitable principles, director's duties are largely derived from the law of trusts and agency, imposing both fiduciary duties and duties of skill, care and diligence on the directors, while holding them liable for any breach in complying with their duties.

Accordingly, directors are the trustees of the company's money and property, and also act as agents entering into transactions on behalf of the company. The Companies Act, 2013 lays down the duties of directors in unequivocal terms and contains the concept of an 'officer who is in default' for the purposes of affixing liability on persons (including directors) in respect of contravention of Companies Act, 2013.

Directors of listed companies are also required to comply with certain additional regulations such as SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and SEBI (Prohibition of Insider Trading) Regulations, 2015. Being designated as a director in a company, also has a cascading effect with respect to exposure to liabilities under various oth-

er legislations, where duties and liabilities, for non-compliance by a company typically vests with the person in charge of the business (which includes directors).

As far as recent trends are concerned, Indian courts have been adopting a strict approach, affixing liability on directors for financial scams and frauds committed in the company. Even independent directors may not be immune and can be held accountable despite them not being in executive control of the company. For instance, the Supreme Court of India recently passed an order restraining independent directors and their family from alienating their personal assets where insolvency proceedings have been initiated against its group company. The growing trend is to fix liability on all directors for the mismanagement of a company.