

How do Boards of Indian Companies Transact Business – Physical Board Meetings and the Position of Circular Resolutions and Unanimous Written Resolutions

This article looks generally at how the Board of an Indian company which has overseas directors, or directors situated at disparate locations in India or outside, can effectively discharge its functions by adopting necessary resolutions as regards the company's business and operations. The author argues that unanimous written resolutions - which are often not met with in practice today in India - ought to be more widely recognized as a legitimate means to secure a Board's approval and sanction. Such use of unanimous written resolutions even militates against the need to maintain a minimum India-based quorum of directors. A unanimous written resolution is, it is argued, permissible in almost all situations except where a physical Board meeting is mandated. The article contrasts the current Indian legal position of circular resolutions with such unanimous written resolutions and looks at the proposed provisions in this regard in the Companies Bill, 2008.

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I. Introduction – the Physical Board Meeting:

Most corporates in India – and foreign investors in particular – perceive the Indian company law regime under the Companies Act, 1956 (the “**Act**”) as archaic. They are often frustrated by its bureaucratic provisions. This is particularly true in the area of Board meetings of Indian companies – especially directorial freedom to adopt resolutions. After all, an Indian company's Board acts by adopting the requisite resolutions after due deliberation. That is the basis on which companies ought to operate. Almost all Indian commentators also bemoan the general lack of enabling certainty for Indian companies to transact business and approve resolutions whilst their Board members are in different locations in India or overseas.

These issues arise primarily from a position inherent in existing Indian company law, namely, that Boards of Indian companies must physically meet (and this is mandatory at least once a quarter¹) to oversee their companies' operations and approve any resolutions. There is a salutary foundation to such a requirement – that only in a face-to-face meeting can point and counter-point be debated real time; that all materials relevant to an issue under consideration can be placed before and scrutinized by all directors present for their approval; that a director can be convinced otherwise of the soundness

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1 See, Section 285 of the Act.

of an opposite view as presented and debated at such a meeting. And, on the same basis, a meeting presupposes the presence of at least two directors² – the thrust and parry of in-person meetings that is impossible to replicate in any other way.

However, in this day and age and especially with modern technology, it is arguable that the above ideal circumstances and benefits of a physical meeting can be replicated via video or telephonic conference link – and access to all relevant documents can now be easily made on e-mail. But, until such time as Indian company law is expressly amended to recognize the ‘presence’ of directors participating via video or telephonic conference link as counting towards meeting the minimum quorum prescription and for voting purposes, the issue remains – how can the Board of an Indian company which has overseas directors, or directors situated at disparate locations in India or outside, effectively discharge its functions by adopting necessary resolutions as regards the company’s business and operations?

II. Use of Alternate Directors, Overseas Board Meetings & the Need to maintain a Physical Quorum in India:

Indian companies often have alternate or other Directors resident in India (in many instances their Indian lawyer or chartered accountant) who in the former instance are meant to stand-in for their non-resident original directors, in order to fulfil the minimum physical quorum requirements for Board meetings³. But, the law is still that an alternate director is subject to the same fiduciary duties and obligations as any Director including, as regards alternates, those that constrain his original director. An alternate or other Director cannot merely rubber stamp the decisions taken by his original director who may participate on Board meeting calls via telephonic or video link, merely to fulfil the requirements of in-person meetings.

Of course, all of these can be overcome if the overseas directors of an Indian company can physically meet together properly quorate outside India – as Indian company law does not stipulate that any Board meeting must be held in India.

In reality, however, based on a simple reading of Section 289 of the Act dealing with how Boards of Indian companies can transact their business by adopting circular resolutions (without the need to convene and hold a duly quorate Board meeting), a minimum quorum of two Indian resident directors is often put in place. As this article argues, maintaining such a minimum quorum in India would not, in most cases, be required if unanimity amongst all directors

2 A position captured in Section 287(2) of the Act which provides that the minimum quorum for a Board meeting is 1/3rd of its total strength or two directors, whichever is higher – excluding, of course, interested directors who will, in any case, not count for quorum or voting purposes. The proviso to Section 287(2) of the Act further provides that if the number of interested directors is equal to or exceeds 2/3^{rds} of the total strength of the Board, the minimum quorum requirement of directors, to be present at any Board meeting, is still two.

3 Section 313 of the Act provides that the Board of an Indian company may, if it is so authorized by its articles of association or by a resolution passed by such company in general meeting, appoint an alternate director to act for an original director during the absence of such original director for a period of not less than three months from the State in India in which meetings of the Board are ordinarily held.

on the Board can be obtained via the 'unanimous written resolution' route that Indian law in fact provides but which is rarely used.

III. Mandatory physical Board meetings:

As stated earlier, the Board of an Indian company must mandatorily meet physically at least once a quarter with a minimum of four such meetings being held in every year⁴. The Act further provides that certain actions can only be taken at a properly quorate physical Board meeting (and not otherwise). These include:

- *Proviso B to Section 77A(2)(b)* in respect of Board approval for the buy-back of a company's shares or specified securities where such buy-back is or less than 10% of the total paid-up equity capital and free reserves of such company.
- *Section 262* relating to the power of the Board to fill a casual vacancy amongst those directors appointed in general meeting, but subject to and in default of any regulations in this behalf in the articles of association of such company. However, this Section does not apply to a private company unless it is a subsidiary of a public company⁵.
- *Section 292* covering the Board's:
 - (a) Power to make calls on shareholders in respect of money unpaid on their shares,
 - (b) Power to authorise the buy-back of shares or specified securities dealt with above,
 - (c) Power to issue debentures,
 - (d) Power to borrow money otherwise than on debentures,
 - (e) Power to invest the funds of the company, and
 - (f) Power to make loans.
- *Section 293A* as regards making a political contribution.
- *Section 297* in respect of the granting of the Board's sanction for entering into certain contracts with the company in which any particular director is interested.
- *Section 299* in connection with the disclosure to the Board of a director's interest in any transaction with the company.
- *Section 308* as regards the disclosure to the Board of a director's shareholding in the company.
- *Section 316* for the appointment of a managing director of a company where such managing director is already a managing director of only one other company (including a pure private company). However, this Section also does not apply to a private company unless it is a subsidiary of a public company.

⁴ See, Section 285 of the Act.

⁵ In other words, pure private companies in India can pass resolutions on such matters otherwise than at a meeting of the Board. This same position is true with regard to Sections 316, 372A and 386 of the Act.

- *Section 372A* as regards the sanction for inter-corporate loans and investment, or the giving of any guarantee or providing security. However, this Section also does not apply to a private company unless it is a subsidiary of a public company.
- *Section 386* relating to the appointment of a manager of a company where such manager is already a manager or a managing director of only one other company (including a pure private company). However, this Section also does not apply to a private company unless it is a subsidiary of a public company.
- *Section 488* in relation to the declaration of solvency during voluntary winding up of a company.

With regard to Sections 316, 372A and 386, the Act interestingly provides for a *unanimous* resolution of *all directors present* at the concerned meeting plus the service of specific notice of such meeting and such resolution on *all* the directors *then in India* (with the latter requirement not being applicable to Section 372A).

IV. An Analysis of the Existing Legal Provisions – Circular Resolutions under Section 289:

Adoption of resolutions by circulation is provided for in Section 289, which is the enabling provision. This provision of the Act applies to all Indian companies, whether private, public or private companies that are subsidiaries of public companies. Section 289 states as follows:

“289. Passing of resolutions by circulation.- No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or to all the members of the committee, then in India (not being less in number than the quorum fixed for a meeting of the Board or committee, as the case may be), and to all other directors or members at their usual address in India, and has been approved by such of the directors as are then in India, or by a majority of such of them, as are entitled to vote on the resolution.”

This provision is in fact fairly restrictive of the circumstances under which the Boards of Indian companies can resort to its apparent convenience. In terms of this provision, a resolution can be passed by an Indian Board by circulation only if ALL the following conditions are met⁶:

- i. The resolution, together with all the requisite background and related papers (if any), must be circulated in draft form to *all* directors *then in India* as well as to *all overseas directors*, but at their ‘*usual*’ Indian address.
- ii. The number of directors then in India must not be less than the quorum requirement for meetings of the Board – in other words, *the directors physically present in India must be of such minimum number as to themselves hold a duly quorate board meeting.*

⁶ This analysis applies also to circular resolutions to be passed by Board committees. This article’s position, therefore, applies equally to Board committee actions.

iii. The circular resolution must be *approved by at least a majority of the directors as are then in India*, provided such directors are entitled to vote on the matter – in other words, if a minimum quorum is not capable of being formed in India because of any larger number of disqualified directors (i.e., those who are otherwise interested in the matter under consideration), then the circular resolution must fall.

In effect therefore, in terms of Section 289, Indian Boards cannot adopt resolutions by circulation if they do not have at least two directors, or their respective alternates, physically present at each relevant point in time in India capable of forming a minimum quorum at a meeting – and all, or at least a simple majority of whom, must approve such circular resolution in order to have it regarded as being duly passed and adopted. This is particularly restrictive in the case of wholly-owned Indian subsidiaries or Indian joint ventures with significant or majority overseas shareholding interests where the majority or all of their respective Boards may consist of overseas resident directors.

On a separate note, Section 289 has what may be regarded today as an unusual requirement – that the draft circular resolution and any related papers must be circulated to all overseas directors at their ‘usual’ Indian address. It is easy to conceive of a situation today that a foreign or an overseas resident director of an Indian company may never visit India at all during his or her directorship – far from having a ‘usual’ Indian address – but such person even under the present state of the law is still entitled to hold directorship in an Indian company and, indeed, be held accountable as such under Indian law. Perhaps this is reflective of the underlying theme (seen also in Section 313, as well as in Sections 316, 372A and 386, of the Act) that overseas directors must have something of an Indian presence or connection.

V. An Analysis of the Existing Legal Provisions – Unanimous Written Resolutions in terms of Regulation 81, Table A:

Table A in Schedule I to the Act contains a set of the standard rules and regulations for the internal management of Indian private and public companies limited by shares that are mandatorily included in the articles of association of such Indian companies if they are not excluded or modified. A similar standard-form set of internal rules and bye-laws for company management exists in Tables C, D and E of Schedule I to the Act, applicable to other types of Indian companies – such as, for instance, guarantee companies without a share capital as in Table C – with the caveat, however, that they can, in such cases, be in such form as near to the prescribed standard forms as circumstances admit. Regulation 81 of this Table A is relevant in the context of the issue under consideration⁷:

“Save as otherwise expressly provided in the Act, a resolution in writing, signed by all the members of the Board or of a committee thereof, for the time being entitled to receive notice of a meeting of the Board or committee,

7 Regulation 29 of Table C is the same as Regulation 81 of Table A. Tables D and E in the case of a guarantee company with a share capital and an unlimited company, respectively, incorporate by reference Regulation 81 of Table A.

shall be as valid and effectual as if it had been passed at a meeting of the Board or committee, duly convened and held.”

Section 28 of the Act provides that if the articles of a company limited by shares, whether registered or not, do not explicitly modify, alter or exclude the standard-form regulations contained in Table A, then such Table A regulations shall apply to the same extent as if they were contained in duly registered articles of association of that company. Section 9 of the Act clearly states that any provision contained in any articles of association of an Indian company (including those included by reference to Section 28) shall, to the extent to which it is repugnant to the provisions of the Act, become or be void, as the case may be.

On the face of it, this Regulation 81 if adopted or applicable in the case of an Indian company’s articles of association appears, at the threshold, to be contrary to the express terms of Section 289, principally on the basis that Regulation 81 does away with the express requirement of Section 289 that the draft resolution should be circulated in draft form in advance to a minimum India based quorum and be approved by all or a majority of such directors as are then in India.

VI. Unanimous vs. Plurality Rule:

A closer reading, however, of Section 289 and Regulation 81 shows no such repugnancy. It is the cardinal principle of statutory interpretation that two provisions – and the Schedule is equally part of the main statute – must be read harmoniously in such a way that a situation of possible repugnancy is avoided.

Adopting this approach, the interpretation that emerges can be summarized and submitted as follows:

(a) Section 289 of the Act and Regulation 81 of Table A occupy and operate in different fields, each with their own scope of application different from the other and, hence, avoiding any mutual inconsistency.

(b) The circular resolution under Section 289 provides for a ‘plurality’ rule (namely, all or a majority of all of the India directors to whom the draft resolution has been circulated in advance, that is in any case a sub-set of all directors wherever situate), while Regulation 81 encapsulates a ‘unanimity’ principle as regards written resolutions – the two, therefore, operate separately of each other.

(c) In other words, Regulation 81 covers those situations which are not provided for under Section 289 – this partly explains the saving clause with which Regulation 82 opens “Save as otherwise expressly provided in the Act....”.

(d) This saving language at the beginning of Regulation 81 is, it is submitted, a reference only to those express provisions of the Act that require Board resolutions to be passed at physical meetings of the Board (and not otherwise) – it cannot, on the basis of the differentiation sought to be made on the ‘plurality’ versus the ‘unanimity’ rule, be a reference to Section 289 of the Act because if it were, Regulation 81 is immediately irreconcilable with Section 289 (which cannot be the legislative intent).

(e) Indeed, by having three Sections of the Act (namely, Sections 316, 372A and 386) provide for a *unanimous* resolution of *all directors present* at the

concerned meeting, the Act itself points to the fact that Regulation 81's 'unanimity' rule cannot supersede the express terms of these provisions that provide for physical meetings of the Board – in other words, a unanimous written resolution signed by all directors cannot take the place of a properly constituted, convened and duly quorate Board meeting for purposes of these Sections 316, 372A and 386 of the Act, but can and is indeed, if it is submitted, effective in all other situations that do not require mandatorily a physical Board meeting.

(f) Finally, on principle, a written resolution approved unanimously and signed by all directors pursuant to Regulation 81 cannot, to the author's mind, be any less effective or binding than a 'plurality' approved circular resolution under Section 289, merely because the latter has been approved by all or a majority of the India based or resident directors or simply because such circular resolution has been circulated earlier in draft form to a minimum India based quorum.

A look into the legislative history of Section 289 of the Act and Regulation 81 of Table A is instructive – unlike Regulation 81, Section 289 is a new provision that did not exist in the earlier Companies Act of 1913. Regulation 81 is a carry-over of the earlier Companies Act and is based on the standard-form articles under the earlier English statutes. So, the introduction of the 'plurality' principle under Section 289 in 1956 is unique to the Indian scheme (especially since such 'plurality' rule is of the directors as are then in India or a majority of such of them) that cannot, if it is submitted, take away from a unanimous written resolution of all directors wherever located regardless of it not being circulated in draft form earlier to a minimum India based quorum.

Of course, in situations where a director dissents, then the only way out for an Indian company is to seek the 'majority' approval in terms of Section 289 of the Act⁸ or, indeed, a simple majority of directors present at a duly convened Board meeting unless any other provision of the Act stipulates a unanimous decision of all those directors present (such, as for example, under Section 316). Indeed, in cases of circular resolutions under Section 289, there is ample scope for a dissenting director to question or object to the actions being taken, especially the manner of obtaining the approval of the directors to such circular resolution and with much depending on the facts and circumstances of each case⁹.

VII. Conclusion:

Unanimous written resolutions ought, at the threshold, to be more widely recognized in India as being a legitimate means to secure a Board's approval

8 A threshold which is crossed, the moment the requisite majority approves, provided it has been circulated in advance in draft form to a minimum India based quorum. See, *M/s. Goa Shipyard Limited v. Babu Thomas*, (2007) 10 SCC 662, a case involving a circular resolution under Section 289 subsequently also ratified in a Board meeting.

9 See, *Citicorp International Finance Corporation v. Systems America (India) Limited & Ors.*, MANU/CL/0055/2007: [2008] 141 Comp Cas 954, a decision of the Principal Bench of the Company Law Board involving an invalid circular resolution to approve and ratify resolutions purportedly passed at an earlier Board meeting, which were in fact fabricated.

and sanction – it is not often met with in practice today. Unanimous written resolutions should, however, be used with care and caution after careful consideration and advice depending on the type and nature of the Indian company involved; whether sparingly or ideally only in emergency situations being a moot point, in particular, in those companies which have a strong and vocal minority. Also, its use militates against the practice in India to maintain a minimum quorum of India based directors if the overseas directors are not capable of forming quorum outside India.

It is conceivable, however, that many such unanimous written resolutions can be impugned on the basis that the directors have not made an informed decision (and thereby have not discharged their fiduciary duties properly), especially if the relevant background papers and information to such resolutions have not been supplied. Having said that, establishing non-application of mind to a matter under directorial consideration via such a written resolution and proving that the director acted mechanically in breach of his or her fiduciary duties is very difficult in the absence of obvious fraud. Also, whether a director has breached his or her fiduciary duty is a question that can be asked even as regards decisions taken in Board meetings – the recent Satyam fiasco (as regards its Board approving the Maytas deal) being a case in point.

The Companies Bill, 2008, proposes to replace Section 289 with a new provision (Section 156) that does away with having a circular resolution to be approved by all or a majority of the directors then in India nor is there the requirement that such resolution should have been circulated in advance in draft form to a minimum India based quorum¹⁰. This new provision states that a circular resolution will be deemed duly passed if approved by a majority of directors entitled to vote on the concerned resolution (although it still provides for prior circulation in draft form to all directors at their usual Indian addresses) – an improved ‘plurality’ position further emphasized by the fact that the Companies Bill, 2008, also recognizes the concept of participation in quorum and voting at Board meetings via ‘video conferencing or such other electronic means’¹¹. No new provision to the effect of Regulation 81 is, however, available. On the face of it, therefore, a more vigorous use of unanimous written resolutions as described in this article is not diluted – in fact, it is strengthened if the intention is to eliminate some of the unnecessarily restrictive prescriptions of Section 289 and replace them with a far more reasonable plurality provision.

It remains to be seen how the Government will draft and prescribe new standard form regulations, including Regulation 81, or merely reproduce the existing set of Tables A through E. If Regulation 81 is reproduced, together with the new Section 156, it is this author’s belief that his view – that a ‘unanimous written resolution’ and a ‘plurality’ approved circular resolution (whatever constitutes such majority) operate separately of each other – would be further vindicated.

10 Interestingly, however, new proposed Section 156 still retains the language that “...the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors...*at their usual addresses in India.*” (emphasis supplied).

11 See, Section 154(2), Companies Bill, 2008.