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Maintaining Companies in India: How do Foreign Subsidiaries hold meetings?

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It is quite common to find that shareholders of a listed company are scattered in various places and different locations. Therefore, attending meetings physically may not be feasible each time for a shareholder. Therefore, this brought the need of an alternative voting system. Postal Ballots therefore, emerged as an efficient tool to bridge the gap between the company and the shareholders so that the shareholders can give their consent to the resolution in case of inability to attend the general meetings. The concept of Postal Ballot was also recommended by Working Group set up by Government to propose a new Bill to re-enact Companies Act, 1956, and also by Kumar Mangalam Birla Committee on Corporate Governance. Sec 192A, inserted by the Companies (Amendment) Act, 2000 specifies passing of resolution by postal ballot. In addition it clarifies that certain resolutions are to be passed only vide postal ballot to ensure voting by 100% members.

In case of Board meetings as well it has now become common to have foreign directors on the Board or that a Company is set up in India but all the directors and shareholders reside abroad. In such cases what are the options a company has to hold the board/general meetings to ensure that all statutory compliances are done.

Today, with the advent of technology we can't even imagine how these issues have become simpler leading to timely decisions, inexpensive modes and efficient use of resources. This article deals with all such related issues and the possible remedies.

Holding General Meetings:

As discussed above it is quite common for companies to have shareholders in different locations and thus, postal ballot is one of the effortless mode for passing the motions. However, for an Indian company it would still be possible to hold a general meeting but what about a company having shareholders exclusively abroad or an Indian Company having subsidiary abroad. Let us see the meaning and the rules framed thereunder as an alternate means of physical voting by shareholders.

Meaning of Postal Ballot:

Though there is no specific meaning assigned but one would define postal ballot as-system of voting made on an official form which is sent through the post, where by the ballot papers assenting/dissenting to a motion are sent via post.

Companies (Passing of Resolution by Postal Ballot) Rules, 2001 (herein after referred to as Principal Rules) define Postal Ballot as-

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“Postal Ballot” includes voting by share holders by postal or electronic mode instead of voting personally by presenting for transacting businesses in a general meeting of the company.

Though the above Principal Rules clearly stated about voting by both postal and electronic voting, but the Principal Rules nowhere prescribed the appropriate mechanism for such voting system and despatch of ballots by the company.

Therefore, in case even if a company has to send postal ballots it does involve complications of sending notices either by registered post or under certificate of posting (now discontinued vide circular no. G Posts No.2-4/2008-PO dated 23.02.2011) alongwith a publication in newspaper in English and a vernacular. In case of a listed company with huge member base it is certainly a costly affair as costs of printing/postage are involved. In many cases companies send a prepaid envelope to expedite revert by the shareholder.

However, though electronic voting is included in Principal Rules there was no framework defined. Thus, new Companies (Passing of Resolution by Postal Ballot) Rules, 2011¹ (Rules 2011) were effected. Under the said Rules, electronic mode has been defines as:

“Voting by electronic mode”- means a process for recording votes by the members using a computer based machine to display an electronic ballot and to record the vote and also the number of votes polled in favor or against such that the entire voting gets registered and counted in an electronic registry in a centralized server.

Unlike the Principal Rules, the Rules 2011 prescribe the mode of sending notices even vide electronic mail subject to conditions such as availability of member’s mail id, apart from registered post and/or any other secured mode of posting. In case the company opts for voting by electronic mode, in that case the notice is to indicate the process and manner of e-voting. Therefore, with the formalization of sending ballots through email the process and the reply of the shareholder become much speedy and cost effective for the companies as well as easy for the shareholder. In today’s era generally all are tech savvy and keep in mind the various green initiatives taken by the Ministry, voting vide email is sure to come up as a successful methodology. Also, that the chances of receiving 100% ballots are much more unlike in the case of posting along with counting being accurate. Therefore, in case of an FDI company costs will come down manifold and affairs will become much easier. The results can be declared much faster. Also, that the regulators will be enabled to reduce the time for sending the postal ballot notice.

¹ Notification no. GSR 419(E) dated 21st June, 2011-
[http://www.mca.gov.in/Ministry/notification/pdf/G.S.R_419\(E\)_21Jun2011.pdf](http://www.mca.gov.in/Ministry/notification/pdf/G.S.R_419(E)_21Jun2011.pdf)

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Place of holding the meeting:

In case of a foreign subsidiary Company as discussed above, one possible way of getting the shareholders' decision is via postal ballots in case the registered office of the company is in India. However, can't one think of the meeting being held outside India itself when all the shareholders are residing outside India? Well, in case of Annual General Meetings, sub-section (2) of section 166 of the Companies Act, 1956 specifies that the Annual General Meeting of the Company shall be held either at the registered office of the company or any other place within the town/city/village where the registered office of the company is situated. However, the second proviso to the said sub-section refers that in case the company is a private limited, not being a subsidiary of a public company may by its articles and also by a resolution agreed by all the members fix a time and place of the subsequent annual general meetings.

However, it is to be noted that there is no restriction as regards other general meetings which may be held at such place and at a time of any day as may be considered convenient to the company. But, they should not be held at a place which will be more expensive or inconvenient to the shareholders than if they were held at the registered office of the company. In fixing the time and place the Board of directors should act in a *bona fide* manner and not with a view to deter shareholders from attending.

Holding Board Meetings:

Just the way holding of general meetings are an issue in case of foreign subsidiaries, similarly it becomes important in case of holding Board Meetings. Again, physical meetings are impracticable as there is both cost and time involved. Since, a company has to hold Board Meetings at least once in every three calendar months as per the provision of sec 285 of the Companies Act, 1956, therefore, it is mandatory for companies to abide by the same. The difficulty is again in the physical presence. With the advancement in technology Ministry has also decided to become tech-savvy. Pursuant to the general circular no. 28 dated May 20, 2011 by Ministry, Video Conferencing is one of the options available to companies to ensure compliance with meeting.

Some questions that are still unclear are in relation to cost of the system and the place of holding the meeting. Law specifies that Companies are to hold meeting at their registered office, but our view says that the same will be irrelevant as long as participation is there as that is the whole idea of a "meeting." As regards the cost and the place of arranging VC facilities, the same can be incorporated in the Articles of the Company for VC participation to allow internal rules to be well defined.

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One of the vague conditions put in the circular is the compulsory physical attendance by a director in atleast one meeting, whereas, even the law does not provide for such compulsion as long as director takes leave of absence. In many a cases people have also taken a view that a director will have to take leave of absence in case of VC participation which is not at all the case in our view.

VC mode is a onetime investment. However, questions may arise in mind if use of facilities and applications like skype/gmail are also an option for conduction VCs. There seems to be virtually no harm in this as we have entered into a technology based global economy.

Provisions in the Companies Bill, 2011:

Holding of Board Meetings:

The participation of directors in a Board meeting may be either in person or through video conferencing or other audio visual means, as may be prescribed, subject to such matters that the Central Government may, by notification, specify not to be dealt with in a meeting through video conferencing or other audio visual means. Further, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means. As in the present case where many of us have confusion if at all the director attending meeting through video conferencing will be counted for quorum or not has been clearly specified in bill that directors participating by video conferencing or other audio visual means shall be counted for quorum.

In case of circular resolutions too, the resolution can be circulated through electronic means alongwith traditional means by hand delivery or by post or by courier. However, the assent/dissent by the director in our view also will be similarly circulated as nothing is specified.

Holding of General Meetings:

As per the recent MCA clarification on December 27, 2011 vide Circular no. 72/2011² on holding of general meetings through video conferencing mode is an option and not a mandate for companies unlike circular no. 35/2011, to ensure compliance with provisions contained in the Bill. The Bill does not lay down VC mode as a compulsion for companies to hold general meetings. Therefore, as per the circular the companies do have an option of holding meetings through VC mode. The voting by a member can be through an electronic mode as the same provisions are

² http://www.mca.gov.in/Ministry/pdf/General_Circular_No_72_2011.pdf

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also contained in the new Bill, subject to the fact that the Central Government may prescribe the class or classes of companies and manner in which a member may exercise his right to vote by the electronic means.

Further, Postal ballot has been defined to mean voting by post or through any electronic mode; therefore, a company will always have an option to carry on postal ballot exercise instead of holding physical meetings. The Postal Ballot Rules, 2011 will be applicable as of now in such a case; the methodology whereof, has already been discussed above in the article.

In the Bill, notices to be given for holding general meetings can be given in writing or through electronic mode. Therefore, there seems no difficulty at all in the coming times for holding of meeting in case of foreign subsidiaries as well.

From, the above discussion, we see that with the advancement and changes adopted by Ministry in the legal provision, holding meetings has become cheaper, time effective and relatively easier. All what needs to be ensured by the compliance officer is that the “purpose” of the meetings is met, whether the same is through postal ballot or through video conferencing or physical meetings. Transparency and independent decision needs to be ensured.

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