

Directors Forum

Publication No. 7

The role and responsibilities of Independent Non-Executive Directors

December 2022

pwc

MIoD
Mauritius Institute of Directors
Promoting Corporate Governance across the board

About the Directors Forum

To support the MIoD in building more effective boards and to promote good corporate governance, the Directors Forum (the Forum) was set up in 2012, in collaboration with PricewaterhouseCoopers (PwC) Mauritius. The Forum acts as an Advisory Council and Technical Committee to the MIoD.

The Forum's objectives are to:

- identify issues which are of most concern to directors,
- produce position papers and, through consultation with Government and regulators, contribute to policy development,
- be the voice for governance and directors' issues in Mauritius,
- develop guidance on governance issues in Mauritius.

The Forum would like to acknowledge the contributions of **Chinien Prabha**, **Dinan Pierre** and **Teeroovengadum Kevin**, as Sub-Committee members, in the drafting of this Position Paper.

Collectively, the Forum is made up of members who are respected local directors and professionals with backgrounds in law, economics, finance and accounting, corporate and securities regulation, business and academia, in the private and public sectors.

Members

- Chinien Prabha
- Dinan Pierre
- Dumbell George
- Hurkoo Dev
- Lamport Matthew
- Leung Shing Georges
- Mamed Baboo
- McIlraith Catherine
- Moteea Giandev
- Radhakeesoon Aruna
- Sauzier Christine
- Tyack Julien
- Teeroovengadum Kevin
- Timol Aisha
- Watkinson Mark

Chairperson

- Ujoodha Sheila (MIoD)

Secretary

- Bissessur Kaveena (PwC)
- Ramdin Vijaya (PwC)

Coordinator

- Mulung Nafeeza (MIoD)

Position Paper series

Previous Position Papers produced by the Forum are listed below and can be accessed at:

- **miod.mu/publications/position-papers/**
- **pwc.com/mu/miod-position-papers**

Paper 6:
Effective and sustainable good governance practices of family businesses
(November 2021)

Paper 5:
COVID 19 - Key considerations for Directors
(September 2020)

Paper 4:
Board Evaluation
(November 2019)

Paper 3:
Engaging with Shareholders – A Guide for Boards
(September 2014)

Paper 2:
An Ethics Guide for Boards
(December 2013)

Paper 1:
Best Practice Guidelines for the Appointment of Directors
(September 2012)

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

1 Executive Summary

This Position Paper 7 provides an insight on the role and importance of Independent Non-Executive Directors (INEDs) in Mauritius, highlighting the factors which impede on their independence, including maximum tenure on Boards and sub-committees, cross directorships, common directorships and over boarding.

Independence is a state of the mind and is a concept covered under various Mauritius legislations and guidelines, including the Companies Act (CA 2001) and the National Code of Corporate Governance for Mauritius (2016) (Code). A sector wise analysis is also provided in the local context in this paper.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

2 Introduction

The boards of directors (Boards) are operating in a VUCA environment where markets are Volatile, Uncertain, Complex and Ambiguous. In a post-pandemic era of geopolitical instability, the Board is having to make tougher decisions. This is accentuating the need for good governance as the bedrock for new opportunities and better business performance.

In Mauritius, companies are bound to comply with the various legislation which describes the definition of INED and composition of the Board. This is further reinforced by a set of robust principles embedded in the Code. It is mandatory for listed entities and other public interest entities to apply the eight principles of the Code to their businesses and to explain in their annual reports and/or their websites how they are applying these principles in practice.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

2 Introduction (continued)

2.1 Definition

Defined below are the three categories of directors which any Board should have with an appropriate balance and combination which brings different perspectives to the Board.

	Executive Directors	Non-Executive Directors	INED
Definition	Involved in the day-to-day management of a company. As employees of the organisation, they manage the company's daily operations and are broadly responsible for oversight, risk management and strategic planning.	Not involved in the day-to-day management of a company. Their knowledge and experience are a plus on the Board as they challenge management and bring a fresh eye's perspective.	Does not have any interest in the company, in terms of shareholding, employment, remuneration or cross-directorship. The director should not have a financial, professional or personal relationship which could materially affect his ability to exercise objective judgement in the best interest of the entity.

In Mauritius, the definition of independent directors is in various legislations and guidelines such as the CA 2001, the Banking Act 2004 (BA 2004) and the Code.

The Code provides a comprehensive definition of INED in its guidance notes with a list of criteria which can be used to assess whether a director is independent. But the key message is that an INED should not have a material interest in the Board or company. Annexes I - IV provide more details.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

3 Role and importance of Independent Non-Executive Directors (INEDs)



"An INED in today's boardroom ….
The role of the Independent Non-Executive Director (INED) has undergone a paradigm shift from being an honour to being a professional engagement. That which was years back more about passively joining an executive club upon retirement just for status is today a serious active job with great responsibility requiring time and commitment. The game changer is the code of governance which provides the proper guidance, framework and empowerment.

The Board committees chaired by INEDs play a vital role in assisting Boards and boardroom decisions. As an INED I can interact freely with management and challenge operational matters whilst true independence and integrity prevail at all times."

Kalindee Ramdhonee,
Director, Karics Partners Ltd

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

3 Role and importance of Independent Non-Executive Directors (INEDs) (continued)

INEDs are appointed to Boards to bring independence and constructive participation in the decision-making process. They are impartial advisers, who bring the relevant skills and experience, and act in good faith and in the best interest of the company. For example, it is imperative that INEDs are able to constructively and without fear challenge executive management on any aspect of the decision making process. In other words, independent directors are required to bring in a questioning attitude not only when they attend general board meetings but also on specific and more specialist sub-committees (e.g. audit committee, remuneration committee and nomination committee). MIoD's position paper on Board Evaluation in 2019 discussed the importance of 'cognitive conflict' - defined as the ability of board members to express multiple viewpoints and exchange positive and negative comments - as one of the components relevant in ensuring effective board performance. And to ensure proper functioning of the Board INEDs will bring that vital element of independence and professional skepticism that will not only keep executive management on their toes but also mitigate any risk of group think where decision making is concentrated in the hands of a few persons.

A good INED will, prior to attending his first Board meeting, set out to understand the history of the organisation, the sector in which it is operating and the passion of individuals who have built and are building the business. Industry experience also carries great importance in this scenario.

In related party transactions and family businesses, it is also important that INEDs, appreciate the complexity and dynamics of the organisation, and the politics of family relationships. Applying independence and objectivity in these situations can be challenging but is of upmost importance to ensure that Principle 2 of the Code - the Board should contain independently minded directors - is adhered to. The appropriate combination of directors – executives, non-executives and INEDs - mentioned in the Code is a function of the sophistication and scale of the organization, the ultimate aim being to prevent one individual or a small group of individuals from dominating a Board's decision making. The CA 2001's requirement for public companies to have at least two independent directors on their Boards therefore should not be seen as an end in itself but rather as a foundation on which to build on if the nature and scale of operations of the firm require more than 2 independent directors to ensure that Executive Directors are operating as efficiently and objectively as possible.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

3 Role and importance of Independent Non-Executive Directors (INEDs) (continued)

The main roles of INEDs are listed below, although the list is non-exhaustive:

- Challenge constructively and contribute to the development of the organisation's strategy.
- Oversee the performance of management against agreed goals and objectives and monitor the reporting of performance.
- Ensure that financial information provided is accurate, and that financial controls and systems of risk management are robust.
- Determine appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary, removing senior management and in succession planning.
- Safeguard the interests of minority shareholders and all the other stakeholders.
- Manage conflicts of interests.
- Lead or attend the INEDs meeting ahead of the Board meeting.

The concept of a lead INED is crucial, especially in complex environment / organisations. Lead INEDs can facilitate / steer Board discussions on sensitive / difficult matters and can be a true ally to the CEO on such matters.

It is worth pointing out that the Australian Accounting Review published a survey in 2009, which was forwarded to independent directors of the top 200 Australian Securities Exchange (ASX) listed companies. The paper aimed to provide the perceptions of independent directors themselves and so contribute to the literature through a better understanding of the nature of the work performed by Australian company independent directors and the environment in which it occurs. Findings suggested that the fundamental role of the independent director has not changed as a result of the corporate governance reforms.

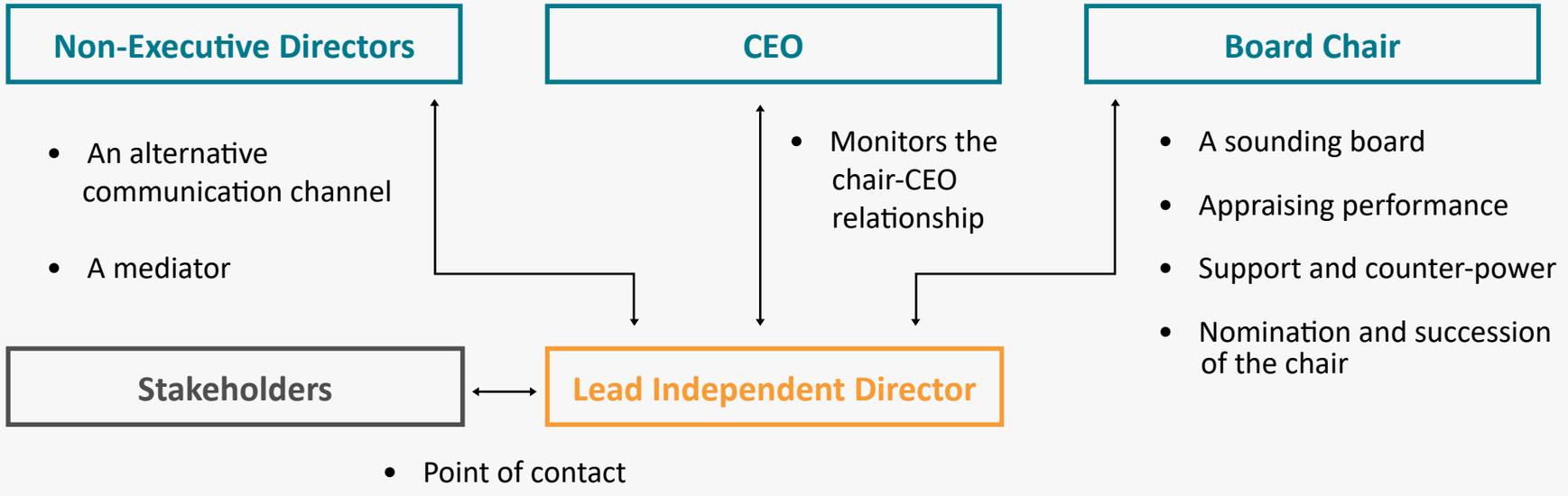
Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

3 Role and importance of Independent Non-Executive Directors (INEDs) (continued)

Additional roles of lead INED are:

- Take the lead in the absence of the Chair. The Chair is the first amongst equals but does not have any additional authority over and above any of the other directors.
- During time of crisis, the lead INED can bring an element of independence during Board deliberations and provide strong oversight on issues such as strategy, performance, risk management, resources, key appointments and standards of conduct.
- In the resolution of difficult situations.



Source: Harvard Law School Forum on Corporate Governance

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

3 Role and importance of Independent Non-Executive Directors (INEDs) (continued)



"Key to being an independent non-executive director is to be able to devote sufficient time and attention to the affairs of the Company.

The criteria to establish what is an "independent" director are spelled out in the Companies Act, various regulations and the Code of Corporate Governance. What I retain from these criteria is to be independent in conduct and character (or mind) and to exercise independent business judgement in the best interests of the company.

Understanding the company's business, the role and effectiveness of the Board as steward of sustainable value creation for the company and making informed decisions require the application of skills, knowledge and experience as well as respect for the company and its industry. Today's environment is quite challenging with geopolitical uncertainty, technology issues and changes in working practices.

It helps to be on the Board of a Company which provides opportunities to its directors to develop and maintain their skills and knowledge to discharge their duties and responsibilities."

Clairette Ah-Hen, Independent non-executive director on Absa Bank (Mauritius) Limited, Vivo Energy Mauritius Limited and Meaders Feeds Ltd.

The general perception and expectation from investors are that the presence and contribution of INEDs will lead to some different, and better decisions by the Board. INEDs contributions are also crucial in the effective corporate governance of a company as they are in the best position to speak out against unethical practices, wrongdoings or corporate exercises that are unfairly advantageous only to the controlling shareholders.

Director compensation is also a factor to consider given its role, responsibilities and risks associated with becoming a director Board could appoint independent consultants to provide an objective perspective on what is fair and reasonable as compensation for directors. It is recommended that INED's take professional advice on the appropriate level of fees for a role that factors in time commitments and risks.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

4 Qualities of INEDs

Important qualities which INEDs must have include leadership, critical thinking, business acumen, integrity, interpersonal skills, professional skepticism and sound judgement with an independent and entrepreneurial mindset. While constantly self-reviewing their position on the Boards, INEDs should identify themselves as being independent to its core to continue to act in good faith.

INEDs must help bridge the gap between actual reality and ambition and be honest and transparent towards the stakeholders. Their independence allows enhancement of stakeholder value without any conflict of interest. While their role on the Board is demanding, INEDs are a valuable source of support and advice for Board members to question and challenge management and hold them accountable. The 2013 article entitled "Honing Skepticism" published by the National Association of Corporate Directors (NADC) stated that "Although no professional standard requires directors to exercise skepticism, this attitude is clearly implied by the concept of director independence". The article lays emphasis on the fact that 'skepticism' is a word that means 'in search of the truth' and this is why independent directors must continually ask probing questions to obtain accurate and honest answers.

Research indicates that Board effectiveness has greater chances of being influenced by the quality of the directors rather than the number of directors alone. Good governance does not only imply having a proportion of INEDs, but factors such as the characteristics, abilities, expertise and skills are very important.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

4 Qualities of INEDs (continued)

The role of INEDs in a VUCA environment

In a VUCA environment, one key aspect that enables companies to be resilient and remain part of the game is “scenario planning”.

INEDs should brainstorm on factors leading to critical uncertainties and alternate futures, assist in formulating strategies while displaying a corporate maturity, encompassing cognitive diversity, and armed for radical uncertainty. Attending seminars, workshops and specific trainings contribute to keeping the INEDs up to date with what is happening in both the local and global VUCA environment.

Continuous professional development for INEDs is a must. INEDs should ensure that sufficient time and resources are allocated by a Board to director training and potentially negotiate for a company to cover the cost of programmes such as the MIoD Chartered Director Development program.

Their independence of mind, spirit, and action could be facilitated continuously through ongoing trainings to emphasize on the importance and characteristics of independence.

An annual evaluation should be carried out to assess the ongoing independence of INEDs for purposes of categorising their status.

INEDs are expected to have strong interpersonal skills to be able to dismantle tensions on Boards and facilitate discussions on difficult agenda



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

5 Factors impacting independence of Directors



"In my experience, the single most important requirement from an INED is intellectual honesty. Without that, the role and title mean nothing.

Once that is established, I believe the INED must bring the same intellectual and professional rigour to the role as they would in their own executive role or company. They must be properly prepared, listen, challenge and be constructive in their criticism. When necessary, they must be forceful and intransigent on matters of ethics. They must be a resource for mediation, be diplomatic and act in the interests of all stakeholders, paying particular attention to instances where majority shareholders may be trying to gain unfair advantage (conflicts of interest or related party transactions).

What impedes on the independence?

Where the perks of the role are attractive and not limited to the director's fees. In my opinion, non-monetary benefits are a minefield to be avoided. Things like free nights within a group's hotels, free hunting parties, very large discounts, preferential access to property deals etc. can weaken the judgement and independence of INED. Fees should be set at an appropriate level and should compensate an INED completely for the role and time."

Marc Lagesse, Independent Non-Executive Director of Medine Group.

It is strongly recommended that directors disclose in a timely manner all related non-pecuniary benefits, including share options, to the Board which would be considered while determining the extent of independence of the directors.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

5 Factors impacting independence of Directors (continued)

5.1 Maximum tenure for independent directors

One of the factors which impede on independence remains the number of years for which the directors have served on the Board. The rationale for this stems from the fact that just like an external auditor an independent director should not only exhibit independence of mind but must also be seen to be independent. If we draw upon the Handbook of the International Code of Ethics for Professional Accountants (2021 edition), independence of mind and independence in appearance are defined as follows: Independence of mind is "the state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity, and exercise objectivity and professional skepticism"; Independence in appearance is defined as "the avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude that a firm's, or an audit team member's integrity, objectivity or professional skepticism has been compromised." Because independent directors need to show independence in appearance, it is therefore relevant to briefly discuss the maximum tenure for independent directors to be considered as independent.

The maximum tenure for directors to be considered as independent non-executive directors on local Boards is nine years per CA 2001, the Code as well as the Financial Services Commission (FSC) Circular Letter to licenses dated 28 October 2021 and six years as per the Bank of Mauritius (BoM) Guideline on Corporate Governance (2001). However, the outgoing director may, with the prior approval of the BoM, be reappointed as director on the Board of the financial institution after having observed a cooling period of two years or BoM may, where it deems it fit, approve the reappointment of a director who has not observed the cooling period.

Notwithstanding the maximum tenure that may be specified by legislation or by the regulator to ensure independence in appearance, independence of mind, which is just as important, may however dictate a tenure that is lower than the prescribed maximum threshold. Therefore, if an INED is of the view that after less than the prescribed maximum years of tenure, the required independence can no longer be exercised, whatever be the reason causing it, consideration to change the director status to Non-Executive director (NED) should be given, in the event that the director chooses to remain on the Board. Stakeholders of the company expect such intellectual honesty and disclosure from the INEDs.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

5 Factors impacting independence of Directors (continued)

5.2 Common directorship and holding companies

The independence of directors sitting on both the holding company and subsidiary company can be impeded since there are two duties of loyalty – one to the holding company and one to the subsidiary. As such, they are not regarded as independent since there could be times when the interests of the two companies are not aligned.

Although this gives rise to an independence issue and is not considered to be best practice, there is however no legal restriction.

5.3 Cross Directorship

Section 2.1 (d) of the Code specifies that an independent director is a Board member who, among other criteria does not have cross directorship nor significant links with other directors through involvement in other companies or bodies. However, as the Code recommends that the Board should decide and determine independence on a case-to-case basis, the Board must take the responsibility to make its own decision in line with its established company policy on corporate governance.

Cross directorship should be avoided as it may undermine director independence through conflict of interests, especially when involving the determination of each other's remuneration in the remuneration committee. This might lead to the directors looking at their personal interests and not acting in the best interest of the company.

It is common in smaller societies that same directors would sit on several different Boards. It is strongly recommended to phase out this process to encourage onboarding and participation of new directors and thus avoiding instances of cross directorship.

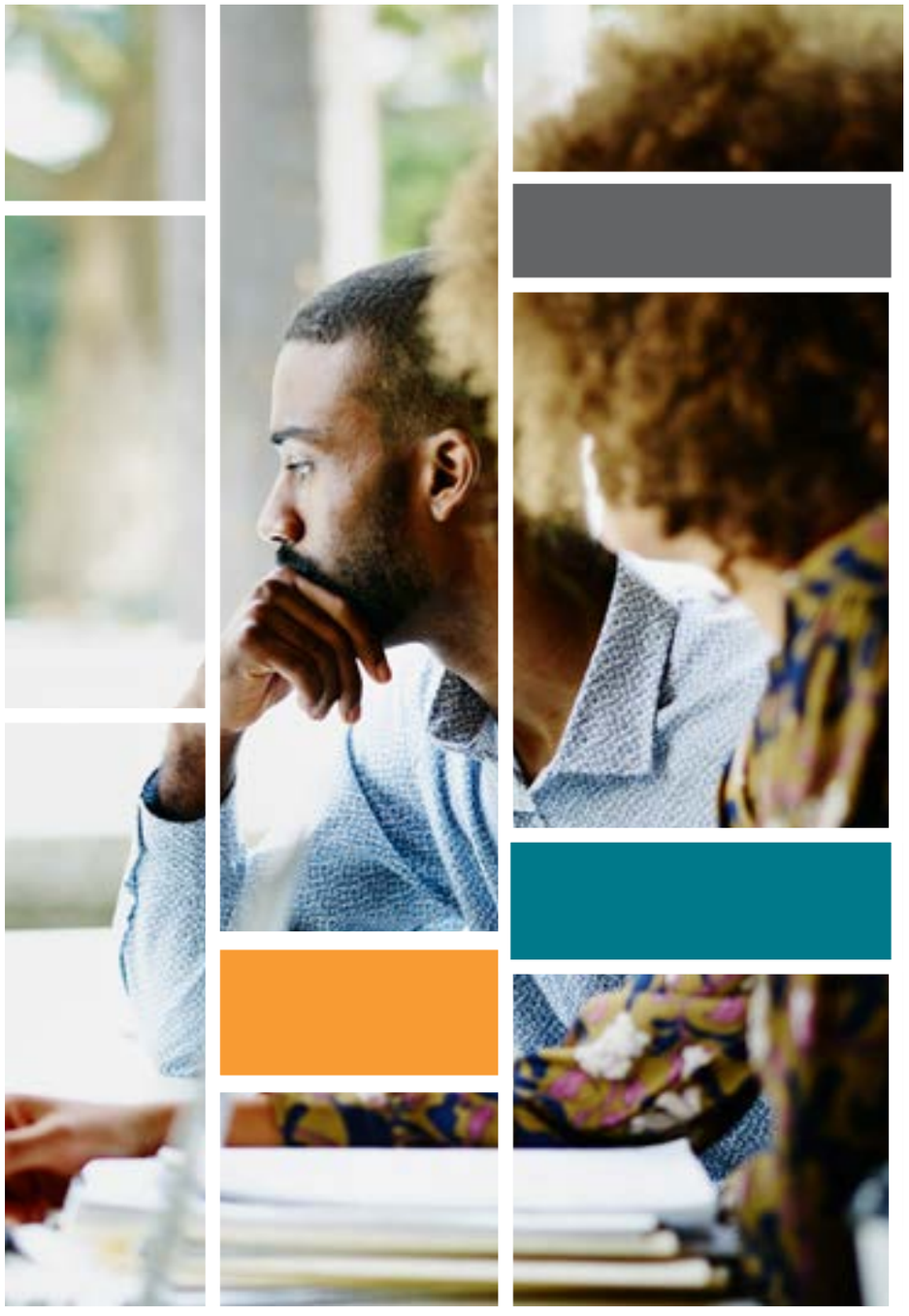
1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

5 Factors impacting independence of Directors (continued)

5.4 Over boarding

Companies today are subject to more stringent governance practices compared to a decade ago. Directors should be mindful not to be over boarded. Sitting on too many Boards, especially on companies having similar year end or a complex structure by nature, and being too active, could result in demanding time commitments which cannot be honoured and the inability to fulfill the duties and responsibilities adequately.

As over boarding also impedes on independence as directors get acquainted with many Board members, especially in a small country like Mauritius, the recommendation is that directors should not sit on too many Boards. A good practice would be for the directors to assess objectively whether sufficient time can be devoted before accepting to be a new company's appointment. The FSC rules for Global Business companies have defined a maximum number of Boards (not exceeding 200) on which a director can sit to be considered as independent.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

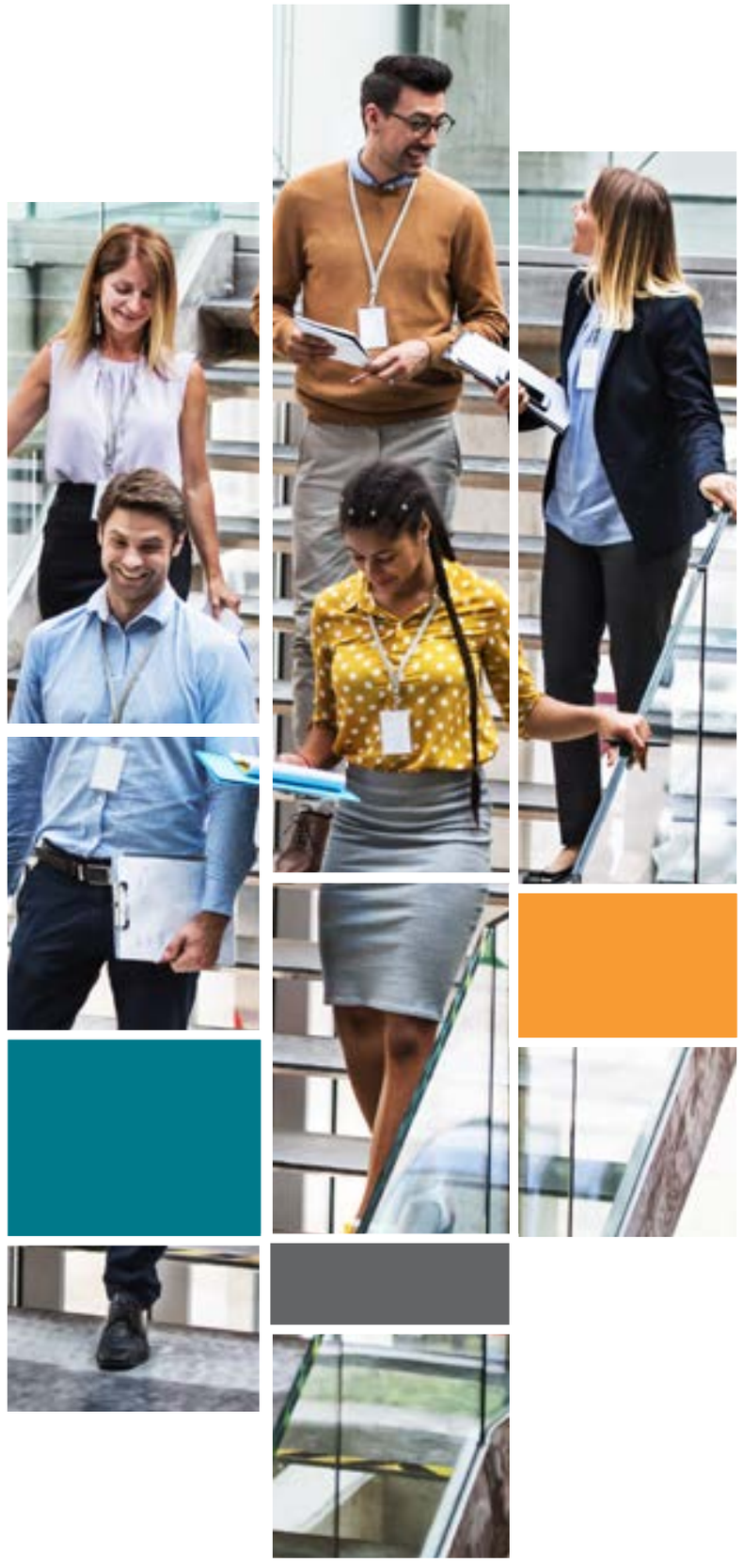
6 Sector analysis in the local context

(i) Banking Industry

In the Banking Act (BA 2004), and in the context of the Mauritian banking industry, the Board should not consist of fewer than: (i) 5 natural persons, and (ii) 40 per cent of independent directors, where the appointment of any such additional director or directors should be done with the prior approval of the Bank of Mauritius.

The Bank of Mauritius also requires that Boards be composed of 40 per cent non-executive directors instead of 40 per cent independent directors in case the bank is a subsidiary or an associate of a foreign banking group of companies.

The importance of INEDs is also highlighted in audit committees of banks incorporated in Mauritius which are required to comprise only independent directors who should not be less than 3 in number.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

6 Sector analysis in the local context (continued)

(ii) GBCs, non-banking financial institutions

The FSC requires a global business licensed company to have at least 2 directors' resident in Mauritius, of sufficient caliber to exercise independence of mind and judgment.

The Financial Services Act 2007 (FSA 2007) requires licensees adhere to the below, which is also recommended by the Code:

- The Board is required to comprise of independently minded directors, including an appropriate combination of executive directors, independent directors and non-independent non-executive directors to prevent one individual or a small group of individuals from dominating the Board's decision taking.
- The Board needs to be of a size and level of diversity commensurate with the sophistication and scale of the organisation. Appropriate Board committees may be set up to assist the Board in the effective performance of its duties.
- A NED's presence on the board is to be commensurate with the sophistication and scale of the organisation. NEDs are entitled to seek independent advice where appropriate. This may be necessary to fully inform themselves about an issue before the board and to effectively contribute to board discussions.
- Boards are to have at least two independent directors normally where their presence on the board are commensurate with the sophistication, scale and sector of the organisation.
- The board has the responsibility to determine whether a director is independent in character and judgement and whether there are relationships or circumstances likely to affect, or appear to affect, the director's judgement on an annual basis.

The above provisions are also applicable for companies operating in other sectors.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

6 Sector analysis in the local context (continued)

(iii) Public interest entities & listed companies

Under the Financial Reporting Act 2004 (FRA 2004), Public Interest Entities (PIE) comprises Public Sector organisations including state-owned enterprises, statutory corporations and parastatal bodies. The Code requires Boards, including public interest entities to have at least two independent directors and in case of less than two independent directors, an explanation need to be provided. In many state-owned enterprises, the appointment of directors is guided by the parastatal legislation which requires directors to be appointed by Ministers. Archaic governance practices and public sector Board underperformance are often associated with the parastatal bodies.

From a good governance perspective, there should be a proper competency assessment conducted before appointing directors to ensure a proper mix of skills and experience. There needs to be more transparency in order to inspire confidence from the stakeholders. An independence assessment can be done by considering the factors delineated in the Code to assess the director's ability to exercise objective judgement in the best interest of the entity.

(iv) Family business

Family businesses in Mauritius, whether recently founded or long-established, are inherently resilient and bring with them various advantages. However, to escape difficulties, including governance challenges and perception of favoritism, which may threaten their sustainability, they should use the Code as best practice.

An effective board needs to achieve the right balance of both family executive directors and independent non-executive directors. Diversity, expertise and gender should also be incorporated because they lead to better overall decision making.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

7 Directors and Officers (D&O) Liability Insurance

The enhanced duties and potential liabilities of D&O have led to a rise in the demand for insurance cover. However, the D&O Liability insurance, a high-risk product, does not cover fraudulent, criminal or intentional non-compliant acts or cases where directors obtained illegal remuneration or acted for personal profit.

Section 161 of the CA 2001 allows a company to indemnify a director or employee of the company or a related company in respect of proceedings that relate to liability for any act or omission in the person's capacity as a director or employee. Annex V provides more details.

Despite having D&O Liability insurance, becoming a director of a board is not without its risks and can lead to significant personal liability. Too often INED appointments are seen as prestigious and risk free. INED's are recommended to take professional advice as to the adequacy of D&O cover for their Boards.



Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

8 Conclusion



The role and importance of INEDs is ever evolving. Boards should be forward looking and ensure that their INEDS have the necessary skills, knowledge, freedom and experience to perform their duties. Skilled INEDs will effectively act as a sounding board for the executive directors, provide an objective view as well as constructive criticism and support to the Board in making the best decision for the future of the organisation. To maximise the benefits derived from well qualified INEDS, the issue of over boarding, cross directorship and common directorship need to be taken into consideration to ensure effective independence.

INEDs should not fear disruption or to add value, on the contrary they should embrace same, keep an open mind and constructively challenge management who are encouraged to provide regular feedback to regulators in order to move towards mindful governance as opposed to mindless and endless compliance.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes

Annex I: Overview of applicable legislation and recommended practices for different category of business

	Category of business	Companies Act 2001	Financial Services Act 2007	Listing rules/ Securities Act 2005	Banking Act 2004	Variable Capital Company Act 2022	The Code
1	Domestic Company.	Mandatory.	Applicable, if licensed by FSC.	Applicable, if listed on Stock Exchange of Mauritius and/or has a CIS Manager license.	Applicable, if licensed by Bank of Mauritius.	A company may be incorporated under the Companies Act 2001 as a VCC.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.
2	Authorised Company.	Mandatory.	Mandatory.	Not applicable.	Not applicable.	Not applicable.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.
3	Global Business Company.	Mandatory.	Mandatory.	Applicable, if listed on Stock Exchange of Mauritius and/or has a CIS Manager license.	Not applicable.	Applicable if it is acting as a VCC Fund.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.

9 Annexes (continued)

Annex I: Overview of applicable legislation and recommended practices for different category of business

	Category of business	Companies Act 2001	Financial Services Act 2007	Listing rules/ Securities Act 2005	Banking Act 2004	Variable Capital Company Act 2022	The Code
4	Protected Cell Company.	Mandatory.	Applicable.	Applicable, if listed on Stock Exchange of Mauritius and/or has a CIS Manager license.	Applicable, if licensed by Bank of Mauritius.	Not applicable.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.
5	Variable Capital Company (VCC).	Mandatory.	Applicable. No company shall operate as a VCC unless that company is authorized by the FSC to operate a VCC fund.	Applicable, if listed on Stock Exchange of Mauritius and/or has a CIS Manager license.	May be Applicable.	Mandatory.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.
6	Foreign company.	Mandatory.	Applicable, if it is carrying on business in Mauritius.	Listing rules apply to international issuers as they do to Mauritian issuers.	Applicable, if licensed by Bank of Mauritius.	Applicable. A company established in another jurisdiction can be registered as a VCC.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex I: Overview of applicable legislation and recommended practices for different category of business

	Category of business	Companies Act 2001	Financial Services Act 2007	Listing rules/ Securities Act 2005	Banking Act 2004	Variable Capital Company Act 2022	The Code
7	Public sector organisations.	Mandatory.	Not applicable.	Applicable if listed. Securities Act 2005 will apply to public offerings of shares owned by the Government but shall not apply to debt securities or treasury bills or guaranteed by Mauritius or any other prescribed country.	Applicable if licensed by Bank of Mauritius.	Not applicable.	Mandatory, if a public interest entity. Otherwise, recommended as best practice.

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex II: Detailed definition of Independent NED (1/5)

(a) The Companies Act 2001:

Section 2 of the Companies Act 2001 defines an independent director as "A director who is a non-executive director and who –

(a) is not an employee;

(b) does not have material business relationship with the company either directly or as a partner, shareholder, director or senior employee of an organisation that has such relationship with the company;

(c) does not receive remuneration from the company except remuneration or any other benefit given to him as a director in accordance with section 159;

(d) is not a nominated director representing a substantial shareholder;

(e) does not have close family ties with any of the advisers, directors or senior employees of the company;

(f) does not have cross directorships or significant link with other directors through involvement in other companies or other organisations; and

(g) has not served on the Board for more than 9 continuous years from the date of his first election."

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex II: Detailed definition of Independent NED (2/5)

(b) The Banking Act 2004:

Section 2 of The Banking Act 2004 on the other hand defines "Independent director" as:

"A director having no relationship with, or interest in, whether past or present, the financial institution or its affiliates, which could or could reasonably be perceived to materially affect the exercise of his judgment in the best interest of the financial institution"

The Guideline on Corporate Governance issued by the Bank of Mauritius in April 2001 (last revised in May 2016) further state that for the avoidance of doubt, the following is considered as an "Independent director":

(a) A director who has not been employed by the financial institution or the group of which it currently forms part of, in any executive capacity for the preceding 3 financial years.

(b) A director who has not been employed by any other financial institution regulated by the Bank of Mauritius in an executive capacity for the preceding 3 financial years;

(c) A director who is not a related party to an individual who is or has been in any of the past 3 financial years employed by the financial institution or the group in an executive capacity;

(d) A director who is not an adviser to the financial institution or the group other than as a member of the Board;

(e) A director who has no relationship or interest in the financial institution or group which could or could reasonably be perceived to materially affect the exercise of his judgement in the interest of the financial institution.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex II: Detailed definition of Independent NED (3/5)

(b) The Banking Act 2004 (continued)**:**

In addition, the following are not considered as independent director:

(a) A director of an immediate and/or ultimate holding company shall not be considered as an independent director of the financial institution.

(b) A director of a company which holds 10 per cent or more of the shares of a financial institution shall not be considered as an independent director of the financial institution.

(c) A director of a company in which a financial institution holds 20 per cent or more of its shares shall not be considered as an independent director of the financial institution.

(d) A former employee receiving a pension or any other benefits from a financial institution will not be considered as an independent director for that institution irrespective of the number of years since his retirement.

(c) Financial Services Act 2007:

While the Financial Services Act 2007 does not specifically define the NEDs, a circular letter issued under section 7(1) of the Financial Services Act require licensees to comply with the Code issued by the National Committee on Corporate Governance.

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex II: Detailed definition of Independent NED (4/5)

(d) The Code of Corporate Governance for Mauritius (2016):

The Code issued by the NCCG covers the following entities:

(i) Public Interest Entities as defined by the Financial Reporting Act 2004.

(ii) Public Sector organisations including state-owned enterprises, statutory corporations and parastatal bodies.

(iii) Other companies are also encouraged to give due consideration to the application of this Code, insofar as the principles are applicable.

The Code defines an independent director as a Board member who:

(i) has not been an employee of the organisation or group within the past three years.

(ii) has not, or has not had within the past three years; a material business relationship with the organisation either directly or as a partner, shareholder, director or senior employee of a body that has such a relationship with the organisation;

(iii) has not received or receive additional remuneration from the organisation apart from a director's fee or as a member of the organisation's pension scheme;

(iv) is not a nominated director representing a significant shareholder;

(v) does not have close family ties with any of the organisation's advisers, directors or senior employees;

(vi) does not have cross-directorships nor significant links with other directors through involvement in other companies or bodies; and

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex II: Detailed definition of Independent NED (5/5)

(d) The Code of Corporate Governance for Mauritius (2016) (continued):

(vii) has not served on the Board for more than nine years from the date of his first election.

A Board can have its own definition of independence, but if the Board allows any material divergence from any of the above criteria, it should be fully explained in the corporate governance section of the annual report and on the website. An explanation should be provided if a board has less than two independent directors.

Annex III: King III and King IV report on Corporate Governance (1/2)

The King III report provides for independent NEDs as follows:

- Not being involved in the management of the company defines the director as non-executive.
- Non-executive directors are independent of management on all issues including strategy, performance, sustainability, resources, transformation, diversity, employment equity, standards of conduct and evaluation of performance.
- The non-executive directors should meet from time to time without the executive directors to consider the performance and actions of executive management.
- An individual in the full-time employment of the holding company is also considered a non-executive director of a subsidiary company unless the individual, by conduct or executive authority, is involved in the day-to-day management of the subsidiary.

9 Annexes (continued)

Annex III: King III and King IV report on Corporate Governance (2/2)

The King IV report on Corporate Governance highlighted the importance Independent Director. The concept of independence was reviewed and includes a more balanced assessment of independence as follows:

- is a significant provider of financial capital, or ongoing funding to the organisation; or is an officer, employee or a representative of such provider of financial capital or funding;
- if the organisation is a company, participates in a share-based incentive scheme offered by the company;
- if the organisation is a company, owns securities in the company the value of which is material to the personal wealth of the director;
- has been in the employ of the organisation as an executive manager during the preceding three financial years, or is a related party to such executive manager;
- has been the designated external auditor responsible for performing the statutory audit for the organisation, or a key member of the audit team of the external audit firm, during the preceding three financial years;
- is a significant or ongoing professional adviser to the organisation, other than as a member of the governing body;
- is a member of the governing body or the executive management of a significant customer of, or supplier to, the organisation;
- is entitled to remuneration contingent on the performance of the organisation.

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex IV: Global practices - King IV report on Corporate Governance and Cadbury report

- **King IV report on corporate governance**

The notion of director independence has been defined across jurisdictions. While the Mauritian definition has been inspired from the UK Corporate Governance Code (formerly known as the Combined Code), this section considers the concept of director independence from the well recognised King Report. The King Report on corporate governance provides a guidance on the governance structure and operations of companies in South Africa. First published in 1994 by the King Committee under the chairmanship of Mervyn King, there are four editions of the report. The latest King IV report includes a balanced assessment of independence and considers, with a lot of relevance, substance over form compared to a tick the box approach – it considers a list of stakeholders which could hinder director independence, including providers of financial capital, security holders, employees, external auditors, professional advisors and other significant stakeholders.

- **Cadbury report**

A key concept in corporate governance is the contribution of Independent Non-Executive Directors. This came into limelight following the publication of the Cadbury report in 1992 in the UK. The report emphasizes as having independent directors on Board has a positive implication on the financial performance of the company. Indeed, Board effectiveness is greatly influenced by the quality of the directors rather than the number of directors.

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex V: Section 161 of Companies Act on indemnity and insurance (1/2)

1. Except as provided in this section, a company shall not indemnify, or directly or indirectly effect insurance for, a director or employee of the company or a related company in respect of :

   (a) liability for any act or omission in his capacity as a director or employee; or

   (b) costs incurred by that director or employee in defending or settling any claim or proceedings relating to any such liability.

2. An indemnity given in breach of this section shall be void.

3. Subject to its constitution, a company may indemnify a director or employee of the company or a related company for any costs incurred by him or the company in respect of any proceedings -

   (a) that relates to liability for any act or omission in his capacity as a director or employee; and

   (b) in which judgment is given in his favor, or in which he is acquitted, or which is discontinued or in which he is granted relief under section 350 or where proceedings are threatened, and such threatened action is abandoned or not pursued.

4. Subject to its constitution, a company may indemnify a director or employee of the company or a related company in respect of -

   (a) liability to any person, other than the company or a related company, for any act or omission in his capacity as a director or employee; or

   (b) costs incurred by that director or employee in defending or settling any claim or proceedings relating to any such liability.

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

9 Annexes (continued)

Annex V: Section 161 of Companies Act on indemnity and insurance (2/2)

5. Subsection (4) shall not apply to criminal liability or liability in respect of a breach, in the case of a director, of the duty specified in section 143(1)(c).

6. Subject to its constitution, a company may with the prior approval of the Board, effect insurance for a director or employee of the company or a related company in respect of :

(a) liability, not being criminal liability, for any act or omission in his capacity as a director or employee;

(b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability; or

(c) costs incurred by that director or employee in defending any criminal proceedings -

(i) that have been brought against the director or employee in relation to any act or omission in that person's capacity as a director or employee;

(ii) in which that person is acquitted;

(iii) or in relation to which a nolle prosequi is entered.

Navigation

1. Executive Summary
2. Introduction
3. Role and importance of Independent Non-Executive Directors (INEDs)
4. Qualities of INEDs
5. Factors impacting independence of Directors
6. Sector analysis in the local context
7. Directors and Officers (D&O) Liability Insurance
8. Conclusion
9. Annexes
10. References

10 References

References

1. *Companies Act (2001), Mauritius.* https://companies.govmu.org/Pages/Legislations/Companies-Act-2001.aspx *(Accessed on: 5th May 2022)*

2. *The Banking Act (2004), Mauritius.* https://www.bom.mu/about-bank/legislations/banking-act-2004. *(Accessed on: 5th May 2022)*

3. *The Code of Corporate Governance for Mauritius (2016).* https://nccg.mu/sites/default/files/2021-01/the-national-code-of-corporate-governance-for-mauritius_2016.pdf. *(Accessed on: 5th May 2022)*

4. *Financial Reporting Act (2004), Mauritius.* https://www.fscmauritius.org/media/1145/financial-reporting-act-2004-130114.pdf. *(Accessed on: 5th May 2022)*

5. *Financial Services Act (2007), Mauritius.* https://www.fscmauritius.org/media/84940/financial-services-act-2007pdf.pdf. *(Accessed on: 5th May 2022)*

6. *Guideline on Anti-Money Laundering and Combating the Financing of Terrorism and Proliferation (2020), Mauritius.* https://www.bom.mu/sites/default/files/guideline_on_aml-cft_jan_2020_15.01.2020_0.pdf. *(Accessed on: 5th May 2022)*

7. *Bank of Mauritius Guideline on Corporate Governance (2017), Mauritius.* https://www.bom.mu/sites/default/files/guideline_on_corporate_governance_revised_12_october_2017_final.pdf. *(Accessed on: 5th May 2022)*

8. *King Report III on Corporate Governance (2007), South Africa.* https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf. *(Accessed on: 5th May 2022)*

9. *King Report IV on Corporate Governance (2016), South Africa.* https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf. *(Accessed on: 5th May 2022)*

10. *Honing Skepticism published by the NACD.* https://www.nacdonline.org/files/NACD%20Directorship%20article%20-%20Honing%20Skepticism.pdf. *(Accessed on: 10th November 2022)*



www.pwc.com/mu

PricewaterhouseCoopers Ltd
PwC Centre
Avenue de Telfair
Telfair 80829, Moka
Mauritius

www.miod.mu

Mauritius Institute of Directors
1st Floor, Standard Chartered Tower
19 Cybercity
Ebene 72201
Mauritius

This document has been prepared by the Mauritius Institute of Directors, in collaboration with PwC. This document contains proprietary information and is not to be copied, duplicated, or publicly released in any manner except with the written permission of the Mauritius Institute of Directors.

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, the Mauritius Institute of Directors and PwC do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2022 Mauritius Institute of Directors and PricewaterhouseCoopers Ltd. All rights reserved.