

SEMESTER- II
SUBJECT/CLASS: COMPANY LAW
BY, URC.
COMPANY ADMINISTRATION

Dear Students,
Greetings.

Under the unprecedented situation prevailing and uncertainty looms large as to restoration of normalcy, we took this path to reach you to mitigate to some extent loss of class hours. Presenting before you the captioned topic for proper understanding and awareness.

Definition: Director includes any person occupying the position of director by whatever name called. A director may be described as an individual who guides, directs, conducts, governs, manages the policy and affairs of the company.

Definition as per Companies Act 2013: Under Section 2(34) director' means a director appointed to the Board of a company; Section 149 says that, "A body corporate, association or firm cannot be appointed as director of a company. Only an individual can be so appointed [Section 149(1)]. As per section 2(10)"Board of Directors for Board in relation to a company, means the collective body of the directors of the company.

Number of Directors: The number of directors to be appointed to the Board of Directors of a company is determined by the articles. Therefore, in every public company there must be at least 3 directors u/s 149 (1) (a) and for private company there should be at least 2 directors and one director in the case of a OPC. Subject to this statutory minimum limit the articles of a company may prescribe the maximum and minimum number of directors. The number so fixed may be increased or decreased within the limit prescribed by the articles, by an ordinary resolution. Any increase beyond the maximum permitted by the Articles must be approved by a special resolution. But where the increase in number does not make the total number of directors more than 15, in that case special resolution is not required.

Provision as per Companies Act 2013: According to section 149(1) Every company shall have a Board of Directors consisting of individuals as directors and shall have:

- (a) a minimum number of three directors in the case of public company, two directors in the case of a private company, and one director in the case of a One Person Company, and
- (b) a maximum of fifteen directors.

Provided that a company may appoint more than fifteen directors after passing a special resolution:

Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director. (newly introduced by Co's Act 2013)

- (2) Every company existing on or before the date of commencement of this Act shall within one year from such commencement comply with the requirements of the provisions of sub section (1)
- (3) Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

The Companies (Amendment) Act, 2017: For newly incorporated company the requirement shall apply proportionately at the end of financial year in which it is incorporated. "Previous calendar year" now replaced by "financial year".

(4) Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Explanation For the purposes of this sub-section, any fraction contained in such one-third number shall be rounded off as one.

(5) Every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as may be applicable, comply with the requirements of the provisions of sub-section (4).

(6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,

(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

(d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year.

DIRECTOR IDENTIFICATION NUMBER (DIN)

Definition: According to companies (Appointment and qualification of Directors) Rules 2014, 2(1)(d)-

"Director Identification Number" (DIN) means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company:

Provided that DIN obtained by the individuals prior to the notification of those rules shall be the DIN for the purpose of Companies Act, 2013; Provided further DIN includes DPIN (Designated Partnership Identification Number) as per Section of LLP Act 2008 (amended 2009).

Significant Provisions of Companies Act 2013 for DIN is given below:

1. Application for allotment of Director Identification Number. [Sec 153]: Every Individual intending to be appointed as director of a company shall make an application for allotment of Director identification Number to the Central Government in such form and manner and along with such fees as may be prescribed.

2. Allotment of Director Identification Number. (Sec 154): The Central Government shall, within one month from the receipt of the application under section 153, allot a Director identification Number to an applicant in such manner as may be prescribed.

3. Prohibition to obtain more than one Director Identification Number. [Sec 155]: No individual, who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another Director Identification Number.

4. Director to intimate Director Identification Number. [Sec 156] : Every existing director shall, within one month of the receipt of Director Identification Number from the Central Government intimate his Director Identification Number to the company or all companies wherein he is a director.

5. Company to inform Director Identification Number to Registrar. (Sec 157): (1) Every company shall, within fifteen days of the receipt of intimation under section 156, furnish the Director identification Number of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed within the time specified under section 403 and every such intimation shall be furnished in such form and manner as may be prescribed. (2) If a company fails to furnish Director Identification Number under sub-section (1), before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty five thousand rupees but which may extend to one lakh rupees.

6. Obligation to indicate Director Identification Number. (Sec 158): Every person or company, who furnished any return, information or particulars as are required to be furnished under this Act, shall mention the Director Identification Number in such return, Information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

7. Punishment for contravention. (Sec 159): If any individual or director of a company, contravenes any of the provisions of section 152, section 155 and section 156, such individual or director of the company shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues.

So remember two essential prerequisites to become a director are

1. DIN: Director identification number, without DIN no individual shall act as a director [u/s 152(3) and (4)]

The Company (Amendment) Act, 2017. It is learnt that government is planning to switch over to "Aadhar" based KYC and identification for directors and hence enabling provision is recognise any other number equivalent to DIN. Meanwhile the professionals can start inclusion of Aadhar numbers of directors in the forms and returns, so as to build a database.

2. Consent: Consent of director is essential, without consent he/she shall not act as a director. It must be filed to the registrar within thirty days of his appointment. [Rule 8: The companies (Appointment & Qualification of Directors) Rules 2014 and u/s 153(5)].

QUALIFICATION OF DIRECTORS

Any academic or professional qualifications for director has not been specified in companies Act, 2013. It not imposes any share qualification of directors. So, unless the company article contain a provision to that effect, a director need not be a shareholder unless he wishes to be one voluntarily. But the articles usually provide for a minimum share qualification. But schedule V, Part-I provides few conditions, which need to be fulfilled for the appointment of Managing or Whole-time director or a manager without the approval of the central government. In Rule5 of the companies (Appointment & Qualification of Directors) Rules 2014 the Qualification for independent director is given.

DISQUALIFICATION OF DIRECTORS

By virtue of Sec. 164 a person shall not be capable of being appointed as director of a company if he/she has,

1. been found to be of unsound mind by a court [u/s 164(1)(a)]
2. an undischarged insolvent [u/s 164(1)(b)]
3. applied to be adjudicated as an insolvent and his application is pending (u/s 164(1)(c))
4. been convicted by a court in India of any offence involving moral turpitude. [u/s 164(1)(d)]
5. not paid any call in respect of shares of the Company. [u/s 164(1)(f)]
6. An order by the court or Tribunal to prohibit a person to act as director. [u/s 164(1)(e)]
7. not been convicted of the offence dealing with related party transactions u/s 188 at any time during the last preceding five years.
8. not obtain Director Identification Numbers (DIN).

Provision as per Companies Act 2013: Section 164

According to section 164(1), A person shall not be eligible for appointment as a director of company, if

- (a) he is of unsound mind and stands so declared by a competent court;
- (b) he is an undischarged insolvent;
- (c) he has applied to be adjudicated as an insolvent and his application is pending;
- (d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company:

- (e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
- (f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
- (g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
- (h) he has not complied with sub-section (3) of section 152.

APPOINTMENT OF DIRECTORS

The directors of a company may be appointed by any of the following situations:

- * Appointment of first Director by articles of association [section 152].
- * Appointment of Directors by the company in general meeting.
- * By the Board of Directors as an additional director or to fill a casual vacancy or as an alternative director or a nominee director {Section 161}.
- * Appointment of Resident director.
- * Appointment of Independent director.
- * Appointment of Director by the rule of proportional representation,
- * Appointment of Small shareholders' director.
- * Appointment of director by Central Government.
- * Appointment of director by Tribunal.

First Director

Persons named in the Articles of Association as directors become the first Director of the company. Where the AOA do not provide for the appointment of first directors, the subscribers to the memorandum, who are individuals, shall be deemed to be the first directors of the company until directors are duly appointed.

In case of OPC an individual being member shall be deemed to be its first director until the directors are duly appointed. But, DIN and ii) Consent

Appointment by the company in General Meeting

Sec. 152(6) of the Companies Act, 2013 provides that not less than 2/3rd of the total number of directors shall be rotational of a public company (Including private company which is a subsidiary of a public company). In case of a private company, which is not a subsidiary of a public company, it is not compulsory under the law that they must have rotational director.

Sec. 152(7) states that the retiring directors shall be deemed to have been reappointed in the adjourned meeting eligible for election to fill up the vacancies thus created. If the place of retiring director is not filled up, the meeting shall stand adjourned till the same day in the next week. If at the adjourned meeting also the place of retiring directors is not filled, the retiring director shall be deemed to have been reappointed. It means all the directors of Private Company are non-rotational in nature u/s 152(6), we observe that, 1/3 of the total number of directors of public company will non-rotational. They may have appointed for a fixed time spans or till they attain the specified age.

Example: Total number of directors on the board of a public company are nine. 1/3 of 9 i.e. 3 directors will be non-rotational and 2/3 of 9 i.e. 6 will be rotational directors. Now, out of 6

directors, 2 directors (1/3 rd of the rotational directors) holding the office for the longest period must retire at the AGM. As between persons appointed on the same day, retirement is to be determined by mutual consent or by draw of lots.

Appointment by Board of Directors

1. Additional Director: By virtue of Sec. 161(1) the Board of Directors may if so authorised by the articles, appoint additional directors who will hold office only up to the next annual general meeting of the company or the last date, on which the AGM should have been held whichever is earlier. The number of Directors and additional Directors together must not exceed the maximum strength for the Board by the articles of the company. Provision relating to additional directors includes Private and public companies. An additional director can be appointed as Managing director or whole time director, no objection specified in Co's Act, 2013.

2. Casual Vacancy: According to Sec. 161(4) the Board of Directors has got power to fill a casual vacancy which will crop up by vacation of the office by any of the director before his term. The resulting Casual vacancy may subject to any regulations in the articles of the company will be filled up by the Board of Directors at a meeting of the Board.

Example: Mr. Das had been elected as a director in a public company and died two month later. Mr. Sen appointed in his place and would perform for the total period for which Mr. Das, if he had not died, would have continued, A vacancy in the office of a non-rotational director will not be treated as casual vacancy u/s 161 and cannot be filled up by the Board.

3. Alternate Director: According to Sec. 161(2) permits the Board of Directors to appoint if the articles or a resolution passed by the company in general meeting authorise, an Alternate Director in place of the original director, who may have to be absent from the state for a period longer than 3 months from India. Alternate director holding post of director for any other directors shall not be appointed. No person shall not be appointed in place of individual director unless he qualified in this Act.

4. Nominee Directors: Subsection (3) of section 161 provides that, a nominee director is one who is appointed by the financial institutions to safeguard their intent in the company.

Provision of Companies Act 2013, Section 161

Appointment of additional director, alternate director and nominee director:

(1) The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

(2) The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India:

Provided that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act:

Provided further that an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Appointment of the Resident Director

Companies Act 2013 has introduced the concept of resident director for the first time through subsection(3) of section 149 of the Act. Now at least one director on the board of every company to be a person who has stayed in india for not less than 182 days in the previous calendar year.

Companies (Amendment) Act, 2017 : Resident director requirement is attributed to the current financial year and not previous calendar year and proportionally for newly incorporated companies.

Appointment of Independent Director

Definition: According to section 2(47) "Independent director" means an independent director referred to in subsection (5) of Section 149, At least one-third of the board of every listed public company to consist of independent directors. Existing companies to be provided a transition period of one year from the date of commencement of the Act to comply.

The Companies (Appointment and Qualification of Directors) Rules 2014

Rule 4. Number of Independent directors: The following class or classes of companies shall have at least two directors as independent directors

- (i) the Public Companies having paid up share capital of ten crore rupees or more; or
- (ii) the Public Companies having turnover of one hundred crore rupees or more; or
- (iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees.

Provided that in case a company covered under this rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

Appointment of small shareholders director

A listed company may have one director elected by small shareholders in the manner and with such terms and conditions as may be prescribed u/s. 151(1).

Explanation: For the purposes of this section "small shareholders" means shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

Appointment by Central Government

All the directors of a company when vacate their office under any of the specified disqualifications the promoter or in his absence Central Government may appoint the required numbers of directors who shall hold office till the directors are appointed by the company in the general meeting u/s 167(3).

Appointment of Directors by the Tribunal

Section 242 of the Companies Act, 2013 describes the Power of Tribunal about removal and appointment of directory. The Tribunal may make an order through which managing director, managers or any of the directors of the Company may be appointed.

POSITION OF DIRECTORS

There has been much of controversy about the legal position of the Director. They have been described as "agents", "trustees", "managing partners". But directors are to a certain extent both agents and trustees. According to Lord Selborne, the directors are mere trustees or agents of the company. Trustees of the companies money and property, agents in the transactions which they enter into on behalf of the company. Though it is not easy to explain the position that the directors occupy, yet it is now well settled that the directors stand in fiduciary position towards the company in regard to the powers conferred on them by the Articles. Companies Act remain silent to explore the position of directors, rather at various times their position have been clarified by several honourable judges. According to Bowen, LJ: "Directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as exhaustive of their powers and responsibilities but as indicating useful points of view from which they may for the moment and for the particular purpose be considered".

Directors of Agents

Since the directors act on behalf of the company in relation to third parties, they enjoy the right and privileges of an agent. They will incur no personal liability or contracts entered into by them. unless they have exceeded the power given to them by the Memorandum and Articles, (ultra-vires acts), in which case they will be liable for breach.

Company being an artificial person, is governed by human agency. Directors control the affairs of the company as its agents. Act of the directors for and on behalf of the company exclude directors from personal liability. The relationship between the company and the directors is that of principal and agent. According to Cairns, LJ.: "The company itself cannot act in its own person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent". The general principles of agency regulate the relation of directors and the company and of person dealing with the company where the directors contract in the name and on behalf of the company, it is the company which is liable on it and not the directors. However they are not merely agents of the company. They also exercise independent powers.

Example: A company had failed to pay sales tax to the Government which was an offence punishable under the Madras General Sales Tax Act. On a case being filed against a director for the recovery of tax payable by the company from him it was held that the directors being agent of the company could not be held personally liable for the payment of the tax.

1. However, this view is not acceptable because, Agents are appointed by the principal, but directors are nominated by the members of the company.

2. An agent work against commission while directors receive remuneration.

Directors as Trustees

Directors have very often referred to as the trustees of company's money and property. As they control the affairs of the company, they are also in charge of company's money and its property.

The Directors may be called up to refund to the company any money and property improperly and negligently applied by them. They are, therefore, called trustees. They must act honestly and in the interest of the company.

1. However, this view is not wholly correct for following reasons, The ownership of the property vests in the trustees, but in the case of directors, they are not vested with the ownership of the company's property.

2. They are not trustees of third person who have made contracts with the company.

3. They are not trustees of the individual shareholders though they are trustees for the company.

4. Director is a paid agent of the company and contracts for the company.

Strictly speaking, the directors are not the trustees though they are in custody of the companies money and property and are obliged to act honestly in the interest of the company and not in their individual interest.

Example: The Directors of A Ltd. paid nothing on their shares but made all the other shareholders to pay Rs.5 on each share as application allotment and call money. The fact was not disclosed to the shareholders. It was held that it was a breach of trust on the part of directors. They were required to pay to the company as much money as the other shareholders had paid. (Alexander v. Automatic Telephone, 1900).

Though the directors are easily called trustees, they are not trustees in the strict sense. (Ref. Case Law-Smith v. Anderson).

Thus it is clear that directors do not hold the position of trustees or agents exclusively.

It does not matter much what we call them so long as we understand about their true position. The reality is that they are commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it.

Directors as Managing Partners

Directors are appointed by the company as paid employees to control its affairs. They do manage its affairs and day-to-day transactions, but they are not partners since they are employees of the company and no director can bind by his acts the other directors. There is no agency relationship amongst the directors. The director has no authority to act for and on behalf of other directors of a company. The directors are agents of the company and not of their co directors. It is therefore not correct to state that directors are managing partners.

Directors as Employees

Though directors are sometimes termed as professional paid employees of the company, yet they are not strictly employees as like other employees, they are neither the servants of the company nor are the members of its staff. A director is treated as an officer under the Companies Act.

Provision of Companies Act' 2013 about the Position of director

The Companies Act 2013 included the term director in various definitions in different cases. The term Directors are included in the definition of officer, manager, key managerial personnel and employees.

Under section 2(53) "manager" means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not:

Under section 2(51) "key managerial personnel", in relation to a company, means:

- (I) the Chief Executive Officer or the managing director or the manager:
- (ii) the company secretary:
- (III) the whole-time director:
- (IV) the Chief Financial Officer; and
- (V) such other officer as may be prescribed.

The Companies (Amendment) Act, 2017: Few changes introduced in the above definition.

Under section 2(59) "officer" includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.

Rule 8 of the Companies (Share Capital & Debenture) Rules 2014 explained the term "employees" which includes director.

Explanation: For the purposes of this rule-

- (i) the expressions "Employee" means-
 - (a) a permanent employee of the company who has been working in India or outside India, for at least last one year; or
 - (b) a director of the company, whether a whole time director or not; or
 - (c) an employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company.

RIGHTS OF DIRECTORS

1. To attend meeting of the company.
2. To participate in the management of the corporate affairs.
3. To receive remuneration, if any, fixed.

DUTIES OF A DIRECTOR

It should be noted that the duties of a director vary according to the nature and size of the company and have to be ascertained on the facts of each use. In discharging their duties, directors must act honestly and must exercise such degree of skill and diligence as would amount to reasonable care which an ordinary man might be expected to take. The duties of directors are:

Classified under two heads: 1. Statutory duties, 2. General duties.

1. Statutory Duties: Duties which are considered as a statutory obligation and specific responsibility:

- I. To file with the Registrar, return of allotment. (Sec. 39) .
- ii. To disclose director's interest (Sec. 184)
- iii, To disclose receipt from transfer of property (Sec. 191
- iv. To disclose receipt of compensation from transferee of shares. (Sec. 191)
- v. Duty to attend Board meetings (167(1)(b))
- vi. To convene AGM and EGM (Sec. 96 and 100).
- vii. To authenticate annual financial statement including consolidated financial statement (if any) [Sec 134
- viii. To appoint first auditor of the Company. (Sec. 139]
- ix. To appoint cost auditor of the Company. (Sec. 148]
- X. To make a declaration of solvency In the case of voluntary winding up (Sec. 305)

2. General duties: These are explained In section 166 of the Companies Act, 2013.

Provision as per Companies Act 2013 (Section 166):

Duty as per "Articles":

Subject to the provisions of this Act, a director of a company shall act In accordance with the articles of the company.

Duty of good faith:

A director of a company shall act in good faith in order to promote the objects of the company for the benefit of Its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

Duty of care:

A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

Duty to ensure common interest:

A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

Duty to remain honest:

A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

Duty within legal ambit:

A director of a company shall not assign his office and any assignment so made shall be void.

Penalty

If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh lakh rupees.