Directors and Key Managerial Personnel

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Important Notes:

- Meaning, Types, and Legal Position
- Disqualification of Directors
- Director Identity Number
- Appointment and Removal of Directors
- Powers and Duties of Directors
- Meeting of Board of Directors
- Key Managerial Personnel

Meaning of Directors

Directors are the persons appointed to direct and supervise the affairs of a company. As per section 2(34) of the Companies Act 2013 director means a director appointed to the board of a company.

Section 149 of the Companies Act states that every company shall have a Board of Directors consisting of individuals as directors and shall have-

(a) a minimum number of 3 directors in the case of a public company, 2 directors in the case of a private company, and one director in the case of a One Person Company.

(b) a maximum of 15 directors. A company may appoint more than 15 directors after passing a special resolution.

(c) Such class or classes of companies as may be prescribed, shall have at least one woman director.

(d) Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

(e) 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.

Legal Position of Directors

Directors are the persons duly appointed by the company to direct and manage the affairs of the company. Their legal position is sometimes described as agents, sometimes as trustees, and sometimes as managing partners. But each of these is not 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. So, the different points of view of legal position of directors are as follows:

Directors as Agents

Directors are viewed as agents of the company for the conduct of its business. A company cannot act by itself; it acts only through its directors. Directors act on behalf of the company and acting on behalf of the company make the company liable on it and not themselves. The directors cannot be held personally liable for any default of the company. Like agents, directors should conduct business of the company with care, skill and diligence possessed by them. They are accountable for all of company's assets under their control, and the profits from assets of the company. Directors cannot deal on their own, and are required to disclose their personal interest, if any, in any transaction of the company.

Directors as Trustees

Directors are also described as trustees of the company. They must account for all the moneys over which they exercise control. Their acts and dealings must be for the benefit of the company. They must exercise their powers honestly in the interest of the company and all the shareholders, and not their own sectional interest. The directors of a company are trustees for the company with reference to their power of applying funds of the company. For misuse of the power they could be liable as trustees. "Directors are the persons selected to manage the affairs of the company for the benefit of shareholders. It is an office

of trust, which it is their duty to perform fully and entirely."[1] Directors cannot exercise their powers of management against the interests of the company.

Directors as Managing Partners

Directors represent the shareholders to conduct the business of the company on their behalf. They enjoy vast power of management over the company and perform many functions which are in the nature of the proprietary, for example allotment of shares, raising of loans, investment of funds of the company. This gives the impression of directors being the active partners and the shareholders appointing them as dormant partners. The very fact that most of the times, directors themselves are the significant shareholders in the company strengthens the argument that directors are the managing partners of the company. But this may be true only partially as unlike partners directors cannot bind other shareholders by their dealing, and dissimilar to partners directors are elected and are subject to retirement also.

Conclusion

In the real sense the directors are not the agents completely nor the trustees nor the managing partners. The position of directors combines all the three and more than that also. Directors are paid agents or officers of the company and conduct business for the company without being the legal owners. In fact, the directors are commercial men managing a trading concern for the benefit of themselves and of all the shareholders in it.

Directors of a company have *fiduciary relationship* with the company as well as the shareholders when they act as agents or officers of a company. The position of directors being in the nature of fiduciary was affirmed by the Supreme Court of India in the case of *Dale and Carrington Investment Pvt. Ltd. v. P.K. Prathapan (2004).* Being in the fiduciary capacity utmost good faith is expected from the directors a company. The directors have to follow the articles of association and acts through meetings of the Board of Directors.

Disqualification of Directors

Following persons cannot be appointed as directors of a company (*Sec. 164*):

(*i*) A person found by a court to be of unsound mind and the finding is in force.

(*ii*) An undischarged insolvent.

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[1]. York and North Midland Railway Co. V. Hudson

(*iii*) a person who has applied to be adjudged as insolvent and his application is pending.

(*iv*) A person who has been convicted by a court, whether in India or elsewhere, of an offence involving moral turpitude and sentenced to six months' imprisonment and a period of five years has not passed from the date of the 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;

(v) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(*vi*) 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;

(*vii*) 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

(*viii*) he has not complied with sub-section (*3*) of section 152.

(*ix*) A person who is already a director of a public company which:

- has not filed the annual accounts and annual returns for any continuous 3 financial years commencing on and after the first day of April, 1999; or
- has failed to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more.

A private company may by its articles provide for more grounds, in addition to those referred above, on account of which a person shall not be appointed as director of the company. But in case of public companies and their subsidiaries provisions on additional dis-qualifications will be invalid.[2]

Number of Directorships (Section 165)

(*1*) No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time:

Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten. For reckoning the limit of public companies in which a person can be appointed as director,

[2]. Cricket Club of India Ltd. & others *v.* Madhav L. Apte & others (1975)

directorship in private companies that are either holding or subsidiary company of a public company shall be included.

(*2*) Subject to the provisions of sub-section (*1*), the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

Who may be appointed as a Director?

(*i*) No body corporate, association or firm shall be appointed director of a company, and only individual shall be so appointed; and

(*ii*) who has been allotted a Director Identity Number (DIN).

Director Identification Number (DIN)

The concept of a Director Identification Number (DIN) has been introduced by the Companies (Amendment) Act, 2006. It is a part of the MCA 21 Project launched by the Ministry of Corporate Affairs. As such, all the existing and intending directors have to obtain DIN within the prescribed time-frame as notified.

The DIN is a unique identification number for an existing director or a person intending to become the director of a company. In the scenario of e-filing, DIN is a pre-requisite for filing of certain company related documents. It is mandatory for all directors to acquire a DIN.

To get the DIN, an online application is to be filed. A provisional DIN will be issued after online filing. Thereafter, the printed detail of the fields entered has to be generated. A photo has to be attached on the form with proof of the residence duly attested by Notary/ Gazetted Officer/Cost Accountant /Company Secretary/Lawyer.

On resignation of the director from a company, the DIN obtained does not have to be cancelled. The DIN will remain with the individual only. Only a single DIN is required for an individual irrespective of number of directorships held by him. All the directorships of an individual are mapped in the database through DIN.

With the introduction of the concept of DIN, the offences committed by the directors can be immediately detected. It would also help in addressing the concerns of companies vanishing after raising funds from the public. Investors also get the chance to take more informed decision by knowing the top management of the company.

Provisions of the Companies Act 2013 relating to Director Identification Number

(1) **Application for allotment of Director Identification Number** (*Sec. 153*). Every individual, intending to be appointed as director of a company; or director of a company appointed before the commencement of the Companies (Amendment) Act, 2006, shall make an application for allotment of Director Identification Number to the Central Government in the prescribed form, along with the prescribed fee.

(2) **Allotment of Director Identification Number** (*Sec. 154*). The Central Government shall, within one month from the receipt of the application, allot a Director Identification Number to the applicant.

(3) **Prohibition to obtain more than one Director Identification Number** (*Sec. 155*). No individual, who had already been allotted a Director Identification Number shall apply, obtain or possess another Director Identification Number.

(4) **Obligation of director to intimate Director Identification Number to concerned company or companies.** (*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) **Obligation of company to inform Director Identification Number to Registrar** (*Sec. 157*). Every company shall, within one week of the receipt of intimation under section 156, furnish the Director Identification Number of all its directors to the Registrar or any other prescribed authority.

(6) **Obligation to indicate Director Identification Number** (*Sec. 158*). Every person or company, while furnishing any return, information or particulars as are required to be furnished under the Act, shall quote 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 the director.

(7) **Penalty for contravention** (*Sec. 159*). If any individual or director or a company contravenes any of these provisions, every such individual or director or the company, as the case may be, who or which, is in default, shall be punishable with imprisonment for a term which may extend to 6 months or fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a

further fine which may extend to R 500 for every day after the first during which the contravention continues.

Appointment of Directors

The appointment of directors is made in the following manner:

1. Appointment of First Directors

The *first directors* of a company are usually appointed by the promoters in the manner laid down by the company's articles. Their names are usually given in the company's articles. Where the articles do not provide for the appointment of first directors, the signatories to the memorandum, who are individuals, and in case of a One Person Company an individual being member shall be deemed to be the first directors of the company subject to the regulations of the company's articles [Sec.152 (1)]. The first directors can hold office only till the first annual general meeting of the company when they are replaced by the directors appointed by the company at this meeting.[3]

2. Appointment of Directors by Members.

The *subsequent directors*, in the case of a public company, are appointed by the members of the company in the general meeting. *Section 152* provides that unless the articles provide for the retirement of all directors at every annual general meeting, at least two-thirds of the total number of directors of a public company shall be persons who shall be subject to retirement by rotation and must be appointed by the company in general meeting. The remaining directors in the case of any such company and the directors of a private company may be appointed in accordance with the provisions of the company's articles. In the absence of any such provision in the articles or in case of default in so appointing directors, these directors shall also be appointed by the company in general meeting. (*Sec. 152*)

Retirement of directors by rotation. In case of a public company, out of the two third directors liable to retire by rotation, one-third (or the nearest number to one-third) shall retire at every subsequent annual general meeting of the company. The turn for retirement shall be determined by the length of office of each director. Those who have been longest in office shall retire first. As between persons who become directors on the same day, retirement may be decided by lot.

Re-appointment of directors. The vacancies caused by the retirement of directors should be filled up at the same meeting. Retiring directors are

[3]. The members may appoint new directors to replace the first directors earlier than the annual general meeting.

eligible for re-election and may be re-appointed again. A person, other than the retiring director, can contest election for directorship only if he or any other member who intends to propose him has given at least 14 days' nomination notice before the date of the meeting, in writing, to the company along with a deposit of Rs. one lakh or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than twenty-five per cent of total valid votes cast either on show of hands or on poll on such resolution. The company shall inform its members of the candidature of a person for the office of director in such manner as may be prescribed.

If the vacancy caused by the retirement of a director by rotation is not filled up at the same general meeting, the meeting shall be deemed to be adjourned to the next week. If at the adjourned meeting also the vacancies are not filled up, the retiring director shall be deemed to have been re-appointed automatically except in the following cases [Section 152(7)]:

(*a*) a resolution for his re-appointment was put before the meeting, but was lost; or

(*b*) when such person has declined re-appointment in writing; or

(*c*) when he has been disqualified; or

(*d*) a resolution, whether special or ordinary, is required for his appointment or re-appointment in virtue of any provisions of this Act; or

(*e*) section-162 is applicable to such case

Appointment of directors to be voted individually (Section 162)

At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

3. Appointment of Directors by the Board.

The Board of Directors may make the following appointments (Section 161):

(*i*) **Additional or co-opted directors.** If authorised by the Articles, Board of Directors may 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.[*Sec*.161(1)]

(*ii*) **Casual vacancy.** A casual vacancy occurring amongst the directors (on account of death, resignation or otherwise) may be filled up by the

Board of Directors unless the Articles provide a different procedure. The person so appointed shall hold office only up to the time his predecessor would have continued. [*Sec*.161(4)]

(*iii*) **Alternate directors.** The Board of Directors may, if so authorised by the Articles of Association or by a resolution passed by the company in the general meeting appoint an alternate director, to act for a director during his absence for a period of not less than 3 months from the State in which meetings of the Board are ordinarily held. Such a director will vacate office immediately on the return of the original director to the state. Such an alternate director will automatically vacate office on the expiry of the term of the original director even if the latter has not returned. [*Sec*.161(2)]

(iv) Subject to the articles of a company, the Board may appoint any person as a director **nominated by any institution** in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.[*Sec.161(3)]*

4. Appointment of Directors by the Tribunal

Where an application is made to the Tribunal under section 241 for relief against oppression and mismanagement of a company's affairs, the Tribunal may, if satisfied, order for the appointment of such number of persons as directors, who may be required to report to the Tribunal on such matters as the Tribunal may direct.

The Tribunal may issue the order on a petition made to it by at least 100 members of the company or the member(s) holding at least 10% of the voting rights in the company. The ground on which such a petition can be filed is conduct of the affairs of the company in a manner oppressive to any member of the company or prejudicial to the interests of the company or public interest.

5. Appointment of Directors by the Central Government

Where all the directors of a company vacate their offices under any of the specified disqualifications the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. [Section 167(3)]

6. Appointment of Directors by Proportional Representation.

Directors in a company may be appointed either by (*a*) a system of straight majority of votes or (*b*) a system of proportional representation.[4]

Section 163 of the Companies Act 2013 gives an option to the company to adopt Principle of Proportional Representation for Appointment of Directors. The articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years.

Removal of Directors

A director can be removed from his office by:

- Shareholders under section 169
- Tribunal under section 402.

(1) Removal by the Shareholders (section 169)

(*i*) A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

(*ii*) However, a company cannot remove those where not less than two thirds of the total number of directors has been appointed according to the principle of proportional representation under section 163.

(*iii*) A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.

(*iv*) On receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

(*v*) Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its

[4] For details refer to Anil Kumar (2012) *Corporate Governance: Theory and Practice*, International Book House, New Delhi

notification to members of the company, the company shall, if the time permits it to do so,—

send a copy of the representation to every member of the company, and if a copy of the representation is not sent due to insufficient time or for the company's default, the director may require that the representation shall be read out at the meeting. However, copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other aggrieved person, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter.

(*vi*) A vacancy created by the removal of a director may be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given. A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.

(*vii*) If the vacancy is not filled as per above, it may be filled as a casual vacancy in accordance with the provisions of this Act, provided that the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

(2) Removal by the Tribunal

Where an application is made to the Tribunal under section 241 for relief against oppression and mismanagement of a company's affairs, the Tribunal may, if satisfied, order for the removal of any of the directors of the company (Section 242). The Tribunal may also pass the order for the termination or setting aside of an agreement which the company might have made with its directors. The effect of such order will be removal of such director or directors from his or their office. Such a director (including managing director) shall not be entitled to serve as a manager, managing director or director of any company for a period of 5 years from the date of the Tribunal's order terminating or setting aside his contract with the company.

Powers of the Directors

Nature and Extent of the Powers of Directors

The powers of directors of a company are co-extensive with the powers of the company. As per section 179 of the Companies Act, the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do. There are however, two limitations upon the powers of the Board:

1. The Board cannot exercise those powers which the Act, or Memorandum or Articles require to be exercised by the shareholders in the general meeting; and
2. In the exercise of their powers, the directors are subject to the provisions of the Act, Memorandum and Articles and other regulations made by the company in the general meeting.

Powers of a company are distributed between the Board of Directors and the shareholders. Powers vested in the Board of Directors can be exercised by it alone. The shareholders cannot interfere with the decision of the directors, unless they are acting contrary to the provisions of the Act or the Articles. However, the inherent residuary and ultimate powers of a company lie with the general meeting of the shareholders, and therefore, the general meeting *i.e.*, the shareholders can act even in a matter delegated to the Board in the following exceptional cases:

1. Where the directors' actions are found to be mala fide. Where the actions of directors are *mala fide* and against the interests of the company, *e.g.* clash of directors' personal interest with the duties towards the company.

2. Where the Board becomes incompetent to act. Where the Board of Directors has for some valid reasons become incompetent to act, *e.g.* all the directors are interested in a particular transaction.

3. Deadlock in the Board. Where directors are unable to act because of a deadlock in the meeting of the Board of Directors. They are equally divided and, therefore, cannot come to any decision.

Statutory Powers

All the powers that a company is vested with can be exercised by the board of directors of the company, subject to the applicable law. The powers of the directors can be exercised either in a board meeting by passing a resolution in the meeting itself or by circulation or by way of delegation

to various committees constituted by the board or to the appropriate officials of the company. The powers of the board of directors under various provisions of the Indian Companies Act, 2013 may be grouped under three heads:

(1) Powers to be exercised by Resolutions Passed at Board's Meeting

According to section 179, the following powers of the company can be exercised only by means of resolutions passed at the meeting of the Board:

(*a*) to make calls on shareholders in respect of money unpaid on their shares;

(*b*) to authorise buy-back of securities;

(*c*) to issue securities, including debentures, whether in or outside India;

(*d*) to borrow money;

(*e*) to invest the funds of the company;

(*f*) to grant loans or give guarantee or provide security in respect of loans;

(*g*) to approve financial statement and the Board's report;

(*h*) to diversify the business of the company;

(*i*) to approve amalgamation, merger or reconstruction;

(*j*) to take over a company or acquire a controlling or substantial stake in another company;

(*k*) In addition to these powers, the following powers shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:

(*i*) to make political contributions;

(*ii*) to appoint or remove key managerial personnel (KMP);

(*iii*) to take note of appointment(s) or removal(s) of one level below the Key Management Personnel;

(*iv*) *to appoint internal auditors and secretarial auditor;*

(*v*) to take note of the disclosure of director's interest and shareholding;

(*vi*) to buy, sell investments held by the company (other than trade investments), constituting five percent or more of the paid up share capital and free reserves of the investee company;

(*vii*) to invite or accept or renew public deposits and related matters;

(*viii*) to review or change the terms and conditions of public deposit;

(*ix*) to approve quarterly, half yearly and annual financial statements or financial results as the case may be.

The Board of directors may, by a resolution passed at a meeting, *delegate* the following powers to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, a principal officer of branch office:

(*a*) The power to borrow money.

(*b*) The power to invest the funds of the company.

(*c*) The power to make loans.

(2) Other Powers Exercisable only at Board Meeting

Besides the powers specified in section 179, there are certain other powers which can be exercised only at the meetings of the Board:

(*a*) The power to fill casual vacancies in the Board.

(*b*) Sanctioning of a contract in which a director is interested.

(*c*) Power to appoint the first auditors of the company, and to fill any casual vacancy in the office of auditors, unless such vacancy has arisen by resignation of the auditor.

(*d*) Power to recommend rate of dividend to be declared at the AGM (subject to approval of the shareholders).

(*e*) The power to make a declaration of solvency in case of proposal for buy-back of shares, and in case of proposal for voluntary winding up of the company.

(3) Powers to be exercised with the consent of the General Meeting or Restrictions on the Powers of the directors

The board of directors cannot exercise the following powers except with the consent of the company in the general meeting by a special resolution (*Sec. 180*).

(*a*) Sale, lease or disposal of the whole or substantially the whole of the undertaking of the company except sale or lease of property by a company whose business ordinarily is to sell or lease properties.

(*b*) To remit, or give time for the repayment of any debt due from a director.

(*c*) Investment otherwise than in trust securities of compensation received by the company as a result of any merger or amalgamation.

(*d*) Borrow money which will make the total borrowings in excess of the aggregate of the paid-up capital and free reserves of the company except temporary loans obtained by the company from its bankers in the ordinary course of its business.

(*e*) Contribution to bonafide charitable and other funds, of amount exceeding 5 per cent of the average net profits of the company for the last three financial years.

Duties of Directors

Under general law, a director's relationship with the company is regarded as fiduciary in nature. Consequently, directors owe a *duty of loyalty and care* in performing their responsibilities on behalf of the company. These duties are owed to the company meaning generally the shareholders collectively, both present and future, not the shareholders at a given point in time. These are enforceable by the company, although derivative actions may be brought by individual shareholders as per the provisions of the Companies Act 2013 on class action suit. A breach of these equitable obligations gives rise to liability to account for improper profits and to pay equitable compensation for improper loss of company assets.

Section 166 of the Companies Act 2013 has codified the duties of directors as under:

(1) To Act in accordance with the Articles of Association of the Company

(2) To Act in Good Faith: Directors must act honestly and diligently in the interests of the company. They must exercise their powers *bona fide i.e.* in what they consider, is in the interests of company and not for any collateral purpose.

It is expected from them to behave as honest men of business may be expected to act. They may be held liable for breach of duty if they have acted in their own interests or that of some third party without considering whether it was also in the interest of the company though they might not have acted with any conscious dishonesty.

The directors have to look after the interest of the company. Interest of the company implies the interests of present and future members of the company. On the footing that the company would be continued as a going concern, they have to balance a long-term view against the short-term interests of present members.

Good faith also requires that directors should not make any secret profit from their dealings with the company nor they should make any profit by corporate opportunities.

(3) Duty of reasonable care. A director is bound to observe reasonable care in the performance of his duties. He is expected to act with that much of skill and diligence which an ordinary man would take in his own case. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.[5] He cannot be held liable for mere errors of judgment. "If directors act within their powers, if they act with such care as is to be reasonably expected of them having regard to their knowledge and experience and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as legal duty to the company."[6]

The directors' duty of care has been explained by Roamer J. in *Re. City Equitable Fire Insurance Co.*:

(*i*) A director need not exhibit in the performance of his duties a greater degree of skill than may be reasonably expected from a person of his knowledge and experience.

(*ii*) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature, to be performed at periodical board meetings and at the meetings of committees of the board of which he is the member. He is however, not bound to attend all such meetings, though he ought to attend whenever, in the circumstances he is reasonably able to do so.

(*iii*) In respect of all duties that, having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, a director in the absence of grounds of suspicion, is justified in trusting that official to perform such duties honestly.

(4) 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. A director interested in a contract with the company must disclose the nature of his interest at the Board's meeting. A director stands in a fiduciary capacity with the company and he must not place himself in a position in which his personal interest conflicts with his duty. He must not vote as a director on any

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5. *Re.* City Equitable Fire Insurance Co. (1925)

6. Lagunus Nitrate Co. *v.* Lagunus Nitrate Syndicate (1899)

contract or arrangement in which he is directly or indirectly interested, unless authorised by the company's articles. If he votes in such a case, his vote would not be counted and his presence would not be counted towards the quorum. There is no ban on company entering into a contract in which a director is interested. The only requirement is that such interest must be disclosed, *bona fide* and fair.

(5) 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.

(6) A director of a company shall not assign his office and any assignment so made shall be void. Directors should perform the entire duties place upon them by the Act and Articles, personally. They can, however, delegate their certain functions to the extent to which the Articles of the company permit or according to the demand of exigencies of business.

If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall be from Rs one lakh to Rs 5 lakh.

Meeting of Board of Directors

Most of the powers of the directors are exercised in the meetings of the board of directors. The meetings are where the Board discusses the affairs of the company and also exercises its authority. Conduct of meetings in a proper manner is important for the proper functioning of the company. Following are the provisions of the Companies Act 2013 regarding conduct of board's meetings:

1. **Frequency of Board Meetings:** Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its incorporation and thereafter hold a minimum number of 4 meetings of its Board of Directors every year in such a manner that not more than 120 days shall intervene between two consecutive meetings of the Board. [Section 173(1)]
2. **Notice of Board Meetings:** 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. A meeting of the Board may be called at shorter notice to transact urgent

business subject to the condition that at least one independent director, if any, shall be present at the meeting, provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty-five thousand rupees.[Section 173(3), 173(4)]

3. **One Person Company provision:** A One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days. However, this shall apply to One Person Company in which there is only one director on its Board of Directors.

4. **Quorum for Board's Meetings:** Quorum means the minimum number of directors who are authorised to act and transact business as a Board. The quorum for a board meeting is one-third of the total number of directors in office or two directors, whichever is more. In those cases, where the number of interested directors is two-third or more of the total strength of the Board, the remaining number of uninterested directors being not less than 2, shall form the quorum for transacting such a business. Directors are not allowed to send their proxies to attend and vote for them in the meetings.

   Meeting of the Board of directors in the absence of quorum, unless otherwise provided in the Articles, shall be adjourned until the same day in the next week, at the same time and place. In case that day is a public holiday it shall be held on the next succeeding day which is not a public holiday.

5. **Minutes of Meeting:** The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat. In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain:

   (*a*) the names of the directors present at the meeting; and

   (*b*) in the case of each resolution passed at the meeting, the names of the directors,

if any, dissenting from, or not concurring with the resolution.

Meetings of Board through Video Conferencing or other audio visual means

As per the Companies (Meeting of Board and its Power) Rules 2014, a company shall comply with the following procedure, for convening and conducting the Board meetings through video conferencing or other audio visual means.

(1) Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.

(2) The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care—

(*a*) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(*b*) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors;

(*c*) to record proceedings and prepare the minutes of the meeting;

(*d*) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.

(*e*) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

(*f*) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting:

(3) (*a*) The notice of the meeting shall be sent to all the directors in accordance with the provisions of section 173 of the Act.

(*b*) The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

(*c*) A director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company.

(4) From the commencement of the meeting and until the conclusion of such meeting, no person other than the Chairperson, Directors, Company Secretary and any other person whose presence is required by the Board shall be allowed access to the place where any director is attending the meeting either physically or through video conferencing without the permission of the Board.

(5) (*a*) The draft minutes of the meeting shall be circulated among all the directors within fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board.

(*b*) Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.

(*c*) After completion of the meeting, the minutes shall be entered in the minute book as specified under section 118 of the Act and signed by the Chairperson.

Matters not be dealt in a meeting through Video Conferencing

The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means.—

(*i*) the approval of the annual financial statements;

(*ii*) the approval of the Board's report;

(*iii*) the approval of the prospectus;

(*iv*) the Audit Committee Meetings for consideration of accounts; and

(*v*) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Resolution by Circulation (Section 175)

A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, if-

_- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee,

- it is sent at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed
- it has been approved by a majority of the directors or members, who are entitled to vote on the resolution, provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

A resolution by circulation shall be noted at a subsequent meeting of the Board or the committee thereof, as the case may be, and made part of the minutes of such meeting.

Key Managerial Personnel

As per 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;

Board of directors usually appoints managerial personnel such as managing directors, whole-time director (also known as the executive director), and manager (i.e. Chief Executive Officer) to manage the affairs of the company under the superintendence and control of the board.

Section 196 does not allow the simultaneous appointment of a managing director and a manager in a company. But a company is permitted to appoint more than one managing director.

Appointment of Key Managerial Personnel (Section 203)

Every listed company and every other public company having a paid-up share capital of Rs 10 crores or more shall have the following whole-time key managerial personnel:

(*i*) Managing Director, or Chief Executive Officer or Manager and in their absence, a whole-time director;

(*ii*) Company Secretary; and

(*iii*) Chief Financial Officer

Provided that an individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time after the date of commencement of this Act unless,

(*a*) the articles of such a company provide otherwise; or

(*b*) the company does not carry multiple businesses:

Provided further that nothing contained in the above provision shall apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government.

Managing Director

Meaning According to *Section 2* (*54*) managing director means "a director who, by virtue of articles of a company or an agreement with the company or resolution passed by the company in general meeting or by its board of directors, is entrusted with substantial powers of management of the affairs of a company and includes a director occupying the position of a managing director, by whatever name called."

A managing director has essentially to be a director. A managing director will cease to be so the moment he ceases to be a director. A managing director of a company has to exercise his powers subject to the superintendence, control and direction of the Board of directors.

Appointment of a Managing Director

The appointment of a managing director can be made either by:

(*a*) an agreement with the company; or

(*b*) a resolution passed by the company in the general meeting; or

(*c*) a resolution of the Board of Directors; or

(*d*) a clause in the articles or association of the company.

As per section 196(4), a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable (subject to the provisions of section

197 and Schedule V) be approved by the Board of Directors at its meeting. The appointment and remuneration payable, however, shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Schedule V of the Act.

Term of office

As per Section 196(2), no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time, provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Disqualifications [Section 196(3)]

No company shall appoint or continue the employment of any person as managing director, whole-time director or manager who:

(*a*) is below the age of twenty-one years or has attained the age of seventy years. Provided that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;

(*b*) is an undischarged insolvent or has at any time been adjudged as an insolvent;

(*c*) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

(*d*) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

Powers and duties of Managing Director

A managing director is appointed to manage the affairs of a company. His powers and duties are usually defined by (*a*) the agreement with the company by which he is appointed, or (*b*)by the Memorandum and Articles of the company, or (*c*) by the resolutions of the shareholders or the directors.

A managing director is entrusted with substantial powers of management. His powers may relate either to particular division or divisions of the business. This follows that there may be more than one managing director in a business.

A managing director is required to exercise his powers subject to superintendence, control and direction of the board of directors of the

company. Since a managing director must be a director he has also the duties, responsibilities and liabilities of an ordinary director. Also, the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management.

Whole Time Directors

Meaning

Section 2(94) "whole-time director" includes a director in the whole-time employment of the company. He may be taken as a director who devotes his whole or substantially the whole of his working time to work with the company. Thus, whole-time director is an employee director of the company. He does not exercise "*substantial power of management*", but performs important administrative functions.

Appointment

The provisions of section 196, which are applicable to the appointment of a managing director, are also applicable to the appointment of a whole-time director.

Manager

As per *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.

Provisions which are applicable to the managing director regarding appointment, term of office and number of companies which can be managed also apply to a manager. (*Sec. 196*)

Difference between a Managing Director and a Whole-time Director

Basis	***Managing Director***	***Whole-time Director***

Power	A managing director is entrusted with substantial powers of management.	A whole-time director does not have any discretionary power to take decisions regarding policy matters.
Number of Companies	A person can be a managing director of more than one company.	A person cannot be in the whole-time employment of more than one company at a time. Therefore, a person cannot have more than one whole-time directorship.
Manager	Managing director and a manager cannot be appointed in one company at the same time.	A company can have a manager and whole-time director, both at the same time.

Distinction between a Manager and a Managing Director

Basis	***Manager***	***Managing Director***
Power	A manager has management over whole or substantially the whole of the affairs of the company	A managing director has substantial powers of management which would not otherwise be exercisable by him.
Director	A manager may not be a director of the company.	The managing director must be a director of the company.
Appointment	A manager may be appointed under a contract of service or otherwise.	A managing director may be appointed by virtue of an agreement with the company or resolution passed by the company in general meeting or by the board of directors or the articles or the memorandum of association of the company.
Number	There can be only one manager in a company	A company may have more than one managing director.

Remuneration	Maximum remuneration payable to a manager cannot exceed 5% of the net profits.	Where there is more than one managing director, the maximum remuneration payable would be 10% of the net profits.