

**Critical issues relating to Directors,
Meetings, remuneration of
Directors/KMPs**

WIRC-ICSI

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Ramaswami Kalidas

Directors

- Director-defined under 2013 Act-Section 2(34)- Means Director appointed to the Board of a company.
- Defined inclusively under '56 Act to include any person occupying the position of director by whatever name called.
- Former definition yields to concept of shadow director. Present definition restrictive.
- Shadow director-labile for wrong doing and dominating Board-(*Maharashtra Power v Dabhol Power*)

Board of Directors

- Section 2(10)-In relation to company refers to collective body of directors in the company.
- Under old Act-Section 2(6)-Expression “collective” conspicuous by absence.
- Director-Natural person-An Individual- (*Oriental Metal Processing Works v Bhaskar Kashinath Thakur*).
- Same concept applied under '56 Act under Section 253.

Maximum No. of Directors

- Section 149(1)-Fifteen-Beyond by Special resolution.
- '56 Act-For Board strength beyond 15-Approval of Central Govt .-Section 259.
- **Woman Director**-Second Proviso under Section 149(1)-Requirement based on Rule 3 Criteria-
a)listed co. b)Unlisted public company-paid up capital 100 crore or turnover 300 crores.
- Criteria based on listing status-Section 2 (52)-Not appropriate.

Woman Director

- Need for her to be Independent-Two phased implementation under LODR.
- What if market cap of company falls-Requirement to continue.
- **Independent Directors –**
- Requirement does not apply to unlisted public co
- JV Company
- WOS and Dormant Company.

Whole time Director

- Law allows appointment in only one company- Restriction emanates from definition under Section 2(94) which provides that WTD in whole time employment.
- Contrast with Managing Director-Section 203(3)-Allows appointment in two companies.

Independent director

- By definition does not include Nominee director-Section 149(6)
- Nominee Director-Nominated by FI pursuant to any law or per agreement or appointed by central Govt.
- Small Shareholders' Director u/s 151–Also represents interests of a particular constituency-Yet considered Independent.
- Paradox in the law.

Fees payable to Directors

- Section 197(5) allows payment for attending Meetings of Board and Committees or for any other purpose as decided by Board.
- Rule 4 lays down ceiling of Rupees one lac.
- Can Directors be paid fees for attending AGM and Independent Directors Meeting?.

Term of Office of Independent Directors

- Section 149(10)-Appointment for term up to five consecutive years.
- Hence appointment can be for term less than five years . Second term cannot extend beyond five years.
- Period of office held prior to 2013 Act not to be considered.
- Views of proxy Advisory firms contradict law.

Appointment of ID

- Can be at Board level –Possible due to gateway provided under Section 152(2)-“Save as otherwise expressly provided in the Act”.
- He can be appointed as Additional Director by Board subject to regularization at ensuing Meeting.
- Appointment can be by circulation.
- Due to need for recommendation of NRC preferable to be appointed at Meeting.

Appointment of Small shareholder director-Section 151

- Whether Section mandatory-Due to use of “may”. Use of “may” does not always make provision directory.
- Rule 7 allows appointment either upon receipt of notice or *suo moto* by Board.
- Can Company refuse to act on Notice validly received.
- Term for such director-Three years –No eligibility for second term.

Appointment of Director

- Receipt of consent in DIR-2 –Condition precedent to appointment-(*Laljibhai Kapadia v Lalji Desai*).
- Director can act and exercise powers pending filing of DIR-12 by company.

Appointment of Director by notice under Section 160

- Notice can be given for appointment at General Meeting.
- Notice can be for appointment of one who is not member.
- No requirement that Notice should bear support of specified number of members.
- Does notice for appointment need seconding-
No. (*Berar Trading v Gajanan Dixit*).

Appointment of Additional Director- Regularization

- To be regularized at next AGM .Cannot be done in General meeting.
- Whether AD holds office up to date of AGM or till conclusion of AGM.
- Holds office till date on which AGM ought to be held.
- View in *Eyre v Milton* properties supported by Departmental clarification that he vacates office before start of AGM.
- View negated in *Syed Mushraf Hussian v Agha Munnawar Khan*-“up to” includes the last date on which AGM ought to be held .

Appointment of Director in casual vacancy- Confusion due to amendment to Section 161(4)

- When one is appointed to fill up a casual vacancy in the Board, he holds office till the date on which the person whom he has replaced is to demit office.
- Amendment made effective 7.2.18 contradicts above position by stating that the vacancy can be filled up by Board which shall be subsequently approved by members in next general meeting.
- Proviso under sub-section retained to stipulate that appointee shall hold office till the date the person replaced was to hold.
- Which position holds good?. Need for clarity.

Resignation by Director

- Section 165(4)-Any resignation pursuant to clause(b) of subsection(3) to take effect from dispatch of resignation to the company.
- Section 168(2)-Resignation to take effect from date on which notice is received by company or on date specified by director whichever is later.
- Dichotomy between 165 and 168-which provision will prevail?.
- Director resigning may forward copy of resignation to ROC. Replacement of “shall” by “may”-effective 7.5.2018.Hence DIR-11 optional.

Assignment of Office by Director

- Section 166(6) imposes express prohibition on assignment.
- Appointment of Alternate director does not tantamount to assignment.
- If Director nominates his successor it is not assignment-(*Oriental Metal Pressing(P)Ltd v Bhasker Kashinath Thakur*).
- Appointment of Alternate Director-rendered redundant under new law.

Meetings of Board

- Significance of term "Year" in Section 173(1).
- As Act defines Financial year in Section 2(41) reference here is to calendar year.
- Definition of Year by Section 3(66) of General Clauses Act – Reference to Gregorian calendar.
- Section 173(3)-Seven days Notice before meeting.-Concept of clear days-Applicability
- If meeting adjourned for want of quorum and if gap between adjourned meeting and last meeting exceeds 120 days-Violation.
- Proviso inserted with effect from 7.5.2018 by which where quorum is physically present ,directors can participate on matters prohibited under Rule 4 not justified.

Meetings of Board

- SS-1 –If meeting adjourned for want of quorum, meeting automatically stands adjourned to the same date next week .If the said date is a national holiday, meeting to be held the next day . Law does not provide that Board cannot meet on National holiday.SS1 travels beyond Act on this point.
- SS-1 applies to meetings of Board/Committees which consist only of directors as members-
- Why it should not apply to RMC and Meeting of IDs?.

Related party transactions

- Amendment to Section 177 effective from 7.5.2018 making the requirement of setting up Audit Committee to public listed companies and other unlisted public companies as stated in Rule 4 welcome.
- Approval needed under Section 177 for every RPT regardless of whether it is in the ordinary course of business and on arm's length basis. Dichotomy with Section 188.
- Section 177 and 188 cannot be read conjointly.
- Appointment of directors' relative to place or office of profit –whether approval under Section 188 required.?

Related party transactions

- Definition of Related party under Section 2(76). Definition under Ind. AS-24-Much wider. Applicability of definition under LODR for listed companies.
- Wide areas of divergence as between Act and LODR.

Board Powers

- Section 179(3)(e)-The power to invest the funds of the company- Can be delegated to MD/Committee of Directors.
- Exemption from Section 185 for private companies by circular dated 5.6. 2015.Does it continue under amended Section 185?
- Can investment in other companies through Securities be made on the strength of the above power vis-à-vis Section 186.
- Non-applicability of Section 186 to loans given to employees . Person does not include any individual in employment with company.(w.e.f.7.5.2018).
- Circular 4/2015 dated 10.3.2015 exempting section 186 for employees not legally sustainable.

Appointment of KMPs

- Section 203(3)-Whole time KMP not to hold office in more than one company except its subsidiary .Can CS of Holding company be CS of its Subsidiary.
- Also whether “Subsidiary” can be construed in the plural.?
- Whether Company Secretary appointed under Rule 8A is a KMP under the Act.

Appointment of KMPs

- Can the same person hold the position of CS and CFO in the same company.
- Status of CEO under the Act.
- Definition of CEO-2(18)-Officer of the company so designated by company.
- CEO need not be a Board member . CEO does not hold substantial powers of management under the Act.
- CEO remuneration not regulated by Schedule V.



THANK YOU