

Roles and Duties of a Director Under Companies Act

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Introduction

The companies act was amended in 2013, prior to the amendment there was no statement of statutory duties of directors, and acts of directors were usually reviewed in the context of their powers in terms of section 291 of the CA 1956 (which dealt with general powers of the board) and other applicable laws, and their established roles under common law as laid down in several legal precedents. The companies act 2013 laid down the roles and responsibilities of a director, also it is the amendment which in section 149, recognises the concept of independent director which was a part of listing agreements only, it also codifies the duties and liabilities of the same.

The companies act, 2013 in section 2(34) defines the term “director” as, “a director appointed to the Board of a company”, wherein a “Board” in relation to a company, means the collective body of the directors of the company.

As per Companies Act provisions every director shall be appointed by the company in general meeting, provided they have been allotted the Director Identification Number (DIN) and on submission of a declaration that he/she is not disqualified to become a director. An additional director is also appointed by the Board of Directors through the Boards vested power to hold office till next general meeting. An alternate director may be appointed by the Board of Directors to act as a Director in absence for a period of not less than 3 months and not more than the allotted period for the director for whom the replacement is.

Section 166 (4) provides for the appointment of not less than two-thirds of the total number of the directors of a company, and such appointments may be made once in every three years and casual vacancies of such directors shall be filled.

The companies act 2013 is built on the principle of responsibility of the Board, protection of interests of the Shareholders, self- regulation and openness through disclosures. The 2013 amendment has ensured several effective measures through clearly defining liabilities and responsibilities of the Directors and penal actions on failure to follow the same.

The Power and Duties of a Director

1. A director must act in accordance with the Articles of Association (AOA) of the company.
2. Fiduciary relationship: A director must pursue the best interests of the stake holders of the company, in good faith and to promote the objects of the company.

Pre- Incorporation Liability- A Company cannot make a contract before it is incorporated because, before incorporation, it has no legal existence. Therefore, a Company after incorporation cannot ratify a contract previously made. It must make a fresh contract. But, those who act on behalf of the unincorporated company may find themselves personally liable. In **Kelner v. Baxter** the Court of Common Pleas held that where a person purports to sign a contract as agent, but has no principle in existence at the time, he is personally responsible.

3. Reasonable care: A director shall use independent judgement to exercise his duties with due and reasonable care, skill and diligence.

In **R.K. Dalmia and others v. The Delhi Administration** it was held that "A director will be personally liable on a company contract when he has accepted personal liability either expressly or impliedly. Directors are the agents or the trustees of a Company."

4. A director should always be aware of conflict of interest situations and should try and avoid such conflicts for the interest of the company.
5. Before approving related party transactions, the Director must ensure that adequate deliberations are held and such transactions are in interest of the company.
6. To ensure vigil mechanism of the company and the users are not prejudicially affected on account of such use.
7. Confidentiality of sensitive proprietary information, commercial secrets, technologies, unpublished price to be maintained and should not be disclosed unless approved by the board or required by law.
8. A Director of a Company shall not assign his office and any assignment so made shall be void (cannot delegate).

A director is bound by the maxim *delegatus non-potest delegare*. Shareholders appoint him because of their faith in his skill, competence and integrity and they may not have the

same faith in another person. It was held in the case of **J.K. Industries v. Chief Inspector of Factories** that the directors being in control of the company's affairs cannot get rid of their managerial responsibility by nominating a person as the occupier of the factory.

Independent Director

The Companies Act of 1956 does not give any specific definition of an independent director, the term was however mentioned in clause 49 of listing agreement as an independent director is a non-executive director who does not have any pecuniary relationship with the company, its promoters, senior management or affiliate companies, is not related to promoters or the senior management, and/or has not been an executive with the company in the three preceding financial years. The Companies Act, 2013 as per schedule VI, assigns various roles and responsibilities on independent directors.

1. Protecting and promoting interests of all and specially for Minority Stakeholders
2. Acting as a mediator in case of Conflict of Interest amongst the stakeholders
3. Assistance in forwarding independent and equitable judgement to the Board of Directors
4. Adequate attention towards related party transactions
5. Honest and impartial reporting of any unethical behaviour, violation of code of conduct or any suspected fraud in the company.

In case of violation of these duties, the penal provisions are attracted. The penalty amounts applicable under Companies Act 2013 are higher in denomination and very stringent compared to the 1956 amendment. The minimum fine applicable is INR 25,00/-, whereas it can be even more than INR 25 Crore. A Proven Defaulter on Section 166 (codified duties) can be fined anything between 1-5 lakhs.

Under Companies Act 2013, directors may be held liable as "officers" of the company. The word "officer" has been defined to include, inter-alia, directors of the company. CA 2013 contains the concept of an 'officer who is in default' for the purposes of affixing liability on such person in respect of any contravention of the provisions of the CA 2013 by the company.

LIABILITIES OF A DIRECTOR UNDER COMPANIES ACT

The Liability of the Directors can be both joint or collective for any and every act prejudicial to the interests of the company. Though the Director and the Company are separate entities, under the following cases the Director may be held liable on behalf of the Company:

1. A director can be made liable for fraud.

“Fraud” in relation to affairs of a company includes “any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful”.

2. Tax Liability

Unless a Director or any Past Director can prove that the non-recovery or non-payment of Taxes are attributable as gross neglect or breach of duty, then any present or past Director (pertaining to the time period of defaulter) will be liable to pay the shortfall in tax amount and any penalty associated.

Under Section 179 of the Income Tax Act 1961, when any private company is wound up and the tax assessed cannot be recovered, then every person who was a director of the private company shall be jointly and severally be liable for the payment of such tax. Where the bank account of a Director was frozen for recovering income tax dues of the Company, it was held in **Gurudas Hazra v. P.K.Chowdhury** that it was for the Director to show that the default on the part of the company was not attributable to any breach of duty on his part.

3. Refunding of share application or excess in share application money

4. To pay for qualification shares

5. Civil liability in case of misstatement in Prospectus.

6. Cheques bounced or dishonoured: Under Negotiable Instruments Act 1881, signing of dishonoured by a Director may lead to prosecution along with the company

7. Offences under Income Tax Act, 1961

8. Offences under Labour Laws, specifically in case of Employees Provident Funds and Miscellaneous Provisions Act, 1952 and Factories Act, 1948

CONCLUSION

The Companies Act 2013 has very well played its role in enacting Corporate Governance in the very core of the companies' system. It needs to be ensured by self that the Directors are not remaining unadvised, however knowledgeable or experienced someone maybe it will be prudent practice to legal advice in case of doubts or critical situations. Directors Liability Insurance is very important for Directors now. In case innocence of the director is proven such indemnity can be enforced. Hence this is a very important clause for Directors and one should always be aware of and try to utilize this to the maximum benefit possible. The Companies Act allows a company for taking insurance for protection against loss caused to it by Directors, also the Director can take insurance policy to compensate for loss incurred due to liability to the company for which premium can be paid by company itself.