

UNIT 3 – MANAGEMENT OF COMPANY (DIRECTORS)

THE BOARD OF DIRECTORS



- **Role and Responsibilities:** The Board of Directors is the highest governing body of a company, responsible for setting the company's strategic direction, overseeing its management, and ensuring compliance with legal and ethical standards. They act as fiduciaries for shareholders and stakeholders.
- **Composition:** The board is typically composed of a group of individuals, known as directors, who may be executive (part of the company's management) or non-executive (independent of the management). An effective board strives for diversity in skills, expertise, and background.

THE BOARD OF DIRECTORS

- **Decision-Making:** The board makes critical decisions that impact the company's future, including major investments, mergers and acquisitions, financial policies, and appointing key executives.
- **Meetings and Committees:** The board convenes regular meetings to discuss important matters. To handle specific areas in-depth, they may form committees such as audit, compensation, and governance committees.
- **Corporate Governance:** The board plays a crucial role in upholding good corporate governance practices, promoting transparency, and ensuring the company's long-term sustainability.
- **Risk Management:** Directors must identify and manage risks effectively, safeguarding the company's assets and reputation.

THE BOARD OF DIRECTORS

- **Legal and Ethical Compliance:** The board ensures that the company operates within the legal framework and adheres to ethical standards, avoiding conflicts of interest.
- **Accountability:** The board is accountable to shareholders and must act in their best interests. It should also consider the interests of other stakeholders, such as employees, customers, and the community.
- **Succession Planning:** The board is responsible for succession planning, including the appointment of new directors and the CEO, to maintain leadership continuity.
- **Shareholder Communication:** The board communicates with shareholders, providing them with relevant information and responding to their concerns.

THE BOARD OF DIRECTORS

- **Evaluations:** Regular evaluations of the board's performance and individual directors' effectiveness are essential to ensure continuous improvement.
- **External Relations:** The board engages with external stakeholders, regulatory authorities, and industry peers to stay informed and make informed decisions.
- **Crisis Management:** During challenging times, such as economic downturns or reputational crises, the board must act swiftly and decisively to protect the company's interests.

APPOINTMENT OF DIRECTORS



- According to the Companies Act 2001, a director of a company is typically appointed by an ordinary resolution, unless the company's constitution states otherwise.
- However, in specific circumstances, the court may appoint directors in a company upon application by a shareholder or a creditor (**Section 135 and 136 of the Companies Act 2001**).

APPOINTMENT OF DIRECTORS

- It is important to note that the court aims to avoid intervening in the company's internal matters whenever possible, as stated in *Carlen v Drury (1812)*. The Act sets the minimum number of directors in a company to one, but at least one director on the board must be ordinarily resident in Mauritius (*Section 132*).
- Furthermore, shareholders cannot vote on a single resolution to appoint multiple directors simultaneously; separate resolutions are required for each appointment (*Section 137*). Any attempt to pass a block resolution for the appointment of directors is invalid.
- Regarding the board's proceedings, they are governed by the Eighth Schedule to the Companies Act 2001, subject to the company's constitution (*Section 158*). This schedule outlines the rules and procedures for board meetings and decision-making processes.

TYPES OF DIRECTORS

- Directors are categorized primarily as executive and non-executive directors. According to **Section 2 of the Companies Act 2001**, an executive director is actively involved in the day-to-day management of the company, while a non-executive director assumes a part-time role and oversees the executive directors in their duties.
- It is important to note that the Companies Act 2001 recognizes the concept of a 'shadow director' under **Section 128(2)**. A shadow director is someone whose directions or instructions the board typically follows in making decisions. However, individuals providing professional advice are not considered shadow directors unless they effectively control the company's affairs.

TYPES OF DIRECTORS

- The UK case of *Re Hydrodam (Corby) Ltd [1994]* outlined four relevant factors to determine whether someone is a shadow director:
 1. The actual directors of the company must be identified first.
 2. The person in question must have directed these directors on how to handle the company's affairs or be one of those who did so.
 3. The directors must have acted according to the individual's instructions.
 4. The directors must have been accustomed to acting in this manner.
- It is crucial to understand that mere control over one director is insufficient to qualify as a shadow director; instead, the person must exert influence over the entire board or a majority of its members.

TYPES OF DIRECTORS

- Determining whether a person qualifies as a shadow director can be challenging in practice. The courts, in cases like *Secretary of State for Trade and Industry v Deverell* [2001] and *Ultraframe (UK) Ltd v Fielding* [2005], have attempted to establish certain principles:
 1. The shadow director doesn't need to give instructions on all aspects of the company's activities.
 2. The assessment of whether a communication amounts to a direction is done objectively.
 3. It's not necessary to prove that the de jure directors acted subserviently to the shadow director.
 4. Merely some de jure directors following the directions is insufficient; a governing majority of the board must be accustomed to following them.
 5. Initially, a person giving directions is not considered a shadow director until the de jure directors become accustomed to following such directions.
 6. It's not enough to give directions; it must also be proven that the directors acted based on those directions.

TYPES OF DIRECTORS

- It's important to note that in company law, the concept of a sleeping or dormant director doesn't exist (*Re Brian D Pierson (Contractors) Ltd [2001]*).
- Once a person is appointed as a director or consents to the appointment, they are bound by the statutory duties of directors and cannot defend themselves by claiming they were a sleeping director at the relevant time.

QUALIFICATIONS OF A DIRECTORS

- To serve as a director on the board, the following conditions must be met by an individual:
 1. The person must be a natural individual.
 2. The age of the person must be over 18 years.
 3. If it is a public company, the age of the person must not exceed 70 years.
 4. The person must not be an undischarged bankrupt.
 5. The person must not be disqualified from acting as a director.
 6. The person must be of sound mind.
 7. The person must fulfill any qualifications specified in the company's constitution.

QUALIFICATIONS OF A DIRECTORS

- It's worth noting that even if a director's appointment is defective or if they lack the necessary qualifications, their actions as a director will still be considered valid (Section 141 of the Companies Act 2001).
- The operation of this provision can be observed in the UK case of *Morris v Kanssen* [1946]. In this case, it was clarified that there is a significant difference between two scenarios:
 - a) a defective appointment, where an act is performed that appears to be an appointment but is insufficient due to some defect, and
 - b) no appointment at all, where there is a complete absence of any appointment act. The section does not validate the acts of a person acting as a director if it is later discovered that they were not genuinely appointed as a director.

QUALIFICATIONS OF A DIRECTORS

- Every alteration in directorship must be recorded with the Registrar of Companies.
- A notice indicating the change in directorship or any relevant particulars of the director must be submitted to the Registrar within 28 days of the modification.
- Failure to provide this notice within the specified time frame will result in the liability of each director and secretary. There is a fine of up to MUR 200,000 for non-compliance with this requirement.

POWERS OF THE BOARD OF DIRECTORS

- The board of directors is vested with the management of the company and holds the authority to oversee its affairs. However, this authority is subject to any limitations specified in the company's constitution (Section 129 of the Companies Act 2001).
- The board of directors can delegate some of its powers to other employees, except for those powers listed in the Seventh Schedule to the Companies Act 2001.
- Nonetheless, even when a power is delegated, the board retains responsibility for its exercise. This responsibility continues unless the board had reasonable grounds to believe that the delegate would exercise the power in accordance with the duties imposed on directors, and the board adequately monitored the delegate's exercise of the power through appropriate means (Section 131 of the Companies Act 2001).

REMUNERATION OF DIRECTORS

- In accordance with Section 159(1) of the Companies Act 2001, the remuneration of directors is typically approved by the company through an ordinary resolution, subject to the provisions laid out in the company's constitution.
- The company's constitution may include specific provisions regarding the remuneration of directors, such as the method of calculation, any performance-related components, or caps on remuneration.
- In the absence of any relevant provisions in the constitution, the shareholders' ordinary resolution will determine the directors' remuneration. The aim is to ensure that the directors are compensated fairly for their work and to maintain transparency and accountability in the company's financial matters.

REMOVAL OF DIRECTORS FROM THE BOARD OF DIRECTORS

- To remove a director from the board, shareholders must follow specific resolution requirements based on the type of company:
 - a) **For public companies:** Regardless of the company's constitution or any other agreement, the removal of a director requires an ordinary resolution (**Section 138(1) of the Companies Act 2001**). This means a simple majority vote of the shareholders present and voting at a general meeting is needed to pass the resolution.
 - b) **For private companies:** The removal of a director in a private company is subject to the company's constitution. If the constitution is silent on this matter, a special resolution is required (**Section 138(2) of the Companies Act 2001**). A special resolution demands a higher approval threshold, typically 75% majority of the shareholders present and voting at a general meeting.

DUTIES OF DIRECTORS

- Directors hold fiduciary positions within the company and must act in the best interest of the company as a whole.
- Their duties are owed to the company in general and not to individual shareholders (Section 143(5)(a) of the Companies Act 2001).
- Therefore, if a director breaches their duty, the company itself is the proper claimant in any legal proceedings regarding the breach.
- This principle is exemplified in the UK case of *Percival v Wright*.
- In the case of *Percival v Wright* [1902], the directors of a company made an offer to buy shares from the shareholders.
- They also disclosed that they were in negotiations with an outsider to sell the entire company at a higher price. The shareholders alleged that the directors breached their fiduciary duty by not revealing this information, and they sought to invalidate the share purchase.
- However, the court ruled in favor of the directors, stating that their duty was owed to the company as a whole, and there was no evidence of unfair dealing. Furthermore, it was highlighted that the shareholders themselves had initially approached the directors for the sale of their shares.

DUTIES OF DIRECTORS

- In most cases, fiduciary duties of directors are owed to the company they serve. However, there are exceptions where these duties may be directed towards the shareholders.
- One such exception is the duty of disclosure, which can be owed to shareholders.
- This exception is exemplified in the case of *Allen v Hyatt (1914)*, where the directors convinced shareholders to grant them options to buy their shares, ostensibly to facilitate a sale to another company.
- Instead, the directors used these options to purchase the shares themselves and then sold them to the other company at a profit.
- The court held that the directors acted as agents for the shareholders during the share sale and were therefore obligated to account for the profit they gained from the transaction.

STATUTORY DUTIES OF DIRECTORS

- Directors are required to consider not only the short-term interests of the company but also its long-term well-being.
- **Section 143 of the Companies Act 2001** outlines the extensive statutory duties of directors, including exercising their powers within the legal framework and company constitution, seeking shareholder authorization for relevant transactions, acting in the company's best interests, and maintaining a high standard of care, diligence, and skill.
- Directors must act honestly and in good faith, avoiding conflicts of interest and disclosing any personal interests in company transactions. They should not use confidential information for personal gain, compete with the company without approval, or engage in illegal activities that harm the company's assets.
- Proper accounting records must be maintained, and directors are expected to attend board meetings regularly. While the company's constitution can add duties, it cannot waive any statutory director's obligations.

STATUTORY DUTIES OF DIRECTORS

- Directors should exercise a reasonable degree of care and diligence, comparable to that of a prudent person in similar circumstances (Section 160 (1) (b) of the Companies Act 2001).
- Directors are protected from liability when making business judgments if they act in good faith, have no material personal interest, inform the company about the matter, and reasonably believe their decision is in the company's best interests. A business judgment refers to decisions related to the company's business operations.
- In general, the director's belief that their judgment is in the company's best interests is considered reasonable, unless it can be proven that no reasonable person in their position would hold such a belief.

OBTAIN PRIOR APPROVAL OF THE COMPANY

- According to **Section 146 of the Companies Act 2001**, the company can grant approval through the following steps:
 - 1) The director must provide complete disclosure of all relevant information, including the nature and extent of their interest in the transaction.
 - 2) The company must secure approval either through a special resolution from the shareholders or an ordinary resolution, excluding the vote of the director if they are also a shareholder.
- It is important to note that the approval can be obtained either before or after the transaction occurs. If it happens after the transaction, the resolution must be passed within 15 months from the date of the transaction.
- See some famous UK case-laws on breach of duties by directors.

CORPORATE OPPORTUNITIES



- The concept of corporate opportunity refers to situations where directors or officers of a company come across business opportunities or assets that could be beneficial to the company.
- These opportunities are considered as assets of the company and, as fiduciaries, directors have a duty not to exploit or misappropriate them for their personal gain or benefit.

CORPORATE OPPORTUNITIES

- Instead, they are obligated to present such opportunities to the company for consideration and evaluation.
- This duty ensures that the directors act in the best interests of the company and avoid any conflicts of interest that could harm the company's interests.
- See some UK cases on corporate opportunities. (Refer to the notes in the word document)

Remedies in case of breach of duties by directors

- Specific performance;
- Injunction;
- Damages or compensation to compensate for the company's losses;
- Restoration of the company's property;
- Account of profits made by the director;
- Declaration; and
- Rescission of a contract in cases where the director failed to disclose an interest.

Ratification of breach of duty

- **Section 180 of the Companies Act 2001** allows a director to exercise a power vested in the shareholders or another person on behalf of the company. If such an exercise is challenged, it can be ratified or approved by the shareholders or the relevant person in the same manner as the original power. Once ratified, the act will be considered valid and proper.
- Regarding the court's power to grant relief, **Section 350 of the Companies Act 2001** grants the court the discretion to relieve a director from liability, either in whole or in part, for negligence, default, or breach of duty. The court can exercise this power if it finds that the director acted honestly and reasonably, and under the circumstances, they should be excused from liability, subject to terms deemed appropriate by the court.

Disqualification of directors

- Section 338 of the Companies Act 2001 grants the court the authority to disqualify directors in various circumstances, including:
 - If the director is convicted of an offense related to the company's promotion, formation, or management.
 - If the director is convicted of a crime involving dishonesty punishable with imprisonment exceeding 3 months.
 - If the director persistently fails to comply with or takes insufficient steps to ensure compliance with the Companies Act 2001 or the Securities Act 2005.
 - If the director is convicted in connection with the performance of their directorial duties.

Disqualification of directors

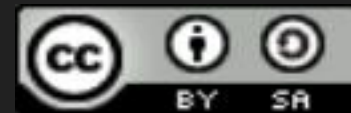
- The court can order that the person is not allowed to be a director or promoter, directly or indirectly, or participate in a company's management **for a period of up to 5 years without the court's permission.**
- If the disqualified director violates the court's order, they may face a **fine of up to MUR 1 million and/or imprisonment for up to 5 years.** Additionally, they will be personally liable for any debts incurred by the company during their period of acting as a director **(Section 339 of the Companies Act 2001).**
- The application for a disqualification order can be made by various parties, including the Registrar of Companies, the liquidator, shareholders, former shareholders, creditors, or former creditors of the company.

Duties of directors

- See other cases of breach of duties of Directors:
- Automatic Self- Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 (CA)
- Bushell v Faith [1970] AC 1099 (HL)
- Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC)
- Mutual Life Insurance Co of New York v Rank Organisation Ltd [1985] BCLC 11 (Ch)
- Re Barings plc (No 5) [2000] 1 BCLC 523 (CA)
- Salmon v Quin & Axtens Ltd [1909] AC 442 (HL)

THANK YOU

This presentation is made available to you with a



licence.