

**ROLES AND RESPONSIBILITIES OF  
A DIRECTOR UNDER COMPANIES  
ACT, 2013 – PITFALLS AND  
SAFEGUARDS**

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**1. Duties and Responsibilities of Directors.**

- 1.1. The erstwhile Companies Act, 1956 ('**CA 1956**') contained 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 judicial precedents<sup>1</sup>.
- 1.2. The Companies Act, 2013 ('**CA 2013**') for the first time has laid down the duties of directors in unequivocal terms in section 166. In summary, the general duties of directors under the CA 2013 are as follows:
  - to act in accordance with the articles of the company, in other words, to act within powers;
  - to act in good faith in order to promote the objects of the company for the benefit of its members as a whole;
  - to act in the best interest of the company, its employees, shareholders, community and for the protection of environment;
  - to exercise due and reasonable care, skill and diligence and independent judgment;
  - to avoid direct or indirect conflicts of interest;
  - to avoid undue gain or advantage either to himself or relatives, partners or associates; and
  - not to assign his office to any other person;

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1.3. A Director is part of a collective body of Directors called the Board, which is responsible for the superintendence, control and direction of the affairs of the company. Under common law rules and equitable principles, director's duties are largely derived from the law of agency and trusts (i.e., set of contractual, quasi-contractual and non-contractual fiduciary relationships with the Company). Under the law of agency, duties of skill, care and diligence are imposed on directors. On the other hand, law of trusts impose fiduciary duties on directors. Accordingly, directors are the trustees of the company's money and property, and also act as agents in the transaction which they enter into on behalf of the company. Directors are liable as trustees for breach of trust, if they misapplied the funds or committed breach of byelaws of the company. A director is expected to perform his duties as a reasonably diligent person having the knowledge, skill and experience both of as person carrying out that director's function and of that person himself. A director, therefore plays various roles in the company, may that be of an agent, an employee (when appointed on the rolls of the company), an officer and/or a trustee of the Company.

**2. Liabilities of Directors under CA 2013.**

2.1 Under CA 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. The ambit of 'officer who is in default' is quite wide and includes, inter alia:

- every whole-time director;
- every Key Managerial Personnel ('KMP');
- if no KMP then such director(s) as specified by the Board in its behalf or all directors, if no director is so specified;
- any person who is charged with any responsibility by the board or any KMP, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent any default;
- any person in accordance with whose advice, directions or instructions the Board of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity; and
- every director, in respect of a contravention of any of the provisions of the CA13, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance.

2.2 A director can also 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".



2.3 Limited Liability of Independent director and non-executive directors: CA 2013, however, limits the liability of an independent director or of non-executive directors (not being a promoter or KMP), who are to be held liable, only in respect of such acts of omission or commission by a company, which (i) occurs with his knowledge, attributable through board processes, and (ii) with their consent or connivance or where they had not acted diligently.

### **3. Nature of Contraventions under CA 2013 – Compoundable vs. Non-Compoundable.**

3.1. Compoundable Offences: Many of the contraventions under CA 2013 are in the nature of non-compliances (such as failure to file annual return, contravention of provisions with respect to related party transactions, acceptance of deposits, giving of loans to directors etc. by the company) which attract either fines (or in some cases are punishable with fines or imprisonment or both). Such offences can be remedied or compounded, subject to relevant provisions in the Act, by paying late fees/penalties/fines as applicable.

3.2. Non-Compoundable Offences: There are, however, a few serious contraventions which are punishable with imprisonment only or with imprisonment and with fines (such as offences of fraud) where officers of the company who are in default or persons concerned with formation of the company or the management of its affairs become liable and cannot be remedied/compounded merely by depositing fines/penalties. These liabilities can be imposed on the directors if they are in default (including non-executive directors) regardless of the fact that they are the executive directors of the company or not.

### **4. Liability under certain other legislations.**

4.1. Be Being designated as a director in a company, also has a cascading effect with respect to exposure of the director to liabilities under various other legislations. From a brief study of a few other legislations, we note that the duties and liability thereof, for non-compliances by a company typically vests with the person in charge of the conduct of business/management of the company.

4.2. Other directors/officers (whether executive or non-executive) of the company can also be held liable in certain cases:

- where the offence has been committed with the consent/connivance of, or is attributable to, any neglect on the part of such director; or
- such director has been designated by the company (as notified to the concerned authority) to be in charge of the management of the company and responsible for compliances (as occupier/owner) under certain legislations which allow for such nomination, failing which all directors of the company.

4.3 As the liability under such legislations would typically fall on persons who are in charge of, and responsible to, the company for the conduct of the business of the company, as a safeguard, companies often designate (and notify the relevant government authorities) a specific person to be in charge for compliances of relevant unit/factory with respect to certain legislations, (such as designating such person as an occupier or manager for compliances under the Factories Act, 1948).

## **5. Safeguards – Adopt a Precautionary Approach.**

5.1. To safeguard their interest and avoid undue liability, it is advisable that directors adopt a precautionary approach. A few of the safeguards that can be considered and implemented are as follows:

- To attend meetings regularly;
- To be inquisitive and peruse agendas for unusual items and seek additional information in writing, if necessary;
- To ensure that disagreements/dissenting views are recorded in the minutes;
- To act honestly and with reasonable justifications;
- To report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy;
- To seek professional advice, establish audit committees, engage external agencies, if situation demands;
- To engage external agencies for addressing whistleblowing issues. The Company may consider appointing an external agency for whistleblowing reporting;
- To provide requisite disclosures of interests/conflicts, consider excusing oneself from participation in proceedings in cases of conflict;
- For ongoing and day to day compliances, have a competent compliance team and establish committees (for regular internal audits etc.); and
- To include indemnity provisions in the letter of appointment and seek Directors & Officers Liability insurance from the company to protect against malicious actions.

### **Endnotes**

<sup>1</sup>Please refer to Chapter – XI – Appointment and Qualification of Director (Section 149 to 172); Chapter – XII – Meeting of Board and its powers (Section 173 to 195) and Chapter - XIII - Appointment and Remuneration of Managerial Personnel (Section 196 to 205) of CA 2013 in this regard.

### **Feedback**

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