

## **MODES OF OBTAINING APPROVAL OF THE BOARD OF DIRECTORS UNDER THE COMPANIES ACT, 2013**

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The corporate form of structure consists of "ownership" (i.e., shareholders) and "management" (i.e., board of directors). Usually, in closely held companies (private company or public company) the ownership and management is with the same individuals. In some companies, i.e., unlisted public companies or listed public companies, the "ownership" and "management" may be completely separate. The Companies Act, 2013 ("Act") prescribes the mode of obtaining approval of shareholders and the board of directors. The Act provides for : (i) Certain powers to be exercised by the board of directors, (ii) Certain powers to be exercised by the board of directors at its meeting only, and (iii) Certain powers to be exercised by the board of directors with the approval of the shareholders. The article focuses on the process of obtaining board approval, provisions relating to board meeting through video-conferencing or audio-video means, etc.

### **Powers of the board of directors**

Section 179 of the Act relates to "Powers of the board of directors". It provides that the company's board of directors 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. However, such powers of the board of directors are subject to the provisions contained in any of the following :

- (i) The Act,
- (ii) The memorandum of association,
- (iii) The articles of association,
- (iv) Any resolution passed by the company in general meeting.

The board of directors shall not exercise any power or do any act which is directed, whether under this Act or by the memorandum of association or articles of association or to be exercised or done by the company in general meeting.

### **Powers of the board of directors that can be exercised in board meetings only (under the Companies Act)**

Sub-section (3) of section 179 of the Act prescribes the powers of the board of directors that can be exercised only by means of resolutions passed

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at meetings. That means such powers cannot be exercised by the board by passing a circular resolution or by any other means. Following are such powers that can be exercised only by means of resolutions passed at meetings :

- (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 monies ;
- (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.

Certain powers of the company (that are to be exercised by the board of directors at its meeting) may be delegated to any committee of directors, managing director, manager or any other principal officer of the company or company's branch office. Such delegation of powers by the board shall be subject to the conditions as prescribed by the board of directors. The powers which can be delegated by the board of directors are as follows :

- (a) To borrow monies ;
- (b) To invest the funds of the company ;
- (c) To grant loans or give guarantee or provide security in respect of loans.

**Powers of the board of directors that can be exercised in board meetings only (under the Rules)**

Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014, prescribes some more powers that can be exercised by the board only by means of resolutions passed at meetings :

- (i) To make political contributions ;
- (ii) To appoint or remove key managerial personnel (KMP) ;
- (iii) To appoint internal auditors and secretarial auditor.

Taking into account operational difficulties and interpretation issues, the MCA amended rule 8, whereby certain powers that were to be exercised

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only at the board meeting have been omitted. Now, the following powers can be exercised by the board of directors by means other than resolution at board meeting :

(a) To take note of appointment(s) or removal(s) of one level below KMP,

(b) To take note of the disclosure of director's interest and share-holding,

(c) To buy, sell investments held by the company (other than trade investments), constituting 5 per cent. or more of the paid-up share capital and free reserves of the investee company,

(d) To invite or accept or renew public deposits and related matters,

(e) To review or change the terms and conditions of public deposit,

(f) To approve quarterly, half-yearly and annual financial statements or financial results as the case may be.

### **Meetings of the board of directors**

Section 173 of the Act relates to "Meeting of the board". It states that the participation of directors in a board meeting may be either in person or through video conferencing or other audio visual means, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Therefore, there are only two ways conducting meeting of the board of directors :

(a) At a board meeting conducted in person or,

(b) At a board meeting through video conferencing or other audio visual means (in prescribed manner).

### **Certain matters that cannot be dealt with in board meeting through video conferencing or other audio visual means**

Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014, prescribes the matters that shall not be dealt with in any meeting held through video conferencing or other audio visual means. Such matters are :

(i) Approval of the annual financial statements ;

(ii) Approval of the board's report ;

(iii) Approval of the prospectus ;

(iv) Audit committee meetings for consideration of financial statement including consolidated financial statement, if any ; and

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

### **Passing of resolution by circulation**

Section 175 of the Act relates to "Passing of resolution by circulation". Pursuant to the provisions, a resolution shall be deemed to have been duly passed by circulation by the board of directors or committee, if the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or committee members. After circulation, the resolution is approved by a majority of directors or members, who are entitled to vote on the resolution. The draft resolution may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means (i.e., e-mail or fax)<sup>1</sup>. A company can pass a resolution by circulation for the resolutions that cannot be passed at a board meeting only, i.e., section 179(3) of the Act read with rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014. The purpose of circular resolution is to obviate the holding of board meeting for trivial matters or for matters that are already discussed in the board meeting but resolution has not been passed. Usually, circular resolution is passed for the following matters : (i) Entering into lease agreements, (ii) Extending lease agreements, (iii) Authorising company secretary or CFO for signing certain documents or agreements, (iv) Opening of bank account for some specific purpose, etc. Where resolution is passed by circulation, there is no verbal discussion amongst the directors which can be recorded in the minutes book.

However, where certain number of directors (i.e., not less than one-third of total number of directors) require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at the board meeting. The provisions of section 175 of the Act, further clarify that the circular resolution shall be noted at a subsequent board meeting or committee meeting. The circular resolution shall also be part of the minutes of subsequent board meeting or committee meeting.

### **Passing of resolution in certain manner—If provided in articles of association**

Table F under Schedule I of the Act is a standard model of articles of association of a company limited by shares. The companies are at liberty to modify the Table F or completely adopt the same as its articles of association. There is an interesting provision in Table F, which can be helpful for the company from the perspective of obtaining board approval. Regulation 75 of Table F states that "Save as otherwise expressly provided in the Act, a resolution in writing, signed by all the members of the Board or of a committee thereof, for the time being entitled to receive notice of a meeting of

1. Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014.



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the board or committee, shall be valid and effective as if it had been passed at a meeting of the board or committee, duly convened and held".

The said provision is not applicable to the resolutions that ought to be passed at a board meeting only. It states that a resolution in writing, signed by all the members of the board of directors (who are entitled to receive notice of the board meeting) shall be valid and effective as if it had been passed at the board meeting, duly convened and held. The provisions with regard to passing of resolution are applicable to committees formed by the board of directors, i.e., CSR Committee, Audit Committee, Nomination and Remuneration Committee, Risk Management Committee, etc. Following are the pre-requisites for passing a resolution in said manner :

- (i) There should be explicit provision in the articles of association for passing resolution in such manner,
- (ii) There is no requirement in the Act or Rules for passing the said resolution at a board meeting only,
- (iii) The resolution shall be in writing,
- (iv) Such resolution shall be signed by all the members of the board (i.e., by the directors who are in time being entitled to receive notice of a meeting of the board).

Such resolution shall be valid and effective as if it had been passed at a meeting of the board or committee, duly convened and held. However, passing of such resolution shall not be considered compliance of holding minimum number of board meetings in a year. Since such resolution is passed without holding or conducting a board meeting, the directors would not be entitled for sitting fees.

### Conclusion

The approval of the board of directors and modes of obtaining such approval are one of the most critical aspects from the perspective of Corporate Governance. The disclosure made by the directors at the time of obtaining board approval is another important aspect from the perspective of transparency. There are certain provisions in the Act which requires specific disclosures to be made in the agenda of the board meeting. At the time of obtaining the board approval, it is necessary to ensure compliance of secretarial standards also. The provisions in the Act and secretarial standards ensure that the directors are adequately equipped to vote on the resolution.

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