

CHAPTER 6

APPLICATION OF SECRETARIAL PROCEDURES AND PRACTICES

Question 1

Explain the procedure for passing the resolution by Circulation under Section 289 of the Companies Act, 1956. (November, 2000)

Answer

The procedure for passing resolution by circulation as under section 269 of the Companies Act, 1956 are as follows:

- (a) Circulate the draft of the resolution in duplicate with all necessary papers if any, to all the directors then in India not being less in number than the quorum for a board meeting and to all other directors at their usual addresses in India for approval by signing one copy of the resolution and send it back to the company.
- (b) If all are majority of the above directors as are entitled to vote on the resolution approve the resolution, the resolution shall deemed to have been duly passed by the Board.
- (c) Record the resolution having been passed by circulation in the minutes of the immediate next Board meeting.
- (d) See that the resolution do not pertain to the matters which cannot be passed by the Board by circulation (i.e. Sections 262(1), 292, 297, 299, 307 etc.
- (e) Enclose a copy of the circular resolution to the Agenda of the ensuing immediately next Board meeting.

Question 2

Under Section 603 of the Companies Act, 1956, what are the particulars required for incorporating in a prospectus to be issued by an exiting Foreign Company? (November 2000)

Answer

Under Section 603, Companies Act, 1956, the prospectus to be issued by an existing or intended Foreign Company in India must be dated and contain the following particulars:

- (a) the instrument constituting or defining the constitution of the company;

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- (b) the enactment's or provisions under which the company was incorporated;
- (c) the address of the place in India where the said instrument, enactments etc translation thereof in English if they are in some other Foreign language, can be inspected;
- (d) the date on which and the country in which the company was incorporated; and
- (e) whether there is a place of business in India and if so, the address of its principal office.

The provision contained in (a), (b) and (c) above, shall not be applicable if the prospectus is issued more than 2 years after the company had become entitled to commence business.

The prospectus of Foreign company must contain the matters laid down in specified in part-II of the schedule subject always to the provisions of Part-III of the schedule.

Question 3

Explain briefly the salient points to be taken into account while drafting the minutes of the Board of Directors. Draft a specimen Board resolution regarding the appointment of Mr. Sincere as the Managing Director of Full Cure Pharma Ltd. (May, 2001)

Answer

While drafting the minutes of the Board of directors, the following points have to be kept in mind.

- (i) The minutes may be drafted in a tabular form or in the form of a series of paragraphs numbered consecutively and with relevant headings.
- (ii) The place, date and time of the meeting should be stated.
- (iii) The names of the persons present at the meeting should be stated.
- (iv) Contents of the meeting giving serial number of the minute, brief subject heading, full terms of the resolutions adopted including the statistical details etc.
- (v) Names of directors dissenting or not concurring with any resolution passed.
- (vi) Reference about interested directors abstaining from voting is necessary.
- (vii) Chairman's signature and date of verification of minutes as correct.

Specimen board resolution: *"Resolved that Shri Sincere who fulfills the conditions specified in Parts I and II of schedule XIII to the Companies Act, 1956 be and is hereby appointed as the Managing Director of the company for a period of 5 years effective from 1.4.2001 and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule XIII of the Act.*

Resolved further that the Secretary of the company be and is hereby directed to file the necessary returns with the Registrar of Companies and to do all acts and things as may be necessary in this connection."

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Question 4

Some of the small shareholders of M/s Progressive Industries Ltd. approach you for advice regarding appointment of one of them as a director of the company. Explain the meaning of a small shareholder and the legal position regarding appointment of a director by such small shareholders.
(November 2001)

Answer

According to Section 252 of the Companies Act, 1956 as amended, every public company having a paid up capital of Rs.5 cores or more and 1000 or more small shareholders may have a director elected by such small shareholders in the manner as may be prescribed. For this purpose, a small shareholder means a shareholder holding shares of nominal value of Rs.20,000 or less in a public company. If the paid up capital of M/s Progressive Industries Ltd., is more than Rs.5 cores and the Company has 1000 or more small share holders, then the small share holders can proceed to elect their nominee as a director. The appointment is to be made in accordance with Companies (Appointment of small shareholders-Director) Rules, 2001.

Question 5

The word "Misfeasance" is used in the Companies Act at several places but the same has not been defined. Explain as to how the meaning of the said word is ascertained in the absence of any definition. Examine whether misfeasance proceedings initiated against a director under the Companies Act can be continued even after his death.
(May, 2002)

Answer

The word "misfeasance" is not defined in the Companies Act, 1956. Where a particular word is not defined, it will be useful to refer to dictionary to find out the general sense in which the word is commonly used or understood. Further the judicial decisions laying down the meaning of the words in construing statutes will have greater weight than the meaning furnished by the dictionaries. For technical terms reference is made to technical dictionaries. The dictionary meaning of the word "misfeasance" is improper performance of a lawful act. For creation of liability under section 543, it must be shown that there has been dishonesty or fraud or at least gross and culpable negligence. An honest mistake not amounting to culpable negligence or breach of duty, would not be misfeasance.

If in the course of winding up of a company, it appears that any person who had taken part in the formation or promotion of the company, any past or present director has misapplied or retained any money or property of the company or has been guilty of any breach of trust in relation to the company, the court may on the application of the official liquidator proceed against such person who is guilty of committing the offence.

The misfeasance proceedings initiated under section 543 of the Companies Act against any director can be continued on his death against his heirs and legal representative for the purpose of determining and declaring the loss or damage caused to the company though no compulsive order may be made. On conclusion of the proceedings, a declaration of liability

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may be made and such a declaration partakes the character of a decree and the same can be enforced against the properties of the deceased director.

Question 6

M/s A to Z Technologies Ltd. has been wound up and the official liquidator has been asked to take charge of the company. Briefly explain the relevant provisions regarding filing of statement of affairs in relation to the company in liquidation. (May, 2002)

Answer

According to section 454 of the Companies Act, 1956 where the Court has made a winding up order or the Official Liquidator has been appointed a provisional liquidator, a statement as regards the affairs of the company in the prescribed Form No. 57 shall be filed with the Official Liquidator. The said statement should be verified by an affidavit and contain particulars of (i) the assets of the company stating separately the cash balance in hand and at bank (ii) its debts and liabilities (iii) the details of creditors including their names, residence, occupations and amounts due to them as secured and unsecured (iv) the details of debtors including the particulars of securities and their values, the names and particulars of debtors (with estimated amount to be realised) and (v) such further or other information as may be prescribed or required by the Official Liquidator. The said statement is required to be verified by one or more directors at the time of passing the winding up order by the court. Further the said statement is required to be submitted within 21 days of the winding up order or within such extended time not exceeding three months as may be fixed by the Official Liquidator or the court for special reasons.

Question 7

The Board Meeting of M/s ABC Company Ltd. was adjourned for want of Quorum. Advise the procedure now to be followed and also whether a resolution can be passed by circulation. If so, how? (November 2002)

Answer

Quorum and Resolution by circulation: For the conduct of business in the Board Meeting quorum is required. The Board Meeting of M/s. ABC Company Ltd. is adjourned for want of quorum. Section 288 of the Companies Act, 1956 provides the procedure when a Board Meeting is adjourned for want of quorum. Thus, under section 288 of the Act, following procedure is applicable :

1. If a Board Meeting could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned till the same day in the next week, at the same time and place, or if that day, is a public holiday, till the next succeeding day which is not a public holiday, at the same time and place.
2. The provisions of Section 285 shall not be deemed to have been contravened merely by reason of the fact that a meeting of the Board which had been called in compliance with the terms of that provision, could not be held for want of quorum.

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When the question of passing resolution by circulation arises, the provisions of section 289 of the Companies Act, 1956 are applicable. For the passing of the circular resolution following conditions must be complied with:

1. The draft resolution, together with supporting papers has been circulated, to all the directors or members of the committee of the board thereof, then in India, not being less in number than the quorum fixed for a meeting of the Board or Committee, as the case may be.
2. to all the directors of the Board or member of the committee who are not in India, at their usual address in India, and
3. the same has been approved by such of the directors then in India, or by a majority of them, who are entitled to vote on the resolution.

Question 8

Explain the circumstances under which a Director retiring at an annual general meeting shall be deemed to have been re-appointed even though no such appointment has been made.

(May, 2003)

Answer

Section 256 of the Companies Act, 1956 deals with deemed re-appointment of a retiring director. The vacancies caused by the retirement of a director by rotation should be filled up at the same meeting or at an adjourned meeting. If it is not so done, the retiring director shall be deemed to have been re-appointed at such adjourned meeting except in the following cases:-

1. at any previous meeting, a resolution for his re-appointment was put to vote but was lost, or
2. the retiring director has, in writing expressed his unwillingness to continue or
3. he is not qualified or is disqualified for appointment, or
4. a special or ordinary resolution is necessary for his appointment by virtue of any provisions of the Companies Act; or
5. it is resolved to appoint two or more directors by a single resolution {Section 263(2) Proviso}; or
6. it is resolved not to fill the vacancy.

Question 9

Examine whether the following transactions are permissible under Foreign Exchange Management Act, 1999:

- (i) *Payment of remuneration to foreign technician.*
- (ii) *Remittance of dividend to non-residents.*

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State also the procedure to be followed with regard to payment of dividend to non-residents.

(November 2003)

Answer

Foreign Technician: Salary payable to a foreign technician is a current account transaction. According to Section 5 of Foreign Exchange Management Act, 1999, any person can sell or draw foreign exchange to or from authorised person if such sale or drawal is a current account transaction and reasonable restrictions on current account transaction can be imposed by the Central Government in public interest, in consultation with RBI. Hence, basically all current account transactions are free, unless specifically restricted by the Central Government. Hiring of foreign nationals as technician is permissible without any restrictions. There is no ceiling on salary, which can be paid as per contract. Their salary can be remitted abroad, after tax deducted at source.

Remittance of dividend: Since remittances of dividend on investment are current account transactions, these are permitted without restrictions, if the shares were issued as per guidelines/regulations/permission. Dividend is restricted only when permission for issue of shares to non-residents was granted with condition for dividend balancing.

Procedure for remittance of dividend to non-residents: The procedure involved is briefly as follows:

1. **Application in Form A2** - Application should be submitted in Form A2 to authorised dealers. It should be accompanied by (a) List of non-resident shareholders (b) dividend to be remitted - the amount will be payable in Indian Rupees and payment will be made to payee in foreign exchange at current exchange rate.
2. **Supporting documents:** Application should be accompanied by copies of supporting documents to establish that the issue of shares was permissible as per regulations/specific approval was obtained as required. Copy of resolution in general meeting/Board meeting approving dividend/interim dividend should be submitted.
3. **Certificates:** Certificate from Chartered Accountant, practicing Company Secretary in respect of amount payable and details of calculation should be submitted. A certificate from Chartered Accountant that tax has been properly deducted at source should be submitted.

Remittance of dividend:- The dividend may be remitted through normal banking channels. If shareholder has issued instructions, the amount can be credited to NRE/FCNR account of NRI.

Question 10

An existing society seeks your advice as to its eligibility to be registered as a 'Producer Company' under the Companies Act, 1956 and the procedure to be followed for such registration. Advise explaining the relevant provisions of the Companies Act, 1956.

(November 2003)

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Answer

Producer Company: Any existing inter-state co-operative society with objects not confined to one State may make an application to the Registrar of Companies for registration as 'Producer Company' under the Companies Act, 1956. The conversion is purely optional (Section 581J(1)).

'Inter-State Co-operative Society' means a 'Multi-State Co-operative Society' within the meaning of Multi-State Co-operative Societies Act, 2002 and includes any co-operative society registered under any other law for the time being in force which has, subsequent to its formation, excluded any of its objects to more than one State by enlisting the participation of persons or by extending any of its activities outside the State, whether directly or indirectly through an institution of which it is a constituent [Section 581A(e)]. Hence a co-operative society registered under Multi-state Co-operative Societies Act, 2002 or any other State Act with objects not confined to one State may opt for conversion into a 'producer company' under Companies Act, 1956.

The application to the Registrar of companies must be accompanied by the following:

- (1) A copy of the special resolution of not less than two-third of total members of inter-state co-operative society, for its incorporation as a producer company under the Companies Act.
- (2) A statement showing the names and addresses or the occupation of the directors and Chief Executive.
- (3) A statement showing the list of members.
- (4) A statement indicating that the Inter-State Co-operative Society is engaged in one or more of the objectives specified in Section 581B.
- (5) A declaration by two or more directors of the Inter-State Co-operative Society (certifying that the particulars given in the above statements are correct. [Section 581J(2)].

When an Inter-State Co-operative Society is registered as a 'producer company', the words 'Producer Company Limited' shall form part of its name with any word or expression to show its identity preceding it [Section 581J(3)].

On completion of all formalities, the Registrar of Companies shall register and incorporate such society to be a 'Producer Company' under Part IXA of the Companies Act, 1956 (Section 581J (4)).

Upon registration as a Producer Company, the Registrar of Companies shall forthwith intimate the Registrar with whom the erstwhile Inter-State Co-operative Society was earlier registered for appropriate deletion from its register [Section 581J(7)].

Question 11

Draft a resolution proposed to be passed at a General Meeting of a Public Company giving consent to the Board of Directors for borrowing upto a specified amount in excess of the limits laid down under Section 293(1)(d) of the Companies Act, 1956 and also state the borrowings, which are to be excluded from the said limits. (May, 2004)

Answer

Draft of ordinary resolution under Section 293(1)(d)

Resolved that the company hereby consents to the Board of Directors borrowing monies not exceeding Rs.....(Rupees.....) in excess of the aggregate of the paid-up capital of the company and its free reserves, that is to say reserves not set apart for any specific purpose, as provided in Section 293(1)(d) of the Companies Act, 1956, and in addition to any temporary loans obtained from the company's bankers in the ordinary course of business.

Borrowings

Section 293(1)(d) does not apply to the borrowing by a company by way of temporary loans obtained from the company's bankers in the ordinary course of business. Therefore, in calculating the limits stipulated in this provision, temporary loans obtained from the company's bankers in the ordinary course of business shall be excluded.

The expression 'temporary loans' in i.e. (d) means loans repayable on demand or within six months from the date of the loan such as short term cash credit arrangements, the discounting of bills and the issue of other short term loans of a seasonal character, but does not include loans raised for the purpose of financing expenditure of capital nature [Explanation II to Section 293(1)].

Question 12

ABC Engineering Limited proposes to invest Rs.20 lakhs in the Equity shares of PQR Trading Limited. The proposed investment together with the investments in securities of companies and loans to body corporates already made exceed 60 per cent of the paid-up share capital and also 100 per cent of free reserves of the company. The company has taken term loans from IDBI.

Explain the procedure to be followed by ABC Engineering Limited to give effect to the proposed investment.
(May, 2004)

Answer

Investment in Shares: The proposed investment together with the investments, loans already made exceed 60% of the paid-up share capital of the company and also 100% of the free reserves. Hence, the proposed investment must be approved by a special resolution passed in a general meeting [Proviso to Section 372A (i)].

The Board of Directors must convene a general meeting for the purpose of passing a specific special resolution authorizing the proposed investment. The special resolution should specify:

- (a) The limit upto which Board is to be authorized to make investment;
- (b) Particulars of the body corporate in which the investment is proposed to be made;
- (c) The purpose of the proposed investment;
- (d) The source of funds to be invested; and
- (e) Other relevant details (3rd proviso to Section 372A(1)).

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The special resolution passed at the general meeting will be filed with the Registrar of Companies.

As the total amount of inter-corporate investments, loans, etc. exceeds 60% of the paid-up share capital prior approval of public financial institution i.e. IDBI must be taken [Section 372A(2)].

Board meeting must be convened and the proposed investment must be sanctioned by a resolution passed with the consent of all the directors present at the Board meeting (Section 372A(2)).

The following particulars must be entered in the 'Register of Investments, Loans, Guarantees and Securities pursuant to Section 372A:

- (a) Name of the body corporate on which the investment is made.
- (b) Amount invested.
- (c) Type and nature of securities in which investment is made.
- (d) Main terms of the issue of the securities.
- (e) The date on which the investment is made.

Particulars must be entered in the register in respect of each investment chronologically within 7 days of the making of the investment. [Section 372A(5)].

The register must be kept at the registered office of the company. Any member of the company can inspect the register. [Section 372A(6)].

Question 13

Answer any **one** of the following:

- (i) *Board of Directors of DBM Limited held a board meeting on 2nd May, 2008 at its registered office. You are required to state the salient points to be taken into account while drafting the minutes of the said board meeting.*
- (ii) *Draft a board resolution for appointment of Mr. Paul as the managing director for 5 years with effect from 1st June, 2008 of DBM Limited passed in the above stated board meeting.*
(May 2008)

Answer

- (i) While drafting the minutes of a board meeting following salient points should be kept in mind:
 - (a) the minutes may be drafted in a tabular form or they may be drafted in the form of a series of paragraphs, numbered consecutively and with relevant headings.
 - (b) the place, date and time of the meeting should be stated.
 - (c) the minutes should contain the constitution of the meeting, i.e., persons present and the capacity in which present, e.g. name of the person chairing the meeting, names of the directors and secretary, identifying them as director or secretary, names of

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persons in attendance like auditor, internal auditor etc. The minutes should also contain the subject of leave of absence granted, if any, to any of the board members.

- (d) content of the meeting giving serial number of the minute, brief subject heading, full terms of the resolution adopted including the statistical details, if any.
 - (e) names of the directors dissenting or not concurring with any resolution passed at the board meeting.
 - (f) reference about interested directors abstaining from voting is also required to be stated in the minutes.
 - (g) Chairman's signature and date of verification of minutes as correct.
- (ii) Resolution passed at the meeting of board of directors of DBM Limited held at its registered office situated at on 2nd May, 2008 at AM.

"RESOLVED that subject to the approval by the shareholders in a general meeting and pursuant to provisions of Sections 198, 309, 310, Schedule XIII and other applicable provisions of the Companies Act, 1956, Mr. Paul be and is hereby appointed as the Managing Director of the Company with effect from 1st June, 2008 for a period of five years on a remuneration approved by the Remuneration Committee as enumerated below:

- (1) Salary: Rs. per month
- (2) Perquisites, Benefits and Facilities

"RESOLVED FURTHER that Mr. Paul, so long as the functions as the Managing Director of the Company shall not be entitled to any sitting fee for attending any meeting of the board of directors or any committee thereof and that he shall not be liable to retire by rotation."

"RESOLVED FURTHER that Mr. Paul till he holds the office of Managing Director of the Company shall not become interested or concerned in any selling agency directly or through his wife or minor children in future without prior approval of the Central Government."

"RESOLVED FURTHER that Mr. Paul, the Chairman, as well as the Company shall have right to terminate the appointment by giving 3 (three) months' notice in writing."

"RESOLVED FURTHER that the Secretary of the company be and is hereby directed and authorized to file necessary returns with the Registrar of Companies and to do all other necessary things required under the provisions of the Companies Act, 1956."