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Editorial

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A CALL FOR CHANGE:

Meeting without Minutes: The Challenge of conducting Independent Directors Meeting



Decisions made in a Meeting of Directors or a meeting of Sub-committee of Directors are recorded in the minutes of the meeting as resolutions.
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Compliance calendar



Due dates for Professional tax, Goods and Service Tax, Companies Act, 2013 among others has been captured for your ready reference. View the list…

Gist of Regulatory Changes in Companies Act, 2013 and Insolvency & Bankruptcy Code, 2016 in the month of January, 2017

Seven Regulatory changes in Companies Act, 2013 and Insolvency & Bankruptcy Code, 2016 was made in the month of January. View the list…

FIRST OF FIRST:

Forfeiture of Shares-A Critical Instrument to Protect Shareholders: Introduced in 1869 CE



By Shankar Jaganathan

In 1869 CE, the Mining Companies Limited Liability Act was passed by the Victorian government in Australia. This act enabled companies to forfeit the shares of shareholders who failed to pay the calls made on their shares. Read more…

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CAIRR Updated with The Companies Amendment Act, 2017 on January 4, 2018

http://ca2013.com/



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Editorial

If we go by the popular saying, 'a good beginning is a job half done', we at **CimplyFive** have only the balance 50% to do in the next eleven months of 2018. But as an aspiring vision led company, could we make this the base and target 600% from ourselves. A target definitely worth striving for as we would be serving many more clients, more effectively and efficiently.

On January 8th, we got an independent Service Auditors Report - SOC2 Type 1 certification from a CPA for our cloud based software solution **BLISS** that certifies our design of controls in **BLISS** meets the criteria for the security and availability principles set forth in TSP section 100, Trust Services Principles, Criteria, and Illustrations for Security, Availability, Processing Integrity, Confidentiality, and Privacy (AICPA, Technical Practice Aids) (applicable trust services criteria), as of December 31st, 2017. This we believe is a significant achievement as it will convince large Indian companies and Multinationals to use BLISS with the assurance that it is secure and reliable.

Simultaneously on the features front, we have significant enhancements under testing scheduled for release in February that will enhance productivity of BLISS users multi-fold.

In the series titled **CALL FOR CHANGE,** we have identified issues related to the Independent Directors Meeting for further deliberation to build a consensus to have them modified thereby enabling a more compliant regulatory framework for the Indian corporate sector.

Continuing our series in the **First of First,** in this issue we have captured the episode that led to forfeiture of shares emerging as a new concept in Australia in 1860s to protect the interest of promoters and compliant shareholders. Our other regular features –**Gist of Changes in the Companies Act** and **Statutory Compliance Calendar** are also included in this issue.

Please feel free to share your feedback with us at contact@cimplyfive.com. We look forward to your feedback with interest and as ever strive to improve the quality of everything we do.

Happy reading,

Shankar Jaganathan
Editor of iComply
February 5, 2018

A CALL FOR CHANGE:

Meeting without Minutes: The Challenge of conducting Independent Directors Meeting

Decisions made in a Meeting of Directors or a meeting of Sub-committee of Directors are recorded in the minutes of the meeting as resolutions. Further, a legally valid meeting of the Directors is evidenced by:

i. A notice served to all the members who are authorized to attend the meeting containing the agenda,
ii. Attendance register evidencing the presence of those who attended the meeting, and
iii. Finally the minutes prepared for the business transacted at the meeting.

While this is accepted in general, does it hold good for a meeting of Independent Directors? While the law does not explicitly make any exceptions for the meeting of Independent Directors, in practice why do differences exist?

ISSUE

The Companies Act, 2013 has not only mandated large[1] companies to appoint independent directors on its Board, but it also requires Independent Directors to have one meeting in the financial year without the presence of non-independent directors and the management team members.

In this meeting the independent directors are required to review the performance on non-independent directors and the Board, review the performance of the Chairperson and assess the quantity, quality and timeliness of information flow for effective functioning of the Board. Incidentally, SEBI's LODR, 2015 also reiterate the same requirement for Listed Companies.

[1] Companies with paid-up capital in of Rs.10 crores or more, or turnover of Rs.100 crores or more or aggregate of borrowings in excess of Rs.50 crores.

In the absence of anything to the contrary, the expectation is that the minutes of the meeting of independent directors are also recorded and maintained by the Company Secretary, which in turn would also be available to other directors entitled to participate in this meeting to inspect or review the same.

CHALLENGE

Given the sensitive nature of matters discussed in the meeting of Independent Directors, especially issues regarding performance of non-independent directors, of the Board, and the performance of the Chairperson, there is a great reluctance to minute these deliberations at this meeting as it may also require capturing any constructive feedback provided for improved functioning of the non-executive directors, the board or the Chairperson. The apprehension is that these suggestions could be misconstrued as criticism especially when quoted out of context. Due to this anxiety, companies follow different practices based on the relationship between the independent directors and the promoters /chairperson.

The variation in practice ranges from:

i. Not maintaining any records for this meeting and conducting it in an informal manner,
ii. Maintaining only the notice containing the agenda circulated for conveying this meeting,
iii. Maintaining attendance register along with the notice circulated, and
iv. Maintaining a cursory minutes of the meeting, along with the attendance register and the notice containing the agenda.

In the cursory minutes prepared, only the procedural aspects and positive feedback is captured. The constructive feedback of the areas of improvement identified in this meeting is verbally communicated to the Chairperson by the Lead Director who chairs this meeting, without maintaining any documentation of the same.

Further, in some companies the minutes maintained for these meetings are shared with the auditors, including secretarial auditors, while in other companies, these minutes are considered sensitive in nature and are not shared even with the auditors. A case to illustrate this practice is of JBF Industries Limited, where the secretarial auditor specifies this aspect in their secretarial audit report.

Given this widespread variance in practice and the need for considered professional guidance, we suggest that the Institute of Company Secretaries come out with a guidance note on the recommended practice to be followed for complying with the requirements of this provision and in particular detail the role to be played by the Company Secretary in this regard.

We believe the most appropriate practice would be:

1. Company Secretary to prepare and maintain the agenda circulated calling for this meeting.
2. Company Secretary to be available at the venue of this meeting to capture the attendance in the attendance register and provide any other assistance to the Independent Directors present in the meeting without attending the meeting.
3. Company Secretary to assist the lead director where requested in preparing the minutes of the meeting and to maintain the minutes of the meeting. This minutes could exclude sensitive feedback to non-executive directors or the chairperson that is personal in nature. However constructive feedback for improvement of Board's performance should be captured for initiating corrective action.
4. Where sensitive, constructive feedback is required to be provided to the Chairperson by the Lead Director on the performance of non-executive directors or the chairperson, only an action item is to be captured in the minutes requiring the Lead director to communicate the same.

Please do write to us if you concur with the need to have this change in place for creating a more enabling regulatory environment that promotes ease of doing business without diluting elements of good governance.

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Forfeiture of Shares-A Critical Instrument to Protect Shareholders: Introduced in 1869 CE

By Shankar Jaganathan

In 1869 CE, the Mining Companies Limited Liability Act was passed by the Victorian government in Australia. This act enabled companies to forfeit the shares of shareholders who failed to pay the calls made on their shares. This was a critical concept introduced to protect the interest of shareholders who paid the calls made on their shares and did not place them at a disadvantage to the unscrupulous shareholders who defaulted on the calls made.

The Concept

At a given point of time, shares issued by a company can be fully paid or partly paid. Where the holders of party paid shares do not pay the calls made on the shares after adequate notice is given to them to make the payment, the company has the right to forfeit the shares.

With forfeiture, the defaulting shareholders are no longer liable for the calls made on those shares and instead lose the right to their partly paid shares. The company that has forfeited the shares on the other hand has the right to reissue these forfeited shares to new shareholders for fresh consideration to be received by them.

The First of First

In the second half of the 18th century Victoria and New South Wales in Australia became a centre for gold mining. Within a short time, more than 500 gold mining companies were formed in Victoria to prospect for gold.

Gold mining firms were attracted to the corporate form of organization as it offered a flexible financing instrument in shares with par value. Companies could issue shares with high par value on which they initially called only a small amount, leaving the remaining amount to be called later when they need further capital.

However, this conceptually attractive financing instrument faced a practical difficulty with shrewd investors using 'dummy' or 'proxy' investor to hold these partly paid shares. These investors did not pay the calls made on their partly paid shares but tracked the prospect of these gold mines. When they hit gold, these investors paid their dues and got their share of reward. But if these companies failed they let their liabilities go unextinguished.

Company promoters, who got the wind of these unscrupulous practice resorted to forfeiture of these partly paid shares, which they subsequently auctioned to raise the money due. On the other hand, the unscrupulous investors whose shares were being forfeited moved the Court of Mines, which held these forfeitures invalid as it was not permitted by the statute.

In response to this court verdict, the miners initiated a new amendment to the act in 1869 titled 'No Liability Act', under which a holder of partly paid shares on its forfeiture was not liable for calls unpaid on the shares but forfeited his shares to the company.

Rationale for Forfeiture of Shares

Forfeiture of shares is required to protect the interest of shareholders who have complied with their contract and paid the calls made by the company on their shares. In the absence of forfeiture, unscrupulous shareholders by not making the payment on their partly paid shares would gain an undue advantage of having the right to participate in the upsides of the company by paying only the interest cost on the money due from them. Further, if the number of unscrupulous shareholders increased due to economic benefit they get, the concept of partly paid shares would come under threat, thereby closing one of the avenues for raising funds by a company.

Companies Act, 2013

While there is no specific section of the Act that deals with forfeiture of shares, Schedule 1 of the Companies Act, 2013 which contains the model Articles of Association provides a company with the power to forfeit shares on which amounts remain unpaid after calls are made. Clauses 28 to 34 of the model Articles contain provisions related to forfeiture of shares. However contrary to the provisions of the original scheme of forfeiture designed in the 19th century, clause 32 in the model Articles of the 2013 Act makes the member liable to the company for the amounts payable in respect of those shares even after those shares are forfeited.

Current Usage

Forfeiture of shares is still a concept used by companies in India. However its use is drastically reduced as practice of using partly paid shares has significantly come down. One reason for this is the reduction in the face value of shares, which has reduced from Rs.1000 in the 19th century to Rs.100 in the first half of the 20th century further coming down to Rs.10 in the second half of the century and further down to Rs.1/- in the last decade of the 20th century.

However, where partly paid shares exist and there are unpaid calls on these shares, forfeiture is a practice that is still used to protect the interest of the compliant shareholders.

Compliance Calendar

February 7th	TDS Payment for January, 2017.
February 10th	GSTR-1 (Dec, 2017): Monthly return for registered persons with aggregate turnover of more than Rs. 1.50 crores
February 15th	Pay PF contribution for January, 2017
	ESIC monthly deposit
	GSTR-1 (Oct-Dec, 2017): Quarterly return for registered persons with aggregate turnover up to Rs. 1.50 crores
February 20th	Professional Tax payment
	GST Payment for January, 2017- GSTR 3B
February 25th	PF Return for January, 2017

Gist of regulatory changes in Companies Act, 2013 in the month of January, 2017

- **16.01.2018**
  - **Clarification on Fees payable to an Insolvency Professional and to other Professionals appointed by an insolvency professional vide, Circular No. IP/004/2018**

IBBI clarifies that the fees payable to any person acting as insolvency professional including for fast track process shall be part of insolvency resolution process cost and shall be paid on priority.

The insolvency professional must charge fees in a transparent manner and with reasonable reflection of the work necessarily and properly undertaken, which shall not exceed the fees disclosed to and approved by the persons fixing his remuneration.

Further it is clarified that the fees charged by insolvency professional and any other professional appointed by an insolvency professional shall be through bills / invoices raised in their respective names and shall be paid in his / its bank account.

  - **Clarification on Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes vide, Circular No. IP/005/2018**

In the interest of transparency, IBBI directs that every Insolvency professional and other persons appointed by him such as registered valuers, accountants, legal and other professionals for assisting him in discharge of his duties in resolution process shall disclose their relationship, if any, with Corporate Debtor, other Professional(s) engaged, Financial Creditor(s), Interim Finance Provider(s), Prospective Resolution Applicant(s) etc., to the Insolvency Professional Agency of which he is a member within such time period and in such manner as is prescribed in Annexure A.

The circular provides for four kinds of relationship- financial, functional, filial or professional, existing at any time or during the three years preceding the appointment of Insolvency professional and other professionals that needs disclosure.

An Insolvency Professional Agency shall facilitate receipt of disclosures and to disseminate such disclosures on its web site within three working days of receipt of the disclosure.

Further the Insolvency Professional shall provide a confirmation to the Insolvency Professional Agency to the effect that the appointment of every other professional has been made at arm's length relationship.

It is provided that disclosure in respect of ongoing resolution processes shall be made to the respective Insolvency Professional Agency by 31st January 2018 and any wrong and/or delayed disclosure shall attract action against the Insolvency Professional and the other Professional as per the provisions of the law.

- **18.01.2018**

The Insolvency and Bankruptcy Code (Amendment) Act, 2018 effective from 23.11.2017

This Amendment Act repeals the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 dated 23.11.2017. Further, the changes made to the ordinance by the Act are provided below:

Section 29A is inserted: It provides that for the purpose of determining the eligibility of resolution applicant to submit resolution plan; a scheduled bank, an asset reconstruction company registered with RBI and an Alternate Investment Fund registered with SEBI shall be excluded from the meaning of connected persons.

Proviso to section 30(4): It provides that where the resolution plan is rejected because of ineligibility to submit the resolution plan due to non-payment of non-performing assets, a period not exceeding 30 days may be allowed by the committee of creditors to the resolution applicant for payment of the overdue amount.

- **20.01.2018**
  - **The Companies (Incorporation) Amendment Rules, 2018 effective from 26.01.2018**

Rule 9 is substituted: It provides that the application for reservation of name of the company shall be made through the MCA's web service "RUN".

Amendment in Rule 10: Form INC- 7 is omitted and shall not be used for intimating the Registrar the details of entrenched articles.

Rule 12 is substituted: The application for registration of company shall be made only in form INC-32 (SPICe) with the jurisdictional Registrar.

Proviso inserted in Rule 38(1): MOA/ AOA shall be filed in the respective formats as specified in Table A to J in Schedule I along with Form INC-32 (SPICe) where a company has more than 7 subscribers to MOA and AOA or where any of the subscriber is signing from place outside India.

Proviso inserted in Rule 38(2): One Person Companies (OPC) and Small Companies having nominal share capital less than or equal to Rs. 10 Lakhs and company having no share capital whose number of members as stated in its Articles of Association does not exceed 20, may file Form INC-32 (SPICe) without paying fees to the registrar.

Forms INC-1, INC-3, INC-12, INC-22, INC-24, INC-32 is substituted and Form INC-7 is omitted.

  - **The Companies (Registration Offices and Fees) Amendment Rules, 2018 effective from 26.01.2018**

Proviso inserted in Rule 10(3): It is provided that re-submission of name reservation application shall not be allowed in case the application is made using the MCA's web services named "Reservation of Unique Name (RUN)".

Table A of Annexure is substituted: One Person Companies (OPC) and Small Companies having nominal share capital less than or equal to Rs. 10 Lakhs and company having no share capital whose number of members as stated in its Articles of Association does not exceed 20, may be registered without paying any fees to the registrar.

- **23.01.2018**

Enforcement notification

MCA has notified with effect from 26.01.2018, the provisions of section 1 and 4 of the Companies (Amendment) Act, 2017. Accordingly, the registrar shall on receipt of application reserve the name of a proposed company and existing company for a period of 20 days and 60 days respectively from the date of name approval.

- **26.01.2018**

The Companies (Appointment and Qualification of Directors) Amendment Rules, 2018

Rule 9(1) is substituted: It is provided that the Application for allotment of DIN shall be made in Form DIR-3 if the director intends to get appointed in an existing company and for getting appointed in new company the DIN application shall be made in form INC-32 (spice) for up to 3 directors.

Clause iii(a) is inserted under rule 9(3)(a): Copy of Board resolution proposing the appointment of director shall be attached with Form DIR-3 for obtaining DIN where the appointment is in existing companies.

Rule 9(3)(b) is substituted: Form DIR-3 is now required to be verified by company secretary in full time employment or by the managing director or director or CEO or CFO of the company.

Forms DIR-3 and DIR-12 is substituted.

About us

CimplyFive Corporate Secretarial Services Pvt Ltd

Vision:
Leverage research and technology to eliminate procedural non-compliance risk for entities regulated by the Indian Companies Act, 2013

Mission:

Provide a cost-effective, secure web-based, menu driven, subscription services that provides curated resolutions, timely alerts and informative dashboards to free the management bandwidth for pursuing business goals

BLISS
(Board Leaders Integrated Software Solution)

Our product BLISS (Board Leaders Integrated Software Solutions)

- A digital productivity tool for Compliance with the Companies Act,2013
- Provides comprehensive coverage of Board meetings, Shareholder meetings and Sub-committee meetings
- Rich bank of curated but editable resolutions
- Fully integrated modules- Agenda, Minutes, Registers and Returns
- Timely alerts and reminders
- Rich and real-time dashboard

www.ca2013.com: Company law at your fingertips. A free to use website, integrating Companies Act with Rules, Notification, Orders and Circulars that is real time and online

Contact:

contact@cimplyfive.com

Phone: 080-23441212

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