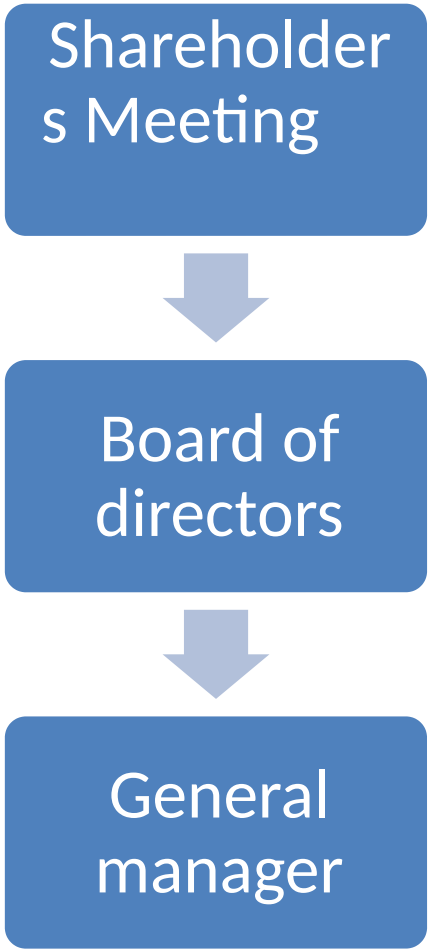
Chap 9

Governance of Share Company



Approaches of Conferring Powers to Governance of Share Company

- There are different approaches of conferring powers governing bodies like to **BOD** and general **meeting** of shareholders.
- **1. Liberal approaches**:- to **confer specific power** to **general meeting** like altering statute of the co., appointment and removal of BOD, and **conferring all other powers** to BOD.
- Common in USA legal system
- **2. Restrictive approaches**:- to confer the power to BOD and general meeting by **specifying in MOA**.
- BOD has **limited** power.
- Common in continental Europe legal system - French company law, which is also model of CCE, confers the powers specifically to BOD.
- Q? Which approach is Ethiopia following???

Shareholders' meetings Art 362

- It is the **highest** decision making organ in a company in which all shareholders take particle.

Types / Class/ of meetings - Art 365.

- Shareholders` meetings may be 1. **General** or
- 2. **Special**.
- **General** meetings are **ordinary** or **extraordinary** and **comprise shareholders of all classes**.
- Special meetings comprise **only shareholders of a special class**.

1.1 **Ordinary General Meetings**

- Held annually within four months from the end of each financial year **to discuss financial and administrative affairs** of Sh.co. – Art **393**
- It shall have the following powers and duties:-
  - Amend or approve or reject **all questions arising out of the accounts for the past financial** year
  - Appoint or remove **directors**, members **BOD**, SB, or **Auditors** and decide their **remuneration**
  - **Decide all matters** other than those specifically reserved to an extraordinary general meeting
- **See Art, 394 for detail**

➢ Decisions are taken by a **simple majority of the capital represented** at the meeting by shares carrying voting right

Calling of General Meetings Art. 366

- General meetings are called by:-
  - Directors,
  - Supervisory board, if any,
  - Auditors,
  - Liquidators,
  - Court,
  - Ministry of Trade and Industry or relevant government authority

1.2 **EXTRAORDINARY GENERAL MEETINGS**

- An extraordinary general meeting shall have the following **powers and duties**:-
  - Amend MOA
  - Increase or reduce the capital of the company;
  - Change the nationality of the company;
  - Decide on dissolution, conversion, division or merger
  - Decide on all other matters specifically assigned to it by the law or by MOA
- **See Art 400**
- Resolutions are passed by **two-thirds majority** of the votes held by shareholders present or represented. Art 402

SPECIAL MEETINGS Art. 404 ff

- It is a meeting that **consists of shareholder's of particular class** to transact business affecting their interest only - (Eg. the holders of **preference** share).
- The requirement to pass resolutions are the **same** as the rules governing extra-ordinary meeting.

Governance by the board of directors

- Sh. Co. shall have **not less than three or more than thirteen directors**

➢ **BOD**:- group of directors as an **institution**.

- ✓ is the managerial body.
- ✓ It is established by general assembly from among the **shareholders representing each class of shares**.
- ✓ Individuals or legal entities can become directors.
- ✓ **Only a director who is a shareholder may become the chairperson of the board of directors. Art. 300**

Directors Art. 298

- **Directors are persons by whom the business of co. is carried on.**
- **The director can be member or non member even an artificial person See Art 296 ff**
- **Requirements to Qualify as a Director** Art. 297
  - Minimum **age** as per MOA or Law;
  - Good **moral** character,
  - No **record** of conviction of breach of trust, theft or similar…

Appointment/Removal/ of directors

- 1st Directors appointed under the memorandum of association approved by subscribers meeting
- **Subsequently** directors shall be appointed by a general meeting for a term of three years.
- See Art. 298ff
- Directors may be **removed at any time by a general**
- **meeting**, notwithstanding any provision to the contrary in the memorandum of association.
- A director who was removed **without good cause** is **not entitled to be reinstated**; He may only claim **damages for the wrongful dismissal**.

Powers, Duties and Liabilities of BOD (Art 315 - 329)

- BOD Shall:-
  - Manage the company's finances
  - Risk management and internal control
  - Provide information to the supervisory board, if any,
  - Prevent/ mitigate /damage to the company;
  - Keeping regular records of the meetings,
  - Submit accounts and books to Auditors when required
  - Calling shareholder's meeting…esc… see **Art 315**

Dealings /Agreements/ between Sh.co. & Directors - Art 319-324

- To regulate **conflicts of interest** between Sh.co. and directors.
- There are **2 (two)** types of dealings/agreements:
- 1. **Prohibited** dealings/agreements and
- 2. **Regulated** dealings/agreements

1. **Prohibited dealings/agreements** Art. 319

- Unless authorized by a general meeting, directors may **not be partners in rival business** entities nor **compete against the company** either on their own behalf or on behalf of third parties

2. **Regulated dealings/agreements** -Article 321 ff

- Disclosure of potentially conflicting relationship.
- The regulation applies to agreements:
- Directly or indirectly between the co. and its directors
- Between the co. and another entity in which one of the directors is owner, partner, agent, director or manager of such entity.
- Such agreement **requires prior approval by BOD & notice to the auditors.**
- The auditors must prepare special report on the agreement.
- **Accepting a gift** or another type of benefit from a third parties. Art. **322**

Directors' liability - Art 325-330.

- Directors may be liable to the Sh.co. and to 3rd party creditors.
- **A**. **Liability to the company**: Art. **325**
- Directors are agents and trustees of the Sh.co. & **jointly and severally liable** to the co. and its shareholders.
- They shall be jointly and severally liable to the company **for damages caused by failure to carry out their duties**.
- Directors shall bear the burden of **proof** for showing that they have exercised **due care and diligence**.

Defenses for Liability to the company Art. 327

- **Agreements** Protecting/exempting/Directors from Liability has **no effect** Art. 326
- So available defense is only if a **business judgment in good faith**
- **Director** shall not be liable for damages to the company where:-
  - **No conflict** of interest;
  - **Reasonably** believed to be **appropriate** in the best interests of the company.
  - He has **dissented** and has **notified the external Auditor** of the decision as soon as possible.
  - the decision was taken on the **basis of a resolution** of the general meeting of shareholders, provisions of the **MOA** or the **law**. See Art. **327**

B. **Liability to the creditors** Art. 329

- Directors have duty to preserve the capital of the co. intact to protect co. & 3rd party.
- Creditors bring the case to the court where **capital of the co. is insufficient to cover the debt**
- So, Directors shall be liable for damage caused to creditors where the company continues its business after the time when the **directors knew or ought to** have concluded that there was **no reasonable prospect** of the company being **able to pay its creditors**.

Proceedings to Enforce the Liability of Directors Art. 328.

- A company may **not institute proceedings** against its directors in connection with their responsibility **without a resolution of a general meeting of shareholders** to this effect.
- Shareholders representing **not less than ten percent** of the capital of the company may **directly institute proceedings** against the directors who have failed to discharge responsibility imposed on them under this Code.
- Company`s decision not to institute proceedings against the directors shall not affect the creditor`s rights to sue such directors.

Supervisory Board Art. 331

- This is an **optional** organ in which **only shareholders** may be elected as members.
- For Powers and Duties of this organ see Article 332

General Manager Art. 337

- Sh. Co shall have a general manager **appointed/revoke**/ by the **BOD** and so accountable to the BOD.
- The general manager is an **employee** of the company who may be a **member** of the BOD.
- GM. carry on **day to day activities i.e. management of the company** of a co. & **represents** the co. in relation to 3rd parties. Art. 338

Powers, Duties, & Liabilities of GM

- **Powers & Duties**:- Art. 338
- Day-to-day management of the company
- **Liabilities**
- Liable to the **co**. or **3rd** party for **damage** resulting from infringement of his power or violation of law, statutes.

Secretary Art. 340

- A company shall have a secretary who shall be accountable to the general manager.
- The secretary has a duties to organize and keep information and records of the company; provide reports and other necessary information promptly to concerned body; Art. 341

Auditors Art. 343

- **Every** share company **shall** have one or more **independent, impartial and licensed external Auditors** and **assistant** Auditors.
- Auditors shall be elected by the meeting of **subscribers** and thereafter by the **general meeting**.
- A body corporate may act as Auditor
- Such Auditors have **Duty to Inform Irregularities** Art. 350

Civil & Criminal Liability of Auditors Art.354

- Auditors shall be **civilly** liable to:-
  - the company,
  - shareholders and
  - third parties for any **fault** in the
- Auditors shall be **Criminally** liable for:-
  - **intentionally** gives or confirms an **untrue** report,
  - **fails** to **inform** the relevant authority of **irregularities**,
  - **Disclosing** professional **secret**

Investigation by Relevant **Government** Authority Art. 355 ff

- Investigation by Ministry of Trade and Industry or any other relevant government authority **upon the request of**:-
  - Shareholders representing at least ten percent of the capital,
  - A general meeting of a company
  - Court or
  - By the Motion of Relevant Government Authority

Chapter 10:

- Chapter 10: Private Limited Company