

INTRODUCTION

In today's corporate landscape, considering the dynamics and potential conflicts between the board of directors ("**Board**") of a company and investors, it becomes crucial to be certain and have a clear understanding of the legal rights given to the directors. In furtherance of the same, we have discussed the rights granted to directors of a company to convene a Board meeting and whether any director of the company can convene a Board meeting at his/her sole discretion without any further consultation or approval.

A Board meeting needs to be convened in accordance with the Companies Act, 2013 ("**Act**") and the secretarial standards prescribed thereunder. However, we believe the legal provisions are slightly ambiguous and provide a scope for subjective interpretation and lack absolute certainty. Due to such ambiguity, there have been cases of disputes between the chairman of a Board and the other Board members relating to whether the other directors can convene a Board meeting without consulting with the chairman or whether it is mandatory to get chairman's approval to convene a meeting.

Due to the increased frequency of such conflicts and uncertainty on the power of directors to convene a Board meeting under the relevant legal provisions and secretarial standards, we have discussed this issue in detail in this Article.

LEGAL ANALYSIS

As per Section 173 of the Act, every company (other than exceptions provided to one person companies, small companies, and dormant companies) is required to hold a minimum number of 4 meetings of its Board every year and there should not be a gap of more than 120 days between 2 consecutive Board meetings. Further, as per Section 118(10) of the Act, every company needs to follow secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India ("**ICSI**") constituted under Section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.

Pursuant to the above, ICSI has issued multiple secretarial standards along with the guidance notes to convene and conduct the Board and shareholders' meetings. For regulation of the procedure of conducting a Board meeting, ICSI has issued Secretarial Standards 1 ("**SS1**") that has a legally binding effect. Furthermore, to facilitate compliance of SS1, the ICSI has issued a guidance note on SS1 (updated in January, 2021) ("**Guidance Note**"). We understand that the Guidance Note is not legally binding.

We examine below who has the power to convene a Board meeting and have specifically discussed, (i) whether any director of a company can convene a Board meeting directly without the need of the meeting being convened by the CS in consultation with the chairman, and (ii)

what are the powers of the chairman pursuant to Paragraph 1.1.1 of the SS1. We have analysed the Act, SS1 and the Guidance Note to ascertain the same.

Who can convene a Board meeting?

Paragraph 1.1.1 of the SS1 deals with the procedure of convening a Board meeting which provides that:

“Any Director of a company may, at any time, summon a Meeting of the Board, and the Company Secretary or where there is no Company Secretary, any person authorised by the Board in this behalf, on the requisition of a Director, shall convene a Meeting of the Board, in consultation with the Chairman or in his absence, the Managing Director or in his absence, the Whole-time Director, where there is any, unless otherwise provided in the Articles.”

In accordance with the abovementioned provision, in case the articles of association (“**Articles**”) of a company are silent on the procedure and the manner of convening a Board meeting, the abovementioned procedure needs to be followed by the concerned company.

Paragraph 1.1.1 of the SS1 states that any director of a company may, at any time, summon a Meeting of the Board, and the company secretary (“**CS**”) or where there is no CS, any person authorised by the Board in this behalf, on the requisition of a Director, shall convene a Meeting of the Board, in consultation with the chairman (or such other persons mentioned in the SS1). It is important to note that the term used between “any director of a company may, at any time, summon a Meeting of the Board” and “the Company Secretary” is “and” and not “or”. Accordingly, if a director wants to summon a meeting, it seems like the director should engage with the CS of the company or with any person authorised by the Board in this behalf, to convene such meeting. Further, in accordance with the term “shall” with respect to the obligation to convene a meeting, the CS (or such other person) is bound to convene the meeting upon the request of the director. However, the CS is also required to consult with the chairman for convening the meeting. Accordingly, the consultation of the chairman is an obligation on the CS and is not optional. Therefore, it can be argued that a director can summon a meeting; however, the meeting can only be convened by a CS (or such other person) in consultation with the chairman. We have discussed the power of the chairman in relation to such consultation by the CS below.

Since Paragraph 1.1.1 is not very clearly worded, it can be read and interpreted in more than one way. One view which can be taken is that considering there is a comma after “any Director of a company may, at any time, summon a Meeting of the Board”, and before “unless otherwise provided in the Articles”, the first part of Paragraph 1.1.1 of the SS1 can be read in isolation as – “Any Director of a company may, at any time, summon a Meeting of the Board, unless otherwise provided in the Articles.” This interpretation suggests that any director can summon a meeting of the Board without consulting the chairman or without requesting the CS to convene the meeting.

However, the more logical and correct interpretation of the procedure to convene a Board meeting is for the entire portion of Paragraph 1.1.1 of the SS1 to be read together and not in isolation. Further, an argument can be made that the usage of the term “summon” in the first part of Paragraph 1.1.1 of SS1 and the term “convene” in the second part of Paragraph 1.1.1

of SS1 is intentional and implies that, a director can summon a meeting, but the meeting is convened only by the CS. It can be reasonably interpreted that summoning is the first step and following that, a meeting is convened by the CS. Essentially, without the meeting being convened, the summon has no real meaning or purpose. Thus, it appears like the only logical interpretation is that Paragraph 1.1.1 of the SS1 provides for one single procedure to convene a meeting, which is – a director can summon a Board meeting only by requesting a CS to convene the Board meeting and the CS is required to consult with the chairman of the Board prior to convening the Board meeting.

Guidance Note: As mentioned above, the Guidance Note issued by ICSI facilitates compliance of SS1 and certain changes were made to this Guidance Note on SS1 in 2021.

Before the 2021 amendments, Paragraph 3 under the heading ‘Authority’ in the Guidance Note stated as follows:

“As a best practice and a measure of good governance, the Director desirous of summoning a Meeting for any purpose should send his requisition in writing to convene such Meeting, along with the agenda proposed by him for discussion at the Meeting,...”

However, Paragraph 3 under the heading ‘Authority’ in the Guidance Note, was updated in 2021, to read as follows:

“As a good governance practice, a schedule of meetings may be fixed in advance. In addition to these meetings, the Director desirous of summoning a Meeting for any purpose should send his requisition in writing to convene such Meeting, along with the agenda proposed by him for discussion at the Meeting....”

The changes made in the relevant paragraph of the Guidance Note indicates that before the 2021 modification to the Guidance Note, as a good governance practice, a director was required to send his requisition to convene a meeting in writing along with the agenda, etc. However, the changes to the Guidance Note in 2021 indicate that the good governance practice is now limited to only scheduling meetings in advance. It is important to note that no changes were made to Paragraph 1.1.1 of the SS1 in 2021, and the changes to the Guidance Note on the procedure to convene a meeting show the inconsistency in the ICSI’s interpretation of the same secretarial standard.

Furthermore, it is important to note that the procedure for convening a Board meeting under the Companies Act, 1956 (“**1956 Act**”) and the related secretarial standard was different from the present Act and SS1. Paragraph 1.1 of the SS1 under the 1956 Act provided that:

“Unless the Articles provide otherwise, any Director of a company may, and the Manager or Secretary on the requisition of a Director should, at any time, summon a Meeting of the Board.”

Accordingly, it is important to note that the requirement to consult the chairman to convene a Board meeting has been added under the SS1 (under the Act).

Consequently, it can be argued that, in case a director wants to summon a Board meeting, the director needs to request the CS to convene the meeting and the CS is further required to

consult with the chairman prior to convening the meeting.

Powers of the chairman in case of consultation by the CS.

Paragraph 1.1.1. of SS1 provides that whenever a requisition is received from a director to summon a meeting, then where the company has a CS, the CS shall convene the meeting in consultation with the chairman. If the chairman is not available (either the company has no chairman or if he is not available to be consulted) then the CS shall consult the company's managing director or in his absence, the whole-time director, if any.

We are of the view that the CS is obligated, as per Paragraph 1.1.1. of SS1, to consult the chairman/managing director/whole-time director (as the case may be) only to take instructions on whether or not a Board meeting is to be convened. Thus, the word "consultation" likely means that the CS has to consult with the chairman (at the chairman's convenience/availability) to convene the meeting, and no other meaning should be conferred to the said term.

A question arises in relation to the power of the chairman when consulted by the CS - whether the chairman has the power to delete, modify and/or add agenda items proposed by the director summoning the meeting or whether the chairman has the power to refuse convening of such meeting?

The Act or SS1 does not confer any power on the chairman to delete, modify and/or add agenda items proposed by a director, especially when such director has summoned a meeting of the Board. Any other interpretation will defeat the power enshrined in the SS1 to a member of the Board to summon a meeting to consider the items that he has specified in the agenda items.

Further, the Guidance Note read with the SS1 also deals with the situation in case the chairman refuses to convene the meeting requisitioned by a director. Paragraph 2 on page 11 of the Guidance Note mentions the course of action upon refusal by the chairman to convene the meeting as requisitioned, as follows:

“Upon consultation by the Company Secretary or the person authorised by the Board in this behalf, if the Chairman/Managing Director/Whole-time Director, as the case may be, refuses to convene the Meeting as requisitioned, the Company Secretary or the person authorised by the Board in this behalf, should act in accordance with the provisions of the Articles in this regard.

In case the Articles are silent, the Company Secretary or the person authorised by the Board in this behalf cannot convene a Meeting requisitioned by the Director and he should communicate the same to the Director concerned. In any case, the Director may, on his own, convene a Meeting.”

As per the abovementioned paragraph, in case the chairman refuses to convene the meeting as requisitioned, the director has the right to still proceed and convene the meeting. Therefore, as per Paragraph 2 of page 11 of the Guidance Note, even if the chairman refuses to convene a meeting, the meeting can still be convened directly by the concerned director who had

requested for the meeting.

CONCLUSION

In conclusion, every director of a company has the power to summon a Board meeting. However, the meeting itself would need to be convened by the CS (or any other person identified) and it is mandatory for the CS to consult with the chairman or in his absence managing director or whole-time director. The chairman does not have any power to delete, modify and/or add agenda items proposed for the meeting. The meeting will need to be convened, irrespective of the chairman's refusal to convene such meeting.

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