Appointment And Removal Of Company Directors In Bangladesh And The United Kingdom: Convergence And Diversity

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1. Introduction

It is a trite principle of law that a company being "a person in abstraction" (artificial legal person) cannot manage or direct its own affairs—to run its functions a company thus must depend upon the agency of humans.[1] Of such agency of humans, the directors hold the most important position relating to the administration and management of the company. Roughly put, they are the officers of the company who are responsible for managing the company under the authority and capacity that law and their constitutional document give to them. In fact, the directors are the persons with the authority of making the decisions as to the operation of the company on a day to day basis, for the benefit of the shareholders. As a matter of fact, the provision relating to the appointment and removal of the directors thus comes to be a common part of the company law.

In Bangladesh, the appointment and removal of the directors are governed generally by the provisions of sections 90-115 of the Companies Act of 1994. On the other hand, the law of the United Kingdom (UK) concerning the appointment and removal of the directors are mainly contained in the provisions of section 154-169 of the Companies Act of 2006. Because of bearing the common law background, the law of Bangladesh in this particular field is also proved generally to be prone to the principles of English Law. Thus, there are many rules relating to the appointment and removal of the directors (such as, the qualification and disqualification of directors, the requirement of keeping of the registers for the directors, etc.) that are common to the Companies Act of both the countries. However, a comparative study of the company law of these two countries will reveal that the law of UK differs in some points from that of Bangladesh.

Of such differences, the most notable are that while UK law includes both artificial person and natural person to be appointed as director, Bangladesh law permits only natural person as director. In case of removal of directors, the difference lies on the requirements of resolution—the UK law allows the removal of directors by way of ordinary resolution, while the law of Bangladesh requires extraordinary resolution. Another difference is that UK Law provides two types of register named as public

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[1] Andres Chan and David C Donald, Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, The UK and The USA (Cambridge University Press, 2010) 312.

and private register, but in Bangladesh law there is no such classification of public and private register. In what follows, this article contains a detailed discussion on the point of divergence and convergence between the respective law of the UK and Bangladesh. In so doing, the article will proceed with an overview of the general principles of appointment and removal of directors, and the scrutiny of the provisions of the relevant statues. And finally, some major recommendation will be offered to reduce the gravity of divergence between the laws of these two countries.

2. General Principles of Appointment and Removal of Directors

In general, director may be defined as an individual who directs, controls, or manages the affairs of the company. The directors of the company collectively are referred to as the "board of directors" or "board". Appointment of a Director is not only a crucial administrative requirement, but is also a procedural requirement that has to be fulfilled by every company. Company directors are appointed by the shareholders of a limited company and must be registered and listed as a company director at Companies House. It is common for shareholders and directors to be the same people in smaller companies. To run the affairs of the company, certain important decisions, e.g. to change the company's name have to be made by the shareholders at a General Meeting. However, the directors are entrusted with the power of making most of the decisions of the company. Seen as such, the shareholders and directors have two completely different roles in a company. The same person can however be both a director and a shareholder, and this is usually the case in private companies. On the other hand, a director need not be a shareholder or vice versa. The shareholders (also called members) own the company and the directors manage it. Unless the articles of association say so (and most do not) a director does not need to be a shareholder and a shareholder has no right to be a director.[2]

Unless laid down in the Articles, there are no specific qualifications required in order to be appointed as a director. Generally, minor cannot be a director but age limit can vary in different laws. No educational or other qualifications are required in order to become director of the company, whether public or private. The only condition is that a body corporate, firms or associates cannot alone become a director. Only individual can be a director of a company because the office of a director is office of responsibility, accountability and position of trust.

In case of number of directors, generally every private company has to appoint at

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[2] The separation in law between directors and shareholders can cause confusion in private companies. If two or three people set up a company together they often see themselves as 'partners' in the business. That relationship is often represented in a company by them all being both directors and shareholders. The problem with this is that company law requires some decisions to be made by the directors in board meetings and others to be made by the shareholders in general meetings. To complicate matters further, some decisions have to be made by the directors, but only with the shareholders' consent. Whether a particular decision has to be made by the board meeting or the general meeting, or both, depends on the provisions of the Companies Act and/or the company's articles of association.

least one director. Public companies must have at least two. Generally any law does not proscribe any maximum number of directors for public company. Maximum number of directors in case of private company shall be as specified by the articles. No approval is required in case of any increase in number. The first directors of the company are appointed by the company's documents of incorporation. Thereafter, they are appointed in accordance with the provisions of the company's Articles of Association. The Articles may permit new directors to be appointed either by the shareholders in general meeting or by the other directors, or both. The Articles will also govern the length of directors' appointments and the basis on which they must retire and seek re-appointment. Where shareholders are appointed either as directors or managers, their roles need to be so clearly distinguished that it becomes where, they are represent all shareholders as a director, and where they represent the interest of the others as a shareholder or manager of the company.

Generally Companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company. Usually, a director now has to notify Companies House of two addresses: service address and usual residential address. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies.

The most common method of removing a Director of a company is either through voluntary resignation or by rotation. Where a company decides to remove one or some of its Directors, whether or not they are employees of the company, the company must serve a special notice of the removal on all the Directors of the company including the Director that is proposed to be removed. "Special notice" must be given of the resolution to remove a director. The resolution is not effective unless notice of the intention to move it has been given to the company with a minimum time before the meeting at which it is moved. The company must then give notice of the resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, advertise in an appropriate newspaper. The ability to remove a director by ordinary resolution cannot be excluded by the company's Articles. However, it can in practice be avoided if the Articles contain a clause which confers enhanced voting rights on the director who is being removed, provided he or she is also a shareholder. A Director can be removed by an ordinary resolution of the general meeting after a special notice has been given, before the expiry of his term of office. However, this is not applicable to Directors appointed by proportional representation or the Directors appointed by the Central Government. The Director that is proposed to be removed is in turn entitled to make written representations concerning the circumstances of his proposed removal.

3. The Appointment and Removal of Directors under the Law of Bangladesh and UK

3.1 The Appointment and Removal of Directors under the Law of Bangladesh: The Companies Act, 1994

3.1.1 Appointment of Directors: Section 2(1) (F) of the Companies Act, 1994 defines the term 'director'. According to this section, "director" includes any person occupying the position of director by whatever name called. The directors of a company are entrusted by law with the management of the business of the company. The principle of separation of ownership and management underlies this provision. However, since companies are usually closely held in Bangladesh, most of the directors are also substantial shareholders. This can and often does result in holders of less than 10% of the shares being left out in the cold, and discourages small investors from investing in shares.

Generally, in a public company or a private company subsidiary of a public company, two-thirds of the total numbers of Directors are appointed by the shareholders and the remaining one-third is appointed in accordance with the manner prescribed in Articles failing which, the remaining one-third of the Directors must be appointed by the shareholders. The Articles of a public company or a private company subsidiary of a public company may provide for the retirement of all the Directors at every AGM. In a private company, which is not a subsidiary of a public company, the Articles can prescribe the manner of appointment of any or all the Directors. In case the Articles are silent, the Directors must be appointed by the shareholders. The Companies Act also permits the Articles to provide for the appointment of two-thirds of the Directors according to the principle of proportional representation, if so adopted by the company in question.

Section 90 makes it obligatory for every public company, and all private companies that are subsidiaries of a public company, to have a minimum of three directors. It requires a private company to have at least two directors, and provides that only individual may be appointed as director. This Act also requires that only an individual can now be appointed a director. This removes the complaint that the appointment of bodies corporate as directors was undesirable. The methods of appointing the Directors of a company are usually dictated by the provisions of the Articles of Association of each company. The specific qualities that a Director must possess, though generally common, are dictated by the peculiarities of the industry in which such a company operates.

The first Directors of a company are appointed by the subscribers to the Memorandum and Articles of Association of the company at the time of its incorporation. Subsequent directorship appointments are undertaken by the Shareholders of the company at the company's annual general meeting(s). The shareholders also undertake the re-election and removal of a Director or Directors at their Annual General Meeting. In case of new company when articles have not yet made, the subscribers of the memorandum shall be deemed to be the directors of the

company. Section 91 (1) (a) provides that 'the subscribers of the memorandum shall be deemed to be the directors of the company until the first director are appointed.' The names of the first directors are contained in the articles. When the articles of association of a company are prepared the names of the first directors are included therein. Reg. 69 of Schedule 1 provides that 'the number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association. Section 91 provides that the subscribers to the memorandum of association shall be deemed to be the directors of the company until the first directors are appointed. Other directors are to be elected by the members in general meeting or in the case of a casual vacancy to be appointed by the board but so that the new appointee retires at the meeting in which the outgoing director was to retire. At least one third of the directors must be such that they are required to retire by rotation at any time. The Act however leaves the determination of the number of directors to the company's discretion. In relation to the subsequent appointments to the position of directors, these will typically be appointed by the members of the company. Section 92(1) (b) states 'the directors of the company shall be elected by the members from among their number in general meeting'. In respect of re-appointment and replacement of directors, Section 91 does not make it clear whether the appointment of directors in general meeting can be done by an ordinary resolution. But section 106 provides that the company may appoint a director in place of another by ordinary resolution, although the removal of his predecessor must be done by an extra-ordinary resolution.

Article 84 of the Schedule 1 regulations provide that subject to the provisions of sections 90 and 91 of the Companies Act, the company may from time to time in general meeting increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office. The Companies Act does not prescribe any qualifications for Directors of any company. A Bangladeshi company may, therefore, in its Articles, stipulate qualifications for Directors. The Companies Act does, however, limit the specified share qualification of Directors which can be prescribed by a public company or a private company that is a subsidiary of a public company. To be appointed as a director of a company, a person must satisfy the following conditions contained in the Companies Act 1994. The person must:

- ✓ Consent in writing to the appointment (s.93)
- ✓ Be a natural person (s.90)
- ✓ Not be a minor (s.94)
- ✓ Not be disqualified from being a director (s.94)

It appears that all kind of person cannot be appointed as a Director of a company. Persons who are insolvent or bankrupt, persons who are fraudulent, persons under the age of 18 years old, persons of unsound mind, Directors that have been absent from Board of Directors meetings for a consecutive period of six months, and persons of like characteristic, cannot be appointed as a Director of a company. In

order to be eligible for appointment as a director, the person must not be disqualified from holding the office of director. Disqualification is dealt with in more detail in Section 94. Section 94 of The Companies Act 1994 negatively stipulates the eligibility requirement for becoming a director by providing certain disqualifications. In summary, the main grounds of disqualifications are:

- ✓ Being unsound, or
- ✓ Being undischarged insolvent, or
- ✓ he has applied to be adjudicated as an insolvent and his application is pending; or
- ✓ he has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call; or
- ✓ he is a minor.

Apart from these grounds, a company may, however, by articles provide for additional grounds for disqualification. This section should thus be read with section 108 which provides that the office of a director shall be vacated in certain circumstances (discussed below under the head of vacancy of the office).[3]

The provisions relating to the restrictions on the appointment of directors are contained in sections 92 and 93 of the Act. According to section 92, a person shall not be capable of being appointed a director of a company by the articles, and shall not be named as director in any prospectus issued by or on behalf of the company unless before the registration of the articles or the publication of the prospectus. It also requires that he has signed and filed with the registrar a consent in writing to act as such director and a contract in writing to take from the company and pay for the qualification shares if he has not already taken and paid for the shares and filed an affidavit to the effect that shares not less than qualification shares are registered in his name. There is a further requirement that the applicant shall file with the Registrar a list of the persons who have consented to become directors of the company, on an application for registration of the memorandum and articles of a company. In addition, section 93 requires that every person proposed as a candidate for the office of director shall sign and file with the company his consent in writing to act as a director, if appointed, and shall not act as a director of company unless he has, within thirty days of his appointment, signed and filed with the Registrar his consent in writing to act as director. According to section 98, the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification, provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such a director has shown to be invalid.

The members of a company elect the directors of a company from among their number in the general meeting. There are no further rules about the election of

[3] M Zahir, *Company and Securities laws* (The University Press Limited, 2005) 64.

directors in the Act. However, recent SEC rules have required that institutional shareholders having at least 5% of shares hold a seat on the board. This provision may have the same effect as a cumulative voting rule. Regulation 57 of the Schedule I Regulations to the Act of 1994 provides that at any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands7 unless a, poll is demanded before or at the declaration the result of the show of hands according to the provisions of section 85 of the Act.

The Act makes it void for the articles of the company or any contract with the company to make any provision indemnifying any director, manager or officer against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or trust. Moreover, the Act provides for restrictions regarding the making of any loans, guarantee or security by a company in connection with a loan made to a third party where any director of the company is also a director or managing agent of the third party. Exceptions are made, among others, in the case of a banking company or a private company not being a subsidiary of a public company, or a holding company in relation to its subsidiary, and if the loan is sanctioned by the board of directors of the lending/guarantor company and approved by the general meeting and in the balance sheet there is a specific mention of the loan. However, in no case shall the loan exceed 50% of the paid up value of the shares held by such director in his own name. A fine and imprisonment are prescribed as penalties for contravention of these provisions, and a loss of directorship may also result. However, experience would appear to show that these are more honoured in the breach than observance.

The term managing director has been defined in this Act as a person entrusted with the main powers of management of a company under a contract with the company, or any decision of the general meeting or Board of the company or by the provisions of its Memorandum or Articles, which powers he would otherwise have been unable to exercise. The appointment of managing directors is regulated for the first time in the Act. In the case of public companies, a person cannot be appointed as a managing director if he is the managing director of another company. Even then such appointment requires the consent of the company in general meeting. The government, however, is empowered to relax this prohibition if it is satisfied that the companies should for their proper working be operated as a single unit and have a common managing director. The term of office of a managing director cannot exceed five years at a time.

3.1.2 Register of Directors: Under the Companies Act of 1994, the companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company during business hours. Any contravention to it results in a fine not exceeding Tk. 1,000. These fines cannot be considered to be a sufficient deterrent to such conflicts of interest.

The law requires the the company shall send to the Registrar a return in the

prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register (a) in the case of the particulars specified in sub-section (1), within a period of fourteen days from the appointment of the first directors of the company; (b) in the case of any change in such particulars, within a period of fourteen days from the day change takes place.

Again, the Companies Act requires the register shall be open to the inspection of any member of the company without charge and of any person on payment of ten taka or such less sum as the company may impose for each inspection. If any inspection required under this section is refused or if default is made in complying with sub-section (1) or (2) of this section, the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine of five hundred taka. In the case of any such refusal, the Court, on application made by the person to whom inspection has been refused and upon notice to the company, may by order, direct an immediate inspection of the register.

3.2.3 Removal of Director: Under the Companies Act of Bangladesh, a director of a company can be removed- (a) by passing a resolution, and (b) by the order of the court. Section 106 of the Companies Act 1994 empowers the company to remove a director by extraordinary resolution before the expiry of his period of office. In this respect, Section, 106(1) states that the company may by extraordinary resolution remove any share-holder director before the expiration of his period of office and may by, ordinary resolution appoint another person in his stead: and the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. Therefore, this section does not apply to contractual appointees, including those nominated managing agents, banks under a loan agreement etc., so long as the latter do not exceed two thirds of the board and are not subject to the compulsory rule of retirement by rotation.

Section 106 establishes one of the most important principles of company law: in general though the shareholders have no power to interfere with day to day management of affairs of the company by the directors yet they retain the ultimate control.[4] To remove any director or to appoint somebody in his place at the meeting at which he is removed by an extraordinary resolution, a Special notice is required to be served to the members not less than fourteen days before the meeting. On receipt of such notice, the company will immediately send a copy thereof to the director concerned. He shall be entitled to be heard before passing the resolution on the meeting.

If a director becomes disqualified by law or by the articles from continuing to be director, he automatically vacates office. S. 108 laid down the circumstances under which a director will automatically vacate his office. On an application to the court for prevention of oppression and mismanagement the court may terminate or set

[4] Ibid. 74.

aside or modify any agreement between the company and the managing director, or any other director or manager. The director so removed is entitled to claim compensation or damages for branch of contract[5]. A vacancy created by the removal of a director as aforesaid can be filled up at the meeting at which he is removed provided special notice of the proposed appointment was also given. The director so appointed shall hold office till the date the director removed would otherwise have hold office. If the vacancy is not filled, it shall be filled up as casual vacancy except that the director removed shall not be re-appointed.

Director's right to make representation: He may make any representation in writing and the copy of such representation may be sent by the company to every member. Where the copy of the representation is not sent to the members, in that case the director concerned may require the representation to be read at the meeting. And if the director is aggrieved because no copy of such representation was sent to the members or no fact of such representation was read out to the board meeting then he may go to the Court.

Resignation: The Companies Act is silent with respect to resignation of Directors. There is no provision in The Companies Act 1994 regarding resignation of director. In section 111, there is however an indication regarding resignation. Section 111 (3) states as (3) "No payment shall be made to a managing or other director in pursuance of sub-section (1) in the following cases namely:- "(a) where the director resigns his office in view of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing director, managing agent, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation"

However, in a majority of cases, the Articles provide for Directors to resign. Even in cases where the Articles are silent, there is no absolute bar on Director's resigning, which becomes effective upon submission of such resignation letter and the filing of the necessary form for such resignation with the Registrar of Companies (whether or not the Board formally accepts the same, unless the Articles provide otherwise). The filing of such resignation related form with Registrar of Companies is an obligation to be discharged by the company in question.

Casual Vacancy: A casual vacancy on the board of directors is one which occurs otherwise than by a director's term of office expiring. Regulation 85 of the Schedule I Regulations relates to the law relating to casual vacancy occurring on the board of directors. According to this provision, any casual vacancy occurring on the board of directors may be filled up by the directors but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director. However, this article does not contain the additional provision in section 91 (e) of the Act that the person so appointed shall be a person qualified to be elected a director. It appears

[5] *Companies Act 1994*, Section 111.

that this provision is consistent with the requirements of section 97 which requires a director to obtain qualification shares. A co-optee director should therefore obtain qualification shares within two months after his appointment. Section 97 also requires a director appointed under Article 86 to obtain qualification shares within two months after the appointment.[6]

Apart from this, there will be a casual vacancy if a director dies or resigns or is removed or becomes disqualified from holding office. Article 87 in the First Schedule applies to remove any director before the expiration of his period of office, and the Act provides that the company may by extraordinary resolution remove a director and may by an ordinary resolution appoint another person in his stead; the person appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Vacation of Office: When a director becomes disqualified by law or by the articles from continuing to be a director, he automatically vacates his office. Section 108 along with Regulation 78 of Schedule 1 provide for the provisions of vacation of office of directors. It states that the office of a director shall become vacant if:

- ✓ he fails to obtain within the time specified in section 97 (1) or at any time thereafter ceases to hold, the qualification shares, if any, necessary for his appointment; or
- ✓ he is found to be of unsound mind by a competent court; or
- ✓ he is adjudged an insolvent; or
- ✓ he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or
- ✓ he or any firm of which he is a partner or any private company of which he is a director, without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or
- ✓ he absents himself from three consecutive meeting of the directors or from all meetings of the directors for a continuous period of three months, whichever is the longer, without leave of absent from the Board of Directors; or
- ✓ he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 103; or

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[6] Article 86 of the First Schedule empowers the directors, from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting (the annual general meeting) but shall be eligible for election by the company at that meeting as an additional director.

- ✓ he is removed by extraordinary resolution.[7]
- ✓ he makes contract with the company without disclosing his interest in the contract.[8]
- ✓ he is concerned or participates in the profits of any contract with the company
- ✓ he is punishable with imprisonment for a term exceeding six months.

In addition, Sub-section (2) of section 108 provides that nothing in this section shall preclude a company from providing by its articles that the office of a director shall be vacated on grounds additional to those specified in the section.

3.2: The Appointment and Removal of Directors under the Law of UK: The Companies Act 2006

3.2.1 Appointment of Director

The Companies Act 2006 streamlined the procedures enabling the appointment, resignation and removal of directors set out in previous UK Companies Acts and Table A provisions. Statute now just requires every company to have at least one director (a public limited company needing at least two), that director has to be an actual human being and not another company and not be under the age of 16.[9]

In UK, A company may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director[10]. The Model Articles (for companies registered after 1.10.2009) provide that the minimum number shall be one director. For existing companies with only corporate directors there was a grace period until 1st October 2010 for them to appoint a natural person. According to main principle B.2[11] of the UK Corporate Governance Code, there should be 'a formal, rigorous and transparent procedure' for the appointment of new directors. Generally, any individual can hold the position of Director, subject to the exceptions set out below:

- o Subject to any provision in the company's articles, any person can be a director unless they have been disqualified from so acting under the Company Directors Disqualification Act 1986 or by being an undischarged bankrupt.
- o There is no maximum age limit, however sec157 CA2006 imposes a minimum age of 16 years. Sec159 CA 2006 states that the directorship ceases where a company has an under-age director on the implementation date (1st October 2008) and the necessary changes must be made.

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[7] Ibid. s 106

[8] Ibid. s 105

[9] *Companies Act 2006*, ss 154-157 (UK).

[10] Ibid. s 155.

[11] Principle B 2 of The UK Corporate Governance Code states as- "Companies should establish a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration.

- There are no statutory limitations as to nationality or residence, etc. It would be possible to include these in a company's articles, but this is very unusual.
- The articles may impose a share qualification, but this is unusual in modern companies' articles. If a company has such a provision in its articles, the shares must be acquired within two months of appointment. The first directors are appointed by the subscribers to the Memorandum and may be named in the Articles. Subsequent appointments are made in accordance with a company's Articles, usually by the members at a general meeting. The directors themselves may fill casual vacancies or make additional appointments up to the maximum permitted by the Articles. Directors so appointed may hold office only until the next general meeting when they must stand for re-election by the members. On each new appointment the company must ensure a 'notice of appointment', signed by the director concerned and either an existing director or the company secretary, is filed at Companies House.

Subsequent directors are appointed in accordance with the company's articles. The Model Articles (for companies registered after 1.10.2009) prescribe that: Any person willing to be appointed by a director, and permitted by law to do so can be appointed by ordinary resolution of a general meeting or by resolution of the directors.[12] Table A, (for companies registered pre-1.10.2009 provides that the general meeting may appoint directors. The directors may appoint a director under Article 79 of Table A, but such an appointee holds office only until the next AGM.[13]

By the Section 161(1) of the Companies Act 2006, in a public limited company, separate resolutions are required for each director, unless a resolution to appoint two or more persons by single resolution has been agreed by the meeting without any vote cast against it. The companies Act 2006 itself says little about the means of appointing the directors, leaving this to the articles of association. Its main concern is to give publicity to those who are appointed rather than to regulate the appointment process. On initial registration the company must send to the registrar of companies the particulars of the first directors (section 12) with their signed written consents to act. Thereafter, there must be sent particulars of any changes with signed consent to act by new directors.[14]

Initial directors are appointed by the 'subscribers to the memorandum' as named on the Companies House form IN01 (Application to Register a Company) when the company is formed. They automatically take office on the date of incorporation[15]. Their names and other details should be entered in the register of directors once the company is formed[16]. The articles of association will determine the method of

[12] Model Articles Article 17 (UK).
[13] Ibid. Article 78.
[14] *Companies Act 2006*, Section 167 (UK).
[15] *Companies Act 2006*, s 16 (6).
[16] Ibid. s 162.

appointment of subsequent directors and should be the first place to affirm correct procedure. The two methods specifically given in Article 17 of the new model articles (the default articles for private companies registered after 1 October 2009) are appointment by:

- the members at a general meeting via an ordinary resolution

or

- the board of directors.

Companies registered before 1 October 2007 that retain the original Table A articles need to have directors appointment by members at a general meeting. Article 78 does allow appointment by directors but that appointee only holds office until confirmed by the members at the next AGM. Revised Table A provisions (for companies registered between 1st October 2007 and 30 September 2009) along with the new model articles. Otherwise, there is no restriction as to who is appointed so long as that person is not:

- a convict
- is insane
- an undischarged bankrupt,
- been convicted of wrongful or fraudulent trading, or
- has been previously disqualified from being a director in the UK or abroad.

In the UK, disqualification of the directors is determined under the Company Directors Disqualification Act 1986 and their name being placed on the Disqualified Directors Register. If they are disqualified in by any means, and the company still wants them as a director then the Courts permission is needed.

The new model articles require the person to be "willing to act" as director but Section167 (2b) Companies Act 2006 goes further demanding "consent by that person, to act in that capacity" be sent to Companies House. Directors have to abide by a number of duties which are set out in sec.171-177 Companies Act 2006, and include duties such as to 'promote the success of the company', and 'exercise reasonable care, skill and diligence'. Other responsibilities which directors have include responsibility for notifying Companies House of certain changes. e.g. to registered office, appointment of directors etc., and for registering the annual return and accounts.

In respect of the appointment of directors, the Act requires neither that directors be elected by the shareholders in general meeting nor that they submit themselves periodically to re-election by the shareholders. This may often be the case, though it is far from universal practice. However, if it is the case, then it will come as a consequence of the provisions of the company's articles, not to the Act's requirements. Equally, there is nothing to prevent articles from providing that the directors can be appointed by a particular class of shareholders, rather than the shareholders as a whole, by debenture holders or indeed by third parties. The Act

provides that each appointment in a public company shall be voted on individually[17] unless the meeting shall agree *nem con* that two or more shall be included in a single resolution. However, there are often provisions in the company's articles (as to notice to be given by the shareholders to the company of their proposed candidates etc.) which make it difficult for shareholders, if they are so minded, to put up candidates against the board's nominees. Thus the crucial decision for the shareholders in public companies is normally whether to accept the board's nominees for election at the annual general meeting and whether subsequently to exercise their removal rights.

Unless the article so provide, directors need not be members of the company. At one time, it was customary so to provide but now the possibility of a complete separation of shareholders and director sis recognized and the model articles no longer provide for a share qualification. Of course, it is common for directors of public companies to become shareholders, often in a major way under a share option or other incentive scheme, but even in these cases being a shareholder is not a formal condition of being a director.

3.2.2 Register of Director

Under the UK Company law, any appointment must be notified to Companies House on form AP01 and the company's own register of directors must be completed to show the director's details. As of 1 October 2009, the 2006 Act requires that a service address be included for directors on the company's register of directors. Residential address details have to be kept on a separate register but this is not open to the public. In UK, since 1st October 2009 a director now has to notify Companies House of two addresses: (a) service address, and (b) usual residential address.

Thus, every company must keep separate registers of directors service addresses and their residential addresses as part of their statutory registers. The public has a right to inspect the former but not the latter. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies. For many directors the service address and residential address are the same. but if the Company has premises, an office, shop etc, this address will often be used as the service address. The address can just be stated as 'The registered office of the company. However, both register are open to inspection by members of the public and so the public can obtain information about the directors either from companies' house or from the companies registered office. This is a crucial provision, enabling people to know who controls what might otherwise appear to be faceless companies and facilitating the enforcement to which directors are subject. whether by creditors, the public authorities or others.

In the UK, the scope of the information of violence (arising as a result of threats. or actual infliction) by protestors on the persons or property of the directors of

[17] *Companies Act 2006*, Section 160.

companies carrying on lawful activities to which the protestor objected on the public registers has been reduced. The company's public register have no longer to contain the director's usual residential address but only a service address (which might be the company's registered address), though the company must maintain a register of the director's residential addresses which is not open to public inspection. Moreover, the company is prohibited from disclosing, except in limited circumstances, the residential address of a director or former director.[18] Similarly, whilst the company must give to the registrar the information which is contained in both its public and non-public registers, the registrar must omit this 'protected information' from the registrar public register and not otherwise disclose it, except in limited circumstances (Ss.240,242).[19]

The UK law requires a company must, within the period of 14 days from (a) a person becoming or ceasing to be a director, or (b) the occurrence of any change in the particulars contained in its register of directors or its register of directors' residential addresses, give notice to the registrar of the change and of the date on which it occurred. In the same way UK law requires the register must be open to the inspection—(a) of any member of the company without charge, and (b) of any other person on payment of such fee as may be prescribed. If default is made in complying with subsection (1), (2) or (3) or if default is made for 14 days in complying with subsection (4), or if an inspection required under subsection (5) is refused, an offence is committed by— (a) the company, and (b) every officer of the company who is in default. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

In the case of a refusal of inspection of the register, the court may by order compel an immediate inspection of it. Section 243 CA 2006 provides that an officer of a company can apply to Companies House to prevent the disclosure of address to credit reference agencies. The Companies (Disclosure of Address) Regulations 2009 set out the requirements for obtaining a restriction on disclosure of address. The individual making the application must consider that there is a serious risk that he, or a person who lives with him/her, will be subjected to violence or intimidation as a result of the activities of at least one of the companies which s/he is or was a director. An application is made on form SR04, available from Companies House, which must be submitted with a written statement of the grounds for making the application and a fee of £100.

3.2.3 Removal of Director

The accountability of the directors depends upon the shareholders' potentials of influencing the policy-decisions of the company. As such, accountability of the

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[18] Sections 163,165,241.

[19] Paul L Davies, Gower and Davies' *Principles of Modern Company Law* (Sweet and Maxwell, 8th ed, 2008) 379 nn 14-10.

directors to the shareholders is obviously enhanced, if shareholders can influence directly the choice of those who sit on the board. Company law does little to enhance shareholders' control over the appointment process, which is regulated predominantly by the company's articles of association. As far as company law is concerned, it would not be a breach of any mandatory rule for the articles to provide that none of the directors should be required to stand for re-election and that the existing directors, again without shareholder sanction, should choose any replacements for directors who resigned or were removed. In other words, shareholders could be wholly written out of the appointment process. In practice, such extreme cases rare, though for reasons that reflect market rather than legal constrains: large companies might find it difficult to sell their shares to institutional investors on basis of such articles. This fact of life is reflected in the CA whose 'best practice' provision is that "all directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.[20]

The UK company law paid close attention to the removal of directors before the expiration of their period of office not only under s.168 Companies Act 2006 (by ordinary resolution at a general meeting with Special Notice of at least 28 days) but in both the 'model articles' and the previously used 'Table A'. In UK, Directors can be removed from office:

1. under sec.168 of Companies Act 2006 by ordinary resolution;
2. under provisions in the articles of association (for example, provisions in the 'Model Articles' if registered from 1.10.2009, or 'Table A' for earlier companies);
3. if disqualified from acting.

Removal by Ordinary resolution: Under s.168 of The Companies Act 2006, a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him. Under Section 168 (2) of Companies Act 2006, special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed. This section is not to be taken (a) as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or (b) as derogating from any power to remove a director that may exist apart from this section.[21]

This expressly applies notwithstanding anything to the contrary in any agreement between the company and the director (s.168). The articles may provide additional grounds for the removal of directors, the most common being a request from fellow directors. In comparative terms, this is a very strong provision. It means that the notion of a term of office for a director has little meaning. Subject to the points made

[20] Paul L Davies, Gower and Davies, above n 19, 389 nn 14-18.

[21] *Companies Act 2006*, Section 168 (5).

below, any director can be removed by an ordinary resolution of the general meeting under the following provisions of the Companies Act 2006.

The special notice provisions are set out in Sec.312 of Companies Act 2006. This provides that the resolution is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved. The company must then give notice of the resolution at the same time and in the same manner as it gives notice of the meeting (or, if that is not practicable, must advertise in an appropriate newspaper). The ability to remove a director by ordinary resolution cannot be excluded by the articles.[22] It can in practice be avoided by inserting in the articles a provision usually known as a **Bushell v. Faith clause**. Such a clause confers enhanced voting rights on the director who is being removed (provided he or she is also a shareholder).

Typical wording is: "Every director of the company has the following rights in the event of a poll being duly demanded at any general meeting: (a) if the poll is so demanded on a resolution to remove that director from office, to [3] votes for each share held by her/him; and (b) if the poll is so demanded on a resolution to delete or amend the provisions of this article, to [3] votes for each share held by her/him." However, it is of importance to note that this clause can only protect a director who is also a shareholder in the company, and the above wording will have to be modified to meet the circumstances of each case.

Removal under the articles: The Model Articles are the default provisions for companies incorporated on or after 1 October 2009. However, companies are free to adopt, vary or exclude some or all of the Model Articles, subject to the provisions of the 2006 Act. The articles may in fact provides that director shall be appointed for three years at a time and things may be carefully arranged so that no more than one third of the board comes up for election in any one year. But these provisions cannot be relied upon because the shareholders may intervene at any time to secure removal. It means also that there is little point in the board securing the appointment of a director over the vigorous opposition of the shareholders, since this may simply provoke them to remove those of whom they disapprove.

Article 18 of Model Articles provide that a person ceases to be a director as soon as-

a) that person ceases to be a director by virtue of any provision of the Companies Act 2006 or is prohibited from being a director by law;
b) a bankruptcy order is made against that person;
c) a composition is made with that person's creditors generally in satisfaction of that person's debts;
d) a registered medical practitioner who is treating that person gives a written opinion to the company stating that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months;

[22] Ibid. s 168(1).

e) by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have;
f) notification is received by the company from the director that the director is resigning from office, and such resignation has taken effect in accordance with its terms.

Table A, article 81 provides that the office of a director shall be vacated if

a) he ceases to be a director by virtue of any provision of the Act or he becomes prohibited by law from being a director; or
b) (b) he becomes bankrupt or makes any arrangement or composition with his creditors generally; or
c) he is, or may be, suffering from mental disorder and either -
   (i) he is admitted to hospital in pursuance of an application for admission or treatment under the Mental Health Act 1983 or, in Scotland, an application for admission under the Mental Health (Scotland) Act 1960, or
   (ii) an order is made by a court having jurisdiction (whether in the United Kingdom or elsewhere) in matters concerning mental disorder for his detention or for the appointment of a receiver, curator bonis or other person to exercise powers with respect to his property or affairs; or
d) he resigns his office by notice to the company; or

e) he shall for more than six consecutive months have been absent without permission of the directors from meetings of the directors held during that period and the directors resolve that his office be vacated.

Other grounds could be added to the articles and/or provisions inserted to make it easier to remove a director.

Disqualification: Under the Company Directors Disqualification Act 1986, a court may make a disqualification order prohibiting the person from acting as a director of a company, or being involved in the management of any company, for the period of the disqualification. It is of importance to not that if the director is removed from office as a director, this will not usually affect the director's position (if he/she has one) as a shareholder in the company. This is often a relevant consideration in private companies, where often a director is also a shareholder. In most circumstances the only solution is for there to be negotiations for the purchase of the ex-directors shares.

In some circumstances, the removal of the director may be grounds for petition under Companies Act 2006, sec994 (the unfairly prejudicial conduct provision) under which the court may order the remaining shareholders (or indeed, The Company itself) to buy the ex-directors shares. Some companies' articles contain a clause that a shareholder who ceases to be a director is deemed to have given the company a transfer notice in respect of his or her shares, so that the shares can, in

effect, be compulsorily acquired. There are two qualifications to the powers contained in s.168 which need to be noted: the courts has authorized provisions in the articles which provide that indirect way around the section, at least in relation to private companies; and the section itself preserves certain rights for directors upon removal, notably their right to compensation for breach of contract.

Director's right on termination: The successful operation of the section requires some pretty stringent conditions to be met, even where the articles contain no provisions as to weighted voting rights. Special notice has to be given of any resolution to remove a director (and to appoint someone else instead, if that is proposed), this means the proposer must give 28 days' notice to the company of the intention to propose the resolution.[23] The company must supply a copy to the director, who is entitled to be heard at the meeting.[24] Further, the director may require the company to circulate any representations which that person whishes to make (s.169 (3). The object of these restrictions is to prevent a director from being deprived of an office of profit on a snap vote and without having had a full opportunity of stating the contrary case.

Section 168 (5) (a) contains a more serious restraint on the members' powers of dismissal which provides that the section shall not deprive a director of any claim for compensation or damages payable in respect of the termination. This provision applies to both the termination of directorship as such and of "any appointment terminating with that as director". Thus compensation for termination of the executive director's service contract is included where, as is invariably the case, both directorship and service contract are terminated at the same time. In fact, the continuation of the service contract is often made contradictional on the holding of the directorship, so that the service the service contract terminates automatically upon cessation of the directorship.[25]

Resignation of directors: Unless there is a provision in the director's service contract requiring the director to give a period of notice, a director may resign at any time by notice to the company. Ideally, the notice of resignation should be in writing, but this is not specifically required. Both Table A and the Model Articles contain provisions regarding resignation of directors. On receipt of the resignation, the company must: (1) notify Companies House on form TM01 (2) record the resignation in its register of directors.

The Model Articles (for companies registered from 1.10.2009) or Table A (for companies registered before 1.10.2009) have specific provisions regarding the resignation of directors. Table A and the model articles both stipulate that the board should receive "notification". It does not state that the notification needs to be in writing, but this would support the entry made in the register of directors (and of members if shares are then sold or transferred).

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[23] Ibid. Section 168 (2), 312.
[24] Ibid. S. 169 (1),(2).
[25] Paul L Davies, Gower and Davies, above n 19, 391-392 nn 14-19.

4. Divergences and convergences between the Law of Bangladesh and the UK
The major point of the divergence and convergences between the law of the UK and Bangladesh can be summed up as follows:

- In case of minimum number of directors, the company law of Bangladesh requires at least three directors for both public company and any private company which is subsidiary of a public company. It also requires two directors for private company. But the law of UK requires two directors for public company and one director for private company. In addition, UK law mentions that a company must have at least one director who is a natural person.
- There is no statutory provision regarding maximum number of directors. The laws of both the countries converge here.
- Under the Bangladesh law, only natural person can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director. Though UK law requires at least one director who is a natural person but the significant difference is that a company or corporation in the UK may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director.
- Under both the law of UK and Bangladesh, every person proposed as a candidate for the office of the director is required to signify the consent by writing for acting as a director.
- In respect of the minimum age requirement, the UK law states that to be a director one must be at least 16 years of age. On the other hand, the Companies Act of Bangladesh requires that he will not be a minor. However, both laws do not mention the maximum age limit of Directors.
- The provisions relating to register of directors under both laws are almost similar but only difference is that the UK law categorically states the details particulars what to be mentioned in the form of register and provides separate register as public and private register. In case of inspection, the company law of Bangladesh mentions minimum time frame of when the register may be open. It also qualifies the right to inspection by making it subject to provision of "reasonable restriction." On the other hand, the UK law is silent about it and states that the public register must be open to the inspection.
- The UK law categorically states the details particulars that are to be mentioned in the form of register[26] but the law of Bangladesh does not mention so.

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[26] *Companies Act 2006*, Sections 163,164,166.

- In case of removal of directors, Section 106 of the Companies Act 1994 does not apply to contractual appointees, including those nominated managing agents, banks under a loan agreement etc. By contrast, the UK law applies to the all kind of directors as Section 168 states that "...........notwithstanding anything in any agreement between it and him."
- Under the law of Bangladesh, director can be removed by extraordinary resolution but in the UK, any director can be removed by ordinary resolution.
- The UK law expressly states that in case of removal of a director under this section (s.168) or to appoint somebody instead of a director so removed at the meeting at which he is removed, a special notice is required. In this respect, the Companies Act of Bangladesh requires extra ordinary resolution, and thus it impliedly requires a special notice to be served to the members not less than fourteen days before the meeting.
- The law of Bangladesh prohibits re-appointing a removed director. The UK law says nothing about it.
- In section 169, the UK law says about director's right to protest against removal and its procedure. But in Bangladesh, the law does not provide any specific provision relating to director's right to protest against removal, though such right may be construed by implication.
- The company law of Bangladesh implies a condition that managing director not to be appointed for more than five years at a time. The UK law says nothing about it.

5. Recommendation

- Recommendation 1: The Companies Act should provide specific age limit (both minimum and maximum) for directors.
- Recommendation 2: Like that of the Companies Act of the UK, the law of Bangladesh should provide provision by allowing the artificial legal person (co-existing with the presence of natural person) to be the director of the company.
- Recommendation 3: The Companies Act of Bangladesh should be specific on the minimum and maximum number of directors in case of both public and private companies. It is recommended that like UK, the law of Bangladesh should require minimum two directors for public company and one director for private company.
- Recommendation 4: Like UK, the Bangladesh law should mention categorically the detail particulars of directors that are to be mentioned in the register.
- Recommendation 5: The UK law provides for both public and private

register. Usually, public register is open for all and private register (for example- residential address of directors) may be disclosed in any special circumstances. Like UK law, the Companies Act of Bangladesh should provide provisions for both public and private register. In this respect, it is recommended that the law of Bangladesh should repeal the provision of 'reasonable restriction'.

- Recommendation 7: In the case of a refusal of inspection of the register, any contravention to law results in a fine not exceeding Tk. 1,000. These fines cannot be considered to be a sufficient deterrent to such conflicts of interest. So it is recommended to increase the amount of such money.
- Recommendation 8: Like the law of UK, the Company law of Bangladesh should provide a provision for removing the directors by ordinary resolution. Like UK law[27], it should also provide provision so that company can remove all kind of directors including contractual directors.
- Recommendation 9: the Companies Act of Bangladesh should provide specific provision on the Directors' right on termination.
- Recommendation 10: The Law of Bangladesh should provide specific provision regarding resignation of directors.
- Recommendation 11: There is a difference between the provision of article 87 and that of section 106: it applies to all directors while section 106 which deals with the removal of directors speaks only of removal of shareholder directors by an extraordinary resolution. It is obvious that the draftsmen, while drafting the new Act, omitted to make corresponding changes in the Schedule 1 Regulation. Neither the article nor the section refers to the filling up of a casual vacancy. It is not clear however whether this means that the members in general meeting can appoint an additional director whether or not that has the effect of filling up a casual vacancy. Section 91 (1) (b) is clear in its terms that the members may elect a director from among themselves in a general meeting.

6. Conclusion

In the management and administration of a company, the directors or board of directors are found to occupy a significant position. It appears that the role of the boards of directors and the directors individually must play a key role to strengthen and provide support for better corporate governance practices. Because of such gravity of importance of the office of the directors, the company law should usually make clear and detailed provisions relating to the appointment and removal of the directors, accommodating all the well-kwon principles of corporate governance. Seen in this light, the Companies Act of both Bangladesh and UK comes to satisfy the standard of providing procedural and substantive rules relating to the office of the directors in details. However, a comparative look at the respective provision of

[27] Ibid. S.168 (1).

the Companies Act of these two countries shows that there are some notable differences, albeit they converge in the point of fundamental rules concerning the appointment and removal of the directors.

In both Bangladesh and UK, directors may be appointed under an authority in the memorandum or articles. It is possible to give that authority to one or more members or to someone who is not a member, or appointed by the board while filling up a casual vacancy or appointed by the company in general meeting. The term of office is normally fixed by the memorandum or articles. This may provide for the appointment of named individuals with provision to cover the eventuality of the appointee's death or onset of legal incapacity occurring while in office. Directors have to file written consent for acting as such. Subsequent directors can be appointed by the company in general meeting in the exercise of their inherent power to direct the control of the company, unless that power is excluded by the contract embodied in the articles, either expressly or by clear implication.[28] In respect of the minimum age requirement, the UK law states that to be a director one must be at least 16 years of age. On the other hand, the Companies Act of Bangladesh requires that he will not be a minor. However, both laws do not mention the maximum age limit of Directors.

In case of minimum number of directors, the company law of Bangladesh requires at least three directors for both public company and any private company which is subsidiary of a public company. It also requires two directors for private company. But the law of UK requires two directors for public company and one director for private company. In addition, UK law mentions that a company must have at least one director who is a natural person. It thus appears that under the Bangladesh law, only natural person can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director. Though UK law requires at least one director who is a natural person but the significant difference is that a company or corporation in the UK may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director. However, there is no statutory provision regarding maximum number of directors. The laws of both the countries converge here. The provisions relating to register of directors under both laws are almost similar but only difference is that the UK law categorically states the details particulars what to be mentioned in the form of register and provides separate register as public and private register. In case of

[28] In Bangladesh, however, the articles typically make provision for the appointment of directors. Articles commonly provide for the power to appoint directors to be exercised by the general meeting. An article empowering the directors to appoint additional directors does not necessarily deprive the general meeting of its inherent power to appoint additional directors up to the maximum number prescribed by the articles, sometimes with the qualification that the board may make appointments to fill casual vacancies, or as appointments of additional directors up to the maximum allowed by the articles.

inspection, the company law of Bangladesh mentions minimum time frame of when the register may be open. It also qualifies the right to inspection by making it subject to provision of "reasonable restriction." On the other hand, the UK law is silent about it and states that the public register must be open to the inspection. However, the UK law categorically states the details particulars that are to be mentioned in the form of register[29] but the law of Bangladesh does not mention so. Under the law of Bangladesh, director can be removed by extraordinary resolution but in the UK, any director can be removed by ordinary resolution.

Compared to the Companies Act of Bangladesh, the company law of UK seems to offer a more functional regime of regulating the appointment and removal of the directors. In this respect, it is however of importance to note that the Companies Act of Bangladesh has been passed in nearly a couple of decades back and there has been no remarkable changes affecting the statuary regime of this Act, while the Companies Act of the UK has been enacted in 2006, and is being constantly revisited. It is thus arguable that the respective provisions of the Companies Act of 1994 relating to the appointment and removal of the directors should be reformed in the light of the recommendation as offered in the preceding part of this chapter.

[29] Sections 163.164,166 of CA 2006.