

DIRECTORS HAVE TO SIGN CERTIFICATES? WHY? WHEN? WHAT?

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Introduction

Among the key policies of the *Companies Act 1997* is to require transparency and accountability.

The logic is that if activities by the company and within the company are transparent and open, shareholders will be informed, will know about those actions and will act to protect their proper interests. If directors are made accountable for their actions, it is expected that they will be more prudent and careful, knowing that the shareholders will be watching them.

So at the time of certain actions the directors are required to sign a certificate, which must be held with company records for seven years and which is available for inspection by shareholders. This identifies those directors responsible for the action, so that they cannot hide behind the excuse that it was 'a decision of the Board'. Failure to complete the certificate has extra consequences.

It is also true that in some places the *Companies Act* requires that a certificate be signed in circumstances where the signing is primarily a formal procedure without the same consequences. Such requirements are not addressed here. Examples of these are:

- secs. 13, 130 – director to certify that he or she is not disqualified from being a director;
- sec 34 – certifying a copy of the constitution;
- sec 215 – certifying financial statement

This article is written to focus attention on those actions - ones which are particularly open to abuse - which require a director who votes in favour of the action to sign a certificate acknowledging or justifying his or her vote in favour of that action.

Certificates which must be signed by directors

| Section of Act | Nature of transaction | What the certificate must state |
|----------------|---|--|
| 47 | Consideration for allotment of shares. The Board may issue shares at any time, to any person, in any number and for any consideration (ss. 43, 44) | (a) The consideration for the issue; and (b) that in his or her opinion, the consideration is fair. |

| | | |
|-----|--|--|
| 50 | Distributions. Distribution includes dividend, loan, return of capital, purchase of property, redemption or acquisition of shares, any direct or indirect transfer of money or property, incurring a debt for the benefit of a shareholder etc. | (a) That in his or her opinion, the company will, immediately thereafter, satisfy the solvency test; and (b) the grounds for that opinion. |
| 139 | Remuneration or benefit to a director. NOTE: In addition, the benefit must be recorded in the interests register. | (a) That in his or her opinion, the benefit is fair to the company; and (b) the grounds for that opinion. |
| 140 | Directors' and officers' insurance NOTE: In addition, the benefit must be recorded in the interests register. | That in his or her opinion, the cost of the insurance is fair to the company |
| 234 | Amalgamation | (a) That in his or her opinion: <input type="checkbox"/> amalgamation is in the best interests of the company; and <input type="checkbox"/> immediately thereafter, the new company will satisfy the solvency test; and (b) the grounds for that opinion. |
| 293 | Resolution in anticipation of appointment of a liquidator by special resolution of members or by the Board on the happening of an event specified in the constitution. | (a) That in his or her opinion, the company would, on appointment of a liquidator, be able to pay its debts as they become due; and (b) the grounds for that opinion. |
| 442 | Election by a pre-existing company to register, before 2 September 1998, under the <i>Companies Act 1997</i> . This was a transitional provision and is not relevant any more. | |

The manner of making the certificate

Who must sign?

In every case, it is "the directors who vote in favour" of the resolution or the transaction. In the case of amalgamation, it is the directors of each amalgamating company who vote in favour of the transaction.

This identifies those directors responsible for the action, so that they cannot hide behind the excuse that it was 'a decision of the Board'. On the other hand, it should be recognised that modern management practice strongly recommends that decisions of the Board should be unanimous, and hence a formal vote may not be taken. This is

because all directors are expected to support decisions of the Board, and it avoids any tendency to factionalise the Board. In such cases, of course, all directors would sign the certificate.

When must the certificate be signed?

In every case, the Act states that the certificate must be signed “forthwith”. This is defined (by dictionary, not by the Act) as meaning ‘immediately’ or ‘without delay’.

Thus the company secretary should have the certificate drafted and available at the meeting at which the resolution is considered.

The form of the certificate

The Act does not require the certificate to be in a prescribed form. Some examples of certificates are set out below as a guide.

Must all those required to do so sign the same form?

The Act is complied with where the directors who are required to do so either sign the same certificate or sign separate certificates in the same wording (section 438).

Keeping the certificate

All certificates given by directors under the Act within the last seven years must be kept at the registered office of the company. (For minor qualifications to this statement, see section 164).

The certificates must be made available for inspection by a shareholder or a person authorised by the shareholder, in accordance with section 217

Consequences of the certificate

Failure to complete - penalties

Each director who is required to sign but fails to do so commits an offence.

Under the specific section itself (50(5), 234(6) or 293(10)), or under section 416 in other cases, each director is liable to a fine of up to K5,000

False statement

Any person who makes a statement, or permits it to be made, knowing it to be false or misleading, commits an offence and is liable on conviction to a fine of up to K200,000.

Any person who votes in favour of the making of a statement at a meeting is deemed to have permitted it to be made! (Section 420)

Shareholder remedies

The signing of any of the certificates, without reasonable grounds existing for the opinion set out in the certificate is, by section 152, conduct that is unfairly prejudicial for the purposes of that section. This section gives wide powers to the Court, where it considers it fair to do so, to give to a disadvantaged shareholder any of a very wide range of types of relief or remedy.

Please note that whether section 152 comes into effect does not depend on whether the opinion was correct or not correct. It depends on whether the individual director had reasonable grounds for his or her opinion. In other words, the director must “do his homework”; must actually consider carefully and form a reasonable opinion.

Other remedies

All the provisions above are in addition to other consequences specific to each section. For example, section 50 authorises recovery by the company of distributions; section 139 makes a director personally liable in certain cases to repay money to the company.

The Interests Register

There are consequences also, in the case of the actions covered by sections 139 and 140, if the benefits received by directors are not immediately entered in the Interests Register of the company.

Examples of certificates

Set out below are 2 sample certificates. These must be adapted to the specific circumstances, but may be useful as a guide. The examples relate to solvency of the company (section 50) and also to directors and officers insurance (section 140).

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This is not a substitute for legal advice. Users should obtain professional advice.

XXXXX Company Limited

CERTIFICATE OF DIRECTORS REGARDING SOLVENCY

Companies Act 1997 Section 50(2)

NOTING that at the meeting of the Board of Directors of the company held on at at am/pm it was resolved:

"The Board being satisfied that the company will, immediately after the transaction, satisfy the solvency test, and in accordance with the constitution, IT WAS RESOLVED THAT a distribution be made in the following terms:
(set out the words of the resolution, giving date, amount and to whom; or modify as appropriate)

AND NOTING that the directors listed below, constituting a majority of those present, voted in favour of the resolution,

WE, the directors whose names and signatures appear below, certify that:

1. in our opinion, the company will, immediately after the distribution, satisfy the solvency test; and
2. the grounds for that opinion are:

*(set out the grounds for that opinion.
For example: On the basis of accounts as at(date).....presented to this meeting the company will, after the distribution, satisfy both the current ratio and the 'quick & acid' test of liquidity and its 'asset-to-liabilities (including contingent liabilities) ratio will be greater than one)*

Dated this day of in the year

Director:
Name (printed) Signature

Director:
Name (printed) Signature

Director:
Name (printed) Signature

(Repeat as often as required)

NOTE: This certificate must be retained with company records for 7 years (section 164)

XXXXX Company Limited

CERTIFICATE OF DIRECTORS

Companies Act section 140(6)

NOTING that at the meeting of the Board of Directors of the company held on at at am/pm it was resolved:

(set out here the words of the resolution)

AND NOTING that the directors listed below, constituting a majority of those present, voted in favour of the resolution,

WE, the directors whose names and signatures appear below, certify that in our opinion the cost of effecting the insurance is fair to the company.

Dated this day of in the year

Director:
Name (printed) Signature

Director:
Name (printed) Signature

Director:
Name (printed) Signature

(Repeat as often as required)

NOTE: This certificate must be retained with company records for 7 years (section 164)