

J.K. SHAH[®]

**TEST
SERIES**



SUGGESTED SOLUTION

CS PROFESSIONAL

Subject – Resolution Of Corporate Disputes

Topic – Chp-08 to 09

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Answer to Q1.A.

It is essential for every company to have a director & office insurance (D&O), in order to have some peace of mind.

The top reasons to buy a D&O insurance are-

1. Personal assets of directors are at risk: If a director has been accused of breaching duties, their personal assets are at risk in case they don't have any D&O insurance.
2. Defending a legal action is an expensive affair: The legal costs and expenses in litigations involving directors are usually complex and costly.
3. Investors can file a case against you: It may sound unlikely, but things can go downward. If investors believe that they have incurred losses due to mismanagement of the company, they could approach the court to seek compensation. For instance, if any action of a director results in a drop-in share price, which leads to loss to shareholders and investors, then there is a high possibility that they may bring a class-action lawsuit against the company and directors.
4. Employees can sue directors: It is not only shareholders who can file a case against the directors as even employees reach the court to challenge the decision of the directors. It is a hard reality that in today's corporate world, there has been a rise in the number of cases filed by employees, related to sexual harassment or wrongful dismissal. For example, in 2016, a sacked software engineer won case against HCL Tech. The court called his dismissal unlawful and asked the company to reinstate the petitioner with continuity of service and paid full salary along with other benefits.
5. Customers can take legal actions: In some cases, customers also reach the court against misrepresentations made in the advertisement materials and deceptive trade practices.
6. Enquiry initiated by regulatory authorities: Regulatory bodies, like SEBI, Revenue Department, etc.; can initiate enquiry against directors.
7. In case of bankruptcy or insolvency: If faced with bankruptcy, creditors can pursue legal action against directors if they think that they have not acted in their best interest.
8. Helps in attracting/retaining talent: Not having a comprehensive D&O may discourage talented employees from joining the company as they know will not be guarded against any legal case if arise in future.
9. D&O claims are not covered under any other policy: Most of the people believe that D&O claims are also covered under other liability insurance plans like professional indemnity.

(5 MARKS)

Answer to Q1.B.

- 1) Section 300 of CrPC contains adequate provisions to protect a person from being prosecuted for the same offence again.
- 2) Section 300 of CrPC cannot be definitely interpreted to mean that if a person steals a property and gets convicted of the offence of theft, he should not be prosecuted for the same offence if it arises out of another theft.

- 3) Section 300 of CrPC is unique in the sense that it requires either a conviction or acquittal as a pre-requisite for the protection to be available.
- 4) In simple words, the marginal note that “Person once convicted or acquitted not to be tried for same offence” conveys everything about the intention of the legislature.
- 5) Analysing the law laid down in section 300 of CrPC, the Kerala High Court in BHARAT PLYWOOD AND TIMBER PRODUCTS PRIVATE LIMITED AND ONR. V. REGISTRAR OF COMPANIES AND ANOR. held as follows:

“Section 300 of the CrPC provides that so long as an order of acquittal or conviction handed down by a court of competent jurisdiction stands in respect of a person charged with committing an offence, that person cannot again be tried on the same facts for the offence for which he was earlier tried or for any other offence arising there from.

Section 300 of CrPC becomes applicable when a court of competent jurisdiction had already tried the accused and that he is either acquitted or convicted. It is also necessary to note that for the first part of subsection (1) of Section 300 to apply, the prior prosecution and subsequent prosecution should be for the same offence.”

The High Court held that the principle embodied in Section 300 of CrPC is as follows:

“A person cannot be tried again for the offence for which he had already been tried or on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 221 (1) of CrPC or for which he might have been convicted under sub-section (2) of that section.”

(5 MARKS)

Answer to Q2.A.

Key differences:

- a) General Liability and Professional Liability cover different risk exposures. Only General Liability can spare your business from lawsuits over a visitor slipping and falling on your commercial property. And only Professional Liability Insurance can shield you from the high cost of alleged professional mistakes that cause a third party financial losses.
- b) Physical damages vs. financial damages. Sometimes, a General Liability policy includes Products Completed Operations Liability Insurance, a coverage that benefits construction professionals, manufacturers, retailers, and more. This coverage protects the insured from lawsuits over finished work that physically harms someone. Though this may seem to be the domain of Professional Liability, physical damage is the dividing line. Professional Liability Insurance concerns itself with lawsuits over financial losses that result from someone’s products or services.

(4 MARKS)

Answer to Q2.B.

POWERS OF THE SUPREME COURT

- 1) As per Article 132 of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in a civil or criminal or any other proceeding, if the High Court certifies under Article 134A that the case involves a

substantial question of law as to the interpretation of some provision of the constitution involved in the case.

- 2) per Article 134 of the Constitution an appeal shall lie before the Supreme Court in a criminal proceeding, from any judgment, final order or sentence, if the High Court on appeal has reversed the order of acquittal of an accused and sentenced him to death or has withdrawn for trial before for any case from any court subordinate to its authority and in such trial, if the High Court had convicted the accused and sentenced him to death or when the High Court certifies under Article 134A that it is a fit case to appeal before the Supreme Court.
- 3) The Supreme Court may, under Article 136 of the Constitution, grant in its discretion, a special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in India.
- 4) Under section 406 of CrPC, the Supreme Court is empowered to transfer, in the interests of justice, cases and appeals from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court subordinate to another High Court.

(4 MARKS)

Answer to Q2.C.

- 1) Crisis management is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. Due to the unpredictability of global events, organizations must be able to cope with the potential for drastic changes in the way they conduct business.
- 2) Crisis management often requires decisions to be made within a short time frame, and often after an event has already taken place. In order to reduce uncertainty in the event of a crisis, organizations often create a crisis management plan.
- 3) Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization or its stakeholders. The study of crisis management originated with largescale industrial and environmental disasters in the 1980s. It is considered to be the most important process in public relations.
- 4) Any business, large or small, may run into problems that may negatively impact its normal course of operations. Crises such as a fire, death of a key managerial personnel, terrorist attack, data breach, natural disasters, management disputes, litigations, and/or regulatory actions can lead to tangible and intangible costs to a company in terms of lost sales, customers, and a decrease in the firm's net income. Businesses that effectively put a business continuity plan in place in case of unforeseen contingencies can mitigate the effects of any negative event that occurs. The process of having a continuity plan in place in the event of a crisis is known as crisis management.
- 5) In order to have a business continuity plan in the aftermath of a crisis, most firms start by conducting risk analysis on their operations. Risk analysis is the process of identifying any adverse events that may occur and the likelihood of the events occurring. By running

simulations and random variables with risk models, such as scenario tables, a risk manager can assess the probability of a risk occurring in the future, the best- and worstcase outcome of any negative event, and the damage that the company would incur should the risk actually happen.

- 6) For example, a risk manager may estimate that the probability of a flood occurring within a company's area of operation is very high. The worst-case scenario of a flood will be destroying the company's computer systems and hard drives, thereby, losing pertinent data on customers, suppliers, and ongoing projects.
- 7) Once the risk manager knows what s/he is dealing with in terms of possible risks and the impact to the firm, a plan is developed by the crisis management team to contain any emergency if and when it becomes a reality. Following the example above in which a company faces a high probability of a flood damage, a back-up system for all computer systems might be created. This way, if a flood occurs that affects the company, it would still have a record of its data and work processes stored. Although business might slow down for a short period of time while the company purchases new computer equipment, business operations would not be completely halted. By having a crisis resolution in place, a company and its stakeholders can prepare and adapt well to sudden, unexpected, and adverse developments.
- 8) Crisis management is not necessarily the same thing as risk management. Unlike risk management, which involves planning for events that might occur in the future, crisis management involves reacting to negative events during and after they have occurred. An oil company for example, may have a plan in place to deal with the possibility of an oil spill, but if such a disaster actually occurs, the magnitude of the spill, the backlash of public opinion, and the cost of cleanup can vary greatly and may exceed expectations. Thus, Crisis Management is not a Choice but an indispensable component of the business organisation.

(4 MARKS)

Answer to Q2.D.

- 1) Section 424 of the Companies Act, 2013 provides that the Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.
- 2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—
 - (a) summoning and enforcing the attendance of any person and examining him on oath;

- (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;
 - (e) issuing commissions for the examination of witnesses or documents;
 - (f) dismissing a representation for default or deciding it ex parte;
 - (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
 - (h) any other matter which may be prescribed.
- 3) All proceedings or before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.
- (a) in the case of an order against a company, the registered office of the company is situate; or
 - (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.
- 4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

(4 MARKS)

Answer to Q2.E.

The importance of corporate governance in risk management is amply supported by the reasoning of the Kumar Mangalam Birla – member of the Committee on Corporate Governance to implement corporate governance in India.

Risk Management is thus an integral component of corporate governance and good management. Several large companies and financial institutions worldwide no longer exist or have been taken over precisely because they neglected the basic rules of risk management and control.

Some common risk management problems in relation to corporate governance that appeared in many financial institutions before and during the crisis according to the OECD (2009) was because:

- Risks were frequently not linked to strategy which is a key issue to ensuring that risk management has a focus on the business context;

- Risk definitions are often poorly expressed. Better risk definitions (context, event, consequence) are contrary to a lot of current thinking in risk management which has shorten risk descriptions to the smallest number of words possible;
- Organizations weren't always in a position to develop intelligent responses to risks;
- Boards didn't take stakeholders and guardians into account in detailing responses to risk;
- Important parts of the value chain were outsourced to others.

Thus, there is a growing realization that corporate governance has an impact on enterprise risk management.

(4 MARKS)

Answer to Q2.F.

If the Company has officer-in-default specified under Sec 2(60) of the Companies Act, 2013 other Directors cannot be held liable.

In PEPSICO INDIA HOLDINGS PRIVATE LIMITED V. FOOD INSPECTOR AND ANR., the Supreme Court held that it is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company.

Therefore, the Director is right in contending that though he is one of the Director of the Company, he was not in-charge of operation of the Company and hence cannot be prosecuted in the absence of any specific allegations regarding his role in the management of the Company.

(4 MARKS)

Answer to Q3.A.

Crisis can either be self-inflicted or caused by external forces. Examples of external forces that could affect an organization's operations include natural disasters, security breaches, or false information about a company that hurts its reputation. Self-inflicted crises are caused within the organization, such as when an employeesmokes in an environment with hazardous chemicals, opens or downloads questionable files on an office laptop, offers poor customer service that goes viral online, or an accounting department cooking the books. Internal crisis can be managed, mitigated, or avoided if a company enforces strict compliance guidelines and protocols regarding ethics, policies, rules, and regulations among employees.

TYPES OF CRISIS-

(1) Natural Crisis: Disturbances in the environment and nature lead to natural crisis. Such events are generally beyond the control of human beings. Tornadoes, Earthquakes, Hurricanes, Landslides, Tsunamis, Flood, Drought all result in natural disaster.

(2) Technological Crisis: Technological crisis arises as a result of failure in technology. Problems in the overall systems lead to technological crisis. Breakdown of machines, corrupted software and so on give rise to technological crisis.

(3) Confrontation Crisis:

a) Confrontation crises arise when employees fight amongst themselves. Individuals do not agree to each other and eventually depend on non-productive acts like boycotts, strikes for indefinite periods and so on.

b) In such a type of crisis, employees disobey superiors; give them ultimatums and force them to accept their demands.

c) Internal disputes, ineffective communication and lack of coordination give rise to confrontation crisis.

(4) Crisis of Malevolence:

a) Organizations face crisis of malevolence when some notorious employees take the help of criminal activities and extreme steps to fulfill their demands.

b) Acts like kidnapping company's officials, false rumours all lead to crisis of malevolence.

(5) Crisis of Organizational Misdeeds

a) Crises of organizational misdeeds arise when management takes certain decisions knowing the harmful consequences of the same towards the stakeholders and external parties.

b) In such cases, superiors ignore the after effects of strategies and implement the same for quick results. Crisis of organizational misdeeds can be further classified into following three types:

i) **Crisis of Skewed Management Values:** Crisis of Skewed Management Values arises when management supports short term growth and ignores broader issues.

ii) **Crisis of Deception:** Organizations face crisis of deception when management purposely tampers data and information. Management makes fake promises and wrong commitments to the customers. Communicating wrong information about the organization and products lead to crisis of deception.

iii) **Crisis of Management Misconduct:** Organizations face crisis of management misconduct when management indulges in deliberate acts of illegality like accepting bribes, passing on confidential information and so on.

(6) Crisis due to Workplace Violence: Such a type of crisis arises when employees are indulged in violent acts such as beating employees, superiors in the office premises itself.

(7) Crisis due to Rumours: Spreading false rumours about the organization and brand lead to crisis. Employees must not spread anything which would tarnish the image of their organization.

- (8) **Bankruptcy**: A crisis also arises when organizations fail to pay its creditors and other parties. Lack of fund leads to crisis.
- (9) **Crisis Due to Natural Factors**: Disturbances in environment and nature such as hurricanes, volcanoes, storms, floods; droughts, earthquakes etc result in crisis.
- (10) **Sudden Crisis**: As the name suggests, such situations arise all of a sudden and on an extremely short notice. Managers do not get warning signals and such a situation is in most cases beyond any one's control.
- (11) **Smouldering Crisis**: Neglecting minor issues in the beginning lead to smouldering crisis later. Managers often can foresee crisis but they should not ignore the same and wait for someone else to take action. Warn the employees immediately to avoid such a situation.

(8 MARKS)

Answer to Q3.B.

a) Criminal Proceeding Vis-A-Vis Civil Proceeding

A civil proceeding is concerned with a civil right, whether with reference to common law or a law created by any statute.

A civil proceeding is distinguished from a criminal proceeding by the fact that if the criminal proceeding is taken to a logical conclusion and if the accused is found guilty, there may be imposition of a sentence of fine or imprisonment or both including a capital punishment, if the statute so provides. In civil proceeding there may be an award of compensation and damages.

A criminal proceeding includes all proceedings which are capable of being instituted under ordinary criminal law of land and is not confined to proceedings under CrPC.

Prosecution of an offence under the Companies Act, 2013 or for that matter those under the Foreign Exchange Management Act, 1999 or the Securities and Exchange Board of India Act, 1992 or the Securities Contracts (Regulation) Act, 1956 and other statutes are criminal proceedings and the complaints filed are criminal cases and, subject to provisions of such statutes, CrPC will apply to regulate the trial of offences under such laws.

Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given.

b) Public Prosecutors and Company Prosecutors

Criminal cases are prosecuted by the State representing the public and the society. Public prosecutors carry out the prosecution in such cases. The role of a prosecutor lies in placing before the court all the material and evidences, whether it helps the accused or otherwise.

Section 24(7) of CrPC states that a person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor only if he has been in practice as an

advocate for not less than 7 years. Section 24(8) of CrPC states that the Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than 10 years as a Special Public Prosecutor.

When a Registrar or any other person duly authorized /entitled, to file a complaint for any offence under the erstwhile Companies Act, 1956, files a complaint, the prosecution is conducted in the trial court by a special category of officers called Company Prosecutors.

The company prosecutors have all the powers and privileges of public prosecutors appointed by State Government under section 24 of CrPC. Under the newly inserted section 443 of the Companies Act, 2013 it has been provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may appoint generally, or for any case, or in any case, or for any specified class of cases in any local area, one or more persons, as company prosecutors for the conduct of prosecutions arising out of this act and the persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Code.

c) Summons Case and Warrant Case

As per section 2 (w) of CrPC, 'summons-case' means a case relating to an offence, and not being a warrant case. This implies that summons cases are cases relating to offences provided they are not warrant cases.

As per section 2 (x) of CrPC, 'Warrant- case' means a case relating to an offence punishable with death, imprisonment for a term exceeding two years. In other words if the minimum punishment prescribed by any substantive law for an offence is an imprisonment for a term exceeding two years, the offence will be dealt with as a warrant case.

The basis of the classification is the seriousness of the offence to which the case relates. A warrant case relates to a serious offence while a summons case relates to a comparatively less serious offence. It is for the same reason that the trial-procedure prescribed for a warrant case is very elaborate when compared to that prescribed for a summons case.

As per CrPC in a summons case a summons is to be issued to the accused in the first instance and in a warrant case a warrant of arrest is normally to be issued for the arrest of the accused. CrPC gives discretion to the Judicial Officer to depart from this general rule if the circumstances so demand in a particular case.

(8 MARKS)

