Management Members Information Pack

Information on Cinenova

Cinenova is Europe's foremost distributor of independent films and videos directed by women worldwide. Cinenova was formed in 1991 following a funding crisis that lead to a semi-merger between the two former women's film distributors in London, Cinema of Women (COW) and Circles.

Cinenova distributes its work into two main arenas

- The education and training sector, including colleges, universities, social services, health promotion units and any body that may use AV material in a training context.
- Semi-theatrically into screening venues such as the Institute of Contemporary Arts in London and the Regional Film Theatres and any other independent screening venue. The venues are limited as currently none of Cinenova's titles are certificated.

Cinenova is currently revenue funded by the London Film and Video Agency and receives project funding from other bodies including the British Film Institute, The Arts Council, and The Foundation for Sport and the Arts. The level of revenue funding has been substantially cut since the formation of Cinenova with staff having had to cut working hours in order for the company to keep operating.

Organisation Structure

Staffing Structure: 2 part time (28 hours/week) co-workers
Office Hours: Monday - Friday 10.00-6.00
Office Closure: Two weeks at Christmas/New Year.

Procedure for Joining Management

The total number of management committee members Cinenova allowed at any one time according to the articles of memorandum is 12.

Management members can resign at any time during the year

Before a new management member is invited to join the board they must be nominated by either a member (Cinenova film maker) or an existing management member and a committee meeting. The person will then be invited to attend the following MCM both to learn more about Cinenova and also to present their case to the board for wanting to join the committee including the skills and experience they can bring to the committee. They will then be elected on to the board at a quorate management meeting by a majority vote.

Meetings 6 weekly meetings on Wednesday nights at 6.45pm at 113 Roman Road.

Attendance All members are expected to attend meetings. Apologies must be given if a management member cannot attend a meeting. Please note, **if a member of management misses three consecutive meetings with no good reason or without prior notice** she may be asked to stand down.

LEGAL DUTIES OF BOARD MEMBERS

All board members owe certain duties to their organisation. What follows is a description of the legal duties of company directors. Most of these obligations also apply to trustees and to committee members.

- **Good faith:** A board member's primary duty is to act in good faith in the best interests of the organisation and its objects as a whole. It is wrong to use powers simply to benefit certain individuals or only some of the members of the organisation.

- **Care, diligence and skill:** Board members must exercise the same degree of care which ordinary people might be expected to take in the circumstances on their own behalf, although they need exercise no greater skill than may reasonably be expected from persons of like knowledge and experience. The duties of a board member are continuous, but contact with the organisation tends to be of an intermittent nature at periodic board meetings.

  Although board members are not bound to attend all such meetings, attendance should be as frequent as possible and members need to be reasonably informed at all times.

  Certain duties must be performed by officials, and board members who have made sensible arrangements authorising others to act on their behalf are entitled to trust those officials to perform such duties honestly. However, from time to time they should take steps to ensure that the delegated authority is being competently used.

- **Honesty:** Board members must exercise their powers for proper purposes only: they must not have personal interests which conflict with those of the organisation.

  Where a board member is directly or indirectly interested in a contract or proposed contract with the organisation, the member is legally bound by the Companies Acts to declare the nature of the interest at a board meeting.

  It is generally prohibited for an organisation to make a loan to any director, and substantial property contracts by the organisation which involve a board member must be approved by the members of the organisation in General Meeting.

All organisation property in the hands of board members or under their control must be applied for the purposes of the organisation. To apply it otherwise would be to misapply it. It is clearly improper for any board member, or indeed any member of a non-profit distributing charity, to make any secret profits arising out of a transaction of the organisation or to accept any financial inducements.

Not exceeding powers: Board members are under a duty to see that they do not act beyond the powers of the organisation. They must ensure that they do not exceed the powers afforded them by the Memorandum of Association or constitution. And they must not act illegally.

Interests of employees: The Companies Act 1985 requires that directors have a duty to have regard to the interests of the employees of the organisation in general.

Financial responsibility: Board members have a duty to ensure that the organisation operates within the limits of its financial resources, actual and expected. Despite the limited liability of an organisation, board members can incur personal liability for its debts and obligations in certain circumstances.

The most important aspect of this is where a board member permits an organisation to continue to operate where he knew or ought to have known that there was no reasonable prospect of the organisation meeting its debts and avoiding going into insolvent liquidation. This is known as "wrongful trading". In such a situation a board member is obliged to take such steps as would be expected of a "reasonably diligent" person. When "wrongful trading" can be established, a board member can be held personally liable for any debts left unpaid after the liquidation of the organisation and can also suffer disqualification from acting as a director in any other company.

It follows that board members must be extremely scrupulous in the attention they pay to the organisation's present and future liquidity and in recording that attention. They must insist on regular meetings of directors and on accurate financial information concerning the organisation being regularly made available to them.

Any person not being a board member whose "directions or instructions the board members of the organisation are accustomed to follow" may be treated as a "shadow director" and may incur similar personal liability.

Compliance with the Companies Acts: Board members also have a duty to ensure that the organisation complies with the requirements of the Companies Acts.

Board members normally look to the organisation's legal advisers and to the Company Secretary to ensure that the organisation is complying with the requirements of the Companies Act. Board members should therefore obtain the appropriate guidelines from the legal advisers and ensure that the Company Secretary has sufficient knowledge of such matters.

An organisation's constitution generally says little about how the board should run the organisation. In general, it states the objectives of the organisation in the broadest terms and provides rules for the appointment and periodic re-election of the board. The actual responsibility for the running of the organisation is in the hands of the board.

This lack of specific legal requirement allows boards the flexibility to act according to current needs. However, *in the absence of other direction, boards must take appropriate steps to ensure the good management of their organisations.*

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3. THE COMPANY AND ITS MANAGEMENT COMMITTEE

As was mentioned in *Chapter 1*, the Management Committee are the company's Directors. For the sake of brevity, Management Committee members will be referred to as 'Directors' throughout this chapter.

Once elected, (or co-opted, if the Articles of Association provide for this), all Directors must provide details of themselves which will be lodged with the Registrar of Companies at Companies House. These details, along with the Memorandum and Articles of Association are open to public inspection. The form which each Director must complete is G288 (see *Appendix 3* for an example).

The company must keep a Register of Directors and Company Secretaries at its Registered Office and send details of all changes in Directors as they occur. So, if Directors resign, retire or are newly elected or co-opted, Companies House must be notified on the appropriate forms: see *Chapter 4, page 19* for more details.

1. The rights of Directors

Obviously, all Directors have the right to be notified of and attend Committee meetings and members' General Meetings. They also have the following specific rights given to them by the Act and a number of decisions in Court cases:

- to have one vote each in Committee meetings (unless the Articles of Association say otherwise);
- to inspect, if they wish, the company's books, accounts and Registers;
- to be paid their reasonable out-of-pocket expenses for attending to or carrying out company business, if the Articles of Association allow for this.

Companies that are registered charities are not permitted to pay salaries to their Directors for being Directors, nor are these companies allowed to appoint their employees as Directors, except in very limited cases. However, there is nothing to prevent a non-charitable company from paying salaries to its Directors in addition to out-of-pocket expenses, if the Articles of Association allow this.

Management committee meetings

Although some Articles of Association may set out detailed rules for how Management Committee meetings should be conducted (as opposed to members' General Meetings), most will leave it up to the Committee to decide when, where and how they meet.

The Articles can give some details as to, for example:

- how often the Committee should meet (e.g. at least once a month);
- who chairs the meetings, and who takes minutes;
- what a quorum will be (that is, the minimum number who need to be present to make it a valid meeting);
- what majority vote is needed for decisions and whether the chair has a casting vote if there is a deadlock;
- whether the Committee can elect sub-committees or working parties;
- whether the Committee can co-opt additional members or replace members who resign.

If the Articles do not give any details, then the Committee should decide by means of Standing Orders what procedures it will follow.

General Meetings

The Act lays down special rules for calling and conducting General Meetings of the company. More information on this is contained in *Chapter 4, pages 16-17.*

2. The Director's duty of care

This duty is to use reasonable skill and care in the management of the company's business. The standard of skill is not very high - it is the amount of skill which could reasonably be expected from a person with that Director's knowledge and experience. In other words a Director does not have to be a business or financial expert, or even to be experienced in business affairs. Directors should take the same care in managing the company's affairs as reasonable people would take in their own affairs. However, if the company is a charity then these duties are more strict - see *Chapter 6* on Charitable Companies.

Here are some examples of failure to take reasonable care, which the law calls 'negligence'. They apply to all directors whether or not the company is a charity:

- signing a cheque or authorising a payment from the company without asking why payment is being made;
- discovering that another director has been dishonest or negligent, but not reporting this to the members of the company;
- allowing one director to take complete control of a part of the company's business without passing a proper resolution to delegate those powers.

In addition to their duty of care, Directors also have a duty not to act beyond the objects of the company or the powers given them by the Articles of Association. Management Committees must therefore make sure that all decisions and transactions they enter into on the company's behalf are:

- within the scope of the objects set out in the Memorandum of Association; and
- within their powers as set out in the Articles of Association and in any resolutions the company has passed or authority the members have given them.

It used to be the case, before the 1989 Act, that actions which Directors took which were outside a Company's objects or powers (or "ultra rises"), were legally ineffective, and thus unforceable by or against third parties dealing with the company. Since the 1989 Act, this law has been abolished but, any member of a company can still sue each Director personally for any loss the company suffers as a result of an ultra vires act'. Examples of 'ultra vires' act are:

- if the Memorandum of Association says that a company can only undertake certain activities and the Directors arrange for it to carry on different activities;
- if the Directors carry out a decision in a way not permitted by the Articles of Association: for example, without getting a confirming vote from the members in General Meeting.

However the members cannot sue the Directors for an 'ultra vires' act if it was done in order to fulfill a previous legal obligation of the company. 'Ultra vires' acts can be ratified afterwards by a **special resolution** passed by the company in a general meeting *(see page 18)*. If a Director makes improper use of the company's assets and it suffers a loss as a result, then it can sue that Director to recover the loss. This could happen, for example, if a Director allows company property to be used for purposes which are not permitted by the Memorandum of Association, and the property is lost or damaged.

Finally, two further duties are placed on company Directors by the Act. First, they must have proper audited accounts drawn up each year. Second, they must present a written Annual Report each year which gives a 'fair review' of the development of the Company's business. It should also include the names of the persons who have been Directors during the year, a description of the company's principal activities, any changes in these activities or in its assets, and planned future developments.

3. The 'fiduciary' duties of Directors

The law sets out a number of duties to act in good faith (called 'fiduciary' duties) which Directors owe to their company.

The **first** fiduciary duty is to act in the interests of the members of the company generally, and also to have regard for the interests of its employees. This duty is not owed to individual members or employees but to each as a group. It can sometimes to lead to conflicts - for example between the interests of members and employees or between different groups of each.

The law is unfortunately rather vague as to what Directors are meant to do in these circumstances. One view is that the duty *to act* in the interests of members but only to *have regard* to the interests of employees means that the interests of members can over-ride those of employees. Thus, in the case of a conflict, as long as the Directors have considered their employees' interests, they fulfill their duty even if they decide not to give them effect, provided this is in the members' interests.

One exception to this is that Directors can provide superannuation, redundancy or other benefits for past and present employees if the company is dissolved or changes ownership. They can do this even if it conflicts with the Memorandum and Articles or the interests of the members.

The **second** fiduciary duty is that a Director must not use her/his powers for her/his own benefit or personal gain. If s/he does so, s/he must pay back to the company any profit s/he has made out of the abuse of power. If a Director has unintentionally made a personal profit from a transaction, then the full membership voting unanimously at a General Meeting can allow her/him to keep that profit. However, they can only do this if, in the notice which calls the General Meeting, the Director concerned makes a full statement of the type and amount of the profit made.

The **third** fiduciary duty is that a Director must tell the Management Committee at the earliest possible opportunity if s/he is directly or indirectly **interested in** any contract or transaction which the company proposes to enter. Being 'interested' in a contract or transaction means that the Director or a person 'connected with' her/him stands to benefit financially from it. A person 'connected with' a Director is:

1. Her/his spouse, child or step-child; or

2. A company in which the Director holds at least 1/5 of the shares; or

3. A trustee of a trust whose beneficiaries include the Director or one of the persons listed in 1 or 2 above; or

4. A partner in business either with the Director or with one of the persons listed in 1, 2 or 3 above.

Failing to tell the Management Committee that s/he is 'interested' in a contract or transaction is a criminal offence for which a Director can be fined up to £2,000 under the Act or even more if the failure is very serious. The Act says that a Director must tell the Management Committee that s/he is 'interested' in a contract or transaction at the first Committee meeting at which it is discussed. If the Director concerned had not yet become 'interested' in a contract or transaction when that meeting takes place, then s/he must tell the Committee about the interest at the next meeting after s/he obtains it.

The Articles of many companies provide that a Management Committee member who has an 'interest' in a proposed contract or transaction must not be allowed to vote in respect of it, or if s/he does vote, then her /his vote will not count.

An agreement made between the company and a Director (or a person 'connected with' her/him), to transfer a 'substantial amount' of property either to or from the company, can only be authorised by a resolution (majority vote) passed at a General Meeting. A 'substantial amount' of property means assets (other than cash) worth more than £50,000 or 10% of the company's total asset value (whichever is less) at the time the arrangement is made. However, if the assets to be transferred are worth less than £1,000, no resolution is needed, even if they represent more than 10% of the total assets.

If the agreement goes ahead without the authorising vote from the members then the company (acting through its members), can:

- in some cases cancel the contract; or
- in all cases sue the Director concerned for any resulting loss that the company suffers or any resulting gain that the Director (or the 'connected person') has made.

Loans to Directors from the company

Charitable companies are not allowed to make loans of company money to their Directors. Non-charitable companies may make such loans, but only if the Memorandum of Association actually permits this. The Act also places restrictions on loans to Directors: no one Director is allowed to have more than £5,000 in total on loan from the Company at any one time.

4. Actions against Directors

A Director who is guilty of breaches of, (that is, failing to do) the duties outlined above, can be sued in the civil Courts either:

- by the company itself; or
- by one member acting on behalf of all the members if the Director has been guilty of a breach of a fiduciary duty.

A Court action must be brought within six years after the breach of duty occurred, except where the Director is guilty of fraud, in which case there is no time limit. The Court has the power to excuse a Director from liability if s/he can prove that s/he acted honestly and reasonably at all times.

If a Director is found to have been negligent or in breach of duty, the amount s/he will have to pay is either:

- the sum s/he has gained from the breach or
- the sum the company has lost as a result of the breach or the negligence.

Also, a third party (that is, a person who is not a member or a Director of the company) can be sued with the Director, if that third party has actively helped the Director to defraud (cheat) the company or to be in breach of duty.

One important change that the 1989 Act has made is that companies can now insure their Directors and auditors against negligence and breaches of duty. But if a company does take out such insurance, it must state this in its Annual Report for the financial year in which the insurance was taken out. This means that each year it takes out the insurance, a company must state this fact in its Annual Report for that year.

5. Protection of members against unfair prejudice

As was mentioned in *Chapter 2*, the general interests of company members are protected by the Act to a certain extent. At least one member of a company can bring an action in the Courts if s/he can show that its business is being conducted in a way which is unfairly prejudicial to the interests of the members or some part of the members (including her/him). Unfairly prejudicial conduct means actions (or failures to act) which:

- are deliberately oppressive or unjust or
- seriously harm the rights or interests of the minority, even if the harm is not actually intended.

The Courts have a variety of powers to help members who prove unfair treatment in this way. The Court can:

- order the company to pay damages (compensation) to the member(s) if the harm has already been done;
- order the company or the Directors not to take any proposed harmful action;
- order the company or the Directors to take action to remedy the unfair treatment;
- authorise anyone to bring other Court actions against the company or the Directors if these are needed.

6. Directors' liability to the company's creditors

Generally speaking, Directors cannot be made liable for their company's debts. This is true even if they take on debts when they know the company is temporarily insolvent, that is, cannot pay its way at the time. They must however, have reasonable grounds to believe that the company will be able to pay those debts when they become due.

If, however, the company is liquidated (dissolved), the Court can make Directors personally responsible for all the company's debts if those Directors have been guilty of fraudulent trading. Fraudulent trading means carrying on business:

- with the intention of defrauding the company's creditors; or
- with the intention of defrauding another person's creditors; or
- for any other fraudulent purpose.

The Courts have held that Directors have been guilty of fraudulent trading when, for example, they ordered goods from suppliers knowing that the company would not be able to pay for them either when the invoices were due to be paid or within a short time afterwards. Ordinary company members can also be made liable for a company's debts in this way if they actively take part in management decisions that result in fraudulent trading.

In addition, anyone found guilty of fraudulent trading can be sent to prison for up to six months and/or fined up to £2,000. In more serious cases, where the person could be tried in the Crown Court, the prison sentence can be up to seven years and the fine unlimited.

A second way that Directors can be made personally liable for a Company's debts in a winding up is if they have been guilty of wrongful trading under the 1986 Insolvency Act. This involves carrying on business after they knew (or should have known) that the company was heading for insolvency. There does not need to be any element of fraud in this - which is why Directors should never bury their heads in the sand and hope that a potential insolvency will go away by itself. In deciding whether a Director has been guilty of wrongful trading, the Court will look at:

- the general knowledge, skill and experience that could reasonably be expected from a person carrying out the Director's functions in relation to the company; and
- that particular Director's general knowledge, skill and experience.

So it follows from this that a Director with a high degree of skill and experience in business is more at risk of being charged with wrongful trading than a person with little or no previous experience of running a company. In a recent case, two directors of a company that was already £2,000 in debt disregarded advice and warnings from their auditors and allowed the company to run up a further £90,000 of debts during a period when it was obvious that business would never improve. They were ordered to pay some £75,000 towards its debts when the company was finally liquidated.

For more information on what to do if a company gets into financial difficulties, see *Chapter 5*. In addition, Directors found guilty of fraudulent or wrongful trading can be disqualified from being Directors - see *section 8* below.

A final way in which Directors can be made personally liable for a company's debts is if they act while disqualified - also see *section 8* below

7. Directors of charitable companies

Directors of companies that are registered charities are treated by law as charity Trustees and are responsible under the Charities Act 1960 for any property which is part of the permanent endowment of the charity. More information on this is contained in *Chapter 6*.

8. People who are disqualified from being Directors

Disqualification

Under the Act, the Courts can disqualify certain people from being Directors. This is done by a 'disqualification order' which can be made if a person:

- has been convicted of a serious crime (that is, where one can be tried in the Crown Court); or
- has deliberately and persistently failed to send Annual Returns or Accounts etc. to the CRO or has been convicted of a criminal offence in connection with these things; or
- has been guilty of fraud in the winding up of a company; or
- has been the Director of two companies that both became insolvent within five years of each other;
- has been found guilty of fraudulent or wrongful trading.

In addition, the Company Directors Disqualification Act 1986 says the Court must disqualify any Director of an insolvent company whom the Court considers 'unfit' to be a Director. Being 'unfit' means that person's conduct as a Director of that or any other company makes her/him unfit to be concerned in the management of any company.

A disqualified director can be made personally liable for a company's debts if s/he becomes involved in the management of that company while disqualified. Also, anyone who helps a disqualified person to circumvent the law in this way can also be made personally liable for that company's debts, whether they are a director or not.

This legislation is aimed primarily at preventing dishonest traders from forming strings of insolvent companies which leave behind them trails of unhappy customers and unpaid creditors. However, it is wide enough to cover all Directors, including those of non-trading companies limited by guarantee.

Bankrupts

The Act also says that anyone who is an undischarged bankrupt and who becomes a founder member or a Director of a company without the Court's permission is guilty of a criminal offence. That person can be sent to prison for up to six months and/or fined up to (currently) £2,000. In more serious cases (where the person could be tried in the Crown Court), the prison sentence can be up to two years and the fine unlimited.

Minors

The Act does not place an age restriction on who can become a Director of a private company. However it is almost certainly the case that a person under 18 cannot be a Director because the law does not allow minors to be legally bound by the duties and liabilities which company law places on Directors.

9. Removing Directors

The members of a company voting by a simple majority in a General Meeting (or a greater majority if the Articles say this), can remove any Director from office. However, at least four weeks' notice of the resolution to remove the Director must be given to the Company - that is, addressed to the Secretary at the company's registered office.

The Director concerned has the right to make written 'representations' (that is, an explanation or defence) and to have these circulated to all members before the General Meeting. If it is too late to do this, then the Director can ask for the representations to be read out at the General Meeting itself.

The Director has the right to be heard at the General Meeting and to put forward any other matters in her/his defence. All these rights are contained in the Act, and are usually stated in the Articles of Association.

10. Directors and criminal law

The Act creates over 200 criminal offences for failing to comply with its requirements. Some of these are fairly obvious, as when Directors have been guilty of fraud, but others are for quite innocent technical mistakes or omissions. Most of these offences are punishable by fines which can range from up to £400 (currently) for minor offences to up to £2,000 or more (plus imprisonment in some cases) for serious ones. The company, the Secretary and each individual Director can be prosecuted and convicted, as well as salaried managers who take an active part in the Committee's decision-making.

Prosecutions under the Act can be brought either by the Director of Public Prosecutions or the Secretary of State for Trade and Industry. Depending on the type of offence, it can be tried either in the Magistrates Court for minor ('summary') offences, or in the Crown Court for the more serious ('indictable') ones.

Although on the face of it, this appears somewhat alarming, the Act specifically says that a Director and other 'Officer' will only be guilty if s/he has deliberately and persistently failed to comply with the Act. This means failing to take any steps to remedy the situation, despite requests and warnings from Companies House or the Secretary of State for Trade and Industry.

11. Retirement of Directors

The Articles of Association usually say whether or not Directors have to retire 'by rotation'. 'Retiring by rotation' means that at the first Annual General Meeting of the company, all the Directors must retire automatically. At each subsequent Annual General Meeting, one-third of the Directors will retire - usually those who have been longest in office. However, many Articles also say that a Director retiring by rotation can offer him or herself for immediate re- election. Even if the Articles do not say this, Directors retiring by rotation can still offer themselves for re-election as long as the Articles do not actually forbid it. In any case, retiring by rotation is not necessary unless the Articles say so.

Directors can, of course, retire voluntarily at any time and the Articles should explain the procedure for replacement. This is usually done by the Management Committee making co-options, but the Articles of some companies say they must call a General Meeting of all members to elect a new Director.