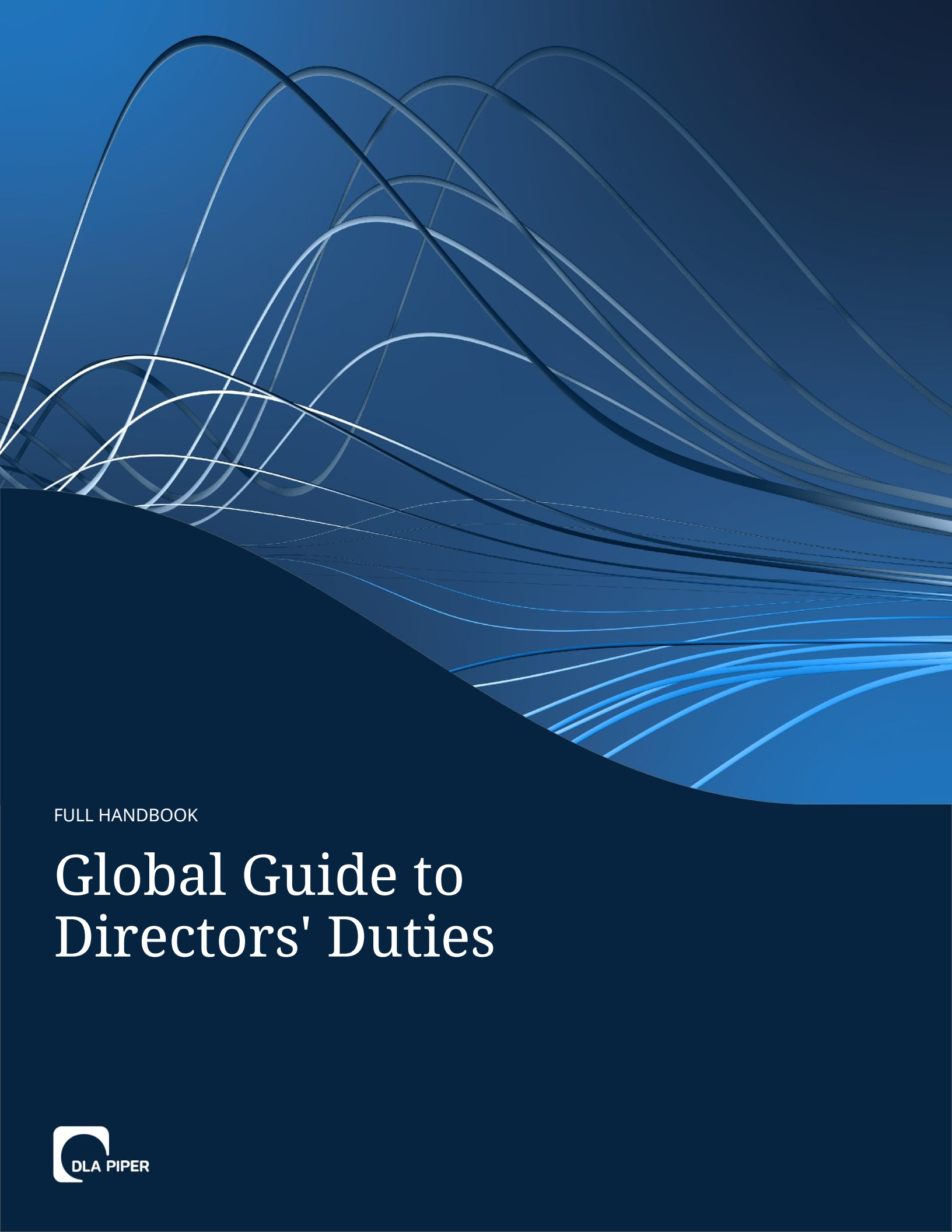




FULL HANDBOOK

Global Guide to Directors' Duties

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Introduction



Explore directors' duties around the world

Prepared by DLA Piper's experts in the field, this guide gives you an overview of directors' duties in 52 jurisdictions around the world, answering questions about the key duties, obligations and potential liabilities faced by directors in each jurisdiction.

The guide also enables you to compare several jurisdictions easily and quickly. For further information about the topics covered in the guide, please contact us.



Corporate entities

What type of company is typically used in group structures?

In Angola, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" in Angolan law. Basically, the law regards someone who manages the affairs of a company on behalf of its shareholders as a director.

What are the different types of director?

Directors validly appointed as such, through a shareholders' resolution, may be executive or non-executive.

The executive directors are responsible for the management of the affairs of the company.

The non-executive directors are responsible for the general supervision of the performance of executive directors' duties.

Eligibility

Who can be a director?

A director must be at least 18 years old. In the event of a legal person being appointed as a director, it must appoint an individual to exercise the office in their own name. The legal person must share liability with the person appointed by it.

Foreign directors must hold a work visa, ordinary visa or residency card.

Minimum / maximum number of directors

Under Angolan law there is no maximum number of directors. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

The management of private limited companies is carried out by a board of directors, composed of an odd number of members.

It may be agreed in the articles of association that the management shall be exercised by one single director when:

- The number of shareholders is only two (which can only happen in cases where the State, public companies or entities legally equivalent to the State hold the majority of the share capital).
- The share capital does not exceed an amount equivalent, in national currency, to USD50,000.00.

Appointment and removal

How are directors appointed?

Directors must be appointed by the company's shareholders (via a shareholders' general meeting or by unanimous written resolution).

A resolution appointing a director must be filed at the company's registry office.

Directors must be appointed for the period fixed in company's bylaws, which must not exceed four calendar years with re-appointment being permitted.

How are directors removed?

Any member of the board of directors may be dismissed (either with cause, or without cause) at any time by means of a resolution approved by the company's shareholders (via a shareholders' general meeting or by unanimous written resolution).

A director may also resign at any time through the issuance of a resignation letter addressed to the Chair of the board of directors, or in case of the resignation of the Chair, to the company's audit board or audit committee.

The resignation or the resolution on director's dismissal must be filed at the commercial registry.

Board / management structure

Typical management structure

Typically, the management of private limited companies is carried out by a board of directors and supervision by a supervisory board, made up of an odd number of members, elected by shareholders at a general meeting.

One of the directors is appointed as Chair of the board of directors.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's bylaws. In private companies limited by shares, the bylaws typically provide directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telematic means (provided that the company ensures the authenticity of declarations and the security of communications, registering the content of all interventions) or an unanimous written resolution.

Directors must meet at least once a month, unless otherwise provided in company's bylaws.

The validity of the resolutions of the board of directors depends on the presence of the majority of its members.

In relation to the minimum quorum, the board of directors must not approve resolutions without the absolute majority of votes of the directors present.

Authority and powers

The board of directors has exclusive and full powers to represent the company.

The powers of representation of the board of directors are performed jointly by the directors.

Acts performed by the directors, on behalf of the company and in the use of the powers conferred upon them by law, shall bind the company before third parties, irrespective of any limitations that may be established by the articles of association or by decisions of shareholders, whether published or not.

Directors shall bind the company if, by affixing their signature, they indicate that intention.

Delegation

Subject to Angolan law restrictions, and unless otherwise provided in the bylaws, the board of directors may delegate powers to one or more directors to deal with certain managing matters. However, the board retains overall responsibility for the company's operations and management.

The board of directors can also appoint attorneys to perform certain acts or categories of acts, without the need for an express contractual clause.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Angola Companies Law, pursuant to which the director:

- Must observe a duty of care towards the company, demonstrate capability, technical competence and an understanding of the company's business considered appropriate for the role, and execute its tasks with the diligence of a careful and earnest manager.
- Must observe a duty of loyalty towards the interests of the company, serving the long term collective interests of the shareholders and taking into consideration the interests of other stakeholders such as employees, clients and creditors by ensuring the sustainability of the company. As a specific realization of this duty, the directors must not pursue or develop, directly or indirectly, other activities in direct competition with the company, unless duly authorized by the general meeting of shareholders.
- Must carry out any acts deemed necessary or appropriate to achieve the corporate purpose in line with the resolutions adopted by the shareholders, the bylaws and the applicable law.
- Are responsible for drafting merger and spin-off plans, in addition to other documents required or appropriate for the full legal and economic transparency of the transaction, as well as preparing a report in case of change of the company's legal form (i.e. a change to a different type of company).
- Are responsible for performing and executing all managing acts not specifically reserved by law or bylaws to the general meeting of shareholders.
- Are responsible for, following a shareholders resolution (except an unlawful resolution or resolutions that are not compliant with the company's by-laws), taking all necessary measures to execute such resolution, as promptly as possible (namely resolutions making any amendments to the company's bylaws).

In addition, if agreed by the shareholders and set out in the company's bylaws, the directors must also decide on and implement:

- The acquisition, disposal and encumbrance of real estate of the company.
- The disposal, encumbrance and lease of the business establishment of the company.
- The subscription or acquisition of other companies' shares or the disposal and/or encumbrance of these shares.
- The establishment of subsidiaries, agencies, branches or other local forms of representation of the company.

In general, the directors are bound to manage a company in a professional and diligent way, which includes compliance with all legal, statutory and contractual requirements.

What are directors' other key obligations?

The directors are responsible for preparing the annual reports and accounts and other financial statements required by law in respect of each financial year, and must submit them to the general meeting of shareholders and supervisory board, within three months from the end of each financial year, or within five months for companies that submit consolidated accounts or that use the equity method.

The directors are also responsible of preparing and submitting a proposal for the allocation of profits and/or handling of losses to the shareholders, in respect of each financial year.

Transactions with the company

Whenever there is a conflict of interest between the company and a director, the director shall advise the Chair of the board of directors and abstain from voting on the resolution concerning that conflict.

The company may only grant loans or credit to directors, make payments on their account, guarantee obligations that they have contracted or make advances to them on account of the respective remuneration, up to the limit of the monthly amount thereof.

Contracts signed between the company and its directors, directly or through another person, shall be null and void except if they have been previously authorised by means of a decision of the board of directors, in which the director concerned may not participate, and if they have obtained the favourable opinion of the supervisory board.

Liabilities of directors

Breach of general duties

Directors are severally liable towards the company for the damages caused to the company as a result of their actions or omissions that are not compliant with their legal statutory or contractual obligations, unless they prove that their actions /omissions were not caused with intentional or negligent misconduct.

The directors may also be subject to criminal liability.

A lawsuit against the directors may be brought by:

- The company – in this case a shareholder's resolution to bring the lawsuit must be approved by the majority of the shareholders, and the lawsuit must be sought within six months from the date of such resolution.
- In the absence of a lawsuit sought by the company, one or more shareholders who jointly own, at least, 10% of the share capital may bring a liability suit against the directors to claim reparation for damages caused to the company.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property, accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

If during the course of its management the company goes bankrupt, the directors may incur in liability if the bankruptcy is declared fraudulent or culpable. The crime of fraudulent or culpable bankruptcy is punishable with a penalty of two to eight years' imprisonment.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Angolan legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Protection against liability

How can directors be protected from liability?

The board of directors or the shareholders' general meeting may declare null and void or annul defective resolutions, at the request of any director, shareholder with the right to vote or of the supervisory board, made within one year of becoming aware of the defect that serves as its basis.

The general meeting of shareholders may ratify any resolution or substitute an invalid resolution if it does not concern a matter that falls within the exclusive competence of the board of directors.

Directors shall not execute or allow to be executed resolutions of the board of directors that are null and void.

Directors' and officers' (D&O) insurance is also available. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position, and compliance obligations. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Act, not only with diligence, but also with loyalty, keeping in mind that they must act always in the interest of the company, taking into account the long-term interests of the shareholders and considering the interests of other subjects relevant to the sustainability of the company, such as its workers, customers and creditors.
- Also in a group situation, directors should keep in mind that they must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

In Australia, the most common type of company used in group structures is the proprietary company limited by shares with a constitution. This guide therefore focuses on the management of proprietary limited companies.

The Australian Securities and Investments Commission (ASIC) administers the company law and regulates the incorporation, operations, management and control of companies and imposes obligations on directors and other corporate officers.

Types of director

What is a "director"?

There is no complete definition of the term "director" in Australian company law. Basically, the law regards someone who manages the affairs of a company on behalf of its shareholders as a director (whether they are called a director or not).

What are the different types of director?

Directors validly appointed as such are known as *de jure* directors and may be executive (usually employees, with an operational/executive role) or non-executive (usually not employees) – and may also be appointed to represent a particular shareholder (a nominee director). In addition, a *de facto* director is a person who acts as though they are a director but is not validly appointed as such and a "shadow director" is a person in accordance with whose directions or instructions the directors of a company are accustomed to act. Also, an "alternate" director is a person who is appointed by a director to act in that director's place. In general, however, Australian company law does not differentiate between different types of director – all directors are subject to the same duties.

Eligibility

Who can be a director?

A director must be a natural person who is at least 18 years of age. For a proprietary company, at least one director must ordinarily reside in Australia.

Minimum / maximum number of directors

A proprietary company must have at least one director. There is no maximum. If the company's internal governing rules are set out in a constitution, the constitution may specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or, if the company's constitution allows, by the other directors. In subsidiary companies, the constitution commonly allows the parent company to appoint directors by a written resolution as sole member of the subsidiary.

Details of the appointment must be filed with ASIC. Companies must do this within 28 days of the appointment taking place, or the company will be subject to late fees. A director's date and place of birth, former names and residential address must be supplied to ASIC, and are included on the public record.

Directors are also required to confirm their identity by obtaining a unique, personal Director Identification Number which must be used for all director appointments thereafter. Directors must apply personally in order to verify their identity. The timeframe for compliance depends on the director's appointment date.

How are directors removed?

If the company has a constitution, the constitution will ordinarily provide that the shareholders may by resolution remove a director from office and may by resolution appoint a replacement. The parent company of a wholly-owned subsidiary will invariably have this power.

The constitution may confer additional powers of removal – for example, to enable the board to remove a director. If the company has a constitution, the constitution will ordinarily provide that a director may also resign at any time by giving written notice to the company.

ASIC must be notified when a director leaves office. Companies must do this within 28 days of the departure taking place, or the company will be subject to late fees. The retiring or resigning director is also permitted to notify ASIC that they have ceased to act as a director of the company.

If a director resigns and the director or the company does not notify ASIC within 28 days of resignation, the effective date of resignation will be the ASIC lodgement date. Also, a director may not resign from office, or be removed from office by the members

of a proprietary limited company, if this would leave the company with no directors (unless the company is being wound up or another director is appointed on the same day).

Board / management structure

Typical management structure

For a proprietary company that has more than one director, the board is a unitary structure made up of all the company's directors acting as a board. Broadly speaking, each director has the same obligations and accountability to the company, in that Australian law does not explicitly distinguish between executive and non-executive directors. However, the legal tests for directors' duties can involve both subjective and objective elements, so in practice the standard of care expected of each individual director may vary based on the director's office held and their specific responsibilities within the corporation, as well as the circumstances of the corporation itself.

Directors' duties are imposed on directors individually, and Australian courts will scrutinise the conduct of directors individually in assessing whether or not each individual director has fulfilled their duties. Nonetheless, generally accepted principles of good corporate governance in Australia favour the board striving to act as a high-performance team (subject to each director fulfilling their individual duties).

No 'supervisory board' is mandated in Australia, and employees and other stakeholders are not ordinarily represented at board level.

However, "ESG" and "stakeholder governance" are increasingly important topics in Australian corporate governance, and many companies and boards are increasing their level of engagement with non-shareholder stakeholders. This is in addition to the expansion of Australian employment laws regarding matters such as discrimination, sexual harassment and bullying, under which directors can face personal liability and may be required to adopt a proactive rather than reactive approach.

How are decisions made by directors?

If the company has a constitution, the constitution will ordinarily regulate the manner in which directors can make decisions. In proprietary companies, the constitution typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, meeting via technology or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice must ordinarily be given to all). Unless the constitution stipulates otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the constitution may specify otherwise.

Directors may exercise weighted voting rights at board meetings for incorporated joint ventures, depending on the terms of the constitution and other contractual terms (such as a shareholders' agreement or joint venture agreement).

Authority and powers

As far as third parties are concerned, directors may be able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (eg in the company's constitution or in internal policies and protocols). The Corporations Act 2001 (Cth) (the Act) sets out various statutory assumptions that people dealing with companies are entitled to make.

Normally, the company's constitution gives the directors wide powers to manage its business and affairs as they think fit (although if the company is a wholly-owned subsidiary, additional decision-making powers or consent requirements may be reserved to the sole member). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf, subject to any specific delegations to individual directors, or authority that can customarily be exercised by a managing director or equivalent.

Delegation

Unless the company's constitution provides otherwise, the directors can delegate their powers to any committee or person. However, each director retains overall responsibility for the delegate's actions other than in the circumstances specified in the Act.

Duties and obligations of directors

What are the key general duties of directors?

Under Australian law, directors are subject to statutory duties (under a range of statutes) as well as general law duties. There is significant overlap between these duties.

The Act sets out some of the key statutory duties of a director. These include:

- **Act with a reasonable degree of care and diligence.** There is an ongoing obligation to maintain a basic understanding of the company's activities, size, distribution of functions and monitor its financial position to ensure that it does not trade while insolvent.
- **Act in good faith, in the interests of the company and for a proper purpose.** Additional consideration must be given to nominee directors in joint ventures. The relationship of wholly-owned subsidiary and corporate group is discussed below.
- **Misuse of position.** Not improperly use their position to gain advantage for themselves or another person or cause detriment to the company.
- **Misuse of information.** Not improperly use information to gain advantage for themselves or another person or cause detriment to the company (this duty continues after the director leaves office).
- **Disclose to fellow directors any material personal interest in matters relating to the affairs of the company.** Depending on the type of company and the

requirements set out in its constitution (if the company has one), a director may not be permitted to be present when a matter in which they have a material personal interest is discussed, or vote on the matter.

- **Insolvent trading.** Directors have a duty to prevent insolvent trading by their company, and can be held personally liable for the company's debts if they allow the company to trade while it is insolvent or its insolvency would have been objectively suspected. Insolvency occurs when a company is unable to pay its debts as and when they fall due. Insolvent trading occurs when a company incurs a debt whilst insolvent or becomes insolvent by incurring the debt.

In addition, directors have both equitable and common law duties, including:

- **Act in good faith and in the best interests of the company.** Good faith has both subjective and objective elements, in that a director must genuinely believe they are acting in the company's best interests and must also act in a way that an honest and reasonable director would.
- **Exercise powers for a proper purpose.** In determining what is a proper purpose, the purpose motivating the exercise of power must accord with the objective purpose for which the power was granted.
- **Not fetter their own future discretion.** A director must exercise active discretions and not improperly limit their decision-making authority (but this does not prevent delegation by directors).
- **Avoid conflicts of interest and duty.** If a director must choose between favouring their own interests and the interests of the company, the director must usually choose the latter. A director should avoid actual and perceived conflicts.

What are directors' other key obligations?

The Act requires every company to keep written financial records that accurately record and explain the company's transactions, financial position and performance, and enable true and fair financial statements to be prepared and (in some circumstances) audited. Companies must also prepare a number of reports each year, including (for most companies) a financial report and directors' report. Failure to comply with financial record-keeping and reporting requirements can result in civil penalties for the directors, or criminal penalties if the contravention is dishonest.

The Act requires directors of certain companies to prepare and file annual accounts and submit other information to ASIC. Proprietary companies are categorised as either 'large proprietary companies' or 'small proprietary companies' and their reporting obligations differ. The test is applied annually and takes into account consolidated revenue, value of consolidated gross assets and the number of employees.

Directors can also face personal liability under a range of statutes, including those relating to taxation, superannuation, workplace health and safety, environmental protection and competition laws.

Transactions with the company

All directors are subject to general law and statutory duties relating to conflicts, misuse of position and misuse of information. In addition, a director of a public company (and the related parties of such a director) may not be given a financial benefit by the company (or a controlled entity) without prior shareholder approval, unless one of the statutory exceptions applies.

Liabilities of directors

Breach of general duties

Directors ordinarily owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, ordinarily only the company can bring an action for breach of duty against a director.

However, shareholders and certain other persons are able to bring an action for breach of duty on behalf of the company in certain circumstances (a statutory derivative action). Broadly, a shareholder must first obtain the court's permission to proceed with a statutory derivative action and the court will take into account a number of factors when deciding whether to grant this permission. This includes whether it is probable that the company itself will not bring the proceedings or properly take responsibility for them, whether the applicant is acting in good faith and whether it is in the best interests of the company that leave is granted (among other factors).

A company may seek a range of remedies against a director for breach of duty, including damages or compensation, grant of an injunction, an order that property held by the director be held on trust for the company, entitlement for profits made by the director in breach of duty, and rescission of a contract entered into by a director improperly.

ASIC may also bring proceedings against a director alleging breach of certain statutory duties. Under the Act, a director who is found to have breached their duties can be guilty of a criminal offence (resulting in fines or imprisonment), be ordered to pay a pecuniary penalty, be ordered to compensate the company or others for any loss or damage they have sustained due to the director's conduct, and be prohibited from managing companies for a specified period.

Liabilities on insolvency

A director (or directors jointly) can be held personally liable for the debts of the company if they allow it to continue trading whilst it is insolvent or insolvency would objectively have been suspected. There are a limited number of defences, including where:

- The "safe harbour" regime applies, which provides directors with a safe harbour from civil insolvent trading provisions where they are developing one or more courses of action that are reasonably likely to lead to a better outcome for the company than the immediate appointment, by the company, of an administrator or liquidator.

- The director can prove that they took reasonable steps to prevent the company incurring the debt.
- The director had reasonable grounds to expect, and did expect, the company to be solvent when the debt was incurred.
- The director received adequate information as to the solvency of the company from a competent and reliable person fulfilling the responsibility to provide such information, had reason to believe that person and did believe the company was solvent and would remain solvent when the debt was incurred.
- The director was not taking part in the management of the company due to illness or some other good reason when the company traded insolvent.
- The director acted honestly and reasonably in the circumstances when the company traded insolvent.

Other key risks

Directors can face personal liability under a range of statutes. Some statutory regimes (such as workplace health and safety laws) apply at State and Territory level and so may not be uniform around Australia, which can heighten the risks for directors of companies operating in more than one State or Territory.

Protection against liability

How can directors be protected from liability?

- **Indemnity** - Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. This is usually done through an indemnity, insurance and access deed, but may also be provided for in the company's constitution (if it has one).
- **Insurance** - Directors' and officers' insurance is common in Australia. It typically provides indemnification against costs arising from defending proceedings (civil and criminal). Despite indemnification for legal costs, it cannot provide an indemnity in respect of liability arising from wilful breach of duty to the company or improper use of position or information by a director. The rising cost and increasingly onerous terms of D&O insurance remain a hot topic in Australia.
- **Ratification** - In limited circumstances, a company's shareholders can ratify or relax duties owed by directors by passing a resolution at a general meeting. This essentially authorises what would otherwise be a breach or forgives an existing breach. Any consent given by members must be informed consent. Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation).

What practical steps can directors take to avoid liability?

- Keep informed about the affairs of the company, particularly its financial position. Directors should ensure they have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make proper disclosure of outside positions or interests which may give rise to a conflict of interest or duty and/or if they have (or a family member or other associate has) a personal interest in any proposed or existing transaction or arrangement with the company.
- Ensure comprehensive minutes are taken, including recording the decisions made and the key information and factors that the directors took into account when making such decisions. Directors should ensure they have considered all available options and carefully analysed their respective merits and cost. This may extend to documenting any alternative options that the board has considered in making those decisions and the reasons why particular options were preferred or discounted. The minutes must be recorded in minute books within 1 month of being passed, and must be signed. The minute books must be kept at the company's registered office or principal place of business in Australia, or at another Australian location approved by ASIC.
- Seek professional advice from lawyers, accountants and other advisors as necessary, in a timely manner.
- Maintain awareness of, and compliance with, any group-wide governance and compliance policies. These may cover areas such as environmental protection, workplace health and safety, workplace conduct generally, ethics, bribery/anti-corruption, competition law and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability. Directors should also continue to monitor legal developments and ensure that policies and protocols are updated to remain current in light of any legal, regulatory or other relevant changes.
- In corporate groups, the director's primary duty is to the company on whose board they serve, not the holding company or other group companies. The Act permits the directors of a wholly-owned subsidiary to act in the best interests of the holding company if the subsidiary's constitution expressly authorises the directors to do so and the other conditions set out in the Act are satisfied. However, this does not permit the subsidiary's directors to act as puppets, disregard their other duties or disregard the interests of the subsidiary's creditors (among other limitations). Where the wholly-owned subsidiary is dependent on parental support to remain solvent, the director should also ensure that this support is ongoing and is documented appropriately.
- Seek the protection of an indemnity, insurance and access deed and ensure that there is appropriate D&O insurance cover in place to protect directors and officers.

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Corporate entities

What type of company is typically used in group structures?

In Austria, the most common type of company used in group structures is the limited liability company (*Gesellschaft mit beschränkter Haftung* or *GmbH*). This guide therefore focuses on the management of a GmbH.

(Note that on 1 January 2024, a new law was enacted in Austria which allows for the formation of a flexible company, similar to a limited liability company.)

Types of director

What is a "director"?

A director (or also managing director; in German *Geschäftsführer*) is the individual who manages the business of the GmbH. A director is responsible both for the business of the company as such as well as for all administrative duties, e.g. preparation of financial statements, filings with the companies register, tax filings, etc.).

Shareholders are free to decide whether a director shall be allowed to represent the company alone or together with another director (or more directors or together with a Prokurist; see [What are the different types of director?](#)).

What are the different types of director?

Austrian company law does not differentiate between different types of director – all directors are subject to the same duties.

However, in addition to a director, proxy holders may be appointed (in German *Prokurist*). A Prokurist may also represent the company and may sign agreements (in each case alone or together with a director or another officer), however, this power is limited to typical transactions for a company. The power of representation of a Prokurist may also be restricted to e.g. a specific branch office.

Eligibility

Who can be a director?

A director must be at least 18 years old, but there are no nationality or residency restrictions (for corporate law purposes). Furthermore, a director may not have been convicted by a final court decision to a prison sentence of more than six months for certain criminal offenses, such as fraud or misuse of funds. It is not possible to appoint legal entities as directors, only individuals.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and are appointed by the company's shareholders (via a shareholders' meeting or by written resolution). In exceptional cases, directors can be appointed by having their names and dates included directly in the articles of association.

The appointment must be made by written resolution in notarised form. Details of the appointment must be filed with the companies register without undue delay. The respective director must also provide a specimen signature in notarised form to the companies register. Furthermore, an affidavit regarding the non-existence of disqualification reasons must be provided in notarized form. The director's residential address (or the c/o address of the company or any other group company) and full date of birth are included on the record (which is open for public inspection). The notice to the companies register is to be signed in notarised form by as many directors as required (depending on whether a director can represent the company alone or together with another director). Depending on where the respective notarisations take place, super-legalisation (by Apostille) might be required.

How are directors removed?

Shareholders have a residual statutory power to remove directors by a majority resolution (subject to certain procedural requirements). If a director is appointed in the articles of association, their removal may be restricted to important reasons.

When a director leaves office, notice must be filed at the companies register without undue delay. The companies register must be provided with the respective resolution (no notarization required unless combined with one or more resolutions which would require a notarized form) or the original resignation letter. The notice is to be signed in notarised form by the remaining director(s) (depending on whether a director can represent the company alone or together with another director).

Board / management structure

Typical management structure

The directors are collectively responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations. A GmbH typically has a unitary board structure.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's constitution. Either the articles of association provide how decisions are taken, otherwise, without a specific provision in the articles of association, the directors have to act unanimously.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g. in the company's constitution or in internal policies and protocols).

The authority of directors vis-à-vis third parties cannot be limited, neither by resolution of the shareholders nor by the articles of association.

Delegation

The directors may delegate tasks to employees, however, the directors remain responsible for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Act on Limited Liability Companies (the Act):

- The managing directors owe a duty to the company to exercise the care of a prudent business person in their management of the company.
- A managing director is deemed to act with the diligence of a prudent business person if, in making a business decision, the director is not guided by extraneous interests and it can be assumed, on the basis of adequate information, that they are acting in the best interests of the company.
- The managing directors must ensure that an accounting system and an internal control system are maintained which meet the requirements of the enterprise.
- Copies of the annual financial statements, including the management report, and of the consolidated financial statements, including the group management report, must be sent to each shareholder without delay after their preparation.
- In the interests of the company, the directors are required to convene shareholders' meetings whenever they deem it appropriate.

What are directors' other key obligations?

The Act requires directors to prepare and file annual accounts and submit other information to the companies register. The accounts and other information must be submitted to the companies register within nine months after the end of the previous financial year.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

Transactions between the company and a director/the company and another company represented by the same director generally require consent from the shareholders (in which case the director - if they are also a shareholder - has no voting right) or the supervisory board or, in absence of a supervisory board, all other directors. No consent is required if the transaction is only for the benefit of the company. The director might be liable for any damage the company suffers due to a transaction for which the required consent has not been obtained.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

Directors who violate their duties shall be jointly and severally liable to the company for the resulting damage. In particular, they shall be liable for compensation if:

- Company assets are distributed in breach of the provisions of the Act or of the articles of association, in particular if capital contributions or additional contributions are returned in whole or in part to shareholders, interest or shares in profits are paid out, or own shares in the company are acquired, pledged or withdrawn.
- Payments are made after the time at which they were obliged to request the opening of the insolvency proceedings.

Shareholders are able to bring an action for breach of duty on behalf of the company in certain circumstances.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Austrian legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director upon request of the majority of shareholders. Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for all (and not only individual) directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but also regulatory fines. However, such an agreement can only be made between the company (represented by the shareholders or the remaining directors) and the respective director after a fine has been imposed or a liability was confirmed by court. Any in-advance agreement on the payment of damages or fines would potentially decrease a director's level of diligence and is therefore void.
- **Insurance.** Directors' and officers' (D&O) insurance is becoming increasingly common in Austria for companies with limited liability, while directors of large size companies more commonly have a D&O insurance. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the other directors and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

Companies with limited liability (WLL), Public Joint Stock Companies (BSC) and Closed Joint Stock Companies (BSC(c)) are commonly used in group structures.

Types of director

What is a "director"?

Generally speaking, a director:

- Is responsible for the overall direction, supervision and management of the company.
- Has the authority, power and discretion to manage and control the business and affairs of the company and to make decisions regarding those matters and to perform acts or activities customary or incidental to the management of the company.
- May establish one or more committees and determine the scope of authority of such committees.
- To the extent applicable, must ensure that the business of the company operates in accordance with its constitution/bylaws.
- Must make all decisions which are not part of the day-to-day management of the company.
- Directs and supervises aspects of the company and its affairs whether commercial, administrative, financial or otherwise.
- Represents the company before, and liaises with, governmental, judicial, administrative and other authorities; arbitration bodies; and all individuals, committees, establishments and other bodies of any kind whatsoever.

- Appoints, engages, removes and replaces managerial staff and other employees, agents, consultants and advisers of the company and determines and approves payment of their salaries, and other remuneration, fees and benefits.
-

What are the different types of director?

Directors may include Executive Directors, Non-Executive Directors, Independent Directors, the Chair, Vice-Chair and Secretary.

The roles and responsibilities of directors are however determined on a case-by-case basis depending on the individual requirements of the company in question.

Eligibility

Who can be a director?

Generally speaking, there are no nationality or residency restrictions, or other barriers which may prevent a foreign national from being appointed as a director under local law.

Minimum / maximum number of directors

BSCs require a minimum of five directors, BSC(c)s require a minimum of three directors, and WLL companies require only one director.

Appointment and removal

How are directors appointed?

Unless otherwise specified in the bylaws of the company, directors are appointed by way of:

- written resolution of the Board
 - shareholder resolution, or
 - power of attorney.
-

How are directors removed?

Directors may be removed by way of written resolution issued by the company's Board or shareholders, in accordance with the company's bylaws.

Board / management structure

Typical management structure

There is no formal management structure requirement in a WLL as only one director is required.

As for BSCs and BSC(c)s, the Board will establish a clear and efficient management structure including the following positions (at a minimum):

- Chief Executive Officer.
- Chief Financial Officer.
- Secretary.
- Internal Auditor.
- Any other officer the Board considers appropriate.

Additionally, the Board will establish (at a minimum) specialized committees being an audit committee, a nomination committee, a remuneration committee and any other committee the Board considers appropriate.

How are decisions made by directors?

Decisions are made by written resolution with a majority vote required to pass, unless otherwise provided for in the bylaws of the company.

Authority and powers

The Board's roles and responsibilities include, but are not limited to, the following:

- Adopting the commercial and financial policies associated with the company's business performance and achievement of its objectives.
- Drawing, overseeing and periodically reviewing the company's plans, policies, strategies and key objectives.
- Setting and generally supervising the regulations and systems of the company's internal control.
- Determining the company's optimal capital structure, strategies and financial objectives and approving annual budgets.
- Monitoring the company's major capital expenditures, and acquiring and disposing of assets.
- Approving the company's quarterly and annual financial statements and presenting them to the general assembly.
- Monitoring the executive management's activities, and ensuring that the operations run smoothly to achieve the company's objectives and that they do not conflict with the applicable laws and regulations.
- Forming specialized committees of the Board as required by the nature of the company's activity and as provided in applicable regulatory requirements, and issuing the regulations of these committees.
- Setting a mechanism to regulate transactions with related parties in order to minimize conflicts of interest.

- Setting standards and values governing the company's business.
- Ensuring the application of appropriate control and risk management systems by setting a framework of the risks that the company might face, creating an environment that is aware of risk management at the company level, and transparently presenting it to company's related parties and stakeholders.
- Assuring equitable treatment of shareholders, including the minority shareholders.
- Setting internal regulations which determine the Board's duties and responsibilities, including the obligations and responsibilities of the directors, from which the Board is not exempt even if it forms committees or delegates certain duties to other bodies or individuals. The Board must avoid issuing general authorizations or authorizations with an unlimited duration.

Delegation

The Board may form specialized committees of the Board as required by the nature of the company's activity and as provided in applicable regulatory requirements, and issues the regulations of these committees.

The Board must also adopt a reasonable policy in delegating authorities to the executive management, and the delegation of authority regulations should cover various financial, administrative, employees' affairs and other functions necessary to operate and manage the company efficiently.

Duties and obligations of directors

What are the key general duties of directors?

The key general duties of directors are to:

- Act honestly within their powers, in good faith, and in the best interests of the company.
- Exercise the care, skill and diligence that a reasonably prudent person would exercise in a similar position.
- Promote the success of the company.
- Exercise independent judgment.
- Exercise reasonable skill care and diligence, and ensure compliance with all applicable laws, regulations and the company's bylaws.
- Avoid conflict of interests.
- Declare interests in proposed transactions and arrangements.
- Approve financial statements, oversee internal controls, and prepare annual reports.
- Define the company's strategic goals and risk policies, and supervise management performance.

What are directors' other key obligations?

The directors are responsible, both individually and collectively, to shareholders for achieving the company's objectives and purposes. They shall be primarily concerned with the interests of the company, which take precedence over any other interests, including the interests of individual shareholders they may represent. The Board represents all shareholders, and must safeguard and promote the interests of the company and maximize its value.

Transactions with the company

There is an absolute requirement to disclose any personal interests when transactions between the company and a Board member arise. The company is also expected to have policies in place on how to deal with these interests. These should include excluding the interested Board members from voting on the approval of such transactions.

Liabilities of directors

Breach of general duties

Depending on the nature and terms of the directors' appointment, they may be removed from office by resolution on written notice. The company may also sue for breach of contract or breach of duty, depending on the manner in which the director was appointed.

Liabilities on insolvency

Unless the director is also a shareholder, generally speaking they will not incur any liability on insolvency. If they have acted in bad faith, resulting in the insolvency or the hiding of key assets from a liquidator, then liabilities may attach.

Other key risks

If a director fails to act when other directors have acted in bad faith then by virtue of their inaction a director may also be found to be complicit in such acts.

Protection against liability

How can directors be protected from liability?

Generally speaking, as long as a director has not acted in a manner which breaches their duties and powers, such director will not be liable for any of the company's breaches. The director may request that professional indemnity insurance be obtained on their behalf. They may also seek to have a shareholder written resolution passed endorsing an agreement or action.

What practical steps can directors take to avoid liability?

Where a director finds themselves in a position where they are uncomfortable with a course of action being proposed by a fellow officer, their objections should be

recorded in writing either by a letter addressed to the other officer, or evidenced in the minutes of the relevant meeting.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

In Belgium, the two most commonly used company types are:

- The private limited liability company (*besloten vennootschap (BV)/société à responsabilité limitée (SRL)*).
- The public limited liability company (*naamloze vennootschap (NV)/société anonyme (SA)*).

This guide therefore focuses on these two types of limited liability companies. Unless stated specifically otherwise, the commentary in this guide applies to both company types.

Types of director

What is a "director"?

A director is a (member of a) corporate organ of the company. As such, a director is basically regarded as someone who manages (either individually or together with others, depending on the company type and board structure) the affairs of the company on behalf of its shareholder(s).

What are the different types of director?

In general, Belgian company law does not differentiate between different types of directors – all directors are subject to the same duties. It should be noted that, under Belgian law, a director cannot be bound with the company through an employment agreement for the execution of their director duties. In joint venture structures, a director may also be appointed upon the explicit proposal of a particular shareholder. In addition, a de facto director is a person who acts as though they are a director, but is not validly appointed as such; such de facto directors may also be subject to directors' liability. Finally, for listed companies, a regime for independent directors is provided.

Under Belgian law, it is also possible to entrust someone (either a director or a non-director) with the daily management of the company (see also below). If a director of the company is charged with such daily management, they will commonly be named a managing director (*gedelegeerd bestuurder/administrateur délégué*).

Also, some articles of association provide that the managing director is the director who can externally represent the company individually in all matters (including those that go beyond the daily management).

Eligibility

Who can be a director?

There are no nationality or residency requirements imposed on directors. It is also possible to have a legal entity (Belgian or foreign entity) appointed as director - in which case however the legal entity must appoint a “permanent representative” (i.e. a natural person who represents that legal entity when carrying out the director’s mandate in the company). Note that a natural person cannot have a seat in the same management organ twice (i.e. in their own name and as a permanent representative of a legal entity, or two times as a permanent representative of a legal entity).

Minimum / maximum number of directors

The minimum number of directors depends on the company type and the chosen board structure. There is no legal maximum number of directors (unless the articles of association specify a maximum).

A private limited liability company must have at least one director. The company’s articles of association may however specify a greater minimum number of directors.

The default regime in a public limited liability company is a one-tier structure consisting of a “board of directors” (a collegiate body), which consists of at least three directors (unless there are only two shareholders or fewer, then the board of directors may consist of only two directors). The articles of association, however, may provide for the possibility to install a sole director regime (meaning that a single director will manage the company).

Alternatively, it is also possible to install a *two-tier structure* in a public limited liability company, consisting of a supervisory board and a management board (each composed of at least three members). Members of the supervisory board cannot have a seat in the management board as well, and vice versa. This two-tier structure is essentially meant for large corporations (e.g. those listed on the stock exchange). For other entities (e.g. affiliates of multinational groups), the less-complex one-tier structure (board of directors or a sole director) is much more common.

In the two-tier structure, the competences of the supervisory board and management board are structured as follows:

- The supervisory board is competent for the general policy and strategy of the company and also has a number of exclusive powers (i.e. powers that in a one-tier structure would be considered key powers of the board of directors – such as the

preparation of the annual accounts and convening of the shareholders' meeting). In addition, they supervise the management board.

- The management board is competent for all managerial acts that are not exclusively attributed to the supervisory board (i.e. residual powers). They report to the supervisory board and at least once a year, they need to provide a written report to the supervisory board which contains the main points on the general strategic policy, the general and financial risks and the managerial and control systems of the company.

Appointment and removal

How are directors appointed?

Directors (i.e. members of the board of directors, supervisory board or sole directors) are appointed by the company's shareholder(s) - via a general shareholders' meeting or by unanimous written resolution. Unless the articles of association of a company provide otherwise, the board of directors (one tier) and supervisory board (two tier) may temporarily fill up a vacant mandate.

In the two-tier structure (public limited liability company), the members of the management board are appointed by the supervisory board.

In a private limited liability company, a director is in principle appointed for an unlimited duration, unless specified otherwise (i.e. for a specified duration).

In a public limited liability company, the members of the board of directors (in a one-tier structure) or members of the supervisory board (in a two-tier structure) are appointed by the shareholders for a maximum term of six years (which can be renewed an unlimited number of times). A sole director can be appointed for an unlimited duration, as can the members of the management board (in a two-tier structure).

For enforceability vis-à-vis third parties, the appointment decision needs to be filed and published in the Annexes to the Belgian State Gazette and details of the director need to be submitted with the clerk's office for their registration in the Belgian Crossroads Bank for Enterprises (i.e. a copy of their passport or identity card, a director's residential address and, for foreign directors, a recent utility bill or other document proving their residential address).

How are directors removed?

Directors can in principle be dismissed *ad nutum* (at any time with immediate effect and without any reason) by the shareholder(s), unless the articles of association or the appointment decision states otherwise. However, the general shareholders' meeting may always, at the moment of dismissal, provide for a notice period or a severance payment - unless the articles of association state otherwise. In the case of dismissal for legal cause however, a director will not be entitled to such compensation. In addition, a director may in principle also voluntarily resign at any time by informing the management organ.

For directors appointed in the articles of association (which is possible in a private limited liability company – but is rather uncommon), resignation or dismissal will require an amendment of the articles of association for the removal of said directors.

When a director resigns or is dismissed, the resignation or removal decision needs to be filed and published in the Annexes to the Belgian State Gazette to be effective vis-à-vis third parties.

Board / management structure

Typical management structure

A private limited liability company in principle consists of a one-tier structure made up of one or more directors.

In the case of a public limited liability company, it is possible (but not common) to choose between a one-tier structure (consisting of a board of directors or a sole director) or a two-tier structure (consisting of a supervisory board and a management board).

How are decisions made by directors?

In a private limited liability company, the directors usually have individual management power, which means they can each make decisions on their own. To comply with good corporate governance practices, however, the directors will often take joint decisions. Alternatively, the articles of association may provide otherwise and install, for instance, a collegiate management body.

In a public limited liability company, the board of directors (in a one-tier structure) or supervisory board and management board (in a two-tier structure) will act as a collegiate body (meaning that they do not have individual management powers and will make decisions jointly, through a majority vote, unless the articles of association provide for stricter majority requirements). In the case of a sole director, the sole director will evidently have sole management power.

A meeting of directors can be held either physically or through teleconference (unless the articles of association prevent this). Unanimous written resolutions are also possible, unless the articles of association provide otherwise.

Authority and powers

Under Belgian law, a distinction needs to be made between internal management powers and external representation powers.

Internal management powers

The management organ is competent to carry out all acts and take all decisions that are necessary or useful in order to realise the company's corporate purpose, except for those powers which the law explicitly attributes to the general shareholders' meeting (i.e. the "residual" powers reside with the management organ).

The articles of association may limit the powers of the management organ (by submitting certain decisions to a shareholders' meeting), but such limitation is not effective vis-à-vis third parties (even if disclosed).

External representation powers

As far as representation vis-à-vis third parties is concerned, the following distinction needs to be made depending on limited liability company type:

- In a private limited liability company, the company is, in principle, validly represented by each director (given the fact that they dispose of individual management power). However, the articles of association may deviate (for instance, by installing a collegiate management body and requiring double signatures).
- In a public limited liability company, the company is, in the case of a board structure (be it a one-tier structure or a two-tier structure), validly represented through the majority of its board members. Evidently, in case of a sole director, such director will solely represent the company.

In a two-tier structure, the representation powers of the supervisory board are limited to its specific competences, whereas the management board has full representation powers.

The articles of association commonly provide for specific signature clauses - for instance, a single signature clause (e.g. a (managing) director acting alone) or a joint signature clause (two directors acting jointly)). Such signature clauses are effective vis-à-vis third parties (if published), but do note that any qualitative or quantitative restrictions in such signature clauses are not effective vis-à-vis third parties, even if disclosed.

Delegation

In the case of a collegiate management body structure (be it a one-tier or two-tier structure in a public limited liability company, or the instalment of a collegiate body in a private limited liability company), the board members can agree on a specific task division amongst them. Such division is however not effective vis-à-vis third parties, even if disclosed.

In addition, the directors can attribute the daily management powers, including the representation of the company in this respect, to one or more persons, that may act individually, jointly or as a collegiate body (as specified in the appointment decision). The daily management concerns all actions and decisions that do not go further than the day to day needs of the company, as well as the actions and decisions that, either due to their minor importance or due to their urgent nature, do not justify the intervention of the directors. Any limitations to the daily management representation powers of the persons(s) entrusted with the daily management are not effective vis-à-vis third parties (even if disclosed).

What are the key general duties of directors?

Duties and obligations of directors

There is no exhaustive list laid down in law of the key duties of directors. The law merely states that the management organ of a company has, through its director(s), the (residual) power to perform all acts necessary or useful for the realisation of the object of the company, except those for which the general shareholders' meeting is authorised by law. In fact, directors are responsible for both the strategy as well as the overall monitoring of the organisation.

The management duties can in general be described as follows:

- **Duty of care and duty of loyalty.** The directors have a general duty of care, meaning that they must be diligent in the performance of their tasks and (actively) participate in board meetings. They are required to manage the company's business and affairs to the best of their ability and in the best interest of the company. They also have a duty of loyalty towards the company which encompasses both a duty of confidentiality and a duty not to compete with the company.
- **Decision making with respect to the general strategy of the company and acting as a reasonable, prudent and diligent person.** Directors have to act within the company's interest and exercise their powers for the purposes for which they were given and not for any collateral purpose.
- **Financial duties.** As part of its financial duties, the management organ is in charge of the drafting of the annual accounts and the management report.
- **Operational duties.** As part of its operational duties, the management organ enters into agreements with third parties, grants special powers to special proxy holders and supervises them.
- **Convening of and reporting to the general shareholders' meeting.** The management organ convenes the general shareholders' meeting at least once a year and replies to questions of the shareholders at the general shareholders' meeting. The management organ is obliged to convene a general shareholders' meeting if the shareholders who represent one tenth of the company's shares /share capital request a general shareholder's meeting.

What are directors' other key obligations?

In general, directors are responsible for ensuring that the company complies with its statutory and legal obligations, for example under company law, environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

In addition, the directors must comply with, amongst others, the following duties:

- Convening a general shareholders' meeting within two months, and preparing of a special report, if the company's financial position meets certain negative exact criteria (the so-called "alarm bell procedure").
- In case of a distribution of dividends in a private limited liability company, the management organ needs to determine that the company will still be able to pay its debts when they become due over a period of at least twelve months (liquidity test).

- Preparing of all legally prescribed reports (e.g. in case of capital increase, issuance of convertible bonds or subscription rights, cancellation or limitation of the preferential subscription right, issuance/abolition of categories of shares or profit certificates or changing its rights, setting up of the authorized capital, the dissolution of the company, conversion of the company).
- Preparing of all proposals and legal reporting in case of a corporate restructuring of the company (i.e. (cross-border) merger, (partial) demerger, contribution of a branch or a universality).
- Ensuring the timely establishment and filing of the annual accounts with the National Bank of Belgium, and take care of all other filings that need to occur in the Annexes to the Belgian State Gazette and the Crossroads Bank for Enterprises.

Transactions with the company

In the event that a director has a direct or indirect interest of a financial nature which is opposed to the interest of the company with respect to a matter or a transaction upon which the management organ has to decide, the director must give prior notice of the conflict to the other directors.

The declaration of the director as well as any justifications of the decisions taken have to be recorded in the minutes of the meeting of the other directors. The conflicted director may not take part in the deliberations (in case of a collegiate management body), nor vote, with respect to the conflicted decision or transaction.

When all directors have a conflict of interest, the decision or transaction is escalated to the general shareholders' meeting (or the supervisory board in case of a two-tier structure with a conflict at the management board level).

In the event of failure to observe these rules: the company may claim the directors' resolution is null; the director who neglected to inform the other directors of their conflict of interest could be found liable for the damages the company incurred; and other directors may be held jointly and severally liable, in the event they could have reasonably been aware of the conflict of interests or it was known to them and they did not ensure compliance with such rules.

Even if the conflict of interest procedure has been observed, the directors may still be held personally and jointly liable for damages suffered by the company or by third parties, if the operation or resolution approved by the directors results in an unjustified benefit for a director, to the detriment of the company.

For listed companies (and their subsidiaries), a specific regime exists for transactions of the company with 'related parties' (in the sense of IAS and IFRS, with the exception of subsidiaries) that's part of the competence of the board of directors. The procedure requires a preliminary assessment by a committee of 3 independent directors, where required assisted by experts, after which the board of directors (excluding directors that are involved in the transaction or the decision) will decide. If all directors are 'involved', the decision must be taken by the general assembly.

Liabilities of directors

Breach of general duties

Generally speaking, directors may be held liable, towards the company and/or third parties, for: management faults (if their acts go beyond the margin of appreciation in which normal, prudent and careful directors, in the same circumstances, could reasonably have deviating views); breach of law or breach of the articles of association; and under the general extra-contractual regime or for infringements of criminal law or special laws.

As a general rule, fault, damage and a causal link between fault and damage must be established if the legal proceedings are to be successful.

If the legal person has several directors, a distinction is made whether the managing organ constitutes a collegiate body or not:

- If the management organ acts as a collegiate body, the members are jointly and severally liable for the faults committed by the collegiate body.
- If the management organ does not act as a collegiate body, then each director is only liable insofar as they can be blamed for fault. However, if the error consists in the violation of a provision of company law or the articles of association, the members of the management organ are jointly and severally liable for all damage resulting from this fault.

However, a director shall be relieved of liability if they did not take part in the fault committed and they have reported the alleged fault to all the other members of the management organ. This denunciation and the discussions to which it gives rise shall be recorded in the minutes.

The liability regime affects not only the members of the management organ, but also the persons entrusted with the daily management, as well as the de facto directors, understood as those who have held the power to effectively manage the legal person. Finally, the permanent representative of a legal entity appointed as director - necessarily a natural person - shall be jointly and severally liable with that legal person, as if they had exercised this mandate personally.

Liabilities on insolvency

In addition to the general liabilities of directors, specific liabilities may arise if the company is insolvent or nearing insolvency. More particularly, a director (both former and current, including a de facto director) may, inter alia, incur liability for:

- Failure to comply with the obligation to file for bankruptcy/judicial reorganisation within one month of the cessation of payments where it satisfies the conditions for bankruptcy (i.e. the company has stopped paying debts as they fall due and it no longer has access to credit).
- The insufficiency of the company's assets/unpaid debts if it is demonstrated that a manifestly serious mistake on their part has contributed to the bankruptcy of the company.
- The insufficiency of the company's assets (debts surpass the income) in the case of wrongful trading, i.e. where the director knew or should have known, at any time

prior to the bankruptcy, that the company had no reasonable prospect of avoiding a bankruptcy, and has not acted in accordance with how a reasonable prudent director would have acted in the same circumstances. If these cumulative conditions apply, the director may be held personally (and jointly and severally) liable to pay the whole or part of the deficit to the company's estate. A claim can however solely be initiated by the curator.

It is sufficient that the error contributed to the bankruptcy. It is up to the courts to decide whether or not such directors will be held severally liable and the portion of the existing liabilities they will have to bear.

Other key risks

There are a number of specific liabilities to take into account as a director, such as:

- **Liability for the incorrect application of the liquidity test in a private limited liability company.** If it is established that the directors knew, or ought to have known, given the circumstances, that the company would no longer be able to pay its debts over a period of at least 12 months as of the date of distribution of the dividend, then they are jointly liable vis-à-vis the company and third parties for all damages that follow from it.
- **Liability for not complying with the conflict of interest procedure** (see [Transactions with the company](#)).
- **Liability for not complying with the alarm bell procedure** (see [What are the key general duties of directors?](#)). If the general shareholders' meeting has not been convened, then any third party damages will be considered to follow from the lack of convocation.
- **Tax liabilities.** A joint liability of directors applies in case of the non-payment of professional withholding tax and VAT, and, in case of the bankruptcy of the company, for the outstanding social security contributions (which is frequently called upon in an insolvency context).
- **Tort liability.** Third parties can bring a claim against a director for damages resulting from a tort committed by such director. Typical cases involve creditors, employees, etc (e.g. failure to enter into an insurance, false appearance of solvability and proceeding with a manifest deficit activity). Before 1 January 2025, the quasi-immunity regime of auxiliaries served to protect directors against claims from contractual parties of the company, except in exceptional circumstances. Since the entry into force of new Book 6 of Civil Code on 1 January 2025, auxiliaries like directors do no longer enjoy such quasi-immunity, the new regime broadening the potential claims by contracting parties of the company toward directors whether on a contractual or extracontractual basis.
- In certain cases, criminal liability may arise (e.g. non-compliance with legal obligations relating to the annual accounts, forgery, misappropriation of company funds and goods, money laundering, etc.).

Protection against liability

How can directors be protected from liability?

The following protection mechanisms exist:

- **Informing board members.** A director can avoid joint and several liability (for violations of company law or the articles of association), if certain conditions are met:
 - The board member may not have taken part in the wrongful action (e.g. they voted against the resolution by the board).
 - The board member must have notified the board of directors of their protest against the wrongful action. The notification to the board must be recorded in the minutes of the board meeting.
- **Capped liability.** The law provides for a maximum liability for directors who cause damages due to mismanagement. The cap of liability benefits each member of a management organ, a director, or the delegates for day-to-day management. The amount of the cap varies depending on the size of the company and applies as an aggregate for all directors concerned for claims based on the same fact(s) regardless of the number of plaintiffs. The liability cap applies both vis-à-vis the company and third parties, and is irrespective of the ground or basis of the liability claim (contractual or non-contractual).

Importantly, the cap does not apply in case of common minor error, gross misconduct or fraudulent intent; nor in case of the joint and several liability resulting from unpaid withholding taxes, unpaid VAT, unpaid social security contributions in case of bankruptcy of the company or certain other liabilities vis-à-vis the authorities.

The company - and its subsidiaries or entities it controls - cannot provide for prior exoneration or further limitation of the directors' liability against the company or third parties. Any provision in the articles of association or in an agreement in this respect will be deemed null and void. However, exoneration by the parent company is thus considered possible.

- **D&O Insurance.** Directors' and officers' (D&O) insurance is often used in Belgium. Policy exclusions typically include claims in respect of a director's fraud, intentional fault or criminal behaviour.

The company can address directors' liability risks with their counterpart during contract negotiations, or by amending existing contracts, in order to include a clause limiting or excluding the liability of auxiliaries of the company (including directors). The new regime provided under Book 6 of Civil Code is indeed supplementary and the parties can deviate from it, with some exceptions.

- **Discharge of liability.** When the annual accounts are approved, discharge is granted to the directors by the shareholders for the exercise of their directors' mandate. This discharge is valid only if the annual accounts contain no omission or false indication concealing the real situation of the company and, as regards acts done in violation of the articles of association or company law, only if they have been specifically indicated in the notice convening the general shareholders'

meeting. A valid discharge given by the company covers both liability for lack of due care and liability resulting from the violations of company law and the articles of association.

However, the fact that a company has discharged its directors does not limit claims brought by third parties.

Finally, it should be noted that any action against directors, permanent representatives, or against all other persons who have effectively held the power to manage the company expire after five years for acts committed in the course of their functions, from the day of those acts or, if they have been concealed by fraud, from the discovery of those acts.

What practical steps can directors take to avoid liability?

Directors should:

- Keep themselves informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for, and regularly attend, board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the other directors at the board meeting if they have a conflicting interest in any proposed or existing transaction or arrangement with the company.
- Keep records – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that.
- Take advice – directors should take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with these can often help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- In the case of a group situation, it should be kept in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

In Botswana, the most common type of company used is a private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

The term director in Botswana is defined in the Companies Act (Cap 42:01) (the Act), as amended from time to time. According to the Act, a director is "a person occupying the position of director or alternate director of the company by whatever name called".

The term director can also be applied to the following persons in accordance with the Act:

- A person in accordance with whose direction or instruction the board of the company may be required or is accustomed to act.
- A person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board.
- A person in accordance with whose directions or instructions a person occupying the position of director or alternate director of the company may be required or is accustomed to act.

A person cannot be appointed as a director of a company unless that person has consented in writing to be a director and has certified that they are not disqualified from being appointed or holding office as a director of a company.

What are the different types of director?

Executive directors, non-executive directors and alternate directors.

Employee or lender representatives are not required to be appointed to company boards.

Eligibility

Who can be a director?

A director must be at least 18 years old. At least one director in the board of directors must be resident in Botswana however there are no nationality restrictions.

The following persons are disqualified from being appointed or acting as directors of a company:

- A body corporate.
- A person who is under the age of 18.

Except with the leave of the court:

- A person whose estate is sequestrated as insolvent.
- An unrehabilitated insolvent in Botswana or elsewhere.
- Any person who has at any time been convicted in Botswana or elsewhere of theft, fraud, forgery or altering a forged document, or perjury and has been sentenced therefore to serve a term of imprisonment without the option of a fine or to a fine exceeding BWP5000.
- Any person removed by a competent court from an office of trust on account of misconduct.

Other disqualifications:

- In relation to a particular company, any person who does not comply with any qualifications for directors contained in the constitution of that company.
- Any person who is prohibited by law from being a director or promoter or being concerned or taking part in the management of a company.
- Any person of unsound mind.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum number which is stated in the Act. The company's constitution may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

The first directors of a private company must consent to their appointment and their names will be indicated in the company's application for registration or in an amalgamation proposal.

All subsequent directors of the company shall, unless the constitution of the company otherwise provides, be appointed by ordinary resolution at a general meeting.

The court may appoint a director upon the application by a shareholder or creditor if:

- There are no directors of a company, or the number of directors is less than the quorum required for a meeting of the board.
- It is not possible or practicable to appoint directors in accordance with the company's constitution and the court considers that it is in the interests of the company to do so.

An appointment may be made on such terms and conditions as the court considers appropriate.

Details of the appointment must be filed at the Companies and Intellectual Property Authority within 14 days of the appointment taking place. A director's residential address and postal address are included on the public record.

How are directors removed?

Subject to the constitution of a company, a director of a private company may be removed from office by special resolution passed at a meeting called for the purpose or for purposes that include the removal of the director. The notice of the meeting shall state that the purpose of the meeting is the removal of the director.

A company can also alter its constitution so as to empower itself to remove a director appointed under the constitution provided the alteration is bona fide and for the benefit of the company as a whole.

In the event that a director has a separate independent contract with the company and they are removed either by provisions in the Companies Act or by alteration of the constitution, but their removal is found to be in breach of the contract, then they can sue for damages for wrongful dismissal.

A director appointed under the constitution can only be removed by alteration of the constitution, under which circumstances the director cannot sue for breach of contract.

A director may also resign at any time.

When a director leaves office, notice must be filed at the Companies and Intellectual Property Authority within 14 days.

Board / management structure

Typical management structure

The management of the company's affairs is generally entrusted to the directors. Legally, directors as the board are agents of the company and have the powers

necessary for managing, directing and supervising the management of the business and affairs of the company. It is in this capacity of agents that the law imposes certain legal duties on them.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's constitution or where the company does not adopt a constitution, the First Schedule of the Companies Act. A key feature in the Act is that the company shall not enter into a major transaction or make a substantial decision unless the transaction is approved by special resolution or contingent on approval of the shareholders. A "major transaction" means any acquisition, disposal, or other transaction by a company that involves assets, rights or liabilities exceeding half of the company's total asset value before the transaction.

However, other decisions that concern the day to day administration of the company can be made by way of an ordinary resolution.

Authority and powers

The main source of the director's powers and authority is the company's constitution and where the company does not adopt a constitution, the First Schedule of the Companies Act, therefore, the two could also be deemed as a source of constraints on the director's powers.

Delegation

Subject to the constitution of the company, the board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers. The board of a company remains responsible for powers it delegates unless it reasonably believed the delegate would act in accordance with directors' duties imposed on the Companies Act or company constitution and properly monitored the delegate's exercise of those powers.

However, the Companies Act stipulates instances in which the board cannot delegate its powers as follows:

- The issuance of new shares and determining the consideration for them.
- Distributions and dividends.
- Any issue relating to shareholder's discount.
- The company's purchase of its own shares and any issues relating to share redemptions.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Companies Act. These are duties:

- To act in good faith and the best interest of the company. It shall be the duty of the director to exercise their powers in accordance with the Act and with the limits and subject to the conditions and restriction established by the company's constitution where applicable.
- Not to agree to the company incurring any obligations unless the director believes at the time, on reasonable grounds that the company will be able to perform the obligations when it is required to do so.
- To obtain the authorisation of a general meeting before doing any act or entering into any transaction for which authorisation or consent of a general meeting is required by the Act or by the company's constitution.
- To act with reasonable care, skill and diligence. To exercise the degree of care, diligence and skill that a prudent person would exercise in comparable circumstances.
- Not to use any assets of the company for any illegal purpose and not to do, or knowingly allow to be done, anything by which the company's assets may be damaged or lost (otherwise than in the ordinary course of carrying on its business).
- To avoid conflicts of interest. A director has an obligation to the company not to compete or become a director or officer of a competing company, unless it is approved by the company with the knowledge of all the facts.
- To attend meetings of the directors of the company with reasonable regularity, unless prevented from doing so by illness or other reasonable excuse.
- Not to disclose any confidential information received by them on behalf of the company as directors otherwise than as permitted by law and in accordance with the Act.
- To transfer forthwith to the company all cash or assets acquired on its behalf (whether before or after its incorporation) or as the result of the employment of its cash or assets, and until such transfer is made to hold such cash or assets on behalf of the company and to use it only for the purposes of the company.

In addition, directors have duties under common law, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company.

What are directors' other key obligations?

The Act requires directors to keep proper accounting records. This is done by:

- Correctly recording and explaining the transactions of the company.
- Ensuring that at any time the financial position of the company will be determined with reasonable accuracy.
- Preparing financial statements that comply with the Act.
- Enabling the financial statements of the company to be readily and properly audited.

Ethical duties of directors include:

- Disclosing any conflict of interests.
- Avoiding illegal transactions.
- Abiding by competition laws.
- Abiding by environmental protection laws.
- Engaging in social corporate responsibility.
- Accounting for any monetary gain (other than remuneration).
- Acting as trustee and giving over collections on company's behalf.
- Acting honestly and in good faith and in the best interests of the company.; and
- Not to make use of the company's confidential information.

Transactions with the company

A director of a company shall, forthwith after becoming aware of the fact that they are interested in a transaction or proposed transaction with the company, cause to be entered into the interest register and in the event that the company has more than one director, disclose to the board of the company the full nature of the interest.

A transaction entered into by the company in which a director of the company is interested may be avoided by the company at any time before the expiration of six months after the transaction is disclosed to all the shareholders.

The general rule is that a company is prohibited from making a loan to a director of it, or from entering into any guarantee or providing any security in connection with a loan made by any person to such director.

However, the Companies Act makes the following exceptions:

- A private company may make a loan or give a guarantee or security in respect of a loan to a director of it or its holding company provided the transaction has the unanimous assent of all its members.
- A company is not prohibited from providing funds to a director to meet expenditure incurred or to be incurred by the director for the purpose of the company or for the purpose of performing their duties as an officer of the company.
- The company may make a loan to director who is engaged in the salaried employment of the company in accordance with any employee loans scheme approved by the general meeting of the company.
- A company may make a loan or give a guarantee or security in connection with a loan made by any person to a related company.
- The company may also make a loan to a director who holds salaried employment in the company or in a holding company or subsidiary of the company.
- A money lending company may advance funds to a director provided this is done in the ordinary course of business.

- Shareholders of a company may agree to advance a loan to a director if the action is deemed to be validly authorized by the company in terms of the Companies Act, notwithstanding any provision in the constitution of the company.

Liabilities of directors

Breach of general duties

The director's primary duty is to act in the best interest of the company. Therefore, any act which is deemed not to have been done in the best interest of the company would be conceived as a breach of duty. Generally, only the company can bring an action for breach of duty against a director.

However, shareholders or any other entitled person or director of the company may by way of a court application bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances.

The application shall:

- Be in the name and on behalf of the company or any subsidiary.
- Intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discounting the proceedings on behalf of the company or subsidiary, as the case may be.

Remedies for the breach include damages or compensation, restoration of property, accounting for profit made in breach of duty, an interdict to prevent breach and rescission of a contract.

Liabilities on insolvency

A director has a duty to engage into contracts on behalf of the company which the company can fulfil its obligations. Thus, a director of a company who is knowingly party to the contracting of a debt by the company and had, at the time the debt was contracted, no reasonable or probable expectation, that the company would be able to pay the debt, shall, on the application of the liquidator or of the creditor concerned in the winding up of the company, be liable for the whole or any part of any loss suffered by the creditor to whom the debt was incurred.

Other key risks

A director may also be disqualified by the court from acting as a director if they being a director of a company were wholly or substantially responsible for the company:

- Being wound up because of its inability to pay its debts as and when they become due.
- Ceasing to carry on business because of its inability to pay its debts as and when they become due.
- Entering into a scheme of compromise or arrangement with its creditors.

- Failure by the director to fulfil their constitutional and statutory duties.

Protection against liability

How can directors be protected from liability?

- **Indemnity and Insurance.** Where a director is found personally liable in respect of negligence, default, breach of duty or breach of trust, the company cannot relieve them of their liability. The company cannot give a director a blanket exemption from liability. However, the company may indemnify them against any liability incurred by them in defending any proceedings in which judgement is given in their favour or in which they are acquitted. Unless its constitution provides otherwise, a company may, with the prior approved of the board, effect insurance for an officer or employee of the company in respect of civil liability and costs in civil and criminal proceedings.
- **Ratification.** In order for a director or directors to protect themselves from any personal liability for transactions they enter into on behalf of the company, such transactions should be subject to ratification by the board.

What practical steps can directors take to avoid liability?

Directors should:

- Perform all their statutory and constitutional obligations with the reasonable skill, diligence, care and good faith required of them. This is the core duty of directors, because this applies to every decision which the directors take, whether they are pressing on the margins of their powers under the constitution or not.
- Not place themselves in a position in which there is a conflict between their duties to the company and their personal interest or duties to others.
- Not abuse their powers; directors must not accept any benefit (from a third party) which is conferred because of the power they have as a director or by way of reward for any exercise of their powers as director.
- Permit individual or minority shareholders, subject to appropriate safeguards, direct access to the court in order to bring an action on behalf of the company against the wrongdoer.
- Keep appropriate records of all meetings by way minutes and resolutions made. Further, ensure that the records of the company's dealings for audit and statutory accounting purposes.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

In Canada, entity choice is an important legal determination and choosing the right entity structure depends on a number of factors, including liability and tax treatment. The most common business structures in Canada are partnerships and corporations. Typically, for group structures, a corporation is used.

Note: There are different acts that exist under Canadian federal laws and the laws of the provinces and territories to govern corporations. This is because one can initially incorporate a corporation federally, or in a given province or territory. This guide provides general answers under Ontario and federal laws, which are similar to the laws in the other provinces and territories.

Types of director

What is a "director"?

A director is a member of the board of directors, which is generally responsible for managing or directing the management of the business and affairs of the corporation. Canadian legislation uses the following definition:

"Director" means a person occupying the position of director of a corporation by whatever name called.

What are the different types of director?

Generally, there are not different types of directors. However, some corporations may appoint committees (i.e., Audit Committee, Compensation Committee) to oversee the corporation's business in a given area, and certain directors can sit on these committees as well.

Eligibility

Who can be a director?

To be a director, the person must:

- be at least 18 years old;
- not have been declared incapable under the laws of a Canadian province or territory, or by a court in a jurisdiction outside Canada;
- be an individual (a corporation cannot be a director); and
- not be in bankrupt status.

Ordinarily, at least 25% of the directors of a corporation must be resident Canadians. If a corporation has fewer than four directors, at least one of them must be a resident Canadian.

Corporations operating in sectors subject to ownership restrictions (i.e., airlines and telecommunications) or corporations in certain sectors (i.e., video or film distribution) must have a majority of resident Canadian directors.

Minimum / maximum number of directors

A corporation must have a minimum of one director. The maximum number of directors is determined by the corporate articles of incorporation or other constating documents, such as by-laws. To increase or decrease the number of directors permitted by the articles, you must amend your articles and file articles of amendment.

Appointment and removal

How are directors appointed?

Shareholders typically elect directors at the shareholders' meeting by a majority of votes. Where a vacancy on the board occurs, but the shareholders hold the exclusive right to appoint directors, the remaining directors may fill the vacancy. This does not include a vacancy created by increasing the number of directors or by failing to elect all of the directors required.

How are directors removed?

Directors' terms ends upon their resignation, death, disqualification or removal by the shareholders of a corporation. The shareholders may, by ordinary resolution at an annual or special meeting, remove any director or directors from office.

Note: A director may not be removed from office if the number of votes cast against the removal would be sufficient to elect that director in a regular election using cumulative voting.

Typical management structure

Board / management structure

The board of directors generally appoints the company's executive officers, including the chief executive officer, president, secretary, and vice presidents, to oversee and manage the company's day-to-day operations.

How are decisions made by directors?

Directors have various considerations to keep in mind when making decisions. Directors have a duty to act honestly and in good faith in the best interests of the corporation and, in so doing, to exercise the care, diligence and skill of a reasonable person in comparable circumstances.

Authority and powers

The officers of a corporation are responsible for the day-to-day operation of the corporation. Officers are appointed by the directors and are delegated the power to bind the company on certain routine matters.

While certain decisions require shareholder approval (i.e., amending the articles), directors may make other significant decisions without such approval, such as:

- approving financial statements;
- issuing shares;
- calling board or shareholder meetings; and
- nominating directors.

Directors typically do not have the authority to bind the corporation acting alone, but this power would be set out in the corporations constating documents.

Delegation

The role of a board of directors is to direct or oversee the business affairs of the corporation, not to manage them on a day-to-day basis. This latter responsibility rests with, or rather is delegated by the board of directors to, the officers of the corporation. A single individual may serve simultaneously as a director, officer, and shareholder. In many small businesses, one person often fills all three roles.

The board of directors may also delegate responsibility over certain aspects of the corporation's operations to committees of directors. These groups may take the form of *regular committees* designed to deal with areas of ongoing corporate concern, such as compensation; *special committees* established to address a particular issue such as an acquisition or defence of a hostile take-over, or; *audit committees*, established for the purpose of reviewing annual financial statements.

Canadian case law opines that directors who were members of an audit committee should bear somewhat more responsibility than other directors for a compliance deficiency in the corporation's financial statements. This is because these directors have more opportunity to obtain knowledge about, and to examine, the affairs of the corporation than other directors. In some cases, the establishment of a special

committee of independent directors is required, particularly where the proposed transaction involves a related party.

In other situations, while not strictly mandatory, it is often prudent to appoint a special committee to provide independent oversight, supervise negotiations and make recommendations to the board. Establishing a committee of independent directors is recognized by Canadian courts as an effective method to manage conflicts of interest. While the delegation of responsibility and authority to officers and committees facilitates the more efficient management of the corporation, ultimate control and responsibility nevertheless remains with the full board of directors. Accordingly, it is prudent for a board of directors to require that officers and committees report to the board on a regular basis and seek ratification of their proposals where appropriate.

Duties and obligations of directors

What are the key general duties of directors?

Directors owe a duty of care, meaning they are required to act honestly and in good faith in the best interests of the corporation. They must avoid conflicts of interest, disclose material interests in corporate transactions, and refrain from self-dealing or diverting corporate opportunities. Directors can be held liable for breaches of these duties, and insurance typically does not cover deliberate breaches.

Directors are generally not liable for honest errors of judgment. Courts focus on the process by which directors make decisions rather than the outcomes. The standard of care is measured against what a reasonably prudent person would do in similar circumstances, requiring directors to actively inquire, seek expert advice, and devote sufficient attention to corporate matters. While no specific education or expertise is required, directors must apply the knowledge and abilities they possess to fulfil their duties. Certain situations, such as responding to hostile takeovers, may require a higher standard of diligence.

Directors owe their fiduciary duty to the corporation itself, not to individual shareholders. This duty is broad and flexible, encompassing long-term corporate interests and allowing directors to consider the interests of various stakeholders as inputs to their decision-making. There is no fixed hierarchy among stakeholder interests, but directors must balance them fairly while prioritizing the corporation's best interests.

What are directors' other key obligations?

Directors have other key obligations which can give rise to personal liability.

Obligations Relating to Securities Offerings, Reporting & Disclosure Requirements:

- Directors of corporations that issue shares to the public or are listed on a stock exchange have significant legal obligations under securities law. Their responsibilities include ensuring accurate and timely reporting and disclosure of financial and other material information to shareholders and the investing public.

Directors may be held personally liable for incomplete, misleading, or false disclosures, and for failing to ensure that the corporation complies with continuous disclosure requirements.

- Directors also face liability related to insider trading. They must report their own holdings and changes in ownership, and they cannot trade or disclose material non-public information. Violations can result in substantial fines, imprisonment, and liability for damages caused to others.
- When issuing shares, directors must comply with corporate law, securities legislation, and the corporation's governing documents, including respecting shareholders' pre-emptive rights.

Obligations under Employment Legislation:

- Directors may be personally liable for unpaid wages, vacation pay, commissions, and other employment-related debts if the corporation fails to meet its obligations. Liability arises not only from failure to pay employees, but also from authorizing, permitting, or acquiescing in breaches of employment laws.
- Certain statutes impose liability for non-compliance with labour, occupational health and safety, and pension regulations. Directors are expected to exercise reasonable care to ensure the corporation meets its legal obligations. Penalties for non-compliance may include fines, orders to pay outstanding amounts, or imprisonment, though enforcement typically targets directors who blatantly ignore their duties.

Obligations Relating to Taxes:

- Directors can be held personally liable for certain tax-related obligations of the corporation. This includes liability for offences committed by the corporation, failure to deduct, withhold, or remit taxes, and, in limited circumstances, direct tax obligations such as during liquidation or asset distributions. Penalties for non-compliance can include fines, repayment of taxes owed, and, in some cases, imprisonment.

Obligations under Environmental Legislation:

- Directors can be held personally liable for environmental offences committed by the corporation. Liability generally arises if directors knew of or influenced the actions causing the offence, or if they fail to take reasonable care to prevent unlawful environmental harm. Penalties can include substantial fines and, in serious cases, imprisonment.

Transactions with the company

Part of duty of care owed by the directors is to avoid conflicts of interest and refrain from engaging in "self-dealing" or diversion of corporate opportunity.

Directors who are party to or have a material interest in a material contract or transaction with the corporation, must disclose this conflict in writing to the corporation or request to have entered in the directors' meeting minutes as to the nature and extent of the interest.

Liabilities of directors

Breach of general duties

Derivative Action:

- The derivative action allows shareholders and other corporate stakeholders to bring an action in the name of the corporation against its directors to enforce rights or remedies belonging to the corporation. The derivative action provides corporate stakeholders with recourse against directors who misuse assets, take personal advantage of corporate opportunities or otherwise cause damage to the corporation.
- Those entitled to bring an action include current or former securityholders, officers or directors and any other person who, in the court's discretion, is a "proper person" to bring the application ("securityholder" in this context has been defined so as to include holders of debt instruments, but Canadian courts have been reluctant to allow creditors unfettered access to derivative actions).
- Under the derivative action provisions, courts are granted the broad power to grant any order deemed necessary to redress the improper action.

Oppression Remedy:

- The oppression remedy allows specified stakeholders, including past or present securityholders, creditors, directors and officers or any other person who in the discretion of the court is the "proper person", to make an application to bring an action in their name for relief from corporate conduct that is oppressive, or unfairly prejudicial to, or that unfairly disregards their interests.
- The definition of oppressive or unfair conduct is to be assessed by courts on a case by case basis.
- The oppression remedy provisions entitle a court to grant any order it deems appropriate, including but not limited to setting aside a transaction, awarding damages, or even dissolving the corporation.

Liabilities on insolvency

Except in cases of insolvency or near-insolvency, directors do not generally owe fiduciary duties to creditors. Considering stakeholder interests is permissible as long as the corporation's interests are not subordinated to benefit other groups.

The directors of a corporation are jointly and severally liable to employees for all unpaid wages, not exceeding an amount equivalent to six months wages. This liability extends to holiday pay, but not statutory severance or termination pay or damages from wrongful dismissal. A director is shielded from such liability if he was not a director at the time the employee services were performed. He is also not liable unless the corporation has been sued for the debt within 6 months after the date of the earliest of the commencement of the liquidation or dissolution proceedings or the date of the assignment or receiving order made pursuant to the *Bankruptcy and Insolvency Act (Canada)*.

Other key risks

Directors can be held personally liable if they approve transactions that could weaken the corporation's financial position and deplete assets available to shareholders or creditors. However, directors are generally protected from liability for dividend declarations if they rely in good faith on financial statements or auditor reports believed to be accurate.

There are also a number of other miscellaneous duties and liabilities. For instance, the federal law renders persons who make reports required by such act guilty of an offence where the report contains certain misrepresentations as to material facts. Pursuant to this provision, any director of the corporation who "knowingly authorized, permitted or acquiesced in" the commission of the offence may be held liable. The federal law also requires that a corporation and its agents, including directors, to take certain precautions with respect to the maintenance and accuracy of certain records and makes the failure to do so punishable by a fine of up to \$5,000 or six months imprisonment, or both. Other sections require directors to approve annual financial statements and, where aware or advised of any error, to prepare and issue revised statements or otherwise to correct the error, and impose penalties for knowingly failing to do so.

Protection against liability

How can directors be protected from liability?

A corporation can adopt one or more of the following measures:

- **Insurance:** obtain insurance to protect directors and officers against liabilities incurred in the course of performing their duties, except where the liability results from a failure to act in good faith in the best interests of the corporation.
- **Mandatory Indemnification:** directors have the right to be indemnified by the corporation for legal costs and other expenses incurred in defending a proceeding, provided the director was substantially successful on the merits and acted in good faith and, where required, with reasonable grounds. In administrative or criminal proceedings, the director must also have reasonably believed that their conduct was lawful. These indemnification rights extend to former directors and to individuals who, at the corporation's request, serve as directors of another corporation in which the corporation has an interest.
- **Discretionary Indemnification:** A corporation can indemnify a director for costs, settlements, or judgments arising from legal proceedings related to their role, as long as the director acted in good faith and in the corporation's best interests. Indemnification does not cover breaches of fiduciary duty, and in criminal cases, the director must also have had reasonable grounds to believe their conduct was lawful.

Note: Directors can rely on expert reports, such as financial statements or opinions, in certain circumstances. Directors are not liable if they exercise the same degree of care, diligence and skill that a reasonable, prudent person would in comparable circumstances.

What practical steps can directors take to avoid liability?

To avoid liability, directors should:

- Ensure they perform the required duties of a director;
- Ensure that the director has an appropriate indemnification agreement with the corporation;
- Ensure that the company has obtained sufficient D&O insurance;
- Hire and retain skilled and effective management;
- Thoroughly document meetings of the board;
- Make robust and accurate disclosures regarding conflicts of interest;
- Adopt procedural safeguards in the event of a conflicted or other high-risk transaction; and
- Obtain and rely on expert advice as to complicated matters.

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Corporate entities

What type of company is typically used in group structures?

Generally speaking, in Chile parties are free to choose their corporate structures, including those for business groups. However, there are some exceptions where certain corporate structures are required by law (i.e. banks and insurance companies).

The most used types of business organizations operating in Chile are:

- *Sociedades de Responsabilidad Limitada* (SRL) or limited liability companies or partnerships.
- *Sociedades Anónimas* (SA) or stock corporations or corporations. A corporation may be open (public), closed (private) or special.
- *Sociedades por Acciones* (SpA) or simplified corporations.

Corporations are mainly governed by Law 18,046 (Corporations Act) and Decree 702 of Ministry of Hacienda, 2011, rules of Corporations Act (Rules). Corporations must be managed by a board of directors appointed by the shareholders. The Corporations Act and its Rules specifically regulate directors, including their appointment, duties, powers and responsibilities.

SRLs and SpAs may be managed by a board of directors if specified by their bylaws, but special regulations for SRLs and SpAs do not include directors' rules. SpAs are regulated in a supplementary manner by the private corporations' rules, so the Corporations Act and its Rules and the rules about directors may be applicable.

Consequently, the general legal framework for directors is contained in the Corporations Acts and its Rules, and this guide refers to those rules.

Types of director

What is a "director"?

A director is a person appointed by the shareholders in a shareholders' meeting to be a member of the board of directors. Directors must accept their appointment, expressly or tacitly.

The board of directors is in charge of managing the company and represents it judicially and extra-judicially, to fulfil its corporate purpose. The board is invested with all the managing and disposal authorities that are not otherwise established, by the law or the bylaws, as authorities of the shareholders' meeting.

Directors' functions are collectively exercised in duly constituted directors meetings. Therefore, individual acts of directors do not constitute an act of the board, nor of the company and they are not binding on the company unless the board, acting as such, has delegated some specific functions to the individual director.

What are the different types of director?

There are the following types of directors:

- **Principal.** A director elected by the shareholders, who has the right (and the obligation) to attend the board's meetings and to vote on the matters discussed in them.
- **Alternate.** By-laws may establish alternate directors. If they do, each principal director shall have an alternate. Alternates are also appointed by shareholders.
- **Substitute.** A person temporarily appointed as director of a corporation by its board, if there is a vacancy of a director and their alternate. This appointment is temporary, until the renovation of the whole board at the next ordinary shareholders' meeting.

Principal and alternates jointly apply for their positions as directors and are appointed in the same and unique election process. The votes for the principal will also benefit their alternate.

Alternates replace principals permanently in case of vacancy or temporarily in case of absence or temporary disability. If the vacancy of a director and their alternate occurs, the whole board has to be renewed at the next ordinary shareholders' meeting. In the meantime, the board may appoint a substitute. However, if the vacancy prevents the board from meeting due to lack of quorum, the board must appoint a substitute.

Alternates may always attend the board's meeting with right to speak, but they only will be able to vote when their principal is absent.

As general rule, alternates and substitutes are subject to the same rules as principals.

A substitute director does not have an alternate.

Certain listed corporations must also appoint at least one independent director and constitute a directors' committee (*comité de directores*). The independent director(s) must be members of this committee. Directors must satisfy a number of criteria in order to be considered independent, including the absence of relevant economic,

professional, credit or commercial relationships with the company, its corporate group or its controlling shareholder during a recent period. Although independent directors are also appointed by shareholders, some special rules apply to their nomination process and also to vacancies of independent directors.

Eligibility

Who can be a director?

The following persons cannot be appointed as board members:

- Minors (aged less than 18 years old).
- Directors whose appointment has been revoked due to the rejection of the balance sheet by a shareholders' meeting.
- Persons with certain criminal records (including bankruptcy crime) and those who are debtors in a bankruptcy liquidation process (*procedimiento concursal de liquidación*).
- Authorities regarding entities that, directly and in accordance with the law, supervise or control.

There are other restrictions applying to directors of listed (open) corporations or their affiliates, such as being a senator, congressman, state minister, CMF (*Comisión para el Mercado Financiero*) officer, stockbroker, etc and other criteria applying to independent directors, as noted above.

Directors may be local or foreign, except in the case of certain industries (mainly banks, insurance companies and other regulated financial institutions).

From an antitrust standpoint, article 3 letter d) of the Competition Act (Law Decree No. 211 of 1973 and its amendments) prohibits interlocking, meaning the simultaneous participation of the same individual in relevant executive positions or as a director at two or more competing companies. This conduct is a violation of the Competition Act when the corresponding companies and their business groups have separate annual earnings coming from the business purpose exceeding 100,000 *Unidades de Fomento* (approx. USD 4,090,000).

Law No. 21,757, enacted in 2025, introduced a recommended board composition rule for listed (public) and special corporations, whereby individuals of the same sex may not represent more than 60% of the members of the board. This recommendation will be implemented gradually between January 2026 and January 2032. To facilitate its application, corporate bylaws must include mechanisms aimed at promoting compliance with this threshold in board elections. Corporations are required to report the identity and sex of each board member to the CMF. During the initial phase, non-compliance does not trigger sanctions, but corporations must publicly explain the reasons for not meeting the recommended composition, with such information disclosed through the CMF, the annual report and, where applicable, the corporations' website.

Minimum / maximum number of directors

The size of the board is determined in the company's bylaws which may specify a set number of directors. If shareholders want to modify the number of directors or to create a new directorship, a bylaws amendment has to be agreed on at the relevant shareholders' meeting and must comply with all the legal formalities.

If the respective bylaws do not set the number of board members, the legal minimum shall apply. The legal minimum number of seats depends on the type of corporation.

- Closed (private) corporations must have at least three directors.
- Listed (public) corporations must have at least five directors.
- Public corporations that must appoint an independent director and establish a special directors' committee must have at least seven directors and must also appoint at least one independent director.

The Corporations Act does not set a maximum number of directors.

However, special laws may establish the minimum and maximum number of directors and other requirements for special corporations (i.e. banks, insurance companies and other regulated financial institutions).

Appointment and removal

How are directors appointed?

Directors are appointed by the shareholders in a shareholders' meeting.

A director's term of appointment, which is set out in the bylaws, cannot exceed a three year term. Directors may also be re-elected indefinitely. If the term of appointment for the board is not set in the bylaws, it will be one year.

There are certain special rules for the appointment of independent directors including, that they have to be proposed as director by shareholders that represent at least 1% or more of the company's shares. The candidate with the highest number of votes shall be appointed as independent director.

Each corporation shall keep a public registry containing information about its president, directors, manager and other executives.

Additionally, in listed (public) corporations, public disclosure of a director's identity to the CMF is required.

How are directors removed?

Directors are freely removed by shareholders acting in shareholders' meetings. In order to revoke the board, all members must be removed at the same time.

Removal affects all directors, therefore individual or collective revocation of one or more board members is not permitted.

Board / management structure

Typical management structure

In Chile, the only permitted board structure is one-tier. Even though the law does not expressly state that it is a unitary board, there is no discussion about this.

There is only one mandatory board committee for certain listed corporations. The duties and faculties of this directors' committee (*comité de directores*) include a mix of accounting, auditing, conflict of interests' management, and compensation matters, and the committee must comprise at least three members, the majority of which must be independent directors.

Finally, the company's bylaws may establish other committees of the board and specify their functions and composition. The board may also agree to create other specific committees of the board from time to time.

How are decisions made by directors?

Directors' functions are collectively exercised in duly constituted meetings, complying with attendance and voting quorums.

Therefore, individual acts of directors do not constitute an act of the board, nor of the company and are not binding on the company unless the board, acting as such, delegates some specific functions to such director.

Authority and powers

The board of directors of a company represents it judicially and extra-judicially and is vested with all the powers of administration and disposition that the law or statute does not otherwise specify as the responsibility of the shareholders' meeting. It is not necessary to grant the board any special power, even for those acts or contracts for which laws require this. This does not preclude the representation of the CEO. Consequently, there is not a list of matters which are the responsibility of the board of directors, on the contrary, the law defines only those matters that must be agreed upon by the shareholders given their relevance.

In Chile, directors do not hold the authority to represent the company individually. However, the board of directors as a body may delegate part of its powers to the main executives, managers, assistant managers or lawyers of the company, to a director or to a committee of directors and, for specially determined objects, to other people.

Delegation

Individual directors are not allowed to delegate their personal functions as directors. However, the board as a body may delegate part of its functions to senior executives, managers, lawyers, one director or directors' committees and, for specifically determined purposes, to other persons.

Duties and obligations of directors

What are the key general duties of directors?

Directors must exercise their functions in accordance with their fiduciary duties. Their main duties are:

- **Duty to be informed.** Directors have the right and the duty to request, deliver and be informed as necessary for the correct functioning of the company.
- **Duty of care (*deber de cuidado*).** Directors are obliged to use, in the exercise of their functions, the care and diligence that people ordinarily employ in their own businesses (and shall be jointly and severally liable for any damage caused to the company and the shareholders). This corresponds to the ordinary standard of care (*culpa leve*) defined by Chilean civil law.

The duty of care obliges every director to regularly follow and decide about management issues (requesting all the information needed for this purpose, with the collaboration or assistance from management), to actively participate in the board and any committees, to attend meetings, to request board meetings, to request that certain matters be reviewed by the board and to oppose illegal acts, among others.

- **Duty of trust/loyalty (*deber de lealtad*).** This means placing the interests of the company (*interés social*) above their own interests, those of their related persons or those interests of those who appointed them as directors. It also includes:
 - Duty of confidentiality (*deber de confidencialidad*). The directors must keep confidential the business and corporate information to which they have access because of their position, and which has not been officially disclosed by the company.
 - Duty to respect the business opportunity of the company.

The director must be loyal to the company in the exercise of their functions and cannot compete with it or damage it with their actions.

What are directors' other key obligations?

Directors appointed by a shareholders' group have the same duties towards the company and other shareholders as the remaining directors. They are not able to infringe their duties to them in order to defend the interests of the shareholders' group that elected them.

Additionally, the Corporations Act sets out a list of conducts or activities that are forbidden for directors (*prohibiciones*).

Transactions with the company

The Corporations Act sets out special rules for related party transactions between the company and its directors.

Closed Corporations

If a director has an interest, directly or as third-party representative, in acts or contracts involving a "significant amount" of money, those acts or contracts may only be executed, when they are:

- Known and previously approved by the board of directors. The director with the interest must abstain from participating in this decision.
- Adjusted to fair conditions similar to those that usually prevail in the market.

The bylaws may authorize these relevant acts or contracts so that they are not subject to these conditions.

These rules will be not applicable if the act or contract has been approved or ratified by an extraordinary shareholders meeting which has a quorum of two thirds of the shareholders with voting rights.

The Corporations Act assumes the director has an interest in any negotiation, act, contract or operation, where the following persons intervene in it:

- The director, their spouse or certain relatives.
- The companies in which the director is a director or owns, directly or indirectly, 10% or more of the capital.
- The companies in which any of the director's relatives specified above, are directors or own, directly or indirectly, 10% or more of the capital.
- The company's controller or any of their related persons, if the director would not have been appointed without the votes of the shares owned by the controller or their related persons.

As stated by the Corporations Act, a "significant amount" means any act or contract that exceeds 1% of the corporation's capital, provided that this act or contract exceeds the equivalent of 2,000 *Unidades de Fomento* (approx. USD82,000); or in any case, when it exceeds 20,000 *Unidades de Fomento* (approx. USD820,000).

All separate acts, contracts and operations that are executed in a period of 12 consecutive months by means of one or more similar or complementary acts, in which there is identity of parties(including related parties) or object, are presumed to constitute one single act, operation or contract.

In addition, minutes of the relevant board meeting must mention the deliberations for approving the terms and conditions of the relevant act or contract. Shareholders shall be informed of these acts or contracts in the next shareholders' meeting.

If these rules are breached, the validity of the act, contract or operation will not be affected. However, relevant sanctions may be applied and the company, the shareholders and the interested third parties, will be allowed to claim compensation for the damages caused.

Listed Corporations

Special rules and provisions apply to related party transactions in listed corporations and their affiliates.

Finally, the Corporations Act exempts some related parties' operations from the requirements and procedures established for them in the law (i.e., operations under a significant amount, customary or ordinary operations determined by the board of directors in accordance with their general habitual policy (*política general de habitualidad*)).

The resolutions adopted by the board of directors approving a related party transaction shall be disclosed at the next general shareholders' meeting (*Junta de Accionistas*) and mention the directors that approved them.

Liabilities of directors

Breach of general duties

If a director breaches the Corporations Act, its Rules or the company's bylaws causing damage to others, they must compensate the damages caused, in addition to any other civil, administrative or criminal sanction.

Directors will be jointly and severally liable (with other directors and/or the company) for damages caused due to any guilty and fraudulent actions.

Any stipulation of the bylaws and any agreement of the shareholders' meeting that releases or limits the directors' responsibility will be null.

The approval by the shareholders' meeting of the annual report and balance sheet presented by the board of directors or of any other account or general information, does not release the directors from their responsibility for certain acts or businesses; nor does the specific approval of these exempt them from that responsibility, when they have been carried out or executed with slight negligence (*culpa leve*), gross negligence (*culpa grave*) or fraud (*dolo*).

To protect themselves from liability for an act or agreement, directors must oppose that act or agreement and this opposition must be recorded in the minutes of the relevant directors' meeting and made known to shareholders in the next ordinary shareholders' meeting.

Any shareholder or shareholders, owning more than 5% of the corporation's capital, or any director or directors may claim any damages caused to the company on its behalf.

In addition, the Corporations Act presumes the liability of directors and they will be jointly and severally liable in certain cases.

Finally, the Corporations Act provides that in case of breach of the Corporations Act, its Rules and other provisions, the company's managers and legal representatives will be personally liable unless they didn't concur with the decision or they opposed it.

Liabilities on insolvency

As a general rule, directors are not responsible for the company's insolvency if they have acted in compliance with all their fiduciary duties. This is an application of the business judgement rule recognised by the courts.

However, directors must not:

- Induce managers, senior executives, account inspectors or external auditors and risk rating agencies, to render irregular accounts, present false information or conceal information.
- Present to shareholders irregular accounts, present false information or conceal essential information.
- Borrow the company's money or property or use them for personal or another person's benefit.
- Use for their own benefit or related third parties, causing damage to the company, the commercial opportunities of which they have knowledge because of their position.

In addition, the Corporations Act presumes the directors will be jointly and severally liable for the damages caused to the company, its shareholders and third-parties if:

- The company does not keep its corporate books or registries.
- Provisory dividends (*dividendos provisorios*) are distributed and the company has accumulated losses (those directors that approved the distribution will be liable).
- The company conceals its assets or property, or it recognizes presumed debt or simulates the sale of goods and properties, amongst other things.

There are other considerations in other legal bodies, such as the Bankruptcy Law.

Other key risks

Disloyal administration

Directors of public and closed corporations may be subject to criminal liability for a crime called "disloyal administration" (*administración desleal*) which was incorporated into the Chilean Criminal Code in 2018.

If a director, in their role as administrator/manager of the company's patrimony assets, causes damage to the company, either by abusively exercising their powers to dispose on behalf of the company or to bind it, and/or by executing or omitting any other action in a manner manifestly contrary to the corporate interest of the company, they shall be subject to imprisonment and fines ranging from 5 to 30 Unidades Tributarias Mensuales (UTM) (approx. USD360 to USD 2,000), in addition to a fine of 50% to 100% of the damage caused.

The Chilean Criminal Code provides higher sanctions in the event the disloyal administration crime is committed by a director of a listed corporation.

Economic Crimes Law

On August 17, 2023, Law No. 21,595 on Economic Crimes (*Ley de Delitos Económicos*) was published in the Official Gazette. It systematizes economic crimes and crimes against the environment and, among other provisions, extends the criminal liability of legal entities (*personas jurídicas*).

This Law establishes a different crime determination statute for the so-called "white collar crimes", increasing penalties and expanding the catalogue of crimes attributable to companies and their officers.

Also, senior management of corporations (including directors) will face more severe liability, meaning that compliance models (*modelos de prevención*) will have to be strictly observed by them in order to avoid reputational and economic damage.

The new concept of "Economic Crimes" (*Delitos Económicos*), contemplates new criminal types which are linked, in general terms, to crimes of socioeconomic and environmental connotation.

Further, directors must not prevent or obstruct investigations which aim to establish their own responsibility, or the responsibility of any managers, executives etc.

Protection against liability

How can directors be protected from liability?

Director's liability insurance is a common practice. Corporations can pay the director's premiums. However, as the director is not an employee of the company, the company would be likely to have to prove before the tax authorities or the tax court that the premium expense is needed to generate the company's revenues.

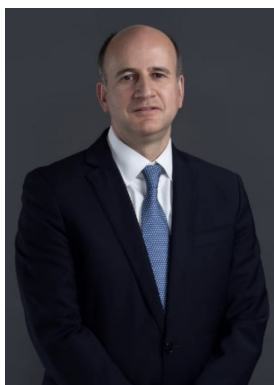
There is no constraint on the company indemnifying directors and officers in relation to liabilities incurred in their professional capacity, but this is an uncommon practice. Liabilities that arise from gross negligence (*culpa grave*) or fraud (*dolo*) cannot be indemnified, in accordance with civil law.

Also, as stated above, to protect from liability for an act or agreement, directors must oppose that act or agreement and this opposition must be recorded in the minutes of the relevant directors' meeting and made known to shareholders in the next ordinary shareholders' meeting.

What practical steps can directors take to avoid liability?

The Chilean Corporations Act recognises the business judgement rule, meaning that directors must act in compliance with the requirements established by law and other applicable rules, in good faith, in the interests of the company and must be duly informed. They are not required to be all the times successful in the business that they manage, but they will be held responsible if they breach their duties.

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Czech Republic

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

Similar to most jurisdictions, the Czech form of a private limited company, "*společnost s ručením omezeným*" in Czech (s.r.o.) is the recommended type of corporate entity in group structures.

This guide therefore focuses on the management of a Czech private limited company.

Types of director

What is a "director"?

There is no specific definition of the term "director" in Czech company law. Basically, the law defines a director by setting out the criteria for how directors can be appointed and what their duties are. It can therefore generally be said that a director describes someone who is a "statutory body" of a company, manages the affairs of a company on behalf of its shareholders as a director and is registered as such in the Commercial Register. Managing affairs of the company includes both representing the company externally to third parties and business management within the company.

What are the different types of director?

There is only one type of director in an s.r.o. under Czech law. However, the managing directors may be elected either as an individual or collective statutory body. If the directors are elected as a collective body, they decide on the affairs of the company in a quorum and are only able to deliberate in the presence of a majority of the members and to decide by a majority of the votes of the members present. Individually appointed directors may represent the company each on their own.

However, for the sake of completeness, please note, that a fairly similar position to a director may be assumed by a proxy, who may be authorised by an s.r.o. to carry out

juridical acts associated with the operation of a business enterprise or its branch, including those which otherwise require a special power of attorney. A proxy's scope of power is however limited compared to a director.

Eligibility

Who can be a director?

A director must either be a natural person with full legal capacity or a legal entity (such as a company). If a legal entity is appointed, it must authorise a natural person to represent it in the body (i.e. be the director); otherwise, the legal entity is represented by a member of its governing body. Any such authorised natural person must fulfil all the eligibility requirements applying to a natural person who wishes to become a director.

In the terms of personal capacity, the person to be appointed as a managing director (i) must be fully competent; (ii) must not be prohibited from holding office by a public authority; (iii) must not have a record of criminal convictions for selected economic offences; (iv) must not have been declared bankrupt. Since 2023, the Ministry of Justice has maintained a Register of Excluded Persons (i.e. individuals disqualified from serving as directors). As of January 2024, the register is fully operational and routinely used by courts and notaries to verify eligibility during Commercial Register filings.

Minimum / maximum number of directors

An s.r.o. must have at least one director and no upper limit is set by Czech law. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

The election of the managing director is within the competence of the general meeting or the sole shareholder, only limited by the personal capacity requirements as described above. It is advisable that the decision to appoint the managing director be accompanied by the approval of their performance contract, including remuneration - the approval of the performance contract is (in addition to its actual conclusion by the relevant parties) a requirement for its effectiveness, without which the executive is not entitled to remuneration. The directors are subsequently registered as such in the Commercial Register - however, their authority to perform their duties is already established at the moment of their appointment. There are other ways of appointment to the office (e.g. co-option or appointment by the court), but these are used only in a very limited number of cases.

How are directors removed?

The termination of the office of the director occurs for several reasons: (1) expiry of the term for which the executive was appointed; (2) dismissal of the executive by the General Meeting; (3) resignation of the executive; or (4) if the executive ceases to meet the statutory conditions for the performance of the function.

1. If the term of office of the managing directors is limited by the articles of association (as is recommended), the managing directors must either be re-elected at the end of the term or their office is terminated.
2. As of the dismissal, the General Meeting may decide on such for any reason – there are no legal restrictions or reasons – and the office is terminated on the day of the relevant decision of the General Meeting, unless a later date is specified in the decision.
3. If a director does not want to continue in the performance of their office for any reason, they may resign from their position by making a notification to the General Meeting. Upon resigning, the office shall end on the date on which the resignation was or should have been considered by the General Meeting. If the resignation was announced at the General Meeting, the office shall terminate two months after such announcement, unless the General Meeting approved different time of termination.
4. If a director ceases to fulfil any of the statutory conditions for the performance of the function, the office ceases *ex lege* on the date on which the impediment occurred.

Board / management structure

Typical management structure

An s.r.o. is managed mainly by directors, whose duties are determined by the General Meeting. The powers in relation to the company are divided between the statutory body (directors) and the General Meeting in such a way that the directors ensure "business management" (*obchodní vedení* in Czech), which includes day-to-day business activities. The General Meeting on the other hand is responsible for strategic (conceptual) management, which includes extraordinary decisions that go beyond the normal organisation. The law prohibits the General Meeting from instructing or obliging directors concerning business management.

A supervisory board may be established if required by the articles of association, but it is not required by law. This however does not apply to a joint stock company (*akciová společnost* in Czech), where a supervisory board (or an administrative board, depending on the form of corporate governance) is required.

How are decisions made by directors?

Generally, the law does not specify a decision-making process in an s.r.o. and as such this is therefore determined by the articles of association. However, the law requires that every director must fulfil their duties with managerial care, i.e. with the necessary loyalty as well as with the necessary knowledge and care. The decision-making procedure (majority present, majority for approval, conduct of a meeting) is set out for the case where the executive directors form a collective body as described above. However, the appointment of managing directors as a collective body is a minority

practice. If more than one managing director has been appointed, but each of them constitutes a separate statutory body, they shall decide by a majority of all. In this case, the law does not provide for any requirements for their meetings or decision-making.

Authority and powers

Every director has a so-called general executive power of attorney and may represent the company and make decisions individually in all matters, even if the company has a multi-member collective board of directors, unless the articles of association specify a different way of acting on behalf of the company (e.g. that two executives must act together). Where a company has multiple directors which do not constitute a collective body, decisions on the management of the company's business require the consent of the majority of them, unless stipulated otherwise in the memorandum of association. The rules for representing the company set out in the articles of association and stated in the Czech Commercial Register must be followed by all directors, as if a breach of such rules occurs, the director will be liable to the company, as directors are contractually bound by such rules.

Delegation

Directors are not entitled to delegate the full scope of their management powers to third parties via a power of attorney and may only delegate a specific task among themselves or to third parties via a power of attorney. A general power of attorney is also prohibited even among the directors.

For the sake of completeness, proxy in the form of "prokura" may be granted. The proxy is authorised by prokura to all legal actions that occur in the operation of the business or its branch but does not have the power to alienate immovable property and encumber it, unless expressly provided for. The proxy is also subject to the managerial care and, like the directors, is entered in the commercial register. The contract of representation is concluded between the proxy and the company, but the granting of a proxy must be approved by the General Meeting.

Duties and obligations of directors

What are the key general duties of directors?

A director is in charge of the company's day-to-day business. The company's business management must be distinguished from the company's representation. While the representation of the company is carried out in relation to third parties, business management is directed inside the company and involves the management of the company, including decisions on business plans. Business management does not include deciding on the long-term strategic plans of the company, as this decision must be taken by the General Meeting within strategic (conceptual) planning.

The general duties include:

- Obligations to the shareholders and the General Meeting, which include (i) the obligation to convene the General Meeting at least once a year; (ii) to inform the shareholders of material corporate governance issues; (iii) the obligation to maintain a list of shareholders.
 - Obligations under accounting and tax regulations, which means (i) to ensure that the prescribed records and accounts are duly and properly kept; and (i) to ensure that taxes are paid and tax returns are filed properly.
 - Obligation to file any changes to the articles of association to the Commercial Register, and to maintain up-to-date information in the Register of Beneficial Owners.
-

What are directors' other key obligations?

A whole range of other (follow up) obligations arise for managing directors in cases where the company is not doing well economically. Directors are obliged to file for insolvency without undue delay after learning or having reasonable cause to learn of the company's insolvency. If the executives do not file an insolvency petition in time, they are personally liable to the creditors for the damage or other harm caused by the breach of this obligation.

Directors must take all necessary measures in order to avert imminent insolvency. If they fail to meet this obligation, then in the event of a declaration of bankruptcy of the company, the court may decide, on the proposal of the insolvency administrator or creditor, that the director in question is personally liable for the fulfilment of the company's obligations.

Transactions with the company

Directors hold a **general representative authorisation**, i.e. they are entitled to represent the company in all matters, which also applies to any transactions that are being concluded with the company. If a company has more than one managing director, each of them may legally sign contracts, unless the articles of association stipulate that the managing directors must sign together. The General Meeting may determine other internal limitations on the representative's authority (e.g. limitations on the value of the contract), but these limitations do not apply to third parties, even if they are registered in the Commercial Register.

However, there are limitations based on the **conflict of interest** between the executive and the company. The director has an obligation to notify:

- any potential conflict of interest to the body of which he is a member (if applicable) and the General Meeting, whereby the General Meeting may suspend director's execution of the office for a specified period of time; and
- intended conclusion of a contract between the company and the director or a person related to him, if such a contract is to be concluded outside the ordinary course of business. The General Meeting may prohibit the conclusion of such a contract.

Liabilities of directors

Breach of general duties

Any director who has violated the duty of due managerial care must return to the business corporation any benefit obtained in connection with such behaviour. Where such return of the benefit is impossible, the obliged person shall pay an equivalent amount to the business corporation in cash.

Every shareholder is entitled to claim, on behalf of the company, compensation or damage against a director or the fulfilment of their obligations and is entitled to represent the company in the following proceedings. The same rights apply to the subsequent enforcement of the ruling on the matter.

Liabilities on insolvency

See [What are directors' other key obligations?](#)

Other key risks

Although the company will be liable for any breach, a director is also personally liable for ensuring the company complies with all of the following requirements:

- Ensuring that there is no violation of contractual obligations. Such violation constitutes an objective liability, i.e. no negligent or intentional conduct is required. All obligations resulting from the Business Corporations Act have to be met.
- Ensuring that the company pays its taxes and advances in time and submits the respective tax declarations.
- Ensuring that the company makes payments in time, especially those regarding the company's employees' social security insurance, health insurance and contribution to the State Employment Policy.
- A director might be found personally liable for crimes defined by the Penal Code, especially economic crimes committed by them during the performance of their duties.
- Ensuring that all administrative law requirements are met fully and in a timely manner, especially those concerning business licences or other titles for executing business and environmental law requirements etc.
- Ensuring that the requirements of the Labour Code and any secondary legislation regarding employees' conditions are met.
- Ensuring that the company meets all the liability requirements specified in the Civil Code as "special liability" cases.

Protection against liability

How can directors be protected from liability?

Liability for damage to the company caused by the director violating managerial care is unlimited. It cannot be limited by the articles of association, management agreement or a contractual arrangement between the company and the director.

In practice, waivers of the company's claims against a member of the statutory body (so-called waiver letter used mainly in the termination of office) are widely used but given the above inadmissibility of limitation of liability there is a risk of such statements being considered void. These statements may, however, be morally persuasive in preventing the company from enforcing claims against the statutory representative in the future.

Directors' and officers' (D&O) insurance is also common in the Czech Republic. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention).

What practical steps can directors take to avoid liability?

Directors should:

- Become and stay informed about the affairs of the company, particularly its financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend any meetings of statutory bodies and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the shareholders (General Meeting) or other bodies, if applicable, if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of meetings of the statutory body and any decision processes are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst directors and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

The type of entities which are typically used in corporate group structures in Denmark are the private limited liability company (in Danish *anpartsselskab* or *ApS*) and the public limited company (in Danish *aktieselskab* or *A/S*). This guide focuses on directors' duties in these types of companies.

Types of director

What is a "director"?

There is no codified definition as such of the term "director" in the Danish Companies Act. However, a director is a natural person who takes and implements decisions on behalf of the company.

The term "director" typically refers to a member of the board of directors in a company that has chosen a two-tier governance structure which is further described in [Minimum /maximum number of directors](#). Thus, this guide also deals with the duties of a board of directors.

What are the different types of director?

There is only one type of director under the Danish Companies Act, which is an individual who has been appointed as a director (usually) by the shareholder(s) at the general meeting and is registered as such with the Danish Business Authority.

Employees have a statutory right to appoint and elect employee representatives to the board of directors provided that the company in question has maintained an average of no less than 35 employees in the preceding three years. The employees are entitled to elect a number of representatives to the supreme governing body (i.e. the board of directors if the company has such), corresponding to half of the number of members elected by the shareholder(s) or others, however, no less than two members. If the number of representatives to be elected by the employees does not constitute a whole

number, the number must be rounded up. An employee representative has the same rights and obligations as other members of the board of directors i.e., in relation to confidentiality, conflict of interests, remuneration, etc.

Eligibility

Who can be a director?

A director is required to be at least 18 years old, must not be under guardianship, and may not be disqualified from serving as a director of companies in Denmark or any other EU/EEA country. A director may only be a natural person and thus a corporate director is not feasible under Danish law. Foreign individuals may be elected as directors as there are no nationality or residency requirements to be met to be eligible for election.

Minimum / maximum number of directors

According to the Danish Companies Act, Danish public limited companies may opt for a two-tier corporate governance structure by which an elected board of directors is responsible for the overall and strategic management, while appointing an executive board to be responsible for the day-to-day management of the company. If a public limited company has adopted a governance structure where the company is managed by a board of directors and an executive board, the company must have at least one member in the executive board. The board of directors must then have at least three members.

There are no restrictions on the maximum number of directors under the Danish Companies Act. However, for public limited companies, information on the number or the lowest or highest number of members of the various management bodies is required to be stipulated in the articles of association. Also, for limited liability companies it is very common to stipulate in the articles of association a range of the required minimum and maximum number of directors.

While members of the executive board may also be elected to the board of directors, the Danish Companies Act provides that in public limited companies, the majority of the board must not also be members of the executive board. Furthermore, no member of the executive board of a public limited company may be chair or vice-chair of the company's board of directors.

Appointment and removal

How are directors appointed?

Members of the board of directors are as a general rule elected by the shareholder(s) at the general meeting (ordinary and/or extraordinary) which may be held in person or by written resolution. However, the articles of association may include detailed provisions on the appointment of directors, such as allowing others to appoint directors.

The election of a director must be filed with the Danish Business Authority no later than two weeks after the election has taken place. If a director is foreign, the following information is required to be provided to the Danish Business Authority upon filing:

- Copy of passport or an identity card
- Full name
- Residential address and proof of such address (for example an electricity bill or similar document where the address is specified)
- Information on citizenship at birth

The name and residential address of a director will – as a starting point – be publicly available through the Central Business Register's website: [CVR.dk](https://cvr.dk), unless the director has been granted address protection under the Danish Civil Registration System (CPR), in which case the address will not be publicly disclosed. This applies to Danish citizens only. Foreign management members in Danish companies may request address protection in CVR, preventing their private residential address from being publicly accessible, upon request to the Danish Business Authority.

How are directors removed?

Directors are removed by the shareholder(s) at the general meeting by a simple majority of votes if the directors have been elected at the general meeting. However, directors that have been appointed by e.g. a third party in accordance with the articles of association may at any time be removed by that person having appointed such director.

Directors are entitled to resign at any time during their term.

The decision to remove directors must be filed with the Danish Business Authority together with the general meeting minutes in question no later than two weeks after the meeting. If the director has resigned, the deregistration with the Danish Business Authority may also be completed on the basis of a signed and dated resignation letter submitted by the director.

Board / management structure

Typical management structure

A Danish private limited liability company may be managed either (i) by an executive board alone or (ii) by a board of directors together with an executive board. Both structures are permitted and commonly used. If the employees elect representatives to the supreme governing body (cf. "Types of director"), the company must have either a board of directors or a supervisory board.

A Danish public limited company must adopt either (i) a board of directors together with an executive board, or (ii) a supervisory board together with an executive board. The board of directors is responsible for the overall and strategic management, while the executive board handles the day-to-day operations. In companies with a supervisory board, the supervisory board oversees the executive board.

How are decisions made by directors?

In general, limited liability companies are free to regulate when board meetings are to be held. However, any member of the board of directors or executive board or the company's auditor may request that a board meeting be held. Nevertheless, a company should have at least one annual board meeting in order to prepare the annual report to be presented at the annual general meeting for the approval of the company's shareholder(s).

The function and duties, including the decision-making of the board of directors, may be governed by a set of rules of procedure of the board of directors if such procedure has been adopted by the board of directors. Adopting rules of procedure is mandatory for limited liability companies if the board of directors consists of more than one member.

The board of directors forms a quorum when more than half of the members are present, unless the articles of association require any larger quorum. However, it is required that all members have been allowed to participate in the board meeting in question.

Meetings of the board of directors are held in person, unless the board decides that members may participate by electronic means or by written resolution and such participation is compatible with the members carrying out their duties. However, any member of the board of directors or executive board may request that a meeting be held in person.

Matters to be determined at board meetings may be passed by simple majority of votes, unless otherwise stipulated in the articles of association or the Danish Companies Act. It may furthermore be provided in the articles of association, the rules of procedure of the board of directors and/or in a shareholders' agreement that the chair of the board has a casting vote in the event of a tie.

Authority and powers

A limited liability company is bound by agreements made by the entire board of directors on behalf of the company even if there are internal limits on its power to do so (e.g., in the rules of procedure, internal instructions etc.).

However, a company will not be bound in cases where members of the board of directors have entered into contracts that either:

- go beyond the limitations set forth in the Danish Companies Act; or
- are outside the scope of the company's objectives or outside of the board members' power to do so

provided that the third party in question knew or ought to have known that the board members acted outside the scope of the company's objectives or their powers.

Pursuant to the Danish Companies Act, a company is also bound by agreements made by a sole member of the board of directors or by a member of the executive board. This general rule may, however, be derogated from in the company's articles of association which companies usually do. The articles of association may derogate from the Danish Companies Act by e.g. stipulating that the company is bound by the joint signature of a board member and a member of the executive board.

Delegation

Directors may authorise an individual to act on its behalf by way of a power of attorney. However, this delegation only covers matters qualified to be day-to-day business and within the scope of the directors' powers. Other matters which are deemed to be more extraordinary require a specific power of attorney.

Duties and obligations of directors

What are the key general duties of directors?

The board of directors is entrusted with the ultimate responsibility of the company as it has both the supervisory function of the executive board and the overall strategic responsibility of the company.

In general, the board of directors must at all times act with due care and diligence and in the best interests of the company.

What are directors' other key obligations?

Bookkeeping, financial position and capital reserves

The board of directors must ensure that the bookkeeping and financial reporting procedures are satisfactory, taking due account of the size and circumstances of the company.

The board of directors must also ensure that adequate risk management is established and that the financial resources of the company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they fall due. The board of directors must therefore receive on a continuous basis adequate reporting about the company's financial position and ensure that the existing capital resources are adequate.

If it has been established that the company's total equity represents less than half of the subscribed nominal share capital, the board of directors and the executive board must ensure that a general meeting is held within six months. At the general meeting, the board of directors must report on the financial position of the company and, if necessary, propose measures that should be taken, including a proposal to dissolve the company.

Yearly assessment of the beneficial owners, annual report and annual general meeting

At the time of incorporation, the information on the beneficial owners of the company must be registered in the Danish Public Register of Shareholders, and such information can be accessed through the Central Business Register's Website: : [CVR.dk](https://cvr.dk). Any changes to this publicly available information must be updated, when required. However, a company is also obligated to assess at least once a year whether any changes to the registered information on legal and beneficial owners have occurred and ensure that the registered information is accurate and up-to date. The result of the assessment must be disclosed at the board meeting where the directors approve the annual report. Information on the company's beneficial owner(s) is no longer automatically publicly accessible in the Central Business Register (CVR). Access is restricted and only granted to authorities and parties with a legitimate interest pursuant to the applicable anti-money laundering rules, however, companies are still obliged to register the information.

The Danish Financial Statements Act prescribes that the board of directors must present the annual report at the annual general meeting for the shareholders' approval, and that the members of the board of directors must sign the annual report.

The board of directors is also responsible for convening and organizing the annual general meeting in due time for the general meeting to approve and submit the annual report so that the Danish Business Authority receives the annual report within six months after the end of the financial year.

Transactions with the company

As of 1 January 2025, the specific provisions on shareholder loans in the Danish Companies Act have been repealed. Companies may therefore now grant loans or other financial assistance to shareholders and members of management without complying with the former statutory conditions. The general capital protection rules, including the rules on financial assistance, continue to apply, meaning that when granting loans the management must ensure that:

- the loan is granted on commercial terms;
- the loan is in the interest of the company and is justifiable considering the company's financial position, including that the company maintains adequate capital reserves; and
- the transaction is lawful, meaning that the decision must not be contrary to neither legislation nor the company's articles of association, and must not be manifestly likely to confer an undue advantage on certain shareholders or others at the expense of other shareholders or the company.

Agreements between a sole shareholder and the company must still be documented unless concluded on ordinary market terms.

A member of the board of directors cannot participate in the decision-making process of a transaction involving an agreement either between the company and that member or between the company and a third party, if that member has a material interest in such business that may conflict with the interests of the company.

Liabilities of directors

Breach of general duties

Members of the board of directors may be held liable to pay damages to the company, the shareholder(s) or a third party if the directors in the performance of their duties intentionally or negligently caused damage to any of them.

The decision to bring an action against one or more of the directors is determined by the shareholder(s) by simple majority. However, shareholder(s) that hold(s) at least 10% of the total share capital may bring an action against a director on behalf of the company if the shareholder(s) has/have opposed either the resolution to grant protection against liability or the resolution to waive the right to commence legal proceedings.

Liabilities on insolvency

The board of directors must continuously assess if it is reasonable to carry on the operation of the company. If this is not the case, the directors must file an application for dissolution, restructuring or bankruptcy on behalf of the company. Thus, directors may be held liable under certain circumstances if an application for restructuring or bankruptcy has not been filed in a timely way.

Other key risks

A director may under certain circumstances be disqualified to participate in the management of a company by the bankruptcy court and thus will not be able to participate in the management of a company without assuming personal and unlimited liability. Further, in certain cases criminal liability may arise for directors.

Protection against liability

How can directors be protected from liability?

- **Discharge.** At the annual general meeting the shareholder(s) may by simple majority decide to discharge the board of directors from liability with respect to events occurred in the past financial year.
- **Indemnification.** Members of the board of directors may require that the company or its shareholder(s) hold(s) the director harmless from liability arising out of their duties as board member. Proceedings to take legal action may, however, be commenced regardless of any previous decision on discharge or indemnification if the passed resolution was based on inaccurate or incomplete information.
- **Insurance.** Companies are also permitted to, and usually do, maintain insurance coverage (i.e. directors and officers liability insurance) for members of the board of directors and executive board in respect of liability to the company.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and / or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

In Finland, the most common type of company used in group structures is the private company limited by shares (*Osaakeyhtiö* in Finnish). This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

"Directors" usually refers to the members of the board of directors and, if appointed, the managing director (CEO). The managing director is optional unless otherwise stipulated in the company's articles of association.

What are the different types of director?

Finnish law does not distinguish between executive and non-executive directors - all members of the board are subject to the same duties. The members of the board may be employed by the company.

The members of the board generally have duties relating to general and strategic matters. If appointed, a managing director has duties relating to day-to-day issues of the company. If not appointed, the members of the board will have duties also regarding the day-to-day issues of the company.

In addition, a *de facto* director is a person who acts as a director but is not validly appointed as such.

Eligibility

Who can be a director?

A director must not be under 18 years old, under guardianship, a person with restricted legal competency, bankrupt or a person banned from doing business.

At least one ordinary member and one deputy member of the board of directors must be resident in the European Economic Area (EEA). A managing director (and any substitutes) must be resident in the EEA. However, the Trade Register Authority can grant dispensation from this requirement.

It is not possible to have a legal entity as a director.

Minimum / maximum number of directors

A private company must have at least one director and at least one deputy member if there are less than three directors. Unless otherwise specified in the company's articles of association, a private company may have at most five directors in the board. The company's articles of association may, however, specify a greater minimum number and/or specify a different maximum.

As of 30 June 2026, certain stock-exchange listed companies shall strive to achieve a balance of genders in the board composition in such way that the proportion of underrepresented gender (in practice women) must be at least 40%.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment.

The members of the board can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution). The company's articles of association may stipulate that less than half of members of the board can be nominated by a specified party.

The managing director will be appointed by the board of directors.

The appointment must be filed at the Trade Register without delay after the appointment takes place. A director's residential address and full date of birth are not included on the public record but must be supplied to the registration authority.

How are directors removed?

A director is removed by the same party which appointed them. The power to remove directors cannot be removed by the company's articles of association. A director may also resign at any time.

When a director leaves office, notice must be filed at the Trade Register without delay.

Board / management structure

Typical management structure

Boards of Finnish private companies are unitary structures made up of all the company's directors except the managing director. Each member of the board of directors has generally the same obligations and accountability to the company.

If the board of directors consists of more than one ordinary members, a chair of the board must be appointed. The chair has a duty to see that the board is convened when needed and issues to be handled at the board meeting are prepared.

The board is responsible (on a collective basis as a board) for the high-level management and operations of the company and for ensuring that the company meets its statutory obligations.

The managing director is responsible for day-to-day operations and other obligations specified in the law. If a managing director is not appointed, these responsibilities and obligations fall to the board of directors.

A private company may also have a supervisory board, but that is very uncommon nowadays.

How are decisions made by directors?

In private companies, law provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone or other electronical meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally more than half of all members of the board (although notice must be given to all). Unless the company's articles of association stipulates otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (eg in the company's internal policies and protocols), unless the director has acted against the limitations to their competence set out in the Finnish Companies Act, or the director has acted against their authority set out in the Finnish Companies Act or the company's articles of association, and the third party knew or should have known about acting against authority.

Normally, the board of directors has wide powers to manage its business and affairs as it thinks fit within the purpose of the company and the scope of operations set out in the company's articles of association. The powers of the board are collective, meaning that directors should act together as a group on the company's behalf. The managing director has power to act alone in day-to-day management of the company in accordance with the guidance and directions from the board.

Delegation

The board can delegate some duties or powers to committees and others (eg executives). However, the board retains liability for proper selection, guidance and supervision of those to whom duties or powers are delegated. For example, board committees may assist in preparations for board duties and decision-making, but board committees do not have independent decision-making power in matters that belong to the board's statutory responsibilities. Furthermore, the board retains liability for proper overall responsibility for the company's operations and management. Most essential duties of the board may not be delegated.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Companies Act 2006 (the Act). These are duties to:

- **Promote the success of the company.** Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of all its shareholders as a whole.
- **Directors must act in accordance with the purpose of the company**, which is to create profit for shareholders, unless otherwise stipulated in the company's articles of association. Directors have a duty of loyalty towards the company and all its shareholders.
- **Act with reasonable care, skill and diligence.** Directors must meet the minimum standard of skill and care expected of a diligent person in their position and they must also bring to bear their particular skills and experience – therefore, the more qualified or experienced a director is, the greater the statutory standard required of them.
- **Exercise independent judgement.** However, a director may rely on other people (eg through proper delegation or by seeking advice) provided they judge that it is reasonable to do so. A director may not usually limit their discretion.
- **Treat the shareholders equally.** The board or the managing director (or the general meeting) shall not make decisions or take other measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder.
- **Act within the company's articles of association** and exercise their powers for the purposes for which they were given and not for any collateral purpose.
- **Disqualify from handling a matter with personal interest.** A director shall be disqualified from handling a contract, transaction or litigation between the director and the company or the company and a third party, if the director is to derive a significant benefit in the matter and that benefit may be contrary to the interests of the company. Even if disqualified the director should declare relevant information about the matter to the company.

In addition, directors have duties, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company and not accept benefits from third parties to promote their interests in the company.

What are directors' other key obligations?

The board of directors is responsible for ensuring that the supervision of the company's accounting and financial management is properly organized. The Act requires directors to prepare and file annual accounts and submit other information to the companies register, including information about beneficial owners. The accounts and other information must be submitted to the companies register within the prescribed time limits.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

General rules (including disqualification) regarding decision making are applicable to transactions with the directors. Certain loans and collaterals to, and certain transactions with, related parties of the company need to be reported in the annual report. The Act sets out specific disqualification provisions concerning related party transactions in a stock-exchange listed company.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and generally not directly to the parent or other group companies or individual shareholders. The shareholders have only limited possibilities to make direct claims towards directors for damage caused to the company which causes a reduction in the value of their shares. Violation of certain specific rules (for example if a shareholder is not given redemption right as provided in the company's articles of association) could cause damage directly to shareholders and for that shareholders would have direct claim against directors.

In insolvency proceedings, creditors may through the bankruptcy estate be able to make claims against directors. Individual creditors may have also direct claims against directors for violations of law or articles of association intended to protect creditors.

Shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, claiming shareholders must either own at least 10 per cent of all shares of the company or the court should consider that not giving the right to make such a claim would violate equal treatment of the shareholders.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency.

If the board of directors notices that the company has negative equity, the board must promptly make a register notification to the Trade Register on the loss of share capital. If this notification is not made, the members may be liable for damages caused to the creditors.

Certain actions to diminish assets or increase liabilities or favour certain creditors in case of insolvency are criminal offences and could also cause liability for damages.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Finnish legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the formation or management of a company or from acquiring controlling interest in an operating company. A disqualification order can be made for conviction for criminal offences relating to the running of a company or persistent breaches of statutory obligations.

Failure to comply with certain company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Discharge from liability.** Shareholders in an annual general meeting must decide whether to discharge directors from liability. The decision is made by a majority resolution (excluding the votes of the directors concerned or shareholders otherwise benefiting from the decision). Discharge by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation). Also a derivative claim by shareholders is possible within 3 months from granting the discharge. The discharge is not effective if the general meeting has not been given essentially correct and adequate information about the decision or measure underlying the liability in damages.
- **Limitation of liability.** If all the shareholders approve, the company's articles of association may contain a provision restricting the right of the company to claim damages from the directors. However, certain liability cannot be excluded. In

addition, any such provisions cannot restrict the right of a shareholder or a third party to claim damages from the directors. This kind of limitation is in practice quite narrow.

- **Insurance.** Directors' and officers' (D&O) insurance is common in Finland. It typically provides cover for individual directors against claims made against them in their capacity as director, including defence costs (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful misconduct or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Ensure they do not participate in discussions, or vote on matters, which they have a conflicting interest.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise and/or of significant importance, for example from legal and financial professionals and accountants.
- Be aware of, and comply with, to the extent allowed by law, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, anti-money laundering, sanctions and human rights.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted or there are minority shareholders). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

In France, the most common type of company used in group structures is the *société par actions simplifiée* (SAS), mainly because of its flexibility. Indeed, French law does not set forth a pre-established corporate governance structure for the SAS, but leaves it up to the bylaws to define the applicable governance system. Note however that an SAS cannot make public offerings, except in limited cases.

This guide therefore focuses on the management of an SAS.

Types of director

What is a "director"?

French law (article L. 227-6 of the French Commercial Code) only requires the appointment of a "President" (physical or legal person) who/which will represent the SAS towards third parties.

The President has the broadest powers to act on behalf of the SAS within the limits of the corporate purpose (subject, as the case may be, to internal limitations which may be provided for in the bylaws, but which are not enforceable against third parties).

French law however provides that the President may be assisted by one or several "General Managers" and/or "Delegated General Managers", who/which may have the same powers than the President, depending on the bylaws of the SAS.

In addition, the bylaws may also create collegiate bodies alongside the President, with complete freedom to determine their names (board of directors or supervisory board, management committee, executive committee, etc.), as well as their respective functions and the rules applicable to decision-making (simple majority, qualified majority, unanimity).

The bylaws of the SAS freely determine the conditions of appointment and dismissal of the directors, but also their number, the duration of their mandate, their method of remuneration and their powers.

The President, any General Manager, any Delegated General Manager as well as any other manager to be appointed pursuant to the bylaws of the company may be referred to as “directors” or “managers” for the purposes of the liability regime applying to managers of an SAS.

What are the different types of director?

Directors validly appointed as such are known as *de jure* directors. In addition, a *de facto* director is a person who acts as though they are a director but is not validly appointed as such: it is a person in accordance with whose directions or instructions the directors of a company are accustomed to act. In general, however, French law does not differentiate between different types of directors – all directors are subject to the same liabilities.

Restrictions apply if directors are employees of the SAS. No obligations to appoint directors representing employees apply to the management of an SAS.

Law no. 2021-1774 of 24 December 2021 requires a proportion of each gender to be respected in the “management bodies” of companies with more than one thousand employees for the third consecutive fiscal year. As from 1 March 2026, the proportion of each gender within each group (i.e., senior executives and executives serving on management bodies) must not be less than 30%.

Eligibility

Who can be a director?

French law does not provide for any restriction relating to the President or any General Manager/Delegated General Manager, therefore they:

- May be an individual or a legal entity.
- May be of French or non-French nationality.
- Need not have specific qualifications.

(The President of the SAS must be of age (18 years) or an emancipated minor. There is no upper age limit.)

The bylaws of the company may impose any of these types of restrictions though.

French law provides that when the director of an SAS is a legal entity, the representative of such legal entity may incur similar civil and criminal liability as if it were director of the SAS in its own name.

Minimum / maximum number of directors

An SAS must have one President in office at all times. This is a compulsory legal requirement in relation to the composition of the management of the SAS. The bylaws of the SAS cannot impose any other minimum/maximum number restriction as regards the President.

There are no legal restrictions as regards the maximum number of General Managers and Delegated General Managers (if any is appointed).

The bylaws of the SAS may freely provide for restrictions applying to the minimum and /or maximum number of General Managers and/or Delegated General Managers and /or any members of other governing bodies or individuals.

Appointment and removal

How are directors appointed?

In an SAS, the rules for the appointment of the directors (whether President, General Manager, Delegated General Manager or any other manager) are freely set out in the bylaws. Directors must consent to their appointment and certify that they are not bound by any judicial sanction preventing them from exercising such functions.

Usually, the bylaws provide that the shareholders are vested with the power to appoint managers (at least the President).

Any decision to appoint or replace the President or any other legal representative of an SAS must be filed (along with the residential address, full name and surname of the father and mother of the appointee, the certificate of absence of conviction and the copy of the identity card or passport) with the competent Trade and Companies Registry within one month of the relevant decision. The appointment/replacement decision will be publicly available. The commercial extract (publicly available) will include the name, date and place of birth and residential address of the legal representatives. The same publicity process can also apply (on a voluntary basis or upon request of the competent Trade and Companies Registry in certain cases) to managers who are not legal representatives of the SAS. Since the decree No. 2025-840 of 22 August 2025, legal representatives who are natural persons may request the confidentiality of their personal residential address on the commercial extract of the company.

Note that French law does not specify the duration for which the director of an SAS is appointed. It is up to the bylaws or, in the absence of such specification, the appointment decision, to determine whether the director is appointed for a limited or unlimited duration. Where the director is appointed for a limited duration, and in the absence of express renewal of the director's office, the corporate office is automatically terminated upon expiry of the term. The director may then continue its duties as a *de facto* director. Tacit renewal of the corporate office remains possible if it is set out in the bylaws. Likewise, remuneration of directors may be set out in the bylaws or determined by a shareholders' decision. It may consist in a fixed and/or variable remuneration, or no remuneration at all.

How are directors removed?

In an SAS, the rules for the removal of the directors (whether President, General Manager, Delegated General Manager or any other manager) are freely set out in the bylaws (with or without cause; with or without prior notice; with or without any removal indemnity, etc.).

However, whatever the contents of the bylaws, the removal decision has to comply with the adversarial principle and a removal which is abusive (i.e. decided under circumstances having affected the reputation or the honor of the relevant manager) may result in damages being granted by courts to the relevant manager. Usually, the bylaws provide that the shareholders are vested with the power to remove managers (at least the President).

Any decision to remove the President or any other legal representative of an SAS (or any other manager of the SAS being included in the commercial extract of the SAS) must be filed with the competent Trade and Companies Registry within one month of the relevant decision.

Board / management structure

Typical management structure

The typical management structure of a SAS consists of one President (mandatory under French law) who/which may be assisted by one General Manager.

In addition, in group structures, we often see supervisory boards created at the level of the holding company, in particular in order to provide for the prior approval of such supervisory board of important decisions made by legal representatives of the group entities.

How are decisions made by directors?

In an SAS, the modalities for directors (whether President, General Manager, Delegated General Manager or any other manager) to take decisions are freely set out in the bylaws.

Authority and powers

In an SAS, the President has the widest powers to act in all circumstances on behalf of the company, within the limit of the corporate purpose and subject to the powers /matters which are reserved to the shareholders by law and, as the case may be, the bylaws and subject to potential additional restrictions provided for in the bylaws.

The bylaws may also grant any General Manager or Delegated General Manager representation powers vis-à-vis third parties (in addition to additional management powers). Limitations of powers of legal representatives of an SAS are not enforceable against third parties.

Delegation

Subject to any contrary provision or specific restriction in the bylaws, legal representatives of an SAS may delegate certain powers to any person through a delegation of authority.

A delegation of authority consists of a transfer of authority implying the transfer from the grantor (*délégrant*) of both the decision and under certain conditions, the corresponding liability. It is different from a power of attorney (*mandat*) whereby the principal (*mandant*) gives the power to do something for the principal in the principal's name (for example a delegation to execute a specific agreement). No liability is transferred in such case.

As a principle, a delegation of authority is temporary. Where a delegation is granted for an indefinite term, the grantor may revoke it at any time.

Unless the delegation provides otherwise, the beneficiary may sub-delegate some of the powers they have received under the delegation.

Duties and obligations of directors

What are the key general duties of directors?

A director must exercise the powers conferred upon them (in the bylaws and the decision appointing them, as well as – as regards the President – pursuant to law) and act in the best interests of the SAS.

There is no specific statement of duties of a director under French law, except for the general duty of confidentiality.

In certain cases however, French courts have stated that directors should conduct the company's business with due and reasonable care (*gestion en bon père de famille*).

In addition, certain restrictions exist so as to ensure that directors ensure that their duties towards the company do not conflict with their personal interests.

What are directors' other key obligations?

In addition to day-to-day management, French law requires the President of the SAS (or other person as provided by the bylaws) to prepare and file annual accounts and submit all required information to the competent Trade and Companies Registry, including information about the company's ultimate beneficial owner. The accounts and other information must be submitted to the Trade and Companies Registry within the prescribed time limits.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

French law provides that certain agreements concluded directly or through a third party between the company and one of its directors (referred to as related party transactions) must be subject to the approval of the shareholders of the company after their conclusion, upon review of a specific report from the company's statutory auditors.

Refusal of approval by the shareholders has no consequences for the validity of the agreement: however, the director concerned and if applicable, the shareholders having entered into the agreement may be held liable for any prejudicial consequence that the agreement may have for the company.

In addition, the bylaws may provide for additional constraints relating to the control procedure.

Certain other agreements, directly or indirectly entered into between an SAS and one of its directors are, under penalty of nullity of the relevant agreement, forbidden:

- To borrow in any form whatsoever from the company.
- To be granted an overdraft by the company, in a current account or otherwise.
- To have the company guarantee or endorse their commitments to third parties.

The same prohibition applies to the spouses, ascendants or descendants of directors and to any intermediary. However, the prohibition does not apply when the director is a legal entity.

Liabilities of directors

Breach of general duties

Directors may incur civil liability if they breach company laws and regulations, the company's bylaws or their duty of care in management, to the extent that damage is caused directly to the person bringing the action before the court.

A shareholder may sue a director for compensation for any prejudice it has personally suffered because of the action of a director, provided that the prejudice suffered is different from the prejudice suffered by the company. If several shareholders have suffered directly and individually from a prejudice resulting from the same facts or action, they may initiate a collective action and instruct one or more of them to act on their behalf.

Shareholders may sue a director on the company's behalf in order to obtain a compensation for the prejudice suffered by the company (*ut singuli action*). A director may also sue a former or another director on the company's behalf in order to obtain a compensation for the prejudice suffered by the company (*ut universi action*).

With respect to third parties, directors may only be held liable if their misconduct is contrary to the normal exercise of their corporate functions and is personally attributable to them (*faute séparable des fonctions*).

The remedies against a director for breach of duty include: damages, imprisonment and/or fines.

There may be additional sanctions such as prohibition from exercising a public, social, commercial, banking and/or industrial activity, permanently or temporarily.

Liabilities on insolvency

- **Liability for the company's debts** (*action en comblement de passif*):

The director of a company facing an asset deficiency (*insuffisance d'actif*), in the context of insolvency proceedings, may be held personally liable for the debts of the company if their actions, in breach of the director's powers, have led to the asset deficiency. The director may only be held liable in such context if they have committed a management fault (*faute de gestion*) which led to the assets shortfall. In this case, there is no potential relief.

- **Deliberately causing the insolvency of a company** (*banqueroute*):

A director may be held personally liable where the director has:

- Made purchases with a view of reselling at a lower price, or used destructive means in order to receive funds, with an intention to avoid or delay the opening of receivership of the company.
- Misappropriated or concealed all or part of the assets of the company.
- Fraudulently increased the liabilities of the company.
- Falsified the accounts or removed accounting documents of the company.
- Failed to keep accounts in accordance with legal regulations (including manifestly incomplete accounts).

Other key risks

- A director may be held personally liable for taxes and relating penalties due by the company if the director has breached tax obligations of the company.
- Directors can be held criminally liable when, for example:
 - They have committed a crime or participated in the commission of a crime.
 - They have committed a criminal offence within the company related to its activity, even if they did not participate directly in the commission of this offence (e.g. under employment law, tax law, environmental law, health and safety regulations, etc.).
- Failure to comply with a company's obligation to file a declaration of beneficial owner (*bénéficiaire effectif*) with the Trade and Companies Registry may lead to liability for the corporate officer, the consequences of which are imprisonment and a fine, as well as additional penalties (such as being prohibited from acting as manager).

Protection against liability

How can directors be protected from liability?

- When submitting the annual accounts to the shareholders, the directors can ask for a discharge (*quitus*) relating to the financial year concerned. Although such a discharge is not recognised under French law, it can make it more difficult for the company to bring an action against its directors for the relevant financial year. The discharge would however have no impact on the directors' liability towards third parties.
- When the directors have validly delegated their authority to another person, they may be exempted from civil, tax and criminal liability, provided the person authorised to act on their behalf had the means, the skills and the appropriate authority to comply with the applicable law and regulations.
- The shareholders can ratify conduct by a director which is negligent or in breach of duty. However, the ratification by shareholders does not absolve a director from any liability to a third party in relation to the matter concerned.
- The company may indemnify a director against personal civil (but not criminal) liability towards third parties arising out of actions occurred in the normal course of the director's activities for the company. The indemnity agreement shall however not cover situations where the director is held liable for a fault severable from their duties, willful misconduct or fraud. In such a case, a director faces strictly personal civil liability and is deemed to bear all financial consequences of the potential sanction.

For liability towards the company, as a general principle, the company cannot waive or agree to waive the liability of its directors towards itself. As a result, indemnity should not cover situations where the company (whether through its representatives or through a shareholder) seeks directors' liability or more generally where the action could benefit the company. In other words, it must not constitute an advanced waiver of liability or an unlawful exemption from the liability of directors.

According to the principle of personalization of criminal offences, crimes and convictions issued against individuals are personal and can only be borne by them. They cannot be transferred to any other entity or individual. Therefore, all financial consequences of a criminal sanction against a director can only be borne by such director. As a result, indemnification cannot cover the criminal liability of the director.

- There are directors' liability insurance policies (the fees of which can be paid by the company), the purpose of which is to cover directors against the financial consequences of civil liability claims brought against them in connection with the management of the company. The insurance policy must however expressly exclude any criminal liability and may also exclude other specific risks (e.g. damages claimed by other directors).

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend board or other relevant governance body meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the President if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of the relevant governance body proceedings are made reflecting the reasoning behind key decisions. Minutes should also record any disagreement amongst the relevant governance body and the reasons for that. In addition, legal representatives should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Germany

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

Typically, a Private Limited Liability Company (*Gesellschaft mit beschränkter Haftung* – GmbH) is used in group structures. It is by far the most common legal type.

Types of director

What is a "director"?

For a GmbH, the correct term is "managing director" (*Geschäftsführer*). A managing director must be a natural person. A managing director manages the affairs of the company and represents it towards third parties.

The general rule is that in case of more than one managing director, the managing directors represent the company jointly. However, the articles of association may stipulate or allow that a managing director has sole power of representation or that, for example, two managing directors represent the company jointly or that one managing director does so jointly with a registered proxy holder (*Prokurist*).

What are the different types of director?

There are no different types of director.

Eligibility

Who can be a director?

A managing director must be a natural person and contractually capable without any restriction, i.e. at least 18 years old.

There are no restrictions as to nationality. However, if the company only has managing directors who are not resident in Germany, this may cause tax residency issues for the GmbH as it may not be considered as tax resident in Germany. In order to qualify as a

German tax resident for double taxation purposes, the place of effective management of the GmbH needs to be in Germany. Such place of effective management is the place where the material decisions with respect to the company's day to day business are actually taken. In particular, decisions of the management should therefore be taken and recorded in Germany. In order to avoid attention from the tax authorities and potential negative tax consequences, it is thus preferable to have at least one managing director with residency in Germany.

Persons who have been convicted for certain crimes such as a delayed filing of insolvency (*Insolvenzverschleppung*), other insolvency crimes, false declarations when founding a limited liability company or fraud within the past five years are not eligible to become a managing director.

Minimum / maximum number of directors

A GmbH must have at least one managing director. There is no maximum number. The articles of association may, however, require a higher minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Corporate Body

The managing directors are generally appointed by a resolution of the shareholders' meeting, either by a formal meeting or by a resolution in text form (including email). The articles of association may also allow for the passing of virtual resolutions or by telephone.

If the company has a supervisory board, the appointment of managing directors may be delegated to such supervisory board in the articles of association.

Form

Before the Covid-19 pandemic, in the absence of any respective allowance in the articles of association, a shareholders' meeting could only be replaced by a resolution passed in text form if all shareholders agreed in text form either to the provision to be made or to the votes being cast in writing.

In order to ease formalities in the Covid-19 pandemic, German law stipulated from 28 March 2020 until 31 August 2022 that shareholder resolutions could be adopted in text form or by casting votes in writing even without the consent of all shareholders. Such relief expired on 31 August 2022 and has been replaced by a stipulation in the German Limited Liability Companies Act (*GmbHG*), specifically § 48(2) GmbHG that shareholder meetings can be conducted remotely if all shareholders consent to such procedure.

The regulation mentioned above by which a shareholders' meeting can be replaced by a resolution passed in text form if all shareholders agree in text form either to the provision to be made or to the votes being cast in writing, is still valid.

Declaratory registration

The appointment of a new managing director must be filed with the commercial register of the company. The registration is merely declaratory and must be signed in a notarially certified form. Both the birthdate as well as the town and country of residence need to be declared and will be publicly available.

How are directors removed?

Managing directors are removed either:

- by a shareholder resolution or
- by a resignation letter of the particular managing director which must be addressed to the shareholders' meeting/supervisory board (see above) and received by the latter.

The removal must also be filed with the commercial register and is merely declaratory.

Board / management structure

Typical management structure

Management board

Typically, a GmbH only has managing directors forming the management board. In principle, all managing directors are jointly responsible for the management of the company. It is, however, possible to delegate certain tasks/fields among themselves. Nevertheless, the managing directors who are not specifically in charge of such tasks /fields have to supervise such managing director who has been accorded with the respective responsibility. In contrast, certain fundamental duties (such as filing for insolvency if the GmbH becomes insolvent) cannot be delegated at all.

Supervisory board

It is possible to implement an optional supervisory board. If the GmbH is subject to German Co-Determination Law (*Mitbestimmung*), the implementation of a supervisory board is mandatory and the following ratios apply:

- If the GmbH has more than 500 employees, a third of the members of the supervisory board must be employee representatives.
- If the GmbH has more than 2000 employees, half of the members of the supervisory board must be employee representatives.

Advisory board

It is also possible to establish an optional advisory board. Such corporate body is particularly common in private equity contexts.

How are decisions made by directors?

Usually, either the articles of association or rules of procedure for the managing board determine the (usually quite flexible) decision making process, in particular determining the frequency of formal meetings as well as listing such measures which are subject to a resolution of all managing directors.

Authority and powers

Managing directors can represent and bind the company towards third parties in an unlimited way regardless of any internal restrictions (e.g. in the articles of association or rules of procedure such as consent provisos in favour of the shareholders' meeting or a supervisory board), unless there is a case of abuse of such power of representation (*Missbrauch der Vertretungsmacht*), meaning that a third party is aware of or, under specific circumstances, should have been aware of such misuse.

Delegation

The managing directors may delegate tasks to proxy holders, but retain overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

Organisational duties

- **Duty to convene and prepare a Shareholders' Meeting** in the following circumstances:
 - The annual ordinary shareholders' meeting
 - If a business decision falls within the competence of the shareholders' meeting due to specific provisions in the articles of association (so called approval catalogue)
 - Extraordinary shareholders' meeting, if this is necessary in the interest of the company, in particular if the annual (or any interim) balance sheet shows that one half or more of the share capital has been lost
- **Disclosure Obligation, Shareholders' Directives**
 - Obligation to provide each shareholder upon request with information about matters concerning the company and to allow them to inspect the books and documents of the company
 - Obligation to comply with shareholders' instructions based on valid shareholders' resolutions
- **Responsibility for compliance with application and filing requirements towards the commercial register.**

Duty of loyalty

The managing director has a duty of loyalty towards the company and a duty to exercise the diligence of a prudent business person (§ 43(1) GmbHG). This duty arises from the extensive competences of the managing director and their access to the share capital of the company. In particular, the managing director is obliged:

- Not to disclose any business secrets or other confidential information about the company
- Not to compete with the company
- To return any personal advantages deriving from executed agreements to the company

Other duties

- Preservation of the share capital
- Accounting duties
- Tax and social contributions
- Obligations during crisis/insolvency

Business Judgment Rule

A managing director does not breach the duty of care if, in making a business decision, the director reasonably believed to be acting on the basis of adequate information and in the best interest of the company (§ 93(1) sentence 2 AktG, applied by analogy to the GmbH). This safe harbour (known as the Business Judgment Rule) protects directors from liability for decisions that turn out to be unfavourable, provided the decision-making process was diligent and free from conflicts of interest. The managing director bears the burden of proof that these requirements were met.

What are directors' other key obligations?

See [What are the key duties of directors?](#)

Transactions with the company

There are no general restrictions except that any such transactions must be at arms' lengths in order to avoid any breach of capital maintenance rules or tax implications. However, a managing director cannot participate in any decision relating to their own discharge or which would give rise to a conflict of interest such as the release of such managing director from a liability.

Liabilities of directors

Breach of general duties

In general, managing directors owe their duties to the company itself. Therefore, in case if any breaches, only the company is entitled to bring an action for breach of duty against a managing director.

Different from other jurisdictions, under certain circumstances, (minority) shareholders may not bring derivative claims of the company against a managing director.

In general, third contractual parties may not personally sue a managing director for a breach of their duties. This is only possible in cases of the legal institute of "immorality" (*Sittenwidrigkeit*).

Liabilities on insolvency

In addition to the liabilities set out in [Breach of general duties](#), the following applies:

- The managing director must prevent a financial crisis of the company by setting up an early warning system, by taking appropriate countermeasures and reporting to the supervisory bodies.
- If the annual (or any interim) balance sheet shows that half or more of the share capital has been lost, the managing directors must call a shareholders' meeting without any undue delay.
- In the event of insolvency, i.e. illiquidity or over-indebtedness, the managing director is obliged to file for insolvency. The application must be filed without undue delay, but no later than three weeks (in the case of illiquidity) or after six weeks (in the case of over-indebtedness) after the event of insolvency. Failure to do so may result in severe civil and criminal liability. (For example, if the managing director continues to make payments on behalf of the company after the company has become insolvent, such director shall be personally liable to the company for the loss incurred by the creditors, unless the payments are consistent with the diligence of a prudent and conscientious manager. The same applies to any payments made to the shareholders which lead to the insolvency of the company.)

Other key risks

In case of non-compliance with the filing of financial statements, the managing directors of a GmbH are subject to administrative fines.

Protection against liability

How can directors be protected from liability?

The company may conclude D&O insurance policies in favour of the directors. Such policies typically cover the personal liability of managing directors for financial losses caused by a breach of duty, but generally exclude intentional misconduct and criminal fines. It is common practice to include a deductible (*Selbstbehalt*) in the policy.

What practical steps can directors take to avoid liability?

The following steps can be recommended:

- Proper information about any internal restrictions imposed on the managing director in the company's articles of association, by shareholder resolutions or in the managing director's service agreement.

- Setting up a specific reporting system for social contribution payments, tax and proper accounting and preparation of financial statements.
- Thorough documentation of any business decision and contract entered into with third parties. For difficult business decisions, the managing director should seek prior shareholder approval.
- Establishment of an early financial crisis warning system.
- Where more than one managing director has been appointed, the shareholders' meeting should allocate specific fields of responsibility.
- The shareholders of a company regularly resolve upon the formal approval of the management (*Entlastung*) after the end of each business year. Such formal approval serves as a waiver of any claims which were identifiable at the time of the resolution.
- Also, the company may explicitly waive any claims, recognizable or not, against its managing director (*Generalbereinigung*).

However, such waivers or underlying shareholders' resolutions do not exclude the managing directors liability if the infringed duties relate to capital maintenance rules, the interests of the company's creditors (most particularly, in an insolvency situation) or any other third party (e.g. tax authorities).

Key contacts



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Corporate entities

What type of company is typically used in group structures?

In Ghana, the type of company typically used in group structures is the private company limited by shares.

Types of director

What is a "director"?

The Companies Act, 2019 (Act 992) defines a director as a person, by whatever name called, who is appointed to direct and administer the business of a company.

What are the different types of director?

Ghanaian law recognises different types of directors, namely:

- A person who is duly appointed to the position of director (and may be appointed by a class of shareholders, debenture holders, creditors, employees or any other person, if provided for by the constitution of the company).
- A person who holds themselves out or knowingly allows themselves to be held out as a director of a company.
- A person who has not been duly appointed as director but on whose directions or instructions the duly appointed directors are accustomed to act.

Persons described in the second and third bullet points above are subject to the same duties and liabilities as duly appointed directors.

Duly appointed directors include substitute directors (appointed by the company to act as a deputy for another named director and as a substitute in the absence of that director), alternate directors (appointed by another director and approved by a board resolution to act as a director in respect of a period not exceeding six months in which the appointing director is absent from Ghana or unable to act as a director) and

executive directors (directors who hold another office or position of profit within the company, other than the office of an auditor. This includes the position of managing director).

Eligibility

Who can be a director?

Anyone can be a director other than infants (defined under Act 992 as persons under the age of 18 years), persons adjudged to be of unsound mind, corporate bodies, persons who have by a court order been prohibited from acting as directors or promoters or taking part in the management of a company for fraud, dishonesty, insider trading or other criminal offences (or are automatically disqualified from becoming a director for the relevant periods provided by Act 992 for such offences) and undischarged bankrupts. The constitution of a company may also specify classes of persons who are incompetent to become directors of that company.

There are no nationality restrictions to appointment as a director, however, at least one director of a company must at all times be resident in Ghana.

Minimum / maximum number of directors

A company is required to have a minimum of two directors, one of whom must be ordinarily resident in Ghana. Subject to this requirement, the company's constitution may fix the number of directors.

Appointment and removal

How are directors appointed?

The appointment of directors may be regulated by the constitution of a company. Directors are appointed by the company's shareholders or such other persons permitted by the company's constitution. Generally, the first directors of a company are named in the application for incorporation of the company.

A person must consent in writing prior to their appointment as director and submit a statutory declaration to the Registrar of Companies stating that they have not, within the preceding five years, been:

- convicted of a criminal offence involving fraud or dishonesty,
- convicted of a criminal offence relating to the promotion, incorporation or management of a company,
- a director or senior manager of a company that has become insolvent (but if the person has been a director or senior manager of a company that has become insolvent, then the date of the insolvency and the name of the insolvent company must be stated), or
- in the case of an application for the incorporation of a company, declared insolvent (but if the proposed director has been declared insolvent, then the date of the insolvency must be stated).

A casual vacancy that occurs when a directorship position becomes available by virtue of any reason other than expiry of the term of office of the director may be filled by the continuing directors or by an ordinary resolution at a general meeting of the company.

The director's statutory declaration and consent must be filed at the Companies Registry (in the case of the consent within 28 days).

How are directors removed?

Directors may be removed by an ordinary resolution at a general meeting, notwithstanding any provision in the constitution of that company or in an agreement with the director. Notice of the intention to remove a director must be given to the company not less than thirty-five days before the meeting at which the resolution is to be moved.

A director may also be disqualified from acting as a director by order of the Court on its own motion or, in certain circumstances (including convictions for fraud and bankruptcy on the part of the director), on the application by a prescribed class of persons which includes members of the company. When there is a change in directors as a result of a disqualification, notice must be filed with the Companies Register within 28 days after the company becomes aware of the disqualification or the relevant court order is made.

A director may also resign in writing. The constitution of a company may also specify additional circumstances in which a director may be removed.

Board / management structure

Typical management structure

The directors form the board of directors, the body that manages the business of the company. Typically, a chair of the board is appointed and depending on the nature of business of the company, sub committees of the board may be established. The board has oversight responsibility over the company and directs the financial and operational affairs of the company.

How are decisions made by directors?

The constitution of a company may prescribe how decisions are made by the directors. The directors of a company are required to meet at least once every six months in each year.

Unless otherwise provided by the company's constitution, the statutory default position is as follows:

- Directors may meet anywhere and regulate their meetings as they think fit.
- The quorum necessary for the transaction of business of the directors and of a committee of directors may be fixed by the directors, and unless so fixed shall be two or in the case of a one-person committee, one.

- Questions arising at a meeting of the directors or a committee of directors are decided by a majority of votes and in the case of an equality of votes the chair has a casting vote.

Decisions may be also made by written resolution signed by all directors.

Authority and powers

The board of directors exercises the powers of the company other than those of the shareholders in general meeting as determined by Act 992 or the company's constitution. Acts of the board of directors while carrying on the business of the company in the usual way are considered to be acts of the company and are thus binding on it. However, no liability is incurred by the company to a person who had actual knowledge at the time of a transaction that the board of directors did not have the power to act in that manner or acted in an irregular manner, or having regard to that person's relationship with or position to the company, should have known of the absence of power of the board of directors to act in that manner or the irregularity involved.

Directors are required to obtain the approval of an ordinary resolution of the company before exceeding the powers conferred on them and are further prohibited from specific actions without authorisation by an ordinary or special resolution, as the case may be, of the company.

Delegation

In the absence of an exclusion in the constitution of the company, the board of directors may exercise their powers through committees consisting of one or more directors, or delegate all or any of the powers of the board of directors to a director appointed as managing director. However, attendance and voting by proxy is prohibited for meetings of the board of directors.

Duties and obligations of directors

What are the key general duties of directors?

Act 992 sets out the general and fiduciary duties of directors. A director must:

- Observe the utmost good faith towards the company in a transaction with or on behalf of the company because of the fiduciary relationship between the company and the director.
- Act in what the director believes is the best interest of the company as a whole so as to preserve the assets, further the business and promote the purposes for which the company was formed, in the manner that a faithful, diligent, careful and ordinarily skilful director would act in the circumstances. In doing so, a director shall have regard to:
 - the likely consequence of any decision in the long term;
 - the impact of the operations of the company on the community and the environment, and

- the desirability of the company maintaining a reputation for high standards of business conduct.

In considering whether a particular transaction or course of action is in the best interests of the company as a whole, a director may consider the best interests of the employees, as well as the members of the company and, where appointed by or as representative of a special class of members, employees, or creditors, may give special but not exclusive consideration to their interests.

- Exercise independent judgment.
- Avoid conflicts of interest and duties to other persons. A director must refrain from placing (without the consent of the company) themselves in such a position that the director's duty to the company conflicts with the director's personal interest or duties to other persons. An example is being directly or indirectly interested in a business which competes with that of the company. This duty is not infringed if the transaction does not reasonably give rise to a conflict, has been authorised by the board of directors or has been consented to by company.
- Disclose to the board of directors the nature and extent of any interest that is likely to create a conflict of interest between that director and the company and register the interest in the Interests Register.
- Act in accordance with the constitution of the company and only exercise their powers for the purposes for which the powers are conferred.
- Not disclose to third parties or make use of company information received by the director in that capacity except for the purposes of the company or as approved by the company or as required by law or authorised by the constitution of the company.

Act 992 further preserves the common law and equity rules governing principal and agent in relation to officers of companies. Consequently, directors have duties under common law and equity as well, for example, to consider the interests of creditors when a company becomes insolvent.

What are directors' other key obligations?

Directors' other obligations include:

- To sign and deliver annual returns for registration with the Registrar of Companies, in the form prescribed by Act 992.
- To prepare and send copies of financial statements and reports of directors and auditors of the company to every member and debenture holder of the company.
- Generally, to ensure that the company is well managed and complies with all its legal obligations.

Transactions with the company

Unless prohibited by the constitution of the company, a director may contract with the company provided the director declares the nature and extent of their interest in the

contract to the company and does not violate any of the duties of a director imposed by Act 992 by reason of their interest in the contract. Act 992 sets out the framework within which the contract between the company and the director may be approved by the board of directors.

Liabilities of directors

Breach of general duties

When there is a breach of the director's duties:

- The director is liable to compensate the company for the loss the company suffers as a result of the breach. The director is personally (or in the case of more than one director, jointly and severally) liable to the company or any other person who has lost money or suffered any damage as a result of the director's breach of duty. An action may be brought by the company or such person to recover the amount of money lost or the monetary value of the damages caused to, or suffered by, the company or other person.
- The director must account to the company for a profit made by the director as a result of the breach.
- A contract or any other transaction entered into between the director and the company in breach of the director's duty may be rescinded by the company.

Civil proceedings to enforce the liabilities of a director may be instituted by the company or by a member of the company. If an action is brought by a member of the company, it must be either a derivative action on behalf of the company or a representative action on behalf of a class of persons. In such an action, the remedies that are available against a director may include injunctions, award of damages, recovery of property, accounting for profits and rescission of contract.

Liabilities on insolvency

A director may incur additional liabilities upon a company's insolvency where it appears that a business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for a fraudulent purpose. A director who is declared by the court to be a knowing party to the carrying on of the business in such manner, may be held personally responsible, without limitation of liability, for the debts or any other liabilities of the company that the Court may direct. The Court's powers here are very wide as it may make any other directions to give effect to this declaration.

The director may also be disqualified from acting as director for a period specified by the Court and may be liable on summary conviction to a fine or a term of imprisonment or both.

Furthermore, a director who causes a company to engage in any form of business or trade or incur a debt or liability where the director has reasonable grounds to believe or ought to have known that the company is insolvent or will become insolvent commits an offence and may be liable on summary conviction to a fine or a term of imprisonment or both.

Other key risks

A director who contravenes provisions of certain legislation may be held to have committed an offence and liable on summary conviction to a fine or a term of imprisonment or both, for example:

- making an affidavit of solvency without reasonable grounds and
- disposing of company assets without court approval and outside the normal course of business after the passage of a resolution for official liquidation.

In addition, the director may also be personally liable for any money lost by the company or any person, for example where a director wilfully conceals the name of a creditor entitled to oppose the confirmation of a resolution to wind-up the company, or wilfully misrepresents the nature or amount of the claim of a creditor, or aids, abets or is privy to a concealment or misrepresentation. In these circumstances, the director is personally liable to pay the amount of the creditor's claim to the extent it is unpaid by the company.

A director of a company (or associated company) in liquidation within the previous two years is not eligible to serve as an administrator of the company in administration.

See also [Liabilities on insolvency](#).

Protection against liability

How can directors be protected from liability?

Act 992 protects directors from liability in the following circumstances:

- **Indemnification.** A company's constitution may provide for the provision of indemnities for directors.
- **Ratification and Acquiescence.** Acts of directors in breach of their duties may be ratified by the company's members, board of directors or managing director by expressly or impliedly authorising the director or representing to the director as having the authority of the company to act in the matter, or by knowingly acquiescing in the action by the director.
- **Insurance.** A company's constitution may provide for the provision of insurance for directors. Such insurance policies may cover both directors (for loss arising from claims against a director for wrongful acts made in the capacity as director) as well as the company (for indemnifying a director for such loss). Losses which are usually covered include judgments, damages or settlements as well as costs and expenses awarded against a director or incurred by the director with the consent of the insurance company, subject to any exclusions provided for by the policy.

What practical steps can directors take to avoid liability?

- **Due care and skill.** To avoid liability, a director must act with the requisite due care and skill by following due process in their activities and act in a manner that a faithful, diligent and ordinarily skilled director would act in the circumstances.
- **Full disclosure.** Directors must also make full disclosure in situations where a conflict of interest may arise in transactions or contracts in respect of which a director may be interested. This also applies generally to situations where the personal interests of the director may come into conflict with that of the company. Full disclosure of material facts enables the company to understand the scope of conflict of interests that may arise and informs the decision to consent to the director's involvement in such a transaction where possible.
- **Due diligence.** Generally, directors should be knowledgeable in the business of the company and well informed about any transaction, contract or business decision to be taken. Where necessary, they should obtain relevant advice for any aspect of transactions that they are unfamiliar with.
- **Legal compliance.** Directors should be aware of their legal obligations in relation to the company, whether statutory or by agreement with the company and endeavour to comply with them. Where there are any uncertainties, they must seek clarification from the company or obtain legal or other professional advice to ensure that they do not inadvertently breach their obligations.

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Hong Kong, SAR

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

In Hong Kong, the most common type of corporate entity used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

The definition of a "director" under Hong Kong law is influenced by the common law jurisprudence. Basically, the law regards any person who manages the affairs of a company on behalf of its shareholders as a director (whether they are called a director or not).

What are the different types of director?

Directors validly appointed as such are known as *de jure* directors and may be executive (usually employees, with an operational/executive role) or non-executive (usually not employees) - and may also be appointed to represent a particular shareholder (a nominee director). In addition, a *de facto* director is a person who acts as though they are a director but is not validly appointed as such and a "shadow director" is a person in accordance with whose directions or instructions the directors, or a majority of the directors, of a company are accustomed to act. Notwithstanding the terms "de facto director" and "shadow director" which derive from customary corporate usage, Hong Kong company law does not distinguish between different types of directors and directors are all subject to the same duties and obligations.

Eligibility

Who can be a director?

There are no nationality or residency requirements, but the following eligibility requirements should be noted.

A director must be at least 18 years old.

A person who is an undischarged bankrupt must not act as director of a company, except with the leave of the court. Also, any person who has been disqualified from acting as a director must not act as a director. The company's articles of association will also usually provide for additional eligibility requirements.

It is possible for a company (the "Company") to have a corporate director, although at least one other director must be a natural person and the Company cannot be a member of a group of companies which includes a listed company.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's articles of association may, however, specify a higher minimum number and /or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and their appointments are governed by the company's articles of association. Normally they can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or the board may from time to time appoint a director to fill a casual vacancy or an additional director to the board. In the latter situation it is common for the articles of association to also provide that such director will only hold office until the next annual general meeting where they can stand for re-election.

With the exception of first directors, the company must deliver to the Companies Registrar a notice in the specified form (Form ND2A) within 15 days after the appointment of a director.

How are directors removed?

Shareholders have a residual statutory power to remove directors by ordinary resolution (i.e. a simple majority) which cannot be removed by the company's articles of association. It is common for the articles of association to confer additional powers of removal – for example, to enable the board to remove a director. A director may also resign at any time unless the articles of association provide otherwise.

The company must deliver to the Companies Registrar a notice in the specified form (Form ND2A) within 15 days after the removal becomes effective.

Board / management structure

Typical management structure

Boards of Hong Kong private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations. The law does not distinguish between executive and non-executive directors. There is also no specific role for supervisory directors.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's articles of association and the Companies Ordinance (Cap. 622) (CO).

In private companies, the articles of association typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice must be given to all). Unless the articles of association stipulate otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the articles of association may specify otherwise (in the case of a single director company, the CO provides for an alternative whereby a written record is provided to the company within seven days after the decision is made).

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g. in the company's articles of association or in internal policies and protocols).

Normally, the company's articles of association gives the directors wide powers to manage its business and affairs as they think fit (although the articles of association may also provide that shareholders may give the board specific directions as to its conduct). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

Delegation

Subject to the company's articles of association or any shareholder resolutions, the board of directors can, (but is not legally required to) establish board committees to deal with specific matters of the company, delegate certain of its powers to the company's senior management and/or appoint a managing director or a CEO who will be responsible for the day-to-day management of the company's business.

The exercise of the power of delegation will not absolve a director from the duty to supervise and discharge the delegated functions – the directors remain responsible notwithstanding the delegation. They remain under a duty to properly supervise the exercise of powers by the delegates. A director will be liable to the company if they fail to exercise proper supervision over the activities of the delegates or have themselves

participated or sanctioned the act of default. Powers of delegation must be properly exercised and cannot be used in order to exclude one or more particular members of the board from the management of the company.

Duties and obligations of directors

What are the key general duties of directors?

As a general rule, directors of a company are subject to fiduciary duties imposed by common law as well as statutory duties imposed by various statutes (principally the Companies Ordinance (CO)).

Under the CO, a director has a duty to exercise reasonable care, skill and diligence. The CO provides that a director must take such actions as would be taken by a reasonably diligent person, having both:

- the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company and
- the general knowledge, skill and experience of that particular director.

In addition, the CO requires a director to take all reasonable steps to ensure that proper books of account are kept so as to give a true and fair view of the state of affairs of the company.

Under the common law, the directors have a range of fiduciary duties. These include:

- **Duty to act in good faith for the benefit of the company as a whole.** A director has to act at all times in good faith and in what they consider as being in the best interests of the company assessed by reference to the interests of its present and future shareholders having regard to both their short and long-term interests. In cases where the interests of the present shareholders and those of the corporate entity differ, the interests of the corporate entity would generally prevail. This fiduciary duty is owed to the company alone, and not to any individual shareholder or even the majority shareholder of the company, or to its parent company or any other company within a group of which the director's company is a member.
- **Duty to use powers for a proper purpose for the benefit of shareholders of the company as a whole.** The purpose of the exercise of the directors' powers ought to be for the benefit of the company and not for any collateral purpose.
- **Duty not to delegate powers except with proper authorisation and duty to exercise independent judgment.** The company's articles of association may allow its directors to delegate their powers by setting up local boards or committees for managing the affairs of the company. However, it should be borne in mind that the exercise of the power of delegation will not absolve a director from the duty to supervise and discharge of the delegated functions – the directors remain responsible notwithstanding the delegation.
- **Duty to avoid conflicts between personal interests and the interests of the company.** In the event that the interests of a director and that of the company conflict with each other, the latter will always prevail. A director should disclose any

personal interest to the Board either at a directors' meeting; by notice in writing and sent to the other directors or by general notice given at a directors' meeting or in writing sent to the company.

- **Duty not to enter into transactions in which the directors have an interest.** A director is generally prohibited under common law from contracting directly or indirectly with the company except in compliance with the requirements of the law, for example, the approval of the shareholders following full disclosure.
- **Duty not to gain advantage from use of position as a director.** A director must not use their position as director for attaining direct or indirect gain/advantage for themselves or others or cause detriment to the company.
- **Duty not to make unauthorized use of the company's property or information.** A director is prohibited from using the company's information or property or exploiting opportunities to benefit themselves at the expense of the company and its shareholders.

Besides the above mentioned common law duties, the directors also owe an equitable duty of confidentiality to the company.

What are directors' other key obligations?

Below is a non-exhaustive list of key statutory duties that a director of a company is required to comply with under the Companies Ordinance (CO):

- File return of allotments.
- Keep proper books of account.
- Lay before the company at its annual general meeting a profit and loss account and the group accounts.
- Procure that the financial statements of the company are approved by the board of directors and signed on behalf of the board by two of the directors of the company.
- Take reasonable steps to secure compliance with the CO's requirements in respect of the preparation and content of the directors' report.
- Make disclosure if any proposed resolution affects the interests of any director differently from the interests of any other shareholders.
- File annual returns with the Companies Registrar.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

Transactions with the company

The Companies Ordinance (CO) prohibits a private company from making a loan or quasi-loan (if the private company is a subsidiary of a public company) to, or entering into credit transaction as a creditor (if the private company is a subsidiary of a public

company) for an entity connected with a director without prescribed approval of disinterested members. The CO also requires members' approval for directors' long-term employment (i.e. a term of employment that exceeds or may exceed three years).

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, a shareholder must first obtain the court's permission to proceed with a derivative action and the court will take into account a number of factors when deciding whether to grant this permission – including whether there is a serious question to be tried, whether the shareholder is acting in good faith and the issue is *prima facie* in the interests of the company, the views of independent shareholders and whether the company is likely to ratify or authorise the act or omission giving rise to the claim.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

If the company is of doubtful solvency or on the verge of insolvency or is insolvent, there is an obligation on the directors to take into consideration the interests of the company's creditors when they discharge their duties as directors.

In the course of the winding up of a company, the potential civil liabilities that may arise include:

- If in the course of the winding up, it appears that any persons were knowingly a party to business being carried on with the intention of defrauding creditors or for any fraudulent purpose, such persons can be made personally liable to make contributions to the assets of the company. A director is not allowed to incur further credit for the company when knowing there is no reasonable prospect of avoiding the company's insolvency.
- If it appears that any past or present officer of the company (i.e. including a director) has misapplied or retained, or become liable or accountable for, any money or property of the company, or is guilty of a misfeasance or breach of duty in relation to the company, the court has the power to order the director to repay or restore the money or property or any part thereof with interest, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

Potential criminal liability in the course of winding up include:

- If any officer of a company, which is subsequently wound up:
 - has made or caused to be made any gift or transfer of or charge on, or has caused or connived at the levying of any execution against, the property of the company; or
 - has concealed or removed any part of the property of the company since, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company,

with intent to defraud creditors of the company, such officer will be guilty of an offence and is liable to a fine and imprisonment.
- If any officer carried on the business of a company with intent to defraud creditors and misfeasance, in addition to the civil liabilities, such persons can also be subject to criminal liabilities including imprisonment and a fine.

Apart from the above, there are also a number of offences that could be committed by past or present officers of the company (such as falsifying records, concealing debts or not cooperating with the liquidator) in the course of or during the period of 12 months prior to winding up of the company.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Hong Kong legislation including that relating to, employment, consumer protection and bribery /anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (eg conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register).

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Insurance.** A company is permitted to purchase and maintain for its directors:
 - Insurance against any liability to the company, a related company, or any other party in respect of any negligence, default, breach of duty, or breach of trust (except fraud) of which such officer may be guilty in relation to the company or related company.
 - Insurance against any liability incurred by such directors in defending any civil or criminal proceedings taken against them for any negligence, default, breach of duty or breach of trust (including fraud) of which they may be guilty in relation to the company or a related company.

The extent of the insurance coverage can only go as far as covering non-fraud related liabilities. Any liabilities incurred due to fraud on the part of the directors will have to be borne by the directors concerned personally.

- **Indemnification.** A company is permitted to indemnify its directors against liability incurred by the directors to a third party, provided that the indemnity does not cover certain liabilities and costs, such as criminal fines, penalties imposed by regulatory bodies, the defence costs of criminal proceedings or civil proceedings brought against the directors where they are found guilty or where judgment is given against them. To enhance transparency, a company which provides a permitted indemnity to its directors of the company or of its associated companies must disclose the indemnity in its directors' report and make it available for inspection by any shareholder on request.
- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).

What practical steps can directors take to avoid liability?

Directors should:

- **Make explicit disclosure to third parties** when acting on behalf of the company to avoid incurring personal liability under contracts.
- **Devote sufficient time and attention to the affairs of the company** and should act with caution when they suspect that the company may be, or may become, insolvent, or that a particular decision may cast doubt on a company's prospects of solvency in the future. Under any such circumstances, the directors should immediately requisition a board meeting to acquaint all directors with the suspicion. The board should seek professional advice to determine whether any remedial measures are required or possible, and if remedial measures are not possible, the directors should ensure the company ceases to trade to guard against contravening any provisions against fraudulent trading.
- **Attend training.** Newly appointed directors should attend training on the first occasion of their appointment and subsequent professional development training as necessary to ensure that they have a proper understanding of the business of the company as well as their responsibilities under the statutes and common law and applicable legal/regulatory requirements pertinent to the business of the company.
- **Keep proper records.** Directors must ensure that accurate minutes of meetings are kept in respect of any significant corporate decisions. The minutes of such meetings should include clear records of reasons for the approving or objecting to any resolutions proposed. Note that even when a director is absent from a board meeting, that director is still responsible for the decisions that are duly made in the meeting.
- **Keep informed about the affairs of the company, particularly its financial position**. Directors should have access to up to date financial information, prepare

thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.

- **Make full disclosures to the board and shareholders** if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- **Be aware of, and comply with, any group-wide governance policies.** These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- **Also in a group situation, keep in mind that directors must act in the best interest of their group company.** Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

The most common (more than 99%) types of company used in group structures are:

- Limited liability companies (*korlátolt felelősségű társaság* or *kft.*).
- Private companies limited by shares (*zártkörűen működő részvénytársaság* or *zrt.*).

The key difference between these two company forms is that in the case of companies limited by shares, the owners' equity interest is embodied in shares (printed or electronic share certificates) while in the case of limited liability companies the owners' interest is only a notional share in the company's equity (business quota/*üzletrész*), shares cannot/must not be issued.

This guide focuses on the management of these two company forms. In general, the directors' duties are the same in both types of companies.

Types of director

What is a "director"?

Under Hungarian law in *kfts.* and *zrts.*, the strategic management of the company is carried out by either one or more individual "executive officers" (*vezető tisztségviselő*), or by a body consisting of "executive officers" (board of directors). For the purpose of this guide we will use the term "director" for the executive officers.

The directors must be registered in the Hungarian companies register and such record must be kept up to date. Accordingly, the identity of the directors of any *kfts* and *zrts* is available to the public at any time.

What are the different types of director?

In general, Hungarian law has a single class of directors, who are responsible for the strategic management of their company. The only distinction in this regard is that in the case of public companies limited by shares (i.e. listed companies) operating a unitary management system (i.e. having only a single committee of directors that unite both management and supervisory duties, without a separate board of directors and a separate supervisory board), the Hungarian Civil Code requires that the majority of the directors must be independent. The definition of independence is set out in the Hungarian Civil Code – in this regard directors can therefore be independent or non-independent. Further, sectoral rules may also require that the board of directors includes "inside" directors, i.e. directors who are executive employees of the company – this applies e.g. to banks.

For completeness, two additional types of corporate officers are mentioned who are sometimes referred to as some form of "director" but who are in fact not directors:

- Company secretaries (*cégvezető*): these officers are appointed by the general meeting to assist the directors. Company secretaries are always employees of their company who must comply with the directors' instructions.
- Supervisory directors: this term is sometimes used for members of the supervisory board – under Hungarian law the supervisory board is usually a monitoring body ensuring shareholder supervision (similar to the widely used audit committees) and it usually does not have a strategic/operative management function; referring to the supervisory board members as "directors" is, therefore, misleading.

Eligibility

Who can be a director?

Directors must meet the following criteria:

- They must be of legal age and have full legal capacity.
- They must not be prohibited from practicing their profession by a final judgment; any person who has been prohibited by a final judgment from practicing a specific profession cannot serve as a director of a company that is engaged in the activity indicated in the judgment.
- They must not be subject to a disqualification order.

Any person who has been sentenced to imprisonment by a final judgment for committing a crime cannot be a director until released from the consequences of having a criminal record.

If the director is a legal person (e.g. a company), it must designate a natural person (individual) to perform the director's functions in its name and on its behalf. The rules applicable to directors shall also apply to this designated person.

In general, Hungarian law does not prescribe nationality or residency requirements for directors in a Hungarian company. However, sectoral legislation may set specific requirements (e.g. the board of directors of Hungarian banks must include at least two directors who are Hungarian residents for foreign exchange purposes).

Minimum / maximum number of directors

- In the case of limited liability companies (kfts) it is possible:
 - To set up a board of directors (Board): neither minimum nor maximum number is set by law.
 - Instead of a Board, to appoint one or more individual directors: such individual officers do not form a board; they can be appointed with sole or joint signatory rights (the latter will force the directors to coordinate their actions).
- In the case of private companies limited by shares (zrts), the shareholder(s) may:
 - Set up a Board (with a minimum of three members; no limit on the maximum number).
 - Appoint a single executive officer (*vezérigazgató*) who exercises the rights of a Board.

Appointment and removal

How are directors appointed?

- The first directors are designated in the articles of association of the company when the company is formed.
- As a general rule, after the incorporation of the company, directors are elected and removed by the general meeting. In a wholly-owned company, the sole shareholder resolves on election and removal (this must be in writing).
- Diverging from the above general rule, kfts and zrts may issue a preference business quota (kft) / share (zrt) that entitles its holder to appoint/remove one or more director(s) without the need for any action by the general meeting. No such preference share may be issued if a private company limited by shares is managed by a sole director (*in lieu of* a Board).
- Appointment takes effect when the appointment is accepted by the person appointed and in accordance with the effective date set out in corporate resolution on the appointment. Accordingly, when the appointment is subsequently registered in the Hungarian companies register, the register will record the aforementioned date as the effective date of the appointment.
- The directors must be registered in the companies register.

How are directors removed?

- The general meeting may remove a director at any time, without having to give any reason. In a wholly-owned company, the sole shareholder resolves on the removal (this must be in writing).
- If the company has issued a preference business quota (kft) / share (zrt) that entitles its holder to appoint/remove director(s), the removal will be decided upon by the holder(s) of such preference business quota (kft) / share (zrt), there is no need for any action by the general meeting. For the decision to take effect, the holder must notify the company of its decision (removal).

- A director may also resign at any time (without having to give reasons) by notice to the company delivered to the other director(s) of the company or its decision-making body. By force of law, if continuity of the operation of the company requires, the resignation will take effect only upon the appointment of the new director/successor but in any case, 60 days after the resignation (so e.g. a director may not “jump ship” immediately if he is the only director in a company and his successor has not been elected yet).
- Removal of/resignation by a director must be registered in the Hungarian companies register. The effective date of the removal/resignation will be the date determined as such in the relevant resolution/resignation – the Hungarian companies register will record such date as the effective date of the change.

Board / management structure

Typical management structure

- **Strategic management: Board or individual directors.** As noted above, in the case of limited liability companies (kfts) strategic management is in the hands of either a Board or one or more (individual) directors. In the case of private companies limited by shares (zrts), shareholders usually set up a Board; however, sometimes they appoint a single director (*vezérigazgató*) instead of a Board.
- **Supervisory Board:**
 - **With monitoring functions.** The primary function of this body is to monitor /oversee the directors on behalf of the shareholders; formation of this body is mandatory in certain limited cases (e.g. if the average annual number of full time employees exceeds 200; state owned companies) and optional in most cases.
 - **With decision-making powers.** To provide flexibility, Hungarian law allows the shareholders to subject certain decisions of the Board/directors to the consent of the supervisory board or to allocate certain decisions altogether to the supervisory board (instead of the Board) creating thereby a divided decision-making system; the foregoing flexibility is sometimes used of as a compromise governance system where one shareholder (group) controls the Board, the other shareholder group controls the Supervisory Board.

How are decisions made by directors?

- In the case of Boards (both in kfts and zrts) the decisions of the Board take the form of board resolutions. Such corporate resolutions are usually passed by voting at Board meetings. The majority requirement for passing a resolution (simple or qualified majority) must be set out in the Board's rules of procedure. Alternatively, board resolutions may also be passed by circulation (i.e. without holding a meeting). In such cases Board members indicate their support for/objection to the proposed action by a written statement (vote).
- In the case of limited liability companies with one or more directors and in the case of private companies limited by shares with a single director: given that these officers are individual officers and not a collegiate body (board), there is no need to pass a resolution. Instead, they simply perform the acts in accordance with their decisions (e.g. they sign a contract).

- In the case of kfts having more than one director with independent signatory rights, the directors are entitled to act independently, however they are each entitled to raise objection against the actions of the other director(s). In that case the objection shall be decided by the general meeting and the planned action cannot be carried out pending such decision.
- In the case of zrts weighted voting may also be applied in decision-making, in which case, for example, the vote of the chairman of the Board may be decisive in case of a tie in votes. Further, it is also possible to grant multiple voting rights to certain members of the Board.

Authority and powers

- **Powers (competence).** Under Hungarian law, the powers of the Board/directors are residual, meaning that *all* decisions that are not expressly reserved for the general meeting shall fall within the competence of the Board/directors. Certain key decisions are reserved for the general meeting by law (e.g. approval of annual accounts, decrease of share capital, winding up of the company, appointment and dismissal of directors, auditors supervisory board members). Further, the shareholders may reserve additional decisions for the general meeting through the articles of association. Decisions that are not reserved for the general meeting by law and the articles of association shall fall within the competence of the Board /director(s). The foregoing issue concerns the allocation of decision making powers within the company and as such this is a corporate governance / internal issue.
- **Authority.** The directors are the legal representatives of the company vis-à-vis third parties. The representation rights of the individual directors (including the signing rights) can be sole or joint. In the latter case, the relevant legal document will only bind the company (as a general rule) if two directors sign it. The companies register must reflect whether or not a director's signatory right is sole or joint. Apart from the joint/sole signatory right, no other internal limitation on the directors' authority shall be effective vis-a-vis third parties. For example, if the articles of association subject the signing of a contract above a given value to the prior approval of the general meeting and the directors sign such a contract without the approval of the general meeting, the contract shall still be binding and effective on the company. Non-compliance with such internal limitations will trigger the directors' liability towards the company for breach of their duties but will not impact the validity /effectiveness of the directors' act vis-a-vis third parties.

Delegation

- As a general rule, under Hungarian law, directors must perform their duties personally. This means that e.g. at Board meetings directors cannot be substituted by a proxy/agent, decisions of the Board must be based on the Board members' votes cast directly. Notwithstanding the foregoing, the company's articles of association and/or its internal organisational rules (which are usually approved by the general meeting or the board) may allocate responsibilities for implementing the decisions of the Board/directors to the various levels of the company's organisations and to make decisions in their own right in this connection.
- As regards the right to act on behalf of the company vis-à-vis third parties, the directors may grant authority to the employees of the company to act on behalf of

the company in the scope specified in the power of attorney on a permanent basis. Such authority can also be granted via the internal organisational rules of the company (e.g. giving authority to the CFO in office at any time to sign certain documents in the name of the company). It is, however, not permitted to give authority to an employee covering the full scope of the directors' duties. For ad hoc /specific cases, power of attorney may also be issued to third parties (non-employees) empowering such persons to act on behalf of the company vis-à-vis third parties.

Duties and obligations of directors

What are the key general duties of directors?

- To make all decisions related to the governance / strategic management of the company that are outside the powers of the general meeting.
- In performing their role, directors must always act in the interest of the company, and in line with the articles of association and the resolutions of the general meeting.
- To keep the shareholders informed in relation to the company and provide access to shareholders to the company's documents, records and registers (subject to confidentiality obligations).

What are directors' other key obligations?

The director(s) must, among other things:

- File the annual accounts (financial statements) of the company with the relevant authority (following the approval of such accounts by the general meeting).
- Ensure that the data indicated in the company register is up to date (e.g. signatories, company address, registered share capital).
- Convene the general meeting if they become aware that:
 - The company's shareholders equity fell below half (kft)/ two-thirds (zrt) of the registered share capital due to losses (sectoral legislation may set higher limits).
 - The company is threatened by insolvency or has stopped making payments or its assets do not cover its liabilities.

Directors must not acquire any shareholding in a business association -except for listed companies- and must not be directors in a business association whose main activity is the same as that of the company in which they are a director; however, the foregoing are default rules of the Hungarian Civil Code, so the articles of association may diverge from these. Further, within fifteen days of accepting their appointment, directors must notify any other company in which they are a director or a supervisory board member of such appointment.

Directors also must not enter into any transactions in their own name and/or on their own behalf falling within the main activity of the company except for usual transactions in the scope of everyday dealings (corporate opportunities); the foregoing are default rules of the Civil Code, so the articles of association may diverge from these.

Transactions with the company

In the case of kfts (limited liability companies), approval of entering into a contract between the company and a director (or his relatives) falls within the exclusive competence of the general meeting.

There is no corresponding mandatory rule for zrts (companies limited by shares) by default. However, the articles of association often contain such requirement or if the decision belongs to the board, the affected board members are usually disenfranchised (by the board rules) when voting on the approval of such contracts.

Liabilities of directors

Breach of general duties

For damages caused by the directors in the performance of their duties:

- **Vis-à-vis their own company.** As a general rule, the directors have unlimited liability towards their company for damages caused by the breach of their duties; commencement of an action against the directors for breach of their duties falls within the power of the general meeting; however, if the general meeting decides not to pursue such action, shareholders with at least 5% of the votes (or 1% in the case of public companies) have the right to litigate against the director on behalf of the company (derivative suit).
- **Vis-à-vis third parties.** As a general rule, it is the company who will be liable towards third parties for the actions of their directors (i.e. such third parties can sue the company, not the individual directors); however, if the director causes damages deliberately to third parties, the director will be liable jointly with the company vis-à-vis the third party.

Liabilities on insolvency

Focusing on officer liability in the context of bankruptcy and liquidation proceedings, Hungarian law prohibits “wrongful trading” by directors. This involves two stages as follows:

- **Establishment of liability.** Any creditor or - in the debtor's name - the liquidator may bring an action during the insolvent liquidation procedure of a company to establish that a person who had been a director of the company within the three year period prior to the opening of liquidation procedure failed to exercise his duties in the interest of the creditors after the threat of insolvency of the company had arisen and as a result of such failure the company's assets have diminished or satisfaction of the creditors' claims have been frustrated for other reasons. For the purpose of the foregoing, amongst others, non-compliance with the rules on the protection of the environment is also considered as a failure to take into account the creditors' interest. The court may not establish the director's liability if he can prove that following when the threat of insolvency of the company had arisen he did not take any business risks that could be considered unreasonable in the light of the company's financial position and that he took all steps that can be reasonably

expected from a director to mitigate the losses of creditors , including by the initiating the actions of the general meeting.

- **Claim for unsatisfied losses.** Following the publication of the court's resolution on the conclusion of insolvent liquidation of the company in the Company Gazette, any creditor may bring an action for ordering the (former) directors of the liquidated company whose liability was established in the course of the insolvency procedure (as set out above), for satisfying its claim registered in the liquidation proceedings that has remained unsatisfied (up to the loss resulting from the wrongful trading).

The above rules also apply if the court of registration strikes off a company from the company register in any involuntary deregistration procedure (*kényszertörlési eljárás*), i. e. not in an insolvent liquidation procedure. An involuntary deregistration procedure (*kényszertörlési eljárás*) is pursued by the court of registration if the company's operation is not in compliance with the applicable laws and such compliance is not remedied despite the measures of the court of registrations imposed on the company.

Other key risks

The Bankruptcy Act imposes several obligations on the directors of companies under insolvent liquidation or bankruptcy procedures (aiming at the orderly and transparent management of such distress situations, particularly the handover of the management and documentation of the insolvent company to the liquidator). Failure to observe these obligations may give rise to penalties imposed personally on the directors.

The direct, personal exposure of the directors to fines or liability may also arise in several other specific cases under applicable laws, including tax and environmental laws. For example, sectorial environment legislations (Section 102(5) of Act LIII of 1995 on the protection of the environment) sets out that directors who have supported a resolution (measure), in respect of which they knew, or should have known given reasonable care that such resolution (measure), if carried out, will cause environmental damage, shall bear unlimited and joint and several liability in the event of the termination of the business association or sole proprietorship for the company's ensuing liability for remediation and compensation for damages, which the company did not satisfy.

Criminal liability of the directors may also be relevant in extreme cases (embezzlement, fraud, serious breach of financial reporting obligations etc.).

Protection against liability

How can directors be protected from liability?

There are three main methods that may be used to protect the directors from liability *to some extent*:

- **Contractual limitation of liability.** The director's liability towards his company may be limited in his service agreement with the company (or the articles of association) – in these agreements, indemnity protection can also be agreed for the directors; liability for deliberate breaches of the directors' duties cannot be lawfully limited; contractual limitation of the directors' liability is not used widely in practice.

- **Hold-harmless/release certificate (*felmentvény*).** This is issued by the general meeting of the company: in connection with the approval of the annual financial accounts or when removed from office (in between the approval of the annual financial statements), the general meeting may pass a resolution confirming that the director duly performed his duties in the previous financial year. If such certificate is issued, then the company may only make a claim against the director for breach of his duties if it proves that the certificate was issued on the basis of incomplete or false information.
 - **Directors' liability insurance.**
-

What practical steps can directors take to avoid liability?

Directors should:

- Keep in mind that they are always expected to act in the interest of the company and in line with the articles of association and the resolutions of the general meeting.
- Keep in mind that they are expected to act independently/autonomously, i.e. except for sole shareholder companies, no shareholders (including majority shareholders) have the right to instruct the directors.
- Avoid conflict of interest situations and if this is not possible, act transparently in that regard (e.g. by informing the general meeting).
- If the financial position of the company becomes fragile, particularly if the company is threatened by insolvency, take legal advice in order to avoid liability for wrongful trading (as detailed in the point concerning Liabilities on insolvency).
- Treat the shareholders equally, in a non-discriminatory manner, including if they request information on the operation of the company.

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Corporate entities

What type of company is typically used in group structures?

In Ireland, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" in Irish company law. Basically, the law regards someone who manages the affairs of a company on behalf of its shareholders as a director (whether they are called a director or not).

What are the different types of director?

Directors validly appointed as such are known as *de jure* directors and may be executive (usually employees, with an operational/executive role) or non-executive (usually not employees) – and may also be appointed to represent a particular shareholder (a nominee director). In addition, a *de facto* director is a person who acts as though they are a director but is not validly appointed as such and a "shadow director" is a person in accordance with whose directions or instructions the directors of a company are accustomed to act. In general, however, Irish company law does not differentiate between different types of director – all directors are subject to the same duties.

Eligibility

Who can be a director?

A director must be at least 18 years old, but there are no nationality or residency restrictions. It is not possible to have a corporate director in Ireland. For Irish companies generally, there are certain director residency requirements (ie at least one

director must be an EEA resident director or a surety bond is required to be put in place) and certain limitations on the number of directorship that a person can hold, but this does not place any eligibility restriction on a director itself.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's constitution may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or, if the company's constitution allows, by the other directors. In private subsidiary companies, the constitution commonly allows the parent company to appoint directors by a simple written notice to the company.

Details of the appointment must be filed with the Registrar of Companies within 14 days of the appointment taking place. A director's residential address and full date of birth are included on the public record (although new legislation is being proposed which will remove the requirement for a director's residential address to be included on the public record).

How are directors removed?

Shareholders have a residual statutory power to remove directors by a majority resolution (subject to certain procedural requirements) which cannot be removed by the company's constitution. It is common for the constitution to confer additional powers of removal – for example, to enable the board to remove a director, or, in a subsidiary context, for the parent company to be able to remove a director by simple written notice to the company. A director may also resign at any time.

When a director leaves office, notice must be filed with the Registrar of Companies register within 14 days.

Board / management structure

Typical management structure

Boards of Irish private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's constitution. In private companies, the constitution typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice of board meetings must be given to all directors). Unless the constitution stipulates otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is required unless the constitution specifies otherwise or there is another reason that the director is not entitled to vote (for example, due to conflict).

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g. in the company's constitution or in internal policies and protocols).

Normally, the company's constitution gives the directors wide powers to manage its business and affairs as they think fit (although the constitution may also provide that shareholders may give the board specific directions as to its conduct). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

Delegation

Generally the board can delegate their powers to committees and others (e.g. executives) as they see fit, subject to the company's constitution or any agreements which limit their powers to do so. However, the board retains overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in section 228 of the Companies Act 2014 (the Act). These duties include:

- **Act in good faith in what the director considers to be the interests of the company.** Directors must act in the way that they consider, in good faith, would be most likely to be in the interests of the company, having regard (amongst other matters) to the interests of the company's employees, shareholders and creditors (where the company is or is likely to be unable to pay its debts).
- **Act honestly and responsibly in relation to the conduct of the affairs of the company.** This duty is consistent with the requirement for directors to declare their interests in any company transactions and to require shareholder approval for certain transactions which involve a director.
- **Act in accordance with the company's constitution** and exercise their powers for the purposes allowed by law.

- **Not use the company's property, information or opportunities for their own or anyone else's benefit** unless this is expressly permitted by the company's constitution or the use has been approved by a resolution of the company in general meeting.
- **Not agree to restrict the director's power to exercise an independent judgment** unless:
 - this is expressly permitted by the company's constitution
 - the director considers in good faith for that agreement to be in the interest of the company or
 - shareholders have approved that agreement.

A director may not usually limit their discretion, however in certain circumstances they can do so.

- **Avoid conflicts of interest.** Directors must not put themselves in a position where there is, or could be, a conflict between their personal interests or their duties to another person and the interests of the company (for example, where they are a director or employee of another company or where they may be in a position to take advantage of any property, information or opportunity they became aware of as a director). This duty is not breached if the situation cannot reasonably be regarded as giving rise to a conflict of interest or if the situation has been authorised by the company's constitution or by a members' resolution (provided conflicted directors take no part in this decision).
- **Exercise the care, skill and diligence** which would be exercised in the same circumstances by a reasonable person having both:
 - the knowledge and experience that may reasonably be expected of a person in the same position as the director and
 - the knowledge and experience which the director has.

Directors must meet the minimum standard of skill and care expected of someone in their position and they must also bring to bear their particular skills and experience – therefore, the more qualified or experienced a director is, the greater the statutory standard required of them.

In addition, directors have duties under common law, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company.

There is no hierarchy to these factors and, where they conflict, a director will need to use their business judgement in weighing them against one another.

What are directors' other key obligations?

The Act requires directors to prepare and file annual financial statements (audited where required) and submit other information to the Register of Companies, including information about significant shareholders and beneficial ownership. The financial statements and other information must be submitted to the Register of Companies

within the prescribed time limits. Other corporate actions may also give rise to ad-hoc filings requirements with the Register of Companies within prescribed time limits (such as change of directors, certain shareholder resolutions, allotment of shares).

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

The Act regulates the circumstances in which directors and their connected persons (broadly, family members and connected companies or trusts) can enter into transactions with the company. The transactions covered by these rules include long term service contracts, loans, guarantees and the disposal or acquisition of substantial assets. Unless any exemptions apply, these transactions may only be entered into with prior shareholder approval (typically as part of a whitewash procedure).

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, a shareholder must first obtain the court's permission to proceed with a derivative action and the court will take into account a number of factors when deciding whether to grant this permission – including whether the shareholder is acting in good faith, the views of independent shareholders and whether the company is likely to ratify or authorise the act or omission giving rise to the claim.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or reckless trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for reckless trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Irish legislation including the making of a declaration of solvency as part of a whitewash procedure or relating to environmental and health and safety, data protection/cyber security, ESG, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be restricted or disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Failure to comply with company-related compliance obligations, such as the preparation and filing of financial statements, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation). Robust corporate governance can also assist with protecting directors by demonstrating that decisions were made in the good faith of the directors, were reasonable decisions, and commercially justified at a particular point in time.
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. The company may also pay a director's defence costs as they are incurred – however these costs become a loan which must be repaid by a director should the defence be unsuccessful and the costs are not covered by any permitted indemnity. The company may seek to obtain security for such loans if appropriate in order to protect the company's assets.
- **Insurance.** Directors' and officers' (D&O) insurance is common in Ireland. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings, asking any relevant questions to ensure they can make informed and reasonable decisions.
- Keep under review, and stay up to date with, any relevant legislation affecting the company. This includes ensuring that new directors receive appropriate induction training and that all directors undertake ongoing training, or legal updates, so they remain abreast of current and emerging legislative developments.

-

Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.

- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and financial statements are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal and tax professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies, ensuring that these are fit for purpose for the local company and have been sufficiently reviewed from an Irish law perspective and adopted by each relevant company. These may cover areas such as health and safety, ethics, bribery/anti-corruption, ESG, data privacy/cyber security and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of breaches arising, and ultimately liabilities being incurred by the company and/or its directors
- Also in a group situation, keep in mind that directors must act in the best interest of the company upon which they sit. . Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when a transaction may negatively impact the solvency of the company upon which they sit or may not be permissible under local laws). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues arise and seek appropriate advice, internally or externally, to ensure the directors are discharging the duties in compliance with Irish law.

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Corporate entities

What type of company is typically used in group structures?

While there are two main types of companies used in Italy – the joint stock corporation (*società per azioni* - SpA) and the limited liability company (*società a responsabilità limitata* - SRL), unless there are specific reasons that require a subsidiary to be in the form of an S.p.A. (e.g. highly regulated sectors such as banking and insurance) or other specific reasons that the shareholders consider relevant, in Italy the most common type of company used in group structures is the SRL.

Types of director

What is a "director"?

There is no complete definition of the term “director” in Italian company Law. The director(s) of a limited company (*società di capitali*) are those person(s) entrusted with the management powers and functions. It is not necessary for a director to be a shareholder.

What are the different types of director?

Directors are regarded as *de jure* directors if they are validly appointed as such and may be executive and non-executive.

On 29 April 2026, Legislative Decree No. 47 of 27 March 2026 came into force, implementing the delegation referred to in [Article 19 of Law No. 21 of 5 March 2024, No. 21](#) (the so-called *Legge Capitali*), which contains significant amendments to both the *Testo Unico della Finanza* ([Legislative Decree No. 58 of 24 February 1998](#), abbreviated as TUF) and the provisions of the Italian Civil Code concerning the administration and control of limited companies and, in particular, S.p.A., with the stated aim, on the one hand, of fostering the growth of the financial market and promoting the competitiveness of businesses and, on the other, of strengthening

autonomy of the articles of association and enhancing the various forms of corporate governance, imposing a radical change on the current regulatory and, more generally, organisational framework.

The new Article 2380 of the Italian Civil Code (which retains the heading 'Systems of administration and control') provides that "The articles of association shall adopt, for the administration and control of the company, one of the systems referred to in paragraphs 2, 3 and 4 of this section, in which, respectively, the functions are assigned to one or more directors and a board of statutory auditors (the so-called "traditional system" before this law changes), to a management board and a supervisory board (the two-tier/dualistic system as it was indicated before the changes), to a board of directors and a management control committee established within it (the one-tier/monistic system as it was indicated before the changes).

Unless the resolution provides otherwise, the change of system shall take effect on the date of the meeting of the competent body convened to approve the financial statements for the following financial year.

Unless otherwise provided, the provisions of this paragraph referring to the board or the directors shall apply, as the case may be, to the board of directors (*consiglio di amministrazione*) or the management board (*consiglio di gestione*) or to their respective members."

Following the amendments, paragraph 1 of this section of the Italian Civil Code retains the heading 'General Provisions' but comprises more articles than in the previous text; paragraph 2 is entitled 'On the system with a board of statutory auditors' (*Del sistema con collegio sindacale*); paragraph 3 is entitled 'On the system with a supervisory board'; and paragraph 4 is entitled 'On the system with a management control committee'.

Executive directors are those directors to which the board has delegated part of its functions and powers. They perform managing functions, while non-executive directors carry out supervising activity on executives. In particular, executive directors make sure that the organizational, administrative and accounting structure is adequate in light of the nature and size of the company and they report to the board of directors and auditors, if applicable, in relation to the general management performance and the most relevant operations carried out by the company. Therefore, the entire board of directors, including the non-executives directors, assess, on the basis of the information received by executives, the adequacy of the organizational, administrative and accounting structure of the company; they examine the strategical, industrial and financial plans of the company, if prepared; and they assess the general performance of management as reported to them by executives. Indeed, each director is required to act in a well-informed capacity and, therefore, each director may request that the executives provide them with information related to the management of the company. The aforementioned amendments to the Italian Civil Code have introduced a significant new provision concerning board information. It is stipulated that, when making decisions, non-executive directors must rely in good faith – taking into account their specific areas of expertise – on the information received in accordance with the provisions of the law and the articles of association.

A SpA's by-laws can require that a director comply with specific requirements of integrity, experience and independence, but this is not mandatory. Similar

requirements may exist under self-regulatory codes issued by professional associations, or by the companies who manage regulated markets.

According to the Italian Civil Code, the title of director may be extended to someone who is not formally invested of the title but that carries out managing activities typical of directors in a continuative and non-occasional manner. These are regarded as *de facto* directors. Managing powers may be legitimately exercised only by *de jure* directors but liability for managing activities may be extended to *de facto* directors.

Eligibility

Who can be a director?

A director must be at least 18 years old, but there are no nationality or residency restrictions. It is possible to appoint a company as director.

Any persons assuming the office of director of a limited liability company or of a joint stock company to declare, before their appointment, the absence of any causes of ineligibility stated under article 2382 of the Italian Civil Code and of disqualification from the office of director adopted in a State member of the European Union. Article 2382 states that the following persons cannot be appointed as directors and, if appointed, must cease from their office: (i) persons who are subject to disqualification (*interdetti*); (ii) persons who are subject to disablement (*inabilitati*); (iii) persons who undergo bankruptcy; or (iv) those individuals who have been sentenced to a punishment entailing interdiction from public offices or the incapacity to assume managerial offices (*uffici direttivi*).

As of 31 October 2025, the regulations regarding the obligation for directors to register their digital domicile / Certified Email Address (PEC) with the Companies' Register have been amended. This obligation, introduced on 1 January 2025, has in fact been redefined by Article 13(3) of Law Decree no. 159/2025, which has changed those required to comply. In particular, according to the new provisions this requirement does not apply to all directors of companies ("*imprese costituite in forma societaria*"), including already existing ones, but to the sole director or managing director or, in their absence, to the Chairman of the Board of Directors. The digital domicile of the aforementioned directors cannot coincide with the digital domicile of the relevant company. Companies already registered with the Register of Companies shall notify the digital domicile of the aforementioned directors by 31 December 2025 and, in any event, upon the granting or renewal of the appointment, under penalty of administrative fines from Euro 103 to Euro 1,032.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's by-laws, however, usually specify a greater minimum number and/or a maximum. A public company must have more than one director.

More than one director is needed when a specific management structure is adopted by SpAs:

- In the system with the management control committee, one third of the board must be composed of independent directors.
- In the system with the supervisory board at least two members of the management board are required.

Appointment and removal

How are directors appointed?

Directors are appointed by way of a decision of the company's shareholders.

For those SpAs that adopt a system with the supervisory board (*Consiglio di Sorveglianza*), except for the first members appointed in the deed of incorporation, the supervisory board appoints the members of the management board (*Consiglio di Gestione*).

Moreover, in all SpAs it is possible that some directors are appointed by the holders of financial instruments or by public bodies; categories of shares may be assigned the right to appoint a certain number of directors and the state or a public body may have a direct right of appointment without causing the alteration of the participation's percentages.

Details of the appointment must be filed with the companies' register within 30 days of the appointment taking place.

Limited liability companies' by-laws can provide specific appointment rights.

How are directors removed?

Directors may be removed at any time by means of a decision of the shareholders. Directors removed without cause may have a claim for damages deriving from their removal from the board. In the absence of reputational damage related to the manner of removal, damages generally correspond to the compensation that director would have received, had they stayed in office for the residual period of their appointment.

Alternatively, in limited liability companies, specific removal rights can also be set out in the by-laws.

If limited liability companies' by-laws provide specific appointment rights, the director can be removed at any time by the shareholder who has the appointment right.

A director may resign at any time.

When a director leaves office, notice must be filed at the companies register within 30 days.

Board / management structure

Typical management structure

As indicated above the management body of a joint stock company (SpA) can be structured according to one of the following systems:

- System with the board of statutory auditors. The shareholder meeting will appoint a management body (composed either of a sole director or a board of directors) and a panel of statutory auditors with the function of ensuring that the company is managed in compliance with the law, company by-laws, and standards of proper management. The panel of auditors usually carries out its control activities only towards management. Accounting control activities are carried out by an external audit body appointed by the shareholders' meeting. However, if certain conditions are met, the panel of auditors may also be required to carry out accounting control activities. The board of directors usually delegates managing powers to an executive committee (*comitato esecutivo*) or to a CEO (*Amministratore Delegato*). In this case the managing functions are carried out by executive directors while the board retains supervising and advisory functions.
- System with a supervisory body (*consiglio di sorveglianza*). The shareholders' meeting appoints a supervisory board. Except for the first members appointed in the deed of incorporation, the supervisory board must appoint the management board (*consiglio di gestione*), which is responsible for the company's management. The supervisory board is also responsible for the approval of the annual financial statements and, where prepared, the consolidated financial statements; for claiming the liability action against the members of the management board; where provided for in the company's by-laws, resolves on strategic transactions and the company's business and financial plans prepared by the management board, without prejudice in any event to the latter's liability for the acts performed. The members of the supervisory board must be jointly and severally liable with the members of the management board for the acts or omissions of the latter where the damage would not have occurred had they exercised supervision in accordance with the obligations of their office. The supervisory body and the persons responsible for the statutory audit shall promptly exchange information relevant to the performance of their respective duties.
- System with the management control committee (*comitato per il controllo sulla gestione*). The shareholders' meeting appoints a board of directors (*consiglio di amministrazione*), which will manage the company. The board of directors will appoint an internal audit committee (*comitato per il controllo sulla gestione*) from among its independent and non-executive members. The shareholders' meeting must also appoint an external auditor (usually, an auditing firm) carrying out accounting control activities.

The company's by-laws provide for the management and supervision of the company in accordance with one of the systems set out above.

The management body of a limited liability company (SRL) can be structured in one of the following ways:

- A sole director.
- A board of directors.
- Two or more directors acting jointly or severally to manage the company but not forming a board of directors.

In SRLs, a supervising body is only appointed if required by the company's by-laws or if the company exceeds specific thresholds regarding the economic results and employment workforce.

How are decisions made by directors?

When the management body consists of a board of directors, decisions are taken collegially with specific procedural rules to be met. The chair of the board of directors is entitled to call the board of directors' meeting, unless the company's by-laws state otherwise. In order for the meeting to be correctly held, the majority of the members of the board of directors or management body must attend the meeting. Board resolutions require the approval of the majority of the directors attending the meeting. The company's by-laws can set out different quorum requirements, the possibility to attend board meetings in plenary form and/or by teleconference or other rules and notice requirements for the calling of a board meeting.

In limited liability companies (SRL), when a board of directors is appointed, it is not mandatory that decisions are taken collegially: if the company's by-laws allow it, decisions on certain matters can be taken upon written consultation or on the basis of written acceptance. If more directors are appointed without forming a board of directors and they do not act jointly according to the by-laws, each director can take decisions individually with the exception of decisions regarding the draft financial statements, the drafting of mergers or demergers plans, and the approval of a capital increase.

Authority and powers

If there is a board of directors, the company's by-laws must specify which directors have authority to act in the name and on behalf of the company and whether they are able to do so individually (*firma disgiunta*) or if they have to act jointly (*firma congiunta*). As already outlined, this specification is irrelevant to third parties, unless it is proven that the third parties have acted intentionally to the detriment of the company.

The difference between the power of representation of the company and managing powers has to be noted: representation has to do with the ability of the director to act with third parties on behalf of the company and with the authority to bind the company by entering into contracts on the company's behalf. Managing powers have to do with the internal decisional process: the power to decide about the company's operations.

Under the law, managing powers belong exclusively to the board of directors and are exercised collegially. It is common however for the board to delegate its powers to individual directors who become executives. The by-laws usually specify that executive directors are also able to act in the name and on behalf of the company providing them with authority to act with third parties.

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so. This rule applies to ultra vires acts and both to joint stock companies (SpA) and limited liability companies (SRL). The internal limits are irrelevant for third parties even if

published on a public register, unless it is proven that third parties have acted intentionally to the detriment of the company. A director may, however, be liable for damages resulting from acts carried out in violation of internal limits or acts which are ultra vires.

Delegation

In a SpA adopting the traditional system with a board of statutory auditors, the sole director or the board of directors can exercise all the management powers of the company. The board of directors can delegate specific functions and grant the relevant powers to a managing body (*comitato esecutivo*) or to a particular director (*amministratore delegato*). In this case the board retains supervisory and advisory functions while executive directors carry out the managing activity.

In particular, executive directors take care of the organizational, administrative and accounting structure and they refer to the board and auditors in relation to the general management performance and the most relevant operations.

The board of directors assess, on the basis of the information received by executives, the adequacy of the organizational, administrative and accounting structure of the company, they examine the strategical, industrial and financial plans of the company and they assess the general performance of management as reported by executives. However, the board of directors cannot delegate certain specific functions, such as: preparing the annual financial statements and the management report, the decision about an increase or a reduction in corporate capital; or the drafting of a merger plan. Furthermore, decisions on access to the crisis and insolvency resolution mechanism which include determining the content of the proposal and the terms of the plan, may not be delegated.

Duties and obligations of directors

What are the key general duties of directors?

As a general principle, the Italian Civil Code provides that the directors must comply with the duties provided by law and by the by-laws with the diligence required by the nature of the office held as well as in consideration of the specific competence of each director. The directors are jointly and severally liable towards the managed company for damages arising from the breach of their duties, except for those competences which have been delegated to the executive committee or which have been otherwise delegated to one or more directors.

The Italian Civil Code further provides that *“in any event [...] all directors are jointly liable if, despite being aware of facts prejudicial to the managed company, they have not done whatever is in their power to avoid the occurrence of such facts or, otherwise, to exclude or limit the prejudicial consequences of such facts.”*

General duties binding each director are, for instance:

- Duty to act in order to pursue the company's purpose.

- Duty to set out the organizational, administrative and accounting structure adequate given the nature and size of the company. Directors also have the duty to act promptly to adopt one of the preventative restructuring frameworks for the overcoming of a business crisis, and to ensure the viability of the company.
- Duty of care. Directors must act with the diligence required by the nature of their office, taking into account their specific skills.
- Duty to inform the other directors. Executives must report to the board, at least once every six months, on the general management performance and on the most relevant operations.
- Duty to act advisedly. Directors may ask executives to report about the company's management.
- Duty to monitor the executive directors. Directors may be held jointly liable if they fail to take the necessary measures to prevent damage to the company (if they are aware about facts that may adversely affect the company) . Non-executive directors must supervise and be informed about company's business; on the basis of information received by executives, they assess the adequacy of the organizational structure of the company, they examine industrial, strategic and financial plans and they assess the general management performance. The new Article 2381-ter of the Italian Civil Code specifies that the liability of non-executive directors must be assessed in relation to the information received, on which they may reasonably rely, also in light of their specific expertise. This latter clarification appears, in fact, to raise (rather than lower) the level of diligence required in assessing the adequacy of the information received where directors have specific experience in relation to certain matters under discussion by the board.
- Duty to inform the other directors and the controlling body, of any existing conflict of interest in a specific company transaction. If the director is a managing director they must refrain from the transaction and defer the matter to the board which must make the decision about the transaction.
- Duty to keep the corporate books and to draft the annual financial statements and submit them for approval to the shareholders' meeting within 120 days from the financial year end (or within 180 days, in certain specific cases provided by the Italian Civil Code). Once the shareholders' meeting approves the draft financial statements, the board members have to file them with the Companies' Register, within 30 days from the date of approval.
- Duty to call the shareholders' meeting without delay in case of losses exceeding one third of the corporate capital.
- Duty to comply with all filing requirements with the Companies' Register, for example, once the shareholders' meeting appoints or removes a director, or approves the company's financial statements, the board members have to make the relevant filing with the Companies' Register within 30 days.

The extent of these duties and responsibilities and the standard of care required for each director depend on the director's office and specific expertise.

What are directors' other key obligations?

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, public capital markets laws and regulations (if applicable), competition laws and bribery/anti-corruption laws.

Under the Italian Civil Code and other legislation, directors have the duty to adopt all measures necessary to preserve and guarantee the health and safety of employees. These measures include: to make an assessment of hazards for employees; to implement a programme of preventative activities; to reduce or, where possible, to eliminate hazards; and to monitor sanitary conditions of employees.

Directors must also adopt and efficiently implement an organizational and management model (so called, "Model 231" prepared in accordance with Legislative Decree 231/2001) which is adequate to prevent the commission of crimes. If such a model is not adopted, and efficiently implemented, the company may be held liable for crimes committed by its directors or employees.

In case of financial imbalance, directors must also operate a "solvency test" before proceeding with a legitimate repayment of shareholders' loans.

Transactions with the company

The main restrictions on directors' transactions with the company concern the operations that can give rise to conflicts of interest (i.e. the circumstances in which an interest of directors and/or their connected persons (broadly, family members and connected companies or trusts) is in conflict with that of the company), which require directors, in general terms, to comply with certain requirements and obligations (such as disclosure to the board and abstention from the vote to implement the transaction).

Liabilities of directors

Breach of general duties

The extent of directors' duties and responsibilities and the standard of care required for each director depend on the director's office and their specific expertise. In certain circumstances, directors are jointly liable to the company for damages that result from a failure to fulfil their duties or for failing to take the necessary measures to prevent damage to the company (if they are aware about facts that may adversely affect the company).

For limited companies, civil liability may be incurred by directors towards:

- The company for damages caused by a failure of one or more directors to perform the specific duties and obligations under applicable law and the by-laws with regard to the management of the company. If the board of directors has delegated specific functions to certain directors, then only those directors will be liable for the delegated functions. However, the directors, without prejudice to the provisions of Article 2381-bis and the fourth paragraph of Article 2381-ter, shall be jointly and severally liable if, being aware of prejudicial facts, they have not done everything in their power to prevent their occurrence or to eliminate or mitigate their harmful

consequences. Such joint liability is owed to the company only and therefore not to creditors and third parties.

- The company's creditors if directors have breached the specific rules regarding the preservation of the corporate assets.
- Individual shareholders or third parties for damages directly caused by directors' fraudulent or negligent action.

An action for damages can be filed by the company or by the shareholders (as per SpA, only if they own one fifth of the stock capital or another share, in any case not exceeding one third, set forth in the by-laws and if they can show that the damage was caused by actions exclusively attributable to the director.), or by company's creditors. The contractual nature of the liability means that the plaintiff has the burden to prove the breach of the duty of diligence, the damages and the causal nexus.

The action for liability towards the director can be exercised by the company only after a resolution of the shareholders' meeting. The action of liability may also be brought upon a resolution of the board of statutory auditors, adopted by a two-thirds majority of its members. The action may be brought within five years of the director's termination of office.

In relation to criminal liability, the general rules that apply to all, specific rules of criminal corporate law apply to directors. They mainly concern the following:

- accounting documents
- shareholders' contribution
- distribution of profits and reserves
- corporate assets.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency.

Directors have criminal liability if they commit offences during either:

- Ongoing insolvency proceedings.
- The period before a company is declared insolvent, under certain specific circumstances.

The main insolvency crimes include:

- Bankruptcy (*bancarotta semplice*).
- Fraudulent bankruptcy (*bancarotta fraudolenta*).
- Illegal applications for loans (*ricorso abusivo al credito*).
- Declaration of non-existing creditors (*denuncia di creditori inesistenti*).

In general terms, the board members are liable towards the company's creditors if they fail to comply with the obligations related to the preservation of the integrity of corporate assets. The relevant liability action can be exercised by the creditors when the company's assets are insufficient to satisfy the debts owed; should the company waive its liability action, this shall not influence the creditors' right to bring an independent claim.

In case of judicial winding-up (*liquidazione giudiziale*), a composition with creditors (*concordato liquidatorio*) or other similar proceedings, the actions for liability are filed by the “*curatore, liquidatore giudiziale, commissario liquidatore* or *commissario straordinario*”. The actions for liability owed to the company and owed to the creditors converge in a unitary action, filed by the official receiver. Accordingly, the creditors lose the right to sue the director directly. These claims must be brought, under penalty of forfeiture, within two years of the judgment opening the judicial winding-up or the judgment declaring insolvency.

In that case, the director's liability to the company creditors is of an extra contractual nature and arises when the director does not comply with duties concerning the preservation of the capital stock integrity and the action can be filed only when such stock capital is insufficient to pay off their debts. The requirements to bring an action against the director are:

- Their unlawful conduct (contrary to the duties established by the law or by the by-laws).
- A prejudice for the creditors represented by the insufficiency of the stock capital in order to satisfy their debts (and the insufficiency does not mean insolvency: there can be insolvency when there is not liquidity, but the assets could however be sufficient).
- A causal nexus between the prejudice and the conduct.

The Italian Civil Code imposes on directors of all types of business that act as corporations or in collective form a duty to adopt and implement without delay those instruments provided by the regulations to overcome the state of crisis and restore the company as a going concern.

Alongside this innovative duty to monitor the evolution of financial dynamics from the perspective of the company's going concern status, the law also sets out a more traditional duty to verify the static situation of the corporate assets, with aggravated liability deriving from requirements for the directors to limit management solely to the conservation of the company's assets after the occurrence of a cause of dissolution (including the erosion of net equity for losses not followed by recapitalization: so called “recapitalize or liquid rule”).

In the event of the occurrence of a cause for dissolution (as provided by law), the directors must, without delay, ascertain the occurrence of the cause and proceed with the formalities required by law. In the event of delay or omission, they are personally and jointly liable for damages suffered by the company, shareholders, company creditors and third parties. In the event of omission by the directors, the competent Court shall take action, at the request of individual shareholders, directors or of the statutory auditors.

In the context of the liquidation process, when a cause for dissolution arises and until the company books are handed over to the liquidators, the directors maintain the power to manage the company, for the sole purpose of preserving the integrity and value of the company assets. The directors are personally and jointly liable for damages caused to the company, to the shareholders, to the company creditors and to third parties, for acts or omissions committed in breach of their duties. When the liability of the directors is ascertained, and unless proven otherwise, the recoverable damages are presumed to be equal to the difference between the net equity at the date on which the director ceased to hold office or, in the case of the opening of insolvency proceedings, on the date of the opening of such proceedings and the net assets determined on the date on which a cause for dissolution occurred, less the costs incurred and to be incurred, according to a criterion of normality, after the occurrence of the cause for dissolution and until the completion of the liquidation.

Other key risks

In general terms, personal liability for directors may, in certain circumstances, arise under Italian legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

Protection against liability

How can directors be protected from liability?

Directors may defend themselves from any claim brought against them in the context of an insolvency or reorganisation by demonstrating that they have been acting lawfully. In short, they should try to prove the following:

- If the claim is brought by the company itself, the directors and officers should demonstrate that they:
 - Fulfilled the duties imposed upon them by the law or the company's by-laws.
 - Supervised the general conduct of the company
 - Once becoming aware of harmful activities, did what they could do to prevent such activities from being carried out or to limit their negative consequences.

Directors and officers who, lacking any negligent behaviour, had their dissent reported in writing in the book of the meetings and resolutions of the board of directors will not be held liable.

- If the claim is brought by the company's creditors, the directors and officers should prove that they complied with their duties to preserve the company's assets (as above) or alternatively demonstrate that the assets of the company, although reduced also as a result of their actions, are still sufficient to satisfy its creditors.
- If the claim is brought by single shareholders or third parties directly damaged by the directors' conduct, directors and officers should demonstrate that they have not

acted with wilful misconduct or negligence (or that the five-year prescription term applicable to such extra-contractual liability is elapsed and therefore the action is time-barred).

Indemnification may also be available. The Italian Civil Code, provides that, through a shareholders' meeting's resolution, the company is able to waive its right to bring a liability action, unless a minority of shareholders representing, in case of private SpA, at least one fifth of the corporate capital, or the different percentage provided by the company's by-laws for the exercise of the liability action itself, are opposed to such waiver.

However, historically the Italian courts have been unwilling to uphold liability waiver agreements, although more recent cases suggest that waivers in respect of specific liabilities and actions expressly indicated may be permissible. In light of this, it can be said that a broader view affirming the validity of the waiver agreements in relation to liability actions against directors (for damages caused to third parties) has been increasingly developing.

Directors' and officers' (D&O) insurance is common in the Italian SpAs, while it is quite rare in the SRLs. It typically provides for both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Adopt an organizational, administrative and accounting structure adequate for the nature and size of the company and to promptly detect a situation of crisis and the loss of the company's going concern status as well as to take action without delay to adopt and implement those instruments provided by the regulations to overcome the state of crisis and restore the company's going concern.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition,

directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.

- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Adopt and efficiently implement an organizational and management model which is adequate to prevent the commission of crimes. If such a model is not adopted, and efficiently implemented, the company may be held liable for crimes committed by its directors or employees.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

Under Italian law, parent companies or entities which, carrying out direction and coordination activities of companies, act in their own entrepreneurial interest or in the interest of another in violation of principles of correct corporate and entrepreneurial management of such companies, are directly liable *vis à vis* the shareholders of the same companies, for the prejudice caused to profitability, and to the value of the shares, as well as *vis à vis* the creditors of such companies for the damage caused to the integrity of the net equity. There is no liability when overall there is no damage as a consequence of the overall direction and coordination activity, or when the damage has been totally eliminated through deliberate transactions.

In this context, Italian law imposes on the directors of the directed companies an obligation to comply with certain disclosure requirements; failure to comply with such obligations may result in liability for the damage that the lack of knowledge may have caused to shareholders or third parties, who were unaware of the relationship between controlling and controlled companies. Italian law also provides for the liability of the parent company, and of any other subject that has participated in the activity – including the directors, for damages caused to the quotaholders and the creditors of the parent company if such “activity of direction and coordination” is being conducted improperly.

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Corporate entities

What type of company is typically used in group structures?

In Japan there are two primary limited liability companies commonly used by foreign companies under the Companies Act, which are:

- A joint stock company called a Kabushiki Kaisha (KK).
- A company that is similar to a US limited liability company called a Godo Kaisha (GK).

No minimum capital is required for the establishment of a KK or a GK, but in both cases registration with the Legal Affairs Bureau is required.

A key difference between a KK and a GK is the flexibility of corporate governance. The GK structure allows more streamlined corporate governance than under the KK structure (such as a board, auditor etc.). A KK is also required to publish its annual financial statement every fiscal year under the Companies Act.

Although the structure of a GK is used by some companies, a KK is the more common type of corporate structure. Therefore, this guide focuses on the management of a KK.

Types of director

What is a "director"?

There is no clear definition of a "director" in Japanese company law. In general, a director is someone who is appointed by the shareholders of a KK in general meeting and whose main roles are making decisions on the operations of the company and supervising the operations engaged in by other directors.

What are the different types of director?

From among the directors, a representative director (*daihyo-torishimari-yaku*) can be appointed. A representative director is a director with the most senior position in a company who is entitled to enter into business and legal contracts on behalf of the company. A KK may have more than one representative director if needed.

In addition, a board of directors may have outside directors (*shagai-torishimari-yaku*). There are certain restrictions applying to an outside director. For example, an outside director cannot be an executive director, officer or employee of the company, its subsidiary or its parent company.

Eligibility

Who can be a director?

There are no nationality or residency restrictions to become a director.

It is not possible to have corporate directors (ie legal persons as director). In addition, the Companies Act prevents the following persons from being a director:

- A person who has been sentenced to a penalty for violating the Companies Act or certain other laws, for whom two years have not passed from the date when the execution of the penalty was completed or when the penalty no longer applied.
- A person who violated other laws, who was sentenced to imprisonment or a more severe penalty and has not completed the execution of the penalty or to whom the penalty still applies (excluding a case where the execution of the penalty is suspended).
- An adult ward, a person under curatorship under Japanese law (unless certain conditions are met, such as consent by an adult guardian).

Minimum / maximum number of directors

A KK must have at least one director. A KK with a board of directors must have at least three directors. A private KK (ie closed KK) is not required to have a board of directors but it may do so if the articles of incorporation allow it.

A KK's articles of incorporation may set a minimum number (no less than the statutory minimum) and/or a maximum number of directors.

Appointment and removal

How are directors appointed?

Directors are appointed by a resolution of the shareholders in a general meeting. Unless a higher majority is required under the articles of association, the shareholders' resolution may be passed by shareholders holding the majority of the voting rights present at the shareholders meeting, which is attended by shareholders holding the majority (this quorum may be reduced to one-third under the articles of incorporation)

of the total voting rights held by shareholders entitled to vote. Any candidate appointed by the shareholders' meeting shall indicate their willingness to accept the position.

Appointment of a director shall be registered at the company's corporate registry within two weeks of the assumption of office.

How are directors removed?

Shareholders can be removed at any time by a resolution of the shareholders' meeting (which is the same type of resolution to appoint a director as described above).

A director may claim damages from the company for the removal unless the dismissal is based on a justifiable reason. The damages will usually include remuneration for the remaining term of the director who was removed.

Dismissal of a director shall be registered at the company's corporate registry within two weeks of the dismissal.

Board / management structure

Typical management structure

A KK may determine whether to operate with or without a board of directors as long as the KK is not a public company (if the KK is a public company, it must have a board of directors).

A KK with a board of directors can establish an audit and supervisory committee or three committees (a nominating committee, an audit committee and a compensation committee). However, it is not very common for local subsidiaries of foreign corporations to appoint committees.

How are decisions made by directors?

If the company has a board of directors, the board of directors has the authority and duty to make decisions on the operation of important business affairs. The resolution of a board of directors meeting may be passed by the majority of the directors present at the meeting where the majority of the directors entitled to vote are present (this voting requirement can be higher under the articles of incorporation). A director with a special interest in the resolution may not participate in the vote. A written resolution of the board of directors is permitted if provided under the articles of incorporation. However, when decisions are made in writing, the unanimous agreement of all directors who can vote for the resolution is required. A board meeting must be held at least once every three months, at which each representative director must report on the performance of their duties.

If the company does not have a board of directors and it has two or more directors, the business affairs of the company is determined by a majority of the directors, unless otherwise stipulated by the articles of incorporation.

Authority and powers

If the company has a board of directors, each representative director appointed from among the directors has the authority to solely represent the company. Other directors cannot represent the company without receiving authority from the representative director(s) or the board of directors. In a company with a board of directors, the representative director and directors with relevant board authorization have authority to execute the business affairs of the company.

In a company without a board of directors, each director has the authority to solely represent the company unless one or more representative directors are to be appointed from among the directors. Also, each director has the authority to execute the business affairs of the company, unless otherwise provided for in the articles of incorporation. If the company without a board has two or more directors, the business affairs of the company is determined by a majority of the directors, unless otherwise stipulated by the articles of incorporation.

Any restrictions imposed on the authority of the representative director to represent the company may not be asserted against a bona fide third party. Also, in general, as far as third parties are concerned in a transaction, a representative director can bind the company despite lack of a necessary resolution unless the third party has knowledge of the directors' lack of authority or does not have knowledge as a result of their negligence.

Delegation

KK with a board of directors

The board of directors may not delegate decisions regarding important business affairs, including without limitation, the following matters to individual directors:

- Disposal of and acceptance of transfer of important assets.
- Borrowing of a significant amount.
- Appointment and dismissal of an important employee including managers.
- Establishment, changes or abolition of important structures including branch offices.
- Important matters regarding the solicitation of persons who subscribe for bonds (e. g. amount of, interest rate for and the method and due date for the redemption of the bonds, etc.).
- Development of systems necessary to ensure that the execution of the duties by the directors complies with the laws and regulations and the articles of incorporation, and other systems (called “internal control system” as described below).
- Exemption from liability of directors to indemnify the company for its damages /losses arising from breach of their duties (details in exemption from liability of directors is described below).
- Any other material business matters.

Except for these matters, the board of directors may delegate decisions and actions regarding business affairs to directors. Practically, companies establish an internal authorization rule to delegate execution/performance of certain business to directors.

KK without a board of directors

Where the company does not have a board of directors, it is permissible for directors to delegate decisions and actions to certain directors, except for following matters:

- Appointment or dismissal of managers.
- Establishment, relocation and abolition of branch offices.
- Matters to be determined for the holding of the shareholders meeting under the Companies Act.
- Development of an internal control system.
- Exemption of directors from liability to indemnify the company for its damages /losses arising from breach of their duties.

Duties and obligations of directors

What are the key general duties of directors?

The key general duties of directors are as follows:

- **Duty of care.** Directors assume a fiduciary duty of care in managing the company. The fiduciary duty of care in managing includes (without limitation) making decisions regarding business operation with the care of a good manager; and complying with all laws applicable to the company's operation.

Under the Japanese court precedents, whether the director breaches the fiduciary duty of care is determined based on whether the process of making the decision or the decision itself was extremely unreasonable or not (so-called "business judgement rule"). Even if a certain decision results in losses of the company, as long as the directors conduct sufficient examination and discussion before making the decision and the decision is reasonable, the directors generally would not be liable for the losses of the company.

- **Duty of loyalty.** Directors are required to perform their duty so as to benefit the company and must not cause any disadvantage to the company by prioritising a benefit to themselves or to a third party.
- **Duty of supervision.** Directors are required to supervise the performance of duties of the representative director(s) or other directors. The directors are obliged to review and monitor any matters related to the company's management even if those are not matters for which the director is responsible; provided, however, under the court precedents, in the case where the directors delegate/allocate responsibility of management among directors, a director generally shall not be responsible for the matters for which the director is not responsible unless the director is aware of any suspicion of breach of duties relating to such matters.

What are directors' other key obligations?

The duty to establish internal control systems

Directors of a "Large Company" are obliged to establish and maintain internal control under the Companies Act. A "Large Company" is generally defined as a company which has: stated capital in the most recent balance sheet of JPY500 million or more; or total liabilities in the most recent balance sheet of JPY20 billion or more.

The internal control system shall include, among others, the following items:

- Distribution of compliance manuals and training concerning internal rules.
- Maintaining records of the status of the execution of business so as to enable inspection by a third party, and thereby preventing any violations of law or administrative orders.
- Properly disciplining any employee who violates the law and building a spirit of compliance within the company.

Transactions with the company

If a director is to engage in transactions with the company (e.g. the director sells their own property to the company), the director needs to obtain the approval of the board of directors (or, if the company does not have a board of directors, the approval of the shareholders in a shareholders' meeting). The director must disclose all relevant facts to the board of directors (or, if relevant, shareholders) prior to their voting on the matter. The director who is to engage in the transaction is considered as having a "special interest" and such director may not participate in decision-making or make a vote on the transaction at the board of directors' meeting. After the transaction is completed, the director must make specified disclosures to the board of directors (if there is one).

Liabilities of directors

Breach of general duties

Liabilities to the company and shareholder's derivative lawsuit

Under the Companies Act, if a director breaches its duties, the director shall be liable to the company for damages arising from the breach.

Even if a director has engaged in a transaction with the company which has been approved by the board of directors (or a majority of directors), the director who engages in the transaction with the company, the director who engages in the transaction on behalf of the company and the other directors approving the resolution will still be liable jointly and severally if the company sustains any loss as a result of that transaction. In order to avoid falling under the latter, a director needs to record their opposition in the minutes of the board of directors or it is assumed that the director has approved the resolution.

If the company does not seek to recover loss arising from a transaction with a director, shareholders who have held stock continuously for at least six months (which may be

shortened by the articles of incorporation of a non-public company) may request the company bring a claim against the director to recover the loss. If the company does not bring the claim within 60 days of the shareholder request, the shareholders may bring a derivative claim against the director.

Liability to third parties

In addition to the liability owed to the company, if third parties are damaged by a director's gross negligence or if a director acts in bad faith in the course of performance of their director duties, such director will be liable to third parties.

Even though the third parties are not "directly" damaged by the directors, they can likely make a claim against the directors under the Companies Act. Specifically, if the company breaches a contract by withholding payment, the counter party to that contract may bring an indemnity claim against a director who acted in bad faith or with gross negligence.

Liabilities on insolvency

There is no special liability caused by an insolvency of the company. However, as described above, a third-party creditor may be able to bring an indemnity claim against a director who acted in bad faith or gross negligence.

Other key risks

Company administration obligations

Under general legislation in Japan, if the company fails to comply with regulatory obligations, it is possible that the (representative) director is also subject to punishment, administrative fine, etc together with the company.

Criminal liabilities - misappropriation

If a director, through their own action or that of a third party, deliberately causes damage to the company, breaches their fiduciary duty and causes a financial loss to the company, such director can be punished by up to 10 years' imprisonment or a penal fine of not more than JPY10 million, or both.

Protection against liability

How can directors be protected from liability?

Limitation by shareholders' resolution

Liability of directors to the company can be reduced by a special resolution of a shareholders' meeting whereby such special resolution is passed by a two-thirds majority (or a higher proportion if required by the company's articles of incorporation) of shareholders present at the shareholders' meeting, and who represent more than half (or a proportion of one-third or higher if required by the company's articles of incorporation) of the total voting rights of shareholders entitled to vote at such meetings.

Limitation by the director(s)

Where the company's articles of incorporation expressly provide and if the company has two or more directors and one or more statutory auditor(s), the liability of directors to the company can be reduced by a resolution of the board of directors (or a majority of the directors in case of the company does not have a board of directors), unless shareholders holding three per cent or more (or a lower percentage if prescribed by the company's articles of incorporation) of the total voting rights oppose this action.

Limitation by contract

In the case of non-executive directors, where the company's articles of incorporation expressly so provide, the amount of their personal liability to the company may be capped to some extent by contractual agreement.

In each of the above limitations, where the company has a statutory auditor(s), the proposal of such a grant of limitation of liability for a director must be approved by each statutory auditor before the proposal is submitted to the general shareholders' meeting.

Directors liability insurance

Directors liability insurance is available although the Companies Act was amended in December 2019, and came into effect in March 2021 (Amended Act), to provide that a directors liability insurance contract with the insurance company must be approved at a shareholders' meeting (or, if the company has a board of directors, at a board meeting).

Directors liability insurance usually provides coverage in the event of a claim by a third-party where the director's actions in the course of executing the business of the company resulted in damages to a third party. Director's liability insurance also usually provides coverage for the director's attorney's fees associated with a claim by the company where the director's actions resulted in damages to the company if the director were to successfully defend such claim.

Indemnification agreement with the company

Under the Amended Act, by obtaining the approval from the shareholders' meeting (or, if the company has a board, the board), a director may enter into an indemnification agreement with the company so that they could be indemnified by the company for certain defense costs and losses incurred by them.

What practical steps can directors take to avoid liability?

Directors should:

- Report any matters that might have significant impact on the company to the board of directors and seek advice/opinions from other directors before making decision.
- Ensure the discussion regarding decisions is duly recorded in the minutes of board of directors.

- Keep any record or material supporting the decision as evidence.

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Corporate entities

What type of company is typically used in group structures?

The private company limited by shares is the most common type of company used in group structures in Kenya. More recently, however, there has been a significant increase in the use of limited liability partnerships (LLPs).

While like limited liability companies LLPs have separate legal personality and the liability of partners is limited, partners have much greater flexibility in determining the governance structure. They also have pass-through tax obligations with income tax payable at the level of the partner.

This guide focuses on private companies whose liability is limited by shares.

Types of director

What is a "director"?

Section 3 of the Companies Act, Chapter 486 of the Laws of Kenya (the Companies Act) defines a director as any person occupying the position of a director in a company by whatever name called. It also includes any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the company are accustomed to act (such persons are generally known as shadow directors).

The law describes the behaviour of persons who would be considered to be directors, their powers, duties and responsibilities.

What are the different types of director?

Directors are either executive or non-executive.

Executive directors, usually senior employees of a company, with an operational /executive role e.g., chief executive officer/managing director, finance director, etc are

responsible for the day-to-day running of the business. These directors are normally appointed to the Board by virtue of their positions as employees of the company and their directorship ordinarily ceases when the employment relationship is terminated unless shareholders choose to retain them as non-executive directors.

Executive directors must be appointed directors of the company in accordance with the governance instruments of the company. This includes passing relevant resolutions to appoint them as directors and filing applicable returns at the Companies Registry to indicate their appointment as directors. They should be distinguished from senior managers assigned the title 'director' for example Human Resources Director or Information Technology Director but who are not directors within the meaning of the Companies Act.

On the other hand, non-executive directors are not employees of the company. Non-executive directors only attend Board meetings and make decisions at that level or as members of committees of the Board. Non-executive directors who have no shareholding in, or other relationship (eg supplier or consultancy relationship) with, the company are referred to as independent directors.

It is also fairly standard for articles of association of a private company and, where a company has a shareholders' agreement, such agreement, to allow a director (subject to any necessary safeguards) to appoint an alternate director. Such alternate director would, in the absence of the appointing director, exercise the powers and carry out the responsibilities of the appointing director. Alternate directors in law have the same responsibility as substantive directors.

Kenya's company law does not differentiate between the different types of directors – all directors whether executive, non-executive, independent or alternate are subject to the same duties and obligations. Sectoral rules such as those governing financial institutions however refer to the various categories particularly in providing guidance on the constitution of effective boards. For example, under the banking laws, it is a mandatory requirement for a commercial bank licensed by the Central Bank of Kenya to have at least one-third of its directors as independent directors.

There is no legal obligation to appoint representatives of lenders or employees to the Board. In practice, it is not common for companies to appoint the head of human resources to the Board as a director. In addition, appointment of representatives of lenders to the Board is not a common practice.

Eligibility

Who can be a director?

Any person aged 18 years and above can be appointed a director. The Companies Act does not prescribe an age at which directors should retire.

It is possible to have a corporate director, although at least one director of a company must be a natural person.

There are no restrictions on nationality or residency on the appointment of a director. Some sectoral laws impose local representation requirements such as those relating

to (i) banking require local representation in the board for foreign owned locally incorporated institutions and (ii) insurance require that at least one-third of directors are local directors. This limits the number of foreigners that may be appointed to the Board of a financial institution or an insurer. Additionally, section 243A of the Companies Act requires a private company or company limited by guarantee without a company secretary or a resident director to appoint a contact person that is resident in Kenya to maintain custody of the company's records and make such records available to the Registrar of Companies (**Registrar**) or other authorities who may require them. The company must lodge with the Registrar the notice of the appointment of the contact person, specifying the person's and residential address and such other particulars.

Adjudged bankrupts are disqualified from appointment as directors without approval from the court. Additionally, a court may issue a disqualification order against a person under the following circumstances:

- upon conviction of an offence in connection with the promotion, formation, management, liquidation or administration of a company, fraud, breach of duty, failure to lodge returns or other documents with the Registrar and insolvency of the company; and
- upon application by the Attorney General if,
 - the Attorney-General considers that it would be in the public interest for a disqualification order to be made against a person who is or has been a director of any company; and
 - the person is or was a director of an insolvent company, the Attorney-General is satisfied that the director is unfit to take part in the management of a company or an investigation report on the company justifies such action.

A person who acts in contravention of a disqualification order or while an undischarged bankrupt becomes personally liable for all debts and liabilities of a company incurred during the time when the person was involved in the management of the company.

The company may also disqualify certain persons through its articles of association or shareholders' agreement.

Minimum / maximum number of directors

A private company must have at least one director who must be a natural person. There is no prescribed maximum number of directors. The articles may specify a higher minimum and/or a maximum number.

Appointment and removal

How are directors appointed?

The first directors are appointed by the initial subscribers to the memorandum of association. Subsequent directors are appointed by shareholders through a resolution.

Directors must consent in writing to their appointment.

Typically, articles of association of private companies empower the Board to appoint a director to fill a casual vacancy or, subject to the prescribed number in the articles, as an additional director. However, such appointments are placed before shareholders at the general meeting following the appointment for ratification.

The appointment of a director must be filed with the Registrar at the Business Registration Service (BRS) in the prescribed format within 14 days of the appointment and the register of directors maintained by the company updated with the particulars of such director.

How are directors removed?

A director may resign at any time in writing.

In practice, a statutory declaration is attached to the letter of resignation. Sometimes, the physical presence of the resigning director may be required by the Registrar before acknowledging, and noting the resignation and updating the records at the Companies Registry. Alternatively, the Registrar may send an email to a resigning director requesting them to confirm that their removal is in order and that the records at the Companies Registry can be updated to note their removal as a director. These are administrative requirements put in place by the Registry to curb cases of fraudulent or unprocedural removal of directors which prior to 2015 were noted on a number of occasions.

Shareholders reserve the power to remove directors by ordinary resolution i.e. simple majority (subject to certain procedural requirements stipulated in the Companies Act). The articles and, in the case of a company governed by a shareholders' agreement, such agreement, may also set out additional powers/processes of removing directors including a higher threshold of shareholders or consent of certain appointing shareholders. The director who is the subject of removal by shareholders' resolution is entitled to due process including the right to be heard by the shareholders.

Section 138 of the Companies Act requires notice of any changes to directors or in their particulars to be filed at the BRS within 14 days of the change. The courts have made it clear that while the failure of a company to comply with the provisions of section 138 exposes the company and each of its officers to penal sanction, nothing in the statute suggests that the changes not notified are invalid for the non-notification.

Board / management structure

Typical management structure

Boards of Kenyan private companies are unitary structures made up of all the company's directors. Unless otherwise specified in a shareholders' agreement, each director has the same obligations and accountability to the company. The directors are responsible (on a collective and individual basis) for the governance of the company and for ensuring that the company meets its statutory obligations. Kenyan law has no provision for supervisory boards.

How are decisions made by directors?

Directors make decision by way of board resolutions, which may be written (circular resolutions) or passed during board meetings. The articles of association and shareholders agreements (together the Governance Documents) normally provide the formalities of conducting the meetings (e.g. physical, virtual or hybrid).

Unless the Governance Documents stipulate otherwise, voting at board meetings is by simple majority. On occasion there are provisions for certain decisions to be made by super majorities of either two-thirds, three quarters or unanimously or other agreed permutations.

Although not a legal requirement, most Governance Documents provide that written resolutions should be unanimous.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so e.g. in the company's articles of association or in internal policies and protocols. Normally, the company's articles give directors wide powers to manage its business and affairs as they think fit. Sometimes the articles empower shareholders to issue specific directions to the board e.g. to hold a general meeting. Directors' powers are collective, meaning that they are exercised jointly by way of board resolutions.

Delegation

Directors are empowered to delegate management responsibilities to employees and officers of the company.

The board may also delegate powers to committees of the Board. However, the board retains responsibility for the exercise of such delegated power.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director under Kenyan law are borrowed from the English common law. Duties of directors have been codified in the Companies Act (Part IX, Division 3). They are as follows:

- Duty to act within Powers

Directors are required to act in accordance with the constitution of the company and only exercise powers for the purposes for which they are conferred. Directors should exercise the powers conferred upon them by law or by shareholders strictly for the benefit of the company in which they are a director and not for any other purposes.

- Duty to promote the success of the company

Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to: (1) the long term consequences of decisions, (2) the interests of the company's employees, (3) the need to foster the company's business relationships with customers, suppliers and others, (4) the impact of the company's operations on the community and the environment, (5) the desire to maintain a reputation for high standards of business conduct, and (6) the need to act fairly between members.

- Duty to exercise independent judgment

A director may rely on other people (e.g. through proper delegation or by seeking independent professional advice) provided that it is reasonable to do so. A director should not limit their discretion, unless properly authorized to do so by the constitution of the company, or by acting in accordance with an agreement entered into by the company.

- Duty to exercise reasonable care, skill and diligence

A director must exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with (1) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the director in relation to the company; and (2) the general knowledge, skill and experience that the director has.

- Duty to avoid conflicts of interest

A director must avoid situations in which they have or could have a direct or indirect interest that conflicts with, or may conflict with, the company's interests. This applies especially in matters relating to the exploitation of any property, information or opportunity.

- Duty not to accept benefits from third parties

A director is under a duty not to accept a benefit from a third party if the benefit is attributable to the fact that the person is a director of the company, or to any act or omission of the person as a director.

- Duty to declare interests in proposed or existing transactions or arrangements

A director must declare the nature and extent of their interest in a proposed or existing transaction or arrangement to the (i) other directors and (ii) members of the company within 72 hours in the case of a public company. Such declaration must be made before the company enters into the transaction or arrangement concerned. This duty does not, however, apply if the director is not aware of the interest or the transaction or arrangement to which the interest relates. A director is however assumed to be aware of matters of which the director ought reasonably to be aware.

Directors have additional key duties under Kenyan Insolvency laws. These duties fall into three broad areas as follows:

- Avoiding misfeasance

A director may be examined in connection with misfeasance related to the money or property of a company, or a breach of their fiduciary duties discussed under the Companies Act. In addition, if within the twelve months preceding a liquidation, a director concealed or fraudulently removed property, concealed any debt or falsified or destroyed documents, the director will have committed an offence under the Insolvency Act.

- Protection of creditors

A director may be held personally liable for wrongful trading where they allow the company to continue incurring liabilities when they know, or ought to know, that there is no reasonable prospect of the company avoiding an insolvent liquidation. If there is no reasonable prospect of avoiding an insolvent liquidation, the directors have an obligation to manage the affairs of the company with a view to minimising the potential losses to creditors.

A director may also be held personally liable for fraudulent trading if they enter into transactions or carry on any business of the company with the intent to defraud creditors or for any other fraudulent purpose. A liquidator can seek a court declaration that anyone who was knowingly party to the fraudulent business make a contribution to the company's assets.

Further, a court may reverse (and render void) an arrangement where a company in financial difficulty gives preference (during the 24 months before insolvency) to a creditor of the company, a surety or guarantor of any of the company's debts or other liabilities that puts them in a preferential position. This provision is meant to balance the interests of all creditors.

A director is also required to make sure that creditors are notified of insolvency related meetings or events so that they can take appropriate action to protect their interests. In this regard, a director must disclose accurate information to creditors to ensure that they are able to make informed decisions, especially regarding an arrangement such as a Company Voluntary Arrangement.

- Co-operation with insolvency practitioners

A director is required to cooperate with insolvency practitioners during an insolvency. A director should therefore provide information required by a liquidator, administrator, monitor, supervisor or other appointed insolvency practitioner. A director should also make themselves available to meet with such insolvency practitioners as reasonably required.

Once an insolvency practitioner is appointed to manage the affairs of an insolvent company, directors are prohibited from performing or exercising management functions without the consent of the practitioner. During this period, the directors are required to disclose and hand over the company's property to such practitioner. It is an offence to dispose of any company property without the practitioner's consent (unless a Court has approved such disposal).

What are directors' other key obligations?

Directors have additional duties to adhere to sector specific laws that apply to their market of operation. Generally, other key obligations of directors include, to:

- Keep a register of members, directors, directors' residential addresses, beneficial owners, debenture holders and charges.
- Keep copies of documents such as the directors' contracts of service or memorandum of terms; all resolutions of members passed otherwise than at general meetings; minutes of all proceedings of general meetings; and all documents creating charges.
- Keep its records in hard copy or electronic form or arrange them in an appropriate and efficient manner to enable future access. Where the records are kept in electronic form, such records must be capable of being reproduced in hard copy form.
- Keep proper accounting records. Accounting records are considered to be proper if they, among others, show and explain the transactions of the company, disclose the financial position of the company and comply with financial accounting standards. The accounting records must be kept at the company's registered office and open at all times to inspection by the officers of the company. In addition, the accounting records must be preserved for a period of not less than seven years from the date on which they were created.
- Prepare and file annual returns, annual accounts and submit other information to the Registrar within the prescribed time limits.
- Ensure compliance with other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

Transactions with the company

Certain transactions such as acquisition of substantial non-cash assets by directors require shareholder approval. Exceptions to this include transactions on an approved securities exchange and in the case of a company in liquidation or under administration unless the liquidation is a member voluntary liquidation.

Loans, guarantees and security provided by a company to its director also require a resolution of shareholders and where the director is a director of the company's holding company, the transaction also needs to have been approved by a resolution of the members of the holding company.

Further, directors are required to declare their interest in any transaction in which they have an interest contemplated by the company.

In summary, the directors (jointly and individually) have a duty to manage the business in the best interest of the company so as to ensure financial soundness of the company taking into consideration the interest of stakeholders such as shareholders, creditors, regulators and the public.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company in which they are a director and not to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, a shareholder must first obtain the court's permission to proceed with a derivative action and the court will take into account a number of factors when deciding whether to grant this permission – including whether the shareholder is acting in good faith, the views of shareholders who have no personal interest (directly or indirectly) in the matter and whether the company is likely to ratify or authorise the act or omission giving rise to the claim.

The consequences of breach (or threatened breach) of the duties of directors are civil in nature and are generally aimed at making good the company's position and interests following the breach. A breach may however lead to criminal consequences as the Companies Act creates specific offences which give rise to penal consequences including fines and imprisonment.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misappropriated property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or is facing a significant insolvency risk. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Director liability is personal and unlimited generally. Some statutes such as those relating to environmental and health and safety, employment, consumer protection, tax and bribery/anti-corruption have express liability provisions for directors.

Most statutes provide that where a body corporate is found to have committed a criminal offence, every director is personally liable for such offence unless they can prove that they were not aware or could not have been aware that the offence was being committed.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company.

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Where a director acts without authority, shareholders may ratify the action in question. Ratification by shareholders does not, however, affect third party claims which can still be lodged against the director but in that case the company would bear the burden of the claim.
- **Indemnity.** A company can indemnify its directors against certain liabilities incurred by them in relation to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. Indemnities are also not valid where directors are fraudulent, have failed to act in the interest of the company or to exercise due care and skill.
- **Insurance.** Directors' and officers' insurance is also available in Kenya. It typically provides both cover for individual directors against claims made against them in their capacity as directors, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Insurance policies usually exclude claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

To avoid liability, directors should:

- **Attend and participate in meetings and decision making.** Directors exercise their powers through resolutions typically passed at meetings. Consistent attendance at meetings is therefore critical. This is especially important as directors are bound by decisions made at meetings in which they did not participate. Technological developments facilitating attendance by electronic means makes it easier for directors to attend meetings.
- **Act in the best interest of the company** especially where they are appointed to represent specific constituencies such as significant shareholders and with due care and skill.
- **Keep themselves informed about the affairs of the company,** particularly its financial position and grant access to up-to-date financial information. Directors should prepare thoroughly for meetings and familiarise themselves with matters affecting the business.
- **Effectively manage conflict** by making full disclosure to the board and shareholders if they have outside positions or interests which may give rise to a

conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.

- **Keep records.** Directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that.
- **Take independent professional advice.** Directors should ensure that returns and accounts are filed promptly and take independent professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- **Be aware of, and comply with, any group-wide governance policies.** These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- **Engage a competent company secretary** to ensure full and timely compliance with all statutory and regulatory obligations.

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Corporate entities

What type of company is typically used in group structures?

In Luxembourg, one of the most common types of company used in group structures is the private limited liability company (*société à responsabilité limitée*) ("SARL"). This guide focuses on the management of SARLs.

Types of director

What is a "director"?

The Luxembourg law of 10 August 1915 on commercial companies, as amended (the "LSC") governing, *inter alia*, SARLs does not clearly define the term "director" (referred to as "manager" for SARLs). A "director" is a person in charge of the management of the affairs of a company on behalf of its shareholders.

The term "manager" will be used in this guide as this is the most appropriate term to refer to the members of the management body of a SARL.

What are the different types of director?

Managers validly appointed as such by the shareholders of a SARL are known as *de jure* managers and are in a contractual relationship with the company.

In addition, *de facto* managers are managers who have not been appointed as such by the shareholders of a SARL but who in fact behave as managers of the company. While they should not be involved in the management of the company, *de facto* managers take management decisions without a legal or contractual basis for doing so and without the authorization of the competent corporate body of the company.

The daily management of the company may be delegated to one or more persons, the daily manager(s) (*délégué(s) à la gestion journalière*), who may or may not be a shareholder or a manager of the company. Their appointment, dismissal and powers are regulated by the articles of association (the "Articles") or by a decision of the

competent bodies. Restrictions on their powers of representation of the company for the purposes of day-to-day management are not enforceable against third parties, even if they are published.

Eligibility

Who can be a director?

The manager can be a shareholder, a third party, a natural or a legal person, having full legal capacity to act. Any person of legal age (or emancipated minor) may be a manager.

From a legal perspective, there are no nationality restrictions or requirements applying to managers.

Minimum / maximum number of directors

A SARL may have one or several managers. There is no legal limit as to the maximum number of managers who may be appointed.

However, the Articles may specify a greater minimum number and/or a maximum number of managers to be appointed.

Appointment and removal

How are directors appointed?

Managers must consent to their appointment and are appointed by the shareholders of the company, upon the incorporation of the company or by shareholders' resolutions during the life of the company. They may be appointed for a limited or unlimited period of time.

Details of the appointment must be filed with the Luxembourg Trade and Companies Register (*Registre de commerce et des sociétés*) ("RCS") and the Luxembourg electronic official gazette (*Recueil électronique des sociétés et associations - RESA*) within one month following the appointment.

A manager's date and place of birth are not included on the public record but must be provided to the RCS. Additionally, the Luxembourg national identification number ("LNIN"), also known as the matricule or CNS number, of the managers must be provided to the RCS. In situations where an individual does not have an LNIN, they can ask for one to be created as part of the filing procedure with the RCS.

How are directors removed?

The managers may be removed at any time, with or, if so provided for by the Articles, without cause (*ad nutum*), by a resolution of the shareholders, to be adopted under private seal.

Damages against shareholders might be sought in case of a harsh or vexatious removal.

Board / management structure

Typical management structure

SARLs are managed by one or several managers. If several managers are appointed, they constitute a board of managers ("Board").

Boards of SARLs are unitary structures made up of all the company's managers. Each manager has the same obligations and accountability towards the company. The managers are responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations.

Although supervisory boards are common for public limited liability companies ("*sociétés anonymes*"), Luxembourg company law does not provide for such management structure for SARLs. The Articles can however provide for the creation of a supervisory /advisory board which would be an internal body and would merely hold an advisory and supervisory functions. Although it may issue recommendations and views to the Board, the Board would not be bound by them and would remain the sole corporate body entitled to make management decisions.

How are decisions made by directors?

The manner in which managers can make decisions is provided by the LSC and is generally set out in the company's Articles.

It is worth noting that in accordance with the LSC, any manager may participate in any meeting of the Board by telephone or video conference, or by any other means of communication which allows all those taking part in the meeting to identify, hear and speak to each other and such attendance shall be equivalent to an in-person attendance for quorum and majority purposes, unless otherwise provided by the Articles.

The managers may also adopt resolutions in writing if so provided by the Articles.

Other than in case of sole manager and unless the Articles provide for higher (but not lower) quorum or majority requirements, the minimum quorum for a board meeting is the majority of the board members present or represented and decisions are adopted on a simple majority basis. When decisions are made in writing, however, the unanimous consent of all managers is required.

Authority and powers

As far as third parties are concerned, managers are vested with the power to bind the company and enter into contracts on its behalf. The Articles generally provide that the company is bound towards third parties by the signature of its sole manager, or in case of plurality of managers, by the sole signature of any manager or the joint

signature of any two managers, but the Articles can provide for a different signature regime. All powers not expressly reserved by the law or the Articles to the general meeting of shareholders fall within the powers of the Board. Any limitation to the powers conferred on the Board is not binding against third parties even if it is published.

Delegation

The Board may delegate the daily management to any person appointed to that effect, as mentioned above, or delegate special and limited powers to any persons for specific matters.

However, the Board retains overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

The key general duties of the managers are to manage the affairs of the company and take any action they consider necessary or useful to realise its corporate purpose, as stated in the Articles, unless that action is reserved to the general meeting of shareholders by law (e.g. approval of the annual accounts). The Board is thus a company's main decision making body, and is responsible for determining the guidelines for its management and business development.

The managers represent the company, and must exercise their duties with as much care, diligence and skill as would be displayed by a reasonable person in the same circumstances. Greater expertise, such as would be displayed by a reasonably competent member of the same profession may be expected from a manager who is a member of a specific profession, e.g. a lawyer or accountant. Although Luxembourg law, unlike common law jurisdictions, contains no such concept as the "fiduciary duty" of managers, the managers must also act with loyalty, honesty and in good faith, for the company's exclusive benefit. Hence they must participate in Board meetings and manage the company actively.

The company must act for its own benefit and in its own corporate interest (*intérêt social*). In that context, managers are responsible for determining whether a particular action falls within the boundaries of the corporate interest, a decision which is made on a case by case basis and in light of all prevailing circumstances.

What are directors' other key obligations?

The main other key obligations of the managers are to:

- Prepare each year an inventory indicating the value of all the company's movable and immovable assets and all the debts it owes and is owed, with an annex summarizing all the commitments and debts of the company's officers, managers and statutory auditors, if any.
- Prepare the annual accounts (balance sheet, profit and loss account and annex).

- Establish a report on the company's business, if required.
- Submit the annual accounts, the consolidated accounts (if required by law), the management report and the report of the person responsible for auditing the company (if any) to the general meeting of shareholders for approval, within six months after the end of the financial year.
- File the approved annual accounts, the management report and the report drawn up by the statutory auditor(s) (if any) with the RCS within one month following their approval by the annual general meeting of shareholders, and no later than seven months after the end of the financial year.

Transactions with the company

A manager who has a financial interest in a transaction carried out other than in the ordinary course of business under normal circumstances which conflicts with the interests of the company must advise the Board accordingly and have the statement recorded in the minutes of the meeting. Such manager may not take part in the deliberations concerning that transaction.

A special report on the relevant transaction must be submitted to the shareholders at the next general meeting of the shareholders, before any vote on any other resolution.

Where, by reason of a conflicting interest, the number of managers required to validly deliberate is not met, the Board may decide to submit this specific item to the general meeting of shareholders.

Liabilities of directors

Breach of general duties

Managers are liable to the company for the performance of their mandate and for any misconduct in the management of the company's affairs. This liability is contractual in nature and may be triggered by the company itself or, where the company fails to act, by one or more shareholders bringing a derivative action in the name and on behalf of the company. In such case, the claimant must establish the manager's fault, the loss suffered and a causal link between the manager's fault and the loss.

It should be noted that in addition to this liability regime, the LSC states that a company's manager may be held jointly and severally liable to the company and third parties for all losses resulting from a breach of the LSC or the Articles. Again, the claimant must establish the manager's fault, the loss and a causal link between the managers' fault and the loss.

While third parties (e.g. creditors) generally have no standing to sue managers for mismanagement, they may exceptionally bring a tort claim, under Articles 1382 and 1383 of the Luxembourg Civil Code, where the misconduct constitutes a personal fault of particular gravity, committed intentionally or outside the normal exercise of the manager's functions (*faute détachable*). In such cases, the manager may be held personally liable, and the claimant must establish a personal damage, a fault attributable to the manager, and a causal link.

Finally, an individual shareholder may also initiate proceedings in tort where they suffer a personal prejudice distinct from that of the company. However, pursuant to the Luxembourg principle of non-cumulation of contractual and tortious liability, shareholders may not rely on both regimes for the same wrongful act. In all cases, a fault, a damage and a causal link are required.

Liabilities on insolvency

Under the Luxembourg Commercial Code, in case of bankruptcy, managers can be held liable based on their serious and characterized misconduct or if they have conducted the business in their personal interest.

In that case, managers may be subject to claims based on additional liability grounds. The company's bankruptcy may be extended to any *de jure* or *de facto* manager who, acting under the corporate veil, has entered into commercial transactions for their own account, has benefited or disposed of the company's assets as if they were their own or has pursued a loss-making business activity which was predestined to lead to bankruptcy, in their own interest and in an abusive manner.

A court may ban from office any manager who has committed serious offences or breaches of duty which have contributed to a company's bankruptcy.

Other key risks

Managers may be subject to all the provisions of the Luxembourg Criminal Code concerning misdemeanours or felonies. Those most relevant for managers include fraud and embezzlement. The LSC qualifies in particular as criminal offences the failure by managers to fulfil some of their specific duties, such as:

Failure to:

- Submit the annual accounts and the management report (and the auditor's report and the consolidated accounts, if applicable) to the general meeting of the shareholders within six months after the closing of the relevant financial year and
- File them with the RCS for publication.
- Convene, the annual ordinary general meeting within three weeks of being requested to do so.
- Publish changes in the shareholdings of the company.
- The opening of a public subscription for shares or bonds.

Protection against liability

How can directors be protected from liability?

Managers may mitigate their liability by:

- Subscribing to managers' civil liability insurance covering liability to the company and third parties arising from a management misconduct, a violation of the LSC or

the company's Articles , or in tort. Such insurance does not cover risks based on criminal liability.

- Entering into an indemnity letter which aims to transfer the monetary consequences of managers' civil liability to the company which enters into them. They are most often used within a group of companies, where the parent company undertakes to indemnify the group's managers for all losses they may bear as a result of their civil liability as managers.
- Using a legal entity with limited liability as a manager. In any case, such limitation of liability of the manager is not applicable in case of fraud, willful misconduct or gross negligence.

The shareholders may reduce the risk that the company may sue the managers for management misconduct by granting the managers discharge for the exercise of their mandates at the general meeting of shareholders approving the annual accounts. This has the following consequences:

- the managers no longer risk facing actions for liability on the basis of decisions taken during that financial year; and
- the discharge is a waiver by the company of its right to act against the managers for their decisions made during the relevant financial year.

Discharge is only valid if the annual accounts contain no omissions or false information concealing the company's true situation, and if any actions falling outside the scope of the Articles have been specifically stated in the convening notice.

What practical steps can directors take to avoid liability?

Managers should:

- Keep track of the affairs of the company, particularly its financial position. Managers should have access to up-to-date financial information, prepare thoroughly for and regularly attend board meetings and familiarize themselves with key legislation affecting the business.
- Make full disclosures to the Board and shareholders if they have other positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – managers should ensure that full written records of Board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the Board and the reasons for that. In addition, managers should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help managers (and employees) fulfil their duties and obligations and minimize the risk of liability.

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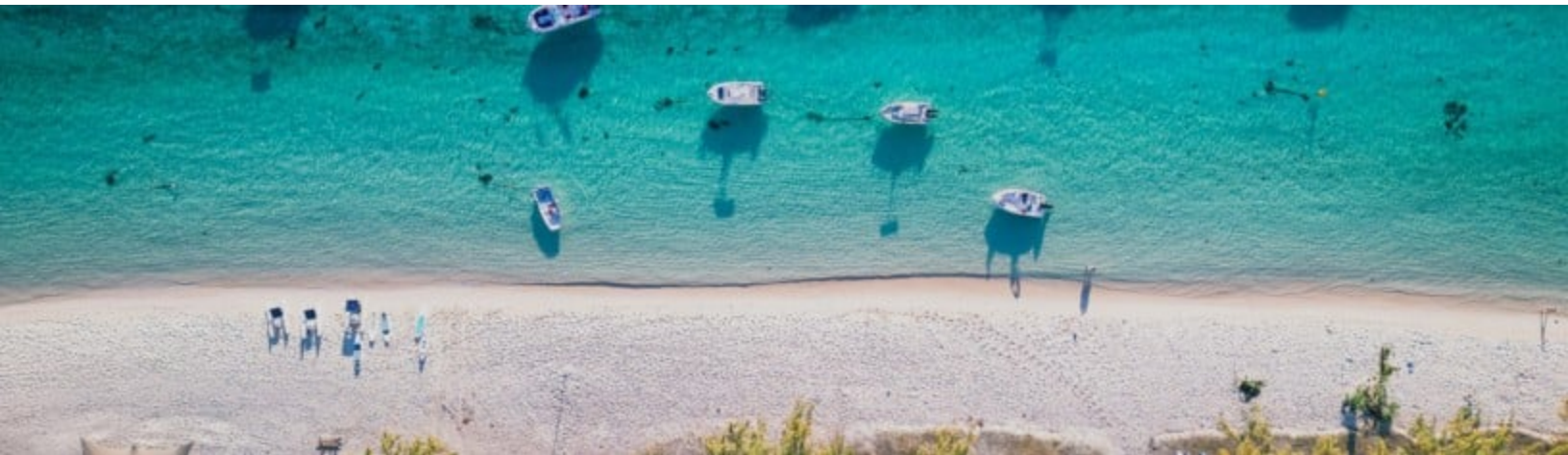
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Corporate entities

What type of company is typically used in group structures?

The private company limited by shares is the most common type of company used in group structures in Mauritius.

This guide therefore focuses on private companies whose liability is limited by shares.

Types of director

What is a "director"?

The Companies Act 2001 (Companies Act) defines a "director" as a person occupying the position of director in a company by whatever name called. It includes an alternate director but does not include a receiver.

It also includes:

- Any person in accordance with whose directions or instructions a person may be required or is accustomed to act.
- A person in accordance with whose directions or instructions the Board of the company may be required or is accustomed to act.
- A person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the Board.
- A person to whom a power or duty of the Board has been directly delegated by the Board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the Board.

What are the different types of director?

Directors are either executive or non-executive.

The Companies Act defines an executive as a director who is involved in the day-to-day management of the company.

Non-executive directors are not employees of the company. Non-executive directors only attend Board meetings and make decisions at that level or as members of committees of the Board. Non-executive directors who have no shareholding in, or other relationship with, the company are referred to as independent directors.

Mauritius' company law does not differentiate between the different types of directors – all directors whether executive, non-executive, independent or alternate are subject to the same duties and obligations.

The directors may appoint one or more members of the Board to the office of managing director for such period and on such terms as they think fit and, subject to the terms of any agreement entered into in any particular case, may revoke that appointment.

Eligibility

Who can be a director?

Any natural person aged 18 years and above can be appointed a director.

Adjudged bankrupts and person adjudged of unsound mind are disqualified from appointment as directors.

Minimum / maximum number of directors

It is a requirement that a company shall have at least one director who shall be ordinarily resident in Mauritius. There is no maximum. The company's constitution may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent in writing to their appointment and certify that they are not disqualified from being appointed or holding office as a director of a company. Directors can also be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or, if the company's constitution allows, by the other directors. It is also permissible to elect two or more directors by ballot or poll.

In the event that there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the Board; and if it is not possible or practicable to appoint directors in accordance with the company constitution or in the event of the death of the sole shareholder and director, a shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make an appointment if it considers that it is in the interests of the company to do so.

Details of the appointment must be filed at the Registrar of Companies ("ROC") within 28 days of the appointment taking place.

How are directors removed?

A director may resign at any time in writing.

Subject to the constitution of the private company, a director may be removed from office by special resolution passed by at a meeting called for the purpose that includes the removal of the director.

A special resolution is a resolution approved by a majority of 75% or, if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on the question.

The Companies Act requires notice to be delivered to the ROC within 28 days of the change in the case of an appointment or resignation of a director and in the case of the death of a director or a change in the name, the usual residential address, the service address of a director, of the date on which the company becomes aware of the change.

Board / management structure

Typical management structure

A supervisory board structure is not common in Mauritius. In private companies, there will normally be a chairperson, a CEO or executive director and other directors. Depending on the size of the private company, Board committees (including audit and remuneration or risk committees) may also be set up.

How are decisions made by directors?

Directors make decisions by way of board resolutions, which may be written or passed during board meetings.

Notwithstanding the constitution of a company, voting at board meetings is by simple majority, except where the shareholders exercise a power to:

- adopt a constitution or, if it has one, to alter or revoke the company's constitution
- reduce the stated capital of the company
- approve a major transaction
- approve an amalgamation of the company, and
- put the company into liquidation,

in which case, the power shall be exercised by special resolution.

Authority and powers

Subject to the Companies Act, the directors of a company shall exercise their powers in accordance with the Act and with the limits and subject to the conditions and restrictions established by the company's constitution.

The business and affairs of a company shall be managed by, or under the direction or supervision of, the director/s.

The director/s shall have all the necessary powers for managing, and for directing and supervising the management of, the business and affairs of the company.

Delegation

Subject to any restriction in the constitution of the company, directors may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers other than powers relating to the following matters:

- issuing of shares
- determination of the amount of the consideration for which the shares shall be issued and the signing of a certificate describing the consideration in sufficient detail
- authorising a distribution
- issuing of shares in lieu of a proposed dividend or proposed future dividends
- offering shareholders discounts in respect of some or all of the goods sold or services provided by the company
- purchasing or otherwise acquiring the company's own shares
- giving financial assistance either directly or indirectly for the purpose of or in connection with the acquisition of its own shares
- changing the registered office address of the company
- approval of an amalgamation proposal, and
- approval of a short form amalgamation of each amalgamating company.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director under Mauritius law are to act, in good faith and in best interests of company and to:

- Exercise their powers in accordance with the Companies Act and with the limits and subject to the conditions and restrictions established by the company's constitution.
- Obtain the authorization of a meeting of shareholders before doing any act or entering into any transaction for which the authorization or consent of a meeting of shareholders is required.

- Exercise their powers honestly in good faith in the best interests of the company and for the respective purposes for which such powers are explicitly or impliedly conferred.
- Exercise care, diligence and skill.
- Not agree to the company incurring any obligation, unless the director believes at that time on reasonable grounds that the company shall be able to perform the obligation when it is required to do so.
- Account to the company for any monetary gain, or the value of any other gain or advantage, obtained by them in connection with the exercise of their powers, or by reason of their position as directors of the company, except remuneration, pensions provisions and compensation for loss of office in respect of their directorships of any company.
- Not make use of or disclose any confidential information received by them on behalf of the company as directors otherwise than as permitted.
- Not compete with the company or become a director or officer of a competing company, unless this is approved by the company.
- Disclose any interest where directors are interested in a transaction to which the company is a party.
- Not use any assets of the company for any illegal purpose and not do, or knowingly allow to be done, anything by which the company's assets may be damaged or lost, otherwise than in the ordinary course of carrying on its business.
- Transfer forthwith to the company all cash or assets acquired on its behalf, whether before or after its incorporation, or as the result of employing its cash or assets, and until such transfer is effected to hold such cash or assets on behalf of the company and to use it only for the purposes of the company.
- Attend meetings of the directors of the company with reasonable regularity, unless prevented from so doing by illness or other reasonable excuse.
- At all times act in a manner which is not, oppressive, unfairly discriminatory, or unfairly prejudicial to shareholders.

What are directors' other key obligations?

The Companies Act requires directors to, *inter alia*, keep proper accounting records and make such records available for inspection. The accounting records must be preserved for a period of not less than seven years from the date on which they were created.

The board of directors cannot approve certain transactions under the Companies Act unless the directors are satisfied that, upon the transaction being effected, the company is likely to satisfy its solvency test. Such transactions include:

- authorising a distribution;
- acquiring or redeeming the company's own shares;
- giving financial assistance for the purpose of acquiring the company's own shares;

- reducing its stated capital.

Directors must also ensure that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

Transactions with the company

Certain transactions such as competing with the company or becoming a director of a competing company, including the nature and extent of any interest of the director, require approval of the company.

Similarly if a director who has information in their capacity as a director or employee of the company, being information that would not otherwise be available to them, they must not disclose that information to any person, or make use of or act on the information, except in any other circumstances authorised by the constitution, or approved by the company.

The approval of a company can be obtained:

- in the form of resolution which has been circulated to all the members and is signed by three-fourths of all members entitled to attend and vote at a meeting of shareholders, or
- by an ordinary resolution of the company passed at a meeting of shareholders at which neither the director concerned, nor the holder of any share in which the director is beneficially interested, either directly or indirectly, has voted as member on such resolution, or where such person has voted, such vote or votes are not counted.

Liabilities of directors

Breach of general duties

A shareholder or former shareholder can bring an action against a director for breach of duty owed to them as a shareholder. The relevant duties for these purposes are to maintain proper share registers, to disclose the director's interest in a transaction with the company, or to disclose any share dealing by the directors.

For a breach of these duties, a shareholder or former shareholder may bring a personal action against a director or a company.

The Court will also grant leave to a shareholder or director of a company to bring a derivative action on behalf of the company where the action is brought bona fide and in the best interest and for the benefit of the company and for wrongs done to the company for which no other remedy is available. Consequently, if the action is brought for an ulterior motive or where there are alternative remedies, leave would not be granted. Case law indicates however that, in respect of breach of fiduciary duties, a derivative action may be justified even though there is only a suspicion that the director (s) have breached their statutory duties.

Liabilities on insolvency

The Companies Act places a mandatory obligation on a director of a company who believes that the company is unable to pay its debts as they fall due to forthwith call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator, or to carry on the business of the company.

If a director fails to do so and at the time of such failure, the company was unable to pay its debts as they fell due and the company is subsequently put in liquidation, the Court may, on application of the liquidator or of a creditor of the company, make an order that the director shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

At a meeting called to consider whether the company should appoint a liquidator or administrator, if the Board does not resolve to appoint a liquidator or an administrator although at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due and the company is subsequently placed in liquidation, the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, other than those directors who attended the meeting and voted in favour of appointing a liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

Other key risks

A failure to comply with duties of directors to act in good faith and in best interests of company engages the director's criminal liability and can lead to a fine not exceeding MUR100,000 and to imprisonment for a term not exceeding 12 months.

A director may also be disqualified by the court from acting as a director for a period not exceeding five years (as may be specified in the order of the Court) where:

- A person has been convicted of an offence in connection with the promotion, formation, or management of a company, or has been convicted of a crime involving dishonesty punishable on conviction with a term of imprisonment exceeding three months.
- A person has committed an offence under certain provisions of the Companies Act.
- A person has, while a director of a company:
 - persistently failed to comply with companies legislation or, where the company has failed to so comply, persistently failed to take all reasonable steps to ensure such compliance
 - been convicted in relation to the performance of their duties as director
 - caused prejudice to the company resulting in a successful claim by a shareholder.
- Within the period of seven years before the making of the application, a person to whom the application relates, was a director of two or more companies and in relation to each of those companies, that person was wholly or substantially responsible for the company:

- being wound up
- ceasing to carry on business because of its inability to pay its debts as and when they become due
- having a receiver or manager of its property appointed, or
- entering into a scheme of compromise or arrangement with its creditors.

Protection against liability

How can directors be protected from liability?

Indemnity

Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. The company may also pay a director's defence costs as they are incurred – however these costs become a loan which must be repaid by a director should the defence be unsuccessful and the costs are not covered by any permitted indemnity. The company may seek to obtain security for such loans if appropriate in order to protect the company's assets.

Insurance

The company may, subject to its constitution, with the prior approval of the Board, effect insurance for a director of the company or a related company in respect of:

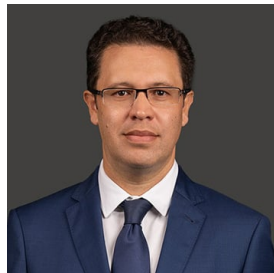
- liability, not being criminal liability, for any act or omission in their capacity as director of the company;
- costs incurred by that director in defending or settling any claim or proceeding relating to any such liability; or
- costs incurred by that director in defending any criminal proceedings:
 - that have been brought against the director in relation or any act or omission in their capacity as director
 - in which that person is acquitted, or
 - in relation to which a notice of abandonment of the prosecution (*nolle prosequi*) is entered.

The Board must ensure that particulars of any indemnity given to, or insurance effected for, any director of the company or a related company are recorded in the interests register (where the company has one), the minutes of directors and in the annual report. If the insurance has been effected for a director and the above conditions have not been complied with, the director shall be personally liable to the Company for the cost of effecting the insurance unless the director proves that it was fair to the company at the time the insurance was effected.

What practical steps can directors take to avoid liability?

- Act in the best interest of the company with due care and skill.
- Attend and participate in meetings and decision making. Directors exercise their powers through resolutions typically passed at meetings. Consistent attendance at meetings is therefore critical. This is especially important as directors are bound by decisions made at meetings in which they did not participate. Technological developments facilitating attendance by electronic means makes it easier for directors to attend meetings.
- Keep themselves informed about the affairs of the company, particularly its financial position and obtain access to up-to-date financial information. Directors should prepare thoroughly for meetings and familiarise themselves with matters affecting the business.
- Effectively manage conflicts by making full disclosure to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records. Directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that.
- Take independent professional advice. Directors should ensure that returns and accounts are filed promptly and take independent professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Engage a competent company secretary to ensure full and timely compliance with all statutory and regulatory obligations.

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Corporate entities

What type of company is typically used in group structures?

The most common forms of Mexican commercial business entities are the:

- Mexican Limited Liability Company (*Sociedad de Responsabilidad Limitada*) (**S. de R.L.**), in which contributions to capital are represented by equity quotas; and
- Mexican corporation (*Sociedad Anónima*) (**S.A.**), in which contributions to capital are represented by shares.

Both provide limited liability to the partners/shareholders and are governed by the Mexican General Law of Business Organizations (*Ley General de Sociedades Mercantiles*) (**GLBO**).

Note that the S.A. is the commercial entity that is usually preferred. However, some jurisdictions will tax the S. de R.L. as though it is a partnership, which gives the members resident in those jurisdictions certain tax benefits as though they were partners, in particular if those members are US resident and control the Mexican subsidiary.

Additionally, some S.A.s are governed by special legal frameworks such as the Mexican Stock Exchange Act (*Ley del Mercado de Valores*) (**LMV**). Unlike, those commercial entities governed by the GLBO, the LMV provides for a detailed legal regulation of the directors' and managers' duties, functions and responsibilities.

Those S.A.s governed by the LMV are:

- investment promotion companies (*Sociedad Anónima Promotora de Inversión*);
- investment promotion for the stock exchange corporation (*Sociedad Anónima Promotora de Inversión Bursátil*); and
- publicly traded companies (*Sociedad Anónima Bursátil*) (**S.A.B.**).

Types of director

What is a "director"?

A director is an individual that may be appointed by the shareholders/partners' meeting (and exceptionally, by the board of directors in the case of S.A.B.s) and whose position is of a personal nature, is temporary and is revocable. Directors may be compensated or not, as so determined by the shareholders or the partners annually.

The personal nature of the role of a director precludes the position from being held through representatives. It is important to make a distinction between two different types of directors of a S.A.B. Such entities must, by law, appoint independent directors, and such independent directors must comprise at least 25% of the membership of the board of directors.

The function of all types of directors is to supervise the day-to-day management of the company, to achieve the goals set by the board of directors or the shareholders /partners (as applicable).

In particular, in the case of S.A.B.s, the main functions of their directors are to set up the company's main strategic priorities and to oversee the management of the company carried out by the Chief Executive Officer. The Chief Executive Officer of a S.A.B. (unlike S.A.s whose stock is not publicly traded) is for legal purposes considered as a corporate body itself (for further information, see [Authority and powers](#)).

What are the different types of director?

In essence there are three types of director: independent directors, directors appointed by the controlling shareholder(s); and provisional directors that are appointed by the board of directors of a S.A.B.

In case of the permanent absence of an already appointed director, provisional directors will remain in office until the shareholders' meeting appoints a new director replacing such provisional director or confirms that provisional director as a permanent director.

Capital stock companies may have one sole director or a board of directors; limited liability companies may have one sole manager or a board of managers.

If the shareholders/partners elect to appoint a board of directors/managers, the GLBO does not provide for a specific role for each member; however, it provides that, in case there is no designation on their specific roles, the first mentioned will be considered the president of the board.

Eligibility

Who can be a director?

Any individual can be a director of a company, even shareholders/partners. The only persons that are not allowed to be appointed to such position are those that are

disqualified by law from practicing commercial activities, such as (i) notaries, (ii) public accountants, (iii) customs agents, (iii) judges, (iv) inmates for patrimonial crimes, and (v) unrehabilitated bankrupts.

Nevertheless, some types of Mexican commercial entities, particularly those that are supervised by Government Financial Agencies, including the Ministry of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*), the Mexican National Banking and Securities Commission (*Comisión Bancaria y de Valores*) (**CNBV**) and the Mexican Central Bank (*Banco de México*), among others, are subject to a special framework which makes it mandatory for them to appoint independent directors. Independent directors must fulfill certain minimum requirements that ensure their status as independent directors. Those that do not fulfill those requirements cannot be independent directors.

Minimum / maximum number of directors

The GLBO does not provide for a maximum number of directors. However, limited liability companies and capital stock companies that have adopted the variable capital structure, where management is entrusted to a sole director or manager, must have at least one manager/director; where management is entrusted to a board, such board must be composed of at least two members.

According to the LMV, S.A.s whose stock is publicly traded and investment promotion companies must always have a board of directors. For publicly traded companies, the board of directors must not exceed 21 directors, and at least 25% should be independent members.

Other laws applicable to specific types of entities impose requirements in relation to the minimum/maximum number of directors who may be appointed to the board of directors, as well as requirements regarding the number of independent members – for example: the board of directors of Mexican holding companies of financial groups (as well as boards of Mexican banking institutions, broker dealers, investment funds and insurance companies) must not exceed 15 members and must have a minimum of 5 independent members; and retirement funds must have a board comprising a minimum of five members, two of whom must be independent members.

Appointment and removal

How are directors appointed?

There are two methods through which a director may be appointed in a Mexican company:

- By appointment in the incorporation deed of the company. Such appointments are made in the transitory provisions of the incorporation deed. Such document shall establish in the bylaws if the shareholders agreed to either have a board of directors or opted to only have a sole director (with the exceptions for publicly traded companies, investment promotion companies, broker dealers, banking institutions, investment funds, insurance companies and retirement funds). As a rule, if the board of directors is composed of three members, the minority shareholders that represent 25% of the total shares may appoint at least one

member. For publicly traded companies, minority shareholders that represent 10% of the total shares may appoint one director to be part of the board.

- Appointment by means of shareholders'/partners' meeting and/or unanimous written consent resolutions by shareholders/partners. The ability to pass unanimous consent resolutions and thus appoint directors in this way must be included in the bylaws of the company.

Provisional directors may be appointed for a temporary term by the board of directors.

How are directors removed?

The directors can be removed from their positions, either by a shareholders'/partners' meeting, or by unanimous written consent resolutions by shareholders/partners. The ability to pass unanimous consent resolutions and remove directors in this way must be included in the bylaws of the company. Also, a director may be removed if they become a unrehabilitated bankrupt.

Provisional board members

According to the LRAF, the LMV and the GLBO, the board of directors may appoint provisional board members, without the intervention of a shareholders' meeting, when only some of the directors are revoked and, therefore, they don't meet the statutory quorum. Hence, in case of not meeting the statutory quorum, pending the new directors being appointed, the former board members will continue to serve in their positions for 30 days (at the most).

For entities that have only one director, the Statutory Auditor shall appoint the missing director on an interim basis.

In the case of financial holding companies (*Controladoras de Grupos Financieros*), the shareholders' meeting of the holding company can ratify such appointments or appoint the substitute directors at the meeting following the occurrence of such event.

Board / management structure

Typical management structure

The typical management structure of a company depends on the size of the company and how many partners or shareholders there are. Usually, if the company does not have many shareholders or has a distinctive group of shareholders/partners, a board of directors/managers is established to give every shareholder/partner a right to appoint a member to such board for it to vote pursuant to the instructions received by the respective shareholder/partner. The usual number would be three or any other uneven number of directors to avoid deadlocks.

As mentioned earlier, if the company opted to have a board of directors/managers to run the operations, the minority shareholders that represent 25% may appoint at least one member. For publicly traded companies, minority shareholders that represent 10% of the total shares may appoint one director to be part of the board.

First level officials and board members are required to perform their duties in such a way as to create value for the benefit of the company, without favoring a particular shareholder or group of shareholders. To this end, they shall act diligently, adopting reasoned decisions and complying with the other duties imposed on them by the Law or the company's bylaws. Therefore, both first level officials and board members are equally liable for any damages and losses derived from the functions that correspond to their roles and shall comply diligently with duty of care and diligence.

How are decisions made by directors?

Usually, decisions are made either by a meeting or through written resolutions. The ability to pass unanimous consent resolutions by the board of directors must be included in the bylaws of the company. Such resolutions must be signed by every director personally.

Unless the corporate bylaws provide for higher affirmative voting percentages, decisions taken by the board of directors or board of managers are valid and enforceable if taken by a majority of its members.

A recent amendment to the GLBO allows decisions to be adopted by the directors remotely (without the need for the meeting to be held at the corporate address of the entity) through the use of electronic, optical, or any other means of technology, provided that this is allowed by the company's bylaws.

Authority and powers

In most cases, the board of directors/managers or the sole director/manager are, because of their position in a company, granted all powers of attorney, which in general terms can include acts of ownership, administrative acts, lawsuits and collections, the ability to open bank accounts, issue or endorse debt securities, labor and employment activities and tax activities.

Furthermore, Chief Executive Officers (Director General) that run publicly traded companies are vested with the broadest powers to represent the company for (i) acts of administration, (ii) lawsuit collections, including special powers that, according to the law, require a special provision, and (iii) acts of ownership with certain limitations established by the board of directors. It is important to point out that the CEO of a S.A. B. is a body of the company, and they are in charge of running the day-to-day operations of the company and for ensuring that the strategic policies and controls set up by the board of directors are applied.

The oversight of a S.A.B. CEO's performance is a function that is delegated by the board of directors to an Audit Committee (*Comité de Auditoría*) and to a Corporate Practices Committee (*Comité de Prácticas Societarias*). The Audit Committee must have a majority of independent directors.

Delegation

To delegate powers of attorney, the board of directors should be appointed with the full authority to delegate such powers.

Duties and obligations of directors

What are the key general duties of directors?

Directors/Managers are obliged to confirm:

- That the shareholders/partners have made their contributions to the entity.
- That the legal and statutory requirements established with respect to the dividends paid to the shareholders/partners have been complied with.
- The existence and maintenance of the accounting, control, registry, filing or information systems provided by law.
- That the resolutions of the shareholders/partners' meetings have been exactly complied with.

What are directors' other key obligations?

Directors must carry out all their obligations established in the bylaws of the company, specifically (i) to take care of the business as if the director is one of the owners (*cuidar del negocio como si fuera propio*); (ii) the duty of loyalty, and (iii) duty of care or diligence.

Regarding the *duty of loyalty*, generally all directors should:

- maintain the confidentiality of the company's information;
- avoid conflicts of interest;
- if having conflicts of interest, disclose such situation to the disinterested directors or the decision-makers;
- ensure that the company's interests prevail over their own personal interests in any decision-making as directors or managers;
- comply with the agreed policies for the approval of transactions with related persons;
- refrain from using insider information for their own benefit;
- use the assets of the company or of the controlled entities only pursuant to the approved guidelines, causing no damage or loss to the company (or the controlled entities); and
- not benefit from a business opportunity targeted at the company or the controlled entities, causing them any harm.

Regarding the *duty of care* or diligence, all directors must act in good faith and in the best interests of the company (and its the controlled entities) and are expected to:

- require timely, true and sufficient information about the company and the controlled entities, as they deem necessary for reasonable decision-making;

- exercise the duty of inquiry by monitoring those to whom they delegate the ongoing operation of the business;
- delay any resolution to be adopted by the board of directors when a member has not been called to the boards' meeting or when the board of directors itself is not completely informed about the matters to be discussed.

Transactions with the company

The directors that have an interest in a transaction with the company must expressly disclose such conflict of interest and refrain from participating in such dealing, and they remain subject at all times to the duty of loyalty previously mentioned. Additionally, audit committees must provide to the board of directors an opinion of the Chief Executive Officer's performance and must make the board aware of the status of the company's audit and internal controls in case any of the high-level officials don't disclose information regarding conflicts of interests in any transaction that the company enters into. Further, the corporate practices committee must assist the board of directors with all observations/dealings regarding the performance of the relevant directors in relation to such transactions, as well as transactions with related parties, detailing the characteristics of the significant transactions.

Liabilities of directors

Breach of general duties

The liability of the directors may only be enforced by resolution of the general shareholders' meeting. That is, the shareholders must call for a meeting at which the liability of the director must be discussed and, once acknowledged by the shareholders, the meeting must decide whether or not to proceed with a liability claim against the director(s).

Shareholders representing at least 25% of the capital stock, may directly bring a civil liability action against the directors, provided that the following requirements are met:

- The claim must include the total amount of the liabilities in favor of the company and not only the personal interest of the petitioners.
- That, if applicable, the petitioners have not approved the resolution adopted by the general shareholders' meeting waiving the right to proceed against the defendant directors.

Additionally, any breach of the duty of loyalty may give rise to criminal penalties of up to 12 years' imprisonment for the offender. Fraudulent management is also considered to be criminal conduct and, therefore, may attract a 10-year imprisonment penalty.

According to the LMV and the LRAF, among others, all directors may be liable if:

- they abstain from attending, unless there is a justified cause in the opinion of the shareholders' meeting, the meetings of the board of directors and, if applicable, the committees of which they are members, and that due to their non-attendance the board in question cannot legally meet;

- they fail to disclose to the board of directors or, as the case may be, to the committees of which they are members, relevant information known to them which is necessary for proper decision-making in such corporate bodies, unless they are legally or contractually obliged to keep such information secret or confidential;
- they fail to comply with the duties imposed by the Securities Market Law or the bylaws of the company.

If found liable, they may be required to indemnify the company (and/or the legal entities it controls or in which it has a significant influence) for damages caused by their lack of diligence detailed above.

Liabilities on insolvency

Pursuant to Mexican bankruptcy law (*Ley de Concursos Mercantiles*), directors and key employees will be liable to indemnify the company in insolvency for the insolvency of the company when such directors and key employees:

- Vote at meetings of the board of directors or make decisions related to the debtor's assets, where there is a conflict of interest.
- Knowingly favour a certain shareholder or group of shareholders of the company, to the detriment of the other shareholders.
- Obtain without legitimate cause, by virtue of their employment, position or commission, economic benefits for themselves or procure them in favour of third parties, including a specific shareholder or group of shareholders.
- Generate, disseminate, publish, provide or order information, knowing that it is false.
- Order or cause the recording of financial transactions carried out by the company to be omitted, or alter or order the alteration of the records to hide the true nature of the transactions carried out, altering the financial statements.
- Order or accept the entry of false data in the debtor's accounts.
- Destroy, modify or order the total or partial destruction or modification of accounting systems or records or the documentation that gives rise to the debtor's accounting entries, prior to the expiration of the legal retention periods and with the purpose of concealing their record or evidence.
- Alter or order that the accounts or the conditions of the contracts be modified, make or order the recording of non-existent operations or expenses, exaggerate the real ones or intentionally carry out any illegal act or operation prohibited by law, generating in any of such assumptions a debt, loss or damage to the debtor's assets, for their own economic benefit, either directly or through a third party, or third parties, including the registration of liabilities in favor of the persons with conflict of interest.
- In general, carry out intentional acts, act in bad faith, or otherwise, carry out acts which are illicit in accordance with this law or other laws.

Additionally, during the conciliation stage of bankruptcy proceeding, directors must always act as diligent managers in their own business, and will be liable for any loss or

damage suffered by the company due to their fault or negligence. If the removal of the director from the administration is declared, the conciliator shall assume, in addition to their own powers, the powers and duties of administration attributed to him by the law. Thus, the conciliator will have to act as a diligent administrator acting in their own business, and will be liable for any loss or damage suffered by the company due to their fault or negligence. Likewise, the conciliator must take the necessary steps to identify the assets owned by the director declared in insolvency proceedings that are in the possession of third parties.

Further, the conciliator must oversee the director/board of directors' of the company, to prevent the sale of assets or any fraud on creditors, otherwise they could also be subject to a criminal sanction.

Other key risks

Another potential risk is that the director has an interest in a transaction that is contrary to that of the company. If the director does not abstain from any deliberation and resolution on such a transaction, the director is liable for any damages caused to the company.

Protection against liability

How can directors be protected from liability?

The *business judgment rule* shields directors and managers from liabilities for decisions that result in losses to company, to its controlled entities or to those over which the company has significant influence, provided that they comply with the required standard of care and loyalty. The law and the principles of corporate governance view the business judgment rule as a *safe harbor* for a director or manager who makes decisions in good faith and in the best interest of the company and its controlled entities while complying with legal and the corporate by-laws provisions. There is a presumption that the directors and managers will perform in accordance with the business judgment rule and will comply with the *duty of care* and *duty of loyalty* to which they are subject. However, such presumption will be lost if it can be shown that the director or manager acted fraudulently, illegally or with a conflict of interest.

In case of any infringement of any of those principles, the affected company may not agree otherwise, or provide in its bylaws for, any benefits or exclusions of liability, the purpose of which is to limit, release, substitute or compensate the director/manager for any liability incurred by them arising from the infringement of their duties.

Hence, all directors that breach their duty of loyalty must indemnify the company for the damage caused by their acts or omissions, and companies can't put in place in favor of any person any insurance, bonds or guarantees covering the amount of such indemnity.

The director(s) will be personally liable for any breach of their duties – in particular if they breach the duty of loyalty, disclose false information to the stock exchange, hide material information, include false information accounting statements of the company or its controlled entities, and destroy any kind of information that may be useful for any investigation of the CNBV.

What practical steps can directors take to avoid liability?

They should ensure that each major decision is approved in writing by the shareholders/partners and that they comply at all times with their duties – namely, the duty of diligence, the duty to act in good faith, the duty of loyalty and the duty to take care of the business as if they were one of the owners.

D&O insurance cannot be acquired to protect a director for breach of the duty of loyalty. By law, such insurance coverage is forbidden in the case of publicly traded companies and other financial entities regulated and supervised by Mexican financial services agencies.

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Corporate entities

What type of company is typically used in group structures?

Generally speaking, common corporate entities established or acquired by foreign investors in Morocco are as follows:

- Limited liability companies (*sociétés à responsabilité limitée* or SARL) (Law no. 5-96),
- Simplified Public limited companies (*sociétés par actions simplifiée* or SAS) (Law no. 19-20),
- Public limited companies (*sociétés anonymes* or SA) (Law no. 17-95).

The most common vehicle in the context of private equity transactions is an SA as this form allows the implementation of a shareholders' agreement, IPOs and the issuance of bonds. However, investors can start with an SARL, which can easily be transformed to an SA if a shareholders' agreement is further needed. Please note that if investors decide to have a SARL with a sole shareholder (SARLAU), the mother entity must not be a single shareholding entity itself.

There are other legal forms (Dahir no. 1-97-49 of 13 February 1997 promulgating Law no. 5-96) but less common:

- general partnership (*société en nom collectif*),
- limited partnership (*société en commandite simple*),
- limited joint-stock partnership (*société en commandite par actions*),
- limited liability company (*société à responsabilité limitée*),
- joint-stock company (*société en participation*).

Types of director

What is a "director"?

A director is a member of the board of directors of a public limited company (*sociétés anonyme* or SA).

It should be noted that a director (*administrateur*) is not a managing director (*directeur général*) who is legally vested with the broadest powers to act on behalf of the company, subject to the restrictions imposed by law, the company's articles of association, the powers of the Board of Directors, and the General Meeting of Shareholders of the company.

What are the different types of director?

There are no different types of directors, unless different categories are created, for example under a shareholders' agreement (e.g. directors appointed by shareholder A and directors appointed by shareholder B).

However, in publicly traded companies, one or more independent directors must be appointed to the Board of Directors. Their number may not exceed one-third of the total number of directors.

The independent director must satisfy the following conditions:

- not to have been, during the three (3) years prior to their appointment, an employee or member of the administrative, supervisory or management bodies of the company;
- not to have been, during the last three (3) years, a permanent representative, employee or member of the administrative, supervisory or management body of a shareholder or of a company consolidated by the latter;
- not to have been, during the last three (3) years, a member of the administrative, supervisory or management body of a company in which the company holds an interest, whatever its percentage;
- not be a member of the administrative, supervisory or management body of a company in which the company holds a seat on the administrative or supervisory body, or in which a member of the company's administrative, supervisory or management bodies, in office or having been in office for less than three (3) years, holds a seat on its administrative, supervisory or management body;
- not to have been or to have represented, during the last three (3) years, a commercial or financial partner or acting as an advisor to the company;
- not to be related up to the second degree to a shareholder or member of the Board of Directors of the company, or to their spouse;
- not to have been an auditor of the company during the six (6) years preceding their appointment.

An independent director may not hold the offices of Chairman of the Board of Directors, Chief Executive Officer, Chief Operating Officer or any other executive office.

The independent director may not hold any shares in the company. However, they are entitled to attend General Meetings of Shareholders.

The independent director is appointed, remunerated and dismissed under the same terms and conditions as apply to directors. Exceptional remuneration may be granted for assignments entrusted to them on a special and temporary basis.

The provisions of this article are not applicable to the independent directors or members referred to in article 35 of law no. 103-12 relating to credit institutions and similar bodies.

Eligibility

Who can be a director?

Directors may be natural persons or legal entities. In the latter case, at the time of appointment, the legal entity is required to designate a permanent representative who is subject to the same conditions and obligations and incurs the same civil and criminal liability as if they were a director in their own name, without prejudice to the joint and several liability of the legal entity they represent.

If the legal entity revokes the mandate of its permanent representative, it must notify the company of this revocation and of the identity of its new permanent representative without delay, by registered letter. The same applies in the event of the death or resignation of the permanent representative.

An employee of the company may only be appointed as a director if their employment contract corresponds to actual employment.

The number of directors bound to the company by an employment contract may not exceed one-third (1/3) of the members of the Board of Directors.

Directors, whether natural persons or legal entities, are subject to the conditions of capacity and the rules of incompatibility laid down by the laws in force and, where applicable, by the company's articles of association. The office of director is incompatible with the duties of the company's statutory auditor.

It should be noted that each director must own a number of shares in the company, determined by the Articles of Association. This number may not be less than that required by the Articles of Association to give shareholders the right to attend the Annual General Meeting, where applicable (generally one (1) qualification share). If, on the date of their appointment, a director does not own the required number of shares, or if, during their term of office, they ceases to own the required number of shares, they are deemed to have resigned *ipso jure* if he has not remedied the situation within three months.

Minimum / maximum number of directors

A *société anonyme* is managed by a Board of Directors comprising at least three and no more than twelve members. The latter number is increased to fifteen when the company's shares are listed on the stock exchange.

Appointment and removal

How are directors appointed?

Directors are appointed by the Shareholders' Annual General Meeting.

The first directors are appointed by the articles of association or by a separate deed forming part of the articles of association.

However, in the event of a merger or demerger, the appointment may be made by the Extraordinary General Meeting.

Any appointment made in breach of the foregoing provisions is null and void.

However:

1. In the event of a vacancy arising from the death, resignation or any other impediment of one or more directors, without the number of directors falling below the statutory minimum, the Board of Directors may, between two Annual General Meetings, make provisional appointments.
2. If the number of directors falls below the legal minimum, the remaining directors must convene an Ordinary General Meeting within a maximum of 30 days from the date on which the vacancy occurs, in order to complete the Board.
3. When the number of directors falls below the statutory minimum, but not below the legal minimum, the Board of Directors must make provisional appointments within 3 months of the date on which the vacancy occurs.

Appointments made by the Board of Directors under paragraphs 1 and 3 above are subject to ratification by the next Ordinary Shareholders' Meeting. In the absence of ratification, the deliberations and actions previously taken by the Board remain valid.

Where the Board of Directors fails to make the required appointments or to convene the Shareholders' Meeting, any interested party may apply to the President of the Court, acting in summary proceedings, for the appointment of an agent to convene the Shareholders' Meeting for the purpose of making the appointments or ratifying the appointments made pursuant to paragraph 3.

How are directors removed?

Directors may be re-elected unless otherwise stipulated in the Articles of Association. They may be removed from office at any time by the Ordinary General Meeting, without such removal being placed on the agenda.

Board / management structure

Typical management structure

The Board of Directors elects a Chairman from among its members, who must be a natural person, failing which the appointment is null and void.

The Chairman is appointed for a term which may not exceed that of their directorship. They may be re-elected.

The Board of Directors may dismiss the Chairman at any time. Any provision to the contrary is deemed unwritten.

On the recommendation of the Chairman, the Board of Directors appoints a Secretary to the Board, who is responsible for organizing meetings under the authority of the Chairman, and for drafting and recording the minutes. The secretary may be an employee of the company or a member of the trade chosen from outside the company, with the exception of the statutory auditors.

The Board of Directors may set up technical committees from among its members, and with the assistance, if it deems necessary, of third parties, whether shareholders or not, to study the questions it submits to them for their opinion. The work of these committees and their opinions or recommendations are reported to the Board at its meetings.

The Board determines the composition and powers of the committees, which operate under its responsibility.

How are decisions made by directors?

The Board of Directors may only validly deliberate if at least half of its members are actually present.

Unless otherwise stipulated in the Articles of Association, directors who take part in Board meetings by videoconference or equivalent means enabling them to be identified, in accordance with the conditions set out in Article 50 bis below, are deemed to be present for the purposes of calculating quorum and majority.

Any clause in the bylaws contrary to the provisions of the paragraph above shall be deemed inapplicable where exceptional circumstances so require and are declared by the public authorities, in accordance with the legislation and regulations in force.

Unless the Articles of Association require a greater majority, decisions are taken by a majority of members present or represented and, unless the Articles of Association provide otherwise, the Chairman has the casting vote in the event of a tie.

Authority and powers

For public limited companies with a board of directors, the company is managed by the Managing Director (*directeur général*) who can combine the functions of Managing Director and Chairman of the board of directors (and in this case is referred to as CEO or *président directeur général*). Otherwise, the board of directors can opt for the dissociation of the functions of Managing Director and Chairman of the Board and appoint separately a Managing Director (legal representative of the company who is vested with the broadest powers to act in all circumstances on behalf of the company) and a Chairman of the board of directors (who organizes and directs the work of the Board of Directors, ensuring that the company's corporate bodies operate in

accordance with the principles of good corporate governance, and in particular that directors are able to fulfill their duties).

Delegation

Unless otherwise stipulated in the Articles of Association, a director may give a written proxy to another director to represent them at a Board meeting. Each director may hold only one proxy at any given meeting.

Duties and obligations of directors

What are the key general duties of directors?

The Chairman organizes and directs the work of the Board of Directors, on which they report to the Annual General Meeting of Shareholders. The Chairman ensures that the company's governing bodies operate smoothly, and in particular that the Directors are able to fulfill their duties.

The Board of Directors determines the direction of the company's business and oversees its implementation. Subject to the powers expressly attributed to Shareholders' Meetings, and within the limits of the corporate purpose, the Board deals with all matters concerning the proper operation of the company and settles all matters concerning the company through its deliberations.

The Board of Directors also carries out any controls and verifications it deems appropriate.

The Board of Directors is notably responsible for:

1. adopting the company's annual budget on the basis of the business plan agreed between the shareholders;
2. authorizing the regulated agreements (*conventions réglementées*);
3. authorizing sureties, endorsements and guarantees, it being specified that the Board of Directors may authorize the Managing Director to grant them up to a predetermined total amount. The duration of this authorization may not exceed one (1) year;
4. and to take any other major decision that the Chairman and Managing Director may decide to place on the agenda.

In its dealings with third parties, the company is bound even by the acts of the Board of Directors which do not fall within the scope of the corporate purpose, unless it can prove that third parties knew that these acts exceeded the said purpose or that they could not have been unaware of this given the circumstances, it being excluded that the mere publication of the Articles of Association is sufficient to constitute such proof.

What are directors' other key obligations?

Directors and all other persons invited to attend Board meetings are bound to maintain discretion with regard to confidential information received during or on the occasion of meetings, after having been informed of this by the Chairman.

Transactions with the company

Any agreement entered into between the company and one of its Directors, the Chief Executive Officer or one of its Shareholders holding more than five percent (5%) of the company's capital or voting rights must be subject to the prior authorization of the Board of Directors and to the approval procedure set out in Articles 56 et seq. of Law no. 17-95.

The same applies to agreements in which one of the persons referred to in the previous paragraph is indirectly involved, or in which they deal with the company through an intermediary, as well as to agreements between the company and another company if one of the company's Directors or Managing Director is the owner, shareholder with unlimited liability, manager, director or Managing Director of the company, or a member of its management or supervisory board.

The Director, Managing Director or Shareholder concerned is required to inform the Board of Directors as soon as they become aware of an agreement subject to authorization. They may not take part in the vote on the authorization sought.

Such agreements are subject to approval by the Annual General Meeting of Shareholders under the conditions laid down by law.

The foregoing provisions do not apply to agreements entered into in the ordinary course of business and on arm's length terms.

Under penalty of nullity, Directors other than legal entities are prohibited from contracting loans from the company in any form whatsoever, from having the company grant them overdraft facilities, whether on current account or otherwise, and from having the Company guarantee or endorse their commitments to third parties.

The same prohibition applies to the Managing Director and to the permanent representatives of corporate Directors. It also applies to the spouses, parents and relatives up to and including the second degree of kinship of the above-mentioned persons, as well as to any intermediary.

Liabilities of directors

Breach of general duties

Corporate law, labor law and a certain number of texts specific to the activity of companies impose civil and criminal liability on company executives. The notion of "company executives" includes both *de jure* company executives (generally members of the board of directors, the chairman of the board of directors, the general manager and the deputy general managers of SA) and *de facto* company executives (any natural or legal person who in fact exercises a preponderant and lasting influence on the management of the company) (the **Company Executives**). Among the Company Executives, only the general manager and the deputy general managers are the legal representatives of SA (the **Legal Representatives**). The Company Executives other than the Legal Representatives are hereinafter referred as the **Corporate Officers**. However, the law provides that Corporate Officers and the Legal Representatives of a public limited company are subject to identical liability rules.

Paragraph 1 of article 352 of Law no. 17-95 lays down the basis for the civil liability of the Company Executives of SA. Under the terms of this article, “the members of the board of directors, the general manager and, where applicable, the delegate general manager or the members of the board of directors are liable, individually or jointly, as the case may be, to the company or to third parties, either for infringements of the legislative or regulatory provisions applicable to public limited companies, or for breaches of the articles of association, or for faults committed in their management or for acts taken outside the interest of the company, during the execution of the mandate they have received”.

It is recalled that even if the liability of the Company Executives is subject to specific provisions which specify its scope, the civil liability of the Company Executives is governed by the general law of liability, which, in order to be engaged, requires a fault, a prejudice and a causal link between the fault and the prejudice concerned.

The Moroccan legislator lists four (4) cases likely to engage the civil liability of the Company Executives.

- Violations of laws and regulations;
- Non-compliance with the Articles of Association;
- Liability for mismanagement; and
- Liability for actions taken outside the interest of the company.

The Company Executives may be held liable, individually or jointly and severally, both to the company and to third parties.

In addition to the prejudice caused to the company and/or its shareholders, third parties are also entitled, on the basis of paragraph 1 of article 352 of Law 17-95 and paragraph 1 of article 67 of Law 5-96, to claim compensation for the prejudice they have suffered as a result of a management fault attributable to the Company Executives.

In principle, the third-party victim of a fault of the Company Executives cannot call into question the personal liability of the latter and must act against the company. However, such a liability action against the Company Executives is possible when the third party proves that the damage is caused by a fault that is detachable or separable from the functions of these Company Executives.

Furthermore, the civil liability of the Company Executives may be individual or joint and several, depending on the case. It is individual when the fault can be attributed to one of the Company Executives without the others being involved. It is joint and several when the incriminated decisions were taken collectively. In this case, it is up to the court to determine the contributory share of each person in the repair of the damage.

Liabilities on insolvency

Moroccan law specifies that, in a PLC, the members of the board of directors, the general manager (and, where applicable, the delegate general manager or the members of the board of directors) are liable, individually or jointly, as the case may

be, to the company or to third parties, either for infringements of the legislative or regulatory provisions applicable to PLCs, or for breaches of the articles of association, or for faults committed in their management or for acts taken outside the interest of the company, during the execution of the mandate they have received.

Even if the liability of the managers/directors is subject to specific provisions which specify its scope, their civil liability is governed by the general law of liability, which, in order to be engaged, requires a fault, a prejudice and a causal link between the fault and the prejudice concerned.

Other key risks

Law 17-95 provides for a number of specific offenses for which the Company Executives of an SA are criminally liable. For example, incorporation offenses can be punished by a sentence of one to six months' imprisonment and/or a fine of 400 to 4,000 euros.

Moreover, article 353 bis of Law 17-95 provides that: *"When profits have been made as a result of the facts and acts provided for in article 352 above, the competent court shall order the persons referred to in the said article, who are held liable, to return the said profits to the company"*.

In addition, the court may prohibit the Company Executives from directing, managing, administering, representing or controlling, directly or indirectly, any company for a period of twelve (12) months.

Protection against liability

How can directors be protected from liability?

Directors can be protected from liability for example if they do not have personally taken part in the commission of the offence, if they prove that they have delegated their powers to subordinates (not only delegation of signature but delegation of representation). Moreover, the fact of the shareholders (for example express orders given to their representatives at the board) can mitigate or exclude the liability of the directors because the damage no longer finds its cause or its sole cause in the fault committed by them. In addition, fortuitous events or *force majeure* may exonerate the directors from all or part of their liability. The common law criteria of force majeure must be established (unpredictability, irresistibility and exteriority). Please see also our recommendations/answer below.

What practical steps can directors take to avoid liability?

- Act without making infringements of the legislative or regulatory provisions applicable to public limited companies, or breaches of the articles of association, or faults committed in their management or acts taken outside the interest of the company;
- Avoid acting as a de facto manager: If the members of the Board of Directors effectively and consistently exercise influence over the company's day-to-day or strategic decisions, beyond the mere fact of countersigning the deeds and/or all the

company's bank settlements and transactions, they could be considered as *de facto*. It should be noted that this influence must be significant and direct.

For example, if the members of the Board of Directors validate all the decisions and countersign all the acts of the company, it puts them at risk of being considered as *de facto* managers and thus they will incur the same liability as the General Manager of the company.

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Corporate entities

What type of company is typically used in group structures?

Despite the introduction of the Simplified Share Company (SAS), there are not many SAS companies being incorporated yet, mostly because of the poor advertisement of this type of company notwithstanding the advantages that it has. Therefore, the most commonly used companies in group structures continue to be the limited liability share company (Sociedade Anónima or S.A.) and the limited liability quota company (Sociedade por Quotas or Lda.).

Nevertheless, considering the advantages that SAS companies offer (as it incorporates the best features of S.As and Ldas and offers significant flexibility in relation to its operation and management) this guide focuses on the management of Lda, S.A and SAS companies.

Types of director

What is a "director"?

Although the Commercial Code (CCom) does not provide a clear definition of the term “director”, it is possible to infer from it that a “director” is a person that is duly appointed to administrate, manage and direct the business of the company and is responsible for (i) the managing of the affairs of the company on behalf of the shareholders; and (ii) representing and binding the company, taking into account the powers established under the relevant law and the company's articles of association.

What are the different types of director?

Except for S.A. companies, the CCom does not provide for different types of directors.

For S.A. companies, the CCom recognizes the concept of executive and non-executive directors, though it does not define them. It is even possible to have an executive committee whose members are not directors, provided, however, that the majority of the members are directors.

The CCom also establishes “alternate directors”. Alternate directors are persons appointed who, in case of a definitive absence of a director, will replace such director. Alternate directors are only liable insofar as they assume the office as effective directors.

The CCom also has the concept of a “*De Facto Director*”, defining it as the person who, without being a duly appointed director, regularly interferes in the activity of the administration, management, or direction of the company. The “*De Facto Director*” is subject to the same responsibilities and sanctions as those applicable to elected directors.

Finally, the CCom provides that, notwithstanding the absence of an express authorization in the company's articles of association, the company may, with the authorization from the General Assembly or from the directors/Board of Directors, appoint a manager for the performance of some branch of business or appoint an assistant to represent it in certain acts or contracts or, by notarial instrument, appoint a proxy for the practice of a certain act or category of acts.

Eligibility

Who can be a director?

Any natural person with full legal capacity (and is, at least, 18 years old), may be a director, regardless of their nationality.

The CCom also allows a legal person to be appointed as director, provided that such legal person designates a natural person to exercise the office. The legal person will be jointly and severally liable with the person it designates in respect of the acts practised by the latter.

A person is ineligible to be a director (and is automatically disqualified) if such person:

- is barred from the exercise of such office by special laws, including those governing the securities market;
- has been convicted of insolvency crimes, corruption and related crimes against the economy and consumers’ rights; and
- has been convicted of the crime of forgery of an authentic instrument, and to a criminal sanction that prohibits, even temporarily, the exercise of public office.

Minimum / maximum number of directors

In Lda and SAS companies, where a Board of Directors is not required, the companies can have only one director. If a Board of Directors is established, it must comprise at least three directors.

In S.A. companies, a Board of Directors (comprising an odd number of members, being a minimum of 3) must be established. There is an exception to this requirement

if the company's share capital does not exceed 5.000.000,00 Meticais and the company is not made public nor listed in the Stock Exchange – in such circumstances it is permitted to have only one director (though this is unusual in practice).

The New CCom does not establish a maximum number of directors for any of the types of companies.

Appointment and removal

How are directors appointed?

The directors are exclusively appointed by the general assembly through the competent deliberation of this corporate body and are appointed for the period established in company's articles of association, which, in the case of Lda. and S.A. companies must not exceed four years. This term may be renewed one or more times.

Appointment of directors requires the favourable vote of a simple majority of the shareholders, save if the articles of association requires a higher percentage for such election.

For S.A companies, the articles of association may provide that minority shareholders representing at least 5% of the share capital, who voted against the proposal for appointment of the directors, have the right to appoint one director.

For SAS companies, if a Board of Directors is established, the directors can be elected by simple majority of votes, by electoral ratio or by any other means provided for in the articles of association.

The elected directors must:

- declare, in writing, their acceptance of the office of director. In case of SA companies, they must also declare in writing the number of shares, subscription bonuses, call options over shares and convertible bonds, issued by the company or companies of the same group, that they hold directly or indirectly; and
- be registered with the Legal Entities Registry Office. The company's commercial certificate must identify who the directors are.

How are directors removed?

Directors cease to hold office either by resignation or by being removed.

The General Assembly can remove any director (either with or without just cause) at any time. "Just cause" under the CCom includes serious and repeated breaches by a director of their duties (e.g. engaging in corrupt practices, engaging in an activity that competes with the company's activity, among others) or becoming ineligible or disqualified from being a director.

A director dismissed without just cause may be entitled to claim compensation.

In the case of an Lda. company, a director who is dismissed without just cause has the right to receive, as compensation, remuneration up to the limit established in the articles of association or up to the end of their term of office or, if the term of office is not fixed, remuneration equivalent to two financial years. Furthermore, in the case of an Lda company, if the company only has two shareholders, dismissal for just cause can only be determined by the courts.

In the case of SA companies, dismissal of a director without just cause gives such director the right to receive, as compensation, the remuneration that such director would have received until the term of office had they not been dismissed.

In SA companies, shareholders holding at least 5% of the share capital may request the judicial removal of a director based on just cause.

The resignation and/or removal of directors must be registered with the Legal Entities Registrar Office.

Board / management structure

Typical management structure

In Lda companies, management is conducted by only one or two directors. When there are two directors, both have equal powers and each of them can act independently of the other. It is also common for this type of company to institute a Board of Directors, although not mandatory.

The supervisory body is not commonly used in Lda companies. It is only mandatory if the company: (i) issues securities; and (ii) is classified, in accordance with the CCom, as a medium or large company. In such cases, an Lda company will have to adopt one of the management/supervision structures provided for SA companies, as detailed below.

It should be noted that Boards are unitary structures made up of all the company's directors. Save for some specificities regarding SA companies (detailed below), typically each director has the same legal obligations and accountability to the company (even though internally the duties can be structured differently, in case of executive and non-executive directors).

In the case of S.A. companies, the CCom establishes that the company may choose between one of the following management/supervision structures:

- Board of Directors and Fiscal Council or Statutory Auditor. (The Fiscal Council / Statutory Auditor is responsible for the oversight of the actions of the company's directors and respective compliance with legal and statutory duties as well as the finances of the company); or
- Board of Directors comprising, at least, an Audit Committee; and an external auditor.

(In this type of structure, the members of the Auditing Committee cannot be executive directors. The Auditing Committee has an oversight responsibility in the same way as the Fiscal Council / Statutory Auditor has and is held liable on the same terms. In

companies that issue securities listed on the Stock Exchange (other than shares) the Audit Committee must include at least one member who must be independent of the company (i.e., cannot be a director) and must have a university degree appropriate to the performance of their duties, as well as knowledge of auditing and accounting. In public companies and companies listed on the Stock Exchange, the majority of the members of the Auditing Company must be independent members.)

For Companies that recur to public subscription or offer, or which shares or obligations are negotiated in the stock market, it is mandatory the hiring of an external auditor.

SAS management/supervision structure is as determined by the articles of association. The supervisory body is not mandatory but if the company decides to establish a supervisory body, the management/supervision rules for SA companies apply.

How are decisions made by directors?

In case of a Lda company with only one or two directors, decisions are made individually by any one of them. When there are two directors, each one of them has, individually, the power to bind the company.

If the Lda company institutes a Board of Directors, decisions are taken by simple majority of votes, save if the articles of association provide otherwise.

In the case of SA companies, the Board cannot meet if the majority of its members are not present, and decisions are taken by simple majority of votes of the directors' present/represented. It is not possible to establish a different quorum and each director has only one vote.

In the case of SAS companies, as this type of company is governed by the will of the shareholders, decisions are taken in the way prescribed in their articles of association.

Directors' resolutions must be recorded in a specific and mandatory minutes book (which can be a physical book, electronic book, or loose sheets that are compiled and legalized by the Legal Entities Registrar Office).

Authority and powers

The acts performed by directors on behalf of the company within the powers provided by the law bind the company before third parties, notwithstanding any limitations on representation powers contained in the company's articles of association or resulting from shareholders' resolutions.

In Lda and SAS companies, directors' powers are general management powers and any specific powers conferred to them should be reflected in the company's articles of association.

In SA companies, in addition to the general management powers and those specifically conferred on directors, the CCom establishes the following specific powers for the Board of Directors:

- choice of its chairperson, where the articles of association so provide;
- co-opt directors;
- request the convening of a General Assembly;
- approval of the management report and annual accounts for submission to the approval of the General Assembly;
- acquisition and sale of real estate;
- provision of security or guarantees, personal or real, by the company;
- opening and closing of commercial premises (*estabelecimentos comerciais*);
- changing the company's organization;
- extension and reduction of the company's articles of association;
- projects of merger, division or transformation of the company to be submitted to the General Assembly's approval;
- establishment and termination of cooperation with other companies;
- change of registered office;
- increase of share capital, when the articles of association allow for authorized share capital, up to the authorized limit;
- issuance of bonds under the terms prescribed in the articles of association; and
- any other matter on which any director requires resolution by the Board of Directors.

The directors bind the company, through their signature together with the indication of their capacity as a director.

Delegation

The CCom establishes that, regardless of whether there is express authorization in the company's articles of association, the company may, with the authorization from the General Assembly or from the directors/Board of Directors, appoint a manager to run any branch of its business, appoint an assistant to represent it in certain acts or contracts or, by notarial instrument, appoint a proxy to perform certain acts or category of acts.

Additionally, the Board of Directors may (subject to certain specified exceptions) delegate the day-to-day management of the company and the majority of its powers to one or more directors.

In SA companies:

- the articles of association may authorize the Board of Directors to set up an Executive Committee for the day-to-day management of the company, in which case it must establish the committee's composition and mode of operation. The Executive Committee may include non-members of the Board of Directors provided, however, that the chairperson and the majority of its members are directors;

- the articles of association may also provide for the company to be bound by the business concluded by the CEO and/or by the Executive Committee, within the delegation limits established by the Board of Directors.

Duties and obligations of directors

What are the key general duties of directors?

In general terms, directors are responsible for the management activities of the company, binding the company, pursuant to the terms established for each type of company, and representing the company in or out of court. Directors must act in compliance with the law and the company's articles of association and are subordinated to the decisions of the shareholders and intervention of the supervisory body insofar as the law or the articles of association so require.

Directors must, in particular:

- act with care, showing adequate availability, technical competence, knowledge of the business of the company and act with the diligence of a judicious and orderly manager;
- observe the duties of loyalty in the interest of the company, taking into account the interests of the shareholders and weighing the interests of other subjects relevant to the sustainability of the company, such as the company's employees and creditors; and
- exercise their office as fiduciary director of all shareholders, whether controlling, minority or holders of preferential shares, whose rights must be treated equally.

Furthermore, under the CCom, the following are fiduciary duties of directors:

- to keep confidential information that has not yet been confirmed and that may, when disclosed to the market, have a significant influence on the listing of the company's securities, and ensuring that its subordinates do not disclose such information;
- to disclose, on the day immediately following the relevant matter, any resolution of the General Assembly or of the management bodies relating to a matter which has occurred in the company's business that may influence, in a considerable way, decisions of investors in the securities market;
- not to use information obtained in the exercise of their office to obtain, for them or for third parties, an advantage through the sale and purchase of securities (prohibition of insider trading);
- to establish an ethical relationship of the minority shareholders in political terms, namely, the right to vote, the right of representation in the corporate bodies and those relating to property rights;
- to ensure the protection of the interests of the shareholders, employees and other participants of the company, within the powers conferred on them by law or the articles of association, in order to carry out the corporate and social purposes of the company;

- to increase investors' confidence in order to attract a greater volume of capital in the long term; and
 - to optimize the use of capital, reducing the company's costs, through more stable financing purposes.
-

What are directors' other key obligations?

The director has a duty to report on the exercise of their management function and in relation to the company's accounts must:

- prepare and submit to the competent corporate bodies the management report, the accounts for the fiscal year in question and other accounting documents required by law;
 - ensure that the management report and accounts for the financial year in question are signed by all directors. Directors who refuse to sign the report and accounts must, even if they have already ceased to be directors of the company, justify their refusal in such documents and explain it to the competent corporate body responsible for approving such documents;
 - ensure that the management report and the accounts for the financial year are prepared and signed by the company's directors in office at the time of the presentation. (Former directors must provide all information requested for such purpose, regarding the period in which they were in office); and
 - save if otherwise provided by law, ensure that the management report and the accountability documents are presented and assessed within the first 4 months immediately following the end of each financial year.
-

Transactions with the company

The CCom details, strengthens and makes mandatory for all types of companies, rules concerning directors' transactions with the company. Under the New CCom:

- the company may not grant a loan or a credit to a director, make payments on their behalf, provide a guarantee for an obligation contracted by them, or provide them with advances on remuneration exceeding one-month salary;
- a contract concluded between the company and its director, directly or through a third party, or a contract concluded by the company in which the director is an interested party, without the prior authorisation from the General Assembly, shall be null and void;
- a director who has a direct or indirect interest in a transaction or contract entered into, or which may be entered into by the company shall declare the nature and extent of such interest;
- in the case of a company that issues securities, prior authorization must be given by a resolution of the Board of Directors, in which the interested party cannot vote, with the favourable opinion of the Fiscal Council/Statutory Auditor or of the Audit Committee, as applicable, as well as with the opinion of the external auditor. (These provisions are applicable to an act or contract entered into with companies that are in group relationships with the one in which the contracting party is director); and

- in its annual report, the Board of Directors must specify any authorisations it has granted to directors, and the report of the Fiscal Council/Statutory Auditor or of the Audit Committee, as applicable, must mention the opinions given on such authorisations.

Liabilities of directors

Breach of general duties

As a general principle, a director shall be held liable to the company for any damage caused to it by an act or omission which is in breach of the director's legal duties or the duties arising from the articles of association, save if the director proves that they acted without fault. A director is also liable:

- to the creditors of the company when, due to non-compliance with a legal or statutory provision, mainly or exclusively designed for the protection of the company's creditors, the corporate assets become insufficient to satisfy the creditor's claim;
- to the shareholder, the company or third party for damages caused directly to any one or all of them in the exercise of their office; and
- if they perform, enter into or do not prevent, when able to do so, the performance or execution of any act or contract imposed by a controlling shareholder that uses its controlling power in a way that harms the company or the other shareholders.

In addition to the civil liability described above, if a company's unlawful act is a crime under the Penal Code or other relevant legislation, the directors may also be held liable for such criminal acts.

A lawsuit against the directors can be brought by the company, the company's shareholders and/or the company's creditors. Also, any third party that has suffered damage caused directly by the exercise of the directors' functions may start a lawsuit against the directors.

In addition, the CCom contains a chapter on penalties applicable to directors for breach of general duties. Under the CCom, fines (which can be substantial) can be imposed on a director who:

- omits or causes to be omitted by another person, acts that are necessary for the payment of contributions of capital;
- in violation of the law, subscribes or acquires for the company quotas or shares of the company, or instructs another person to subscribe or acquire quotas or shares of the company on behalf of the company, even if in their own name, or in any way provides funds or guarantees for the company so that another person may subscribe or acquire quotas or shares representing the company's share capital;
- in violation of the law, redeems, totally or partially, a quota that has not been paid up, or redeems or causes to be redeemed a quota or share, totally or partially, without proceeding with the reduction of the share capital of the company, or with the use of funds that cannot be distributed to the shareholder for such purpose;

- in violation of the law, redeems, or causes to be redeemed, totally or partially, a quota or share over which there is a usufruct or pledge right, without the consent of the holder of such right;
- proposes the illicit distribution of company's assets for approval by the shareholders, convened in a General Assembly, or who executes or causes to be executed by a third party distribution of the company's assets in violation of a valid resolution of the General Assembly;
- has responsibility to convene the General Assembly of shareholders or of bondholders, who omits or causes the convening of the meeting by others within the time limits established in law or articles of association, or convenes the meeting or causes the meeting to be convened without complying with the time limits or formalities established by law or by the articles of association;
- appoints another person to represent them as the holder of quotas or shares or bonds, without such person being the rightful holder of such quotas, shares or bonds, or as the holder of representative powers, without such person having been conferred with such powers;
- refuses or causes others to refuse to provide documents which the law states should be made available to interested parties for the preparation of General Assemblies, or refuses to send or causes the sending of such documents to be refused, or sends or causes the sending of such documents without compliance with the conditions and time limits established by law;
- prevents or hinders, or procures another person to prevent or hinder, the supervision of those who, by law or by the articles of association or by judicial order, have the duty to exercise such supervision;
- for the relevant accounting period verifies that half of the capital is lost and does not propose the dissolution of the company or the reduction of its share capital;
- being an interested party in a transaction with the company, fails to make a declaration of such interest;
- consents and signs, with their signature, a provisional or definitive certificate of shares or bonds, issued by or on behalf of the company, when the issue was not approved by the competent corporate body;
- fails to submit or instructs another not to submit to the competent corporate bodies, within the legally established time limit to do so, the administration report, the accounts for the accounting period and other accountability documents prescribed by law.

As an accessory penalty, a director convicted of any of the above may be prohibited from holding the office of director or any other management office for a period of between one to three years.

The prohibition on holding the office as director or any other management office is applied when:

- the director breached their duties with serious prejudice to the company;
- the director breaches the provisions of articles 139 and 140 of the New CCom (which, among other things, require a director to observe the duty of care and act

with the diligence of a judicious and orderly manager; to observe the duty of loyalty in the company's interest, taking into account the interests of the shareholders and weighing the interests of other relevant parties for the sustainability of the company, such as its employees and creditors; and to report the management activities and the company's accounts as prescribed by law, etc;

- the director is convicted of providing false information;
- the director is convicted for failing to disclose interests in a transaction with the company; and
- the director repeatedly breaches its duties.

Liabilities on insolvency

Under the Mozambican Insolvency Law, approved by Decree-Law no. 1/2013 of 4 July, there are civil and criminal liabilities for directors if:

- the director, through falsification of written documents, inaccurate accounting, simulation, concealment of accounting documents, artificial creation or aggravation of losses or reduction of profits, or any other dishonest act before, during or after the declaration of insolvency, the granting of judicial business rescue or the deposit of the extrajudicial rescue plan, harms the interests of creditors, for the company's benefit, their own benefit or that of third parties;
- the director provides false information or statements in the procedures of insolvency, judicial or extrajudicial business rescue, with the aim of misleading the judge, creditors or representative of the Public Prosecutor Office;
- the director illicitly disposes, dissipates or encumbers the company's assets in the course of insolvency proceedings, judicial or extrajudicial business rescue, for the benefit of the company or their own benefit or with the intention of favouring one or more creditors, to the detriment of others;
- the director appropriates, dissipates or hides assets of the debtor company in the course of insolvency procedures, judicial or extrajudicial business rescue, by himself /herself or through a third party;
- the director fails to comply with the obligation of having organized commercial bookkeeping suitable for the company's activity, before or after the sentence that determines the insolvency, the judicial business rescue or of the deposit of the conciliation or mediation minutes; and
- the director, during the course of insolvency procedures, judicial or extrajudicial business rescue, refuses to comply with or fails to comply with the order or instructions of the judge.

A director convicted of any of above will be also prohibited:

- from acting as a director, or exercising any administrative office, in any company and prohibited from exercising any commercial activity; and
- from managing any company under a mandate or a title for business management.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Mozambican legislation, including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court (or by the Central Bank in case of companies supervised by this institution) from acting as a director or from taking part in the management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing and keep the company's books, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Protection against liability

How can directors be protected from liability?

Except for SAS companies, any clause/agreement excluding or limiting the directors' liability is null and void. In SAS companies, the articles of association may exclude and /or limit directors' liability. However, such exclusion/limitation has no effect in relation to affected third parties.

As a general principle, directors' liability may be guaranteed by a guaranteed deposit, a bank guarantee or by D&O (Directors and Officers) insurance, regardless of the type of company. Whether the directors' liability is so insured must be reflected in the articles of association or subject to shareholders resolutions.

In the case of SA companies, the guarantee (or D&O insurance) cannot be inferior to 25% of the share capital. In the case of Public Companies or companies listed on the Stock Exchange, it is mandatory that the directors' liability is guaranteed/insured.

The following actions can be considered by directors to avoid or reduce their exposure to liabilities:

- Record contrary votes and do not participate in the execution of resolutions which: (i) they voted against; or (ii) they did not participate in. Directors who did not participate in or who have voted against and who have not taken part in the execution of a decision of management are not liable for damages resulting from it. The contrary vote must be duly recorded in the minutes of the meeting where such decision was made.
- no execution of unlawful resolutions – as a general rule, directors are not liable to the company if the act or omission is based on a decision of the shareholders, even if voidable, with the exception of resolutions that are passed with the conscious purpose of obtaining for a controlling shareholder or for a third party undue advantage to the detriment of the company, other shareholders or the company's creditors.
- Ratification – (i) when taking decisions in respect of a related party transaction; (ii) when the act or business was conducted only by one director, and the ratification is obtained from the majority of the directors; (iii) when the act or business needed approval from the General Assembly and a ratification is obtained from this

corporate body; or in case of sensitive matters where the approval or ratification is recommended to confirm the director's decision; (iv) when the resolution has some irregularity (e.g. misses the opinion of the supervisory body, the minutes miss some other crucial element for the resolution, etc). Ratification may not, however, absolve a director from liability towards third parties. It should be considered on a case-by-case basis.

What practical steps can directors take to avoid liability?

In addition to the actions described in [How can directors be protected from liability](#), directors must ensure that they act with due diligence as a thoughtful and coordinated manager, acting always in line with the company's, shareholders', employees' and creditors' interests, as well as exercising their duties as fiduciary directors for all shareholders regardless of who appointed them as directors and the shareholding held by any one shareholder in the company.

It is important that directors have a clear knowledge of their obligations and duties, which includes knowledge of the main legal provisions applicable to them and to the company. Also, directors must be aware of, and comply with, any group-wide governance policies. These may cover areas such health and safety, ethics, bribery/anti-corruption, anti-money laundering and human rights, designed to help them to fulfil their obligations/duties and minimize the risk of liability.

Thus, directors should:

- Stay informed about the affairs of the company, particularly its financial position and compliance obligations. Ensure that they have access to updated financial information, prepare thoroughly for and regularly attend Board meetings and familiarize themselves with key legislation affecting the business.
- Make full disclosure of any related party interest they have in any transaction with the company.
- Ensure that all resolutions are diligently recorded in the minutes and that such resolutions are duly backed up with sufficient information to show the reasoning behind their decisions.
- Ensure that any vote against a specific resolution is duly recorded in the minutes with the justification for such opposition.
- Make sure that any resolution on any matter that is either outside their personal expertise or should be subject to an expert's opinion is not taken without such expert opinion having been obtained.
- Implement, and comply with, policies designed to protect the company, its shareholders, and employees, from corrupt practices, money laundering and financing of terrorism practices.
- Implement, and comply with, policies addressing health, safety & environmental issues, ethics policies, and any other policy that can help minimize liability risks for them and for the company.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

In Namibia, a distinction is made between two main types of companies: companies having a share capital and companies not having a share capital. Companies having a share capital are further divided into private and public companies. The most common type of company is the private company, although the same duties and obligations apply to all types of companies.

Types of director

What is a "director"?

The Companies Act 28 of 2004 (Companies Act) does not contain a comprehensive definition of "director", but defines a director as *"includ[ing] any person occupying the position of director or alternate director of a company, by whatever name that person may be designated"*. While the Companies Act does not purport to define the status and nature of a "director", it is clear that it is intended to apply to all directors who are formally appointed as directors as well as *de facto* directors who are not formally appointed. In addition, the Act will regard certain persons as directors even though they may be designated by a different name.

The status and nature of a director is determined with reference to the duties of a company director, which is governed by the Act and common law. A person *de facto* exercising the duties of a director will be considered a director under the Act.

What are the different types of director?

The Companies Act makes no distinction between different types of directors. In the Namibian Corporate Governance Code (NamCode), as well as in practice, a distinction is usually made between executive directors (employees or members of management), non-executive directors (directors who are not employed by the company and therefore not involved in the day-to-day running of the company), and independent directors (directors with no existing or prior business, employment, consultancy or

other relationship with the company). Other types of directors may be recognised in practice such as directors who are nominated to act as director on behalf of someone else, commonly referred to as a nominee director. Directors not formally appointed are referred to as de facto directors, and executives who are able to influence the board or on whose instructions the board is accustomed to act are commonly referred to as shadow directors.

Eligibility

Who can be a director?

Any person not disqualified from holding office as a director under the Companies Act may be appointed as director. According to the Companies Act, the following persons are disqualified from being appointed or acting as a director of a company:

- a body corporate;
- a minor or any other person under legal disability;
- any person who is the subject of any order under the Companies Act or deemed to have been issued under the Companies Act disqualifying them from being a director; and
- save under the authority of the Court:
 - an unrehabilitated insolvent;
 - any person removed from an office of trust on account of misconduct;
 - any person who has been convicted of insider trading or any other fraud-on-the-market offence; and
 - any person who has been convicted, whether in Namibia or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under any law for the prevention of corruption, or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and has been sentenced to imprisonment without the option of a fine or to a fine to the equivalent of or exceeding N\$1 000.00

Minimum / maximum number of directors

The minimum number of directors for private companies is one, while the minimum number of directors for public companies is two. No maximum number of directors is prescribed. The articles of association of the company may determine a minimum or maximum, provided a minimum below the statutory minimum is not prescribed.

Appointment and removal

How are directors appointed?

Under common law, a person's appointment as director is complete on their appointment by those having the authority to do so and their consent or acceptance to such appointment.

Under the Companies Act, the subscribers to the memorandum may determine the number of directors and may, in writing by majority vote, appoint the first directors, unless the articles of the company provide otherwise. The articles may also state the names of the first directors and / or the number of directors. Further directors (i.e. directors other than the first directors) are appointed under the provisions of the company's articles (or a shareholders agreement). Usually, the articles will state that the members appoint directors at the annual general meeting. It is possible, however, for the articles to state that the board may appoint further directors, or that a third party shall be authorised to appoint further directors. The articles also usually provide for the filling of casual vacancies.

Every person appointed as a director of a company must, within 28 days after the date of appointment, lodge with the company their written consent to that appointment on the prescribed form.

After every change in the board of directors, the company must lodge a prescribed form giving details of the change with the Registrar of Companies. The company must lodge this form within 14 days after receipt of the director's written consent form.

How are directors removed?

Under the Companies Act, the members of a company in a general meeting may (notwithstanding anything in its memorandum or articles or in any agreement between it and any director) by ordinary resolution remove a director before the expiry of their period of office. Special notice (28 days' notice) must be lodged with the company of any proposed resolution to remove a director under the Act or to appoint any person in the place of a director so removed at the meeting at which such director is removed. On receipt of notice of the proposed resolution, the company must, as soon as is reasonably possible, deliver a copy of the notice to the director concerned who is entitled to be heard on the proposed resolution at the meeting.

After every change in the board of directors, the company must lodge details of the change in the prescribed form with the Registrar of Companies.

Board / management structure

Typical management structure

Namibia follows a one-tier board structure, where supervisory and control functions are vested in the board.

How are decisions made by directors?

Director decisions are usually taken by ordinary majority of the board. Unanimous resolutions / consent are also recognised under the common law and the Companies Act.

Authority and powers

Under common law, the directors are empowered to do whatever is reasonably necessary and incidental to the management of the company's business. The articles of association of a company usually provide for the specific powers of the directors.

The Companies Act contains certain restrictions on the powers of directors. The articles may also impose further restrictions on the powers of directors.

Delegation

The day-to-day running of the company is typically delegated to the executive directors and management of the company. NamCode, however, warns that executive directors should carefully manage the conflict between their management responsibilities and their fiduciary duties as directors to act in the best interest of the company when delegating powers to other persons or entities, such as a managing director or committee. NamCode also confirms that the board may delegate authority to management, but in doing so the board and its directors do not abdicate their duties and responsibilities. The same applies to delegation to committees.

Duties and obligations of directors

What are the key general duties of directors?

Director duties are determined mainly under common law. Specific duties are also provided for under the Companies Act and under the company's articles of association. Under common law, the main duties of directors may be grouped in two groupings: the duty of care, skill and diligence; and fiduciary duties.

Duty of care, skill and diligence

All directors of a company are required by law to exercise the necessary care, skill and diligence in the performance of their duties. This is confirmed by the NamCode as well. The duty to act with care, skill and diligence is owed to the company and not the shareholders. The extent of a director's duty of care and skill depends to a large degree on the nature of the company's business and on any particular obligations assigned to the relevant director and other officers.

This duty entails that, in discharging their duties, a director must at all times act honestly and in good faith. No director should be entitled to hide behind culpable ignorance or failure to understand a company's business. A director, in the performance of their duties, does not need to exhibit a greater degree of skill than may reasonably be expected from a person of their knowledge and experience.

As a result, directors are not required to have special business acumen or expertise, or even experience in the company's business. However, the skill that the director must exercise will depend on whether they were appointed for a particular skill or expertise in a given field; directors are expected to exercise the care and skills which can reasonably be expected of a person with that director's knowledge and experience.

Fiduciary duties

Directors stand in a fiduciary position towards the company on whose board they serve. A director's fiduciary duties – as with the duty of care, skill and diligence – is owed firstly to the company and not the shareholders or any individual shareholder. Various duties of directors flow from this fiduciary relationship between directors and the company. Some of the fiduciary duties of directors have also been codified in the Companies Act. The fiduciary duties of directors are grouped under the following categories:

- the duty to act bona fide in the best interest of the company
- the duty to act within their powers and the powers of the company
- the duty to exercise their powers for the purpose for which they were conferred
- the duty to act with unfettered discretion and independent judgment, and
- the duty to avoid conflicts of interest.

What are directors' other key obligations?

Aside from the common law fiduciary duties and duty to act with care, skill and diligence, the Companies Act also prescribes various other duties of directors, mainly relating to the administration of the company. These are numerous, but it is worth mentioning a few:

- Directors must ensure that the prescribed detail is contained on all stationery and negotiable instruments of the company.
- Directors must call general meetings if one has been requisitioned by members.
- Directors and officers must ensure that copies of special resolutions are embodied in and annexed to every copy of the articles issued after the resolutions has been registered and that a copy is sent to any member who has requested one and paid the prescribed fee.
- Directors are responsible for taking all reasonable steps to secure compliance by the company with the requirement to keep the necessary accounting records.
- Directors must also take all reasonable steps to ensure that annual financial statements are made out and laid before the annual general meeting of the company.
- Finally, directors must ensure that all statutory registers are kept.

Transactions with the company

Under common law, the fiduciary relationship between companies and their directors means that contracts between a company and one or more of its directors are voidable by the company at the instance of the company. The rule is the same when the company enters into a contract with another company in which a director of the first mentioned company has an interest. The contract may, however, be validated if the director in question properly disclosed in full their interest in the contract and the shareholders in general meeting ratified the contract. It is also possible for the articles to authorise directors to enter into contracts with the company.

The Companies Act sets out in detail the statutory requirements where a director (or officer) has an interest in a contract entered into or proposed to be entered into by the company. These provisions do not however replace the common law rule, which continues to apply even if the statutory provisions have been complied with. The voidability of the contract will only be avoided if the articles permit contracts with directors or if the shareholders in general meeting have approved the contract after full disclosure by the interested director.

In essence, the statutory rules provide that:

- A director who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract which is of significance in relation to a company's business must declare their interest and to give full particulars of their interest. Interests are material and legally subject to disclosure where the director has a serious, substantial or appreciable financial interest in a contract.
- The contracts governed by the statutory disclosure requirement are those which are of significance in relation to a company's business and which are entered into or to be entered into in pursuance of a resolution taken or to be taken at a meeting of directors of a company, or by a director of the company who either alone or together with others has been authorised by the directors of the company to enter into that contract or any contract of a similar nature.
- A declaration of interest is not effective unless it is made at or before the meeting of directors at which the question of confirming or entering into the contract is first taken into consideration and, if in writing, is read out to the meeting or each director present states in writing that they have read that declaration. The declaration can be verbal, in writing, or even tacit.
- Failure to declare such an interest is a criminal offence and, on conviction, a director may be subject to a fine, imprisonment or both. In addition to the contract being voidable, the company can recover all profits made by the director under the contract.
- Every declaration of interest must be recorded in the minutes, failing which the company commits an offence (subject to a fine only). A register of directors' interests in contracts must also be kept.
- It is also possible for directors to make an annual, general declaration of interests by notice to the other directors.

Liabilities of directors

Breach of general duties

A director that breaches their fiduciary duties is liable for a breach of trust. A breach of fiduciary duties may also lead to criminal liability. The company itself, the other directors or the members may bring an action to court for breach of trust.

When a director breaches the duty of care, skill and diligence, they may be held liable for damages suffered by the company. If there is a contract between the director and

the company incorporating the duty of care, skill and diligence, the director may be held liable for breach of contract as well. The company is the proper plaintiff for such an action, but a derivative action by the members is also possible.

Liabilities on insolvency

When it appears (whether in a winding-up procedure, judicial management procedure or otherwise) that any business of the company was or is being carried on recklessly, or with the intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the court may declare that any person, who was knowingly a party to the carrying on of the business in that manner, is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company. Proceedings may be instituted by application or action by the master, the liquidator, the judicial manager, or any creditor, member or contributory of the company.

Other key risks

Specific industries place additional obligations on directors of companies in those industries. These industries, for example, include banking and financial services.

The general principle is that a director is not held personally liable for the debts of the company. There are, however, several instances where directors may be held personally liable for the debts or losses of the company. The main instances are discussed below.

- A director is personally liable for the debts of the company if that director personally bound themselves for the liability of the company, for example through signing a surety or guarantee.
- A director may also be held personally liable if that director breaches a warranty of authority or acts beyond their powers and the third party, with whom the director transacted, is unaware that the director does not have proper authority or is acting beyond the scope of their authority.
- A director may be held personally liable if they wrongfully procured a breach of contract by the company or deliberately committed an act that prevents the company from carrying out its duties under a contract.
- The Companies Act contains several other provisions where the directors can be held personally liable for the debts of or losses suffered by the company - for example where provisions relating to unauthorized loans to group companies, the use and publication of company names, the power of directors to issue shares and loans to directors are breached.
- A director may also be held personally liable where the director acted negligently.
- Finally, a director may be held personally liable where the director acted fraudulently or recklessly.

Protection against liability

How can directors be protected from liability?

It is possible for a director to take out professional indemnity insurance. However, it should be noted that the Companies Act specifies that any provision, whether contained in the articles of a company or in any contract with a company, and whether expressed or implied, which purports to exempt any director or officer or the auditor of the company from any liability which by law would otherwise attach to them in respect of any negligence, default, breach of duty or breach of trust of which they may be guilty in relation to the company or to indemnify them against that liability, is void. Therefore, an agreement with the company to indemnify a director is invalid. Directors may however take out professional indemnity insurance.

What practical steps can directors take to avoid liability?

The overarching responsibility of directors is to act in good faith in the best interest of the company. Directors will normally not be held liable for mere mistakes, as long as they act with the necessary care, skill and diligence, in good faith and in the best interest of the company.

Key contacts



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Netherlands

LAST MODIFIED 31 MARCH 2025



Corporate entities

What type of company is typically used in group structures?

In the Netherlands, the most common types of company used in group structures are public non-listed limited companies (*niet-beursgenoteerde naamloze vennootschappen*) (NV) and private non-listed companies with limited liability (*besloten vennootschappen*) (BV).

Types of director

What is a "director"?

Basically, the law regards as a director someone who is charged with the management of the company, subject to any restrictions under the articles of association.

What are the different types of director?

There are two types of directors: executive directors (*uitvoerende bestuurders*) and non-executive directors (*niet-uitvoerende bestuurders*). This is explained further under [Typical management structure](#).

In addition, Dutch law also recognises an informal director, so-called "policy makers" (*feitelijk beleidsbepalers*). Such policy makers may be held liable as if they were directors.

Eligibility

Who can be a director?

Directors can be legal entities or natural persons, however, non-executive directors (in case of a one-tier board) and supervisory directors (*commissarissen*) (in case of a two-tier board) must be natural persons. The articles of association may restrict the scope of and requirements for persons eligible for appointment as a director. Such requirements may be waived by a resolution of the general meeting.

From a corporate law perspective, there are no residency requirements for directors. However, often tax substance rules require that at least 50% of the directors are actually Dutch (tax) resident.

In the event that a company, for two consecutive years, meets certain criteria under the Dutch law and accounting rules concerning its asset value, turnover and number of employees (Qualifying Company), restrictions with respect to the appointment of directors are applicable. These restrictions are applicable when a company, for two consecutive years, meets at least two of the three following criteria:

- An asset value exceeding EUR20 million.
- A net turnover exceeding EUR40 million.
- At least 250 employees.

In a Qualifying Company, a person cannot be appointed as a director (other than a non-executive director or a supervisory director) when such person is either:

- A supervisory director or a non-executive director for more than two other Qualifying Companies.
- In the case of a two-tier board structure, the chair of the supervisory board or, in the case of a one-tier board structure, the chair of the board of directors, of another Qualifying Company.

A person cannot be appointed as a non-executive director or supervisory director when such person is non-executive director or a supervisory director for five or more other Qualifying Companies. An appointment as chair counts as two appointments.

Furthermore, a Qualifying Company is obliged to adopt a plan on how to achieve an improved balance between the number of women and men appointed as executive directors, non-executive directors or supervisory directors. A Qualifying Company shall inform the Dutch Social and Economic Council (*Sociaal-Economische Raad*) annually about the effects of such plan so far.

Minimum / maximum number of directors

The board consists of one or more directors, as decided by the general meeting. There is no maximum for the number of directors.

In general there is also no minimum for the number of directors, although Dutch law does stipulate that a company that qualifies under the Large Company Regime (as defined in the next paragraph) should have at least three non-executive directors or supervisory directors.

The Large Company Regime (*structuurregime*) applies if a company, for three consecutive years, meets the following three criteria:

- Its issued share capital, reserves and retained earnings according to the balance sheet amount to at least EUR16 million.

- The company, or any other company in which it has a controlling interest, has appointed a works council (*ondernemingsraad*) pursuant to a legal obligation.
- The company, alone or together with any company in which it has a controlling interest, normally has at least 100 employees in the Netherlands.

Appointment and removal

How are directors appointed?

At incorporation of the company, directors are appointed in the notarial deed of incorporation.

After incorporation, the general meeting is authorised to appoint new directors, unless the company qualifies as a Large Company, in which case the authority to appoint directors can shift from the general meeting to either the supervisory board in case of a two-tier board structure or the non-executive directors in case of a one-tier board structure.

For a BV, the articles of association may provide that a director may also be appointed by another corporate body of holders of a certain class of shares.

How are directors removed?

A director can be dismissed by the corporate body competent to appoint. Generally, this is the general meeting or the supervisory board (if one is in place). For a BV, the articles of association may provide that a director may also be dismissed by another corporate body, unless the Large Company Regime applies.

When a NV has established a works council (*ondernemingsraad*) by virtue of statutory provisions, the proposal for the appointment, suspension, dismissal or discharge of a director must not be presented to the general meeting before the works council has been given the opportunity to determine its point of view on it.

Board / management structure

Typical management structure

There are three possible management structures:

- The company has one corporate management body, being the board, which consists of executive directors (*uitvoerende bestuurders*) only.
- The company has a one-tier board structure, whereby the board consists of both executive (*uitvoerende bestuurders*) and non-executive directors (*niet-uitvoerende bestuurders*) operating from within one corporate body.
- The company has a two-tier board structure. The board consists of executive directors and the supervisory board, as a separate corporate body, consists of non-executives called supervisory directors (*commissarissen*).

The main reasons for a company to opt for a one-tier board structure including non-executive directors are either:

- The Large Company Regime applies and hence it is mandatory to appoint either a one-tier board including non-executive directors or a two-tier board.
- The supervision of the executive directors by the non-executives is more practical (in terms of information sharing etc.) if the non-executives and executives are positioned within the same corporate body.

Furthermore, the non-executives may be more inclined to perform well, as they are considered part of the board and therefore subject to a lower threshold for directors' liability.

The main reasons for a company to opt for a two-tier board structure are either:

- The Large Company Regime applies and hence it is mandatory to appoint either a one-tier board including non-executive directors or a two-tier board.
- The separation of supervisory directors and executives in two separate corporate bodies may provide for a more independent and objective view of the supervisory directors.

How are decisions made by directors?

The law assumes that in general the management of the board is the result of a collective deliberation and decision-making process.

The law and the articles of association set requirements for the adoption of board decisions. For some matters the involvement of the general meeting, the works council or the supervisory board or another corporate body of holders of a certain class of shares is prescribed. A resolution must be reasonable and fair and must be passed as a "result of mutual consultation". This means that no directors may be excluded from the meeting. At the board meeting, unless the articles of association provide otherwise, each director has one vote. If these rules are not complied with, the resolution is void (*nietig*) or voidable (*vernietigbaar*) at a later date. (The difference between a void decision and a voidable decision is that a void decision is deemed never to have existed, whereas a voidable decision is valid until it has been nullified by the court.)

If a certain decision has important (material) consequences for the company, it is advisable to make a formal resolution recorded in writing.

Under the Dutch Civil Code (DCC), a resolution of the board is void if it is in breach of the law or the articles of association. However, sometimes a resolution of the board is only void if it:

- Is contrary to provisions laid down by law or in the articles of association governing the adoption of decisions.
- Contravenes reasonableness and fairness (*redelijkheid en billijkheid*).
- Contravenes internal regulations.

Authority and powers

In general, the board is authorised to make binding decisions and thus represent the company. The scope of these powers are determined by Dutch law and the articles of association. A legal act by the company is voidable if it exceeds the scope of the company's corporate objective (*doeloverschrijding*). Therefore, directors are limited in their authority and capacity to act because their actions should be in line with the legitimate purpose of the company.

Furthermore, the board may be restricted in its decision-making by the articles of association to the extent these provide that certain resolutions are subject to the prior approval of another corporate body of the company, such as the general meeting or, when installed by the company, the supervisory board or another corporate body of holders of a certain class of shares.

In principle, the power of representation accrues to each director individually and is unrestricted and unconditional. The articles of association may deviate from this, for example by stipulating that directors must act jointly. Such restriction applies to all matters and not to certain matters only. This restriction must have been registered with the Dutch Chamber of Commerce in order to invoke it against third parties.

In the event of a breach of the power of representation arising from the law or the articles of association, the company shall in general not be bound by the contract.

Delegation

The board can grant a power of attorney to represent the company, for instance to a single director or another person who would generally not have the necessary representative powers based on the articles of association. Such a power of attorney is normally limited in scope (such as amount and/or nature of the acts). Such a (corporate) power of attorney is generally registered with the trade register of the Dutch Chamber of Commerce (*Kamer van Koophandel*) as proxy-holder (*gevolmachtigde*) in order to have external effect towards third parties.

Furthermore, a single director can grant a power of attorney to carry out certain specific acts in its name. In practice, these kinds of powers of attorney are limited to a specific legal act for a specific period of time (for example, the signing of a share purchase agreement in respect of a particular transaction).

Duties and obligations of directors

What are the key general duties of directors?

The basic principle under Dutch law is that the board is collectively responsible for the day-to-day management of the company. Its duties also include making plans for the future and determining the strategy and policies of the company. The board has a central role with respect to preparing, determining and executing the policies of the company.

The key duties of a director are set out in the DCC:

- The task of the board is to serve the corporate interest of the company, meaning the interests of the company and the enterprises affiliated with it, i.e. the interests of all stakeholders of the company. When the board acts contrary to the corporate interest, the relevant director(s) can be held liable.
- The company and the persons who by virtue of law and the articles of associations are concerned with its organisation must conduct themselves in relation to each other in accordance with the requirements of reasonableness and fairness. The board should act reasonably and fairly in relation to other persons who are concerned with the company and its organisation. The company must furthermore treat its shareholders equally. A resolution of the board may be voidable if it is contrary to the principles of reasonableness and fairness.
- The duty of each director towards the company is to properly perform the individual tasks allocated to them. When a director breaches their duty of proper performance, they may be held personally liable.

What are directors' other key obligations?

The following duties, in general, can be regarded as other key obligations of the board:

- Managing the day-to-day operations of the company, subject to possible limitations in the articles of association.
- Setting out and executing company strategy and policies.
- Achieving company aims.
- Responsibility for drawing up and publishing annual report and accounts.
- Keeping the company's books and accounts.
- Monitoring the risks, solvency and liquidity of the company.
- Ensuring the company's compliance with relevant legislation and regulations.
- Responsibility for the company's financing.
- Ensuring that other company bodies function well.
- Representing the company.

Duties of the board can be expanded or limited through the articles of association.

Transactions with the company

When directors enter into a transaction with the company, a conflict of interest might arise. Pursuant to Dutch law directors cannot take part in the deliberation and decision-making process of the board if they have a personal direct or indirect conflict of interest (*tegenstrijdig belang*). A director has a conflict of interest when their personal interest (*persoonlijk belang*) is not aligned with the corporate interest (*vennootschappelijk belang*) of the company and as a result of which it can be reasonably questioned whether such director solely has acted in the interests of the company. If a director does not comply with the provisions on conflicts of interest, the

resolution concerned is subject to voidability or nullification (in case of a decisive vote) and this member may be held personally liable towards the company. The voidability or nullification does not have an external effect towards third parties.

When a sole shareholder enters into a transaction with the company, Dutch law prescribes that such transaction is always recorded in writing unless the transaction is conducted within the ordinary course of business.

Liabilities of directors

Breach of general duties

As a starting point, directors are not liable for acts performed in their capacity as directors on behalf of the company. However, there are specific principles under Dutch law pursuant to which a director could be held personally liable. A distinction should be made between internal and external liability:

- **Internal liability** is liability towards the company and is based on the relationship between the director(s) on the one hand and the company on the other hand. Generally, a director can only be held liable internally for improper performance of duties in the event of serious negligence (*ernstig verwijt*). Whether serious negligence can be established should be assessed on the basis of all particular circumstances.
- **External liability** is liability towards third parties, such as creditors of the company or the Dutch tax authorities. A director is generally at fault when they have procured the performance of a legal act on behalf of the legal entity in circumstances where they knew, or reasonably should have known, that the legal entity concerned would not be able to meet its obligations. The liability can also be based on an omission.

Under Dutch law, it is not possible for shareholders to bring an action for breach of duty on behalf of the company (a derivative action).

Note that in the event that the relevant director is a Dutch legal entity, the person(s) managing the legal entity director shall also be jointly and severally liable in accordance with the DCC if the legal entity director is successfully held liable.

Liabilities on insolvency

As a general principle, directors will not be held liable for the (inevitable) risks of entrepreneurship (*ondernemersrisico*). However, if a company is declared bankrupt, the directors are personally liable for the deficit in bankruptcy if the bankruptcy is caused by their apparent negligence (*kennelijke onbehoorlijke taakvervulling*) to a significant extent during a period of three years prior to the date of bankruptcy. The burden to prove that the decisions which lead to the miscalculation, financial setback or disappointing investments were taken with proper caution lies with the respective director(s).

Under Dutch law the board is obliged to keep financial records in such a way that all assets and liabilities of the company can be determined at any time and that the annual accounts and other financial information are duly filed with the trade register of

the Dutch Chamber of Commerce. If one of these obligations has not been fulfilled, two statutory presumptions apply:

- An irrebuttable presumption (*niet weerlegbaar vermoeden*) that there has been apparent negligence.
- A rebuttable presumption (*weerlegbaar vermoeden*) that the apparent negligence is a significant cause of the bankruptcy.

In the event that a director will be considered to have evidently improperly performed their duties which will be regarded as a significant cause of the bankruptcy, each director can consequently be held jointly and severally liable for the shortfalls in the estate of a bankrupt company.

An individual director can only avoid liability if they are able to prove that:

- They have not been negligent (*nalatig*) as far as the improper management is concerned.
- They have not been negligent in taking measures to prevent the consequences of improper management.

A claim on this basis can solely be instituted against the director(s) by the trustee in the bankruptcy (curator) on behalf of the collective creditors. Only improper management in the three year period prior to bankruptcy can serve as a basis for such a claim. The Dutch court has the authority to reduce the amount for which directors are liable on a collective or individual basis.

Dutch law imposes liability in the event of bankruptcy of the company not only on directors, but also on policy-makers (*feitelijke beleidsbepaler*). Such a policy-maker may be held personally liable for the deficit in bankruptcy as if they were a director of the company.

Other key risks

Tax debts, social security and pension premiums

Each individual director is responsible for adequate notification to the Dutch tax authorities, social security authorities and pension funds when the company is no longer able to pay certain taxes (including wage tax and VAT), social security and/or pension premiums. Notification must be made forthwith when it appears that the company is or will no longer be able to fulfil its payment obligations, and in any event within 14 days after the date on which the sums were due.

If the notification is not sent in time or not sent at all, the individual directors are jointly and severally liable based on the assumption that the non-payment is caused by mismanagement. An individual director who is able to prove that they are not responsible for the late notification will not be liable, however, such exculpation is subject to a high threshold.

Misleading accounts

If the (annual) accounts published by the company contain a misleading presentation of the financial situation of the company, the directors can be held jointly and severally liable towards third parties for damages suffered as a result.

Protection against liability

How can directors be protected from liability?

Internal liability: discharge

The general meeting can grant discharge (*décharge* or *kwijting*) from liability to the directors for their management conducted during a specific period. Generally, discharge is granted at either:

- The annual general meeting in which the annual accounts for a financial year are adopted.
- The end of the director's position as a member of the board by way of a shareholders' resolution.

Discharge can only be granted for management conducted in the period prior to the resolution granting the discharge was taken, i.e. discharge cannot be forward looking. Discharge can only release a director from liability for management activities to the extent that these appear or may appear from the company's annual accounts or were made known to the general meeting. A director may not invoke discharge as a ground of release from liability if this is in breach of the principle of reasonableness and fairness (*redelijkheid en billijkheid*), which is assessed on the basis of all relevant circumstances. Discharge is limited to prevention of a director's contractual internal liability towards the company, i.e. it cannot prevent external liability to third parties.

External liability: indemnity

External liability of a director can be covered by an indemnity from the company and may include costs for legal assistance. Furthermore, the general meeting or the company may contractually waive its rights to claim damages from a director (i.e. in relation to liabilities not covered by discharge). Such indemnity will have no effect if the company is in a state of bankruptcy.

D&O insurance

It is customary in the Netherlands for a company to take out directors and officers liability insurance for its directors, covering both internal and external liability risks.

What practical steps can directors take to avoid liability?

Directors should:

- Remain up to date on and keep each other informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.

- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, anti-bribery/corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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New Zealand

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

The use of a company is the most common form of corporate vehicle in New Zealand, and the most common type of company used is a limited liability company. These companies are incorporated under the New Zealand Companies Act 1993 (**Companies Act**) and are statutorily obligated to have their names end with one of “Limited”, “Ltd” or “Tāpui (Limited)”.

New Zealand company law does not have separate concepts of “public” and “private” companies. All companies must be registered under the Companies Act and are otherwise formed in the same way.

A company must have at least one shareholder and one director to be incorporated in New Zealand. The Companies Act provides that the business and affairs of a company must be managed by, or under the direction or supervision of, the company's board of directors.

A range of other types of entities do exist in New Zealand such as limited partnerships, trusts and co-operatives, but this guide focuses on the legal mechanics of management of limited liability companies.

Types of director

What is a “director”?

Directors (other than a “deemed director”) must be a natural person, and are generally elected or appointed by the company's shareholders. The Companies Act provides that the meaning of the term ‘director’ can also include any person:

- occupying the position of director of a company by whatever name called
- in accordance with whose directions or instructions a director or the board of a company may be required or accustomed to act

- who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which would fall to be exercised by the board
- to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board, and
- in accordance with whose directions or instructions a director (whether appointed or not) may be required or is accustomed to act in respect of their duties and powers as a director.

Any of these persons (other than those specified in the first bullet point) who have not been validly appointed or elected as a director of a company will be considered a “deemed director”, and will owe many of the same duties and may face many of the same liabilities as a validly appointed or elected director. “Deemed directors” can be non-individuals, including another company if that company has a certain amount of influence over the decision making of the company's directors. In general, however, New Zealand company law does not differentiate between different types of directors – all directors are subject to the same duties.

What are the different types of director?

Under the Companies Act there is only one type of “director”. In practice, however, there are generally two 'sub-categories' of director in New Zealand; executive directors and non-executive directors (who will often be independent directors).

Executive directors are typically directors who are also a member of the company's C-suite and hold a high-ranking executive title. Often the managing director of a company will be the CEO and will be appointed as such by the board. Sometimes the constitution or shareholders' agreement of a company will make an express provision for the appointment of a managing director, though this is not a requirement of the Companies Act.

Non-executive directors will not hold an executive position with the company but may have a financial interest in the company (either directly or through their nominating shareholder).

Independent directors are persons who do not have a financial or other material interest in the company or are not related to any shareholder. Companies listed on the New Zealand stock exchange are required to have a number of independent directors on their boards. Independent directors are increasingly seen as a prerequisite to good governance and can also be found on the boards of non-listed companies. This is particularly usual in a joint venture arrangement, where the joint venture parties hold an equal shareholding in the joint venture company and have an equal right to the appointment of directors on the board. The terms of appointment of an independent director will be found in the governing documents of the company, namely its constitution, shareholders' agreement or joint venture agreement (as applicable).

Eligibility

Who can be a director?

Any person who is:

- 18 years or older
- not an undischarged bankrupt
- not subject to a property order under the Protection of Personal and Property Rights Act 1988
- not prohibited from being a director, general partner or promoter under certain statutory provisions (including the Companies Act, the Financial Markets Conduct Act 2013, the Takeovers Act 1993 and the Insolvency Act 2006), and
- not prohibited from being involved in the management of a company or limited partnership under certain statutory provisions (including the Companies Act, the Financial Markets Conduct Act 2013, the Takeovers Act 1993 and the Insolvency Act 2006),

may be a director of a limited liability company.

In addition to the above, every limited liability company in New Zealand must have at least one director who either lives in New Zealand or who lives in Australia and is also appointed as a director of a company incorporated in Australia.

Minimum / maximum number of directors

Every limited liability company must have at least one director. There is no maximum number of directors. However, a company's constitution may specify a greater minimum number of directors and/or designate a maximum number of directors on its board.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or by any other means set out in a company's constitution. The constitution of a wholly owned subsidiary company commonly allows the parent company to appoint directors by a simple written notice to the company.

The appointment of a director must be notified to the New Zealand Companies Office within 20 working days of the director's appointment taking effect. A director's residential address is included on the public record.

From 18 November 2026 the Companies (Address Information) Amendment Act 2025 will provide a mechanism for directors to use an alternative to their residential address on the public record if they have serious concerns for their own personal safety or that of those they live with. In order to use an alternative address a director must give a statutory declaration that public disclosure of their residential address is *"likely to result in physical or mental harm"* to the director or someone they live with.

How are directors removed?

Subject to a company's constitution, directors can be removed by way of ordinary resolution of the shareholders. The constitution of a wholly owned subsidiary company commonly provides for the removal of a director by the parent company by way of a simple written notice to the company.

The removal of a director must be notified to the New Zealand Companies Office within 20 working days of the removal or resignation taking effect.

Board / management structure

Typical management structure

Boards of New Zealand companies are unitary structures constituted by all of the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company, at a minimum, meets its statutory obligations.

How are decisions made by directors?

The manner in which directors make decisions is set out in the company's constitution. The constitution typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Subject to a company's constitution, the quorum for board meetings is a majority of two directors (although notice must be given to all). Unless the constitution stipulates otherwise, each director has one vote and voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the constitution may specify otherwise.

If a company does not have a constitution, the Companies Act sets out the way in which directors make decisions, which is similar to the manner set out above.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (eg in the company's constitution or in internal policies and protocols). This is commonly referred to as the "indoor management rule" and entitles third parties who deal with a company to presume that all internal company procedures to secure the necessary authority have been taken. Since being codified in New Zealand under the Companies Act, recent case law has confirmed a more limited application of the protection afforded by this rule to third parties dealing with a company director exercising powers that they would *customarily* have authority to do.

Normally, a company's constitution gives its directors wide ranging powers to manage the company's business and affairs as they see fit, though the constitution may

provide that shareholders can direct the company's business and affairs, or reserve certain powers for the shareholders to exercise. Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

Delegation

The Companies Act provides that the board of a company may delegate one or more of its powers to any person. This is subject to a company's constitution, and there are certain powers that cannot be delegated in any circumstance, which are generally processes contemplated by (and itemised at Schedule 2 of) the Companies Act.

Delegation does not, at any time, absolve directors of responsibility. The Companies Act provides that a board will remain responsible for the exercise of the power by the delegate, as if the power had been exercised by the board, unless:

- the board believed on reasonable grounds before the exercise of the power that the delegate would exercise the power in conformity with duties imposed on directors of the company by the Companies Act and the company's constitution; and
- the board monitored, by means of reasonable methods, the exercise of the power by the delegate.

Duties and obligations of directors

What are the key general duties of directors?

The core corporate duties applying to company directors are found in the Companies Act. Directors also owe duties at common law and in equity in parallel to these statutory duties. A director occupies a fiduciary position in relation to their company and owes the company certain fiduciary obligations in equity.

These duties apply to all directors of a company, whether active or not. There is no protection under New Zealand law for "sleeping" or "silent" directors who in fact have little or no knowledge of the affairs of a company.

It is a criminal offence if a director commits a serious breach of these duties, and they can be liable to imprisonment for a term not exceeding five years or to a fine not exceeding NZD200,000. A serious breach would be where the director exercises powers or performs duties as a director in bad faith while knowing the conduct is not in the best interests of the company and knowing that the conduct will cause serious loss to the company.

Set out below is a brief description of each duty.

Te Aka Matua o te Ture | Law Commission is reviewing the duties and potential liabilities of company directors, focusing on directors' core duties and liabilities under the Companies Act and whether directors' duties and liabilities under other legislation can be approached in a more consistent and principled manner in future legislative reform. The Law Commission will consult publicly in 2026 and aims to complete its final report in 2027. As at the date of this guide consultation had not commenced.

Duty to act in good faith and in the best interests of the company

A fundamental directors' duty under New Zealand law is the duty to act in good faith and in what the director believes to be in the best interests of the company. This is a subjective test and requires directors to act honestly, exercise powers in the interests of the company, and avoid conflicts of interest. There is growing appreciation, both in practice and established in case law, that a company's best interest can include more than its financial bottom line, and may include environmental, social and governance concerns. A legislative amendment was made to the Companies Act in August 2023, which confirmed that directors may consider matters other than the maximisation of profits (for example, environmental, social, and governance matters).

In certain circumstances (including express permission in the company's constitution) a director may act in accordance with what they believe to be in the best interests of the company's holding company or joint venture partner, even though it may not be in the interests of the company. This does not excuse the directors from acting in good faith (or in compliance with their other duties); it merely allows different interests to be taken into account.

Further, where the company is or may be approaching insolvency, a director's duty of good faith extends to creditors of a company, given that it is primarily creditors' funds which are at stake in such circumstances. The current settled caselaw on this topic is the New Zealand Supreme Court's decision in *Yan and others v Mainzeal Property and Construction Limited (in liquidation) and another* [2023] NZSC 113 (**Mainzeal**), where the Supreme Court comprehensively set out the principles applicable in such circumstances.

Powers to be exercised for a proper purpose

Directors must exercise their powers for a proper purpose. In assessing what a "proper purpose" is, the purpose for which a power is used must be consistent with the purpose for which the power was granted, assessed objectively.

To date, courts have confined the application of this duty to limited situations where a director takes certain steps (such as issuing shares) to prevent a take-over or change of control in a company.

Directors to comply with the Companies Act and a company's constitution

A director must not act, or agree to the company acting, in a way that contravenes the Companies Act or its constitution (in the case of the latter, if the company has one). A court can make an order restraining a director that proposes to engage in conduct that would contravene the company's constitution. On the application of a shareholder, the court can also order a director to take action that is required by the directors under the company's constitution or the Companies Act. A court may also appoint a liquidator if it is satisfied that the company or one or more of its directors or shareholders, has in a persistent or serious way failed to comply with their duties under the Companies Act.

Reckless trading

A director must not cause, allow or agree to the carrying on of the business of the company in a manner which is likely to create a substantial risk of serious loss to creditors. There can only be a substantial risk of serious loss where the company is

already in some financial difficulty, or where the action proposed would effectively expose the company's solvency. In the case of looming insolvency, it is the creditors' funds at risk, rather than shareholders' equity. Directors need to be extremely cautious before embarking on a course of continued trading as a result. If operating the business as usual is likely to cause significant risk of serious loss to creditors, trading in that manner in the face of insolvency will breach this duty. *Mainzeal* has confirmed that compensation for a breach of this duty should be assessed on a net deficiency basis. This means directors may be liable for the amount by which a company's position worsened from the time the company should have stopped trading and the time it went into liquidation.

Duty in relation to obligations

Equally, a director must not agree to a company incurring an obligation unless the director believes at that time on reasonable grounds that a company will be able to perform the obligation.

In cases of near insolvency, directors need to carefully monitor the company incurring new obligations. This provision requires consideration of the specific obligations being taken on by the company, and the reasonableness of the director's belief that the company would be able to meet that obligation. *Mainzeal* has confirmed that compensation for a breach of this duty should be calculated on a new debt basis (i.e. the amount of new debts incurred in breach of this duty, to the extent not satisfied).

Carrying on business fraudulently or dishonestly incurring debt

A director cannot knowingly be a party to a company carrying on business that has an intention to defraud creditors of the company or any other person or for a fraudulent purpose.

Every director of a company commits an offence if:

- the company incurs a debt
- the company is insolvent at the time that it incurs the debt (or other debts that include the debt) or becomes insolvent by incurring the debt (or other debts that include the debt)
- the director knows, at the time when the company incurs the debt, that the company is insolvent or will become insolvent as a result of incurring the debt or other debts that include the debt, and
- the director's failure to prevent the company incurring the debt is dishonest.

Any director who breaches this duty is liable to imprisonment for a term not exceeding five years or to a fine not exceeding NZD200,000.

Duty to exercise reasonable care and skill

A director of a company, when exercising their powers or performing duties as a director, must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account (but without limitation) the:

- nature of the company;

- nature of the decision; and
- position of the director and the nature of the responsibilities undertaken by them.

The standard of care and skill required is not that of a person of the same knowledge and experience as the director, but the objective standard of a reasonable director. However, greater care and skill may be expected of directors in certain circumstances, for instance for directors of some types of complex companies (such as issuers of financial products) or for decisions that require greater time and effort (such as approval of financial statements). So, while at face value the notion of a reasonable director does not draw distinction between executive and non-executive directors, the greater the responsibility undertaken by a director, the higher the standard they will be held to. In *Mainzeal* the New Zealand Supreme Court focused on the need for directors to act reasonably, as well as honestly and diligently. The *Mainzeal* directors relied on unenforceable assurances of support from group companies, which the New Zealand Supreme Court found was unreasonable in the circumstances and ultimately a factor in the directors being found liable in this case.

Duty relating to use of company information

The general rule is that a director of a company who has information in their capacity as a director or employee of the company, being information that would not otherwise be available to them, must not disclose that information to any person, or make use of the information except for the purposes of the company.

In addition, directors have similar duties under common law, for example not to misuse the company's property, and to keep company information confidential and only use it for the benefit of the company.

What are directors' other key obligations?

The Companies Act requires directors to file annual returns, prepare and file annual accounts if the company is “large”, is internationally owned or if there is another legislative requirement to file, and submit other information to the New Zealand Companies Office, including details of changes to the ultimate holding company, directors and constitution of the company. The annual return, annual accounts and other information must be submitted to the New Zealand Companies Office within the time limits prescribed by the Companies Act. It is also the responsibility of the directors to maintain and keep the share register of the company up to date.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental, health and safety and building laws, tax laws, employment laws, consumer protection laws, competition laws, overseas investment laws and bribery/anti-corruption laws.

Transactions with the company

The Companies Act regulates the circumstances in which directors and their connected persons (broadly, family members and connected companies or trusts) can

enter into transactions with the company. The transactions covered by these rules include long-term service contracts, loans and the disposal or acquisition of substantial assets.

Provided a director's interest in a transaction is disclosed, and the constitution of the company does not provide otherwise, "interested directors" may vote on any decision by the board.

The constitution of a company may set out specific requirements regarding how such conflicts are managed.

All disclosed directors' interests must be recorded in the interests register of the company, and unless approved unanimously by all shareholders, shareholders have the right to require the company to establish that it received fair value under any contract in which any director is interested.

Liabilities of directors

Breach of general duties

Directors generally owe their duties to the company itself and not to the parent or other group companies, individual shareholders or creditors. Therefore, in most situations only the company can bring an action for breach of duty against a director.

However, a shareholder or director is able to bring an action for breach of duty on behalf of the company (known as a "derivative action") in certain circumstances. In order to bring a derivative action, the shareholder or director must apply to the courts for leave to bring proceedings in the name of the company.

In determining whether to grant leave, the court will have regard to:

- The likelihood of the proceedings succeeding
- The costs of the proceedings in relation to the relief likely to be obtained
- Any action already taken by the company to obtain relief, and
- The interests of the company in the proceedings being commenced, continued, defended or discontinued, as the case may be.

In addition, leave to bring proceedings may only be granted if the court is satisfied that:

- the company does not intend to bring, diligently continue to defend, or discontinue the proceedings, as the case may be or
- it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

A court may make any order it thinks fit in relation to proceedings, including, damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

In addition to the above, a shareholder or former shareholder may bring an action against a director for breach of a duty owed to them as a shareholder. Such duties would include supervising the share register and disclosing interests and share dealings. No action may be brought against a director to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain foregone, by the company.

Liabilities on insolvency

Personal liability may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on “reckless trading” or trading while insolvent may be held personally liable for the unsatisfied liabilities of the company in the event of the company's failure. In those circumstances the director may be liable to contribute to the company's assets on a winding up, the shortfall owed to creditors from the point of insolvency to the time of failure and, in the case of carrying on the business fraudulently or dishonestly incurring debt, to criminal penalties.

If, in the course of a liquidation of a company, it appears to the court that a person (including a director or former director or the company) has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the court may, on the application of the liquidator, creditor or shareholder:

- inquire into the conduct of the director and
 - order the director:
 - to repay or restore the money or property or any part of it with interest at a rate the court thinks just or
 - to contribute such sum to the assets of the company by way of compensation as the court thinks just, or
 - where the application is made by a creditor, order that director to pay or transfer the money or property or any part of it with interest at a rate the court thinks just to the creditor.
-

Other key risks

There are over 100 sections of the Companies Act which provide that a breach can constitute a criminal offence. In almost all these sections, criminal liability is imposed on the directors personally, in addition to the company (there are also limited defences relating to reasonableness on the part of directors). Penalties can be up to NZD10,000 depending on the offence. More serious dishonesty offences can carry up to five years imprisonment or a fine of NZD200,000.

A director can also be liable for a tort (for example, negligence) committed primarily by the company, but through their agency if they have assumed personal responsibility for their actions.

Directors can also be personally liable under other New Zealand legislation. This includes, among others, the Financial Reporting Act 2013, Fair Trading Act 1986, Financial Markets Conduct Act 2013, Health & Safety at Work Act 2015, Resource Management Act 1991, Commerce Act 1986, Privacy Act 2020, Overseas Investment Act 2005, the Building Act 2004 and the Takeovers Code. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (eg conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the Companies Register, being found liable for reckless trading or carrying on a business fraudulently and generally for conduct which makes a director unfit to manage a company).

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

A company may, if authorised by its constitution, indemnify a director or employee of the company in respect of liability to any person other than the company or a related company for any act or omission of the director or employee (other than criminal liability, or breach of the director's duty to act in good faith and in the best interests of the company, and in the case of an employee, any fiduciary duty owed to the company or a related company). The company may also indemnify a director or employee for costs incurred by that director or employee in defending or settling any claim or proceeding relating to such liability.

Provided that it is authorised by its constitution, a company may put in place and pay for directors' insurance in relation to the directors' roles as directors (D&O cover). The directors of the company must resolve to give effect to the insurance and sign a certificate stating that the cost of the insurance is fair and reasonable to the company.

At a minimum, we recommend company directors:

- know and understand the nature and scope of D&O cover in place, and be briefed on the limits of all such insurance cover; and
- ensure that appropriate disclosures are made at the annual renewals of that cover.

What practical steps can directors take to avoid liability?

Directors should do all of the following:

- Understand the business and exercise financial literacy. Understanding the business is fundamental. Directors must ensure they have sufficient familiarity with the business operations to supervise management. A core role is to regularly monitor the financial performance of the business and forecasts and so the ability

to read and understand financial statements is a key piece of a director's artillery. This is particularly important where the company may be approaching insolvency, as directors are required to address how they can continue to protect creditors of the company if there is substantial risk of serious loss or where there is doubt as to whether obligations incurred by the company can be honored.

- Keep informed about the affairs of the company, particularly its working capital and financial position. Directors should have access to up-to-date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Insist on a strong corporate governance framework. A number of statutory obligations have express or implicit process-based defences and many of the prominent director liability cases feature obvious corporate governance failings. In circumstances where misconduct is alleged, the courts will inevitably look to the processes surrounding the directors' decision-making.
- Keep proper records. Directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Resolutions should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants. Directors should read minutes taken and ensure they are correct. They should consider whether the record indicates any inconsistency in decision-making. A good question for directors to ask themselves is whether the minutes are sufficiently detailed so as to assist if ever they're asked to give evidence.
- Take professional advice. Obtaining professional advice regularly and ensuring that all such advice is understood and, where necessary, acted upon can be a director's lifeline. Certain areas of directors' obligations are technical and will require specialist external advice, particularly in relation to understanding what is necessary for a director to discharge their duties and especially on matters of solvency. In some cases, reliance on professional advice will provide a potential defence to liability (for example, for disclosure breaches under New Zealand's financial markets legislation). In other cases, advice may be too generalised or vague to provide a defence. In all cases, however, directors should not abdicate their own judgement.
- Communicate. Communicating with shareholders, financiers and key stakeholders (including government bodies and regulators) can both assist with discharging duties and also mitigate risk by allowing views to be cross-checked and problems identified early. For example, early engagement with financiers on solvency concerns should always be promoted.
- Ensure that they are aware of, and comply with, the terms of any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.

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Corporate entities

What type of company is typically used in group structures?

The most common type of company used in a group structure is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

A director is any person appointed by the company to direct and manage the business of the company. A person who has not been formally appointed as a director will also be regarded as a director under the law, if they are a person on whose directions and instructions the directors of the company are accustomed to act, except where such person is merely acting in a professional capacity.

What are the different types of director?

All directors are subject to the same legal duties and responsibilities. However, under Nigerian law public companies are required to have at least one third of all directors as "independent directors". An Independent Director is one who (or whose relatives) during the two years preceding their appointment:

- Was not an employee of the company;
- Did not own directly or indirectly more than 30% of the shares in the company;
- Did not give to or receive payments from the company of more than NGN20,000,000;
- Did not own at least a 30% shareholding in a company that gave or received such payments - nor were they a partner, director or officer of such a company or partnership;
- Was not engaged directly or indirectly as an auditor of the company.

Directors may also appoint a director to the position of Chair with the responsibility of presiding over board and shareholder meetings. Unless the articles of association state otherwise, the Chair will have a casting vote in the case of equality of votes. The Board may also appoint a Managing Director to preside over the daily affairs of the company on behalf of the board and the shareholders.

Directors may be executive (usually employees who have an executive role) or non-executive (usually not employees). They may also be appointed to represent a particular shareholder (a nominee director) on the Board.

Eligibility

Who can be a director?

There are no nationality or residency restrictions. However, a foreign director must have a duly issued Combined Expatriate Residence Permit and Aliens Card (CERPAC) where the director provides a Nigerian address as their residential address. Additionally, a director must be at least 18 years of age, must be of sound mind, must not have been removed or suspended from the board of another company, convicted of any offence related to the management or winding up of a company and must not be insolvent. A director must also not have been disqualified by the courts or a regulatory authority.

A corporation cannot be a director and must appoint a representative.

Minimum / maximum number of directors

Subject to specific industry requirements, a company is required to have a minimum of two directors. There is no maximum number of directors under the law. However, the articles of association of a company may specify a minimum (greater than the minimum specified under the law) and maximum number of directors. Where the number of directors falls below two (2), the company must ensure new directors are appointed within a month.

A director or member of a company other than a small company, who knows that the company carries on business with less than 2 directors for more than 60 days will be liable for all liabilities and debts incurred by the company during the period when the company carries on business.

A small company is a private company with a turnover of less than NGN25,000,000; a net assets value of not more than NGN12,500,000; where none of its shareholders is a non-national; none of its members is a government or government corporation or nominee; and the directors hold at least 51% of its equity share capital. A company qualifies as a small company in a subsequent financial year only if these conditions are met in both that year and the preceding financial year.

Appointment and removal

How are directors appointed?

Directors are required to consent to their appointment. The initial directors are appointed in writing by the subscribers of the memorandum of association of the company or they can be named in the articles of association of the company. Subsequently, directors can be appointed by a vote at annual general meetings of the shareholders. Where a vacancy exists on the board because of death, resignation, retirement or removal, the board of directors may appoint a new director to fill such vacancy until the next annual general meeting, when such an appointment may be approved by the shareholders. If the appointment is not so approved, that person immediately ceases to be a director.

Details of the appointment must be filed at the Corporate Affairs Commission within 14 days of the appointment taking place.

How are directors removed?

Notwithstanding anything in a company's articles or any agreement between a director and the company, a director can be removed by a simple majority vote of the shareholders, subject to certain procedural requirements which must be strictly followed. A director may also resign at any time.

When a director leaves office, notice must be filed at the Corporate Affairs Commission within 14 days.

Board / management structure

Typical management structure

Boards of Nigerian companies are single-tier structures made up of all the company's directors who individually have the same duties and obligations to the company. The directors are also collectively responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations. The board may appoint one or more of its members to the office of the managing director and may delegate its powers to such managing director to manage the daily operations of the company. Directors may also appoint a director to the position of Chair with the responsibility of presiding over board and shareholder meetings.

How are decisions made by directors?

Directors are free to regulate their proceedings, and the manner in which directors can make decisions may be set out in the company's articles of association – whether by physical meeting, teleconference or a written resolution. Other than single director companies and unless the company's articles stipulate otherwise, the minimum quorum for board meetings is two directors where there are not more than six directors. If there are more than six directors, then quorum is a third of the number of directors.

Unless the articles stipulate otherwise, decisions at board meetings are made by a simple majority vote, and the chair will have a casting vote in the case of equality of votes. When decisions are made in writing, however, the unanimous agreement of all directors is required.

In making decisions, directors must act in the best interests of the company and must have regard to the impact of the company's operations on the environment, the interests of the company's employees in general, as well as the interests of its shareholders.

Authority and powers

The business of a company is directed and managed by the board of directors who can exercise all powers of the company that are not required (by law or by the company's articles) to be exercised by the members. Any collective act of the board of directors, or the act of a managing director in the usual way the business of the company, will generally be treated as the act of the company itself.

Where a company holds a person not duly appointed out to third parties as a director, and such person acts as such on behalf of the company, the company is bound by such person's acts.

Delegation

Generally, the board of directors may exercise its powers through committees consisting of directors or may delegate its powers to a managing director (or CEO) to manage the daily operations of the company. Such committee or managing director must conform to the terms of such delegation.

Where directors delegate their powers they must not delegate their power in such a way and manner as may amount to an abdication of their duty and overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

A director stands in a fiduciary relationship with a company and must observe the following duties:

- **Good faith:** Directors must observe good faith in any transaction in relation to the company and discharge their duties honestly.
- **Best interest of the company:** Directors must act in the way that they believe to be the best interest of the company, so as to further its business and promote its objectives. In doing so, the directors must have regard to the impact of the company's operations on the environment in the community it operates in, the interest of the company's employees and the interest of its shareholders. Directors are responsible for monitoring the risk management framework in place in the Company, to ensure business continuity.
- **Care and skill:** Each director must exercise a degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances. Directors must meet the minimum standard of skill and care expected of someone in their position, and they must also bring to bear their skills and experience.

Therefore, the more qualified or experienced a director is, the greater the statutory standard required of them.

- **No collateral purpose:** Directors must exercise their power for the specific purpose it was given and not for any collateral purpose. They must not restrict their discretion to vote in any particular way.
- **No conflict of interest:** Directors must not put themselves in a position where there is, or could be, a conflict between their personal interests and their duty to the company.
- **No secret profit:** Directors must not make any secret profit or achieve any unnecessary benefit during management of the affairs of the company or through utilisation of the company's property. They must declare the nature and extent any interest in proposed transactions or arrangements with the company before the secret profits are made.
- **Misuse of corporate information:** Directors must not misuse the company's information, and this duty does not cease by the director having resigned from the company.
- **Gifts:** Directors must not accept bribes, gifts or commissions (either in cash or kind) from any person in respect of any transaction involving their company in order to introduce their company to deal with such a person.

What are directors' other key obligations?

Nigerian law requires directors to prepare and file annual returns, financial statements and other corporate information to the corporate affairs commission within the prescribed time limits.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

Directors must not put themselves in a position where there could be a conflict between their personal interests and their duty to the company. A director who is directly or indirectly, interested in a transaction or a proposed transaction with the company must immediately notify the directors of such company in writing, specifying nature of their interest.

Generally, Nigerian company law regulates the circumstances under which directors or persons connected to them can enter into transactions with the company, e.g. the disposal or acquisition of substantial company property. Unless exemptions apply, these transactions may only be entered into with prior shareholder approval.

Liabilities of directors

Breach of general duties

Generally, only the company can bring an action to enforce a director's duty or remedy its breach, as directors owe their duties to the company itself and not directly to the company's shareholders or creditors.

However, shareholders are permitted to sue directors for breach of duty on behalf of the company by way of a personal/representative action or through a derivative action, under certain circumstances. In the case of a derivative action, the court approval must be obtained by the shareholders.

A range of remedies in favour of the company are available against a director for breach of duty including suing for negligent performance, damages, recovery of misapplied property, accounting for profit made in breach of duty, restitution, injunction to prevent breach and rescission of a contract.

Acting Without Proper Appointment

If a person acts as a director without being duly appointed, any actions they take are not binding on the company, and the individual will be personally liable for those actions. However, if the company holds that person out as a director, the company itself will be bound by their acts.

Liabilities on insolvency

Directors may be held personally liable for fraudulent or wrongful trading if the company is insolvent or nearing insolvency.

If, during the winding up of a company, it appears that the business of the company has been carried on in a reckless manner, or for any fraudulent purpose, the directors who knowingly allowed it may be held personally responsible for the liabilities of the company, without any limitation of liability. In the case of fraud, the director commits an offence and is liable upon conviction to a fine or to imprisonment for a term of two years or both. Liability may however be avoided if the directors can show that they took every step they possibly could take to minimise the potential loss to the company's creditors.

Where a director makes a statutory declaration of solvency where they have no reasonable grounds for making the declaration, if convicted, the director will be liable to a fine in addition to imprisonment for a term of three months.

If the company has gone into insolvent liquidation and at some time before the commencement of the winding-up of the company, the directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, they may be held liable to make any necessary contribution to the company's assets.

Other key risks

A director may be held personally liable for taxes and related penalties that are due by the company if the director has breached the tax obligations of the company.

A director may be held criminally responsible if:

- The director committed a crime or participated in the commission.
- If they committed a criminal offence within the company related to its activities, even if the director was not directly involved in the commission of the crime (e.g. under the Labour laws, Economic and Financial Crimes Commission Act, Money Laundering (Prohibition) Act, Investment and Securities Act).

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company or being found liable for fraudulent or wrongful trading).

Protection against liability

How can directors be protected from liability?

- **Indemnity:** A company cannot indemnify a director from liability arising from the breach of any law in relation to the company. Such breaches may include negligence, default, or breach of trust. However, a company may indemnify a director in the form of an advance against legal costs incurred by the director in successfully defending legal proceedings or in which the director is acquitted. If the director is, however, not successful, the advance must be repaid to the company.
- **Insurance:** Directors' and officers' (D&O) insurance is available in Nigeria. It typically provides cover for individual directors against claims made against them in their capacity as director (including defence costs) and company reimbursement when it has indemnified its directors.
- **Ratification:** shareholders can ratify or confirm negligent actions taken by directors, or conduct which breach a director's duty, except where the breach is an illegal or fraudulent. This does not, however, absolve a director from any liability to a third party.

What practical steps can directors take to avoid liability?

To avoid liability, directors should:

- Ensure that the company's articles provide for indemnification, that they have entered into an appropriate indemnification agreement with the company, and that there is sufficient D&O insurance in place.
- Perform their duties conscientiously, and act in the best interest of the company. They must also ensure that they are aware of, understand, and comply with the company's governance and compliance structures.
- Keep informed about the affairs of the company and ensure that they have access to up-to-date financial information. They should not hesitate to ask important management questions to enable them to have a better understanding of the company's business.

- Devote ample time to the company, attend board meetings regularly and prepare sufficiently for them. They must also ensure that the meetings are well documented. The minutes should include key information such as the factors the directors took into consideration when making such decisions. A director that disagrees with a majority vote must ensure that their dissent is formally and accurately recorded.
- Make full disclosures to the board and shareholders regarding conflicts of interest.
- Understand their fiduciary and legal duties to the company, undertake professional development as a director, and seek professional advice from lawyers, and other advisers when necessary.

Key contacts



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Norway

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

In Norway, a private limited liability company will normally be the corporate entity of choice in a group structure.

Types of director

What is a "director"?

There is no complete definition of "director" under the Norwegian Private Limited Liability Companies Act. However, reference to a director is typically to a member of the company's board of directors, which is responsible for the organisation of a company and management of the company's affairs.

Further, the general manager of a private limited liability company may be referred to as the "managing director".

What are the different types of director?

There are two types of director:

- A board of directors whose members usually are appointed by a shareholders' meeting and must be registered with the Norwegian Register of Business Enterprises.
- A managing director (general manager) who may be appointed by the board of directors and, if so, must be registered with the Norwegian Register of Business Enterprises. For a private limited liability company, it is not mandatory to have a managing director.

If the number of employees in a company exceeds 30 employees, and the company has not established a corporate assembly, employees have the right to be represented in the board of directors and elect their representatives themselves. In companies with more than 200 employees the company is required to have employee representatives,

provided that it has been agreed that the company shall not have a corporate assembly.

Eligibility

Who can be a director?

Only persons over the age of 18 may be elected as members of the board of directors.

At least 50% of board members must reside in an EEA state, the United Kingdom of Great Britain and Northern Ireland, or the Swiss Confederation. If appointed, the general manager must also reside in an EEA state, the United Kingdom of Great Britain and Northern Ireland, or the Swiss Confederation. It is not possible to have a legal person (e.g., a company) serving as a member of the board of directors or as a managing director.

Anyone employed in the company at the date of election may serve as an employee representative and anyone employed in the company on the election date may vote on their election.

Requirement for gender representation on the board of directors

For private limited liability companies (AS) (and certain other legal entities) of a certain size (measured in income and number of employees on the balance sheet date of the company's annual accounts), new requirements for gender representation on the board of directors were introduced from 1 January 2024. For such companies that have at least three board members, the new requirements (which vary depending on the number of board members) mean that a maximum of between 67 and 50 per cent of these board members may be of the same gender. In practice, the requirement means that the board of directors in companies subject to the gender composition requirements must have at least 40 per cent of each gender represented on the board.

There are transitional provisions which provide for a gradual introduction of these requirements:

1. companies with more than 30 employees have until 30 June 2026 to comply;
2. companies with operating revenues and financial revenues that cumulatively exceed NOK 70 million have until 30 June 2027 to comply; and
3. companies with operating revenues and financial revenues that cumulatively exceed NOK 50 million have until 30 June 2028 to comply.

There are separate requirements for gender composition of deputy board members, and for board members and deputy members elected by and from among the employees.

Minimum / maximum number of directors

For private limited liability companies (AS) there must be a minimum of one director in the board of directors. For companies with a corporate assembly, the minimum number of board members is five. There is no maximum.

For public limited liability companies (ASA) the board of directors must have a minimum of three directors, or five in companies with a corporate assembly. There are also similar gender composition requirements for the board of directors as have been introduced for private limited liability companies.

Appointment and removal

How are directors appointed?

Directors are elected by the general meeting of the company. All shares have the right to vote at the general meeting unless they are considered non-voting shares pursuant to the articles of association.

The articles of association may provide that the general meeting's right of election shall be transferred to others, but this is rarely used. More than half of the board of directors must in any case be elected by the general meeting unless the right to elect is assigned to a corporate body stipulated in the articles of association. The right of election may not be transferred to the board of directors or to a member of the board of directors.

The elected directors must be registered in the Norwegian Register of Business Enterprises. For the registration of non-Norwegian individuals, a certified passport copy, application for d-number (i.e., a personal identification number for foreign individuals) and a registration form must be filed with the Norwegian Register of Business Enterprises. The election of a new director is effective from the date of election by the general meeting.

The election of employee representatives is managed by an election committee (*valgstyre*), which is to be formally established by the company in collaboration with the employee representatives. The election must take place every second year.

How are directors removed?

The members of the board of directors serve for two years. Board members can be removed by the body that elected the director. This does not apply for a board member that has been elected by the employees. The removal decision must be registered with the Norwegian Register of Business Enterprises by filing a registration form.

Any member of the board of directors can retire before its period of service has expired. A director who wishes to resign must notify the company's board of directors and the body that elected the director in advance and file a notification form with the Norwegian Register of Business Enterprises.

Board / management structure

Typical management structure

A Norwegian private limited liability company normally has at a management level, a system consisting of a board of directors and a general manager (managing director).

The company must have a board of directors, comprising of one or more members. If the board of directors consists of at least two directors, the board of directors must have a chairperson. The chairperson is elected by the board unless the chairperson has been appointed by the general meeting. If the board of directors only consists of one person, such director is automatically registered as the chairperson.

In Norwegian private limited liability companies, the board of directors can choose to have a general manager. If one is appointed, the general manager is responsible for the day-to-day management of the company. If a managing director is not appointed, these tasks and obligations will fall to the board of directors.

In Norwegian public limited liability companies, it is obligatory to have a general manager.

How are decisions made by directors?

The board of directors must deal with matters in meetings unless the chairperson of the board finds that the matter can be submitted in writing or dealt with in some other adequate manner. Minutes must be kept of all board meetings.

The board of directors forms a quorum when at least half of the directors are present. A resolution of the board of directors requires the supporting vote of a majority of the directors who participate in the consideration of a matter. In addition, the board may only adopt resolutions if all members of the board of directors have, wherever possible, been invited to participate in the proceedings. In the event of a tie, the chairperson of the board has the casting vote. Those who vote in favour of a proposal which entails a change must however always make up more than one third of all the members of the board of directors.

In companies where the employees are represented on the board of directors, the board of directors must issue instructions detailing the board of directors' activities and procedure. The instructions must, inter alia, include rules as to which matters that are to be dealt with by the board of directors and the functions and duties of the general manager towards the board. The instructions must also include rules for notices of meetings and proceedings at meetings.

Authority and powers

The board of directors jointly represents the company towards external parties and has the authority to sign on behalf of the company.

The board of directors may authorise directors, the general manager or named employees to sign on behalf of the company. Such authorisation may be included in the articles of association, which may also restrict the board of directors' powers to grant authorisation to sign for the company. The right to sign on behalf of the company may not be limited in another manner than individuals acting jointly. The signatory right must be registered with the Norwegian Register of Business Enterprises. The general manager represents the company in relation to the day-to-day management of the company.

As far as third parties are concerned, the board of directors and a managing director can bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g., in respect of internal policies and protocols). However, a legal act may be considered void as against the company if the company, under certain circumstances, shows that the third party realised or ought to have realised that the authority had been exceeded.

Delegation

The board of directors can delegate certain duties to one or more directors in the board or to other persons. However, the board of directors must act with care and regularly check that delegation can be maintained.

Once a duty has been delegated, the board of directors still has a supervisory responsibility. The same rule applies to a managing director when delegating a duty.

Duties and obligations of directors

What are the key general duties of directors?

There are three key duties of the board of directors:

- **Management of the company.** The board of directors must ensure the proper organisation of the business of the company. The board of directors must draw up plans and budgets for the company's business. The board of directors may also lay down guidelines for the business. The board of directors must keep itself informed of the company's financial position and is obliged to ensure that its activities, accounts, and capital management are subject to adequate control.
- **Supervisory responsibility.** The board of directors must supervise the day-to-day management and the company's business in general.
- **Duty to act in the event of capital deficiency of insolvency.** If the equity is presumed to be less than adequate in terms of the risk and scope of the company's business, the board of directors shall forthwith deal with the matter. The board of directors must within a reasonable time call a general meeting and report to it on the company's financial position and propose remedying measures. If the board of directors does not find measures to ensure adequate equity, it must propose the dissolution of the company.

What are directors' other key obligations?

The directors must fulfil their obligations with the company's best interest in mind, and not abuse their position in the company. Abuse would include the following:

- Members of the board of directors may not adopt any measure which may tend to give certain shareholders or others an unreasonable benefit at the expense of other shareholders or the company.
- The directors and general manager may not comply with any resolution of the general meeting or another company body if the resolution is contrary to statutory law or the company's articles of association.

Transactions with the company

There are certain restrictions concerning a board member's and a general manager's ability to transact with the company.

Neither a board member nor the general manager may participate in the discussion or decision of any matter which is of such particular importance to them or any related party that they must be deemed to have a special and prominent personal or financial interest in the matter.

Nor may a member of the board of directors or general manager participate in any decision to grant a loan or other credit to themselves or to issue security for their own debt.

Liabilities of directors

Breach of general duties

The company, a shareholder or others may hold the general manager and/or a member of the board of directors personally and jointly liable for any damage which they, in the capacity mentioned, have intentionally or negligently caused such party.

Members of the board of directors or a general manager who intentionally or negligently infringe any provision issued in or pursuant to the Norwegian Private Limited Liability Companies Act may be punished by fines or in aggravating circumstances by imprisonment for up to one year. Complicity will be similarly punished.

Liabilities on insolvency

It is the responsibility of the board of directors to submit any petition for debt negotiations or bankruptcy proceedings in relation to the company. The board of directors represents the company as bankruptcy debtor in bankruptcy proceedings. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Norwegian legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

Protection against liability

How can directors be protected from liability?

The company can take out directors and officers insurance for the board of directors, which is common in Norway. Usually, this insurance is taken out for the whole board of directors, and not for single members of the board of directors.

The general meeting can adopt a resolution to approve an agreement between the company and members of the board of directors that governs or restricts their liability. The general meeting can also adopt a resolution of no liability, but this can only be done for specific actions, not in general. A resolution of no liability is only effective between the company and the board of directors, which means that shareholders and others still may hold the board of directors liable.

What practical steps can directors take to avoid liability?

Directors should:

- Make sure they fully understand the resolution they are voting for or against, especially what the consequences may be and how the resolution may affect the company's financial situation and shareholders. If the director does not fully understand, the director should seek further information to clarify the situation.
- Keep records. The directors should ensure that written records of board proceedings are kept, and make them as detailed as possible, including the reasons for the decisions that were taken, whether any alternatives were considered, and also any disagreement amongst the board members and the reasons for that.
- Act in the best interest of the company on which board they serve, and not necessarily in the interest of a group of companies. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g., when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.
- Monitor the financial situation of the company, and immediately prepare a balance sheet for liquidation purposes where there is reason to believe the shareholders' equity or liquidity is less than adequate. If the balance sheet evidences that the shareholders' equity is not adequate, the board shall immediately take further actions (see [What are the key general duties of directors](#)).
- Ensure that all transactions are made on arms' length terms.

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Corporate entities

What type of company is typically used in group structures?

The stock corporation (*Sociedad Anónima*) is the most common type of company used for doing business in Peru. This type of company has the following three subtypes:

- Closed form (*Sociedad Anónima Cerrada – SAC*).
- Ordinary form (*Sociedad Anónima - SA*).
- Open form (*Sociedad Anónima Abierta – SAA*) – mandatory for public companies.

For closely held group structures, the SAC is commonly used, in part because it offers greater flexibility, including the possibility of not having a board of directors.

For all these subtypes, a minimum of two shareholders is always required.

Types of director

What is a "director"?

A director is an individual appointed by the shareholders' meeting to be part of the board of directors of the company, a collective body in charge of its management.

An appointed director must perform the position with the diligence of an orderly business person and a loyal representative. They are obliged to maintain confidentiality regarding the affairs of the company and the company information they have access to, even after the termination of their role.

What are the different types of director?

The company's bylaws may provide for the possibility of having three different types of directors to comprise the board of directors: principal, substitute and alternate.

Substitute directors are those appointed to replace any principal director in the event of absence or vacancy.

Alternate directors are those appointed to replace a specific principal director in the event of absence or vacancy.

The board of directors must designate among its principal directors the Chair (*Presidente*) of the board of directors. According to law, unless expressly stated differently in the company's bylaws, the Chair of the board will have a casting vote in the event of a tie in a board vote.

It is not mandatory by law to appoint employees' or lenders' representatives as directors of a company.

Eligibility

Who can be a director?

The legal impediments for an individual to be a director are the following:

- Those persons incapable.
- Persons who are bankrupt.
- Persons that due to their position or duties are barred from engaging in commerce.
- Officials and public servants serving in public bodies whose functions are directly linked to the economic sector in which the company conducts its business activity, except if they represent the Government's participation in those companies.
- Persons who have pending litigation with the company as plaintiffs or who are subject to a corporate liability action initiated by the company and those who are prevented by mandate of an injunction issued by a judicial or arbitral authority.
- Persons who are directors, administrators, legal representatives or agents of companies or partners of partnerships that have interests permanently opposed to the company or who personally have permanent opposition to its interests.

Minimum / maximum number of directors

There must be a minimum of three directors and there is no maximum number of directors.

The bylaws may set a fixed number of directors or a minimum and maximum number of directors. If this is the case, the shareholders' meeting will need to decide the precise number of directors to be appointed for a fixed period, before the election(s) are held.

Appointment and removal

How are directors appointed?

Companies are required to elect their board of directors to ensure minority shareholders are represented. For such purposes, the law regulates the appointment of directors using cumulative voting.

Cumulative voting allows shareholders, for each share held, as many votes as there are directors to be elected, and each shareholder may cast their votes in favor of one person or distribute them among several persons.

The persons who obtain the largest number of votes shall be appointed directors, following the order of votes in favor.

The cumulative voting process is not applicable when directors are elected unanimously by all the shareholders.

How are directors removed?

Directors may be removed at any time, either by the general meeting or by a special meeting that elected them, even if their appointment was one of the conditions of the articles of incorporation of the Company.

Also, the position of director becomes vacant by death, resignation, removal, or if the director has incurred one of the grounds for impediment specified by law or the company's bylaws.

If the director's appointment was registered before the Public Registry of Companies, it will be necessary to file a notarized copy of the shareholders' meeting minute to register the removal of the director.

Board / management structure

Typical management structure

Companies are typically managed by the board of directors, the chief executive officer (general manager as commonly used) and one or more managers depending on the company's size.

How are decisions made by directors?

The company's bylaws specify the way the president of the board or any director (in specific cases) may summon the board of directors of the company.

The quorum for the board of directors is half plus one of the total members. Each director has the right to one vote and resolutions are adopted by the absolute majority of votes of the directors who attend the meeting. The bylaws may establish higher quorums (but may not require the attendance of all members) and majorities.

The board of directors' resolutions must be recorded in a minute book.

Authority and powers

As a collective body, the board has the management and legal representation powers necessary for the administration of the company within its corporate purpose, except for matters reserved by law or the bylaws to the shareholders' meeting. Individual directors do not have separate authority to represent the company unless expressly granted.

Delegation

The board of directors may appoint one director or more (acting as a committee) to resolve or perform certain acts. In order to permanently delegate any power of the board to some directors, two-thirds of board members must vote in favor and the resolution must be registered with the Public Registry of Companies.

Accountability for, and the submission of, financial statements to the shareholders' meeting may not be delegated.

Duties and obligations of directors

What are the key general duties of directors?

Directors must perform their role with the diligence of a prudent businessperson and a loyal representative.

The board of directors should provide shareholders and stakeholders with sufficient, reliable and timely information, as determined by law, regarding the legal, economic and financial situation of the company.

What are directors' other key obligations?

Directors must:

- Prepare the annual report, the financial statements and the proposal for the distribution of profits, if any, to be submitted to the shareholders' meeting.
 - Prepare reports on the advisability of capitalizing loans for a capital increase.
 - Convene general shareholders' meetings.
 - Inform the shareholders, if they so request, with reports or clarifications they deem necessary regarding the matters included in an agenda for a shareholders' meeting.
 - Approve any merger or spin-off project.
-

Transactions with the company

Directors can only enter into agreements with companies which deal with those operations normally carried out between the company and third parties according to market conditions. The company can only grant loans to directors or grant guarantees on its behalf on similar terms and conditions to such transactions usually executed with third parties.

If the agreements, loans or guarantees do not meet these requirements, the prior approval of the board with the vote of at least two-thirds of its members is required.

The directors are jointly and severally liable to the company and third party creditors for any agreements, loans or guarantees entered into or granted in violation of the above-mentioned provisions.

Liabilities of directors

Breach of general duties

Directors shall be liable, jointly and severally, to the company, shareholders and third parties for damages caused by agreements or acts contrary to the law or the bylaws or caused by those made intentionally, with abuse of authority or gross negligence.

The directors are also jointly and severally liable along with the directors that have preceded them for irregularities they have committed if, being aware of them, they had not denounced them in writing to the general meeting.

Likewise, the board is responsible for the compliance with resolutions of the general shareholders meeting, unless the board provides otherwise for specific cases.

Liabilities on insolvency

If, when preparing the latest annual financial statements of the company, or a lesser period, the loss of half or more than a half of the capital has occurred, or shall be presumed, the board must immediately call a shareholders' meeting to inform them about the financial situation of the company.

When the assets of the company are not sufficient to meet its liabilities, the board must, within no more than 15 calendar days of such occurrence, call the creditors and request, if applicable, the insolvency of the company.

If a company has losses that reduce its net assets (*patrimonio neto*) to an amount which is less than one third of the capital stock of the company, without this position being regularised by shareholders, this is a cause for dissolution of the company according to law.

If the company continues doing business despite having incurred a cause for dissolution, the company becomes irregular. In such case, directors (as well as managers and any other representatives and attorneys, duly appointed or de facto) will be personally liable for the acts executed by them in representation of the company since the irregularity occurred.

Other key risks

Given that the directors are the administrators of the company, they are personally, jointly and severally liable (without limit) for contracts and, in general, for all legal acts performed if the company becomes irregular.

The liabilities comprise the fulfillment of the respective obligations, together with, if applicable, compensation for damages and losses caused by acts or omissions that directly damage the interests of the company, partners or third parties. The foregoing is in addition to any criminal liability of the liable parties.

Also, within the scope of anti-trust law, the directors of the company may be held liable if they have participated in the planning or execution of anticompetitive conduct.

In the tax field, the directors may be liable if they exercise the administration or have decision-making capacity in the disposition of necessary resources of the company to pay taxes, or if the duties of their position include the control of the accounting or finances of the company.

In the criminal area, the director of a company may be sanctioned with a penalty of up to four years if they are involved in bribery through which a favor is obtained in the acquisition or contracting of goods and services or, in general, through which a favor is obtained in the course of commercial relations.

Protection against liability

How can directors be protected from liability?

A director will be protected from liability if, having participated in an unlawful agreement or being aware of it, expresses their disagreement with it at the time the agreement was made, provided that their disagreement is stated in the minutes or is notified to the company by means of notarized letter.

Directors can also take out D&O (Directors & Officers) insurance to cover them against civil liability arising from the exercise of such position, providing them with economic resources for the payment of indemnities for damages and losses.

What practical steps can directors take to avoid liability?

The board of directors should play an active role in communicating the company's economic and financial information to shareholders.

From an organizational perspective, it is recommended that companies establish a Criminal Risk Prevention Mechanism applicable to the company's business activities, in order to prevent the commission of crimes in the company's operations, and to mitigate the risks associated with the potential criminal liability of the legal entity.

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Poland

LAST MODIFIED 31 MARCH 2025



Corporate entities

What type of company is typically used in group structures?

In Poland, the most common type of company used in group structures is the limited liability company. This guide therefore focuses on the management of limited liability companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" in Polish company law. Basically, the law regards the management board which represents the company and manages its affairs (the management board consists of members) as a body equivalent to the board of directors.

What are the different types of director?

Polish company law does not differentiate between different types of management board members – all members are subject to the same duties. However, the shareholders may appoint the chair/president of the management board from among the board members. If this is the case, the company's articles of association may provide that, in the case of a voting deadlock at management board meetings, the president of the management board will have the casting vote. Furthermore, the articles of association may confer special powers upon the president of the management board in respect of managing the work of the management board.

The management board member may be an employee or a civil law contractor of a company, but they may perform this function based on separate agreement(s) to be concluded between such member and the company itself.

Eligibility

Who can be a director?

A management board member must be at least 18 years old (full legal capacity), but there are no nationality or residency restrictions (however, a person who has been validly convicted of certain offences specified in Polish law cannot be a management board member). It is not possible to have a legal person as a management board member.

Minimum / maximum number of directors

A company must have at least one management board member. There is no statutory maximum. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Management board members must consent to their appointment and, as a statutory rule, can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution). The articles of association may provide that a given entity (shareholder or any other person) is authorized to appoint management board members by a simple written notice to the company.

Details of appointment must be filed with the commercial register within seven days of the appointment taking place. A management board member's residential address is not included on the public record but must be supplied to the commercial register. By the same deadline, appointment should be filed with the electronic Central Register of Beneficial Owners (as a side note – such filing should be made by sending an electronic form which should be signed with a qualified electronic signature within the meaning of EU Regulation No 910/2014 (eIDAS Regulation) by one of the management board members in accordance with company's rules of representation). Registration in the commercial register is only of informative nature and the appointment is effective upon the date that the company's shareholders resolution is adopted (or at the date indicated in the resolution itself). A management board member cannot be appointed /removed retroactively.

How are directors removed?

Shareholders have a statutory power to remove management board members at any time (via a shareholders' meeting or by written resolution). Management board members may also resign at any time by simple written notice to the company. The removal is effective upon the date that the company's shareholders resolution is adopted (or on the date indicated in the resolution itself) or, in case of resignation, upon filing the resignation letter with the company (or on any other date indicated in the letter).

When a management board member leaves office, notice must be filed with the commercial register within seven days. By the same deadline, notice of removal /resignation should be filed with the electronic Central Register of Beneficial Owners.

Board / management structure

Typical management structure

Management boards of Polish limited liability companies are unitary structures made up of all the company's management board members. Each management board member has the same obligations and accountability to the company. Management board members are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which management board members may make decisions is set out in the Polish Company Law and, optionally, in company's articles of association. The management board may adopt resolutions at the meeting, in writing or using means of direct remote communication.

There is no statutory minimum quorum for management board meetings (although notice must be given to all members). Unless the articles of association stipulate otherwise, voting at management board meetings is on an absolute majority of votes basis.

Each member of the management board may, without a prior resolution of the entire management board, carry out the company's affairs within the ordinary course of the company's business. However, if even one of the other members of the management board opposes the carrying out of any such affair or if the affair exceeds the scope of ordinary activities of the company, a prior resolution of the entire management board is required.

Authority and powers

As far as third parties are concerned, management board members are able to bind the company and enter into contracts on its behalf even if there are internal limits on their powers to do so (e.g. in the company's articles of association, or in by-laws or internal policies and protocols), i.e. the internal restrictions are not effective towards third parties. However, all legal acts on behalf of the company must be undertaken in accordance with the company's rules of representation set out in the Polish Company Law and, optionally, in the company's articles of association. As a statutory rule, two management board members acting jointly or one member of the management board acting together with a commercial proxy (i.e. holder of a special power of attorney granted by company) are authorised to make statements on behalf of the company. Commonly, the company's articles of association give each management board member authorization to act solely. However, several important legal acts envisaged in the Polish Commercial Companies Code may be undertaken only upon the prior consent of the shareholders' meeting (for example, this applies to a disposal or lease of the business enterprise or an organised part of it, establishment of a property right in relation to it or the acquisition and disposal of real property, perpetual usufruct right or of an interest in them or the reimbursement of additional shareholders' payments made earlier to the company).

Normally, the company's articles of association give the management board members wide powers to manage its business and affairs - as they think fit (although the articles of association may also provide that shareholders may give the board specific directions as to conducting its affairs or prior shareholders' consent may be required for specific matters, depending on, for instance, a threshold for a given action to be taken).

Delegation

Management board members can delegate their specific powers to company's employees, civil law contractors or any other individuals. However, management board members retain overall responsibility for the company's operations and management. Furthermore, certain duties (e.g. signing yearly financial statements or reports on company's activities) may be carried out only by management board members personally. Therefore, each of the management board members shall have a qualified electronic signature compliant with the EU eIDAS Regulation issued by one of the Polish certified providers.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of management board members are set out in the Polish Commercial Companies Code, however, they are also spread throughout the entire Polish legal system.

These are duties to:

- **Carry out the company's affairs and represent the company in relation to third parties.** This means that any activity that is not attributed to another body of the company belongs to the management board and is the responsibility of its members.
- **Apply diligence resulting from the professional nature of management board members' activities.** Management board members should fulfil their duties with diligence resulting from the professional nature of their activities. This includes, in particular, the knowledge of organisational and financial processes, but also of the law in force including the legal consequences arising from statutory law with regard to business activity, as well as human resources management.
- **Fulfil yearly reporting obligations.** This covers preparing and signing (with qualified electronic signatures) the company's yearly financial statements and management board's reports on the company's activities and submitting them to the National Court Register within the prescribed time limits each year.
- **Convene ordinary and extraordinary shareholders' meetings.** In general, an ordinary meeting of shareholders should be held within six months of the end of each financial year. If the balance sheet drawn up by the management board shows a loss exceeding the sum of supplementary and reserve capitals and a half of the share capital, the management board members are obliged to immediately

convene the shareholders' meeting in order to adopt a resolution concerning the company's further existence. Furthermore, a shareholders' meeting should be convened at the request of a shareholder(s) representing at least one tenth of the share capital. Nevertheless, the shareholders' meeting should be convened in all instances where the management board deems it appropriate.

- **Keep a share register.** The management board members are jointly obliged to prepare and maintain such a register. The members are also obliged to update this book if any changes appear.
- **Refrain from engaging in competitive business or participate in competitive entities** as a partner in a civil law partnership or a partnership, or as a member of the authorities of a company, or any other competitive legal entity. However, the shareholders may give a relevant consent which allows a board member to carry out the competitive activities.
- **Avoid conflicts of interest.** In the event of a conflict of interests between the company and a management board member, their spouse, relatives and second degree next of kin and persons with whom the management board member has a personal relationship, the member should disclose the conflict of interests and refrain from participating in the settlement of such issues and may request that this fact be recorded in the minutes of the management board meeting.

In addition, management board members have duties under various legal acts of statutory law, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company.

What are directors' other key obligations?

These are duties to:

- **Report changes in company's data disclosed in the National Court Register.** As a rule, this should be done within seven days after a relevant change has occurred.
- **Report changes in the Central Register of Beneficial Owners.** As a rule, this should be done within seven days after a relevant change has occurred. Relevant filings should be made by sending an electronic form which should be signed with a qualified electronic signature within the meaning of EU Regulation No 910/2014 (eIDAS Regulation) by one of the management board members in accordance with company's rules of representation.
- **Ensure that the company complies with its other statutory and legal obligations.** For instance, this covers requirements under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

The Polish Commercial Companies Code regulates the way in which management board members may enter into transactions with the company. Firstly, the execution by a company of a loan agreement, credit agreement, guarantee agreement or a similar agreement with a member of the management board or for the benefit of such member requires consent of the shareholders' meeting. Secondly, in a contract

between the company and a management board member, as well as in a dispute with such a member, the company must be represented by the supervisory board (if established at a given company) or a proxy appointed by a resolution of the shareholders' meeting.

Liabilities of directors

Breach of general duties

Each of the management board members may be liable to the company if they cause damage to the company by an act or omission which is unlawful or which is contrary to the company's articles of association.

Furthermore, management board members who are responsible for the distribution of dividend in a way which is contrary to the law or the articles of association may be liable jointly and severally with the recipient (shareholder) and required to reimburse it to the company.

In the abovementioned instances, the company may bring an action for a breach of duty against such management board members.

As an exception, where the management board member provided, intentionally or negligently, false information in the statement on the contributions made to pay for any newly created shares (in the event of a capital share increase), such member may be liable towards the company's creditors jointly and severally with the company for a period of three years following the registration of the share capital increase. Such liability is capped to the increased amount.

Based on general rules, a company may seek a range of remedies against a management board member for a breach of duty including damages, recovery of misapplied property, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. As a general statutory rule, if enforcement proceedings against the company prove ineffective, the management board members are jointly and severally liable for the company's liabilities. However, a management board member may be discharged from such liability if they prove that:

- A petition in bankruptcy was filed on time.
- At the same time, an order was issued to open restructuring proceedings or to approve an arrangement in proceedings regarding approval of an arrangement.
- The failure to file a petition in bankruptcy occurred through no fault on their part.
- Despite the failure to file a petition in bankruptcy or to approve an arrangement in proceedings regarding approval of an arrangement, no creditor suffered damage.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Polish legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

Special rules of liability are set out in Polish tax law. Responsibility for the company's tax arrears is jointly and severally borne by members of the company's management board with their entire property, if enforcement proceedings against the company's property appear to be entirely or partly ineffective, and if a member of the management board fails to fulfil certain obligations specifically set out in the Polish Tax Ordinance.

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines, restriction of liberty or even imprisonment for individual management board members.

Protection against liability

How can directors be protected from liability?

- **Acknowledgement of the fulfilment of duties by members of the management board.** At the ordinary shareholders' meetings to be held each year, the shareholders should issue an acknowledgement of the fulfilment of duties by members of the management board holding their position in the previous financial year. As a result of adopting such resolution on acknowledgement, it will be difficult for the company to prove that a management board member has failed to fulfil their duties, although such a resolution does not automatically mean that the company waives any claims that it may have against the member of the management board. Such resolution is not effective towards third parties.
- **Insurance.** Directors' and officers' (D&O) insurance is common in Poland. This insurance protects the management board members from civil liability towards third parties that has arisen from the performance of their duties as members of the governing bodies in the company. Insurers provide assistance also in the event of (actual or alleged) breach of criminal or administrative law. Certain insurance policies may finance administrative penalties imposed on members of the management board, but not on the organisation they manage. Under such type of insurance, it is also possible to cover the management board's defence costs in both civil and criminal proceedings and some administrative and regulatory proceedings.

What practical steps can directors take to avoid liability?

Management board members should:

- Keep informed about the affairs of the company, particularly its financial position. Management board members should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a

personal interest in any proposed or existing transaction or arrangement with the company.

- Keep records and take advice – management board members should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, management board members should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help management board members (and employees) fulfil their duties and obligations and minimise the risk of liability.

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Corporate entities

What type of company is typically used in group structures?

In Portugal, the most common type of company used in group structures is the limited liability company by shares (*sociedades anónimas* or S.A.). This guide therefore focuses on the management of private limited companies by shares.

Types of director

What is a "director"?

Pursuant to the Portuguese law, there is no legal definition of the term "director". Basically, the law regards someone who manages the affairs of a company on behalf of its shareholders as a director.

What are the different types of director?

Although not expressly provided in the Portuguese Companies Code, Portuguese doctrine classifies a company's directors in the following types: *de jure* directors, *de facto* directors, and shadow directors.

Directors validly appointed as such, through shareholders resolution, are known as *de jure* directors and may be executive or non-executive:

- The executive directors are responsible for the management of the affairs of the company.
- The non-executive directors are responsible for the general supervision of the performance of executive directors' duties.

A *de facto* director is a person who performs, directly or indirectly and autonomously the duties of a *de jure* director but is not validly appointed as such.

A shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act.

Eligibility

Who can be a director?

A director must be at least 18 years old and hold a Portuguese taxpayer number, but there are no nationality or residency restrictions. In some cases, if the director to be appointed is resident outside the European Union and upon verification of certain conditions, it may be required to appoint a tax representative in order to obtain a Portuguese taxpayer number. In the event of a legal person being appointed as a director, it must appoint an individual to exercise the office in their own name. The legal person must share liability with the person appointed by it.

Minimum / maximum number of directors

If the share capital of the company exceeds EUR200,000 a limited liability company by shares should have at least two directors. If not, a limited liability company by shares may have only one director.

In addition, according to the Portuguese Companies Code there is no maximum number of directors. The company's bylaws may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must be appointed by the company's shareholders (via a shareholders' general meeting or by unanimous written resolution).

A resolution appointing a director must be filed at the companies registry office within 60 days from the approval of the resolution. A director's residential address and the director's Portuguese taxpayer number must be provided to the commercial registry office and are included in the commercial certificate of the company.

In addition, at the time of the appointment registration, the companies registry office must also be provided with an acceptance declaration issued by the relevant director. In such declaration the relevant director must state that (i) they accept the appointment to the role of director of the company; and (ii) they are not aware of any circumstances that may prevent them performing such function.

Directors must be appointed for the period fixed in company's bylaws, which must not exceed four calendar years with re-appointment being permitted.

How are directors removed?

Any member of the board of directors may be dismissed (either with cause, or without cause) at any time by means of a resolution approved by the company's shareholders (via a shareholders' general meeting or by unanimous written resolution). A director may also resign at any time through the issuance of a resignation letter addressed to the Chair of the Board of Directors, or in case of the resignation of the Chair, to the

company's audit board or audit committee. The resignation is only effective at the end of the month following the month in which the resignation letter was issued, unless in the meantime a substitute is appointed.

The resignation or the resolution on director's dismissal must be filed at the commercial registry office within 60 days from the date of the shareholders resolution or the issuance of the resignation letter.

Board / management structure

Typical management structure

According to the Portuguese Companies Code there are three types of management structure:

- Board of directors and Supervisory Board (Monist Corporate Governance Model).
- Board of directors, to include an audit committee and a statutory auditor (Anglo-Saxon Corporate Governance Model).
- Executive board of directors, general and supervisory board and statutory auditor (German Corporate Governance Model).

The most common type of management structure is the Monist Corporate Governance Model.

One of the directors is appointed as Chair of the Board of Directors.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's bylaws. In private liability companies by shares, the bylaws typically provide directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telematic means (provided that the company ensures the authenticity of declarations and the security of communications, registering the content of all interventions) or through a unanimous written resolution.

Directors must meet at least once a month, unless otherwise provided in company's bylaws.

In relation to the minimum quorum, the board of directors must not approve resolutions without the majority of its members being present or represented.

Unless the bylaws stipulate otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is required.

Authority and powers

The powers of representation of the board of directors are performed jointly by the directors. The company is bound, before third parties, by those legal transactions

concluded by the majority of the directors (or ratified by them), or by a smaller number of directors if so provided in company's bylaws. The board of directors is responsible for managing the company's business, and must act according to the resolutions of the shareholders only in cases where the law or the bylaws so determine. The board of directors has exclusive and full powers to represent the company.

Delegation

Subject to Portuguese law restrictions, and unless otherwise provided in the bylaws, the board of directors may delegate powers to one or more directors to deal with certain managing matters. However, the board retains overall responsibility for the company's operations and management.

The Board of Directors can also appoint attorneys to perform certain acts or categories of acts, without the need for an express contractual clause.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Portuguese Companies Code, pursuant to which the director:

- Must observe a duty of care towards the company, demonstrate capability, technical competence and an understanding of the company's business considered appropriate for the role, and to execute its tasks with the diligence of a careful and earnest manager.
- Must observe a duty of loyalty towards the interests of the company, serving the long term collective interests of the shareholders and taking into consideration the interests of other stakeholders such as employees, clients and creditors by ensuring the sustainability of the company. As a specific realization of this duty, the directors must not pursue or develop, directly or indirectly, other activities in direct competition with the company, unless duly authorized by the general meeting of shareholders.
- Must carry out any acts deemed necessary or appropriate to achieve the corporate purpose in line with the resolutions adopted by the shareholders, the bylaws and the applicable law.
- Are responsible for drafting merger and spin-off plans, in addition to other documents required or appropriate for the full legal and economic transparency of the transaction, as well as preparing a report in case of change of the company's legal form (i.e. a change to a different type of company).
- Are responsible for performing and executing all managing acts not specifically reserved by law or bylaws to the general meeting of shareholders.
- Are responsible for, following a shareholders resolution (except an unlawful resolution or resolutions that are not compliant with the company's by-laws), taking all necessary measures to execute such resolution, as promptly as possible (namely resolutions making any amendments to the company's bylaws).

In addition, if agreed by the shareholders and set out in the company's bylaws, the directors must also decide on and implement:

- The acquisition, disposal and encumbrance of real estate of the company.
- The disposal, encumbrance and lease of the business establishment of the company.
- The subscription or acquisition of other companies' shares or the disposal and/or encumbrance of these shares.
- The establishment of subsidiaries, agencies, branches or other local forms of representation of the company.

In general, the directors are bound to manage a company in a professional and diligent way, which includes compliance with all legal, statutory and contractual requirements.

What are directors' other key obligations?

The directors are responsible for preparing the annual reports and accounts and other financial statements required by law in respect of each financial year, and must submit them to the general meeting of shareholders and supervisory board, within three months from the end of each financial year, or within five months for companies that submit consolidated accounts or that use the equity method.

The directors are also responsible for preparing and submitting a proposal for the allocation of profits and/or handling of losses to the shareholders, in respect of each financial year.

Transactions with the company

Pursuant to the Portuguese Companies Code, any contracts entered into between the company and its directors, directly or through an intermediary, are null and void, if prior authorisation was not given through a resolution approved by the board of directors, in which the party in question cannot vote, and with the consent of the supervisory board. The annual report of the board of directors must specify any such authorisations that were granted and the report from the supervisory board must refer to the statements of opinion drawn up in connection with these authorisations.

Please note that the company is prohibited from granting loans or credit to directors, making payments on their behalf, providing guarantees for obligations assumed by them and granting them salary advances of more than one month.

Liabilities of directors

Breach of general duties

Directors are severally liable towards the company for the damages caused to the company as a result of their actions or omissions that are not compliant with their legal statutory or contractual obligations, unless they prove that their actions /omissions were not caused with intentional or negligent misconduct.

Director's liability may be excluded in specific cases provided by law.

The directors may be subject to criminal liability.

- A lawsuit against the directors may be brought by:
- The company – in this case a shareholder's resolution to bring the lawsuit must be approved by the majority of the shareholders, and the lawsuit must be sought within six months from the date of such resolution.
- In the absence of a lawsuit sought by the company, one or more shareholders who jointly own, at least, 5% of the share capital (or 2% in the case of a company with shares admitted to trading on a regulated market) may bring a liability suit against the directors to claim reparation for damages caused to the company.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property, accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

After insolvency is declared by a Court of Law a specific procedure called "Qualification of the Insolvency" may be opened in order to qualify, or not, the insolvency as intentional. Insolvency is deemed to be intentional when it is considered to be the result of intentional or negligent conduct by the insolvent company or its directors. In the event that a Court of Law decides to qualify the insolvency as intentional, directors that have been proven to have acted intentionally or with negligence, may be disqualified for carrying on business activities during a defined timeframe, up to a maximum of ten years.

The financial consequences that may arise for the company's directors in cases of proven intentional insolvency are the following:

- Loss of any credits (including labour related credits) that these directors may have over the company.
- Restitution of the assets or rights that they may have already received as payment for those credits.
- Joint payment of unsatisfied credits up to the limit of their own personal assets.

Additionally, please note that the directors may be held personally liable from a criminal perspective for intentional insolvency, if there is evidence of fraud or intentional misconduct, as a result of acts or omissions, that decrease, compromise, make difficult, endanger or delay the satisfaction of creditors and that may have directly caused the company's insolvency status. If the directors are found guilty of such a criminal offence of faulty insolvency or faulty management, they may also become civilly liable for the damages arising out of their criminal actions or omissions.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Portuguese legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Protection against liability

How can directors be protected from liability?

Directors' and officers' (D&O) insurance. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defense costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, willful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position, and compliance obligations. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and acquaint themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.

- Directors must act, not only with diligence, but also with loyalty, keeping in mind that they must act always in the interest of the company, taking into account the long-term interests of the shareholders and considering the interests of other subjects relevant to the sustainability of the company, such as its workers, customers and creditors.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

Companies may be formed and registered in the State of Qatar (Qatar or the State), the Qatar Financial Centre (a business and financial centre located onshore in Qatar with its own laws, regulations and courts) or in a Qatar free zone. This guide focuses on companies licenced by the Qatar Ministry of Commerce and Industry and regulated by the Qatar Commercial Companies Law No. 11 of 2015, as amended (Qatar Companies Law).

In the State, the most common type of company used in group structures is a limited liability company (LLC).

Types of director

What is a "director"?

There is no exhaustive definition of the term "director." The Qatar Companies Law essentially regards an individual who manages the affairs of a company on behalf of its shareholders as a director. In most instances, the terms "director" and "manager" are used interchangeably. A director is a person appointed to the board of a company to oversee its business and affairs. Directors are entrusted with making strategic decisions and ensuring that the company adheres to legal and regulatory requirements.

What are the different types of director?

The Qatar Companies Law does not explicitly distinguish between types of directors or managers. However, it is possible to define, to an extent, different types of directors in the memorandum of association of a LLC. This may include designations such as the managing director or the general manager. The specific nature of the managing director's authority would be outlined in the memorandum of association.

Regardless of the type of director appointed, an LLC must also appoint a manager. It is permissible for the same individual to hold both the roles of director and manager. The LLC's main business licence, known as the commercial registration, must include the names of the managers. It must also specify whether the manager has full and absolute authority for the management of the business or authority to conduct administrative and immigration affairs. It is important to note that the concept of shadow or de facto directors is not recognised under the Qatar Companies Law. This means that only formally appointed directors are subject to the legal duties and liabilities provided in the memorandum of association or the commercial registration of an entity.

Eligibility

Who can be a director?

A director must be a natural person, meaning that legal entities cannot be appointed as directors. The individual must be at least 18 years old. There are no nationality or residency restrictions, although individuals from certain countries may be subject to additional security checks, added visa requirements or denied a visa entirely. A foreign expatriate director must hold a valid Qatar work and residence permit. Directors of a public listed entity may also be required to hold a certain number of shares in the company.

Minimum / maximum number of directors

There is no minimum or maximum number of directors that may be appointed. The LLC's memorandum of association may, however, specify a minimum or maximum in this regard. An LLC must have at least one manager who is named on the commercial registration issued by the Qatar Ministry of Commerce and Industry.

Appointment and removal

How are directors appointed?

Directors are appointed by a resolution passed by the shareholders. The names of the appointed directors should also be included in the company's commercial registration. The appointment process ensures that directors are formally recognized and accountable for their roles in managing the company.

The name of the director may also be listed in the memorandum of association of the LLC, however, this is not mandatory. To do this, the memorandum of association must be notarised by the Qatar Ministry of Justice notary in Qatar. The person signing the memorandum of association before the notary must produce at the time of signing their applicable authorising instrument (such as a power of attorney or resolution) in order to sign the memorandum of association before the Qatar Ministry of Justice notary. Documents originating from outside of Qatar must be notarised, legalised at the Ministry of Foreign Affairs in the country of issue, legalised at the Qatar Embassy in the country of issue and legalised at the Qatar Ministry of Foreign Affairs in Qatar.

Board / management structure

How are directors removed?

Directors may be removed by way of a resolution of the shareholders. Where the name of the director is listed on the commercial registration, it must be amended to reflect the removal of the director. The same conditions will apply as with appointing directors with regard to signatories evidencing their authority to sign on these documents.

Typical management structure

The boards of LLCs are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company pursuant to the LLCs memorandum of association. The roles and responsibilities of directors are largely set out in the LLC's memorandum of association, but directors will typically be responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the LLC's memorandum of association (subject to adherence to Qatar's Companies Law). In LLCs, the memorandum of association can provide directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone or a written resolution. Other than single director LLCs, the minimum quorum for board meetings is set out in the memorandum of association. Unless the memorandum of association stipulates otherwise, voting at board meetings may be on a simple majority basis. When decisions are made in writing, the unanimous agreement of all directors is usually required, although the memorandum of association may specify otherwise.

Authority and powers

The authorities and powers of directors are predominantly set out in an LLC's memorandum of association and are determined by the shareholders. Where this is not defined in a memorandum of association, the common approach is to issue powers of attorney to directors to enable them to represent the company. These powers of attorney are typically notarised.

Delegation

The ability for a director to delegate their authorities is determined by what is permitted pursuant to the memorandum of association of the LLC or what is set out in a power of attorney authorising the delegation.

What are the key general duties of directors?

Duties and obligations of directors

The duties of a director in a LLC include:

- General company obligations, such as the preparation and filing of accounts.
- Acting honestly and in the LLC's best interests.
- Acting in manner which is compatible with the LLC's constitution and objectives.
- Exercising a degree of care in the discharge of management responsibilities.
- Acting within the powers granted.
- Disclosure of any conflicts of interest.
- Compliance with statutory restrictions, including relating to loan arrangements.
- Compliance with statutory requirements in the case of insolvency.

What are directors' other key obligations?

Other obligations may include matters which are assigned to directors in the memorandum of association of an LLC and may vary according to how responsibility of managing the LLC is apportioned by the shareholders. They may include general company obligations such as maintaining records or calling annual general meetings.

Transactions with the company

A director should be expressly authorised in an LLC's memorandum of association or by way of a power of attorney in order to transact in the name of an LLC. In most cases, such authority is scrutinised in Qatar depending on the nature of the transaction. Merely holding the position of director is not always sufficient in and of itself to permit a director to bind an LLC.

Liabilities of directors

Breach of general duties

In certain circumstances directors may face liabilities where they have acted unlawfully, including:

- Errors and omissions in the management of the company.
- Disclosing corporate secrets.
- Participating in a competing business.
- Fraud and embezzlement, misuse of power, violation of the Qatar Companies Law.
- Act carried out in the course of their duties which causes harm to another person.
- Exceeding authority.
- Unlawful competition.
- Issuing a cheque with insufficient funds.

- Certain violations under the Qatar Commercial Law such as deliberately giving a bankruptcy judge false data, selling goods at less than their regular price with the purpose of delaying the company's declaration of bankruptcy and engaging in transactions in defrauding creditors.

Depending on the nature of the unlawful act, action can be taken against a director for breach of legislation (including the Qatar Companies Law, Civil Code, Penal Code, Commercial Code or Bankruptcy Law) or breach of the LLC's memorandum of association. Directors can be held personally liable for any losses incurred by the company due to their negligence or breach of duty. This includes both civil and criminal liabilities under Qatari law. To mitigate these risks, companies can purchase Directors and Officers (D&O) insurance, which provides coverage for personal losses and legal defense costs arising from lawsuits against directors, but this is not a widely available product in the Qatari market.

Liabilities on insolvency

Under the Qatari companies law, there is a risk that directors/managers may be personally liable for losses incurred as a result of any failure to call a meeting of the shareholders within 30 days of losses reaching half of the issued capital.

In a bankruptcy context, if it is established that the LLC has insufficient assets to pay at least 20% of its debts, the court may order some or all of the directors/managers jointly and severally to pay all or some of the company's debts. A defence is available if it can be established that they exercised reasonable diligence in managing the company's affairs.

Other key risks

See [Breach of general duties](#) and [Liabilities on insolvency](#).

Protection against liability

How can directors be protected from liability?

In the context of a LLC, the shareholder's must release the directors from their liability for the preceding financial year during the annual general meeting.

Although not common, directors may request an indemnity from the LLC and require that the LLC takes out professional indemnity insurance that covers that negligent acts committed by a director.

What practical steps can directors take to avoid liability?

To mitigate the risks of any liability, directors should:

- Act in accordance with the LLC's constitution.
- Avoid conflicts of interest and to the extent this is not possible, to declare conflicts of interests.

- Refrain from participating in any work that is in competition with the activities carried out by the LLC unless with the approval of the shareholders.
- Refrain from using information they obtain through their role as a director for their own benefit or for the benefit of their family members.
- Refrain from disclosing information about the company where the veracity of that information is questionable.
- Convene a general assembly where the losses of the LLC reach half of its issued share capital.
- Refrain from signing cheques on behalf of the LLC where there is a possibility that funds on account may not be sufficient.

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Corporate entities

What type of company is typically used in group structures?

In Romania, the types of corporate vehicles typically used in group structures are limited liability companies (in Romanian *societate cu raspundere limitata*) (LLCs) and joint-stock companies (in Romanian *societate pe actiuni*) (JSCs), mainly due to their flexible incorporation procedure and the limitation, in principle, of the shareholders' liability (in certain situations, their liability may be extended, e.g. by piercing the corporate veil). In practice, LLCs are the most common type of company.

Therefore, this guide focuses on the management of Romanian LLCs and JSCs.

Types of director

What is a "director"?

Romanian law does not provide for an express definition of the term "director" (in Romanian *administrator*), but it addresses the eligibility criteria to be observed by the person to be appointed as director, as well as the duties, liabilities and the organization /functioning requirements of the various board of directors/management structures. In a nutshell, the director manages the affairs of the company and represents the company towards third parties.

What are the different types of director?

In the case of LLCs:

Romanian law does not distinguish between different types of directors. More exactly, under Company Law No. 31/1990 (Company Law), the director is the statutory body having management and representation duties.

In the case of JSCs:

Romanian JSCs can be managed either under a one-tier management system or a two-tier management system.

The one-tier system is the most common. In such system, the sole director/board of directors (in Romanian *administrator unic / consiliu de administratie*) ensures the general management of the company, either directly or by way of delegating certain of its powers to the managers (in Romanian *directorii*). The board of directors has both an executive and supervisory function. While the delegation of the company's management to managers is generally optional, in the case of JSCs whose annual financial statements are subject to legal auditing obligations, the delegation is mandatory. If management (executive) duties are delegated, such duties pertain to the managers and the majority of the members of the board of directors shall be formed by non-executive directors (i.e. directors who have not been appointed as managers).

As opposed to the one-tier management system, in the two-tier management system, the two functions, executive and supervising, belong to different bodies. The executive board (in Romanian *directorat*) is the executive body of the company. The executive board performs its duties under the control of the supervisory board (in Romanian *consiliu de supraveghere*).

To sum up, in the case of JSCs:

- With a one-tier system – in the absence of management duties being delegated, such duties pertain to the sole director / board of directors. Otherwise (if management duties are delegated by the board of directors), such duties pertain to the managers.
- With a two-tier system – the sole manager / executive board has management duties (as opposed to the supervisory board which only appoints the sole manager / executive board and supervises their activity).

Eligibility

Who can be a director?

A director and a member of the supervisory board, respectively, may be either a legal entity or an individual with full legal capacity. If a legal entity is appointed as director or as member of the supervisory board, such entity must designate an individual to act as its permanent representative.

The managers and the members of the executive board, respectively, may only be individuals with full legal capacity.

Persons who, according to the law, are incapable or have been denied by final court judgment the right to exercise the capacity of director as a complementary sanction for crimes involving breach of trust, corruption, embezzlement, forgery, tax evasion, money laundering, as well as for other criminal offences provided by the Company Law, cannot be appointed as directors. If such persons have already been appointed as directors, they must be revoked. The same rules apply to managers and members of the executive board or of the supervisory board.

Minimum / maximum number of directors

In the case of LLCs: minimum one director.

In the case of JSCs:

- With a one-tier system – minimum one director (or minimum three directors, if the company's annual financial statements are subject to a legal auditing obligation); the total number of directors must be an odd number. In the case of delegation of management duties - minimum one manager.
- With a two-tier system – minimum one manager (or minimum three managers, if the company's annual financial statements are subject to a legal auditing obligation); total number of managers must be an odd number. Supervisory board - minimum three and maximum 11 members.

Other than for the supervisory board, Romanian law does not establish a maximum number of directors/managers.

Appointment and removal

How are directors appointed?

In the case of LLCs: Directors are appointed by the General Meeting of Shareholders (GMS), except for the first directors who are appointed through the Articles of Association (AoA).

In the case of JSCs:

- With a one-tier system – the sole director/board of directors is appointed by the GMS, except for the first director/members of the board of directors, who are appointed through the AoA. If management duties are being delegated, the managers are appointed by the board of directors.
- With a two-tier system – the sole manager/executive board is appointed by the supervisory board. The supervisory board is appointed by the GMS, except for the first members, who are appointed through the AoA.

For appointments to be binding on third parties, they have to be registered with the Trade Registry.

How are directors removed?

In the case of LLCs: Directors are removed by decision of the GMS.

In the case of JSCs:

- With a one-tier system – the sole director/members of the board of directors is/are removed by decision of the GMS. The managers are removed by decision of the board of directors.
- With two-tier system – the sole manager/members of the executive board is/are removed by decision of the supervisory board (or by the GMS in case the AoA

expressly provides this possibility). The members of the supervisory board are removed by decision of the GMS.

For removals to be binding on third parties, they must be registered with the Trade Registry.

Board / management structure

Typical management structure

In the case of LLCs: The management body is formed by directors. The directors are not required by law to establish a board of directors.

In the case of JSCs:

- **With a one-tier system** – typically, the management body (having executive duties) is represented by the board of directors. However, in the case of delegation of management, the management structure comprises the board of directors and the managers (only the latter having executive powers);
- **With a two-tier system** – the management structure comprises the executive board (having executive powers) and the supervisory board (which supervises the activity of the executive board).

When it comes to the management of JSCs, the one-tier system is the most common – however, special provisions apply to publicly listed companies. While the delegation of the company's management to managers is generally optional, for JSCs whose annual financial statements are subject to legal auditing obligations, the delegation of the directors' powers to the managers is mandatory.

How are decisions made by directors?

In the case of LLCs: the Company Law does not specify how decisions may be adopted by the board of directors (*e.g.* how meetings are convened, quorum and voting requirements). These may be provided for in the AoA.

In the case of JSCs:

- Quorum requirements for the meeting of the board of directors/executive board /supervisory board: at least half of the total number of members, unless the AoA provides for a higher number.
- Voting requirements for the meeting of the board of directors/executive board /supervisory board: vote of the majority of the present members. Decisions regarding the appointment / revocation of the chairperson of such corporate bodies are taken with the vote of the majority of the members.

The rules for adopting decisions by managers of JSCs with a one-tier system are established by the AoA or by a decision of the board of directors.

Authority and powers

As a general note, the directors may perform all the operations required to carry out the company's scope of activity (except for the restrictions set forth by law or in the AoA) and may represent the company towards third parties provided that such right was granted to them by law or, as the case may be, by the GMS/AoA.

The company is bound by the acts of its statutory bodies (e.g. directors/board of directors), even if such acts exceed the company's scope of activity, unless it proves that the third party knew or, given the circumstances, should have known that the acts exceeded the scope of activity, or when such acts exceed the limits of the powers provided by law for the respective bodies. Publication of the AoA does not constitute, alone, the proof of knowledge. The provisions in the AoA or the decisions of the company's bodies limiting the powers granted by law to the statutory bodies are not enforceable against third parties, even if published.

Delegation

In the case of LLCs: Directors are allowed to delegate representation powers provided that such right was expressly granted to them by the GMS/AoA.

In the case of JSCs:

- **With a one-tier system** - while delegation by the board of directors of company's management to managers is generally optional, for JSCs whose annual financial statements are subject to legal auditing obligations, the delegation of the directors' powers to managers is mandatory.

Company Law specifies certain duties that cannot be delegated to managers, e.g. summoning the GMS, drafting the annual report, approving the financial planning, etc.

- **With a two-tier system** - the management and representation powers belong exclusively to the executive board, which may perform all the operations required to carry out the company's scope of activity (except for those belonging to the GMS and the supervisory board).

Duties and obligations of directors

What are the key general duties of directors?

Directors' rights, duties and liabilities are governed by the civil law provisions regarding the mandate agreement and by the special rules set out under the Company Law.

Directors' rights (e.g. the right to manage the company and the right to represent the company towards third parties) set out by the Company Law are designed in a quite broad manner in order to allow a flexible management of the company.

According to the Company Law, the directors represent the company towards third parties and may undertake all actions required to carry out the company's business.

Directors are empowered to make any necessary decisions in relation to the company's activity, within the limits set out by the Company Law, shareholders' resolutions and the AoA of the company.

Directors have several duties related to the internal management of the company, such as the duty to convene and attend the shareholders' meetings, the duty to draft the annual report accompanying the annual financial statements of the company and business plan, the duty to keep the company's registries.

- **Convening and attending the shareholders' meeting.** The directors are obliged to convene the GMS at least once a year or as many times as necessary.
- **The annual report.** The annual report should comprise an accurate presentation of the business performance and financial position of the company, together with a summary of the main risks and uncertainties faced by the company. In addition, explanations and details on the figures within the annual financial statements should also be included.
- **Keeping the company's registries (which includes the shareholders' register).** The obligation of the directors to maintain and update the shareholders' register is compulsory. Such shareholders' register should reflect:
 - The shareholding history of the company, including the identification details of the former and existing shareholders and their participations in the share capital.
 - All the transfers of shares that have occurred in the company, if the case.
 - Any other changes that have occurred in relation to the shares of the company (e.g. any pledges over the shares, share capital increases, etc).

What are directors' other key obligations?

- **Duty of loyalty/ confidentiality.** Directors not only have the right but also the duty to manage the company in compliance with the high standards set out for a prudent and diligent competent director in the best interest of the company.

Directors have a general duty of loyalty towards the company and must exercise their powers in an honest and faithful manner. Directors cannot act in their own interest to the detriment of the company.

Company Law also provides that directors of JSCs must not divulge confidential information and business secrets of the company, both during and after the expiry of their mandate. While not expressly provided by the Company Law, this duty should apply by analogy in case of directors of LLCs, on the basis of their general duty of loyalty.

- **Avoiding conflicts of interests.** The Company Law provides specific rules as regards the directors' conflicts of interest but only in case of JSCs. Thus, any director who, directly or indirectly, has interests contrary to the interests of the company in a certain operation, must inform the other directors and the censors or internal auditors about it and refrain from participating in any deliberations on the operation in question.

Directors are under the same obligations if they are aware that their spouse, relatives or kindred up to the fourth degree included have an interest in a certain operation.

While not specifically provided by the Company Law as regards LLCs directors, the loyalty obligation should also imply that the director of a LLC informs the shareholder(s) in case of a conflict of interest and abstains from taking a decision.

In any event, the Civil Code provides, as a general rule, for any type of company, that the director having a personal interest in a matter must inform about it the company and refrain from participating in any deliberations on the operation in question.

- **Non-competition with the business.** According to the Company Law, unless authorised by the shareholders, a director cannot be a director in competing companies or in companies having the same business object, nor exercise the same trade or other competing trade, on the director's own account or on account of others, under the penalty of being dismissed and held liable for damages.

Transactions with the company

Unless the AoA of the company provide otherwise, the director of a JSC is only allowed on their own account, to dispose of, or acquire, assets to or from the company, having a value of more than 10% of the value of the company's net assets, with the prior approval of the GMS, under the sanction of nullity.

The Company Law does not contain similar provisions for the case of LLCs. However, it may be construed that the same limitation applies by analogy.

The considerations provided above in relation to the conflict of interests should also be taken into account.

Liabilities of directors

Breach of general duties

Under Romanian law, the failure of directors to fulfil their duties may trigger both civil or criminal liability.

Civil liability

The directors' civil liability may be held both towards the company and its shareholders and towards third parties.

Civil liability towards the company and its shareholders

Directors are liable for breach of their duties under the Company Law, the AoA and the shareholders' resolutions, such as breaches resulting from the transfer of powers to other persons without being permitted to do so and acts exceeding the limits on the powers granted to the directors by way of the AoA/shareholders' resolutions, etc.

As a general rule, each director is to be held civilly liable only for the damages which that director has personally caused to the company or to the shareholders. By way of exception, the Company Law expressly provides for certain situations where directors are to be held jointly liable, towards the company, as follows:

- The existence and accuracy of payments made by the shareholders.
- The true existence of the paid dividends.
- The existence of the registries required by law and their accurate keeping.
- The correct fulfilment of the resolutions of the GMS.
- Strict compliance with the obligations prescribed by the law and the AoA.

If the directors exceed their powers when acting in relation with third parties and provided that the agreement concluded as such could be considered binding and valid with regards to the company, the company is entitled to claim compensation from the respective directors for the damages incurred as a result of such act.

Criminal liability

The Company Law provides for a number of criminal offences applicable to directors. However, if the actions of such directors may qualify as offences more serious than those provided in the Company Law, the provisions of the Romanian Criminal Code become applicable. Moreover, directors may be held liable for offences under other special laws.

The director committing a criminal offence provided by the Company Law can be imprisoned (for a minimum of one month and a maximum of five years) or may be ordered to pay a fine. The amount of the penalty differs for each type of criminal offence. The criminal offences regulated under the Company Law refer mainly to breaches of the directors' duties, such as:

- Providing misleading information to the shareholders/the public in relation to the financial status, economic or legal standing of the company.
- In certain cases, benefitting in any form, directly or through an intermediary, from loans or guarantees granted by the company managed by the director (or by a company controlled by or controlling the company managed by the director).
- Collecting or paying dividends, in any form, out of fictitious profits or which could not have been distributed, in the absence of a financial statement or contrary to the results thereof.
- Violating the provisions of the Company Law which state that at least 5% of the company's profits must be set aside each year for the purpose of establishing a reserve fund until such fund reaches a minimum of 20% of the share capital.
- Failure to convene the GMS in the cases provided by the law etc.

Liabilities on insolvency

Law no. 85/2014 on insolvency proceedings (Insolvency Law) extends, under certain specific conditions, the liability for part or the entirety of the uncovered debts of the

insolvent company to the members of the management bodies and any other person to which the company's insolvency may be imputed, to the extent they performed certain unlawful actions, such as:

- Using the company's assets or credit in their own benefit or that of another person.
- The decision (in their own interest) to continue an activity which has the evident result of the company's insolvency.
- Maintaining fictitious accounting documents, deleting or disposing of accounting documents or not keeping the accounting books and records according to the law.
- Using ruinous methods to obtain funds, in order to delay the insolvency, etc.

The Romanian Criminal Code provides that the failure of the legal representative of an insolvent company to file for insolvency within six months after the term provided by law from the onset of insolvency is punishable by imprisonment ranging from three months to one year or a fine. In addition, the Romanian Criminal Code provides that the person who, to the detriment of the creditors, counterfeits, takes away or destroys the debtor's documents, hides a part of its assets, presents fictitious debts or indicates in the debtor's documents amounts that are not owed or, in case of insolvency, sells part of the debtor's assets, is punishable by imprisonment ranging from six months to five years.

Other key risks

Consideration should also be given to the fact that shared/common directors could, in certain circumstances, be considered as evidence in support of piercing the corporate veil.

The directors' liability may also be triggered if regulations within various sectors are breached such as competition legislation, anti-corruption legislation, tax-related legislation, etc.

Protection against liability

How can directors be protected from liability?

- **The business judgment rule.** The Company Law has introduced the common law concept of the "business judgment rule" as a legal limitation of the directors' liability. Thus, in the case of a decision based on adequate information, where it is reasonable to consider that the director has acted in the interest of the company, the director will not be held liable for damages suffered by the company. However, the director is not exempted from liability in case of fraud or gross negligence.
- **Possibility to contractually limit directors' liability.** The Company Law does not regulate the possibility of limiting director's liability. To the contrary, according to the law, failure to perform or inadequate performance of any of the duties bestowed on directors by the shareholders shall be assessed based on the highest standard of care and diligence (subject to the above-mentioned business judgment rule).

However, taking into account that the directors' duties and powers are regulated by the rules of the mandate agreement, such limitations of liability are conceivable, but only as regards the liability of the directors towards the company (theoretically, the director's liability towards the company may also be limited through the AoA or the management agreement) and not against third parties. Nevertheless, the limitation of liability for fraud, gross negligence or wilful misconduct is not possible under Romanian law. In addition, criminal liability cannot be limited.

- **Liability insurance.** While, in case of JSCs, it is mandatory for the directors to have insurance for professional liability, in case of LLCs, there is no such legal requirement. If deemed necessary, such an insurance may be concluded.

What practical steps can directors take to avoid liability?

Please see [How can directors be protected from liability](#) for considerations related to the possibility of contractually limiting liability and liability insurance.

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Rwanda

LAST MODIFIED 31 MARCH 2025



Corporate entities

What type of company is typically used in group structures?

Private limited company.

Types of director

What is a "director"?

Pursuant to the Companies Act, a director is a member of the Board of Directors, whether a shareholder or not, being appointed by shareholders to make follow-up on the management of a company.

What are the different types of director?

Types of directors

1. Managing/Executive director/Country Representative (director)
2. Independent or non-executive director
3. Ordinary director (directors who are not any of the above)

Employee or lender representatives are not required to be appointed to company boards.

Eligibility

Who can be a director?

A company appoints a natural person as a director when the person meets the following requirements:

- being at least sixteen (16) years of age;
- being a discharged bankrupt, if applicable;

- not being subject to a disqualification by a court's order;
- not having been sentenced in the immediately preceding five (5) years to a penalty under the Company Act or the Law regulating Capital Market or for economic crimes;
- complying with any qualification for directors contained in the company's incorporation documents;
- not having a mental disability as certified by a recognised medical doctor.

A person who has not been disqualified from appointment as a director may be appointed as a director of a company.

For purposes of company incorporation, kindly note that it is a legal requirement for one of the members of the board of directors to be ordinarily resident in Rwanda.

Minimum / maximum number of directors

There is no maximum number of directors.

The minimum number of directors is one (1).

Appointment and removal

How are directors appointed?

Pursuant to the company's incorporation documents, the appointment of the first and subsequent directors of the company is authorised by an ordinary resolution of the shareholder(s).

The shareholder resolution must be notarised and filed with the Registrar General of Companies.

How are directors removed?

Pursuant to the Companies Act, a company may, by an ordinary resolution passed at a shareholders' general meeting remove one or all of the directors before the expiration of their term of office, with or without a stated reason or cause notwithstanding anything in its incorporation documents or in any agreement between the company and the director.

The shareholder resolution must be notarised and filed with the Registrar General of Companies.

Board / management structure

Typical management structure

Pursuant to the Companies Act, the business and affairs of a company are managed by or under the direction of the Board of Directors of the company which has all powers necessary for the management except where the company's incorporation documents

or the Companies Act expressly reserve those powers to the shareholders or any other person.

How are decisions made by directors?

Decisions of the board of directors are made through board resolutions.

Authority and powers

Management of business and affairs of a company.

Appointment of company secretary.

Delegation

Pursuant to the Companies Act, and subject to the provisions of the incorporation documents of a company, members of the board of directors can delegate any of their powers:

1. to committees consisting of such a director or directors if deemed appropriate; and
2. to one or more Managing or Executive Directors appointed by them.

However, the members of Board of Directors cannot delegate any of their fiduciary duties.

Duties and obligations of directors

What are the key general duties of directors?

Key general, fiduciary duties of directors are:

- To act in good faith in a manner that they believe on reasonable grounds is in the best interests of the company.
 - To use reasonable diligence in the discharge of the duties of their office.
-

What are directors' other key obligations?

Other key obligations for directors are:

- To exercise their power for a proper purpose.
- A director of a company does not act or agree to the company acting in a manner that contravenes its incorporation documents or the Companies Act.
- When exercising their powers, a director of a company performs their duties as a director. They are not allowed to act or agree to the company to act in a manner that unfairly prejudices or unfairly discriminates against any existing shareholder of the company.

- A director of a company does not agree to the company entering into a contract or arrangement or acting in any other manner unless they believe at that time on reasonable grounds that the act concerned does not involve an unreasonable risk of causing the company to fail the solvency test.
- A director of a company does not agree to the company incurring an obligation unless they believe at that time on reasonable grounds that the company will be able to perform the obligation when required to do so.
- A director of a company, when exercising powers or performing duties as a director, exercises the care, diligence and skills reasonably to be expected of a director acting in like circumstances.
- A director of a company, when exercising their powers or performing duties as a director, may accept as correct, reports, statements, financial data and other information prepared, and professional or expert advice given, by any of the following persons:
 - an employee of the company whom a director believes on reasonable grounds to be reliable and competent in relation to the matters concerned.
 - any professional or expert person in relation to matters which a director believes on reasonable grounds to be within the person's professional or expert competence;
 - any other director, or a committee of directors upon which they did not serve, in relation to matters within their committee's designated authority.

Transactions with the company

A director of a company who is interested in a transaction or proposed transaction with the company is required immediately after becoming aware of the transaction or proposed transaction cause to be entered in the register of interests, the annual report of the company and if the company has more than one director, disclose to the board the nature and extent of their interest and where the interest can be quantified and the monetary value of that interest. The director is required to disclose all material facts concerning the interest of the director in the transaction.

Liabilities of directors

Breach of general duties

- The company shareholders can bring action for breach of duty by a director.
- The company can also bring action for breach of duty by a director.
- The organ in charge of prosecuting crimes may also bring action against the director for breach of general duties where criminal liability is involved.
- Potential remedies that may be sought against directors include the following:
 - ○ Compensatory damages
 - Restitution
 - Injunction

- Removal from the board of directors
- Disqualification from representing or holding a position on the Board of Directors or management of a company for a period of at least one (1) year
- Criminal sanctions

Liabilities on insolvency

Please refer to the response above.

Other key risks

Please refer to the response above.

Protection against liability

How can directors be protected from liability?

Directors are protected from liability for all acts done in their capacity as directors except for criminal acts.

A company can provide insurance for a director in respect of any liability or costs incurred by them in any legal proceedings.

A company may indemnify a director in respect of any liability or costs incurred by them in any legal proceedings:

- brought by any person other than the company against them in their respective capacities.
- which do not result from a failure by the director to act in good faith in a manner that they believe on reasonable grounds to be in the best interests of the company.

Subject to any restriction in its incorporation documents, a company may indemnify a director in respect of any costs incurred by them in a legal action:

- brought by the company against them in their capacity as a director.
- in which judgment is given in their favor, or is acquitted, or relief is granted to them by the court.

What practical steps can directors take to avoid liability?

Directors should act within their mandate and follow the company's incorporation documents and the law.

Directors should act in good faith and in the company's best interest. They must refrain from using their positions for personal gain or to the detriment of the company.

In executing their duties, directors must exercise them with the care, skill, and diligence that a reasonably prudent person would exercise in similar circumstances.

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Saudi Arabia

LAST MODIFIED 31 JANUARY 2023



Corporate entities

What type of company is typically used in group structures?

In the Kingdom of Saudi Arabia (KSA), the most common type of company used in group structures is a limited liability company (LLC). This guide therefore focuses on the management of an LLC.

Types of director

What is a "director"?

There is no complete definition of the term "director" in KSA company law. The law essentially regards someone who manages the affairs of a company on behalf of its shareholders as a director. In most cases, the terms "director" and "manager" are used interchangeably.

What are the different types of director?

An LLC is required to have a general manager, although not necessarily to have a board of directors/managers. An LLC may be managed by one or more managers, or by a general manager and a board (of which the general manager can be a member, but is not required to be, subject to there being at least a general manager in all cases).

Eligibility

Who can be a director?

A general manager must be either a Saudi national or an expatriate with a valid visa (*Iqama*) to reside/work in KSA. In addition to the general manager, to the extent that there is a board, there is no nationality or residency requirement for its members.

Minimum / maximum number of directors

There is no minimum/maximum number of directors, unless the LLC has 20 or more shareholders, in which case there must be a minimum of three directors.

Appointment and removal

How are directors appointed?

The general manager/directors are appointed by the shareholders by being listed in the articles of association of the LLC (which, to be effective, must be executed before a Saudi notary public) or by way of a resolution of the shareholders executed by authorized signatories of the respective shareholders.

How are directors removed?

Directors may be removed by way of a resolution of the shareholders. Where the name of a director is listed on the articles of association, an amendment removing the name of the director is necessary, which must be executed before a Saudi notary public. The same conditions apply as with appointing directors with regard to signatories evidencing their authority to sign on these documents.

Board / management structure

Typical management structure

Boards of LLCs are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company pursuant to the LLC's articles of association. The roles and responsibilities of directors are largely set out in the LLC's articles of association, but directors will typically be responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the LLC's articles of association (subject to adherence to the KSA Companies Law). In LLCs, the articles of association can provide directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than an LLC managed by a sole director/general manager, the minimum quorum for board meetings is set out in the articles of association. Unless the articles of association stipulate otherwise, voting at board meetings may be on a simple majority basis. When decisions are made in writing, the unanimous agreement of all directors is usually required, although the articles of association may specify otherwise.

Authority and powers

The authorities and powers of directors are predominantly set out in an LLC's articles of association and are determined by the shareholders. Where this is not defined in

the articles of association, the common approach is to issue powers of attorney to directors to enable them to represent the company. These powers of attorney should generally be notarised.

Delegation

The ability for a director to delegate their authorities is determined by what is permitted pursuant to the articles of association of the LLC or what is set out in a power of attorney authorising delegation.

Duties and obligations of directors

What are the key general duties of directors?

The duties of a director include:

- General company obligations, such as the preparation and filing of accounts.
 - Acting in compliance with applicable law and the provisions of the articles of association.
 - Acting in a way which is compatible with the LLC's objectives.
 - Exercising a degree of care in the discharge of management responsibilities.
 - Acting within the powers granted.
 - Not acting against the interests of the company for personal benefit.
-

What are directors' other key obligations?

Other obligations may include matters which are assigned to directors in the articles of association of an LLC and may vary according to how responsibility of managing the LLC is apportioned by the shareholders. This may include general company obligations such as maintaining records or calling annual general meetings.

Transactions with the company

A director should be expressly authorised in an LLC's articles of association or by way of a power of attorney in order to transact in the name of an LLC.

Liabilities of directors

Breach of general duties

Depending on the nature of the breach, action can be taken against a director for breach of law or breach of the LLC's articles of association by the company, its shareholders or third parties.

Liabilities on insolvency

Subject to potential liability for breaches relating to matters up to the time of liquidation, upon liquidation, the authority of the company's directors shall be terminated (however, the directors shall remain liable for the management of the company and shall be considered as liquidators towards third parties until a liquidator is appointed). Liquidators are jointly liable to compensate losses of the company, the shareholders or third parties resulting from the liquidators acting beyond their powers or due to faults committed during the performance of their duties.

Other key risks

In certain circumstances, directors who engage in any of the following activities could face imprisonment of up to three years or fines up to SAR5 million:

- Deliberately making false or misleading statements in the financial statements or reports prepared or omitting in such statements or reports essential facts with the intent to conceal to the shareholders or others the financial position of the company.
- Using the company's funds for personal benefit or to personally benefit from company transactions or acting against the company's interests in order to personally benefit.
- Not convening the General Assembly or not taking the necessary actions in this regard, after becoming aware of losses in accordance with the relevant provisions of the KSA Companies Law.
- Liquidators' misuse of company funds.

In certain additional circumstances, directors could face imprisonment of up to one year or fines up to SAR1 million.

Protection against liability

How can directors be protected from liability?

Although it is not possible for shareholders to exempt/discharge its directors from liability, an LLC or its shareholders can indemnify its directors against certain liabilities incurred to third parties. D&O insurance can also be considered for the benefit of directors.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a

personal interest in any proposed or existing transaction or arrangement with the company.

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Corporate entities

What type of company is typically used in group structures?

In group structures, the type of company typically used is the limited liability company (LLC) (*Société à Responsabilité Limitée*). This guide therefore focuses on the management of a LLC.

Types of director

What is a "director"?

Under the provisions of the Company Act (which forms part of the law of the Organisation for the Harmonisation of Business Law in Africa (Ohada)), the director is an individual who is responsible for the management of the company. The director can be a shareholder of the company. It is important to specify that in Senegal only an individual can be a director of a LLC.

What are the different types of director?

The management of the company is normally the responsibility of the legal directors. However, it may happen that individuals not having this capacity interfere in the management, either as de facto directors, or as apparent or hidden directors.

Jure directors. The jure managers are the persons regularly appointed to manage the company and who, as such, legally assume management or administrative functions within the company and normally commit it externally

De facto directors. De facto directors are persons who, without having been appointed for this purpose, behave as true directors by effectively interfering in the management of the company. In other words, the de facto director is the one who, without any title, performs acts of management in place of the de jure directors. The person qualified as a de facto director must exercise, in full sovereignty and independence, a positive management activity and have the power to commit the company by their decisions.

Apparent directors. Apparent directors presuppose the existence of an apparent mandate. Indeed, the company can be committed by any person as soon as the third parties having dealt with it have legitimately believed that it had the necessary powers. This belief is considered to be legitimate in situations where the commercial practices, the documents presented, the relations of the parties authorize third parties not to verify the powers of the person acting.

Hidden directors. Hidden directors are persons who ensure the "real" management of the company behind the screen formed by the legal directors. They are therefore people who manage the company through an intermediary without their identity being known or made public. The hidden managers are those who keep the legal managers under their dependence and subordination; "they are in the shadow and they pull the strings".

In Senegal, some laws apply only to de jure directors (e.g. the security law) while others apply to all directors, whether de jure or de facto, apparent or hidden (eg laws organizing collective proceedings for the clearing of debts).

Eligibility

Who can be a director?

In Senegal only individuals can be a director of a LLC. However, there are no nationality or residency restrictions.

Minimum / maximum number of directors

The minimum number of directors is one. The law does not set a maximum.

Appointment and removal

How are directors appointed?

The terms and conditions of the appointment of the directors are provided in the articles of association or in a subsequent act.

When they are appointed in a subsequent act, unless a clause in the articles of association requires a higher majority, the decision is taken by a majority of shareholders representing more than half of the capital.

The document evidencing the appointment of a director must be registered with the Trade Register.

How are directors removed?

Directors are removed by a decision of the shareholders representing more than half of the shares. The document stating this must be registered at the Trade Register.

They can also be removed by the competent court in whose jurisdiction the head office is located, for just cause, at the request of any shareholder.

Board / management structure

Typical management structure

Usually, a LLC is managed by a single director who performs all management acts in the interest of the company.

However, it is possible that the limited liability company has several directors. In such a case, the directors have the power to perform all the management acts in the interest of the company separately.

How are decisions made by directors?

When there is a sole director, that person takes all the decisions except those which are within the competence of the shareholders.

When there is more than one manager, each manager can take decisions separately, except for those which are within the competence of the shareholders.

Authority and powers

In relation to shareholders and in the absence of determination of their powers by the articles of association, the director may perform all acts of management in the interest of the company.

In relation to third parties, the director is invested with the most extensive powers to act in all circumstances in the name of the company, subject to the powers expressly attributed to the shareholders.

Delegation

If permitted by the articles of association, a director can delegate their powers.

Duties and obligations of directors

What are the key general duties of directors?

A director contributes to the daily running of the company and performs all management acts in the interest of the company.

A director also represents the company with regard to third parties.

What are directors' other key obligations?

The director is responsible for convening the general meetings of shareholders (ordinary or extraordinary).

For the annual ordinary general meeting, the director must prepare the management report. The director also sends to the shareholders 15 days before the meeting the

financial statements for the financial year, the management report, the text of the proposed resolutions and, if any, the general report of the auditor together with any special report of the auditor relating to the agreements between the company and a manager or partner.

Transactions with the company

The director is prohibited from taking out loans from the company in any form whatsoever - including being granted a current account overdraft or otherwise and having the company guarantee or endorse their commitments to third parties.

Transactions which are carried out by a company, in the usual way, within the framework of its activities under normal conditions (i.e. those which are applied for similar agreements with the company in question or, possibly, in companies of the same sector), do not require the authorisation of the ordinary general assembly.

All other transactions must be submitted to the authorisation of the ordinary general meeting.

Liabilities of directors

Breach of general duties

The shareholders representing a quarter of the shares may, either individually or in a group, institute a corporate action for liability against the director.

They are entitled to claim compensation for the entire damage suffered by the company, for which, if necessary, damages are awarded.

Liabilities on insolvency

When the cessation of payments by a company reveals a lack of assets, the court may, if mismanagement has contributed to this lack of assets, decide at the request of the trustee, the public prosecutor, or even ex officio, that the debts of the company are borne in whole or in part, with or without joint and several liabilities, by all or some of the directors.

In the event of legal redress or liquidation of a company, a director may incur personal liability if they have:

- exercised an independent professional activity, civil, commercial, artisanal or agricultural, either through an intermediary or under the cover of the company masking their actions
 - disposed of the credit or property of the company as their own property, and
 - abusively pursued, in their personal interest, a loss-making operation which could only lead to the company's cessation of payments.
-

Other key risks

Criminal liability of the directors can be engaged in the case of offences related to the management, administration and direction and dissolution of companies.

Protection against liability

How can directors be protected from liability?

Liability insurance may be purchased on behalf of the directors.

What practical steps can directors take to avoid liability?

To avoid liability, directors must manage the company and act in all circumstances on behalf of and in the interest of the company.

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Corporate entities

What type of company is typically used in group structures?

In Singapore, the most common type of company used in group structures is a private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

Section 4 of the Companies Act 1967 of Singapore (Act) provides that "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors or the majority of the directors of a corporation are accustomed to act and an alternate or substitute director.

Broadly, the law therefore potentially regards someone who manages the affairs of a company on behalf of its shareholders as a director (whether they are called a director or not). Accordingly, it is the position that the individual holds and the role that the individual plays in managing the company that are important in determining whether they are a director of the company.

What are the different types of director?

Some Singapore companies categorise their directors under the following categories (non-exhaustive):

- Executive and non-executive directors.
- Local directors.
- Associate directors.
- Managing director(s).

- Alternate directors.

It is important to note, however, that the Act does not differentiate between the types of directors and all directors are subject to the same level of duties.

Eligibility

Who can be a director?

Section 145 of the Act provides that a director must be a natural person of at least 18 years old and of full legal capacity. At least one of the directors has to be ordinarily resident in Singapore. Additional criteria include, inter alia, the following:

- A resident director must a Singapore Citizen, Singapore Permanent Resident or EntrePass holder (note: if the individual is an Employment Pass (EP) holder, they must first get a Letter of Consent (LOC) from the Ministry of Manpower before being appointed as a director of a company in Singapore).
- A director must not be disqualified from acting as a director of a company by virtue of, e.g. being declared an undischarged bankrupt or being disqualified under statutes including but not limited to, the Act, the Banking Act 1970, the Financial Advisers Act 2001, the Insurance Act 1966 and the Monetary Authority of Singapore Act 1970.

Corporate directors are not allowed or recognised under Singapore law.

Minimum / maximum number of directors

A private company must have at least one natural person director (who is also ordinarily resident in Singapore – see [Who can be a director](#)). Except as provided in the company's constitution, there is no maximum number of directors.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment by signing a declaration of consent to act as director (Form 45) and a statement that they are not disqualified from acting as a director.

Directors can be appointed by:

- The company's shareholders (via a shareholders' meeting or by written resolution).
- As usually provided for in the constitution of a Singapore company, by the other directors (to fill a casual vacancy or as an additional director).

In private subsidiary companies, the constitution commonly allows the parent company to propose the appointment of directors by written notice to the company. Similar nomination rights exist for a joint venture company/VC company as well.

Details of the appointment (including details of shares that the directors have acquired or shares that are registered in the directors' name) must be filed at the Accounting and Corporate Regulatory Authority of Singapore (ACRA). The ACRA must consent to the appointment before the individuals can be appointed as directors. A director's residential address (unless an alternate address is registered instead) and identity numbers (i.e. NRIC / FIN / Passport numbers, as applicable) are available on the public record.

How are directors removed?

- **Removal by shareholders.** Section 152 of the Act provides that shareholders may remove directors by ordinary resolution, notwithstanding any agreement between the company and the directors.
- **Written notice by appointing shareholder.** It is also common for the constitution of a company to enable the appointing shareholder (or the parent company) to remove its nominee director by written notice.
- **Vacation of office.** A director may be disqualified and vacated from office upon conviction of certain offences (please also refer to [Who can be a director](#) for examples of relevant statutory breaches) and persistent default in relation to delivery of documents to the Registrar.
- **Resignation:** A director may resign by writing under their hand left at the registered office of the company at any time.

When a director leaves office, a notice must be filed with the ACRA within 14 days.

Board / management structure

Typical management structure

Boards of Singapore private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company (despite any differentiation in titles of, inter alia, "non-executive" and "executive" directors). The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

It is common for a Singapore company to appoint a Chief Executive Officer (CEO) and Managing Director to manage and oversee all or part of the company's business. It should however be noted that the appointment of a CEO does not absolve the board from its liabilities and responsibilities.

How are decisions made by directors?

Directors make decisions collectively in the manner as set out in the company's constitution.

In private companies, the constitution typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice must be given to all). Unless the constitution or the Act stipulates otherwise (for instance where the constitution provides for certain shareholders' and board reserved matters requiring a higher voting threshold), voting at board meetings is on a simple majority basis. In the case of equality of votes, the chair (who is elected by the directors and among the directors from time to time) will usually have a second or casting vote under the constitution of the company.

When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the constitution may specify otherwise (for instance, a majority of the Directors for the time being and being not less than are sufficient to form a quorum).

Authority and powers

As far as third parties are concerned, section 25B of the Act provides that directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (including in the company's constitution or in internal policies and protocols).

Normally, the company's constitution provides the directors with wide powers to manage its business and affairs as they think fit (although the constitution may also provide that shareholders may give the board specific directions as to its conduct by way of, inter alia, shareholders' reserved matters). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

Delegation

It is usually permitted under a Singapore company's constitution for the board to delegate their powers to committees and others (e.g. executives or a Chief Executive Officer (CEO)). However, the board retains overall responsibility for the company's operations and management and such delegation does not absolve the directors from discharging their directors' duties.

Duties and obligations of directors

What are the key general duties of directors?

The Act provides that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of their office.

The key duties of a director are set out in the Act and under common law. These are duties to:

- **Act in good faith in the best interest of the company.** Directors must act in the way that they consider, in good faith, would be most likely to promote the success

of the company for the benefit of its members as a whole, having regard (amongst other matters) to:

- The long term consequences of decisions.
- The interests of the company's employees.
- The need to foster the company's business relationships with customers, suppliers and others.
- The impact of the company's operations on the community and the environment.
- The desire to maintain a reputation for high standards of business conduct
- The need to act fairly between members.

There is no hierarchy to these factors and, where they conflict, a director will need to use their business judgement in weighing the conflicts against one another.

Companies which are "large" for accounting purposes are required to include a statement in their annual financial report describing how, during the relevant financial year, the directors have had regard to these factors when performing their duty to promote the success of the company.

- **Act with reasonable care, skill and diligence.** Directors must meet the minimum standard of skill and care expected of someone in their position and they must also bring to bear their particular skills and experience – therefore, the more qualified or experienced a director is, the greater the subjective standard of duty of care, skill and diligence is imposed on the director.
- **Exercise independent judgement.** However, a director may rely on other people (e.g. through proper delegation or by seeking professional advice) provided they judge that it is reasonable to do so and it does not fetter the director's discretion pursuant to an agreement entered into by the company or is done in a way that is authorised by the company's constitution.
- **Act within the company's constitution** and exercise their powers for the purposes for which they were given and not for any collateral purpose.
- **Act honestly and avoid conflicts of interest.** Directors must not put themselves in a position where there is, or could be, a conflict between their personal interests or their duties to another person and the interests of the company (for example, where they are a director or employee of another company or where they may be in a position to take advantage of any property, information or opportunity they became aware of as a director). This duty is not breached if the situation cannot reasonably be regarded as giving rise to a conflict of interest or if the situation has been pre-authorised by the board, by shareholders or in the company's constitution.
- **Not accept benefits from third parties, without prior shareholder approval.** This duty is not breached if acceptance of such benefits cannot reasonably be regarded as giving rise to a conflict of interest. This allows for reasonable levels of corporate hospitality from third parties.
- **Declare interests in proposed transactions or arrangements with the company.** Directors must disclose the nature and extent of their personal interests in a

proposed transaction or arrangement with the company before it is entered into. Directors must also declare the nature and extent of their interest in a transaction or arrangement that has already been entered into by the company as soon as reasonably practicable.

- Not to make improper use of information obtained by virtue of office to gain advantage personally or to cause detriment to the company and not to make improper use of unpublished price-sensitive information to gain personal benefit.
- **Maintain duty of confidentiality.** A director must not disclose information of a confidential nature concerning the company (which could include information about its business, future plans, research and development and other commercially sensitive information) to anyone else, unless they have been authorised by the company to do so. For example, where a director is appointed by a shareholder they must not, without the authority of the company, disclose to that shareholder any confidential information relating to the company which has been gained by them as a director. In this situation, the board should agree in advance what categories of information a director can pass to a shareholder, for example, through a shareholders' agreement.

What are directors' other key obligations?

The Act requires directors to prepare and file annual accounts and submit other information to the companies register, including information about significant shareholders. The accounts and other information must be filed with the ACRA within the prescribed time limits. The directors are also required to lay financial statements before the shareholders in the company's annual general meeting

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

Every director or a chief executive officer of a company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as is practicable after the relevant facts have come to their knowledge declare the nature and extent of their interest in the proposed transactions at a meeting of directors or by written notice to the company. Save as otherwise provided for in the constitution, the director shall be entitled to vote in the proposed transaction and enter into the proposed transaction.

Nonetheless, a director should also be reminded of their common law fiduciary duty to the company and must not place themselves in a situation in which there is a conflict between their duties to the company and their personal interests or their interests to others.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, a shareholder must first obtain the court's permission to proceed with a derivative action and the court will take into account a number of factors when deciding whether to grant this permission – including whether the shareholder is acting in good faith and whether it appears to be in the best interest of the company for the permission to be granted. Notwithstanding, a shareholder (who is acting on the company's behalf with the court's permission) will not benefit directly and personally from a derivative action as any damages or remedies awarded will be payable to the company.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the clawback of unlawful dividends declared), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Directors are under a duty to take into account the interests of the company's creditors when the company is insolvent or nearly insolvent. It is advisable for directors to seek personal professional advice to avoid taking actions increasing their liability exposure to the company's creditors.

Directors may be personally liable for the payment of debts if they knew, or ought to have known in all the circumstances that the company was trading wrongfully / fraudulently under sections 238 and 239 of the Insolvency, Restructuring and Dissolution Act 2018. Liability for wrongful trading can be avoided if the director can satisfy the court that: they had acted honestly; and that having regard to all the circumstances of the case, the director ought fairly to be relieved from personal liability. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Personal liability for directors may, in certain circumstances, arise under legislation including those relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company). Please also refer to Who can be a director? for examples of relevant statutory breaches that would trigger disqualification.

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or is in breach of any duty by an ordinary resolution (excluding the votes of the director concerned or their connected persons) upon a full and frank disclosure of all material facts. Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. Notwithstanding, a company cannot directly or indirectly provide an indemnity (to any extent) for a director of the company against any liability attaching to them in connection with any negligence, default, breach of duty or breach of trust in relation to the company. To the extent that a third party indemnity is obtained, the indemnity would be void if it is against, inter alia, any liability incurred by the director in defending criminal proceedings in which they are convicted.
- **Insurance.** Directors' and officers' (D&O) insurance is common in Singapore. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take

professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.

- Be aware of, and comply with, the company's constitution and any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with these is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Additionally, in a group situation, directors should keep in mind that they must act in the best interest of the company. Whilst group interests and the company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

As in most jurisdictions, a limited liability company (in Slovak: *spoločnosť s ručením obmedzeným*) is the typically used type of corporate entity in group structures.

Types of director

What is a "director"?

There is no specific definition of the term "director" in Slovak commercial law. Basically, the law defines a director (in Slovak: *konateľ*) by setting out the criteria for their role, for example how directors can be appointed and what their duties are. In general, a director (one or more) is a statutory body of a limited liability company, acting on its behalf (if there is more than one director, each of them is authorised to act on behalf of the company independently, unless the Articles of Association stipulate otherwise). Directors are registered in the Commercial Register.

The role of the director consists of, for example:

- Representation of the company externally in relation to state institutions, courts or other (third) parties.
- Conclusion of contracts on behalf of the company, conducting transactions, etc.

What are the different types of director?

There is only one type of director in a Slovak limited liability company.

For the sake of completeness, please note that in addition to a director, it is also possible to appoint a proxy (in Slovak: *prokurista*). If appointed, a proxy is authorised to carry out all legal acts arising in the operation of an enterprise, even if they otherwise require a special power of attorney. However, a proxy is not authorised to sell and encumber real estate, unless this authorisation is explicitly stipulated. Further, a proxy cannot sign documents concerning employment relations.

Eligibility

Who can be a director?

Only a natural person can be a director of a Slovak limited liability company. At the time of registration in the Commercial Register, such person cannot be listed in the register of enforcement proceedings as a debtor. A director also cannot be listed in the register of disqualifications.

Further conditions follow from the Slovak Trade Licensing Act. Directors must:

- be at least 18 years of age
- have legal capacity, and
- have integrity.

If the director is not a citizen of an EU member state or an OECD member state, a residence permit in Slovakia is also required.

Minimum / maximum number of directors

A Slovak limited liability company must have at least one director, but no upper limit is set by the Slovak commercial law.

Appointment and removal

How are directors appointed?

When the company is established, the first directors are listed in the Articles of Association. The application for the registration of a Slovak limited liability company in the Commercial Register must be signed and filed by all its directors. The registration of the first director(s) in the Commercial Register is constitutive, i.e. a director may perform their duties only upon registration in the Commercial Register.

During the existence of the company, subsequent directors are appointed by the general meeting or by the sole shareholder acting within the scope of the general meeting. The registration of such new directors in the Commercial Register is only declaratory, and therefore the directors may perform their duties and may represent the company from the date of their appointment (i.e. if the appointment is made with immediate effect, from the date of decision of the general meeting).

Only the company's first directors need to be stipulated in the Articles of Association, later changes of director do not need to be reflected in the Articles.

It is also recommended to conclude a management agreement with the director, which regulates remuneration of the director and the mutual rights and obligations of the director and the company (otherwise the director will be entitled to a so-called usual remuneration). Such a management agreement needs to be approved by the general meeting (or sole shareholder).

Board / management structure

How are directors removed?

A director can resign from the function.

However, the easier and the most common method for removing a director is recall by the general meeting (or sole shareholder). The deregistration of a director from the Commercial Register is only declaratory, i.e. the function terminates with effect from the date of recall (i.e. if the recall is made with immediate effect, from the date of decision of the general meeting).

Typical management structure

A Slovak limited liability company is managed by one or more directors.

Creation of a supervisory board in a limited liability company is not mandatory and is very rare.

For the sake of completeness, we note that in case of a joint stock company (in Slovak: *akciová spoločnosť*) creation of a supervisory board is mandatory.

How are decisions made by directors?

Generally, the Slovak commercial law does not specify a decision-making process of directors of a Slovak limited liability company. The articles of association may also provide for voting outside a meeting by written form or by means of communication technology.

The law requires that every director fulfils their duties with professional care and in line with the interests of the company and all its shareholders.

Authority and powers

Each director is authorised to act on behalf of the company independently, unless the Articles of Association stipulate otherwise (e.g. that two directors must act jointly).

The scope of powers may be limited by the Articles of Association or by general meeting (or sole shareholder). However, such limitation is not effective towards third parties.

The company's business management must be distinguished from the company's representation. While representation of the company is carried out externally in relation to third parties, business management relates to the internal management of the company. According to the Slovak Commercial Code, where decisions fall within the company's business management, the consent of a majority of the directors is required, unless the Articles of Association require a higher number of votes.

Delegation

The directors are not entitled to delegate the full scope of their management powers to third parties via a power of attorney and may only delegate a specific task or tasks (i.e. a general power of attorney is prohibited).

Duties and obligations of directors

What are the key general duties of directors?

A director is in charge of the company's day-to-day business.

The key duties of a director are, for example:

- To ensure due administration of the company's prescribed records and accounts, to keep a list of shareholders and to inform shareholders of the company's affairs.
- To submit for the general meeting's approval financial statements and a proposal for the distribution of profit or payment of losses.
- To exercise powers with professional care and in accordance with the interests of the company and all its shareholders. In particular:
 - Directors must obtain and take into account in their decision-making all available information relating to the subject of their decision.
 - Directors must maintain confidentiality about confidential information and facts, the disclosure of which to third parties could cause damage to the company or endanger its interests or the interests of its shareholders.
 - While exercising their powers, directors must not give priority to their own interests, the interests of only certain shareholders or the interests of third parties over the company's interests.

What are directors' other key obligations?

In general, directors must take all necessary measures in order to prevent insolvency.

Directors are obliged to file a petition for bankruptcy within 30 days of the moment they learned or could have learned of the company's insolvency while maintaining professional care. If the director does not file a petition for bankruptcy in time, they are obliged to pay to the company a penalty in the amount of EUR12,500.

A breach of this obligation to file a petition for bankruptcy in time is also punishable under the Slovak Criminal Code.

Transactions with the company

A director cannot:

- Conclude, in their own name or on their own account, business deals related to the company's business activity.
- Mediate the company's business deals for other parties.

- Participate in the business activity of another company as a shareholder with unlimited liability.
- Perform activities as a statutory body or another body of another legal entity with a similar subject of business (unless exemptions under the Slovak Commercial Code apply).

The Articles of Association of a company may stipulate further limitations.

Liabilities of directors

Breach of general duties

Directors who breach their obligations while exercising their powers are obliged to jointly and severally compensate the company for the damage caused.

According to the Slovak Commercial Code, the directors are not liable for damage if they can prove that they exercised their powers with professional care and in good faith and that they were acting in the company's interest. Directors are not liable for any damage caused to the company by executing a decision of the general meeting; however this does not apply if the general meeting's decision is contrary to legal regulations, the Articles of Association or if it concerns the obligation to file the petition for bankruptcy.

Claims for damages of the company against its directors may be exercised on behalf of the company by each shareholder. Such claims may be also be exercised by a creditor of the company that is unable to satisfy its receivable from the company's property.

Liabilities on insolvency

Please see [What are directors' other key obligations](#).

Other key risks

A director is also personally liable if, for example, they breach the following obligations:

- To ensure that there is no violation of contractual obligations.
- To ensure that the company pays its taxes and advances in time and submits its respective tax declarations in accordance with Slovak tax legislation.
- To ensure that the company makes timely payments (in this respect, please note that non-payment of salary and severance payments is a crime under the Slovak Criminal Code for which also the statutory body of the employer is punishable).
- To ensure that all administrative law requirements are met fully and in a timely manner.
- To ensure that the company complies with the Slovak labour law regulations, etc.

Protection against liability

How can directors be protected from liability?

Agreements between a company and its director that exclude or limit the liability of the director are not permitted. The Articles of Association can neither limit nor exclude liability of the director. A company may waive its claims for damages against a director or conclude a settlement agreement with them only after a period of three years since such claims arose, provided that the general meeting approves this and that no shareholder or shareholders with contributions amounting to 10% of the registered share capital file a protest against such decision at the general meeting.

Insurance of liability for damage can be concluded.

What practical steps can directors take to avoid liability?

Directors should perform their duties in compliance with the Slovak Commercial Code and other applicable regulations (such as tax regulations, labour law regulations, regulations concerning health and safety, ethics, bribery/anti-corruption, etc.).

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South Africa

LAST MODIFIED 6 JANUARY 2026



Corporate entities

What type of company is typically used in group structures?

In South Africa, the most common type of company used in the South African market is a private company limited by shares. This guide therefore focuses on the management of private companies in South Africa.

Types of director

What is a "director"?

A director is a member of the board of a company responsible for the day-to-day management of a private company. The definition of a director is an inclusively defined concept in terms of South African law. This means that the formalities are not crucial in attempting to identify those persons who are directors of a particular private company, therefore a director includes an alternate director, a non-executive director and any person occupying the position of a director by whatever name designated. The business and affairs of the company must be managed by (or under the direction of) the board.

South African company law also makes provision for "prescribed officers", which are persons who are not specifically appointed as directors but which exercise (or regularly participate to a material degree in the exercise) of general executive control over and management of all or a significant portion of the business or activities of a company. Prescribed officers are subject to the same statutory fiduciary duties as directors.

At common law, persons who outwardly purport to act as a director, and which are tacitly permitted to do so by the company, will also be deemed to have the authority of a director to bind the company in certain instances.

What are the different types of director?

In general South African company law does not differentiate between different types of director and all directors are subject to the same duties. Although the concept of a director is wide, the most common types of directors are:

- an alternate director: refers to a person appointed as a member of the board in substitution for a particular elected or appointed director of that company;
- an *ex officio* director: refers to a person who is a director of a company as a consequence of holding some other office, title, designation or similar status;
- executive directors: refers to a person who is employed by the company to oversee the day-to-day operations of the company;
- independent or non-independent non-executive directors: refers to person who is a director of a company but who is not employed by the company other than in their capacity as members of the board of directors; and
- *de facto* director: refers to a person who claims to act and purports to act as a director, without having been so appointed either validly or at all.

The distinction between executive directors (persons also employed by the company to oversee the day to day operations of the company) and independent or non-independent non-executive directors (directors which are not employed by the company other than in their capacity as members of the board of directors) is important in terms of applying the principles of good corporate governance set out in the King IV Report on Corporate Governance for South Africa 2016 (King Code). Although not codified in statute, the King Code's principles are required to be implemented by all listed companies in South Africa and are applicable to private companies on a voluntary basis.

A company's memorandum of incorporation may make provision for a person to hold the office of director by virtue of their office, title or designation (e.g. CEO or MD), in which case such a person will be an *ex officio* director.

Eligibility

Who can be a director?

A director must be a natural person who is least 18 years old. There are no nationality or residency restrictions on the appointment of directors.

A person will be disqualified and/or ineligible to act as a director where such person: (i) is a juristic person; (ii) is declared a delinquent by a court; (iii) is prohibited in terms of any public regulation to be a director of a company; (iv) is an unemancipated minor; (v) was removed from office of trust due to dishonesty; (vi) was convicted of a crime of dishonesty (including, *amongst others*, fraud and theft) without an option of a fine; or (vii) does not meet the qualifications set out in the company's memorandum of incorporation.

Minimum / maximum number of directors

A private company must have at least one director (public companies must have at least three directors). There is no prescribed maximum number of directors, however, it is common for a company's memorandum of incorporation to determine a maximum number of directors.

Appointment and removal

How are directors appointed?

Directors are appointed if they:

- are elected by the shareholders of the company at a shareholder meeting or through a written resolution.
- hold a specific office, title or designation which automatically entitles them to be an ex officio director, if the company's memorandum of incorporation so provides.
- are nominated for direct appointment by certain shareholders, if the company's memorandum of incorporation so provides.
- are appointed by the board of directors to fill a vacancy (which appointment will be valid until the next annual general meeting of the company).

Each director must consent to their appointment in writing.

Details of their appointment must be filed at the Companies and Intellectual Property Commission within ten days of the appointment taking place. A director's residential address and full date of birth together with a certified/notarised copy of their identity document or passport must be supplied with the filing. Foreign directors are required to have their passport copies reviewed and authorised by the Companies and Intellectual Property Commission prior to the appointment being effected.

How are directors removed?

Shareholders may remove a director by a majority resolution adopted at a shareholders meeting (subject to certain procedural requirements, including the requirement that such director be (i) invited to the shareholders' meeting and (ii) provided with an opportunity to make representations to the shareholders prior to the voting of the shareholder resolution). The right to remove a director is in addition to the right to place a director under probation or have them declared a delinquent director.

If a company has more than two directors, the board may remove a director by resolution (after allowing representations by the director) if it determines that the director:

- has become ineligible or disqualified
- has become incapacitated or
- has neglected, or been derelict in, the performance of the functions of a director.

If a company has fewer than three directors, the board of directors may not remove such director and the matter must be referred to the Companies Tribunal to remove a director on the same basis.

A director appointed for a fixed term ceases to be a director upon expiry of that term.

A director may also resign at any time.

When a director leaves office, the change must be effected with the Companies and Intellectual Property Commission within ten days.

Board / management structure

Typical management structure

Boards of South African private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's memorandum of incorporation. In private companies, the memorandum of incorporation typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings differs per company (based on the number of directors) and is set out in the memorandum of incorporation (although notice of the meeting must be given to all directors). A board meeting may not be convened without notice being given to all of the directors, except to the extent that the memorandum of incorporation provides otherwise or if all the directors waive notice of the meeting.

Unless the memorandum of incorporation stipulates otherwise, each director has one vote on a matter. A director may not be prevented from voting on a matter by their co-directors. Should a director be prevented from voting on a matter, the resolution may be set aside as invalid by a court. Directors may not bind themselves by a voting agreement in terms of which they bind themselves to vote in accordance with the directions and instructions of some other person as this would be contrary to their fiduciary duties. Voting at board meetings is on a simple majority basis. The company's memorandum of incorporation may provide for a resolution in respect of certain matters to be adopted by a supermajority of votes.

Directors may consent in writing to decisions that could be voted on at a board meeting, in terms of a resolution informally known as a 'round robin' resolution. Such decisions have the same effect as if they had been approved by voting at a meeting. Decisions may be taken by means of a written resolution provided that every director has received notice of the matter to be decided.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (e.g. in the company's memorandum of incorporation or in internal policies and protocols), unless a third party is aware of such limits.

Usually the company's memorandum of incorporation gives the directors wide powers to manage its business and affairs as they think fit (although the memorandum of incorporation may also provide that shareholders may give the board specific directions as to its conduct in specific instances, or may limit the powers of the company (and thus limit the powers of the board), such limitations typically relate to the existence and structure of the company, the ability of the company to conclude certain transactions or engage in certain corporate actions).

Directors' powers are collective, meaning that directors should act together as a group on the company's behalf – however each director has inherent authority to act individually on the board's behalf.

Delegation

Unless restricted by the company's memorandum of incorporation, the board can delegate their powers to committees and others (e.g. executives). However, the board retains overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

A director, alternate director, prescribed officer and member of a committee or board must:

- Perform all powers and functions:
 - in good faith and for a proper purpose, which entails acting within the company's capacity at all times and using powers only for the purpose which they have been assigned;
 - in the best interests of the company whilst considering the interests of the stakeholders of the company; and
 - with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director and having the general knowledge, skill and experience of that director.
- Exercise an independent and unfettered discretion and judgement, and in particular where the opinion of an outside expert is relied upon, such director must still apply their mind and exercise their own independent judgment.
- Avoid any conflicts of interest.

What are directors' other key obligations?

The South African Companies Act requires directors to prepare and file annual accounts and submit other information to the Companies and Intellectual Property Commission. The accounts and other information must be submitted to the Companies and Intellectual Property Commission within the prescribed time limits.

A director, alternate director, prescribed officer and member of committee or board (collectively directors) must not:

- use their position or any information obtained while acting as a director to either gain an advantage for themselves or for another person other than the company or knowingly cause harm to the company or its subsidiary, by hindering the company's commercial opportunities.
- exceed the company's powers. A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in good faith and for a proper purpose. A 'proper purpose' means that the powers given to directors must be exercised for the purpose for which they were granted.
- make a secret profit.
- conclude a transaction or acquire an opportunity which was in fact a transaction or an opportunity that was available to the company, unless a full disclosure is made to and consent is obtained from the other directors.
- breach their duty of care, skill and diligence, by putting their interests above those of the company or by acting negligently. The test for determining negligence is an objective one, as it compares the conduct of the director to that of a reasonable director's conduct.
- knowingly (an actual knowledge or where the director ought reasonably have known or have investigated further):
 - act in the name of the company, sign on behalf of the company or authorise action by or on behalf of the company without authority;
 - act or fail to act with the intention to defraud a creditor, employee or shareholder of the company, or for any other fraudulent purpose;
 - acquiesce in carrying out the company business despite knowing (or where the director ought reasonably to have known and fails to investigate further) that such actions constitute reckless trading; or
 - sign, consent or authorise the publication of materially false or misleading financial statements or a prospectus containing untrue statements;
- be present at a relevant meeting or participate in the making of a decision by round robin and fail to vote against any of the following actions (to the extent the director knew the relevant action was inconsistent with the South African Companies Act or the company's memorandum of incorporation):
 - issue of unauthorised shares or securities.
 - grant of options over unauthorised shares.
 - provision of unlawful financial assistance to any person for the acquisition of securities of the company.

- provision of unlawful financial assistance to a director, to the extent that the resolution or agreement has been declared void.
- approval of an unlawful distribution.
- unlawful acquisition by the company of any of its shares, or the shares of its holding company.
- an unlawful allotment by the company, to the extent that the allotment or the acceptance of it is declared void.

If such director has or knows that a related person has a personal financial interest in a transaction or proposed transaction with the company, or in a matter to be considered by the board of directors at a board meeting, the director must not participate in the consideration of the matter, except to the extent of the disclosure or execute any document on behalf of the company in relation to the matter, unless specifically requested to do so.

Transactions with the company

A director or a person related to that director may transact with the company subject to full disclosure of their interests, however that director may not participate in the board's consideration of such transaction and may not vote in respect thereof if they or a related person have a personal financial interest in the matter. A failure to comply with this requirement in respect of a particular decision, agreement or transaction may render the relevant decision, agreement or transaction invalid.

If a director has or knows that a related person has a personal financial interest in a transaction or proposed transaction with the company or in a matter to be considered by the board of directors at a board meeting, the director must:

- Disclose the interest and its general nature before the matter is considered.
- Disclose any material information relating to the matter, and known to the director.
- Disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors.
- If present at the meeting, leave the meeting immediately after making any disclosure.
- Communicate to the board at the earliest practicable opportunity, any information which comes to the director's attention which is of importance to the company, unless the director:
 - reasonably believes that the information is immaterial to the company, generally available to the public or known by the other directors, or
 - is bound by legal or ethical obligation of confidentiality.

Business Judgement Rule

An important concept to discuss concerning directors duties is the business judgement rule, essentially this rule states that a director acted in the best interests of company, and with the requisite degree of care, skill and diligence in respect of a particular matter if that director:

- took reasonably diligent steps to become informed about that matter;
- had no material personal financial interest in that matter or, if he did, followed the requisite disclosure and recusal provisions contained in the South African Companies Act; and
- had a rational basis for believing and did believe, the decision to be in best interests of company.

The purpose of the business judgement rule is to prevent directors being held liable, with the benefit of hindsight, for honest errors of judgement. The business judgement rule is supplemented with the 'reliance rule', which provides that, in exercising their functions as such, a director is entitled to rely on others (such as employees, committees or advisors of the company) reporting to them, as well as opinions and information provided to them.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, the South African Companies Act does make provision for civil claims to be instituted by third parties against directors (and others) in respect of breaches of the Act if that third party (including a shareholder) is able to prove it suffered a loss due to the breach. Recent case law suggests the courts will recognise the rights of creditors and other third parties to bring such claims, but will not recognise shareholder rights to do so.

Generally, directors are liable to the company under common law for any losses, damages or costs sustained by the company as a direct or indirect consequence of the director having breached their fiduciary duties and obligations.

Liabilities on insolvency

Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or reckless trading. This may result in criminal liability (including the possibility of a fine or imprisonment) as well as personal civil liability for any loss incurred by any other person as a result of such reckless trading.

Other key risks

Personal liability for directors may, in certain circumstances, arise under South African legislation including that relating to environmental and health and safety, anti-trust and bribery/anti-corruption. In certain cases, criminal liability may arise.

Directors may also be declared delinquent or under probation if, amongst other things, they have breached their duties or certain obligations under the South African Companies Act. An order of delinquency or probation prevents a person acting as a director of a company (or places restrictions on their ability to do so) and a court may also order that compensation is payable to persons adversely affected by the director's conduct.

Recent amendments to the South African Companies Act allow a court, on good cause, to extend the three-year time period in which to bring proceedings against a director for any loss, damages or costs sustained by the company as a consequence of any breach by a director of their fiduciary duties.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. The company may also pay a director's defence costs as they are incurred – however these costs become a loan which must be repaid by a director should the defence be unsuccessful and the costs are not covered by any permitted indemnity. The company may seek to obtain security for such loans if appropriate in order to protect the company's assets. A company may not indemnify a director in respect of the following:
 - A liability arising from:
 - actions undertaken on behalf of the company whilst knowing they had no authority to act
 - acquiescence in the company carrying on business recklessly, with gross negligence or with the intention to defraud any person, or
 - a director being party to an act or omission by the company calculated to defraud a creditor, employee, or shareholder or for any other fraudulent purpose.
 - Wilful misconduct or wilful breach of trust.
 - A liability to pay a fine as a consequence of conviction of an offence (excluding a strict liability offence).

- **Insurance.** Directors' and officers' (D&O) insurance is available in South Africa. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

A director, alternate director, prescribed officer or member of a committee will be deemed to have discharged the duty to act in the best interests of the company and with a degree of care, skill and diligence, if the director, prescribed officer or committee member:

- Takes reasonably diligent steps to become informed about the matter.
- Either has no material personal financial interest in the subject matter or has disclosed such personal financial interest to the board or shareholders.
- Made a decision, or supported the decision of a committee or a board, with regard to the subject matter.
- Had a rational basis for believing, and did believe, that the decision was in the best interests of the company.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

The most common type of company used in group structures in Spain is the limited liability company (*sociedad de responsabilidad limitada* or *S.L.*). This guide therefore focuses on the management of this type of company.

Although there are some differences with other types of companies such as joint-stock companies (*sociedad anónima* or *S.A.*) or public listed companies (*sociedad cotizada*), please note that, according to the Spanish Companies Act (*Ley de Sociedades de Capital*), most of the particular provisions applicable to limited liability companies are also applicable to these types of companies.

Types of director

What is a "director"?

Company directors are natural persons or legal entities (in the latter case represented by a natural person) who are in charge of managing and representing the company. They are responsible for making business decisions and overseeing the affairs of a company.

What are the different types of director?

Directors are appointed by the shareholders. A company may have the following types of directors:

- **Sole director.** The sole director is the sole representative of the company and therefore acts individually.
- **Multiple directors.** Either joint and several directors, each one of them can act separately and the actions carried out by one of the joint and several directors will bind the company, or joint directors, who must necessarily act jointly.

- **Board of directors.** The board of directors shall not have less than three and no more than 12 members. The bylaws may establish the number or a minimum and maximum number of members for the board of directors. In the latter case the shareholders shall determine the exact number. In addition, the board must appoint a chairperson and a secretary. If the company has a board of directors, individual directors do not have authority to bind the company unless powers are delegated to them. The board may delegate some of their functions to a managing director/CEO (*consejero delegado*) or an executive committee (*comité ejecutivo*). Please note that a board of directors is mandatory for joint-stock companies (*sociedad anónima* or *S.A.*) when there are more than two directors and for public listed companies (*sociedad cotizada*).

In all cases, powers of attorney can be granted by the management body of the company in favour of other persons (subject to some restrictions).

Directors may be shareholders of the company (*consejero dominical*) or not (*consejero independiente*).

Finally, company's directors may be *de jure*, as they are validly appointed through the procedures provided for by law and the company's bylaws, or *de facto*, by exercising its functions in spite of not have been formally appointed. Nevertheless, all of them are subject to the same duties.

Eligibility

Who can be a director?

Everybody (shareholder or not) is eligible to be a director and a director is not required to be a Spanish resident. It is possible to be a natural person or a legal entity. In the latter case, the legal entity must appoint a representative for the performance of its functions as director.

The above is the general rule. However, Spanish law establishes some exceptions for certain people who cannot be directors:

- Non-emancipated minors and judicially incapacitated persons.
- People judicially disqualified under the Insolvency Law, for the period of disqualification.
- People convicted of certain crimes.
- Those who, due to their position, cannot carry out commercial activities.
- Civil servants whose functions are related to the activities of the company.
- Judges and magistrates.
- Whoever is affected by other legal incompatibilities (e.g. auditors of the company's accounts and those engaged in the same commercial activity or analogous).

There is also a special feature specific to public listed companies (*sociedad cotizada*), whose board of directors may only be composed of natural persons.

Minimum / maximum number of directors

The number of directors shall be that specified in the company's bylaws. The company's bylaws may provide for a single management system which will be one of those indicated in [What are the different types of director?](#) (i.e. a sole director, multiple directors (two or more) or a board of directors), or establish several management systems as alternatives. In the latter case, the shareholders can, without the need to amend the bylaws, decide which of the various systems provided for in the bylaws will be effective. If a single management system has been included in the bylaws, the change from one system to another will necessarily require an amendment of the bylaws to be approved by the shareholders.

If the shareholders resolve to appoint a board of directors as the management body of the company, the following rules must be followed:

- There must be a minimum of three and a maximum of 12 directors for limited liability companies (*sociedad limitada* or *S.L.*).
- There must be a minimum of three directors, without upper limit, for joint-stock companies (*sociedad anónima* or *S.A.*).

Appointment and removal

How are directors appointed?

Directors are appointed by the company's shareholders, with effect from the acceptance of the concerned person.

The appointment of the directors, once accepted, must be filed for registration with the relevant Commercial Registry, stating the identity of those appointed and, in relation to the directors who have been assigned to represent the company, whether they can act individually or need to do so jointly.

How are directors removed?

Directors may be removed by resignation or, at any time, by the company's shareholders even if the removal is not included on the general meeting's agenda.

The removal of a director must be registered with the Commercial Registry in order to be effective against third parties.

Board / management structure

Typical management structure

A company may have the following types of management body structure:

- **Sole director.** The sole director is the sole representative of the company and therefore acts individually.

- **Multiple directors.** Either joint and several directors, each one of them can act separately and the actions carried out by one of the joint and several directors will bind the company, or joint directors, who must necessarily act jointly.
 - **Board of directors.** The board of directors shall not have less than three and no more than 12 members. The bylaws may establish the number or a minimum and maximum number of members for the board of directors. In the latter case the shareholders shall determine the exact number. In addition, the board must appoint a chairperson and a secretary. If the company has a board of directors, directors do not have authority to bind the company unless powers are delegated to them. The board may delegate some of their functions to a managing director /CEO (*consejero delegado*) or an executive committee (*comité ejecutivo*). Please note that a board of directors is mandatory for joint-stock companies (*sociedad anónima* or S.A.) when there are more than two directors and for public listed companies (*sociedad cotizada*).
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How are decisions made by directors?

The company's bylaws contain the manner in which a decision/resolution is made by the directors (in any case subject to the requirements of the Spanish Companies Act), likewise the quorum (if applicable), the deliberation process and the majority required for the adoption of these decisions/resolutions. All the decisions and resolutions of the management body are transcribed in a minutes book (*libro de actas*).

Authority and powers

Directors manage and represent the company. They are responsible for making business decisions and overseeing the affairs of a company.

The representation of the company, in court or outside it, corresponds to the directors in the form determined by the company's bylaws. In the case of a sole director, the power of representation shall necessarily correspond to them. In the case of joint and several directors, the power of representation shall correspond to each joint and several director. In the limited liability company, if there are more than two joint directors, the power of representation shall be exercised jointly by at least two of them in the manner determined in the company's bylaws.

In the case of a board of directors, the power of representation corresponds to the board itself, which shall act jointly. However, the company's bylaws may attribute the power of representation to one or more members of the board, either individually or jointly. In the latter case, the permitted scope of their actions shall be indicated.

Representation extends to all acts included in the corporate purpose defined in the company's bylaws. Any limitation of the representative powers of the directors, even if registered with the Commercial Registry, shall be ineffective against third parties. Note that the company shall be bound to third parties acting in good faith and with no gross negligence, even when it appears from the company's bylaws filed with the Commercial Registry that the act is not included in the corporate purpose.

Delegation

Powers of attorney can be granted by the management body of the company in favour of other people. Nevertheless, some functions cannot be delegated. These functions are, among others:

- The determination of the company's general policies and strategies.
- Drawing up the annual accounts and its presentation to the general meeting.
- The calling of the general shareholders meeting, the preparation of the agenda and the proposal of resolutions.

In addition, in the case of a board of directors, the board may also delegate some powers to an executive committee (*comité delegado*) or one or multiple managing directors (*consejero delegado*), unless prohibited by the company's bylaws.

Duties and obligations of directors

What are the key general duties of directors?

The main duties of directors are the following:

- **A duty of care (*deber de diligencia*).** Directors must perform their duties with the diligence of an "orderly businessman" (*ordenado empresario*) and comply with the various duties imposed by applicable law, by company's bylaws and by other internal rules of conduct of the company with this level of diligence. The duty of care includes:
 - the duty to exercise the office effectively
 - the duty of vigilance or supervision
 - the duty to be informed and
 - the duty to subordinate their particular interest to the "interest of the enterprise" (*interés de la empresa*).

For strategic and business decisions, which are subject to business judgement, diligent conduct can be reviewed by applying the "business judgement rule" (*regla de la discrecionalidad empresarial*). Under this rule, the diligence standard is met when the director has acted in good faith, without self-interest, with sufficient information and in accordance with an appropriate decision-making procedure.

- **A duty of loyalty (*deber de lealtad*).** This duty requires the directors to exercise their functions at all times in the interest of the company. This duty of loyalty obliges the director to act in good faith and be guided by what is most favourable to the company. It includes, among others, not to exercise their powers for purposes other than those provided, to keep the confidentiality of the received information or to refrain from participating in decisions in which the director has a direct or indirect conflict of interest.

What are directors' other key obligations?

Among other obligations laid out by the Spanish Companies Act, the directors must call the general shareholders' meeting, draw up the annual accounts and file them with the Commercial Registry. They also shall, if necessary, apply for a declaration of insolvency.

Transactions with the company

With the exception of usual transactions, in standard conditions and with low relevance, directors and their connected persons or companies shall not enter into transactions with the company unless a specific exemption is generally granted by the general shareholders meeting. Please note that this is the general regime. In the special regime for public listed companies (*sociedad cotizada*) there are some particularities.

Liabilities of directors

Breach of general duties

Directors shall be liable to the company, shareholders and creditors, for the damage caused by their acts or omissions against the law or the company's bylaws or for those incurred in breach of their duties, provided that there is fraud or negligence. Guilt shall be presumed, unless proven otherwise, when the act is contrary to the law or the company's bylaws.

All the members of the management body that execute the damaging act or adopt the damaging resolution are, in principle (the opposite can be proved), jointly and severally liable.

The director shall not be exonerated from liability to the company and shareholders when the act causing the damage has been adopted, authorised or ratified by the general shareholders meeting. In addition, the liability of the directors also extends to the de facto directors. To this end, a person who actually performs the functions of a director in the business without a title, with a title that is null or extinguished, or with another title, as well as a person under whose instructions the directors of the company act, is considered a de facto director.

There are two main legal actions against directors:

- **Corporate liability claim (*acción social de responsabilidad*)**. This action is taken by the company or by the shareholders under certain circumstances and, on a subsidiary basis, in the absence of a corporate claim by the company or by its shareholders, by creditors to compensate the damages caused to the company insofar as the company's assets are insufficient to meet their claims.
- **Individual liability claim (*acción individual de responsabilidad*)**. This action allows the shareholders and third parties to take legal action for acts carried out by directors that directly harm their interests.

Liabilities on insolvency

Directors' liability may also exist in case of insolvency proceedings of the company and becomes particularly serious if the insolvency is classified by the judge as “guilty of fraud” (*concurso culpable*), which means that the insolvency was caused or aggravated by the wilful misconduct (*dolo*) or gross negligence (*negligencia grave*) of the company's directors (including *de facto* directors). In this case, the directors may be declared liable for the damages caused, and it could lead, under certain circumstances, to them being responsible for covering the shortfall in assets.

Other key risks

An important issue is the possible liability for company's debts (*responsabilidad por deudas sociales*): directors are jointly and severally liable for obligations arising after the occurrence of a cause for dissolution, when they have not called the general shareholders meeting within two months to adopt the dissolution or, where appropriate, when they do not apply for the judicial dissolution or the declaration of insolvency.

Personal liability for directors may, in certain circumstances, arise under Spanish legislation including liability relating to civil, employment, tax, corporate and environmental matters. In certain cases, criminal liability may arise.

Protection against liability

How can directors be protected from liability?

- **Authorization.** Directors may request authorization from shareholders to carry out some actions that could otherwise imply a breach of the duty of loyalty. The company may waive the prohibitions by authorising a director to carry out a specific transaction with the company, to use certain assets, to take advantage of a specific business opportunity, or to obtain an advantage or remuneration from a third party.
 - **Ratification.** Shareholders can ratify the conduct of a director. However, ratification by shareholders does not absolve a director from any liability to a third party in relation to the matter concerned.
 - **Insurance.** This is effected through a directors' and officers' (D&O) insurance agreement. It typically provides both cover for individual directors against claims made against them in their capacity as director, including, generally, defence costs. Policy exclusions include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.
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What practical steps can directors take to avoid liability?

Directors should keep informed about the affairs of the company, particularly its financial position. In this regard, directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.

They should also make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with

the company. In addition, they should also keep records and ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions.

Key contacts



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[View bio](#)

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Corporate entities

What type of company is typically used in group structures?

In Sweden, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" under Swedish company law. However, a director can be a member of a company's board of directors who is responsible for the organisation of a company and management of the company's affairs and/or managing director of the company.

What are the different types of director?

There are two types of directors: a board of directors whose members usually are appointed by a shareholders' meeting and are duly registered with the Swedish Companies Registration Office, and a managing director who must be appointed by the board of directors and be duly registered with the Swedish Companies Registration Office. For a private limited company, it is not mandatory to have a managing director.

In companies bound by a collective bargaining agreement, the unions have a right to appoint employee representatives to the board of directors in the following circumstances:

- If the company during the previous financial year has employed at least 25 employees on average, the employees in the company shall have the right to appoint two (2) union-appointed directors and one (1) deputy director for every appointed director.

- If the company is active in various fields of business and has at least 1,000 employees on average, the employees shall have the right to appoint three (3) union-appointed directors and one (1) deputy director for every appointed director.

However, the number of union-appointed directors may never exceed the regularly appointed board members. Accordingly, if the board of directors has one (1) sole director, as is possible in a private company, there can only be one (1) union-appointed director.

Eligibility

Who can be a director?

Each member of the board of directors and the managing director (if appointed) must be at least 18 years old. They must not be declared bankrupt, be prohibited from carrying on business or have a guardian. It is not possible to have a legal person (e.g. a company) serving as a member of the board of directors or as a managing director. There are no nationality restrictions.

At least half the members of the board of directors, at least half of the deputy board members and the managing director (if appointed) must reside within the European Economic Area. Exemptions to these residency requirements can be granted by the Swedish Companies Registration Office, typically on a time-limited basis (approximately 1-2 years).

Minimum / maximum number of directors

A private company must have at least one director and one deputy director. There is no maximum. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum.

If the board of directors consists of fewer than three directors, a deputy director must be appointed. If the board of directors consists of more than one director, one of the members of the board of directors must be elected chairman.

For a private limited company, it is not mandatory to have a managing director (but it is mandatory for public companies).

Appointment and removal

How are directors appointed?

Shareholders, in a general meeting, have the right to appoint members of a company's board of directors. In addition, the company's articles of association may provide that one or more directors are to be appointed in another manner (e.g. a bank providing debt financing to the company). However, the right to appoint directors may not be delegated to the board of directors or to any individual director. (In a public company, at least half of the board of directors shall be appointed by the general meeting.)

The appointment must be duly registered with the Swedish Companies Registration Office. For the registration, a verified copy of the minutes of the shareholders' meeting

and a notification form must be filed with the Swedish Companies Registration Office. If a director is not registered in the Swedish population register, a certified passport copy of that director is required for the registration. The appointment becomes effective from and including the date on which notification of the appointment has been received by the Swedish Companies Registration Office or the later date stated in the decision on which the notification is based.

A managing director can be appointed by the company's board of directors (but it is not mandatory for a private company to appoint a managing director). If appointed, the appointment must be duly registered with the Swedish Companies Registration Office. For the registration, a notification form must be filed with the Swedish Companies Registration Office. If the managing director is not registered in the Swedish population register, a certified passport copy of the director is required for the registration. The appointment becomes effective from and including the date on which notification of appointment has been received by the Swedish Companies Registration Office or the later date stated in the decision on which the notification is based.

How are directors removed?

Members of a company's board of directors must be removed by the same person or party who has appointed such director, i.e. normally by a shareholders' meeting. The removal decision shall be duly registered with the Swedish Companies Registration Office. For the registration, a verified copy of the minutes of the shareholders' meeting and a notification form must be filed with the Swedish Companies Registration Office. The removal decision becomes effective from and including the date on which notification of the removal has been received by the Swedish Companies Registration office or the later date stated in the decision on which the notification is based.

An employee representative may at any time be dismissed from the board on the same grounds as any ordinary board member. However, it is up to the local trade union, which appointed the employee representative, to decide upon any such dismissal (rather than the shareholders in a general meeting who can decide to remove ordinary board members).

A managing director must formally be removed by the company's board of directors, however the general meeting would in practice have the authority to remove the managing director by instructing the board to do so. The removal decision shall be duly registered with the Swedish Companies Registration Office. For the registration, a notification form must be filed with the Swedish Companies Registration Office. The removal decision becomes effective from and including the date on which notification of the removal has been received by the Swedish Companies Registration Office or the later date stated in the decision on which the notification is based.

A director may also resign at any time. A director who wishes to resign from office must notify the company's board of directors and file a notification form at the Swedish Companies Registration Office. The same applies to the managing director.

Typical management structure

Board / management structure

A Swedish private limited company has, at a management level, a system consisting of a board of directors and (if appointed) a managing director.

The board of directors is responsible for the organisation of a company and management of the company's affairs. Each member of the company's board of directors has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company's organisation is arranged so that the company's accounts, asset management, and finances in general are satisfactorily monitored.

A managing director is responsible for the day-to-day management of a company in accordance with guidelines and instructions issued by the board of directors. In addition, a managing director may, without being authorised by the board of directors, take measures of an unusual nature or of great significance in view of the scope and nature of the company's operations under certain circumstances.

A managing director must take any measures necessary to ensure that the company's accounts are maintained in accordance with the law and that its asset management is conducted satisfactorily.

If a managing director is not appointed, the board of directors will assume these responsibilities and obligations.

How are decisions made by directors?

Unless the company's articles of association stipulate otherwise, the directors usually have the flexibility to determine between themselves how decisions are made - whether by physical meeting, telephone meeting or a written resolution.

Other than single director companies, a board of directors is quorate if more than half of the total number of directors or a higher number as provided by the company's articles of association is present at the board meeting (however, the notice of the board meeting must be given to all). Unless the company's articles of association stipulate a specific voting majority, resolutions of the board of directors are passed by a simple majority of those present. In the event of a tied vote, the chair has the casting vote. However, if not all directors are present at the board meeting, those voting in favour of a resolution must constitute more than one-third of the total number of directors, unless otherwise provided by the articles of association. When resolutions are made in writing, the unanimous agreement of all directors is usually required, although the articles of association may specify otherwise.

Authority and powers

The board of directors is responsible for the organisation of the company and the management of the company's affairs. The management of the company's affairs includes all matters where the shareholders' meeting does not have the exclusive right to make decisions. The board of directors represents a company and signs its name. Further, the board of directors may resolve that the right to represent the company and sign its name may be exercised by two or more persons acting jointly or be

exercised by some or each director individually. The managing director may represent the company and sign its name as required for the day-to-day management of the company.

As far as third parties are concerned, a board of directors and a managing director, respectively, are able to bind the company and enter into contracts on its behalf even if there are internal limits to their power to do so (e.g. in the company's articles of association or in internal policies and protocols). However, a legal act may be considered void against the company if the company, under certain circumstances, shows that the third party realised or ought to have realised that the board of directors or the managing director had exceeded their authority.

Delegation

The board of directors can delegate certain duties to one or more directors in the board or to other persons. However, the board of directors must act with care and regularly check that delegation can be maintained.

Once a duty has been delegated, the person who has been entrusted with a duty is primarily responsible for the duty, while the board of directors who has delegated the duty has a supervisory responsibility. The same rule applies to a managing director when delegating a duty.

Duties and obligations of directors

What are the key general duties of directors?

The board of directors is responsible for the organisation of the company and management of the company's affairs. The management of the company's affairs includes all matters where the shareholders' meeting does not have the exclusive right to make decisions.

The key general duties consist of:

- **The duty to ensure the organisation of the company and management of the company's affairs.** The board of directors shall ensure that the company's organisation is structured in such a manner that the company's accounts, asset management, and finances in general are monitored in a satisfactory way.
- **The duty to regularly assess the company's financial position.** The board of directors shall regularly assess the company's financial position and, if the company is the parent of a group, the group's financial position. The board of directors is also responsible for ensuring that the company's taxes and fees to the relevant authorities are paid. A failure by the company to pay taxes may entail personal liability for the board of directors.
- **The duty to act in the event of capital deficiency or insolvency.** The board of directors shall immediately prepare and cause the company's auditor to examine a balance sheet for liquidation purposes where (Sw. *kontrollbalansräkning*):
 - there is reason to assume that the company's equity is less than half of its registered share capital; or

- in conjunction with execution pursuant to the enforcement code (Sw. *utmätning*) it has been found that the company lacks attachable (Sw. *utmätningsbara*) assets for the full payment of the relevant claim.

Where the balance sheet for liquidation purposes shows that the company's equity is less than half of its registered share capital, the board of directors shall, as soon as possible, undertake a number of actions, including convening a shareholders' meeting which shall consider whether the company shall enter into liquidation (initial meeting for liquidation purposes). The balance sheet for liquidation purposes and an auditor's report on such balance sheet shall be presented at the shareholders' meeting. If the general meeting does not resolve that the company shall go into liquidation, the general meeting shall, within eight months of the initial meeting for liquidation purposes, reconsider the issue again (second meeting for liquidation purposes). However, if the company undergoes an in-court company reorganisation proceeding (Sw. *företagsrekonstruktion*), the second meeting for liquidation purposes does not have to be held earlier than two months after the reorganisation procedure is completed. Where the board members have failed to act in this regard, the members of the board of directors shall be jointly and severally liable for such obligations as are incurred by the company during the period of such failure to act.

- **The duty to act in good faith to promote the success of the company for the benefit of its shareholders as a whole.** When discharging this duty, directors must have regard to a number of factors including (amongst other things) the long term consequences of their decisions; the interests of the company's employees; the need to foster the company's business relationships with customers, suppliers and others; the impact of the company's operations on the community and the environment; and the desire to maintain a reputation for high standards of business conduct.

What are directors' other key obligations?

The board of directors shall ensure that:

- The annual report is prepared and filed at the Swedish Companies Registration Office within the prescribed time limits.
- A share register is maintained, stored and made available in accordance with the Swedish Companies Act.
- A meeting of the board of directors be convened when requested by a board member or the managing director. The chair of the board (if any) shall ensure that meetings are held when necessary. There are no statutory requirements for a certain number of board meetings. In practice, at least one inaugural board meeting is held in connection with the annual shareholders' meeting. However, the company's articles of association may contain requirements for the number of board meetings that must be held annually.
- An annual shareholders' meeting be held within the prescribed time limits.
- The company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

Transactions with the company

There are certain restrictions on a board member's (and such board members' affiliates) ability to transact with the company, including conflicts of interest and loans from the company.

Conflicts of interest

A board member of a Swedish limited liability company may not participate in any stage of the decision process (preparation or decision-making) where there is a conflict of interest. The following situations, among others, constitute conflicts of interest: (i) an agreement between the board member and the company; (ii) an agreement between the company and a third party, where the board member in question has a material interest which may conflict with the interests of the company; or (iii) an agreement between the company and a legal person which the board member is entitled to represent, whether alone or together with another person.

However, there is no conflict of interest where the board member owns all of the shares in the company, whether directly or indirectly through a legal person; and in relation to the situation described at (iii), there is no conflict where the party contracting with the company is an undertaking in the same group as the company or in a group of undertakings of a corresponding nature.

Loans from the company

A Swedish limited liability company may not lend money to any board member of the company or a board member of another company within the same group. Certain affiliates of the board member are also included in this restriction, as well as legal entities controlled by the board member.

Liabilities of directors

Breach of general duties

If directors neglect any of their duties, they are personally and jointly liable to the company for the damages caused by the neglect.

A director may also be liable towards shareholders and third parties in case of breaches of the Swedish Companies Act, the company's articles of association or the Swedish Annual Reports Act, for damages caused due to negligence or intent.

Shareholders are able to bring an action for breach of duty either on behalf of the company or in their own name in certain circumstances. Broadly, it requires that the majority or a minority comprising owners of at least one-tenth of all shares in the company has supported a general meeting resolution intending to bring an action for damages or has voted against a resolution on discharge from liability.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

In addition, the management of a company may be held personally liable for unpaid taxes in certain situations. A board member or managing director who intentionally or through gross negligence has failed to pay the company's taxes may, jointly with the company, be held liable for the company's taxes and the interest accrued. In these circumstances, gross negligence is not a particularly high standard; it is more akin to a negligence standard.

Liabilities on insolvency

Insolvency as such does not trigger personal liability for the directors. However, directors who knowingly or negligently allow a company to carry on trading when it is, or becoming, insolvent may be held liable for fraudulent or wrongful trading. The directors may also be held liable for failing to prepare a balance sheet for liquidation purposes.

Personal liabilities can be avoided if the director is able to show that they took every step they ought to have taken in accordance with the requirements imposed by the Swedish Companies Act, including the preparation of a balance sheet for liquidation purposes and convening a first and a second general meeting for liquidation purposes. See further [What are the key general duties of directors](#).

Other key risks

Personal liability for directors may, in certain circumstances, arise under Swedish legislation including that relating to environmental and health and safety, tax and bribery/anti-corruption.

In certain cases, criminal liability may arise. When a crime is committed within a business operated by a legal entity, the legal entity may be subject to corporate fines (Sw. *företagsbot*), while individuals (such as members of the board of directors or the managing director) may be held personally liable for criminal offences under the Swedish Penal Code (Sw. *brottsbalken*). A precondition for an individual being held liable for criminal acts committed by the legal entity is that the criminal course of events have taken place within the scope of the company's business, that the violation has an objective connection to the company's business and that the individual has a responsibility for the criminal acts having taken place. Furthermore, criminal liability usually requires that the perpetrator must have acted with intent.

Furthermore, violation of certain provisions in the Swedish Companies Act may constitute a criminal act. Such provisions cover (among others) the inaccurate maintaining of the share register, negligence in convening a board meeting upon the request of a member of the board of directors, the provision of inaccurate information to the members of the board of directors, and participation in an unlawful loan. Furthermore, certain instances of the provision of false information may constitute criminal acts. Finally, a board member or managing director may naturally also be held liable for their own criminal behavior, where they do not act on behalf of the company, including for fraud and breach of trust against a principal.

If a director or managing director has been declared bankrupt, has had a guardian appointed under the relevant legislation, or has been banned from trading, the

Swedish Companies Registration Office must remove the representative from the Companies Register.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, discharge a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation).
- **Insurance.** Directors' and officers' (D&O) liability insurance is common in Sweden. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs. The insurance also provides a cover for those entitled to compensation, which often is the company itself. Policy exclusions typically include claims in respect of a board member's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position and ensure that the company's taxes are duly paid. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that board meeting minutes are prepared, which preferably setting out a full record of the board proceedings and the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that the company's annual report is filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and compliant with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- In a group situation, keep in mind that directors must act in the best interest of their company as the interests of a corporate group are not recognized as such. Whilst the interests of a corporate group and the interests of an individual company in the corporate group are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep

communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

- Monitor the financial situation of the company, and immediately prepare a balance sheet for liquidation purposes where there is reason to believe the shareholders' equity is less than one-half of the registered share capital. If the balance sheet evidences that the shareholders' equity is less than one-half of the registered share capital, the board shall immediately take further actions, see [What are the key general duties of directors](#).
- Ensure that all transactions are made on arms' lengths terms.

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Corporate entities

What type of company is typically used in group structures?

The private company limited by shares is the most commonly used corporate structure for group operations in Tanzania. This entity type offers:

- Limited liability protection for shareholders
- Flexibility in governance structures
- Ease of share transfer within group arrangements
- Simplified compliance requirements compared to public companies

This guide focuses specifically on the management aspects of private limited companies.

Types of director

What is a "director"?

Tanzanian company law (primarily the Companies Act Cap 212 R.E 2023 (CA)) does not provide an exhaustive definition of "director." However, key characteristics include:

- Individuals formally elected or appointed to manage company affairs.
- Bound by both statutory requirements (CA) and the company's articles of association.
- May include executive management personnel (employee-directors) or external appointees.

What are the different types of director?

While the Companies Act doesn't formally classify director types, practical distinctions exist:

- Executive Directors
 - Typically company employees holding management positions
 - Involved in day-to-day operations
 - Often have specific functional responsibilities (e.g., Finance Director)
- Non-Executive Directors
 - Generally not company employees
 - Provide independent oversight and strategic guidance
 - May serve on key committees (audit, remuneration)
- Nominee Directors
 - Appointed to represent specific shareholders' interests
 - Must balance nominator's interests with fiduciary duties to the company
 - Common in joint ventures and subsidiary companies
- Key Legal Considerations:
 - All directors, regardless of type, owe identical fiduciary duties to the company
 - The standard of care expected varies based on:
 - Director's specific role and responsibilities
 - Professional qualifications and expertise
 - Nature of company operations
 - Shadow directors (undeclared but influential persons) are not formally recognized under Tanzanian law.
 - Nominee directors must prioritize company interests over appointing shareholders when conflicts arise.

Eligibility

Who can be a director?

- Age Requirement

A director must be at least **18 years old** (no upper age limit unless specified in the company's Articles of Association).

- Nationality & Residency

- No nationality or residency restrictions apply, meaning foreign individuals can serve as directors.
- However, sector-specific local content laws (e.g., in mining, oil & gas, or banking) may impose additional requirements.

- Corporate Directors

A company can serve as a director, but **at least one director must be a natural person.**

- **Disqualifications**

An individual cannot serve as a director if they:

- Have been disqualified by a court order (e.g., for fraud, mismanagement).
- Are an undischarged bankrupt (unless court permission is granted).
- Have been persistently non-compliant with filing requirements (e.g., failing to submit annual returns or financial statements to the Registrar of Companies).
- Have been found guilty of misconduct during a company's winding-up process.

- **Compliance with Articles of Association**

The company's **Articles** may impose additional restrictions (e.g., limiting the number of directors from the same family or requiring shareholder approval for certain appointments).

- **Sector-Specific Requirements**

Some industries (e.g., extractives, finance, telecoms) have **local content rules** affecting director appointments (e.g., requiring a minimum number of Tanzanian directors).

Minimum / maximum number of directors

A private company must have at least two directors. There is no maximum. The company's articles of association may, however, specify a maximum.

Appointment and removal

How are directors appointed?

- **Consent to Appointment**

A director must formally consent to their appointment before taking office.

- **Methods of Appointment**

- By Shareholders:
 - Through an ordinary resolution at a shareholders' meeting.
 - Via written resolution (if permitted by the company's Articles).
- By the Board of Directors:

If the Articles authorize it, existing directors may appoint additional directors (common in private companies).

- By Parent Company (for Subsidiaries):

Many subsidiary companies' Articles allow parent companies to appoint directors by written notice.

- Filing Requirements
 - The company must file Form 213a (Appointment of Director) with the Registrar of Companies within 14 days of the appointment.
 - The filing includes the director's:
 - Full name
 - Nationality
 - Business occupation
 - Other directorships (if any)
 - Residential address & date of birth must be provided to the Registrar but are not publicly disclosed.

How are directors removed?

- Voluntary Resignation
 - A director may resign at any time by giving written notice to the company.
 - The company must file Form 231b (Terminating Appointment as Director) within 14 days.
- Removal by Shareholders
 - If the Articles are silent, the Companies Act Cap 212 R.E 2023 applies:
 - A special notice must be given to shareholders at least 28 days before the meeting.
 - The director in question must be notified and given the right to respond (in writing or orally at the meeting).
 - Removal requires an ordinary resolution (majority vote).
- Removal by the Board or Parent Company
 - Many Articles grant additional removal powers, such as:
 - Board removal (if authorized).
 - Parent company removal (common in subsidiaries, allowing removal by written notice).
 - Automatic Disqualification
 - A director may be automatically removed if they:
 - Become disqualified (e.g., bankruptcy, court order).
 - Persistently fail to meet filing obligations.
 - Are found guilty of misconduct in a winding-up process.

Board / management structure

Typical management structure

- Typical Management Structure
 - The board of directors is the primary governing body of a Tanzanian private company, composed of all appointed directors.
 - Collective Responsibility: Directors act jointly in managing the company's operations and ensuring compliance with statutory obligations.

How are decisions made by directors?

- No Hierarchical Distinction: While roles may vary (e.g., executive vs. non-executive directors), all directors share equal legal duties unless specified otherwise in the Articles of Association or a Board Charter.
- Decision-Making Process
 - The process is governed by:
 - Articles of Association (primary document)
 - Board Charters (if adopted, providing further governance rules)

Methods of Decision-Making

Method	Typical Requirements	Notes
Physical Meetings	Quorum (usually 2 directors unless Articles specify otherwise)	Notice must be given to all directors.
Virtual Meetings (phone /video)	Same as physical meetings	Must comply with notice requirements.
Written Resolutions (Circular)	Usually unanimous consent unless Articles allow majority approval.	Faster for non-contentious decisions.

Voting Rules

- Default Rule: Decisions pass by simple majority unless Articles require a higher threshold.

- Chair's Casting Vote: If included in the Articles, the chair may have a deciding vote in deadlocked decisions.

Authority and powers

- Binding Authority: Directors can legally bind the company in contracts, even if internal restrictions exist (e.g., in Articles or policies). Third parties are protected unless acting in bad faith.
- Statutory Powers: The Companies Act Cap 212 R.E 2023 grants directors broad management authority, subject to:
 - Shareholder-Reserved Matters (e.g., major asset sales, amendments to Articles).
 - Fiduciary Duties (acting in the company's best interest).

Delegation

- To Committees/Executives: Permitted if authorized by shareholders or the Articles. Example: An Executive Committee may handle day-to-day operations.
- Limitations:
 - The board remains ultimately responsible for delegated functions.
 - Non-Delegable Powers: Certain decisions (e.g., dividend declarations, major borrowings) typically require full board approval.

Duties and obligations of directors

What are the key general duties of directors?

Under the CA, directors owe fiduciary and statutory duties to the company, including:

- Duty to Act in Good Faith & Promote Company Success
 - Must act in the best long-term interests of the company and its
 - Must consider:
 - Long-term consequences of decisions.
 - Employee welfare.
 - Business relationships (suppliers, customers).
 - Environmental and community impact.
 - Maintaining high ethical standards.
 - Fair treatment of shareholders.
 - In a sale scenario, directors must maximize shareholder value.
- Duty to Act Within Powers
 - Must comply with the company's constitution (Memorandum & Articles of Association).

- Powers must be exercised only for their intended purpose (e.g., no misuse of authority).
- Duty of Care, Skill, and Diligence
 - Directors must meet:
 - Objective standard: What a reasonably competent director would do.
 - Subjective standard: Higher expectation if the director has specialized skills (e.g., legal, financial).
 - Non-executive directors must:
 - Supervise executives (cannot delegate oversight).
 - Seek independent verification of management proposals.
- Duty to Avoid Conflicts of Interest
 - Must disclose any personal interest in company transactions.
 - Conflicts must be authorized by the board or shareholders.
 - Secret profits are prohibited (any personal gain must be approved).
- Duty to Disclose Interests & Beneficial Ownership
 - Must declare:
 - Shareholdings, salaries, loans, or contracts with the company.
 - Beneficial ownership (per Companies (Beneficial Ownership) Regulations, 2021).
 - Penalties for non-compliance:
 - TZS 5 million fine per officer for failing to disclose beneficial owners.
 - Illegal to publicly disclose beneficial ownership (except for legal compliance).

What are directors' other key obligations?

- Financial Reporting & Compliance
 - Must prepare and file annual accounts with the Registrar of Companies within statutory deadlines.
 - Failure to file:
 - Criminal offense (fines + daily penalties for delays).
 - Courts may order compliance at directors' expense.
 - No defense that accounts were "not prepared" - directors must prove they took all reasonable steps.
- Statutory & Regulatory Compliance

Directors must ensure the company adheres to:

- Tax laws (filing returns, PAYE, VAT).
- Employment laws (minimum wage, contracts, safety standards).
- Anti-corruption laws (Prevention and Combating of Corruption Bureau (PCCB) regulations).
- Environmental & consumer protection laws.

Transactions with the company

- Loans, asset sales, or service contracts with directors/related parties require:
 - Prior shareholder approval (unless exempted in Articles).
 - Full disclosure of interests.
- Connected persons include:
 - Family members.
 - Companies/trusts linked to the director.

Liabilities of directors

Breach of general duties

Directors owe their duties exclusively to the company, not to shareholders, creditors, or parent companies. However, enforcement mechanisms exist to hold directors accountable.

- Who Can Sue for Breach?
 - The Company: Primary right to bring claims against directors.
 - Shareholders (Derivative Claims):
 - May sue on behalf of the company with court permission.
 - Applies to negligence, breach of duty, or misconduct (past or present).
 - Any shareholder can initiate, regardless of shareholding size.
 - Former directors can also be sued.
 - Key Limitations on Derivative Claims
 - Court Approval Required: Shareholders must prove:
 - Good faith (no ulterior motives).
 - The company would not ratify the breach.
 - The claim is in the company's best interest.
 - No Direct Compensation: Any recovery goes to the company, not the suing shareholders.
 - Potential Remedies

- Damages (for financial losses).
 - Return of misapplied assets (e.g., unlawful dividends).
 - Account of profits (from breaches).
 - Injunctions (to stop ongoing breaches).
 - Rescission of contracts (if improperly approved).

Liabilities on insolvency

Directors face heightened risks if a company becomes insolvent.

- Wrongful Trading
 - Definition: Continuing to trade when the company cannot avoid insolvency.
 - Liability: Directors may be personally liable for creditor losses.
 - Defense: Must prove they took all possible steps to minimize losses.
- Fraudulent Trading
 - Definition: Knowingly carrying on business to defraud creditors.
 - Consequences:
 - Civil liability (repayment of debts).
 - Criminal prosecution (fines or imprisonment).
- Resignation During Insolvency
 - Not an Escape: Resigning does not absolve liability for prior actions.
 - Duty to Act: Must take reasonable steps to protect creditors.

Other key risks

Directors may face civil or criminal penalties under various Tanzanian laws:

Area of Risk	Potential Liability
Tax Violations	Fines, penalties, or prosecution for unpaid taxes.
Employment Law	Personal liability for unpaid wages, unfair dismissals.

Environmental Breaches

Fines or imprisonment for non-compliance.

Bribery & Corruption

Criminal charges under Prevention and Combating of Corruption Bureau (PCCB) laws.

Health & Safety

Prosecution for workplace accidents.

Consumer Protection

Fines for misleading practices.

Competition Law

Penalties for anti-competitive behavior.

Protection against liability

How can directors be protected from liability?

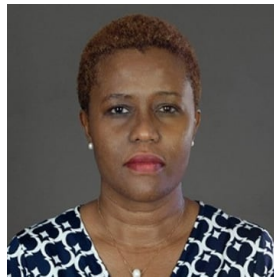
- Legal Protections Available to Directors
 - Ratification by Shareholders
 - Process: Shareholders may approve (ratify) a director's breach of duty via ordinary resolution.
 - Limitations:
 - Votes from the breaching director and connected parties cannot be counted.
 - Cannot protect against:
 - Third-party claims (e.g., creditors, regulators).
 - Criminal acts (fraud, corruption, wrongful trading).
 - Insolvency-related breaches.
 - Directors & Officers (D&O) Insurance
 - Coverage: Protects against negligence, breach of duty, or default.
 - Exclusions:
 - Fraud, dishonesty, or criminal
- Must be issued by a Tanzanian insurer (unless exempt by the Tanzania Insurance Regulatory Authority).

- Key Benefit: Covers legal defense costs and settlements (where permissible).
- Indemnification by the Company
 - Permitted Scenarios:
 - Legal costs if the director is acquitted in criminal proceedings.

What practical steps can directors take to avoid liability?

- Defense costs if the court rules in the director's favor in civil cases.
- Prohibited: Indemnification for fraud, willful misconduct, or illegal acts.

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Corporate entities

What type of company is typically used in group structures?

In Tunisia, the most widespread and frequent form of company is the limited liability company (SARL). The limited liability company protects its shareholders, since they will have limited liability. Indeed, they are only responsible for the amount of their contributions.

The limited liability company is endowed with legal personality, bringing together two or more physical or legal persons and has a share capital.

Nevertheless, there are certain restrictions, in fact, some companies cannot take the form of a limited liability company, such as; insurance companies, banks and any other financial institution or credit institution.

This guide therefore focuses on the management of this form of company.

Types of director

What is a "director"?

It should be noted that there is no exact and general definition of the term "director" in Tunisian company law.

Under the law, a director means any person in charge of representing the company towards third parties and who enjoys multiple powers. In Tunisian legislation, a director is referred to as a "manager".

The manager must always exercise their powers in the interest of the company and within the framework of its corporate purpose.

What are the different types of director?

In Tunisian law, the limited liability company is directed or managed by one or more physical persons called "manager" or "co-managers".

The manager of the limited liability company assumes the role of a business manager for the employees of the company.

The manager has the authority, the powers and the essential responsibility in the management of the company's affairs. They are the legal representative of the company towards third parties and before the courts.

The manager may be either a shareholder or a third party who is not a member of the company.

The manager or managers can be designated in the company's bylaws, in which case they are a statutory manager. In the absence of a statutory designation, managers will be designated by a minute of an ordinary general meeting which determine their rights, duties, the duration of their mandate and their remuneration. It should be noted that this appointment must be made as soon as possible because the company cannot function without a manager.

If the duration of the manager's mandate is not designated in the statutes or in the appointment decision, it will be, by operation of law, fixed at a renewable period of three years.

Eligibility

Who can be a director?

Under Tunisian law, the manager should in principle be a Tunisian citizen. Managers of certain companies such as the foreign company, the off-shore company and some service companies may be non-Tunisian citizens.

In addition, a manager of a limited liability company:

- Must be a physical person. Therefore, legal entities cannot act as managers.
- May be appointed from among the shareholders or from among third parties.
- Must be a capable person ie have the legal capacity to manage a limited liability company.

Further, certain misdemeanors or felonies carry the penalty of being prohibited from managing companies. Also, a manager cannot be an unrehabilitated bankrupt.

The function of manager is also incompatible with the exercise of certain liberal professions, such as accounting experts and lawyers. In particular, persons who have held the position of auditor in a limited liability company may not be manager of that company for five years following the termination of their functions.

Minimum / maximum number of directors

A limited liability company must have at least one manager but there are no legal restrictions as regards the maximum number of managers.

Appointment and removal

How are directors appointed?

According to Tunisian company legislation, the manager(s) may be appointed in the bylaws or by a minute of an ordinary general meeting of shareholders.

A manager appointed in the bylaws is appointed as statutory manager (i.e. the name of the manager must appear in the bylaws).

The appointment of a manager takes place either at the time of the constitution of the company or during the life of the company. In the latter case, the appointment should be the object of a deliberation approved by the shareholders representing at least the simple majority of the shares and gathered in an ordinary general assembly.

All acts and deliberations concerning the appointment of company directors, the renewal or termination of their functions are subject to the formalities of deposit and publication with the national register of companies, within one month from either the final constitution of the company, or the date of the minute of the general assembly which approved the appointment.

How are directors removed?

In the case of a limited liability company, there are four ways to terminate the functions of the manager(s):

- Expiry of the term. The duties of the manager(s) cease at the expiry of the period for which they have been appointed in the bylaws or in a minute of an ordinary general meeting. The managers can be re-elected, unless the bylaws provide otherwise.
- Revocation. In this case, a distinction must be made between a manager appointed by the bylaws and a manager appointed by a minute of a general ordinary meeting. In the first case, the dismissal can only take place following a decision taken by one or more shareholders representing at least three quarters of the share capital. In the second alternative, the manager can be dismissed by a decision of the shareholders representing more than half of the share capital. There is also a procedure called legal dismissal, when the shareholder or shareholders representing at least one quarter of the share capital decide to bring an action before the competent court to obtain the dismissal of the manager for legitimate reasons.
- Resignation. No law prohibits the manager from resigning from their position. However, it is important to note that in the event of the occurrence of events that impede the exercise of the manager's duties (incapacity, bankruptcy, etc.), the manager must resign; otherwise, they risk judicial dismissal for just cause.
- Death of the manager.

As with the appointment of the manager, the termination of the manager's function is also subject to the formalities of deposit and publication with the national register of companies. Within one month of cessation, an insertion in the official gazette of the national register of companies must be made.

Board / management structure

Typical management structure

The limited liability company is managed by one or several managers acting under the control of the shareholders, gathered in general assembly.

In order for this control to be effective in the limited liability company, Tunisian law requires in some cases the appointment of an auditor. In general, all commercial companies must appoint an auditor. However, commercial companies other than joint stock companies are exempted from the appointment of an auditor:

- for the first accounting period of their activity
- if they do not meet two of the numerical limits relating to the balance sheet total, the total income excluding taxes and the average number of employees, or
- if during the last two fiscal years of the auditor's mandate they no longer meet two of the numerical limits referred to above.

Thus, the functioning of the limited liability company is ensured by a management body which is the manager(s), a deliberation body, namely the general assembly of the shareholders and a control body which is the auditor.

How are decisions made by directors?

In a limited liability company, the powers of the manager(s) may be freely determined by the bylaws. The manager may, unless otherwise stipulated in the bylaws, perform all acts that fall within the scope of the company's purpose and in its interest.

Nevertheless, certain acts of a manager are prohibited by law. A manager may not enter into agreements with the company, be granted credit by the company or obtain a guarantee or endorsement from the company of their commitments towards third parties.

Authority and powers

In a limited liability company, the shareholders may freely decide in the bylaws the powers of the manager in the manager's relationship with them. Thus, in the absence of any stipulation in the bylaws limiting the powers of the manager, the manager remains legally free to perform all acts which they consider necessary for the interests of the company and which fall within the scope of its corporate purpose.

The manager is also often invested with extensive powers to act on behalf of the company towards third parties. Thus, the shareholders may opt for a system of total freedom granting the manager all the powers, or a system which prohibits the manager from carrying out certain specific acts or which obliges the manager to

submit some decisions to an authorization of the general assembly. If the powers of the manager are exceeded in these circumstances, this is considered to be a contractual breach which makes the manager liable to the shareholders.

Tunisian company legislation provides that in its relations with third parties, the company is bound by all acts performed by the manager, and that the articles of the bylaws limiting the powers of the manager are not enforceable against third parties, even in case of publication of the bylaws.

This article is intended to protect third parties, however, it is not an absolute protection in all cases. When the act committed by the manager falls within the sphere of the company's object, there is absolute protection for third parties. However, when the manager commits any act exceeding the company's object, the protection enjoyed by third parties is only relative since the company can be exonerated from liability if it can prove the bad faith of the contracting third party. It can do this simply by proving that the third party was aware of the overrunning at the time the act in question was committed.

Delegation

The delegation of powers means contractually agreeing with another person to perform certain acts in the name and on behalf of the company. Tunisian company law provides that a delegation of powers by a manager of a limited liability company must be special and not general (ie it must not cover all the manager's powers).

Thus, the delegating manager may confer on a delegate the power to represent the manager in the accomplishment of a given act. The delegate commits the company when exercising this specific power. If the delegate exceeds their powers, their liability is engaged. In addition, and with respect to the company, the delegating manager could also be responsible for the acts carried out by their delegate.

Duties and obligations of directors

What are the key general duties of directors?

The law enables a manager of a limited liability company to carry out all the acts which fall within the object of the company and which are in the interest of the company. The manager is able to exercise all the powers granted to them either in the bylaws or in the minute of an ordinary general meeting of appointment, and must act in the best interests of the company.

It should be noted that there are no specific duties of the manager of a limited liability company in corporate law, except for the general duty of professional secrecy and confidentiality.

What are directors' other key obligations?

In addition to the general obligations of managers, a manager has two main obligations:

- the administrative, accounting, fiscal and financial management of the company, and
- the obligation to inform the shareholders about the financial and legal situation of the company.

Therefore, the manager must ensure the annual filing of accounts at the registry, that proper accounting records are kept and that an auditor is appointed (if required).

The manager is also responsible for making available to the shareholders the legal and accounting documents of the company. They are also obliged before each general assembly, whether it is an ordinary or an extraordinary general assembly, to put at the disposal of the shareholders certain documents such as the reports.

In the event that the company is experiencing economic difficulties, or is bankrupt, the law provides that in the case of limited liability companies, the manager must notify the commission for the monitoring of economic enterprises of the precursory signs of economic difficulties experienced by the company and which, if they persist, are likely to lead to the cessation of payments.

The notification must also be made by the shareholder or shareholders holding at least 5% of the capital of the company experiencing economic difficulties.

Transactions with the company

Tunisian company legislation prohibits the company from granting credit to a manager or to shareholders who are natural persons. It is also prohibited for the company to guarantee or endorse managers' commitments to third parties.

Moreover, any agreement entered into directly or through an intermediary between the company and its manager must be the subject of a report presented to the general assembly either by the manager or by the auditor if there is one. The general assembly will rule on the report without the manager concerned being able to take part in the vote.

Liabilities of directors

Breach of general duties

According to the law, the manager(s) is/are individually or jointly and severally liable to the company or to third parties for violations of the legal provisions applicable to limited liability companies, for violations of the bylaws, or for faults committed in their management of the company. If the facts giving rise to liability are the work of several managers at the same time, the court is responsible for determining the contributory share of each of them in the award of compensatory damages.

A liability action against a manager takes the form of either an individual action or a social action.

In an individual action, a shareholder or a third party can bring a liability action in order to seek reparation for a prejudice suffered personally because of a fault committed by the manager. When the action is brought by a third party, the third party

must prove that the fault committed by the manager is not related to their function as a manager of the limited liability company.

A social action can be exercised in order to obtain the repair of a prejudice suffered by the company. It can be exercised by one of the legal representatives of the company, for example a manager against a co-manager. The law also specifies that shareholders representing a tenth of the social capital, can by grouping together bring the social action against the manager(s) responsible for the damage.

These liability actions must be commenced within three years of occurrence of the damaging fact, or if it was concealed, from the date it became known. Criminal actions must be commenced within ten years.

Liabilities on insolvency

In the event of cessation of payments, and when the company is subject to a collective procedure, it will be necessary to refer to the rules specific to the company. When the judicial settlement or bankruptcy reveals a lack of assets, the court may, at the request of the judicial administrator, the trustee in bankruptcy or one of the creditors, decide that the debts of the company will be borne, in whole or in part, with or without joint and several liability and up to the limit of the amount designated by the court, by the manager(s) or any de facto manager. The court may also prohibit the convicted person from managing the company or carrying out a commercial activity for a period of time determined in the judgment.

This action must be commenced within three years of the judgment which announces the judicial settlement or the bankruptcy.

An action for the payment of liabilities may also be brought against a manager. If the company's assets are insufficient, the manager is liable to bear part or all of the company's liabilities. The manager's liability is engaged without the need to prove fault, as a presumption of fault applies to the manager as soon as the company is in suspension of payments. In order to be exonerated from liability, the manager must provide proof of their diligence, prudence and loyalty in the exercise of their powers.

Other key risks

A manager of a limited liability company can be held criminally liable for several offences, for example:

- At the time of the constitution of the company, a manager is criminally liable if they open directly or through an intermediary a public subscription to securities.
- A manager (who is also a shareholder) commits an offence if they make false declarations or a voluntary overvaluation relating to contributions in kind.
- Violation of obligations relating to accounting, the convening of general meetings, the communication and approval of financial statements or the appointment of an auditor.

- Presentation of annual accounts that do not reflect the true situation of the company and any use of company assets or credits committed in bad faith for personal purposes and not in the interest of the company.

It should also be noted that tax legislation and procedures provide that if the company has not complied with its tax obligations, the penalties incurred by the company (legal entity) also apply to any manager having the capacity to represent it.

Protection against liability

How can directors be protected from liability?

The most efficient way for a manager to protect themselves from liability claims is via liability insurance for corporate officers. This insurance allows the managers of a limited liability company to cover themselves against the pecuniary consequences of civil liability actions, which sometimes can be serious when the sums due are large.

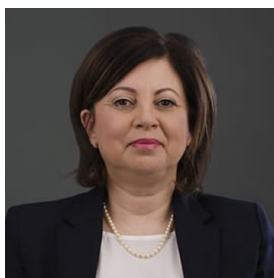
It is important to note that this insurance only covers the pecuniary consequences of civil liability, as no insurance or other protection can protect the manager against criminal prosecution.

What practical steps can directors take to avoid liability?

Managers should:

- Perform their duties with diligence and care, and act in the manner that a faithful, loyal and competent manager would act in the same circumstances.
- Be acutely aware of their legal obligations to the company. In case of uncertainty, they should contact the company for more information.
- Consider seeking professional advice and assistance (e.g. from legal counsel and legal advisors) when making important decisions in areas outside their personal expertise and knowledge.
- Avoid delegating powers as much as possible and if powers are delegated, make sure that the delegated person is capable of fulfilling the tasks that are in their charge.
- Act not only with diligence, but also with loyalty, so that everyone in the company can work as a harmonious team to accomplish their aims in the sole interest of the company and ensure its sustainability.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

The most common type of company used in group structures in Uganda is the private company limited by shares. This guide therefore focuses on the operation and management of private companies.

Types of director

What is a "director"?

A director means any person occupying the position of a director by whatever name called, so it may be any person either appointed as such (*de jure* director) or that who is not appointed but acts as one (*de facto* director), and includes a shadow director.

What are the different types of director?

The law recognises the following categories of directors:

- Executive directors – who are involved in the day-to-day management or are employed by the company or its subsidiaries as such.
- Non-executive directors – who are not full or part time employees of the company or holders of an executive office.
- Independent directors – being non-executive directors who have no financial, personal, professional, contractual, business or other relationship with the company.
- Nominee directors – being directors who are specifically appointed at the request of the company's shareholders.
- Shadow director – being a person in accordance with whose directions or instructions the directors of a company are accustomed to act. This does not include a person who advises the directors in a professional capacity.

Directors may appoint one or more of their fellow directors to the office of managing director and confer such powers exercisable by them to such fellow director(s) as they deem fit.

Eligibility

Who can be a director?

A director must be at least 18 years old at the time of appointment as director. There are no nationality or residency restrictions on directors of private companies, and the law allows for corporate directors. A person may be barred from being a director where:

- they have been declared bankrupt or insolvent by a court in or outside Uganda and has not been discharged,
- they are convicted of any offence in connection with the promotion, formation, or management of a company, or
- it appears that such person committed any fraud or breach of duty while an officer of the company.

Where the articles of a company require a director to hold a specific share qualification, that qualification must be obtained within two months of appointment or else the office of director will be vacated.

Minimum / maximum number of directors

A private company must have at least one director, but a sole director cannot also be the company secretary. There is no statutory maximum for the number of directors a private company may have. However, it should be noted that even though a company may theoretically have only one director, the widely accepted convention is for a company to have a minimum of two directors.

Appointment and removal

How are directors appointed?

Depending on the company's articles, directors may be appointed by the company or by board resolution. A notice of particulars of directors must be filed with the registrar of companies and updated in case of any changes within 14 days from the appointment or change.

How are directors removed?

The law allows the members of a company to remove directors by ordinary resolution notwithstanding any provision to the contrary in the company's articles or in any agreement between the company and the director. Special notice of the intended resolution must be issued and served on the director concerned, who is entitled to be heard on the resolution at the meeting.

A company's articles may entitle the board to remove a director by majority vote.

A director may also resign by written notice at any time.

Upon removal of a director, notice of a change of particulars of directors must be filed with the companies registrar within 14 days.

Board / management structure

Typical management structure

The typical board of a private company in Uganda follows a unitary structure with executive and non-executive directors. Supervisory boards are neither common nor mandated but are encouraged especially for group structures. Some (especially bigger) companies have board committees in charge of the different core management functions.

How are decisions made by directors?

Decisions by directors are typically made through a board resolution passed by majority vote unless otherwise stipulated in the company's articles. In most cases, the board has discretion to regulate the nature and conduct of its meetings.

Authority and powers

Directors manage the affairs/business of the company and exercise all powers except those reserved for shareholders by statute or by the company's articles such as alteration of capital, variation of rights or borrowing beyond the company's share capital.

Acts of directors are binding on the company, and the power of the board to bind the company against third parties cannot be limited by the company's constitution. Third parties are not required to inquire into the internal affairs or management procedures of a company such as limitations on the powers of the board or its delegates. Additionally, the acts of a director remain valid notwithstanding subsequent discovery of a defect in their appointment.

Directors powers are usually collective, except that the companies articles may allow for certain functions to be performed by a particular number of directors rather than the whole board.

Delegation

Directors may delegate any of their powers to management and board committees or any of the board members as authorised by the company articles, but the board maintains ultimate responsibility notwithstanding such delegation.

It is advisable that a formal procedure for delegation exist to discharge the board's duties and facilitate decision making.

Additionally, directors may by power of attorney appoint any company, firm or person to perform particular duties for such time and subject to such conditions as they deem fit. However, the powers and discretions accorded to such delegate cannot exceed those vested or exercisable by the directors under statute and the company's articles.

Duties and obligations of directors

What are the key general duties of directors?

Directors have the following statutory duties:

- To act in a manner that promotes the success of the business of the company.
- To exercise a degree of skill and care as a reasonable person looking after their own business would.
- To act in good faith in the interests of the company as a whole, which duty includes fair treatment of all shareholders, avoiding conflicts of interest, declaring any conflicts of interest, not making personal profits at the company's expense, not accepting compromising benefits from third parties, and ensuring statutory compliance.

Common law duties such as the duty to retain discretion remain enforceable despite not being codified.

What are directors' other key obligations?

Every private company is required to file an annual return (with a balance sheet and auditors' report annexed) within 42 days from the annual general meeting of the year, containing information about past and present members, its directors, secretary and its shareholding. The law also requires registration of particular resolutions and agreements within 30 days after their passing such as special resolutions.

Directors have the following additional administrative obligations:

- To cause minutes of all proceedings of general meetings and directors' meetings to be entered in the company books.
- To avail the company books for inspection by any member upon request.
- To keep proper books of accounts which must be open to inspection by the directors.
- To prepare a report with respect to the state of the company's affairs and the amounts recommended to be paid by way of dividend or to be carried to reserves.

In case of non-compliance with any of these obligations, each director may be held personally liable to pay the default fine or to imprisonment depending on the nature of the non-compliance and whether or not it is committed wilfully.

In group structures, directors of a company with subsidiaries are required to lay group accounts dealing with the state of affairs and profit or loss of the company and the subsidiaries before the company in a general meeting. However, this obligation does

not apply where the company is a wholly owned subsidiary of another domestic company.

Directors also have the general duty of ensuring statutory compliance by the company.

Transactions with the company

The law prohibits companies from making tax-free payments to directors as remuneration or otherwise and from making loss of office payments to them without shareholder approval. Transactions relating to substantial assets with directors their associates/connected persons can only be entered into after the arrangement is approved by the company. Additionally, directors have a statutory duty to declare their interest in any contract or proposed contract with the company and failure to do so may result in personal liability. The law also prohibits the grant of loans to directors, with certain exceptions applicable only to public companies.

Directors of regulated entities and listed companies

The law imposes additional requirements and restrictions on the directorship of regulated entities and public listed companies. For instance, financial institutions and insurance actors are both required to have a minimum of five directors, including non-executive and independent directors, with at least two directors resident in Uganda. Directors of regulated entities must possess demonstrable academic and experience qualifications in the sector, which are subjected to a fit and proper assessment by the respective sector regulators. Additionally, they are restricted from simultaneously serving on the boards of other companies within the same sector.

Similarly, the Capital Markets Authority (Corporate Governance) Regulations 2025 requires all public listed companies to have a minimum of five fit and proper directors, a third of whom must be independent non-executive directors. The Regulations also prescribe specific statutory criteria for the qualifications and functions of the Board Chairperson and the Chief Executive Officer, and prohibits directors from simultaneously serving on the boards of more than three listed companies.

The law also imposes additional good-governance obligations and responsibilities on the directors of regulated and listed companies, beyond the general common law and administrative duties provided for under the Companies Act.

Liabilities of directors

Breach of general duties

As a general rule, only a company can bring an action for breach of duty against its director. However, shareholders may petition in cases of oppressive or unfairly prejudicial conduct of the company's affairs upon which the court or registrar may issue any order:

- regulating the conduct of the company's affairs in the future,
- requiring the company to refrain from doing or continuing the act complained of,

- authorising civil proceedings to be brought in the name and on behalf of the company, or
- providing for the purchase of the shares of any members of the company by other members or by the company itself.

Shareholders, creditors and the registrar can also commence court action against directors for failure to comply with registration requirements and obtain an order compelling them to file necessary documents.

Liabilities on insolvency

On a company's insolvency, directors are required deliver up all the property of the company and disclose the details of disposal of any company property to the liquidator. Failure to do so is an offence.

In cases of voluntary winding up, directors are required to make a declaration of solvency indicating that they have made a full inquiry into the affairs of the company and have formed the opinion that it will be able to pay its debts in full within a year from liquidation. A director who makes a declaration of solvency without reasonable ground commits an offence, and the law presumes that there was no reasonable ground if the company does not pay its debts in full within the period stated in the declaration.

Other key risks

Directors may incur personal liability for wilfully making false statements in company returns, reports, certificates, balance sheets, or other company documents.

Criminal liability may arise in certain cases of non-compliance with the statutory obligations of companies especially where it can be proved that the non-compliance was wilful or due to gross negligence. Additionally, the corporate veil may be lifted in cases of fraudulent dealing and the company's directors held personally liable.

A director may be disqualified from acting as a director for three years for failure to keep proper accounting records, prepare and file accounts, send returns to the registrar, file tax returns and pay tax, or for allowing the company to trade while insolvent.

Protection against liability

How can directors be protected from liability?

Internally, directors may be absolved from liability for breach of duty or for negligent conduct by ratification through a general resolution of a company. Shareholders may also ratify transactions executed by directors without the requisite authority. However, ratification does not protect directors or the company from liability to third parties.

Against third parties, directors may be protected from liability either by indemnity or insurance cover for acts done in a managerial capacity and any resultant loss or damage.

What practical steps can directors take to avoid liability?

Directors should take the following measures to avoid liability:

- Keep and maintain updated records of board and company meetings and of all company information.
- Ensure prompt filing of necessary company documents.
- Retain professional advisers for decisions that may require expert advice or skill such as law and accounting.
- Stay informed on all company affairs including its financial position, major transactions and any obligations arising from newly enacted or amended laws.
- Harmonise director and company positions and relationships.
- Make full disclosure of any interest in proposed or existing transactions or arrangements with the company.
- Comply with any group-wide governance policies.

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United Arab Emirates

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

Onshore UAE

In onshore UAE (to be differentiated from a UAE free zone), the most common type of company used in group structures is a limited liability company (LLC). This guide therefore focuses on the management of an onshore LLC.

Dubai International Financial Centre

While there are various company types available in the Dubai International Financial Centre (DIFC), the most commonly used company is a private company. This guide therefore focuses on the management of DIFC private companies.

Types of director

What is a "director"?

Onshore UAE

There is no complete definition of the term "director" in UAE company law. The law essentially regards someone who manages the affairs of a company on behalf of its shareholders as a director. In most cases, the terms "director" and "manager" are used interchangeably.

Dubai International Financial Centre

The DIFC Companies Law does not provide a complete definition of the term "director". However, a director is considered to be someone who manages the affairs of a company on behalf of its shareholders (whether they are called a director or not). If a person acts in this way they should be formally registered with the DIFC as a director.

What are the different types of director?

Onshore UAE

The UAE Companies Law does not distinguish between types of directors. It is nevertheless possible to define, to an extent, different types of directors in the memorandum of association of an LLC. This may include a designation as a managing director, for instance. The particular nature of such a designation would be defined in the memorandum of association.

Regardless of whether a director is appointed, a manager must also be appointed for an LLC. A director and manager may be the same person holding both roles.

Dubai International Financial Centre

The DIFC does not distinguish between types of directors and the DIFC Companies Law similarly does not provide for a variation on the designation of a director. If a company wishes to internally assign a prefix to a director denoting a particular role, then this should be acceptable. A director registered with the DIFC will assume the same responsibility and authority regardless of their internal designation, unless the articles of association of the company are amended to reflect this (the DIFC must approve the articles of association).

Eligibility

Who can be a director?

Onshore UAE

A director must be a natural person who is at least 18 years old. There are no nationality or residency restrictions, however individuals from certain countries may be subject to additional security checks or denied a visa. A director in an onshore LLC must hold a valid UAE visa.

In some circumstances, a director may be required to hold a minimum legal or academic qualification in order to hold office, depending on the activities that the LLC is conducting (for example if the LLC conducts regulated financial activities).

Dubai International Financial Centre

A director must be a natural person who is at least 18 years old. There are no nationality or residency restrictions, however individuals from certain countries may be subject to additional security checks or denied a visa.

An individual may not be a director if they are:

- Convicted of a criminal offence, involving dishonesty or moral turpitude, in any jurisdiction in the past ten years.
- Guilty of insider trading or the equivalent in any jurisdiction at any time.
- Judged disqualified by any court.
- Disqualified by the Dubai Financial Services Authority.
- Disqualified pursuant to a provision specified in the articles of association of the company.

- An undischarged bankrupt.

Minimum / maximum number of directors

Onshore UAE

There is no minimum or maximum number of directors that may be appointed. The LLC's memorandum of association may, however, specify a minimum or maximum in this regard. A LLC must have at least one manager who is named on the licence issued to the company by the economic department of the Emirate in which the LLC is established.

Dubai International Financial Centre

A private company must have at least one director. There is no maximum number of directors. The company's articles of association may, however, specify a greater minimum number and/or specify a maximum, subject to approval by the DIFC.

Appointment and removal

How are directors appointed?

Onshore UAE

Directors may be appointed by way of a resolution of the shareholders of an LLC, which should be duly notarised by a UAE notary public. The relevant signatories of any shareholders that are body corporates must produce at the time of signing their applicable authorising instrument (such as a power of attorney or resolution) in order for them to execute the written resolution. Documents originating from outside of the UAE must be notarised and legalised up to the level of the UAE embassy in the country of origin, translated into Arabic for use in the UAE and attested locally by the UAE Ministry of Foreign Affairs and Ministry of Justice.

The name of the director may also be listed in the memorandum of association of the LLC, however this is not mandatory. To do so, the memorandum of association must be notarised by a notary public in the UAE. The same conditions apply as noted above with regard to evidencing authority to sign the memorandum of association.

Dubai International Financial Centre

Directors may be appointed by way of a resolution of the shareholders of the company. Subsequently a filing of an online request with the DIFC Registrar of Companies through the portal account of the company must be made. This includes the submission of a director's declaration consenting to their appointment as well as a copy of a shareholder's resolution approving the appointment. A certified copy of the new director's passport must also be provided in line with the DIFC Certification Policy.

How are directors removed?

Onshore UAE

Directors may be removed by way of a resolution of the shareholders. Where the name of a director is listed on the memorandum of association, an amendment removing the name of the director is necessary, which must be notarised at a UAE notary public. The same conditions apply as with appointing directors with regard to signatories evidencing their authority to sign on these documents. Documents originating from outside of the UAE must be notarised and legalised up to the level of the UAE embassy in the country of origin, translated into Arabic for use in the UAE and attested locally by the UAE Ministry of Foreign Affairs and Ministry of Justice.

Dubai International Financial Centre

Directors may be removed by way of a resolution of the shareholders of the company. Similar to the process for appointing a director, an online request must be filed with the DIFC Registrar of Companies through the portal account of the company. The documents that must be filed for this process include either a resignation/termination letter or a copy of the shareholder's resolution approving the removal.

Board / management structure

Typical management structure

Onshore UAE

Boards of LLCs are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company pursuant to the LLC's memorandum of association. The roles and responsibilities of directors are largely set out in the LLC's memorandum of association, but directors will typically be responsible for the management and operations of the company and for ensuring that the company meets its statutory obligations.

LLCs are generally not required to appoint directors. Pursuant to the UAE Companies Law, LLCs with more than fifteen (15) shareholders are required to appoint a supervisory board comprising at least three shareholders for three years starting at the date of appointment, to oversee the management of the LLC.

Dubai International Financial Centre

Boards of DIFC private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

Onshore UAE

The manner in which directors can make decisions is set out in the LLC's memorandum of association (subject to adherence to the UAE Companies Law). In LLCs, the memorandum of association can provide directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director LLCs,

the minimum quorum for board meetings is set out in the memorandum of association. Unless the memorandum of association stipulates otherwise, voting at board meetings may be on a simple majority basis. When decisions are made in writing, the unanimous agreement of all directors is usually required, although the memorandum of association may specify otherwise.

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The manner in which directors can make decisions is set out in the company's articles of association (subject to adherence to the DIFC Companies Law). In private companies, the articles of association typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice must be given to all), unless agreed otherwise by the directors. Unless the articles of association stipulates otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the articles of association may specify otherwise.

Authority and powers

Onshore UAE

The authorities and powers of directors are predominantly set out in an LLC's memorandum of association and are determined by the shareholders. Where this is not defined in a memorandum of association, the common approach is to issue powers of attorney to directors to enable them to represent the company. These powers of attorney should generally be notarised.

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As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf subject to internal limits on their power to do so (e.g. in the company's articles of association).

Normally, the company's articles of association gives the directors wide powers to manage its business and affairs as they think fit (although the articles may also provide that shareholders may give the board specific directions as to its conduct). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

For a director or board to exercise their powers in onshore Dubai, it is typically a requirement for such powers to be clearly stated and unambiguous. This is to say that certain UAE authorities (including the notary public) may insist on seeing a power that specifically refers to the task a director is attempting to carry out. In some circumstances, a power of attorney or authorising written resolutions will be requested instead of relying on the powers set out in the articles of association of a company.

Delegation

Onshore UAE

The ability for a director to delegate their authorities is determined by what is permitted pursuant to the memorandum of association of the LLC or what is set out in a power of attorney authorising delegation.

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If authorised by shareholders, or if permitted by the company's articles of association, the board can delegate their powers to committees and others (e.g. executives). However, the board retains overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

Onshore UAE

The duties of a director in an LLC include:

- General company obligations, such as the preparation and filing of accounts.
- Acting in a way which is compatible with the LLC's objectives.
- Exercising a degree of care in the discharge of management responsibilities.
- Acting within the powers granted.
- Disclosing any conflicts of interest.
- Complying with the statutory restrictions relating to loan arrangements.

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The key duties of a director are set out in the DIFC Companies Law. These are duties to:

- **Promote the success of the company.** Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to: (1) the long term consequences of decisions; (2) the interests of the company's employees; (3) the need to foster the company's business relationships with customers, suppliers and others; (4) the impact of the company's operations on the community and the environment; (5) the desire to maintain a reputation for high standards of business conduct; and (6) the need to act fairly between shareholders.

There is no hierarchy to these factors and, where they conflict, a director will need to use their business judgement in weighing them against one another.

- **Act with reasonable care, skill and diligence.** Directors must meet the minimum standard of skill and care expected of someone in their position and they must also bring to bear their particular skills and experience – therefore, the more qualified or experienced a director is, the greater the statutory standard required of them.
- **Exercise independent judgement.** However, a director may rely on other people (e.g. through proper delegation or by seeking advice) provided they judge that it is

reasonable to do so. A director may not usually limit their discretion, however in certain circumstances they can do so by acting in accordance with an agreement entered into by the company or in a way authorised by the company's articles of association.

- **Act within the company's articles of association** and exercise their powers for the purposes for which they were given and not for any collateral purpose.
- **Avoid conflicts of interest.** Directors must not put themselves in a position where there is, or could be, a conflict between their personal interests or their duties to another person and the interests of the company (for example, where they are a director or employee of another company or where they may be in a position to take advantage of any property, information or opportunity they became aware of as a director). This duty is not breached if the situation cannot reasonably be regarded as giving rise to a conflict of interest or if the situation has been pre-authorised by the board (provided conflicted directors take no part in this decision) or by shareholders or in the company's articles of association.
- **Not accept benefits from third parties**, without prior shareholder approval. This duty is not breached if acceptance of such benefits cannot reasonably be regarded as giving rise to a conflict of interest.
- **Declare interests in proposed transactions or arrangements with the company.** Directors must disclose the nature and extent of their personal interests in a proposed transaction or arrangement with the company before it is entered into. Directors must also declare the nature and extent of their interest in a transaction or arrangement that has already been entered into by the company as soon as reasonably practicable.

What are directors' other key obligations?

Onshore UAE

Other obligations may include matters which are assigned to directors in the memorandum of association of an LLC and may vary according to how responsibility of managing the LLC is apportioned by the shareholders. This may include general company obligations such as maintaining records or calling annual general meetings.

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The DIFC Companies Law requires directors to cause annual accounts to be prepared in relation to each financial year of the company.

Unless otherwise provided in the articles of association, the directors of a private company must also submit copies of the annual accounts to the shareholders together with an auditor's report, and file these with the DIFC within 30 days after circulation to the shareholders if:

- annual turnover exceeds USD5,000,000 calculated on a consolidated basis including all subsidiaries; and
- the company has more than 20 shareholders for the whole of that year.

The directors of a private company shall within 6 months after the end of the financial year, or earlier, appoint an auditor to hold office from such date until the end of the next period for appointing auditors.

Transactions with the company

Onshore UAE

A director should be expressly authorised in an LLC's memorandum of association or by way of a power of attorney in order to transact in the name of an LLC. In most cases, such authority is scrutinised in the UAE depending on the nature of the transaction and holding the position of director is not always sufficient in and of itself to permit a director to bind an LLC.

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The DIFC Companies Law indicates that the validity of an act by a company shall not be called into question on the ground of lack of capacity by reason of anything in its articles of association or by any act of its shareholders. Without limitation to the generality of this position, a person acting in good faith when dealing with the company is not affected by any limitations in its articles of association relating to its directors' powers to bind the company, or authorise another to bind the company.

With respect to director's transactions with the company, as above, directors must disclose the nature and extent of their personal interests in a proposed transaction or arrangement with the company before it is entered into. Directors must also declare the nature and extent of their interest in a transaction or arrangement that has already been entered into by the company as soon as reasonably practicable.

Liabilities of directors

Breach of general duties

Onshore UAE

In certain circumstances directors may face liabilities where they have acted unlawfully, including:

- Disclosing corporate secrets.
- Participating in a competing business.
- Fraud and embezzlement, misuse of power, violation of the UAE Companies Law or the company's memorandum and gross error/mismanagement.
- Any act carried out in the course of their duties which causes harm to another person.
- Exceeding authority.
- Unlawful competition.
- Issuing a cheque with insufficient funds.

- Certain violations prescribed under the law (such as, the Federal Environmental Law, the Federal Labour Law, etc.).
- Certain acts in the event of a company's bankruptcy, such as engaging in transactions defrauding creditors.

Depending on the nature of the unlawful act, action can be taken against a director for breach of legislation (including the UAE Companies Law, Civil Code, Penal Code, Commercial Code or Bankruptcy Law) or breach of the LLC's memorandum of association.

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Pursuant to the DIFC Companies Law, a breach by a director of any one or more of the duties set out in the Law shall constitute a contravention by that director of the relevant duty. On this basis, the company may bring action against the director.

Where it is apparent to the DIFC Registrar of Companies that a director should not hold office, they may apply to the DIFC Courts for an order against that director. This consideration is based on whether the director has breached any of the duties prescribed in the Law or the Registrar of Companies has otherwise determined, based on the given circumstances, that a director is unfit to be involved in the management of a company.

Remedies may be sought against the director by filing a claim with the DIFC Courts. These may include remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Onshore UAE

On insolvency, a director may face potential civil liability where an LLC's funds are insufficient to repay 20% of creditor liabilities. The court may order the manager to contribute to the company's losses and the court has wide discretion in relation to the terms of the order mandating the director to contribute to the LLC's losses.

With regard to events leading to insolvency, a potential criminal liability may arise and directors may face up to five years imprisonment and a fine amounting to AED1,000,000 where they engage in any of the following acts:

- Hid all or some of the company's books and records, or destroyed or amended those books and records with the intent to cause prejudice to the creditors.
- Embezzled or concealed any part of the company's assets.
- Declared/acknowledged debts that were not due from the company while being aware of that fact, whether the declaration was in writing, verbally or in the accounts or they refrained from submitting evidence or clarifications while being aware of the outcome of such inactions.

- Obtained preventive composition or restructuring (within the meanings of the Bankruptcy Law) for the company by way of fraud.
- Made false declarations concerning the subscribed or paid-up capital, distributed fictitious profits or seized bonuses exceeding the amount set out in the law, the company's memorandum of association or articles of association.

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Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Onshore UAE

In some circumstances, directors who engage in any of the following activities could face criminal liability and up to two years imprisonment:

- Did not maintain commercial books sufficient to reveal the company's financial position or assets.
- Refrained from providing the data required by the bankruptcy trustee or the court, or intentionally provided incorrect data.
- Disposed of the company's assets after becoming cashflow-insolvent with the intent of depriving the creditors of those assets.
- Paid the debt of a creditor, while cashflow-insolvent, to the detriment of the other creditors or treated a creditor preferentially to other creditors, even if such acts were conducted with the intent of achieving a preventive composition or restructuring procedure.
- Disposed of company assets at a value less than their market price, or acted in a manner detrimental to the interest of the creditors with the intent to obtain funds in order to avoid or delay cashflow-insolvency, the adjudication of bankruptcy or the termination of a preventive composition or restructuring procedure.
- Spent disproportionate or excessive sums in gambling or speculative activities outside the company's usual business.
- Entered into disproportionate undertakings in favour of a third party without having regard to the financial status of the company at the time such acts were decided.

The UAE bankruptcy laws provide defences for directors/managers not involved in the crime or who vote against resolutions approving such acts.

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A director may also be disqualified by the court from acting as a director. A disqualification order can be made for a variety of reasons (eg conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations such as filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

Onshore UAE

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for an LLC to exempt its directors from liability, an LLC is able to indemnify its directors against certain liabilities incurred to third parties, to the extent permissible under the law. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings.

Dubai International Financial Centre

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. The company may also pay a director's defence costs as they are incurred – however these costs become a loan which must be repaid by a director should the defence be unsuccessful and the costs are not covered by any permitted indemnity. The company may seek to obtain security for such loans if appropriate in order to protect the company's assets.

What practical steps can directors take to avoid liability?

Onshore UAE

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.

Dubai International Financial Centre

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- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and/or if they have a personal interest in any proposed or existing transaction or arrangement with the company.

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United Kingdom

LAST MODIFIED 31 MARCH 2026



Corporate entities

What type of company is typically used in group structures?

In the UK, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" in UK company law. Basically, the law regards someone who manages the affairs of a company on behalf of its shareholders as a director (whether they are called a director or not).

What are the different types of director?

Directors validly appointed as such are known as *de jure* directors and may be executive (usually employees, with an operational/executive role) or non-executive (usually not employees) – and may also be appointed to represent a particular shareholder (a nominee director). In addition, a *de facto* director is a person who acts as though they are a director but is not validly appointed as such and a "shadow director" is a person in accordance with whose directions or instructions the directors of a company are accustomed to act. In general, however, UK company law does not differentiate between different types of director – all directors are subject to the same duties.

Eligibility

Who can be a director?

A director must be at least 16 years old, but there are no nationality or residency restrictions. A person disqualified under applicable directors' disqualification legislation cannot be appointed as a director and any purported appointment in

contravention of this prohibition is void. It is possible to have a corporate director, although at least one other director must be a natural person. There are proposals to implement a ban on corporate directors (which will be subject to certain limited exceptions), but no implementation date has yet been announced.

Minimum / maximum number of directors

A private company must have at least one director. There is no maximum. The company's constitution may, however, specify a greater minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Directors must consent to their appointment and can be appointed by the company's shareholders (via a shareholders' meeting or by written resolution) or, if the company's constitution allows, by the other directors. In private subsidiary companies, the constitution commonly allows the parent company to appoint directors by a simple written notice to the company.

All new individual directors must verify their identity with the registrar of companies before they are appointed. There are various ways in which a person can verify their identity, including online directly with the companies registrar (using, for example, a biometric passport or driving licence), in person at a post office, or via a registered "Authorised Corporate Service Provider" (ACSP) (eg lawyers, accountants, company formation agents subject to the UK's anti-money laundering regulations that have registered as ACSPs). Identity verification is a one-off exercise. Once a person is verified, they will obtain a verified status account at the registrar of companies and an 11-character personal code for all their roles that require verification. The code is important and will need to be provided on certain filings made at the companies register to confirm the individual's identity has been verified. It is an offence for individual directors to act if their identity has not been verified.

Details of the director's appointment (including their personal identity verification code) must be filed at the companies register within 14 days of the appointment taking place. It is an offence for a person to act as a director if notice of their appointment is not given within the prescribed 14 days. A director's residential address and full date of birth are not included on the public record but must be supplied to the registrar of companies. Under new laws to be introduced, anyone filing a notice of appointment of a director will need to confirm that the person is not disqualified.

How are directors removed?

Shareholders have a residual statutory power to remove directors by a majority resolution (subject to certain procedural requirements) which cannot be removed by the company's constitution. It is common for the constitution to confer additional powers of removal – for example, to enable the board to remove a director, or, in a subsidiary context, for the parent company to be able to remove a director by simple written notice to the company. A director may also resign at any time.

When a director leaves office, notice must be filed at the companies register within 14 days.

Board / management structure

Typical management structure

Boards of UK private companies are unitary structures made up of all the company's directors. Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations.

How are decisions made by directors?

The manner in which directors can make decisions is set out in the company's constitution. In private companies, the constitution typically provides directors with flexibility to determine between themselves how decisions are made – whether by physical meeting, telephone meeting or a written resolution. Other than single director companies, the minimum quorum for board meetings is generally two directors (although notice must generally be given to all). Unless the constitution stipulates otherwise, voting at board meetings is on a simple majority basis. When decisions are made in writing, however, the unanimous agreement of all directors is usually required, although the constitution may specify otherwise.

Authority and powers

As far as third parties are concerned, directors are able to bind the company and enter into contracts on its behalf even if there are internal limits on their power to do so (eg in the company's constitution or in internal policies and protocols).

Normally, the company's constitution gives the directors wide powers to manage its business and affairs as they think fit (although the constitution may also provide that shareholders may give the board specific directions as to its conduct). Directors' powers are collective, meaning that directors should act together as a group on the company's behalf.

Delegation

If authorised by shareholders, or if permitted by the company's constitution, the board can delegate their powers to committees and others (eg executives). However, the board retains overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the Companies Act 2006 (the Act). These are duties to:

- **Promote the success of the company.** Directors must act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, having regard (amongst other matters) to: (1) the long term consequences of decisions; (2) the interests of the company's employees; (3) the need to foster the company's business relationships with customers, suppliers and others; (4) the impact of the company's operations on the community and the environment; (5) the desire to maintain a reputation for high standards of business conduct; and (6) the need to act fairly between members.

There is no hierarchy to these factors and, where they conflict, a director will need to use their business judgement in weighing them against one another.

Companies which are "large" for accounting purposes are required to include a statement in their annual financial report describing how, during the relevant financial year, the directors have had regard to these factors when performing their duty to promote the success of the company.

- **Act with reasonable care, skill and diligence.** Directors must meet the minimum standard of skill and care expected of someone in their position and they must also bring to bear their particular skills and experience – therefore, the more qualified or experienced a director is, the greater the statutory standard required of them.
- **Exercise independent judgement.** However, a director may rely on other people (eg through proper delegation or by seeking advice) provided they judge that it is reasonable to do so. A director may not usually limit their discretion, however in certain circumstances they can do so by acting in accordance with an agreement entered into by the company or in a way authorised by the company's constitution.
- **Act within the company's constitution and exercise their powers for the purposes for which they were given and not for any collateral purpose.**
- **Avoid conflicts of interest.** Directors must not put themselves in a position where there is, or could be, a conflict between their personal interests or their duties to another person and the interests of the company (for example, where they are a director or employee of another company or where they may be in a position to take advantage of any property, information or opportunity they became aware of as a director). This duty is not breached if the situation cannot reasonably be regarded as giving rise to a conflict of interest or if the situation has been pre-authorised by the board (provided conflicted directors take no part in this decision), by shareholders or in the company's constitution.
- **Not accept benefits from third parties,** without prior shareholder approval. This duty is not breached if acceptance of such benefits cannot reasonably be regarded as giving rise to a conflict of interest. This allows for reasonable levels of corporate hospitality from third parties.
- **Declare interests in proposed transactions or arrangements with the company.** Directors must disclose the nature and extent of their personal interests in a proposed transaction or arrangement with the company before it is entered into. Directors must also declare the nature and extent of their interest in a transaction or arrangement that has already been entered into by the company as soon as reasonably practicable.

In addition, directors have duties under common law, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company.

What are directors' other key obligations?

The Act requires directors to prepare and file annual accounts and submit other information to the companies register, including an annual confirmation statement confirming that the information on the companies register is accurate and up-to-date and that the company's intended future activities are lawful. The accounts and other information must be submitted to the companies register within the prescribed time limits.

Directors are also responsible for ensuring that the company complies with its other statutory and legal obligations, for example under environmental and health and safety laws, employment laws, consumer protection laws, competition laws and bribery /anti-corruption laws.

Transactions with the company

The Act regulates the circumstances in which directors and their connected persons (broadly, family members and connected companies or trusts) can enter into transactions with the company. The transactions covered by these rules include long term service contracts, loans and the disposal or acquisition of substantial assets. Unless any exemptions apply, these transactions may only be entered into with prior shareholder approval.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company itself and not directly to the parent or other group companies, individual shareholders or creditors. Therefore, only the company can bring an action for breach of duty against a director.

However, shareholders are able to bring an action for breach of duty on behalf of the company (a derivative action) in certain circumstances. Broadly, a shareholder must first obtain the court's permission to proceed with a derivative action and the court will take into account a number of factors when deciding whether to grant this permission – including whether the shareholder is acting in good faith, the views of independent shareholders and whether the company is likely to ratify or authorise the act or omission giving rise to the claim.

A company may seek a range of remedies against a director for breach of duty including damages, recovery of misapplied property (including the payment of unlawful dividends), accounting for profit made in breach of duty, an injunction to prevent breach and rescission of a contract.

Liabilities on insolvency

Additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency. Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Personal liability for directors may, in certain circumstances, arise under UK legislation including that relating to environmental and health and safety, employment, consumer protection and bribery/anti-corruption. In certain cases, criminal liability may arise.

A director may also be disqualified by the court from acting as a director or from taking part in the promotion, formation or management of a company. A disqualification order can be made for a variety of reasons (e.g. conviction for criminal offences relating to the running of a company, persistent breaches of statutory obligations relating to identity verification and filing documents with the companies register, being found liable for fraudulent or wrongful trading and generally for conduct which makes a director unfit to manage a company).

Failure to comply with company-related obligations, such as the preparation and filing of accounts, can also lead to fines for individual directors.

Protection against liability

How can directors be protected from liability?

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). However, there are limits on what may be ratified (eg illegal acts cannot be ratified) and ratification by shareholders does not absolve a director from any liability to a third party in relation to the matter concerned (eg creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** Although it is not possible for a company to exempt its directors from liability, a company is able to indemnify its directors against certain liabilities incurred to third parties. An indemnity can potentially cover both the award of damages against a director and the costs involved in defending a claim but cannot cover regulatory fines or the unsuccessful defence of, or fines imposed in, criminal proceedings. The company may also pay a director's defence costs as they are incurred – however these costs become a loan which must be repaid by a director should the defence be unsuccessful and the costs are not covered by any permitted indemnity. The company may seek to obtain security for such loans if appropriate in order to protect the company's assets.
- **Insurance.** Directors' and officers' (D&O) insurance is common in the UK. It typically provides both cover for individual directors against claims made against them in their capacity as director, including defence costs (which applies when

indemnification by the company is not available), and company reimbursement when it has indemnified its directors (subject to an excess/retention). Policy exclusions typically include claims in respect of a director's fraud, dishonesty, wilful default or criminal behaviour.

What practical steps can directors take to avoid liability?

Directors should:

- Keep informed about the affairs of the company, particularly its financial position. Directors should have access to up to date financial information, prepare thoroughly for and regularly attend board meetings and familiarise themselves with key legislation affecting the business.
- Make full disclosures to the board and shareholders if they have outside positions or interests which may give rise to a conflict of interest and / or if they have a personal interest in any proposed or existing transaction or arrangement with the company.
- Keep records and take advice – directors should ensure that full written records of board proceedings are made reflecting the reasoning behind key decisions. This should include any alternative courses of action considered. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and are accurate and complete. They should also take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Be aware of, and comply with, any group-wide governance policies. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Also in a group situation, keep in mind that directors must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (eg when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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Corporate entities

What type of company is typically used in group structures?

In the United States, entity choice is an important legal determination and choosing the right entity structure depends on a number of factors, including desired management structure and tax treatment. The most common type of company used in group structures is a corporation, specifically a “C-Corporation”. This guide therefore focuses on the management of C-Corporations.

Note: Corporate laws differ among the 50 US states. This guide provides general answers under Delaware corporate law, where approximately two thirds of Fortune 500 US companies are incorporated.

Types of director

What is a “director”?

The oversight of a corporation is undertaken by its board of directors. A director is a member of the board of directors, which is generally responsible for managing or directing the management of the business and affairs of the corporation. A director (also called a “board member”) is distinct from the company’s stockholders, or owners, and distinct from the company’s executive officers or management. A stockholder, executive officer or other member of management can serve as a director if elected by the stockholders.

What are the different types of director?

In general, there are not multiple types of directors under Delaware law: all directors are members of the board with the same voting power, duties and responsibilities. Some companies may appoint board committees to oversee distinct aspects of the business, such as an audit committee that oversees the company’s audits and financial

affairs. It is also common to appoint a “chairperson of the board” and/or “committee chair” who is a member of the board of directors responsible for presiding over board or committee meetings and may have certain other specific delegated duties or authority.

Eligibility

Who can be a director?

In general, the stockholders of a corporation may elect anyone to serve as director. In the United States, there is generally no requirement that directors be stockholders; to have an employee representative on the board; or other generally specified legal qualifications for directors. The company’s certificate of incorporation (sometimes called the “charter”) or its bylaws (the “bylaws,” and together with the charter, the “charter documents”) may prescribe qualifications for directors, such as minimum or maximum age requirements or a requirement that the company’s chief executive officer serve on the board, although in practice that is less common. In addition, regulatory schemes imposed by other, non-corporate US laws may limit a person’s ability to serve as a director.

Some examples of other limiting regulatory regimes are:

- The Securities and Exchange Commission may limit the ability of certain “bad actors” (such as individuals who have committed fraud or other crimes) from serving as a director of a US public company.
- The Clayton Antitrust Act limits the ability of directors to serve on the boards of directors of certain competitive companies.
- The Committee on Foreign Investment in the United States (CFIUS) may determine that a certain corporate transaction (such as a merger whereby a board is replaced with foreign nationals) is improper because it violates national security.

Additionally, a company’s charter documents may provide for other director qualifications.

Minimum / maximum number of directors

Delaware corporate law requires that a board have at least one director and otherwise does not establish a minimum or maximum number of directors. The number, or the manner for establishing the number, of directors must be fixed in the charter documents. Depending on the facts, other regulatory regimes may apply that require a number of directors greater than one. For example, the “independence” and committee requirements for publicly traded companies make it logically difficult to have a board with fewer than three independent directors.

Appointment and removal

How are directors appointed?

Directors are generally elected by stockholders, provided that the charter documents may provide (and commonly do provide) that the board may fill any vacancy in the

board. For example, the charter documents typically permit the board to increase the size of the board and to fill vacancies on the board, which effectively permits the board to appoint directors until the next meeting of stockholders at which directors are elected.

How are directors removed?

In general, any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares of stock then entitled to vote at an election of directors pursuant to the company's charter. A notable exception, however, is that in companies with "classified" boards (in which directors are divided into "classes" that are elected for staggered multi-year terms), stockholders may remove directors only for cause unless the charter provides otherwise. In situations where companies attract investment from funds or other sophisticated investors, particularly in private companies, it is common for those investors to have voting or similar agreements that allow them to control the removal and appointment of designated directors.

Board / management structure

Typical management structure

The board of directors generally appoints the company's executive officers, such as the company's chief executive officer, president, secretary, treasurer and any vice-presidents, to manage the day-to-day affairs of the company.

How are decisions made by directors?

Directors have duties of care and loyalty to the corporations that they oversee. Directors must exercise these duties by becoming informed, prior to making a business decision, of all material information that is reasonably available, including reasonable alternatives (duty of care), and by acting in the best interests of the company and putting the company first (duty of loyalty). Directors typically discuss actions at one or more meetings, ask management questions and consider a decision and its alternatives. Any director with an interest in the outcome of the decision should disclose all material facts relating to that interest and recuse themselves from the deliberations and decisions regarding the matter. Once the board has satisfied its obligation to become informed, it may vote on the action, either by a vote at the meeting or via written consent. Alternatively, a majority of votes cast by disinterested stockholders entitled to vote on the matter may approve the transaction. Usually, a majority vote of the board is required to approve an action, although the nature of approval depends on a number of factors, including the company's charter documents and whether the company is seeking a vote of the independent directors to protect the board against claims of self-dealing or conflicts of interest.

Authority and powers

The board of directors generally has the power to manage the corporation, including the power to appoint and remove officers of the corporation, and approve fundamental transactions such as issuance of stock, mergers and acquisitions and

amendments to the company's charter documents. Usually, boards will appoint officers to manage the day-to-day affairs of the company and delegate to them the power to bind the company on routine matters, subject to certain limitations. Unless otherwise provided in the company's charter, directors generally do not have the power to act alone, and decisions must be made by the board, or a committee or individual to which the board has delegated power.

Delegation

Directors may delegate day-to-day responsibilities to management. The officers have the titles and duties stated in the bylaws (or in a resolution of the board not inconsistent with the bylaws) including an officer that can sign instruments and stock certificates on behalf of the company (traditionally referred to as the secretary). Generally, as a U.S. corporate law matter, a company would have a president who acts as the company's chief executive officer, a secretary who records the proceedings and meetings of the company's stockholders and directors and authenticates official records, and a treasurer who oversees the company's finances (often a chief financial officer). The board may also appoint one or more vice-presidents and other officers of the company, with the duties outlined in the company's bylaws or resolutions of the board. Typical officers may include a chief operating officer, chief revenue officer or head of sales, chief technology officer, general counsel, or other officers that may be important to the company's business.

Directors may not delegate their personal judgment or decision-making authority, such as their authority to choose the officers or to vote as a director on board actions (there is no "director proxy" in the United States). However, the board may delegate certain decisions of the board to a specified committee. For example, the board may delegate the ability to set executive compensation to a compensation committee.

Duties and obligations of directors

What are the key general duties of directors?

Directors have duties of care and loyalty to the corporations that they oversee. The duty of care is the duty to act with the level of care that an ordinary, prudent person would exercise under the same circumstances. In addition to becoming informed about decisions, the duty of care focuses on refraining from engaging in reckless conduct, intentional misconduct or gross negligence. The duty of loyalty is the duty to act in the best interests of the company. It includes disclosure obligations, oversight obligations and a duty to not take actions that are harmful to the company or its stockholders for the benefit of directors or management. The duty of loyalty includes a duty of good faith, which requires directors to take actions performed with an honest belief that such actions are in the best interests of the company.

What are directors' other key obligations?

The board generally oversees and manages the business and affairs of the company and must approve certain fundamental actions, such as appointing or removing the company's executive officers, amending the company's charter documents, approving the issuance of stock, or approving a sale of the company. Certain fundamental

transactions may also require the approval of the company's stockholders under the Delaware General Corporation Law or the company's charter. As part of its duty to remain informed, a board would ordinarily require management to present regular reports regarding material aspects of the company's business, including its financial results. In the event the company is in or nearing insolvency, directors may be personally liable for actions or inactions the company takes. For example, if the company is unable to pay taxes to taxing authorities or wages to employees, the director may face personal liability.

Transactions with the company

The duty of loyalty requires directors to act in the best interests of the corporation and its stockholders, and not to engage in conflicted or self-interested transactions that are not in the corporation and its stockholders' best interest. A board considering a transaction in which one or more directors have a conflict of interest can implement procedural safeguards to protect against claims of a breach of duty of loyalty. For example, the director may disclose all material facts relating to a conflict of interest and recuse themselves from the deliberations and decisions regarding the matter, the board may form a committee of directors without conflicts to negotiate and enter into the transaction, and/or the transaction may be made subject to the informed, uncoerced vote of the unconflicted stockholders.

Liabilities of directors

Breach of general duties

Generally, a company (directly) or its stockholders (derivatively, on behalf of the company) may bring an action against a director for breach of fiduciary duty of care or loyalty. The court has broad powers to grant remedies for a breach of fiduciary duty, which can include requiring the rescission of a transaction or the payment of monetary damages.

Liabilities on insolvency

Directors are generally not personally liable for obligations of the corporation, even in the event of its insolvency. In such circumstances, however, the corporation's creditors, as the residual beneficiaries of the company, are authorized to sue the company's directors derivatively for breach of fiduciary duty. Employees may also sue directors for unpaid wages in certain states.

Other key risks

A key risk is a derivative action by a company's stockholders for breach of fiduciary duties, which commonly happens in connection with M&A activity, securities offerings, data breaches, or other significant transactions or events. In addition, directors may be held personally criminally or civilly liable for misconduct by the company or its employees, including violations of securities laws, environmental laws or the Foreign Corrupt Practices Act. Additionally, directors may be held jointly and severally liable for

unlawful share purchases or redemptions or dividends. Under “bad actor” laws, directors who have committed fraud or other crimes may be barred from serving as a director of a company offering or selling securities in the future.

Protection against liability

How can directors be protected from liability?

Directors can be protected from liability by:

- A written provision in the company’s certificate of incorporation that exculpates a director or officer from personal liability for breach of the duty of care (a company may not exculpate a director from liability for a breach of the duty of loyalty).
- Indemnification in the company’s charter documents and in written indemnification agreements between directors and the company, including advancement of litigation costs.
- Obtaining directors and officers insurance.

What practical steps can directors take to avoid liability?

To avoid liability, directors should:

- Ensure that the company’s charter documents provide for exculpation and indemnification for directors.
- Ensure that the director has an appropriate indemnification agreement with the company.
- Ensure that the company has obtained sufficient D&O insurance.
- Conscientiously and faithfully perform their duties as a director, including by asking questions of management, thoroughly understanding the company’s compliance program and policies and acting in good faith and with loyalty to the company and its stockholders.
- Hire and retain skilled and effective management who deliver strong results for the company.
- Thoroughly document meetings of the board and the director’s appropriate oversight of the company.
- Make robust and accurate disclosures regarding conflicts of interest and transaction details and alternatives to the company’s stockholders.
- Adopt procedural safeguards in the event of a conflicted or other high-risk transaction, such as by requiring a stockholder vote and/or a vote of a special committee of non-conflicted directors for transactions with directors. Under Delaware law directors may be shielded from certain breach of duty claims involving an act or transaction in which one or more directors, officers or controlling stockholders or groups has an interest or relationship if such act or transaction is approved by a majority of disinterested directors or a majority of votes cast by disinterested stockholders or both. In each case, the approvers must be fully

informed of the conflict and, in the case of the board or a board committee, it must act in good faith and without gross negligence.

- Obtain and rely on expert advice as to complicated matters (such as financial advisors on valuation, IT consultants on data breach remediation, or legal advisors on complicated questions of law).

Additionally, specific practical steps should be taken in certain circumstances, such as ensuring true and complete disclosure is set forth in securities filings, following up on red flags that may indicate misconduct, creating special procedures for corporate transactions, and considering creditors as the company approaches insolvency.

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Corporate entities

What type of company is typically used in group structures?

In Zambia, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

The Companies Act No. 10 of 2017 (Companies Act) defines a director as a person appointed as a member of the board of directors and includes an alternate director, by whatever name designated.

The Companies Act defines board of directors as persons appointed or nominated as either:

- directors of the company whose number is not less than the required quorum acting together as a board or,
- if the company has one director, that director acting alone.

An alternate director is a person who is not a director appointed by a director with the approval of the board of directors and subject to any restrictions in the articles of association.

What are the different types of director?

The different types of directors provided for in Zambia under the Companies Act, common law and the standard articles of association which form part of the Companies Act are as follows:

- Executive Director – a director who is involved in the day-to-day management of a company.

- Non-Executive Director – a director who is not involved in the day-to-day management of a company.
- Local Director – a director of a foreign company who is resident in Zambia and empowered and authorised to conduct and manage the affairs, property, business and other operations of the company in Zambia. This type of director is appointed under a Zambian registered foreign branch of a company which is incorporated in another jurisdiction.
- Alternate Director – a person who is not a member of the board of directors that is appointed by a director, subject to any restriction provided in the articles and with the approval of the board of directors. The person appointed is not a director but acts in place of a director during a temporary period of absence.
- Associate Director – a person appointed by the directors who is not in strict legal terms a director but rather a senior manager and a director of purely internal significance.
- Chief executive officer – a person who is responsible, under the immediate authority of the board, for the day to day management of the affairs of the company.
- Managing director – someone who is responsible for the daily operations of a company.
- De facto director – a person who, not being a duly appointed director, holds themselves out, or knowingly allows another to hold that person out, as a director.
- Shadow director – a person who is recognized as being a director because of the influence or control they exercise over a company.

The Companies Act also defines an executive officer as the chief executive officer, chief financial officer or a person holding a managerial position.

Zambian Laws do not provide for the appointment of an employee or lender representatives of the company board – this is usually agreed upon under a shareholders agreement or under the articles of association.

Eligibility

Who can be a director?

The Companies Act provides that a company must appoint a natural person as a director.

The Companies Act further provides that a person under the age of eighteen, an undischarged bankrupt, a person disqualified by the High Court from being a director, a person declared by the court to be of unsound mind or any person who fails to satisfy any additional qualifications for directors provided under the articles of association cannot be appointed as a director.

Additionally, the Companies Act provides that a director may not be a member or hold shares in the company unless the articles of association provide otherwise. Therefore, companies that intend to appoint directors who are also shareholders must ensure that such allowance is made in the articles of association.

The Companies Act also provides residential requirements for directors. It provides that the number of directors, including an executive director, resident in Zambia, shall not be less than half the number of directors appointed. However, it should be noted that the Minister may, by statutory instrument, permit a company which after 1st February, 2000, entered into a Development Agreement in accordance with the Mines and Minerals Act, 1995, to have not less than thirty percent of its director's resident in Zambia.

Minimum / maximum number of directors

The Companies Act provides that the board of directors shall comprise, in the case of a:

- private company, not less than two directors or
- public company, not less than three directors.

The Companies Act also provides that the articles may specify a higher number than the required minimum number of directors however, it does not provide for a maximum number of directors.

Appointment and removal

How are directors appointed?

According to the Companies Act a company shall, unless the articles of association provide otherwise, appoint a person as a director by ordinary resolution passed at a general meeting of the company. This means the articles of association may specify the manner of appointment of a director.

Further, the Companies Act provides that directors may also be appointed by the Courts following an application by a shareholders or a creditor of a company. In such a case the court may, on such terms and conditions as the Court considers just in the circumstances, make the appointment where:

- there are no directors of a company, or the number of directors is less than the statutory minimum number, or
- the quorum required for a meeting of the board of directors, and
- it is not possible or practicable to appoint directors in accordance with the articles.

A person who is appointed as a director must give their written consent and make a declaration in the prescribed forms.

The registration of the appointment is made at the Patents and Companies Registration Agency (PACRA) by filing the resolution, the prescribed forms and payment of the prescribed fee within 21 days of passing the resolution.

How are directors removed?

The Companies Act provides that a company may remove a director from office by an ordinary resolution passed at a general meeting of the company. The Companies Act requires that the notice of intention to remove a director is made in the prescribed manner and form and is sent to the company secretary within not less than 28 days before the general meeting.

The removal of the director must be registered at PACRA by filing the prescribed forms, the resolution removing the director and the prescribed fee within 21 days of the resolution being passed.

A director can also be removed if they resign. A director can be removed where the director has been absent from meetings held during a 6 months period where consent has not been given for the absence.

In all cases of removal of a director, the prescribed forms must be filed at PACRA within 21 days of the removal.

Board / management structure

Typical management structure

The Companies Act provides that the business of the company shall be managed by, or under the direction or supervision of a board of directors. The Companies Act provides that the board of directors of a company is constituted by the directors of the company and is defined as persons appointed or nominated as either:

- directors of the company whose number is not less than the required quorum acting together as a board or,
- if the company has one director, that director acting alone.

Each director has the same obligations and accountability to the company. The directors are responsible (on a collective basis as a board) for the management and operations of the company and for ensuring that the company meets its statutory obligations. However, only executive directors are responsible for the day to day management of the company whereas non-executive directors are not involved in the day to day management of the company.

While the Companies Act does not prescribe management structures, regulated entities such as financial institutions have prescribed supervisory functions with respect to the board of directors and management.

How are decisions made by directors?

The company's articles of association determine the manner in which directors can make decisions. In most cases, decisions are made by resolutions which are passed at quorate meetings (by simple majority, unless the articles stipulate otherwise) or via round robins (ie written resolutions, which must be permitted by the company's articles and typically must be signed by all the directors of the company).

Authority and powers

The Companies Act provides that the board of directors may exercise all such powers of the company as are not required to be exercised by the members by the Companies Act or otherwise by the articles of association.

The Companies Act also provides that the board of directors may exercise the powers of the company to:

- borrow money
- charge any property or business of the company, including any of its uncalled capital, and
- issue debentures or give any other security for a debt, liability or obligation of the company or of any other person.

The board of directors also have power to appoint a person to be the attorney of the company for such purposes, periods and subject to such conditions as the board of directors considers appropriate. The appointment must be made by way of a power of attorney.

Any two directors or number of directors determined by the board of directors must sign, draw, accept, endorse or execute all cheques, promissory notes, bankers' drafts, bills of exchange and other negotiable instruments, unless the power has been delegated as evidenced by a resolution of the board of directors, including receipts for money paid to the company.

The board of directors however, require the approval of the shareholders by ordinary resolution to do the following:

- sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking or assets of the company
- issue any new or unissued shares in the company
- create or grant any rights or options entitling the holders to acquire shares of any class in the company, or
- enter into a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is the value of the company's assets before the transaction.

Such approval is required for each specific transaction.

The validity of any transfer or disposition of property to a person dealing with the company, in good faith, shall not be affected by a failure of the directors to obtain the necessary approval whether from the board of directors or from the shareholders.

Further, the Companies Act provides that a decision made by an officer of a company shall, subject to the requirements as to disclosure, be considered valid if:

- the decision is made in good faith for a proper purpose

- the officer does not have a personal interest in the decision
- the company is appropriately informed of the subject matter of the decision, and
- the officer reasonably believes that the decision is in the best interests of the company.

Delegation

The Companies Act allows the board of directors to delegate its powers to a director or committee of directors. It should be noted that the articles of association can make provision relating to delegation of powers.

Duties and obligations of directors

What are the key general duties of directors?

Directors' duties are codified under the Companies Act. Under the Companies Act, directors have the following fiduciary duties. Directors must:

- Exercise their powers in accordance with the Act and the company's articles and for the purposes for which the powers are conferred.
- Promote the success of the company.
- Exercise independent judgment.
- Disclose information about that director's remuneration in the financial statements of the company.

The directors also have the following specific duties:

- Duty to avoid conflict of interest.
- Duty to not accept third party benefits.
- Duty to disclose where director is interest in a transaction or proposed transaction with the company.

The general responsibilities of directors provided for under the Companies Act are as follows:

- To take necessary measures to prevent, reduce and manage any attendant risks to the business of the company.
 - Not to cause, allow or agree for the business of the company to be conducted in a manner that is likely to create a substantial risk of serious loss to a member or creditor of the company.
 - When exercising powers or performing duties of a director:
 - to act in good faith and in the best interests of the company, and
 - to exercise the degree of care, diligence and skill that may reasonably be expected of a person carrying out the functions of a director.
-

What are directors' other key obligations?

The Companies Act provides that the board of directors shall cause accounting records to be kept that correctly record and explain the transactions of the company, enable the financial position of the company to be determined with reasonable accuracy and enable financial statements of the company to be readily and properly audited.

In addition the board of directors are required to ensure that, within three months following the end of the financial year, an audit is conducted, and the report of the financial affairs is signed by not less than two directors. The board of directors are required to also prepare an annual report on the affairs of the company during the accounting period ending on that date. Lastly the Companies Act provides that a company is required, within ninety days after the end of each financial year, to lodge with the Registrar an annual return in the prescribed form.

Companies are not exempt from complying with the law, therefore directors must ensure that their operations and business complies with the relevant laws of the Republic of Zambia.

Transactions with the company

The Companies Act provides that a transaction entered into by a company, in which a director has an interest known to the other party, may be avoided by the company within six months after the transaction is disclosed to all the shareholders.

Liabilities of directors

Breach of general duties

Directors owe their duties to the company as they act as agents, therefore only the company can bring an action against a director where they act in an ultra vires manner.

When a director acquires or disposes of shares or debentures, in contravention of the Companies Act, the director shall be liable to the person who, or from whom, the shares or debentures were acquired or disposed to, for the amount by which the consideration received by the director exceeds the fair value of the shares or debentures.

The Companies Act also provides that where a director of a company willfully commits a breach of any duty or responsibility specified in the Companies Act, the director:

- is liable to compensate the company for any loss the company suffers as a result of the breach
- may be removed from the board of directors, and
- is liable to account to the company for any profit made as a result of the breach.

Further, a contract or other transaction entered into between a director and the company in breach of any duty of the director, may be rescinded by the company.

Additionally, the Companies Act provides that where a company establishes that a decision made by an officer is not valid, the officer shall be held personally liable for any obligation or liability that arises as a result of that decision. If the decision is valid, the officer shall be indemnified for that decision.

Liabilities on insolvency

According to the Insolvency Act No. 9 of 2017 a director who makes a written declaration knowing that the company does not satisfy the solvency test commits an offence and is liable to a fine on conviction.

Directors who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable for fraudulent or wrongful trading. These expose the director to liability to contribute to the company's assets on a winding up and, in the case of fraudulent trading, to criminal penalties. Liability for wrongful trading can be avoided if the director can satisfy the court that they took every step they ought to have taken to minimise the loss to creditors. In practice, this may limit the director's ability to resign when the company is insolvent or nearing insolvency.

Other key risks

Criminal liability now extends to failure to file annual returns and financial statements, these are duties of directors and where they are not complied with they shall be held liable.

Directors can also be held liable as agents of the company for failure to adhere to the relevant laws, these could include laws in the Companies Act, Competition and Consumer Protection Act, Zambia Environmental Management Act, Employment laws, Employment Code and taxation laws amongst others.

Protection against liability

How can directors be protected from liability?

- The Companies Act provides that valid acts of directors may be indemnified.
 - It is also possible for directors to take out insurance that protects against claims against them in their capacity as directors.
 - The Companies Act provides certain acts of the directors may be ratified. However, such ratification or approval does not prevent the Court from exercising a power which might, if it were not for the ratification or approval, be exercised in relation to the action of the board of directors.
-

What practical steps can directors take to avoid liability?

- Ensure that the company maintains accounting records in accordance with its legal obligations.
- Ensure that the management of a company verifies information given by officers and employees of the company.

- Obtain professional advice in order to make informed decisions about matters which affect the company.
- Obtain proper advice in respect of the primary legislation that applies to the activities of the company and the obligations that are imposed by the legislation on both the company and you as a director.
- Ensure that proper procedures exist and are followed in order to minimise the risk of the company breaching any of its liabilities to minimise the risk that you become vicariously liable.
- Ensure that all actions taken by the directors are properly approved.
- Consider obtaining directors' liability insurance.
- In an event that a person is acting as a nominee director, obtain a deed of indemnity from the appointing shareholders.

Key contacts



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Corporate entities

What type of company is typically used in group structures?

In Zimbabwe, the most common type of company used in group structures is the private company limited by shares. This guide therefore focuses on the management of private limited companies.

Types of director

What is a "director"?

There is no complete definition of the term "director" in Zimbabwean company law. However, the definition of a "director" in terms of the Companies and Other Business Entities Act (the COBE or the Act) includes:

- Any person occupying the position of director.
- An alternate director as defined in the COBE.
- A person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

What are the different types of director?

There are two types of directors in terms of Zimbabwean company law.

- Executive directors – these are usually employees, with an operational/executive role in the company. They are appointed through a formal process.
- Non-executive directors – these are appointed to represent a particular shareholder and to provide expertise in a certain sector.

However, Zimbabwean company law does not differentiate between different types of directors, as all directors are subject to the same duties under the COBE.

Eligibility

Who can be a director?

A director:

- Must be at least 16 years old, and must not be a body corporate.
- Must not be a person who has been removed by the court from any office of trust on account of misconduct save with the leave of the court.
- Must not be a person who has at any time been convicted whether in Zimbabwe or elsewhere, of theft, fraud, forgery or perjury.
- Must not be a person who has ever been sentenced for any of the crimes listed above and served a term of imprisonment without the option of a fine.

Minimum / maximum number of directors

A private company with more than one and fewer than ten shareholders must have two or more directors; a private company with ten or more shareholders must have not fewer than three directors.

There is no maximum number of directors under Zimbabwean company law.

Appointment and removal

How are directors appointed?

Directors are appointed individually at either a general meeting of a company or through a resolution. Directors must consent to their appointment.

How are directors removed?

Directors are removed in accordance with the COBE, if they have been:

- Declared insolvent or bankrupt in terms of any law in Zimbabwe or any other country.
- Convicted of theft, fraud, forgery or perjury.
- Sentenced to serve a term of imprisonment without the option of a fine or to a fine exceeding level 5 unless they have received leave from a court or been discharged or rehabilitated.

Further, a director may be removed, with or without a stated reason or cause, upon a majority shareholder vote. However, the removal of the director may only be carried out if the notice of the meeting states that the purpose of the meeting is to vote on the removal of such director at the meeting.

A director may also choose to resign. Written notice must be given to board.

Board / management structure

Typical management structure

Boards of Zimbabwean private companies are singular structures made up of all the company's directors. The directors are accountable (on a collective basis as a board) for the management and operations of the company and for guaranteeing that the company meets its statutory obligations. The board of directors is then managed by a management committee.

How are decisions made by directors?

Every director (as the case may be) must exercise independent judgment and must act within the powers of the company in a way that they consider, in good faith, to promote the success of the company for the benefit of its shareholders as a whole. Decisions are made either through a general meeting where the board votes with a minimum quorum (of at least two directors being present after notice is given to all) or through a written resolution being passed.

Authority and powers

Directors are permitted to bind the company and enter into contracts on its behalf. Where the director does so without authority, ratification can be sought.

Delegation

Generally, a board may not assign or delegate their responsibilities or accountabilities and should retain overall responsibility for the company's operation and management. However, if permitted to do so by the memorandum of association, the board can delegate their powers to committees and others.

Duties and obligations of directors

What are the key general duties of directors?

The key duties of a director are set out in the COBE, as follows:

- **To act in good faith.** A director stands in a fiduciary relationship with their company which requires them to act in good faith always for the benefit of the company. This is especially so since the director is in a position of trust and confidence with the business entities and thus the law exacts the highest degree of integrity from those who control it.
- **Duty of care and business judgment rule.** Every manager of a private business corporation and every director or officer of a company has a duty to perform as such in good faith, in the best interests of the registered business entity, and with the care, skill, and attention that a diligent businessperson would exercise in the same circumstances.
- **Duty of loyalty.** A manager or controlling member of a private business corporation and a director, officer or controlling member of a company has a duty to act with loyalty to that registered business entity and, in the case of a company, towards any subsidiary of that company.

- **Duty to disclose a conflict of interest.** Where a director has a personal financial interest in respect of a matter to be considered at a meeting of the board of the company or a meeting of the members of the private business corporation, or knows that an associate has a personal financial interest in the matter, the person must disclose this to the board.

In addition, directors have duties under common law, for example not to misuse the company's property and to keep company information confidential and only use it for the benefit of the company.

What are directors' other key obligations?

The Act requires that directors ensure that the company complies with its other statutory and legal obligations, for example under exchange control laws, export and import laws, environmental laws, health and safety laws, employment laws, consumer protection laws, competition laws and bribery/anti-corruption laws.

The Act also requires that the directors ensure that the accounts and other information are kept up to date and are submitted within the prescribed time limits.

Transactions with the company

A director is not permitted to receive financial assistance from the company unless it is done pursuant to paying them what is owed to them, or the business is one that lends money, or the loan is to help the director buy shares in the company.

Liabilities of directors

Breach of general duties

A member of a company (a shareholder) may bring a legal action against the directors or managers of a company. The shareholder must establish that:

- The managers or directors, or the member, of the entity are deadlocked, whether because of even division in their number or another reason, and irreparable injury to the company is likely to be caused to the business or the business can no longer be conducted to the members' advantage due to that deadlock.
- The managers, directors, or any other persons in control of the entity have acted illegally, fraudulently, oppressively, recklessly or with gross negligence toward the petitioning member.
- A shareholder may bring a claim of personal damages against a director or manager who fails to exercise the duty of care and duty of loyalty as enshrined in the COBE. The damages to be claimed may be for harm caused to the member by the conduct of the manager or director.

Liabilities on insolvency

In terms of the Insolvency Act, additional personal liabilities may arise for directors if the company is insolvent or nearing insolvency.

Directors or managers who knowingly or negligently allow a company to carry on trading when it is insolvent may be held liable by a court. This exposes the director to liability to contribute to paying off the debt incurred by the company.

Liability for insolvent trading can be avoided if the director can satisfy the court that they had no knowledge of the transaction and that they did not participate in the handling of the accounts of the company or believed that the debt could be paid off.

Other key risks

Personal liability for directors may, in certain circumstances, arise under Zimbabwean legislation.

The courts have been prepared to lift the corporate veil in situations under the alter ego doctrine. This involves situations where the individuals or individuals behind the corporation use the business as a mere mask for personal dealings.

The courts have specific guiding principles which are to be looked for in such situations such as absence of corporate formalities, inadequate capital, degree of separate property, financial interest of the individual, degree of control and any personal factor of the individual involved. The court's evaluation involves a balancing of considerations being the principle of separate personality against rising considerations or facts which favour piercing of the corporate veil.

If the courts enquiry dictates, the individual may be forced to pay the corporations' creditors from their personal funds.

Directors who act in a manner which is *ultra vires*, or which contravenes the COBE, may be liable to damages. There is also possible civil and criminal liability. If there is a contract in place, directors may also be held liable for breach of contract and any repercussions which may result from that breach.

The board is responsible for compliance with all of the above. Where the board fails to comply with the applicable laws, including non-binding rules and codes and standards, and if this causes any prejudice to the company, the directors can be held liable for any damages arises from such board's failure and can be held criminally liable where an offence has been committed.

Protection against liability

How can directors be protected from liability?

A director of a company is liable for unlawful distributions as set out in the COBE:

- If the director was present at a meeting when the board approved a distribution, or otherwise participated in the making of such a decision.
- If the director failed to vote against the distribution, despite knowing that the distribution was contrary to the COBE Act.

However, directors may be protected from this liability and others in the following ways:

- **Ratification.** Shareholders can ratify conduct by a director which is negligent or in breach of duty by a majority resolution (excluding the votes of the director concerned or their connected persons). Ratification by shareholders does not, however, absolve a director from any liability to a third party in relation to the matter concerned (e.g. creditors in an insolvency/pre-insolvency situation).
- **Indemnity.** The company may seek to indemnify a director against any liability incurred by successfully defending the director in any proceedings brought against them. It is important to take note that neither the articles nor any contract may have the power to exempt a director from any such liability which by law would otherwise attach to them in respect of any negligence, breach of duty, or of trust of which they may be found guilty. The company may only defend the director in this regard, while the court can make an order as fit if they believe that a person was acting honestly and reasonably.

What practical steps can directors take to avoid liability?

Directors should:

- Stay well informed about the affairs of the company, in particular the company's financial position. This will mean looking at the accounting books of the company and ensuring that the company is acting within the bounds of the law.
- Ensure that they have made full disclosures to their company about any interests they have, that could result in there being a conflict of interest.
- Ensure that they keep records and take advice from individuals who have expertise in certain matters. Minutes should also record any disagreement amongst the board and the reasons for that. In addition, directors should ensure that returns and accounts are filed promptly and take professional advice for decisions based on areas outside their personal expertise, for example from legal professionals and accountants.
- Comply with corporate governance policies like the Zim Code. These may cover areas such as health and safety, ethics, bribery/anti-corruption, and human rights. Compliance with them is designed to help directors (and employees) fulfil their duties and obligations and minimise the risk of liability.
- Further, in a group situation, directors should keep in mind that they must act in the best interest of their group company. Whilst group interests and that company's interests are usually aligned, this may not always be the case (e.g. when their group company's solvency is adversely impacted). It is important to keep communication and reporting lines as open and clear as possible between parent and subsidiary companies when issues may arise and seek appropriate advice.

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