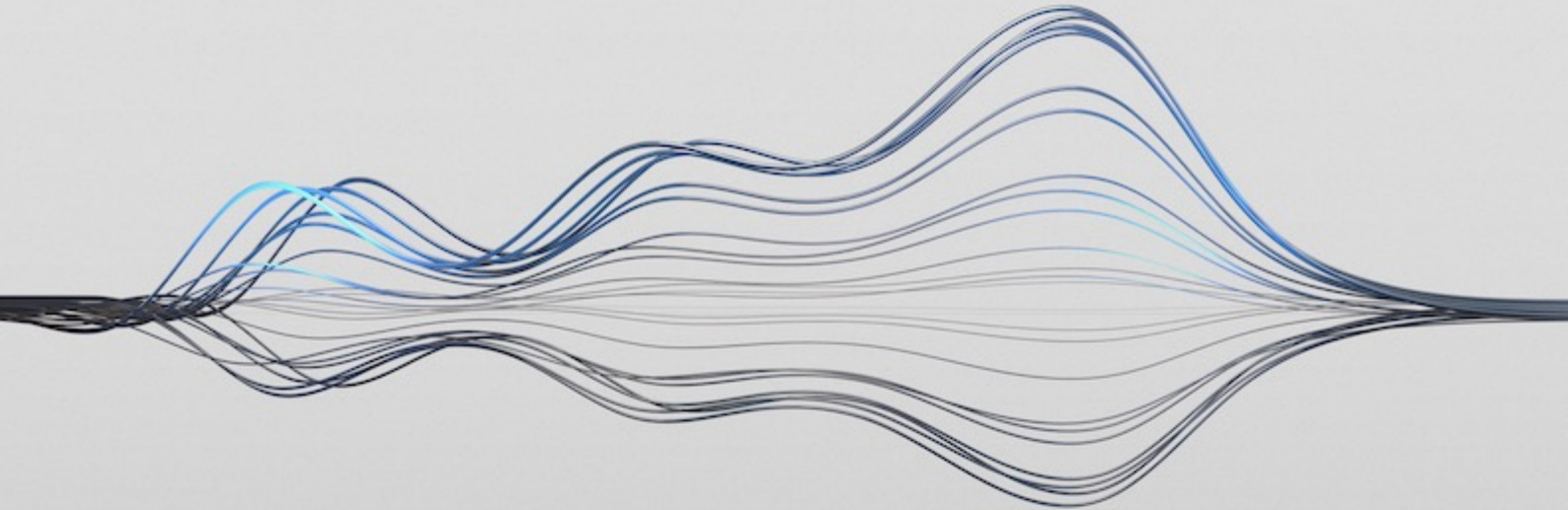


GHANA

Global Guide to Directors' Duties





Ghana

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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 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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