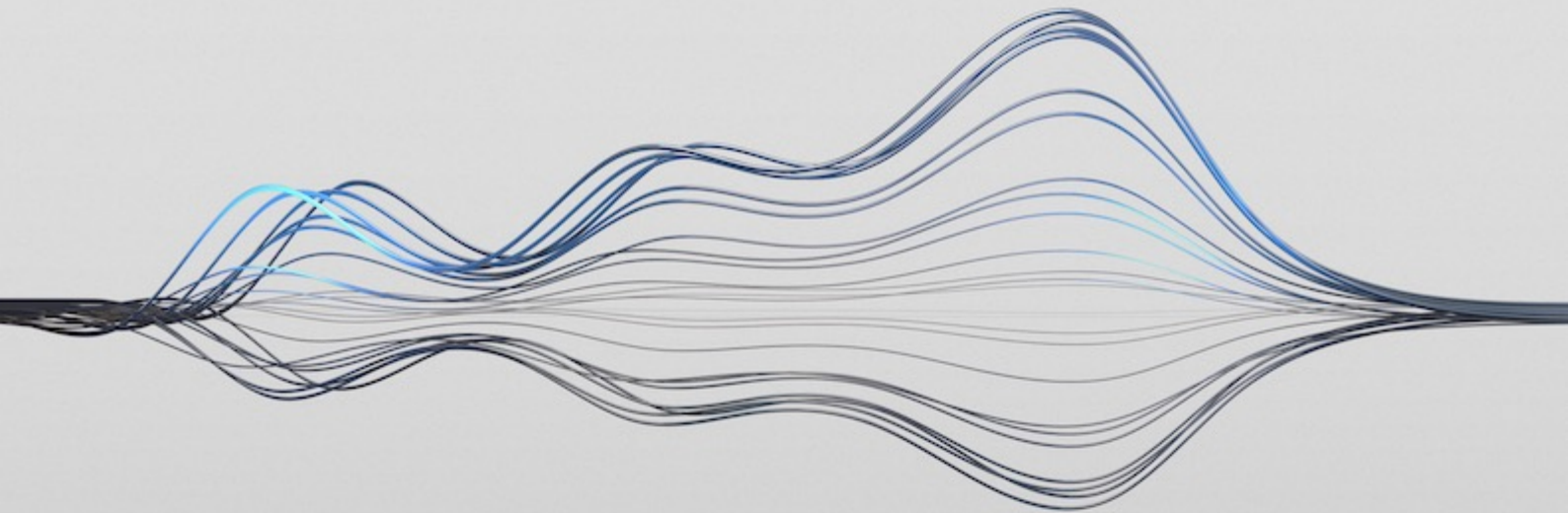


MOZAMBIQUE

Global Guide to Directors' Duties





Mozambique

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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 Meticaís 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.

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 Registrar 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.)

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, 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 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 director's 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 director 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.

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