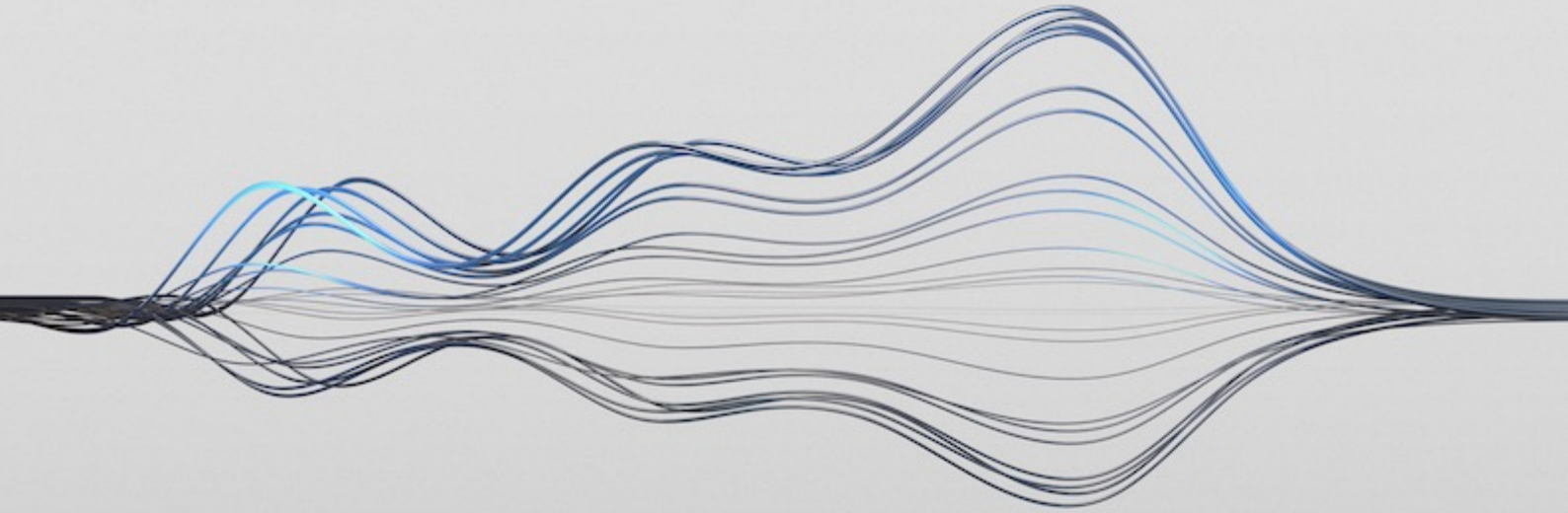
SINGAPORE

Global Guide to Directors' Duties



Singapore

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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 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 and 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.

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