A cross-border guide for group company directors

July 2014
Purpose of this guide

This guide aims to help multinational groups by giving an introduction to the role, powers, duties and liabilities of directors of subsidiary companies in different jurisdictions.

Directors usually have wide powers to manage the affairs of their company and act as its agent and a duty to do so with due care, skill and diligence. The interests of the company should also be put ahead of the director’s own interests. As this guide illustrates, however, the exact nature and scope of these duties varies from one legal jurisdiction to another.

Company directors are, of course, also subject to the company’s constitution and to further laws and regulations, depending on the business of the company concerned. In particular, directors may need to be aware of rules relating to health and safety, the environment, bribery and anti-corruption and financial and markets regulation. This guide focuses solely on the general laws to which a director is subject by reason of becoming a director.

For convenience, the information is given in relation to the type of non-listed corporate entity most commonly used within a group in each particular jurisdiction. Different rules will apply to other corporate entities and/or if the company is listed.

Information about Australia and Vietnam was contributed by Allens, Brazil by Lefosse Advogados, Indonesia by Widyawan & Partners and South Africa by Webber Wentzel.
<table>
<thead>
<tr>
<th>Country</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>4</td>
</tr>
<tr>
<td>Belgium</td>
<td>8</td>
</tr>
<tr>
<td>Brazil</td>
<td>12</td>
</tr>
<tr>
<td>France</td>
<td>16</td>
</tr>
<tr>
<td>Germany</td>
<td>20</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>24</td>
</tr>
<tr>
<td>India</td>
<td>28</td>
</tr>
<tr>
<td>Indonesia</td>
<td>32</td>
</tr>
<tr>
<td>Italy</td>
<td>36</td>
</tr>
<tr>
<td>Japan</td>
<td>40</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>44</td>
</tr>
<tr>
<td>Netherlands</td>
<td>48</td>
</tr>
<tr>
<td>People’s Republic of China (PRC)</td>
<td>52</td>
</tr>
<tr>
<td>Poland</td>
<td>56</td>
</tr>
<tr>
<td>Portugal</td>
<td>60</td>
</tr>
<tr>
<td>Russia</td>
<td>64</td>
</tr>
<tr>
<td>Singapore</td>
<td>68</td>
</tr>
<tr>
<td>South Africa</td>
<td>72</td>
</tr>
<tr>
<td>Spain</td>
<td>76</td>
</tr>
<tr>
<td>Sweden</td>
<td>80</td>
</tr>
<tr>
<td>Thailand</td>
<td>84</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>88</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>92</td>
</tr>
<tr>
<td>United States</td>
<td>96</td>
</tr>
<tr>
<td>Vietnam</td>
<td>100</td>
</tr>
<tr>
<td>Contacts</td>
<td>104</td>
</tr>
</tbody>
</table>
What type of company?

In Australia, subsidiaries within a group are more likely to be proprietary companies limited by shares but may also be public companies limited by shares.

Management structure

Australian companies (with more than one director) are managed by a board of directors.

In practice, the board may consist of executive and non-executive directors. Executive directors are employed by the company (or a related body corporate) and are in charge of managing its business. Non-executive directors generally fulfil a supervisory role and are not expected to be involved in the day-to-day management of the company, although this does not absolve them from the legal responsibilities and duties applying to directors. Except to the extent delegated, management decisions must be taken by the board acting collectively, although all directors are still personally responsible for their actions as directors.

Under the law, persons not formally appointed as directors but who act in the position of a director (de facto directors) will be treated as directors. Similarly, persons in accordance with whose instructions or wishes the directors are accustomed to act (shadow directors) will also generally be treated as directors. De facto and shadow directors are bound by the same civil liabilities and criminal sanctions applying to validly appointed directors.

The company’s internal management may be governed by: provisions of the Corporations Act 2001 (Cth) that apply to the company (known as replaceable rules), the company’s constitution or a combination of both. Company constitutions are not mandatory.

Board composition

A proprietary company must have at least one director who must ordinarily reside in Australia. A public company must have at least three directors on its board, two of whom must ordinarily reside in Australia. In both cases, a company’s constitution may provide for a higher minimum number.

All formally appointed directors must be natural persons (although a corporation may be a shadow director). Any person over the age of 18 can be appointed as a director, unless he / she:
- has not consented in writing to the appointment,
- is disqualified by law from managing corporations (unless granted leave by the Australian Securities and Investments Commission (“ASIC”) or by the court), or
- is the current (or within the last two years) auditor of the company (other than a small proprietary company).

Employees do not have the right to be represented on the board (unless a company’s constitution requires it). Directors are not required to have specific qualifications to act as directors. There are no share ownership requirements at law on directors, although a company’s constitution may mandate those. A director can also be a secretary of the company (unless the constitution provides otherwise). Also, it is possible to serve as a director of several companies in the same group, although directors must avoid conflicts of interest.

Appointment and removal

Directors are first appointed on incorporation and, thereafter, under a company’s constitution or the replaceable rules (as applicable). The replaceable rules (and usually the constitution) provide for appointment by a majority vote of the shareholders or a decision of the existing directors (which, at least under the replaceable rules, must be subsequently confirmed by majority shareholder vote). Unless required in a constitution, there is no limit on the period of office for directors of proprietary and unlisted public companies.

The appointment of, as well as certain personal information about, directors (and any subsequent changes) must be notified to ASIC and this information is accessible to the public.

For proprietary companies, if the replaceable rules apply or a company’s constitution permits, the shareholders can remove directors by a majority vote. For public companies, the law allows shareholders (but not directors) to remove directors by a majority vote. The statutory procedure includes providing at least two months’ notice to the company and a copy of that notice to the director. There is, however, legal uncertainty as to whether the statutory procedure can be displaced by other procedures in a company’s constitution. Constitutions will generally also provide for circumstances in which a directorship automatically terminates (such as bankruptcy or ill health).
Directors have the following fiduciary duties under general law (which are largely reflected in statute):
• to act in good faith in the best interests of the company and for a proper purpose,
• to exercise a reasonable degree of care, skill and diligence, and
• to avoid actual and potential conflicts of interest / duty.

Under statute, directors also must not improperly use their position, or information obtained because they are a director, to gain an advantage for themselves or someone else, or to cause detriment to the company.

The general law duties require directors to take reasonable steps to put themselves in a position to guide and monitor the management of the company. In particular, they must have a general understanding of the company’s business, act in accordance with its constitution or, where applicable, the replaceable rules and exercise independent judgement. In addition to reasonable skill, care and diligence, they should use any actual knowledge and skills that they have, for example, in financial management.

See also “Dealings with company / conflicts”.

Directors owe their duties to the company and not to the company’s shareholders or, generally, to the group to which the company may belong.

It is important to bear this in mind, in particular, when a director is also a director of another company within the group (although, under Australian law, the constitution of a wholly-owned subsidiary may provide for its directors to act in the best interests of the holding company), or has been appointed by a specific shareholder.

In a situation where a company is or may become insolvent, its directors will owe duties to creditors.

Directors have a fiduciary duty to avoid actual or potential conflicts between their own interests and those of the company, and between their duty to the company and their duties to third parties (for example, duties owed as directors of other companies). Under statute, a director must notify the other directors of any “material personal interests” they have in matters that relate to the company’s affairs (this can be done by standing notice). Exemptions include where a contract is subject to shareholder approval, in relation to the director’s remuneration, where the interest relates to permitted insurance or indemnities, or, for proprietary companies, where the other directors are already aware. Public company directors with a material personal interest may not generally vote or be present while the relevant matter is considered at a board meeting unless permitted by the non-interested directors (subject to statutory requirements).

Shareholders can authorise or ratify any potential breach of the director’s duty to avoid conflicts.

The law also requires certain transactions (such as providing finance or property, buying, selling or leasing of assets, or supply or receipt of services) with public company directors to be approved by shareholders, unless an exemption applies (a proprietary company’s constitution could provide similarly). Additionally, shareholder approval may be required for the payment of loss of office or retirement benefits to a director.
Liability

A company may bring claims against its directors for breaching duties owed by them to the company. In that case, directors may be personally liable to compensate the company for losses caused, restore company property and pass to the company any profits they have made. Also, depending on the circumstances, the company may be able to terminate any contracts with, or involving, the director which have been entered into in connection with the breach of duty.

Shareholders may also bring claims against directors on behalf of the company (statutory derivative actions), although leave of the court must be obtained (and these actions are relatively rare).

ASIC may also commence civil or criminal proceedings (including, if relevant, on behalf of affected persons). If directors breach their duties under statute, they may be subject to a range of civil penalties (including financial penalties and disqualification from managing a corporation) and / or criminal penalties (including fines and imprisonment).

Failure by a director to take all reasonable steps to comply with the statutory financial reporting requirements may expose the director to civil / criminal liability. Directors may also be subject to civil / criminal liability for failure to comply with restrictions relating to conflicts of interest / duty.

Indemnities and protections

Under Australian law, a company (or related body corporate) cannot exempt a person from a liability to the company incurred as a director of the company. Nor can the company indemnify a director in relation to liabilities owed to the company or a related body corporate, certain civil penalties or compensation orders, or liabilities owed to a third party where the person did not act in good faith.

A company (or related body corporate) cannot indemnify a director against legal costs incurred in defending an action for a liability incurred as a director if the costs are incurred in defending or resisting certain proceedings, including where the person is found to have a liability as stated in the paragraph above, criminal proceedings where the person is found guilty or proceedings brought by ASIC.

A company may, however, protect its directors against some liabilities, in particular in relation to a liability owed to a third party, provided that the director acted in good faith. A company may also provide loans to its directors to meet the costs of defending or resisting civil or criminal proceedings, provided that the loan is reasonable in the circumstances and is repaid if the costs become costs for which the company cannot indemnify a director under law.

Insurance

It is possible for a company to take out directors’ liability insurance.

This insurance may protect a director’s personal assets if claims are made against that director in respect of any negligent acts, errors or omissions in the director’s capacity as an officer of the company.

The law, however, prohibits companies from insuring their directors against conduct arising out of:

• a wilful breach of their duties in relation to the company, or
• a misuse of position, or a misuse of information.

Although not settled at law, the prohibition on insuring against a director’s “wilful” breach of their duties is likely to encompass an intentional or reckless breach of those duties (which is consistent with the statutory trigger for criminal sanctions for those breaches and also with considerations of public policy).

Financial difficulty and insolvency

Directors have a statutory duty to prevent insolvent trading by their company. A director contravenes this duty if the company is or becomes insolvent after incurring a debt and, despite the director being aware of reasonable grounds for suspecting that the company was or would become insolvent after incurring that debt, failed to prevent the company from incurring that debt.

Appropriate legal advice should be taken in these circumstances. Contravention of this duty may attract similar civil and criminal penalties to those described earlier for breaches of general statutory duties (see “Liability”). Directors may also be personally liable to repay creditors (with whom the company traded).

Some defences may apply in relation to civil penalty proceedings (for example, the director may have reasonably relied on information provided by others which led the director to believe that the company was solvent). There are no defences for criminal proceedings.
Decisions and meetings

Except for single-director proprietary companies, the exercise by the board of directors of its powers usually occurs in board meetings. The replaceable rules or a company’s constitution (as applicable) usually set out how board decisions are to be made. Apart from regulating physical meetings, they generally also allow for written resolutions and decisions to be made where directors are in separate locations but able to communicate effectively with each other.

Subject to a company’s constitution (if any), notice of a board meeting must usually be sent to all directors, any director may convene a meeting and there is no minimum notice requirement, provided reasonable notice is given.

The quorum for a board meeting will normally be stated in a constitution (and is also a replaceable rule) and will be at least two directors (for single-director proprietary companies, the law allows the director to pass a resolution by recording it and signing the record). Typically, each director has one vote. Subject to a company’s constitution, decisions are made by a simple majority of those present and entitled to vote. The chair, elected by the other directors, may have a casting vote (usually in addition to their vote in their capacity as a director) to be used when votes on a resolution are equal (which is also a replaceable rule).

Minutes

The law requires companies to keep minute books in which they record (within one month after the event) all proceedings and resolutions of directors’ or shareholders’ meetings as well as any resolution passed by directors or shareholders without a meeting. There is no minimum statutory period for which minutes must be kept.

There is no prescribed form for board minutes. Apart from including basic details (such as the name of the company, chair and attendees, the place, date and time of the meeting, and the business transacted), they must record any notice required by law to be given by a director to the other directors disclosing a material personal interest that the director has in a matter that relates to the affairs of the company (see also “Deals with company / conflicts”).

Once the minutes have been signed by the chair (which must happen within a reasonable time after the meeting, or the resolution is passed where no meeting took place (as applicable)) and recorded in the minute books, they are evidence of the proceeding or resolution to which they relate, unless the contrary is proved. This means that, without contrary proof, it is assumed that the meeting (if relevant) was duly convened and held, all proceedings duly took place and all relevant resolutions were passed.

Administration and accounts

The board of directors is responsible for the administration of the company, including such matters as:

- making public filings (company secretaries also have obligations in this regard),
- appointing and removing company officers and auditors,
- maintaining statutory books and records,
- displaying the company’s details at places of business and in business communications,
- paying dividends, and
- calling annual and other shareholder meetings where required by law.

The directors must also ensure that written financial records are kept that correctly record and explain the company’s transactions, financial position and performance, and that would enable true and fair accounts to be prepared. The directors must also ensure that an annual financial report (comprising financial statements, notes and directors’ declaration, including as to solvency) and directors’ report are prepared and audited (although small proprietary companies generally need not prepare these documents or appoint auditors). Failure by the directors to take all reasonable steps to comply with these requirements may expose them to criminal and civil penalties (see also “Liability”). In certain circumstances, a parent company must prepare group consolidated financial statements.

Relevant rules

The main sources of regulation of companies and their directors are:

- general law,
- the Corporations Act 2001 (Cth) (and statutory rules made under it), including the replaceable rules, which generally supplement the general law requirements, and
- the company’s constitution (if it has one), which may impose additional requirements on, or in some cases displace or modify, the general law and statutory requirements.
What type of company?

In Belgium, subsidiaries within a group are most likely to be public companies limited by shares (société anonyme or “SA” in French / naamloze vennootschap or “NV” in Dutch).

Management structure

The SA / NV is managed by a board of directors (conseil d’administration / raad van bestuur) with a single-tier structure.

The articles of association may, however, provide otherwise by creating a management committee within the board.

Persons who have not been legally appointed as directors but act as such (dirigeants de fait / de facto leiders) are bound by the criminal sanctions and civil liabilities which apply to directors.

Board composition

The board of directors must consist of at least three members who may, but need not, be shareholders. The minimum number of directors can be reduced to two if the company only has two shareholders (unless the articles provide otherwise). The articles of association can also provide for a higher minimum number of directors.

Subject to the articles, there are no age, nationality or residence restrictions on directors. Directors which reside outside Belgium are, however, deemed to be domiciled at the company’s registered office and any writs or notifications, relating to their management of the company, can validly be served on them at that address.

Directors can either be individuals or legal entities. A legal entity acting as a director must appoint a person (that is, a director, partner, manager, member of the management committee or employee) as its permanent representative. The permanent representative is liable in the same way as the legal entity which he / she represents.

Persons convicted of certain crimes may be barred from acting as directors, as may be unrehabilitated bankrupts or directors of a bankrupt company.

Appointment and removal

Directors are appointed in the company’s deed of incorporation or by the shareholders’ meeting, usually by a simple majority vote. Unless the company’s articles provide otherwise, whenever a vacancy occurs, the remaining directors may temporarily fill the vacancy until the next shareholders’ meeting makes the final appointment. The appointment of a director is only effective once the mandate has been accepted.

Directors may be removed at any time, without cause and without any notice period or damages being due, by a simple majority vote of the shareholders. This power cannot be excluded by the articles of the company or otherwise.

An excerpt from the resolutions for the appointment of directors (or, in the case of corporate directors, their permanent representatives) must be filed with the clerk’s office of the competent commercial court and published in the Annex to the Belgian State Gazette.

Directors are appointed for a renewable maximum term of six years. If a director is appointed for a longer period, the term of his / her mandate is reduced to six years.

Directors should remain in office until replaced.
The board of directors has the power to perform all acts which are necessary or useful for fulfilling the purpose of the company, except where powers are expressly reserved for shareholders by the law or in the articles. The articles may allow the board to establish a management committee (comité de direction / directiecomité). The board’s powers of management can be delegated to this committee, except where decisions concern the general policy of the company or are specifically reserved for the board by the Companies Code. These decisions, for example, include making use of the authorised capital, convening a shareholders’ meeting and drawing up the annual accounts. The board remains responsible for supervising the management committee.

Powers of daily management may also be granted by the board to a director, usually referred to as the managing director (administrateur délégué / gedelegeerd bestuurder), or to any other person, typically an employee and usually referred to as general manager (directeur général / algemeen directeur).

In addition, the board of directors may give specific powers, including banking powers, to any person of its choice.

---

**General duties**

The board of directors / managers must exercise full and effective control over the company by meeting regularly and monitoring senior management. The board is also responsible for deciding the company’s long term strategy, implementing and supervising this and reporting back to the shareholders.

Each director is under a duty of due care. This means that they must act in good faith and for proper purposes, in a manner which they believe to be in the best interests of the company and its shareholders, taking such care as an ordinarily prudent person, placed in the same situation, would use under similar circumstances (see also “Liability”).

This implies that the director must have a reasonable knowledge of the company’s business, obtain reliable information as relevant and understand the consequences of decisions made. Directors can delegate and rely on expert advice, but only to the extent that it is reasonable to do so.

**Who are the duties owed to?**

Under Belgian company law, the duties of directors are usually described in terms of acting in good faith in the interests of the company itself, rather than in the interests of any group to which the company may belong.

The concept of the interests of the company is a flexible one and means, as a minimum, taking into account the interests of the shareholders as a whole (and not individual shareholders).

It may also include the interests of the company’s employees and creditors.

**Dealings with company / conflicts**

The Belgian Companies Code governs situations where a director has a direct, or indirect, personal and conflicting interest of a financial nature in a decision or transaction within the authority of the board of directors. In such cases, the director must notify the other directors of the existence of the conflict prior to a decision being made by the board and this declaration must be recorded in the minutes of the relevant meeting with a description of the board’s decision and the financial impact on the company. In non-listed companies, the director may take part in the meeting and vote. Any auditors appointed must also be informed of the conflict. The annual report must contain these minutes in their entirety and the auditor’s report on the accounts must contain a separate description of the financial consequences for the company. The company may seek to nullify or void decisions or transactions made in breach of the legal provisions if the other party was, or should have been, aware of such breach at the time. These rules do not apply to certain intra-group decisions or transactions or to ordinary transactions that take place on normal market terms. Even if the procedures are followed, directors are personally, jointly and severally liable for damages suffered by the company or third parties if a decision or transaction procures an unlawful financial advantage for a director, to the disadvantage of the company.
Liability

Directors may incur civil liability for failing to perform the duties of a director and can be sued for such failure by the company, or one or more minority shareholders acting for the company. Directors may also be jointly and severally liable for violations of the Companies Code or the articles and actions can be brought by the company and interested third parties. Directors can also be liable for torts committed where the general duty of due care or non-contractual obligations are infringed. The test is what a diligent director would have done in similar circumstances. Courts can take into account all the circumstances under which a decision was made (including the director’s qualifications, whether the director is an executive or non-executive and the time available for making the decision) but may not substitute their own business judgements for the decisions made by the director. Directors can only be liable for a breach of the duty of due care if their judgement was manifestly flawed or there was a clear lack of diligence (such as erratic attendance at board meetings and failure to properly consider issues). In addition, particular civil liabilities apply (for example, if directors fail to convene a shareholders’ meeting or incur losses because the net assets of the company fall below one-half of the company’s registered capital) as do sanctions for criminal misdemeanours (such as, in relation to tax, environmental and accounting matters).

Indemnities and protections

Under certain conditions, a company may undertake to indemnify its directors for liability that the directors might incur in the performance of their duties. A company cannot, however, indemnify its own directors for liabilities incurred towards the company itself. Third parties (such as shareholders or group companies) are also permitted to indemnify directors, even for liabilities owed to the director’s own company.

In each case, the directors remain liable but the company or a third party agrees to cover the financial consequences of the liability incurred.

Indemnities cannot cover liability as a result of fraud (or wilful misconduct which is similar to fraud) or intentional damage or criminal penalties imposed on directors personally.

As a general rule, any undertaking to indemnify directors for liability they might incur must be in the corporate interest of the company granting the undertaking. Exoneration clauses limiting the liability of the directors towards the company are uncommon and controversial. Most legal scholars are of the opinion that they are invalid. The annual shareholders’ meeting can, however, agree to release directors from liability to the company. This does not release directors from liabilities towards third parties or criminal liabilities incurred.

Insurance

It is possible to take out insurance against directors’ liability.

Typically, such insurance policies cover amounts which may be payable by the directors who are insured because of a claim for damages made against them in relation to the performance of their duties as directors of a company.

The insurance will not cover deliberate damage, or criminal or tax penalties and fines.

Financial difficulty and insolvency

Further to the general rules on directors’ liabilities, additional regulations come into play when a company is facing bankruptcy or financial difficulties. Appropriate legal advice should be taken in these circumstances.

In principle, it is the bankruptcy trustee who brings claims against the directors in the case of bankruptcy and he / she can hold the directors liable for both contractual and non-contractual issues. In particular, if directors continue with a chronically loss-making company which is in deficit and without any real prospect of success, this may be a breach of the directors’ duties to the company and a tort against third parties. Under Belgian law, a director is also liable if he / she knew, or should have known, that the company fulfilled the conditions of bankruptcy and did not file for bankruptcy within a month after cessation of payments of its debts.

Other specific liabilities for directors arise if they commit a manifestly gross fault which contributed to, or resulted in, a bankruptcy, or if the directors were involved in at least two bankruptcies, liquidations or similar operations within a five-year period preceding the bankruptcy.

In certain circumstances, Belgian courts can pierce the corporate veil and “extend” a company’s bankruptcy to its directors (or shareholders) by rendering them personally liable for the company’s debts.
### Belgium

#### Decisions and meetings

Board meetings should be held regularly and all directors must be convened by the chair of the board to each meeting. The law does not set out a specific notice period, but this should be reasonable. The notice of meeting must include an agenda. The notice period and inclusion of the agenda are not required when all directors are present/represented at the meeting and agree to another agenda. Usually, a majority of the directors must be present/represented at each board meeting and board resolutions are passed by a majority vote.

As a general rule, directors must be able to discuss the business of the meeting. Consequently, at least two directors (or more, if the articles so require) must attend each board meeting. The articles may allow joint discussions to take place by use of telephone or video-conference. Board meetings should generally be held in Belgium. They can be held abroad from time to time, but this should not become common practice.

It is also possible, if the articles so permit, the business is urgent and the corporate interest requires immediate action, for the board to transact certain business by written resolutions signed by all the directors. Written resolutions cannot, however, be used to draw up the annual accounts or to increase capital using the so-called “authorised capital” procedure (see “Minutes”) or for any other business prohibited by the articles.

#### Minutes

The resolutions of the board of directors are recorded in minutes signed by the chair and the secretary of the meeting and by those directors who wish to do so.

The proxies given for the meeting are attached to the minutes of such meeting.

These minutes are kept in a special minute book at the registered office of the company.

Certain resolutions should be notarised and published in the Annex to the Belgian State Gazette. This includes any decisions to increase the capital using the “authorised capital” procedure, whereby the board of directors and not the shareholders’ meeting resolves to increase the company’s capital, in reliance on authorisation set out in the company’s articles and subject to specific conditions.

#### Administration and accounts

The board of directors has a duty to provide annual accounts for the company and a management report.

The management report comments on the annual accounts in order to set out, in a faithful manner, the development of the company’s business and of its position.

Other specific duties include convening the shareholders’ meeting and preparing reports in defined circumstances.

#### Relevant rules

The Belgian Companies Code sets out the general duties of directors and their responsibilities in relation to the management and external representation of an SA / NV.

In addition, corporate documents of the company, including its articles of association (statuts/statuten), its internal rules (règlement intérieur/reglement van orde) and any specific resolutions may impose additional requirements or restrictions on directors. In some cases, the provisions of these corporate documents will override the rules of the Belgian Companies Code.

The Code of Corporate Governance for non-listed companies includes some additional recommendations. It is not compulsory for a company to comply with the Code. Companies must, however, explain to investors in their annual report why they have not complied with relevant provisions.
What type of company?

In Brazil, a subsidiary within a group is most likely to be a limited liability company (Sociedade Limitada).

A Sociedade Limitada must have at least two shareholders. This is normally achieved by granting a single share to another group company.

Management structure

A Sociedade Limitada is usually managed by its officers. If the articles of association do not specifically provide for the company’s management, each of the shareholders has full powers and authority to manage the Sociedade Limitada.

Consequently, the officer of a Sociedade Limitada may be either a shareholder or (more usually) a third party appointed by the shareholders.

Shareholders of a Sociedade Limitada may also decide to create complementary management structures, such as a supervisory board, with power to supervise the officers in the execution of their duties or to solve conflicts of interest.

Management structures, including a supervisory board, are, however, more common in Sociedades Limitadas with large revenues and complex activities.

Board composition

A Sociedade Limitada may have one or several officers and there is no limit on the number of officers.

Only individuals with full legal capacity to act can be appointed as officers. Additionally, officers must be resident in Brazil. Officers which are not Brazilian nationals are also required to have a permanent visa permitting them to both reside and work in Brazil.

Certain legal restrictions may prevent a person from acting as an officer. For example, persons cannot be officers of a Sociedade Limitada if they have been prohibited from holding a public office or found guilty of crimes involving:

• bankruptcy,
• abuse of a public office,
• bribery,
• the economy,
• the Brazilian financial system,
• competition,
• consumers,
• public faith, or
• property.

Appointment and removal

The power to appoint and remove company officers lies with the shareholders. Details relating to the appointment of an officer need to be set out in the company’s articles of association. Nonetheless, officers can also be appointed by a separate resolution of the shareholders.

The right to appoint officers entails the right to remove them. An officer ceases to exercise his / her functions when he / she is removed from office and this may occur at any time or upon expiry of the term of office fixed in the articles of association or in a separate shareholders’ resolution.

In addition, the removal of an officer who is appointed in the articles of association requires the approval of shareholders who hold quotas representing at least two-thirds of the capital of the Sociedade Limitada, unless the articles of association provide otherwise.

If an officer is appointed by separate shareholders’ resolution, such appointment and removal require the approval of shareholders representing at least one-half of the corporate capital of the Sociedade Limitada.
Brazil

Powers

The officers are generally responsible for representing the company and managing its business. There are two options for granting powers to officers of a Sociedade Limitada.

• Restricted powers: the articles of association or a separate shareholders’ resolution may require certain acts to be reserved for the prior approval of the shareholders. These restricted powers, once established, are effective against third parties, such as creditors and suppliers. Third parties usually check the articles of the company to ensure that the officers have the necessary powers to act.

• Unrestricted powers: the powers of the company’s officers are not restricted by the articles and they can, therefore, manage the company without obtaining the prior approval of the shareholders.

An officer may also delegate activities to non-officers by power of attorney. Such delegation is valid in relation to third parties.

In addition to other matters specified by law or in the articles, the following matters must be approved by shareholder resolution: approval of the management accounts, appointment / removal of administrators, officers’ remuneration (if not established in the articles), amendment of the articles, merger, split, dissolution, cessation / liquidation of the company, appointment / removal of liquidators, insolvency accounts and petition for insolvency protection.

General duties

Brazilian law provides for general guidelines and duties that must be observed by the officers in their management of the company. These include the following:

• Duty of care: officers must act with diligence and certain standards of care in managing the company. To be “diligent” means that the officer must conduct the business of the company with the degree of care which would be expected to be employed by an averagely diligent peer of such officer. In addition, the officer should use the same degree of diligence that would be expected from a person conducting his / her own business. This means that officers are expected to actively protect the company’s interests and, if they do not, may incur liability for actions taken, but also for omitting to take certain actions.

• Duty to inform: officers are expected to keep the shareholders and the company, as an entity, informed of any fact or occurrence which is material to the company’s business. Officers must also keep the shareholders and company informed of any conflict of interest between the company and the officers. Furthermore, the duty to inform means that directors should take decisions on an informed basis.

• Duty of loyalty: officers must perform their duties in the best interests of the company and keep its affairs confidential.

Who are the duties owed to?

Officers owe their duties to the company and to its shareholders.

Dealings with company / conflicts

Officers should avoid conflicts between the interests of the company and their own interests. Possible conflicts of interests should be disclosed to the shareholders.

To avoid conflicts of interests, it is common to provide in the articles that officers are prohibited from entering into agreements with the company, in their own names or on behalf of third parties.

In addition, the potential for conflicts is customarily reduced by reserving certain matters of day-to-day management for the decision by the shareholders or any supervisory or advisory board that may be installed.
Brazil

Liability

As a general rule, officers are not personally liable for actions taken in the normal course of managing the company’s business. Officers may be held liable, however, if they cause damage to the company, its shareholders and / or third parties because they have acted:
- in breach of applicable laws or the articles,
- within the scope of their authority, but with fault (culpa), meaning that they have acted with negligence or a lack of ability or proper care, and / or
- in a way which amounts to wilful misconduct (dolus).

Officers may also be exposed to other types of liability, for example, in relation to tax, employment, environmental or social security issues, or other corporate, criminal, civil and commercial liability.

The Sociedade Limitada is liable for any damage caused by its officers to third parties. As a result, it may be entitled, depending on the circumstances, to be indemnified by the defaulting officer (or vice versa, if applicable). In some very specific cases, however, any liability for loss / damage caused by an officer will rest solely with the officer (for example, where an officer acts beyond limits on his / her powers which have been registered with the Commercial Registry and are accessible by third parties or acts beyond the scope of the company’s purpose).

Indemnities and protections

To mitigate the risks to which officers are exposed, it is common for companies in Brazil to issue indemnification letters, executed by the company and guaranteed by its controlling shareholders.

An indemnification letter is a written undertaking by a company, or by companies belonging to the same economic group, to hold the officers harmless from any damages or liabilities incurred personally by them during the conduct of the company’s business. This is an alternative to directors’ and officers’ liability insurance.

An indemnification letter may include several risks that are often not covered by directors’ and officers’ liability insurance.

The indemnity provided by the indemnification letter is usually limited to acts that have been performed by the officers with due regard to the law and the articles of association.

Insurance

A Sociedade Limitada is permitted, but not required, to take out directors’ and officers’ liability insurance.

Such insurance is usually only offered with a considerable liability excess and numerous exclusions and restrictions.

Directors’ and officers’ liability insurance is contracted by the Sociedade Limitada, or by any company within the same economic group. It is directly payable to the officers insured as indemnification for certain damages / losses or in advancement of defence costs, where the officers suffer a loss as a result of a legal action (whether criminal, civil, or administrative) brought for alleged wrongful acts in their capacity as officers of the company.

In Brazil, directors’ liability insurance usually aims to provide cover in relation to the legal and contractual duties of the officers of the company. Liabilities arising out of the company’s core activities and operations and other risks are normally excluded.

Financial difficulty and insolvency

Brazilian law does not set out specific duties for officers where a company is in financial difficulties or insolvency.

The articles of association of the Sociedade Limitada can, however, establish obligations of this type.

Requests for insolvency protection (for example for judicial recovery or liquidation) must be approved by a resolution adopted by shareholders in a meeting or assembly and follow the provisions of Brazilian bankruptcy law.
### Brazil

#### Decisions and meetings

Officers’ meetings or decisions can take any form established in the articles, for example, meetings can be physical or electronic, may be replaced by written resolutions, decided by casting votes, etc.

Most commonly, the officers either hold a physical meeting in which the agenda is orally discussed and each officer casts their vote orally or each officer votes in writing on the matter under deliberation.

#### Minutes

Although not prescribed by law, the company’s articles of association or rules of procedure commonly provide that minutes of officers’ meetings are to be set out in writing and forwarded to the shareholders.

#### Administration and accounts

The officers are required to keep due accounts and prepare the annual financial statements. They must ensure that an organisation is in place to provide an overview of the company’s economic and financial situation at any time, even when no financial statement is available.

The officers are also responsible for the company’s compliance with applicable laws, for example, the timely filing of tax declarations.

Furthermore, officers must make all necessary registrations and filings in the Brazilian Commercial Registry and obtain all necessary governmental licences and authorisations.

#### Relevant rules

The chapter of the Brazilian Civil Code (Brazilian Law No. 10,406/02) which establishes the rules relating to a Sociedade Limitada sets out the general duties of officers and their responsibilities in relation to the representation and management of a Sociedade Limitada.

To the extent that this chapter fails to provide for certain issues, the Sociedades Limitadas are governed by the rules applicable to general partnerships (sociedades simples).

Additionally, the articles of association of a Sociedade Limitada may provide (and usually do) that the rules applicable to joint stock corporations (sociedades anonimas) (Brazilian Law No. 6,404/76) also apply to the Sociedade Limitada.

In a situation where a company may become insolvent, its officers may be subject to specific provisions of the Recovery and Bankruptcy Law (Brazilian Law No. 11,101/05).

The company’s constitutional documents (such as its articles of association or internal rules of procedure), specific resolutions and oral or written agreements between the officer and the company may impose additional requirements or restrictions on the officer. Such arrangements, in some cases, may also override the provisions described in this section on Brazil.
France

What type of company?

In France, a subsidiary within a group is likely to be either a joint stock company (société anonyme or “SA”) or a simplified joint stock company (société par actions simplifiée or “SAS”).

The SA and the SAS are both commercial limited liability companies. The SAS is similar to the SA, but is primarily regulated by its articles of association, which means provisions applying to directors can be more flexible than those prescribed for an SA. Unlike an SA, however, an SAS cannot make public offerings.

Management structure

Management structures for French companies can vary, as below:

- **Classic SA**: control is exercised by a Board of directors and a General Manager.
- **Dual board SA**: a Management Board is overseen by a Supervisory Board.
- **SAS**: the only legal requirement for its management is that a President must be appointed. In addition, the articles may provide for other governing bodies or individuals to be appointed and how they should operate.

In this discussion of the law applying to directors of French companies, the term “director” means:

- the Chair of the Board of directors, the General Manager, the Deputy General Managers and the directors (Classic SA),
- the members of the Management Board and, to a lesser extent, of the Supervisory Board (Dual board SA), and
- the President and any managers appointed (SAS).

Persons not legally appointed as directors but acting as such (dirigeants de fait) are bound by criminal sanctions applying to directors in the French Commercial Code. Any civil liabilities of such directors are determined in accordance with the rules of general civil responsibility set out in the French Civil Code.

Board composition

For an SA, the number of directors and their maximum age is generally set out in the articles and must comply with the limitations of the French Commercial Code. For example, the Board of a Classic SA can have between three and 18 members and typically the Chair of the Board and General Manager cannot be older than 65. French law does not require directors to have specific qualifications.

It is possible for a company to be appointed to the Board / Supervisory Board of an SA or as President / manager of an SAS. Restrictions apply if directors are also employees of the SA / SAS and certain formalities must be observed if a non-EU / EEA / Swiss Confederation citizen is appointed as legal representative of an SA / SAS. The statutory auditors of the SA / SAS must be given notice of all meetings relating to accounts and, in certain cases, employee representatives must be given notice of Board / management meetings of the SA / SAS, although these representatives will have no right to vote.

Complex legal restrictions on the holding of several corporate mandates apply to an SA (but not to an SAS).

The articles of an SA (and, less frequently, of an SAS) may set out share ownership requirements, usually complied with by a share loan from another shareholder.

Appointment and removal

**SA**

Members of the Board of directors and of the Supervisory Board of an SA are appointed and removed at general meetings of the ordinary shareholders of the company.

The terms of the directors’ mandates are generally set out in the articles and must comply with the French Commercial Code, being typically for a maximum term of six years.

**SAS**

In an SAS, the rules for the appointment and removal of the directors will be set by the articles.
### Powers

**SA**

In an SA, the Board of directors is responsible for determining corporate strategy and supervising its implementation. Powers of day-to-day management are vested in the General Manager (in a Classic SA) or in the Management Board (in a Dual Board SA).

Specific management decisions taken by an SA (for example, in relation to related party transactions or the granting of a guarantee by the company) must be authorised in advance by the Board of directors or Supervisory Board.

The Supervisory Board, in a Dual board SA, has the power to supervise the operation of the Management Board, but not to take direct part in management.

**SAS**

In an SAS, the President has wide powers to manage the company, subject to any specific restrictions set out in the articles.

For both an SA and an SAS, the powers of the directors must be exercised within the limits of the corporate purpose of the company and subject to the powers reserved by law to other governing bodies, in particular the shareholders. Legal representatives may temporarily delegate some of their powers, under strict conditions, or for the execution of a specific agreement on behalf of the company.

### General duties

A director must exercise the powers conferred upon him / her and act in the best interests of the company.

There is no specific statement of the duties of a director under French law.

In cases coming before the French courts, however, it has been established that directors should conduct the company’s business with due and reasonable care (*gestion en bon père de famille*).

In addition, a director must not put him / herself in a position where his / her duties towards the company may conflict with his / her personal interests (see also *Dealings with company / conflicts*).

### Who are duties owed to?

A director does not ordinarily have any duties towards individual shareholders or third parties, but only towards the company.

### Dealings with company / conflicts

Certain transactions, directly or indirectly, entered into between an SA / SAS and a director (referred to as related party transactions) are prohibited, including loans made by the company to a director. Other related party transactions are subject to control procedures, including obtaining the prior authorisation of the Board of directors / Supervisory Board in an SA and ratification by the annual shareholders’ general meeting after conclusion of the relevant transactions.

This particular approval process is not required for related party transactions relating to ordinary operations conducted under normal conditions (which are assessed by French courts on a case by case basis).

Related party transactions which are not approved by the shareholders remain valid. The manager and, if applicable, the shareholder having entered into the transaction may, however, be held liable for any prejudicial consequence that the transaction may have for the company.

Under proposed new legislation, the French government will simplify the rules governing related party transactions. For example, agreements entered into between a company and its wholly-owned direct or indirect subsidiaries will be excluded from the approval procedure. We expect the new legislation to be implemented no later than early September 2014.
Liability

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

All members of the Board of directors / Management Board of an SA can be held jointly and severally liable for wrongful acts or negligence of the Board (whilst Supervisory Board members are jointly liable only).

Actions for damages against directors may be brought:
• on behalf of the company (by its legal representatives or by shareholders with a minimum shareholding),
• in exceptional circumstances, by a shareholder who suffers personal loss or damage distinct from the company’s loss, or
• by a third party, which suffers loss / damage because of the negligence of the directors. Directors are only liable to third parties if they commit a fault severable from their duties (faute séparable de ses fonctions), defined by case law as an intentional and particularly serious fault, incompatible with the normal course of a director’s duties.

French law also contains numerous criminal sanctions for corporate regulations infringed by directors, including in relation to the preparation and filing of the annual accounts. Directors may incur personal criminal liability separate from any liability of the company.

Indemnities and protections

Directors may be exempted from liability in certain cases, for example, where decisions are taken collectively (if the director can prove that he / she personally opposed the relevant decision) or within a group of companies or where powers have been validly and effectively delegated to another. No further relief from liability is generally available.

A company may, however, indemnify a director against personal civil (but not criminal) liability arising out of actions or omissions which occur in the normal course of the director’s activities for the company. An indemnity agreement should not cover situations where:
• a director is held liable as a result of a fault severable from his / her duties, wilful misconduct or a malicious action, or
• the action could benefit the company (for example, by contributing to the company’s assets).

A company may also advance the costs of any legal proceedings to a director, but to avoid incurring liability for the misuse of the company’s assets, the company should only do so where it is in the interests of the company. If the director is found liable for a severable fault, he / she must reimburse the company for any such advance.

Insurance

French companies are permitted to take out insurance to cover any civil liabilities which may be incurred by directors to third parties in the course of carrying out their duties as directors.

The insurance policy must, however, expressly exclude any criminal liability incurred by a director and may also exclude other specific risks (for example, damages claimed by other directors).

Financial difficulty and insolvency

Directors of an SA or SAS facing insolvency proceedings may face civil liability and / or criminal liability.

Civil liability, under specific conditions, may extend to the assets of the directors and personal sanctions such as personal disqualification and / or prohibition from managing a company.
Decisions and meetings

**SA**
The articles of an SA determine how and when notice of Board meetings is given, how often meetings are held and how they are conducted.

In the SA, the quorum for meetings of the Board of directors / Supervisory Board is half of the members and decisions are taken by a majority of the members attending / represented at the meeting (including by way of video-conference, if this is allowed).

Quorum and majority rules for meetings of the Management Board of the SA are determined by the articles and not subject to other restrictions.

**SAS**
The articles of an SAS determine how and when decisions are made, how notice of meetings is given, how often meetings are held and how they are conducted. These rules are not subject to other legal restrictions.

Minutes

Minutes of directors’ meetings must be set out in writing.
Minutes which need to be filed with the commercial register must also be drafted in, or translated into, the French language.

Administration and accounts

The Board of directors / Management Board (SA) or President (SAS) must prepare the annual accounts and management report.
They are also responsible for compulsory public filings with the commercial register.

Relevant rules

The French Commercial Code is the main source of regulation for directors and sets out specific obligations and sanctions applying to them.

In addition, corporate documents of the company may impose additional requirements or restrictions on directors.

These include:
- the company’s articles of association (statuts),
- its internal rules (règlement intérieur), if any, and
- any specific resolutions or decisions, in particular those relating to the appointment, renewal and / or compensation of a director.

In some cases, the provisions of these corporate documents will override the rules in the French Commercial Code.
Germany

What type of company?
In Germany, subsidiaries within a group are most likely to be limited liability companies (Gesellschaft mit beschränkter Haftung or "GmbH").

Management structure
A GmbH is managed by its managing directors.

If the company is subject to employee co-determination provisions, or is an investment company under the German Investment Act, it must also have a supervisory board.

In addition, the shareholders may choose to create a supervisory board or other bodies, for example, an advisory board (Beirat) or a shareholders’ committee.

Details of any such arrangements will be set out in the company’s articles of association.

A person who acts as managing director without having been formally appointed to that function may, under certain conditions, be held to be liable as a managing director.

Board composition
A GmbH may have one or several managing directors and there is no limit on their number. If the company is subject to parity co-determination, it must have one labour director (Arbeitsdirektor) and, therefore, at least two managing directors.

Only natural persons with unlimited legal capacity may be appointed as managing directors. Managing directors do not need to be resident or domiciled in Germany, nor to be able to speak German.

Certain statutory reasons may prevent a person from acting as a managing director, for example, specific violations of accounting or insolvency rules.

Managing directors must devote their entire working capacity to the GmbH. It can generally be assumed that further activities, if considerable and regardless of whether these are remunerated (for example, acting as managing director of another GmbH) or not remunerated (for example, acting as president of a sports club), will require the approval of the shareholders’ meeting.

There are no share ownership requirements for managing directors.

Appointment and removal
The power to appoint and remove managing directors generally lies with the shareholders’ meeting. It can be delegated to another corporate body, for example, to a supervisory or advisory board, but not to managing directors.

The right to appoint managing directors usually entails the right to remove them at any time, unless otherwise provided. In addition, individual shareholders may be given the right to nominate a certain number of managing directors by directly appointing them. A managing director who has been appointed by a shareholder on the basis of a nomination right cannot be removed without that shareholder’s consent (unless for important cause).

A shareholders’ resolution to appoint or remove a managing director is passed by majority vote, unless a higher voting threshold is provided for in the articles.

In companies that are subject to parity co-determination provisions, the power to appoint and remove managing directors rests with the supervisory board.

There is no fixed term of office for a managing director, unless otherwise provided in the articles or in the resolution on appointment.
Germany

Powers

The managing directors are responsible for representing the company and managing its business. Whilst the managing directors’ power to represent the company to third parties cannot be limited, their internal authority to act may be restricted, for example, by the articles of association, the service agreement, standing instructions or rules of procedure. Of practical importance are approval requirements for certain management measures under the articles or adopted by shareholders’ resolution.

If the company has more than one managing director, the law provides that they represent the company jointly. It is, however, possible for the articles to provide for sole representation. Typically, articles provide for a managing director to act jointly together with another managing director or person vested with a statutory power of attorney (Prokurist). In addition, the corporate body with the power to appoint the managing directors (usually the shareholders) may grant diverging powers of representation in individual cases (such as the authority for specific managing directors to represent the company alone).

A managing director may delegate specific activities to non-managing directors by power of attorney and this will be valid with regard to third parties.

General duties

The primary duty of a managing director is to manage the company with the due care of a prudent businessman. He / she must manage the business to an appropriate degree and as expeditiously as possible.

If the company has more than one managing director, they are all required to co-operate and mutually supervise each other. This applies even if their responsibilities have been divided up. The duty of supervision involves managing directors making use of their wide-ranging right to information.

The managing directors have standard fiduciary duties, which include, among others:

- the obligation to keep information about the company confidential,
- a comprehensive obligation not to compete with the company,
- the obligation to use any knowledge (including private knowledge) of opportunities arising in the company’s business field for the good of the company and not for the director’s own ends (Geschäftschancenbindung), and
- the obligation to surrender to the company benefits granted by third parties in connection with the conclusion of transactions by the company (for example, commissions).

Who are the duties owed to?

Managing directors owe their duties to the company and not to its shareholders.

Dealings with company / conflicts

Unless otherwise provided for in the articles, managing directors are generally prohibited from entering into agreements on behalf of the company with themselves in their own name or in the name of a third party.

Furthermore, managing directors should avoid conflicts between the interests of the company and their own interests. Possible conflicts of interests should be disclosed to the shareholders’ meeting.

To avoid conflicts of interests, it is common to provide in the articles that managing directors are only authorised to represent the company jointly together with other managing directors.

In addition, the potential for conflicts is customarily reduced by reserving certain matters of day-to-day management for the decision of the shareholders or any supervisory or advisory board that may be installed.
Managing directors are liable to the company for damage caused if they do not meet the standard of care of a reasonable businessman. The extent of the liability depends on the type, size and structure of the company. A managing director is generally not liable if he/she acts on instructions properly given by the shareholders’ meeting.

Managing directors may also incur specific liabilities for corporate breaches (for example, under rules for the maintenance of capital or if false or incomplete information is given on the company’s incorporation or a share capital increase).

Liability to the shareholders may be incurred in specific cases, for example, for a failure to file an updated list of shareholders with the commercial register.

A director may also incur liability to a third party if he/she breaks a law intended to protect such third party (for example, by failing to file for insolvency or by withholding employee social security premiums).

Criminal offences include providing false information (for example, about the company’s financial situation) or failing to file for insolvency or to inform the shareholders if one-half of the share capital is lost.

A managing director cannot be indemnified by the company for any liability incurred to the company.

In certain circumstances it may be possible for a managing director to seek a statutory indemnity from his/her own company for liability incurred towards third parties. This is only possible, however, if the managing director has not breached his/her duties towards the company.

Statutory indemnity claims should be distinguished from contracts entered into by shareholders or other third parties to indemnify a managing director. It is currently a matter of dispute in Germany under which conditions such agreements can be legally entered into.

A GmbH is permitted, but not required, to take out directors’ liability insurance. Such insurance is usually only offered with a considerable liability excess and numerous exclusions and restrictions.

Directors have specific duties in a financial crisis of the company. These include, among other things, the obligation to apply for insolvency proceedings without undue delay, and at the latest within three weeks of the company becoming unable to settle its debts (zahlungsunfähig) or over indebted (überschuldet).

If it becomes apparent from the annual financial statements or from a balance sheet set up in the course of the business year that half of the statutory share capital has been lost, a shareholders’ meeting must be called and the shareholders must be informed.

Managing directors may incur both civil and criminal liability for a breach of these rules.

The GmbH has a compensation claim against the managing director if, after the company has become insolvent or its overindebtedness has been determined, payments are made from the company assets and such payments are not consistent with the due care of a prudent businessman.
Decisions and meetings

Under German law, managing directors of a GmbH do not form a board, and managing directors are deemed to act as individuals. A board structure may, however, be created by the articles of association or rules of procedure set out for the management of the company.

Unless otherwise provided, resolutions of the managing directors may be adopted in meetings, by telephone, video-conference or in writing (including, for example, by facsimile or email).

The law does not set out a specific notice period for the calling of meetings, but this should be reasonable. The company’s articles or rules of procedures can allow for notice of meetings to be waived.

Apart from certain important measures that must be decided on by all managing directors together, the quorum for board meetings and majorities necessary for passing resolutions are not prescribed by law.

A company’s articles or rules of procedures may provide for weighted voting rights, giving certain directors a greater say, and for a casting vote to be used where the voting is tied.

Minutes

Although not prescribed by law, the company’s articles or rules of procedure may provide that minutes of a board meeting are to be set out in writing and forwarded to the managing directors.

Administration and accounts

The managing directors are required to keep due accounts and prepare the annual financial statements. They must ensure that an organisation is in place to provide an overview of the company’s economic and financial situation at any time, even when no financial statement is available.

The managing directors must convene a shareholders’ meeting if the company’s net assets fall below an amount equal to one-half or less of the share capital. In addition, a meeting must be convened if it appears necessary to protect company interests for other reasons, or if requested by shareholders representing at least 10% of the company’s share capital. Further obligations to convene a shareholders’ meeting may be provided in the articles.

The managing directors are also responsible for the company’s compliance with applicable laws, for example, by filing the company’s tax returns.

Furthermore, they must make all necessary registrations and filings in the commercial register. If the shareholder structure changes and no notary was involved, the managing directors must file an updated list of shareholders in the commercial register.

Relevant rules

The German Limited Liability Companies Act sets out the general duties of managing directors and their responsibilities in relation to the representation and management of a GmbH.

Duties and responsibilities relating to the preparation and publication of accounts are set out in the Limited Liability Companies Act in accordance with the German Commercial Code.

In a situation where a company may become insolvent, its managing directors may be subject to specific provisions of the Limited Liability Companies Act and the Insolvency Act.

A company’s constitutional documents (such as its articles of association or internal rules of procedure), specific resolutions and oral or written agreements between the managing director and the company may impose additional requirements or restrictions on managing directors. Such arrangements, in some cases, may also override the provisions described in this guide.
**Hong Kong**

<table>
<thead>
<tr>
<th>What type of company?</th>
<th>Management structure</th>
<th>Board composition</th>
<th>Appointment and removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>In Hong Kong, subsidiaries within a group are most likely to be private companies, with members' liability limited by shares.</td>
<td>Hong Kong has a single board system. Directors are collectively responsible for decisions made by the board. The law recognises that a person may control a company without formally being appointed as a director and may be liable for his/her actions and omissions in the same way as other directors.</td>
<td>A private company must have at least one director, and may have as many directors as the articles permit. Generally, a director must be a person over the age of 18 and cannot be a body corporate, although exceptions apply. An undischarged bankrupt cannot act as a director, unless the leave of the court is obtained. Also forbidden to act are the company's auditors and individuals disqualified from directorship (for example, because of fraud or dishonesty, or for persistently failing to file company information). A director need not be resident in Hong Kong, is not required to have specific qualifications and can serve as a director for multiple companies (although conflicts of interests must be avoided). Directors are not legally required to hold any shares in the company, although the articles may impose a share qualification or authorise the company to do so.</td>
<td>Directors are appointed in accordance with the company’s articles. These often provide for directors to be appointed by a majority vote of the shareholders or by the existing directors, if there is a casual vacancy or where the number of directors falls below the prescribed number of directors set out in the articles. Appointments made by directors usually must be confirmed by shareholders at the company's next annual general meeting. In addition to what is provided in the articles, shareholders have the right to remove directors before the end of their term of office by majority vote. Special notice of the intention to remove a director must be given to the company at least 28 clear days before the relevant meeting. On receipt of such notice, the company must immediately send a copy of the notice to the director concerned and also give notice to all shareholders at least 14 clear days before the meeting. A company cannot use a written resolution for this purpose. The term of office for a director is usually set out in the articles. Directors of a public company are normally subject to retirement by rotation at least once every three years. Having retired, if they wish to stand again, they are generally eligible for re-election as directors.</td>
</tr>
</tbody>
</table>
Directors represent the controlling mind of the company and are empowered by the company’s articles to administer, direct and manage it. Specific powers may be delegated to committees, agents or individuals to fulfil specific roles or responsibilities.

Directors are generally, however, under a duty not to delegate powers, except with proper authorisation and to exercise independent judgement in relation to the exercise of their powers (for example, a director should not blindly accept instructions from a shareholder, another director or the advice of an adviser without considering the relevant facts).

The board retains responsibility for delegated decisions and therefore should set up systems to supervise those who act under its authority.

A director’s acts are valid, notwithstanding any defect that may afterwards be discovered in his / her appointment or qualification.

Directors must act honestly and diligently, showing the company their highest loyalty, acting in good faith and in the company’s best interests.

Directors must exercise their powers for a proper purpose, act in accordance with the company’s constitution and exercise reasonable skill, care and diligence. This last duty, to exercise reasonable skill, care and diligence, has been codified in the recently enacted new Companies Ordinance.

Furthermore, they must not allow any conflict between their duties as directors and their personal interests.

The fiduciary duties of the directors are owed to the company alone, and not to the shareholders.

It is generally accepted, however, that, while the company remains solvent, the duty to act in its “best interests” is assessed by reference to the interests of its present and future shareholders. The directors may, therefore, legitimately balance a long term view against the short term interests of the current shareholders.

Directors do not owe fiduciary duties to the company’s creditors. Nevertheless, in the period immediately prior to any liquidation of the company, the directors must take into account the interests of creditors.

The law restricts certain transactions between the company and a director, including a loan (or loan guarantee) to a director, unless an exemption applies or the transaction is approved by shareholders. Exemptions include (i) amounts up to 5% of the value of the company’s net assets, (ii) funds to meet proceedings or regulatory actions defences (see “Indemnities and protections”) and (iii) expenses on company business.

Shareholder approval is required if a director’s guaranteed term of employment exceeds three years or for payments made to directors (above a minimum threshold) to compensate them for a loss of office.

Directors also have a duty not to place themselves in a position where there is a conflict, whether actual or potential, between their personal interests and their duties to the company. This duty extends to the entry into contracts with the company, the use of information or opportunities for personal profit and competing with the company.

Directors are required to disclose the nature of all direct or indirect material interests in any arrangement or transaction involving the company. A company’s articles may require a director to abstain from voting in respect of any such arrangement or transaction in which he / she is interested, or any matter arising from that arrangement or transaction.
# Liability

A company can take action against a director to make good any loss suffered by the company as a result of a breach by the director of any fiduciary or statutory duty.

Shareholders may also take action against a director in respect of a wrong done to the company by way of a derivative action. Derivative actions are provided for by common and statutory law. Multiple derivative actions are possible, meaning that actions may be brought by the shareholders of a parent company, on behalf of its subsidiary, in respect of a wrong committed against the subsidiary.

Directors can also be disqualified from acting as directors under the law or under the company’s articles.

In addition, directors may be subject to criminal conviction or fines for wrongful or fraudulent trading (see “Financial difficulty and insolvency”).

# Indemnities and protections

A Hong Kong incorporated company cannot exempt its directors from liability they incur to the company for any negligence, default, breach of duty or breach of trust. A company can protect its directors, however, against liabilities arising from their directorship in several ways.

A company can agree to indemnify its directors against liabilities incurred in defending civil actions brought by a third party, or criminal proceedings, so long as the director is found not liable or not guilty. The indemnity cannot cover criminal or regulatory fines where the director is found guilty.

A company can also provide funds to its directors to meet expenditure incurred in defending civil or criminal proceedings in connection with any alleged negligence, default, breach of duty / trust in relation to the company, or any investigation or action by a regulator for alleged misconduct. Companies can also help directors to avoid incurring such expenses. In either case the funds must be repaid and company expenses discharged if the director is found liable or guilty.

It is also possible for the court to grant relief to a director if proceedings for negligence, default, breach of duty / trust are taken against him / her. Relief is only available if the court determines that the director acted honestly and reasonably and, having regard to all the circumstances, ought fairly to be excused.

# Insurance

The law permits a company to purchase directors’ and officers’ liability insurance for the benefit of its directors.

This insurance may protect a director’s personal assets against liabilities for any negligence, default, breach of duty or breach of trust of the directors in relation to the company (including expenses incurred in defending the relevant proceedings).

# Financial difficulty and insolvency

In a winding-up of the company, directors will be personally responsible for contributing to the assets of the company if it appears that the directors were knowingly involved in fraud against the creditors or others.

Directors may also incur criminal liabilities if they are found guilty of offences such as:

- fraudulent trading,
- making false entries in books or registers,
- concealing assets, or
- failing to keep proper books of account in the two years prior to a winding-up.
Decisions and meetings

Generally, each director has one vote and decisions of the board are taken by a simple majority. The chair of the board, elected to act as such by the other directors, is often given a casting vote in a deadlock, although this is not provided for by law. The articles usually set out how decisions of the board are to be made, and may allow for written resolutions and for lawful electronic means to be used.

Reasonable notice, having regard to all the circumstances, must always be given to directors before a board meeting is held. The law is silent on how notice is to be given, but a company’s articles may set out details. What constitutes reasonable notice will depend on the facts of the case and on the structure, business and usual practice of the company. Directors may, expressly or by conduct, waive notice of the meeting. As a general rule, the articles of Hong Kong companies provide that it is not necessary to give notice to any director who is absent from Hong Kong. If a director takes the view that inadequate notice was given, he / she is entitled to challenge the validity of the meeting, although this must be done immediately.

For a board meeting to be properly constituted, the quorum prescribed in the articles must be present.

Minutes

Minutes of all proceedings at meetings of its directors must be recorded and kept at the company’s registered office for at least ten years.

There are no specific requirements on the form of board minutes. They usually contain basic information such as the name of the attendees and the venue, date and time when the meeting took place and the business transacted. If a director declared his / her interest in any arrangement or transaction involving the company in writing, the declaration will form part of the proceedings of the immediately following directors’ meeting. If the interest was declared at a board meeting, it will form part of the proceedings of that meeting.

When the minutes have been signed by the chair of the meeting, or of the next directors’ meeting, they are treated as evidence of the proceedings at the meeting. This means that, unless the contrary is proven, it is assumed that the meeting was duly held and convened, all proceedings duly took place and all appointments made were valid.

Administration and accounts

Directors must ensure sufficient accounting records are kept and accounts are prepared annually.

Directors must also prepare a directors’ report each financial year, and both the directors’ report and the annual accounts must be approved by the board. Copies of the reports and accounts must be sent to parties entitled to receive them and the accounts must be laid before the members of the company in general meeting.

In addition, the directors are responsible for the administration of the company, including such matters as making public filings, calling general meetings of members, maintaining statutory books and records and allowing these to be inspected.

Relevant rules

The Companies Ordinance, together with the common law and other guidance, forms the bulk of the rules and regulations most relevant to directors.

The Companies Ordinance went through a major review and has been substantially amended. The new provisions are in effect from 3 March 2014.

A company’s constitutional documents and other specific resolutions may impose additional requirements and restrictions on directors.
## India

### What type of company?

In India, subsidiaries within a group are most likely to be private companies limited by shares and this section focuses only on private limited companies.

A private company which is a subsidiary of a public company is treated as a public company from a compliance perspective.

### Management structure

The law provides for a single tier board, which has the authority to delegate responsibilities to committees constituted by it.

The board is in charge of the management of the company and is deemed to act as a whole.

The general duties and responsibilities are the same for all directors even if some of them may be given additional duties and responsibilities.

### Board composition

A private limited company must have a minimum of two directors and a maximum of 15 directors (which may be further increased by the shareholders of the company passing a special resolution, that is, by a majority of not less than three-fourths of the members present and voting).

Only individuals can be directors. Corporates, firms or other bodies with non-physical legal personalities cannot be directors.

Every company must have at least one Indian resident director who has stayed in India for a total period of not less than 182 days in the previous calendar year. Therefore, even wholly-owned subsidiaries of foreign companies must have at least one resident Indian director.

An individual can be appointed as a director of a maximum of 20 companies (provided that, out of the 20, he / she is not a director of more than ten public companies).

### Appointment and removal

Subject to the company’s articles, the subscribers to the memorandum of association are deemed to be the first directors of the company, until directors are appointed by the shareholders at a general meeting. The articles can prescribe how directors are appointed and allow the board to appoint additional and / or alternate directors. If the articles are silent, directors can be appointed only by the shareholders in general meeting. The law allows shareholders to remove directors at any time by majority vote. Special notice of an intention to remove a director must be given to the company and can only be given by shareholders holding either 1% of the total voting power or paid-up shares aggregating to INR 500,000.

A director may resign from office by giving notice in writing to the company and the board. On receipt of such notice, the company must inform the Registrar of Companies.

The resigning director must forward his / her resignation, with detailed reasons for the resignation, to the Registrar within 30 days. A director also vacates his / her office if he / she remains absent from all board meetings during the preceding 12 months, with or without seeking leave of absence.
India

Powers

The board of directors can exercise all the powers of the company, unless any law or the company’s constitution requires the shareholders to approve certain acts.

The board can delegate its powers to a committee of directors, the managing director, the manager or any other principal officer of the company, subject to such conditions as it may think fit.

There are certain powers which can be exercised by the board only at an actual board meeting, for example, borrowings by the company, approval of amalgamation, merger or reconstruction of the company, to make calls on shareholders in respect of money unpaid on their shares, etc.

In addition, there are certain powers (such as the sale, lease or disposal of an undertaking) which can be exercised by the board only with the consent of the shareholders, by passing a special resolution.

All other matters which are not by law or under the articles required to be approved at a general meeting or a board meeting can be approved by means of a “resolution by circulation” (which is similar to a written resolution). Resolutions to be passed by circulation become effective when approved by a majority of directors entitled to vote on that resolution.

General duties

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 the members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.

Directors must act in accordance with the articles of the company and use reasonable skill, care and diligence and exercise independent judgement.

Directors should avoid conflicts between the interests of the company and their personal interests.

In addition, directors must not achieve or attempt to achieve any undue gain or advantage either for themselves or for their relatives, partners or associates.

A director is also prohibited from assigning his / her office to another.

Additionally, directors are required to discharge certain common law duties which include the duty of confidentiality to the company and the duty of supervision (that is, a duty to exercise supervision over the officers of the company to whom they delegate powers).

Who are the duties owed to?

As a general rule, directors owe their duties to the company alone and would not generally owe their duties to the company’s shareholders, subsidiaries or holding companies.

Deals with company / conflicts

Directors who are concerned or interested in a proposed contract or arrangement with the company in any way must disclose the nature of their concern or interest to the board at the beginning of the meeting at which the contract / arrangement is discussed. The interested director is prohibited from participating in such meetings. In addition, a director is required to disclose his / her interest in a contract / arrangement, whether entered into or to be entered into, with: (i) a body corporate in which such director, in association with any other director, holds more than a 2% shareholding, or is a promoter, manager, CEO of that body corporate or (ii) a firm or entity in which such director is a partner, owner or member.

Failure by a director to disclose his / her interests will result in imprisonment for up to one year and / or a fine of up to INR 100,000. A director is prohibited from: (i) entering into any non-cash transactions with the company, (ii) participating in insider trading activities or (iii) entering into forward contracts or dealings (such as put and call options) in relation to the securities of the company, its holding, subsidiary or associate company. Subject to certain exceptions, a company cannot, directly or indirectly, advance a loan, including a loan represented by a book debt, to any director or person in whom the director is interested or provide a guarantee or any security in connection with any loan advanced to the director or other person in whom the director is interested.
**India**

**Liability**

If a company contravenes any provisions of the Indian Companies Act, then the company and every director in default is liable for the penalty imposed for the breach. In the absence of a specific director being found liable, all directors will be regarded as “officers in default”.

As a general rule, since the company and its director are separate entities, the director has no personal liability on behalf of the company, unless it can be established that the director has acted in a fraudulent manner. A director may be held personally liable, without any limitation of liability, for all or any of the debts or other liabilities of the company if he/she was knowingly involved in the fraudulent carrying on of business.

Directors may incur criminal liability in various ways, for example, for failing to comply with statutory administrative requirements regarding the matters to be stated in the balance sheet and the content and disclosures to be made in the profit and loss account. It is also a criminal offence for a director to make a false declaration of solvency.

As directors owe their duties to the company, only the company can bring a claim against a director. Claims can, however, also be brought by one or more shareholders on behalf of the company (but not to enforce the personal rights of the shareholders).

**Indemnities and protections**

A company can indemnify its officers or directors against liability which they may incur in defending any proceedings, whether criminal or civil. The indemnity is only valid, however, if judgment is given in favour of the director or he/she is acquitted or discharged in the proceedings.

A director can claim relief in any proceedings for negligence, default, breach of duty, misfeasance or breach of trust. The court will grant this if it is of the view that the director acted honestly and reasonably and, having regard to the circumstances of the case, ought to be fairly excused.

In the event that a director anticipates any claim against him/her in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he/she may apply to the High Court for relief.

**Insurance**

It is possible for the company to purchase directors’ and officers’ liability insurance cover and this is common practice in India.

The premium for such insurance can be paid by the company. Any such premiums paid, however, must be treated as part of the directors’ remuneration in the event that a director is found to be guilty of any negligence, default, misfeasance or breach of duty or trust.

**Financial difficulty and insolvency**

If a company is unable to pay its debts, it may be involuntarily wound-up on a petition before the courts by, amongst others, the creditors of the company or the company itself. A company may also be voluntarily wound-up by passing a special resolution that the company be wound-up voluntarily.

In a voluntary winding-up of the company, the directors will be responsible for, amongst other things:

- making a declaration of solvency,
- preparing a statement of affairs,
- giving notice to the Registrar of Companies regarding the resolution of winding-up, and
- appointing a liquidator.

In an involuntary winding-up, each director is required to file a statement of the affairs of the company upon appointment of an official liquidator by the court. The directors are also required to assist the official liquidator from time to time by providing relevant information and assistance.

Any concealment of information, wrongful disclosure etc. to the liquidator during the winding-up process is a criminal offence punishable with a fine and imprisonment for a term between three to five years.
## India

### Decisions and meetings

Every company is required to hold the first board meeting within 30 days of incorporation of the company. One board meeting must be held every three months and there must be a total of four such board meetings every year. The articles of the company usually contain provisions governing the conduct of the board meetings.

To call a board meeting, it is necessary to give not less than seven days’ notice in writing. Shorter notice may be given to transact urgent business.

The quorum for a board meeting is one-third of the total strength of the board or two directors, whichever is higher. Higher requirements can be set out in the articles of the company. In any event, a minimum of two directors must be present.

Directors can participate in board meetings by video-conference or other prescribed audio-visual means, provided that such meetings are recorded and the records are properly stored. The board cannot, however, approve the annual financial statements or the directors’ report during these meetings.

All decisions of the board are taken by the requisite majority of the directors voting at a board meeting.

See also “Powers” for information about decision-making.

### Minutes

The minutes of board meetings must be finalised and entered in the minutes books of the company within 30 days of the conclusion of the meeting.

There is no set form for the board minutes. The minutes must include basic details (such as the names of the chair and the attendees, the date, place and time of the meeting and the business transacted).

Minutes must also be signed by the chair of that meeting or by the chair of the next board meeting.

### Administration and accounts

The directors are responsible for the administration of the company. Directors are responsible for, amongst other things, matters such as:

- making statutory filings (including filings with the Registrar of Companies for the allotment of shares and creation of charges over the property or assets of the company),
- convening shareholders’ meetings within the time periods stipulated by law,
- preparing and maintaining the company’s books of accounts, approving the financial statements of the company before they are signed on behalf of the board and presenting such statements to the shareholders at the general meetings,
- maintaining statutory registers, such as the register of members and the register of debenture holders and the minutes books of the company, and
- in cases of winding-up or liquidation, ensuring that the books of accounts of the company are completed and audited up to the date of the winding-up order issued by the court.

### Relevant rules

The Companies Act, 2013 sets out the general duties of directors and specific responsibilities in relation to the administration of companies, including the preparation of accounts and making public filings. This Companies Act will replace the Companies Act, 1956, but is not yet fully in force, and is being brought into effect in a phased manner. In addition, all of the related rules had not been finalised at the time this guide was published. Accordingly, it will be necessary to take further advice on matters of Indian law.

A company’s constitutional documents, including its articles of association, may set out additional duties and obligations of the directors. These may have been agreed under a shareholders’ agreement (for example, in the case of a joint venture) but will not be binding on the company and its directors unless they are incorporated in the articles of association.

Additional duties and liabilities could also be set out in the contract of employment (if any) between the directors and the company.

In terms of priority, where there is a conflict between statute, constitutional documents and / or the contract of employment, a court would first look at the statute, then the constitutional documents and then the contract of employment (if any).

The contents set out above do not constitute any opinion or determination on, or certification in respect of, the application of Indian law. Any comments concerning India are based on our transactional experience and our understanding of the practice in India. Linklaters LLP is not licensed to practise law in India. We have a best friend relationship with Talwar Thakore and Associates, a law firm in India, and we would be pleased to contact them on your behalf.
Indonesia

What type of company?

In Indonesia, there are three types of private limited liability companies. Only one of these, a foreign investment company (penanaman modal asing or “PMA”), can have non-Indonesian shareholders and is, therefore, likely to be used as a subsidiary within a multinational group.

The exceptions to this rule are private limited liability companies which engage in financial sector activities, including banking and insurance. These do not have PMA status, but may have foreign shareholders, if approval is obtained from the relevant government authorities.

This section of the guide focuses solely on PMA companies.

Management structure

An Indonesian company has a two-tier board structure, consisting of a board of directors and a board of commissioners.

The board of directors exercises an executive function and is responsible for the day-to-day operations of the company.

The board of commissioners supervises and advises the board of directors.

Indonesian law does not regulate persons who may be acting as directors or commissioners but have not been formally appointed to these positions.

Board composition

Subject to applicable sectoral requirements, all private companies must have at least one director and one commissioner. There is no maximum number. No individual may be a member of both boards.

Non-Indonesian nationals can be appointed as directors but will need a work permit and must reside in Indonesia. Directors with specific functions (such as finance directors) must reside in Indonesia and have Indonesian nationality. Generally, there are no residence or nationality obligations for commissioners.

Companies cannot be appointed as directors or commissioners. To be eligible, individuals must be at least 21 years old, unless they are married and at least 19 (men) or 16 (women) years old.

People who cannot become directors or commissioners include those who, in the preceding five years, have been:

- declared bankrupt,
- on a board of directors or commissioners declared by a court as being responsible for the bankruptcy of a company, or
- punished for a crime involving the financial sector and / or the loss of public funds.

Appointment and removal

Directors and commissioners of a company are appointed and removed by the approval of shareholders holding more than 50% of the total number of issued shares of the company at a shareholders’ meeting. The date on which each director’s appointment takes effect should be stated at the meeting. If no date is given, appointments are deemed to take effect from the closing of the meeting.

Any shareholder resolutions to remove directors and commissioners must state the reasons for such removal and the relevant director or commissioner must be given the opportunity to defend him / herself. The resolution must state the date the removal takes effect.

Directors are appointed for a fixed term determined by the general meeting of shareholders. A director’s term of office cannot be indefinite, although a director can be re-appointed by the shareholders.
Indonesia

Powers

The board of directors is responsible for the day-to-day running of the company. Under the law, each member of the board is entitled to take part in management and to represent and bind the company. It is common, however, for the company’s articles to give these powers to a specific director who acts as a chief executive officer and is referred to as the “President Director”.

The board of commissioners supervises the management of the company and reports back to the shareholders on the board’s performance. It can query decisions of the board of directors, request information about the company’s management and / or suspend directors. The commissioners cannot, however, instruct the directors to take specific actions. In addition, the board of commissioners must review the company’s annual business plan and annual report and approve any declaration of an interim distribution before these matters are presented for approval at the shareholders’ meeting.

The directors may delegate their powers by board resolution to individual directors or committees. Any individual director may delegate his / her specific powers to a non-director by using a power of attorney. The relevant directors remain responsible for the acts of any delegate or attorney which they have appointed.

General duties

The directors must act in good faith and in the best interests of the company, in accordance with the company’s objectives.

Each commissioner must advise the board of directors in good faith, prudently and responsibly, in the best interests of the company, in accordance with the company’s objectives.

Who are the duties owed to?

The duties of the directors and of the commissioners are owed to the company, and not to the shareholders.

Deals with company / conflicts

Directors and commissioners, as well as their spouses and children, are permitted to own shares in the company but must notify the company of such ownership and of any interests in other companies. These interests will be recorded in a designated register maintained by the board of directors.

There are no specific restrictions on transactions between directors / commissioners and the company.

Nevertheless, if a transaction results in a conflict of interest between a director and the company, such director will not be allowed to represent the company in relation to the transaction. The law also prohibits directors from representing the company in litigation or proceedings involving the director and the company.

If all the directors are disqualified from representing the company, the commissioners will be authorised to do so. If all the directors and commissioners are disqualified from acting, the shareholders at a shareholders’ meeting must appoint a separate representative.
**Indonesia**

**Liability**

If the directors and commissioners are negligent in carrying out their duties, in accordance with the objectives and interests of the company, they will be jointly and severally liable for any losses suffered by the company or because the company’s financial statements are incorrect or misleading.

If the company suffers losses at the end of a financial year and interim dividends have been distributed to the shareholders, the directors and commissioners are jointly and personally liable for any amounts not returned to the company.

If directors fail to comply with certain company registration requirements, they will also be personally and jointly responsible for any losses suffered by the company. In addition, such failures may lead to criminal charges (which, upon conviction, carry a penalty of up to three months’ imprisonment or a fine of up to Rp. 3 million).

Shareholders representing at least one-tenth of the total shares in a company may bring a claim in the name of the company against the board of directors or commissioners.

As there is no concept of a de facto director in Indonesia, only duly appointed directors or commissioners are subject to liabilities incurred in respect of a company.

**Indemnities and protections**

It is possible, but not common, for the company to agree to indemnify directors against personal liability they may incur. Such indemnities would need to be in the best interests of the company and are available only where there has been no breach of a director’s duties to the company.

The board of directors is not liable for the company’s losses or bankruptcy if it can prove that:

- these were not attributable to its fault or negligence,
- it managed the company in accordance with the company’s objectives and interests,
- it had no personal interest (direct or indirect) in the managerial actions that caused the losses / bankruptcy, or
- it took preventative action.

The board of commissioners is not liable for the company’s losses if it can prove that it:

- prudently and responsibly supervised the board, in accordance with the company’s objectives and interests, in good faith,
- had no personal interest (direct or indirect) in the managerial actions that caused the losses, and
- advised the board on how to prevent such losses.

Director / commissioner liability to the company can also be discharged by shareholder resolution to the extent that such matters have been disclosed in an annual report.

**Insurance**

It is common practice for PMA companies to arrange for directors’ liability insurance and to pay the relevant premiums.

The insurance will cover directors against any civil claims for compensation which may arise as a result of the actions taken by that director. The insurance will not cover any criminal claims made against the director.

**Financial difficulty and insolvency**

If a company is declared bankrupt because of the fault or negligence of the board of directors and the company’s assets are insufficient to pay its debts, then the directors are, individually and jointly, responsible for paying all outstanding debts.

If the company is declared bankrupt because of the fault or negligence of the board of commissioners in supervising the board of directors and the company’s assets are insufficient to pay its debts, then each commissioner, together with the directors, is, individually and jointly, responsible for paying all outstanding debts.

This obligation to repay outstanding debts applies to all the members of the board of commissioners and the board of directors who held office in the period of five years before the declaration of bankruptcy was made.
Decisions and meetings

Directors and commissioners can take decisions by passing resolutions at a meeting or by using written resolutions. Written resolutions must be signed by each director or commissioner, as the case may be. A company’s articles may allow video-conference / conference calls to be used in decision-making.

Procedures for board meetings are set out in the company’s articles of association. These would usually include:

- that written notice is to be sent to all members of the relevant board prior to the meeting,
- notice periods (which can be waived or shortened), typically ranging between three to 21 days,
- quorum of the meetings (which can be all or more than 50% of the members of the relevant board, and can require the presence of one or more directors or commissioners appointed by certain shareholders), and
- voting requirements (which may be unanimous, a super majority (however defined) or a simple majority).

Minutes

Although not prescribed by law, articles of association typically provide that minutes of a board meeting are to be set out in writing and kept at the company’s domicile. This is the city or specific area provided for in the company’s articles of association and does not have to be the registered office of the company.

Administration and accounts

The board of directors is responsible for the preparation and accuracy of the company’s accounts. The company’s accounts must, under certain circumstances, be audited by a public accountant and submitted to the relevant authority.

A company’s accounts must be audited if:

- its business activities relate to the mobilisation and / or use of public funds (for example banks and insurance companies),
- it issues debt instruments (such as bonds),
- it is publicly listed,
- it is a state-owned enterprise (persero),
- it has assets and / or businesses of Rp.50 billion or more, or
- this is required by specific laws and regulations applicable to that company (for example, sector regulations).

Relevant rules

The rules governing limited liability companies are set out in Law No. 40 of 2007 dated 16 August 2007 concerning Limited Liability Companies.
What type of company?

In Italy, a subsidiary within a group is likely to be incorporated either as a joint stock company (Società per azioni or “SpA”) or as a limited liability company (Società a responsabilità limitata or “Srl”).

The capital of an Srl is not divided into shares but into quotas (quote), therefore investors in an Srl are often called “quotaholders” (quotisti). For the sake of simplicity, in this section on Italy, when referring to investors in both SpAs and Srls we have used the term “shareholders”.

Management structure

**SpA**

Shareholders may choose between three systems.
- **Traditional system**: (most commonly used): board of directors / sole director.
- **Two-tier system**: management board (consiglio di gestione), with management responsibilities, and a supervisory board (consiglio di sorveglianza).
- **One-tier system**: board of directors, with management responsibilities and an internal management audit committee (comitato per il controllo sulla gestione).

**Srl**

The company can be managed in different ways, most commonly by a sole director or a board of directors. Other forms of governance less frequently used when more than one director is appointed are those where directors must act either:
- severally (amministrazione disgiuntiva), or
- jointly (amministrazione congiuntiva).

Persons who have not been formally appointed as directors but who exert the powers of a director directly, continuously, freely and in relation to material aspects of the company’s business, may be subject to the same liabilities as those attaching to duly appointed directors.

Shareholders of an Srl who have deliberately resolved upon or authorised acts that are prejudicial for the company are jointly liable with the directors.

Board composition

**SpA**

Certain specific rules (relating to numbers, integrity, professional skills and / or independence) apply, depending on the governance system adopted.
- **Traditional system**: the number of directors is determined in the by-laws.
- **Two-tier system**: the management board must have at least two members, who cannot also be members of the supervisory board.
- **One-tier system**: the board must have at least two members and at least one-third of its members must be independent.

**Srl**

The number of directors is freely determined by the shareholders.

In all cases, individuals can normally be appointed as directors as long as they are at least 18 years old and are not bankrupt or barred from public office.

Corporates can be appointed as directors under certain conditions but must have a person (such as a director) to represent them.

Employees can be appointed as directors within some limits (for example, they cannot be the sole director of a company).

Non-Italians can be directors as long as Italians can also become directors within the relevant non-Italian jurisdiction.

Appointment and removal

The first director(s) are appointed in the company’s deed of incorporation.

After the incorporation of the company, directors are appointed by the shareholders’ meeting.

Unless the by-laws provide otherwise, whenever vacancies occur, the remaining directors may temporarily fill such a vacancy until the next shareholders’ meeting appoints an alternative director or confirms the appointment made by the board.

Directors may be removed at any time and for any reason by a simple majority vote of the shareholders. A director is entitled to claim damages if removed without cause.

**SpA**

Directors cannot be appointed for more than three consecutive financial years.

**Srl**

No minimum or maximum term applies, therefore, directors can be appointed for either an unlimited period of time or for a fixed number of financial years.
### Powers

**SpA**
The sole director, board of directors or management board, as the case may be, has full power to pursue the company’s objectives, save for those powers expressly reserved to the shareholders’ meeting. Powers are commonly delegated to one or more managing directors (amministratori delegati) or to an executive committee (comitato esecutivo). Some powers cannot be delegated (such as the drafting of the balance sheet and of merger / de-merger plans). It is also common to appoint a general manager (direttore generale) who is in charge of daily business, but is not on the board.

**Srl**
If a board is appointed, management decisions are taken by majority. As above, the board may delegate certain powers to managing directors.

Specific rules apply to other types of management:

- **Directors acting severally** (amministrazione disgiuntiva): Directors can act alone, unless their actions are specifically opposed by the other directors.

- **Joint management** (amministrazione congiuntiva): Single directors cannot normally act alone as the unanimous consent of all directors is required.

### General duties

One of the main duties of the directors is to manage the company “with care” and to pursue the company’s interests.

In particular, the directors have the following duties.

- **To the company (and the company’s shareholders as a whole):** the main duty of the directors is, in general terms, to manage the company with care and in compliance with the duties imposed by the company’s by-laws and the relevant law while pursuing its corporate purpose. In doing so, the directors must always act in the best interests of the company, whilst ensuring that the company’s activities are fully compliant with its deed of incorporation, by-laws and any relevant laws.

- **To the company’s creditors:** the directors are liable for the preservation of the company’s capital and assets.

- **To individual shareholders and / or third parties:** the directors are specifically liable for damage to the property of any individual shareholder or third party as a direct and immediate consequence of actions taken (whether negligently or fraudulently) by the directors.

### Who are the duties owed to?

Directors’ duties are generally owed to:

- the company (and the company’s shareholders as a whole),
- the company’s creditors, and
- individual shareholders, as well as to any third party, within some limits.

### Dealings with company / conflicts

**SpA**
Directors must inform the other directors and the board of statutory auditors of any direct or indirect interests they have in specific transactions in which the company is involved. The disclosure must specify the nature, terms, origin and relevance of such interest. Furthermore, managing directors, before entering into any such transaction, must submit it to the board for approval. A breach of these rules means the transaction (if prejudicial to the company) can be challenged by the other directors and the board of statutory auditors (or the supervisory board, as the case may be) within 90 days of the date of the relevant resolution. Directors in breach are liable, amongst other things, for any damages suffered by the company. Rights acquired in good faith by third parties are, however, valid and enforceable.

**Srl**
Board resolutions which are prejudicial to the company and which were passed with the decisive vote of a conflicted director can be challenged within 90 days of being passed by the other director(s) and (if appointed) the statutory auditors / external auditor.

Agreements entered into by conflicted directors which are prejudicial to the company may be declared null and void if the other party to the agreement knew (or should have recognised) the conflict.
Directors are jointly and severally liable for damages which result from a breach of their duties (see “General duties”). Directors are also liable for any damage caused to the company by the use of data, information or business opportunities acquired by the directors in their office as directors and used for their own benefit or for the benefit of a third party.

In addition, Italian law contains numerous criminal sanctions for the infringement of corporate regulations by directors, who incur personal criminal liability separate from any liability of the company.

The company, its creditors and its individual shareholders and / or third parties may take action against the directors.

Judges are not allowed to pass judgement on the merits of a business decision (the so-called “business judgement rule”) and, in general, a business misjudgement will not give rise to liability. Where damage is caused by acts / omissions falling within the responsibility of an executive committee or one or more directors, the board remains liable if it was aware of the prejudicial acts but did not prevent them or take steps to mitigate their effects. Individual directors will not be liable for board decisions if they recorded their dissent in the minutes and by written notice to the chair of the board of statutory auditors.

It is unclear whether companies can indemnify their directors against civil liability claims brought by third parties against the directors, acting in execution of their duties.

The company is, however, permitted to advance funds to pay for a director’s defence against any claims made against such director, on condition that the money must be repaid if the director is found guilty / liable.

It is common for Italian companies to take out a directors’ and officers’ liability insurance policy to indemnify their directors and officers against losses or costs resulting from legal actions for alleged wrongful acts brought against them in their capacity as directors and officers.

Certain acts of the directors may, if the company is insolvent or in financial distress, give rise to civil liabilities and / or specific criminal offences. In particular, liability may be incurred for:

- any negligent delay in filing for the commencement of insolvency proceedings (including compulsory administrative liquidation proceedings (liquidazione coatta amministrativa)),
- making payments to, or creating or faking security interests in favour of, some creditors with the aim of favouring them over other creditors,
- failing properly to keep the required accounting books,
- diverting, wasting or concealing funds or assets or making transactions (including intra-group transactions) at an undervalue, causing insolvency by breaching directors’ duties or acknowledging inexistent debts as well as false accounting, and
- seeking financing (including renewals or the maintenance of existing financing or waivers of events of default) from third parties, thereby concealing the company’s insolvency or financial difficulties.
Decisions and meetings

**SpA**
Meetings of the board of directors / management board must be convened at least once a year, but in practice may take place more frequently. The by-laws may allow directors to attend the meeting using electronic means, provided that certain safeguards are satisfied.

**Srl**
Unless otherwise provided, directors’ resolutions may be adopted in meetings, by written consultation or by consensus in writing, provided that certain formalities are satisfied (that is, the written document must clearly state the object of the consensus). As above, the by-laws may allow directors to attend meetings using electronic means.

In all cases, board meetings should be held regularly and are usually convened by the chair. The notice of meeting must include an agenda for directors to follow, unless all directors are present and agree otherwise. A majority of the directors must be present at each meeting and resolutions are usually passed by majority vote. Directors must personally participate in the decision-making process and cannot be represented by attorneys. It is possible to hold meetings of the board without prior notice if all directors and statutory auditors are present. Employee representatives cannot take part in directors’ meetings, but statutory auditors should attend or risk losing their office.

Minutes

Minutes of directors’ meetings must be set out in writing, and drafted in, or translated into, the Italian language.

The minutes must be entered in a minute book and kept at the company’s registered office.

Some minutes also need to be notarised and / or filed with the commercial register (for example, resolutions relating to the issue of bonds).

Administration and accounts

Directors must prepare the annual accounts (bilancio d’esercizio) and the management report (relazione sulla gestione).

The directors need to approve them and submit them to the shareholders for approval.

Relevant rules

The Italian Civil Code is the main source of regulation for directors and sets out the general duties of directors and their responsibilities.

In addition, corporate documents of the company may impose additional requirements or restrictions on directors. These include the by-laws (statuto) and any specific shareholders’ resolutions, in particular those relating to the appointment of, and granting of powers to, a director.
Japan

What type of company?

In Japan, a subsidiary within a group is most likely to be a private stock company (kabushiki kaisha), which is a limited liability company with restrictions on the transfer of its shares.

Management structure

The type of management structure typically used in a Japanese subsidiary is a company with a board of directors.

In such company, a representative director will be the legal representative of the company. A representative director has unlimited representative power and therefore represents the company in all business actions.

A company with a board of directors must have a statutory auditor (kansa yaku), unless the company has an accounting adviser (kaikei sanyo).

The statutory auditor’s main responsibilities are to check the financial information of the company and to monitor the activities of the directors of the company.

Board composition

A company with a board of directors must have at least three directors. In such company, a representative director must be elected among the directors by a decision of the board. A company can elect one or more representative directors, but at least one of the representative directors must be a resident of Japan.

Employees do not have the right to be represented on the board.

Body corporates cannot be appointed as a director.

An employee of a company can be a director of the same company, but a director of a company cannot be a statutory auditor of the same company. Serving as a director of several companies in the same group is permitted.

Other than the residential restriction mentioned above which applies to representative directors, directors are not required to have specific qualifications (note, there are some general requirements such as that a candidate must not be bankrupt) and there are no nationality or residency restrictions or share ownership requirements. Further, there is no age restriction and no need to appoint an independent director in a private stock company.

Appointment and removal

The initial directors are appointed upon incorporation and, thereafter, appointed by a majority vote of the shareholders.

Changes to the information about directors must be registered in the company register. Thereupon, the names of the directors (and, in the case of representative directors only, their home addresses) will be made available to the public.

The Companies Act allows shareholders to dismiss a director at any time by a majority vote. A director who is dismissed by the shareholders may make a damages claim against the company, except in cases where there are justifiable grounds for such dismissal.

The default rule of the appointment term of a director under the Companies Act is until the closing of an annual shareholders’ meeting in relation to the last financial year which ends within two years from the appointment. The articles of incorporation may stipulate a shorter period or, where the company is a private company (that is, a company with restrictions on the transfer of its shares), a longer period. A director’s term of office cannot, however, be longer than a period until the closing of an annual shareholders’ meeting in relation to the last financial year which ends within ten years from the appointment.
### Powers

Decisions of a company are made by the board of directors.

A board can, however, delegate certain matters to a designated director, except where matters are reserved to the shareholders or to the board by the Companies Act or by the company’s constitutional documents (for example, a merger or changing the articles of incorporation). In many cases, the articles of incorporation set out a clause by which the board delegates power to its president/CEO to determine certain daily operations.

A representative director has unlimited representative power to represent the company. Many companies delegate certain representative powers to their senior employees under their constitutional documents.

In addition, a company can issue a power of attorney to any person to act on behalf of the company.

### General duties

Each director owes a fiduciary duty to the company.

A director is also required to exercise a duty of care of a prudent manager in performing his/her duties.

In addition, each director has a duty to supervise other directors of the company.

### Who are the duties owed to?

Each director owes his/her fiduciary duty and a duty of care to the company.

This effectively means that the directors owe their duties towards the shareholders as a whole.

### Dealings with company / conflicts

In relation to conflicts of interest between the company and its directors, there are three types of conduct stipulated in the Companies Act that require prior board approval. They are:

- a director engaging in a business that competes with a business of the company,
- a director entering into a transaction with the company, and
- a company entering into a transaction which has a conflict of interest between the company and a director of the company.

In addition, a director must report the key contents of the transaction that has a conflict of interest to the board after the completion of such transaction. Even if a director obtains board approval in connection with transactions entered into with the company, he/she is still liable for any damages incurred by the company as a result of such transaction.

A director with a conflict of interest in relation to items to be determined by the board (not limited to the cases set out above) may not participate in the discussions of the board in relation to such topic and has no voting rights in the decision-making process for such items.
Liability

If a director breaches his / her duties to the company, he / she may be personally liable to compensate the company for losses caused.

In addition, a director may be liable to third parties (including shareholders) in cases where such third parties incur damages which were caused by the wilful misconduct or gross negligence of a director in his / her exercise of those duties.

A breach of certain obligations under the Companies Act, such as administrative requirements, can constitute either a criminal offence or a violation subject to an administrative penalty.

Indemnities and protections

The liability of a director for damages incurred by the company can be discharged by a unanimous affirmative vote by shareholders.

In addition, a two-thirds affirmative vote of the shareholders can limit the liability of directors to a certain amount set out in the Companies Act (for example, four times the annual compensation for a director), unless the damages incurred by the company were caused by the gross negligence of the relevant director.

This power to limit the liability of the directors can be delegated to the board of directors in the articles of incorporation of the company.

Partial limitation of liability is not possible, however, where the liability of the company is caused by a transaction between the company and its director (that is, in cases where there are certain conflicts of interest).

Insurance

Directors’ and officers’ liability insurance is permitted under the Japanese Companies Act and the company can pay the premiums for such insurance.

Financial difficulty and insolvency

If a company becomes insolvent, the directors of the company are liable to third parties (typically creditors of the company) to the extent that the court finds that the company became insolvent because of the wilful misconduct or gross negligence of the directors (see "Liability").

Under the Bankruptcy Act, a director of the company is subject to criminal sanctions if (i) the director effects any of the following actions, (ii) the director was aware of a likelihood that such action would be detrimental to the creditors, and (iii) bankruptcy proceedings are commenced:

- hiding assets of the company (making a fictitious disposal of assets or incurring fictitious debt is also considered to be hiding assets),
- destroying assets of the company,
- prejudicing the value of assets of the company by changing the condition of them, or
- disposing of the company’s assets or incurring obligations in a manner that is detrimental to the creditors.
**Decisions and meetings**

The quorum for a board meeting is a majority of the directors and decisions are made by a simple majority of the directors present. Each director has one vote and a casting vote cannot be given to a director in advance.

Board meetings can be conducted through a medium which enables the directors to communicate effectively with each other (that is, by video-conference or teleconference). A written resolution can be used if such method is specifically allowed in the company’s articles of incorporation.

A representative director of a company must report his / her business activities to the board at least once every three months. Therefore, a board meeting must be convened at least once every three months.

A convocation notice of a board meeting must be sent to all the directors and statutory auditors of the company at least one week prior to the board meeting, unless a shorter period is stipulated in the articles of incorporation. Nevertheless, a board meeting can be held at any time without a meeting having been convened, as long as all the directors and statutory auditors agree to it.

**Minutes**

The Japanese Companies Act requires companies to prepare minutes of the proceedings at board meetings and to keep such minutes for ten years from the date of the relevant board meeting. Minutes must be prepared, even in the case of a written resolution.

There is no set form for board minutes. Certain contents listed in the Japanese Companies Act must, however, be covered in the minutes. Board minutes must also be in writing and in Japanese.

Notarisation of the minutes is not necessary.

The attendees to the board meeting must sign the board minutes.

Board minutes are not published.

**Administration and accounts**

A representative director of a company is generally responsible for the administration of the company, including tasks such as preparing minutes and updating company registrations.

A representative director of a company must ensure that the company’s financial statements (such as the balance sheet and profit and loss account) and the business reports are prepared every financial year. The financial statements and the business reports must be approved by the board. The company must make its balance sheet (and also a profit and loss account for companies of a certain size) available to the public after its annual shareholders’ meeting.

**Relevant rules**

The Japanese Companies Act (Act No. 86 of 2005) sets out the rules regarding the general duties of directors and their specific responsibilities in relation to the administration of the relevant company.

Further, the constitutional documents of a company, such as its articles of incorporation and internal board rules, may impose additional requirements or restrictions on its directors.
What type of company?

In Luxembourg, subsidiaries within a group may take various forms depending on the group’s specific requirements.

Public limited liability companies (sociétés anonyme or “S.A.”) and private limited liability companies (sociétés à responsabilité limitée or “S.à r.l.”), which ensure limited liability and can be set up by a single shareholder, are the most likely to be used.

Partnerships may also be relevant in specific circumstances. A partnership can be:
- limited by shares (société en commandite par actions or “S.C.A.”),
- a common limited partnership (société en commandite simple or “S.C.S”), or
- a special limited partnership (société en commandite spéciale or “S.C.Sp”).

As S.à r.l. are, by number, the most frequently used companies, due to their simplicity and flexibility, this section of the guide refers to directors’ duties in relation to the S.à r.l. The duties and liabilities of the managers and directors of other Luxembourg entities are, however, largely similar under the Luxembourg legal regime.

Management structure

A S.à r.l. is managed by its managers.

In principle, each manager has individual responsibility and the power to manage and represent the company.

When two managers are appointed, however, the articles usually provide that these can only represent the company by acting jointly.

If three, or more, managers are appointed, the articles usually provide that the managers are to be organised within a board of managers. Consequently, the articles will lay down specific rules about how the board is to be organised and operate.

Persons who have not been formally appointed as managers but act as such will be treated as de facto managers (gérants de fait) and may be liable under statutory rules which govern liability generally and in specific cases, such as where the company is insolvent.

Board composition

A S.à r.l. can be managed by one or more managers and there is no limit on their number, unless imposed by the articles.

Shareholders and employees may be appointed as managers. Managers may be either individuals or legal entities. When a legal entity is appointed as manager, it must designate an individual as a permanent representative. The permanent representative is liable in the same way as the legal entity which he / she represents.

Subject to the provisions of the articles, there are no age, nationality or residence restrictions on managers, nor restrictions on the ability of the managers to hold several mandates.

If appropriate, it is advisable for a majority of the managers to be Luxembourg residents to prove that the company has its central administration in Luxembourg and, therefore, is of Luxembourg nationality.

A manager who has contributed to the bankruptcy of a company is disqualified from acting as a manager of other companies.

The auditors of the company’s annual accounts cannot be appointed to act as its manager.

Appointment and removal

Managers are appointed by the shareholders, either in the company’s deed of incorporation or by a simple majority vote of the shareholders’ meeting. The articles may require a larger majority.

The appointment is made for a limited or unlimited period. Unless the articles provide otherwise, whenever vacancies occur, the remaining managers continue to be authorised to act until the next shareholders’ meeting appoints new managers.

In principle, managers can resign at any time. A resigning manager should, however, remain in office if the interest of the company requires this, until the shareholders’ meeting or the remaining managers could reasonably have found a replacement. Managers who wish to resign should also bear in mind that they may incur liability if they leave a company in a difficult situation.

Managers may not be removed by shareholders without cause, unless the articles provide otherwise. To remove managers appointed in the articles, it is necessary to observe the quorum and majority rules for amending the articles.

Appointments and removals of managers must be published in the same way as the articles in the Luxembourg Register of Commerce and Companies.
Powers

Generally, managers have wide powers to manage the company and delegate to others. They may carry out all acts necessary or useful in order to fulfil the corporate object of the company, except for those reserved for the general meeting of shareholders by law or by the articles.

The internal authority of the managers may be restricted by rules set out in corporate documents, in particular the articles. Such restrictions do not bind third parties, even if the restrictions have been published. The power of the managers to represent the company in relation to third parties can be limited, however, if it can be demonstrated that the third party knew or should reasonably have known about the representation regime of the company.

In addition, the board of managers may give specific powers to any person of its choice. Individual managers also have the power to delegate in this way, in the absence of a board of managers.

The company is bound by the acts of its managers, even if these exceed the company’s object, unless it is proved that the third party knew that the act exceeded the corporate object or could not, in view of the circumstances, have been unaware of it. The fact that the articles have been published does not prove that third parties were aware of the corporate object.

General duties

The managers / board of managers must exercise full and effective control over the company by meeting regularly and monitoring its day-to-day activities. Managers must act in accordance with the articles and exercise independent judgement. The board is also responsible for the company’s long term strategy, implementing and supervising this strategy and reporting back to the shareholders.

Each manager has a duty of due care. This means that they must act in the way they consider (in good faith and for proper purposes) to be in the best interests of the company. Managers should take such care as an ordinarily prudent person, placed in the same situation, would use under similar circumstances. In doing so, they must have regard to the likely long term consequences of their decisions.

The general duties of managers imply that each manager must have a reasonable knowledge of the company’s business, obtain reliable information and understand the consequences of decisions made.

Managers may delegate and rely on expert advice, but only to the extent that it is reasonable to do so. If powers are delegated, managers have a duty to supervise such delegation.

Who are the duties owed to?

Under Luxembourg company law, the duties of managers are usually described in terms of acting in good faith in the interests of the company itself. The interests of the company are not necessarily aligned with the interests of its shareholders.

The concept of the interests of the company is not very specific but means taking into account the interests of all stakeholders in the company, including:

• the shareholders as a whole (and not individual shareholders),
• the company’s employees and creditors, and
• the company’s group (that is, its affiliates).

Deals with company / conflicts

Conflicts of interests of managers in a S.à r.l. are not regulated by law. A prudent and generally accepted approach is to apply the rules governing a Luxembourg public company limited by shares (société anonyme), as follows.

Managers with an interest in a transaction which conflicts with the corporate interest should disclose such conflict at the relevant board meeting. The conflict of interest should also be referred to in the minutes of the board meeting, except where such transaction is at arm’s length and concerns the daily affairs of the company.

In addition, managers with a conflict of interest cannot take part in deliberations on the resolutions relating to the conflict of interest.

The board must inform the shareholders of the conflict of interest at the subsequent general meeting of shareholders before any votes are taken by the general meeting.

Where the company has only one manager, such sole manager is not prevented from acting on a transaction where there is a conflict and does not need to inform the shareholders’ meeting of the conflict of interest. In such case, however, the manager must include details of the transactions where a conflict of interest arises in the minutes of the board.
**Luxembourg**

**Liability**

Managers are jointly and severally liable to the company and third parties for damages resulting from violations of the articles or the law, unless they were not responsible for the misconduct and on becoming aware of it informed the next shareholders’ meeting. Managers are also liable for management misconduct (faute de gestion) or infringement of the general duty of due care (obligation générale de prudence). The courts can consider what a diligent and reasonably skilled manager would have done in similar circumstances, but cannot substitute their own business judgements for the managers’ decisions. Managers will be liable only if their judgement was manifestly flawed or there was a clear lack of diligence (such as erratic attendance at board meetings and a failure to properly consider issues). Claims against managers are brought by the company, if the shareholders’ meeting votes in favour of doing so. The right to initiate such claims can also be waived by the shareholders.

Managers cease to be liable to the company on resignation (except for faults incurred prior to resignation). Liability to third parties continues, however, until the resignation is published in the Luxembourg State Gazette, unless the third party was aware of the resignation. Relevant criminal offences include infringement of disclosure obligations, illegal distributions to shareholders and the fraudulent use of corporate assets. These are punishable by imprisonment for several years and / or fines of up to €250,000.

**Indemnities and protections**

It is not possible for a S.à r.l. to exempt a manager from liability to the company for breach of the duty of due care, for negligence or for other defaults in relation to the company’s management. Therefore, clauses in the articles which seek to exonerate managers from liability are invalid.

Managers can be protected, however, in various ways against liabilities to third parties arising from their roles as managers.

As a general rule, any undertaking to indemnify managers for liability they might incur must be in the interest of the company. This means that a manager can be indemnified by the company against civil claims brought by third parties, but not against legal actions which are brought by the company itself. Likewise, the indemnity cannot cover liability arising because of the fraud or wilful misconduct of the manager, nor any criminal or regulatory penalties which may be imposed on the manager, nor the cost of defending criminal proceedings where the manager is found to be guilty.

It is also possible for third parties (including shareholders or group companies) to indemnify managers. Such indemnities can be widely drawn and cover liabilities owed to the company itself. In any such case, the managers remain liable, but the third party can cover the financial consequences of the liability incurred.

**Insurance**

Luxembourg companies are permitted to take out directors’ and officers’ liability insurance.

Typically, such insurance policies cover amounts which may be payable by the managers because of a claim for damages made against them in relation to the performance of their duties as managers of the company.

The insurance cannot cover:
- criminal, tax or administrative penalties incurred by managers,
- damages caused intentionally by the managers, or
- damage resulting from the gross negligence of the managers.

Legal or investigative costs incurred in defending a prosecution may, however, be covered.

**Financial difficulty and insolvency**

When a company is in financial difficulties or insolvent, managers may face additional liabilities. In such case, managers must take every reasonable step to minimise creditors’ losses and appropriate legal advice should be sought.

Firstly, criminal liability may attach to the managers of an insolvent company in certain situations. This can result in imprisonment of two years for simple bankruptcy (banqueroute simple) and five to ten years for fraudulent bankruptcy (banqueroute frauduleuse). Managers found guilty will also be prohibited from carrying on any commercial activities and from acting as managers or statutory auditors of a company.

Secondly, the managers may be ordered to assume all or some of the company’s losses as joint or separate debtors if serious faults of the managers contributed to the company’s bankruptcy and its assets are insufficient to satisfy all claims.

Finally, if managers have entered into commercial transactions in their own interest under cover of the company or disposed of the company’s property as if it was their own or for their own benefit, or created losses which could only lead to the company’s insolvency, the court may declare the managers personally bankrupt. This means that the liabilities of the bankrupt manager include the bankrupt company’s liabilities.
Decisions and meetings

If the articles provide for the company to be managed by a board of managers, such board forms a collegiate body and the articles will set out how decisions of the board are to be adopted. The rules governing the boards of public companies limited by shares (société anonyme) are generally taken as an example, as set out below, but there is great flexibility in this respect.

A chair is appointed from among the board’s members. The chair in turn appoints a secretary (who does not need to be a manager) for taking the minutes of the meetings.

Board meetings are generally convened by the chair or by at least two managers. Generally, three days’ written notice is required and decisions are adopted by a majority of the votes of the managers present or represented at the meeting.

Managers may participate in meetings by conference call, video-conference or other similar means of communication enabling the participants to simultaneously communicate with each other. Such participation is deemed equivalent to physically attending the board meeting in Luxembourg.

In most cases, the articles also allow decisions of the board to be taken by way of written decisions signed by all the managers.

Minutes

The resolutions of the board of managers are recorded in minutes signed by the chair and the secretary of the meeting. The minutes may also be signed by those managers who wish to do so.

The proxies, if any, given for the meeting are attached to the minutes of such meeting.

Certain resolutions should be notarised and published in the annex of the Luxembourg State Gazette (Mémorial C, Recueil des Sociétés et Associations). This includes any decision by the board (rather than the shareholders’ meeting) to increase the company’s capital by using the authorised capital procedure (capital authorisé), in reliance on authorisation set out in the articles and subject to specific conditions.

Administration and accounts

The managers / board of managers have a duty to prepare annual accounts consisting of a balance sheet, a profit and loss account and notes. These should include the items required by Luxembourg law. Depending on the size of the company and other circumstances, a S.à r.l. may choose to apply International Financial Reporting Standards as implemented in the European Union, instead of Luxembourg GAAP.

Managers must also draft a managers’ report which comments on the annual accounts in order to set out, in a faithful manner, the development of the company’s business and position.

Other specific duties include convening the shareholders’ meeting and preparing reports in defined circumstances.

Relevant rules

The Law of 10 August 1915 on Commercial Companies, as amended from time to time, sets out the general duties of managers and specific responsibilities in relation to the management and external representation of companies.

In addition, corporate documents of the company, in particular its articles of incorporation and any specific resolutions may impose additional requirements or restrictions on managers. In some cases, such corporate documents may override certain provisions of the law as described in this section. Managers should therefore be aware of relevant provisions.

The duties and specific responsibilities of managers in relation to the preparation and publication of accounts are regulated by the Law of 19 December 2002 on the Register of Commerce and Companies and the Accounting and Annual Accounts of Undertakings.
What type of company?

In the Netherlands, subsidiaries within a group are most likely to be private companies with limited liability (besloten vennootschap met beperkte aansprakelijkheid or “BV”).

Management structure

Dutch companies can use one of the following systems.

- **Two-tier system**: This includes, in any case, a shareholders’ meeting and a management board, entrusted with the management of the company. It may also include a separate supervisory board, responsible for supervising and advising the management board.

- **One-tier system**: In this case there is only one board, consisting of executive directors and non-executive directors. The executive directors are generally responsible for day-to-day management and the non-executive directors are at least responsible for supervising the management of the board as a whole. All directors, however, remain collectively responsible for actions taken (see “Powers”).

A person who acts as a managing director without having been formally appointed as such may, under certain conditions, be held to be liable as a managing director.

The two-tier system is the most commonly used management structure for group companies in the Netherlands. In this section on the Netherlands, therefore, the term “directors” refers to managing directors and the term “board” refers to the management board. Further rules apply to supervisory directors and members of a one-tier board.

Board composition

A Dutch company must have at least one director, although the company’s articles of association (statuten) may specify that there should be a greater number.

Both legal entities and individuals can act as directors.

Unless the articles provide otherwise, directors are not required to have specific qualifications and there are no nationality or residency restrictions or share ownership requirements. For tax purposes, it may be necessary for a certain number of directors to be resident in the Netherlands.

Directors of “large” Dutch companies and certain “large” Dutch foundations (as defined in Dutch law) cannot hold more than a certain number of supervisory positions. If directors are appointed in violation of these restrictions, the last appointment is void.

Supervisory positions at more than one legal entity within the same group are regarded as one position only.

New legislation is expected to be submitted to the Dutch Parliament shortly, under which a person can be disqualified from acting as a managing / executive director or supervisory / non-executive director if he / she is shown to have improperly managed a legal entity during, or for a certain period preceding, the bankruptcy of that entity.

Appointment and removal

The first directors are appointed in the company’s incorporation deed and thereafter, as a general rule, by the shareholders’ meeting. The articles may provide that directors are appointed by a meeting of holders of shares of a specific class, provided that each shareholder with voting rights can take part in the decision-making for the appointment of at least one director. There is no fixed term of office for a director, unless otherwise provided in the articles or in the resolution on appointment. A director can be suspended and / or removed at any time by the corporate body empowered to appoint that director. Other corporate bodies can also remove directors, if permitted to do so by the articles. Directors can also be suspended by the supervisory board (if any), unless the articles provide otherwise. A resolution to suspend or remove a director can be voided by the court if the relevant director was not given a proper hearing before such resolution was adopted. If the company has a works council, the works council may be entitled to give non-binding advice to the board before a director is expected to be appointed or removed. If the “large” company regime applies, specific rules for appointing and removing directors must be observed. The articles must provide for the temporary management of the company if a seat on the board is vacant or one or more directors are unable to perform their duties.
Powers

The board is entrusted with the management of the company.

The board is not subordinate to the shareholders or supervisory board (if any). The articles may, however, provide that certain board resolutions require the approval of another corporate body (such as the shareholders’ meeting or the supervisory board) or that the board must comply with the instructions of another corporate body. Any such instructions should not conflict with the interests of the company and the business connected with it.

If the company has a works council, the board may be required to seek its consent or advice before taking certain important decisions.

The board may establish written regulations (reglement) which set out its working methods and decision-making process and may also determine the duties which particular directors are responsible for.

The directors have collective powers and responsibilities as they share responsibility for all decisions and acts of the board and the individual directors can, in principle, be held liable for mismanagement if duties are not fulfilled properly (see “Liability”).

The company is represented by the board. Each individual director is also authorised to represent the company, unless the articles provide otherwise. In addition, the board may give specific powers to any person of its choice.

General duties

The board is responsible for determining the company’s long term strategy, implementing and supervising such strategy and reporting back to the shareholders. The strategy determined by the board must be in accordance with the company’s objects, the interests of the company and the business connected with the company.

Each director is under a duty of due care. This means that a director must properly fulfil the duties assigned to him / her in accordance with what can be expected of a reasonable and competent director in the same circumstances. In doing so, directors must act in good faith and for proper purposes in a manner which they believe is in the best interests of the company and of the business connected with the company (see “Liability”).

This implies that a director must have a reasonable knowledge of the company’s business, obtain reliable information as relevant and understand the consequences of decisions made.

The duty of good faith means that the company and its directors and shareholders (as well as any other parties connected with the company’s organisation pursuant to the law or the articles) must behave in a reasonable and fair way towards each other.

Who are the duties owed to?

In performing their duties, the directors must act in the interests of the company and of the business connected with the company. This may include the interests of the:

- shareholders (meaning all the shareholders jointly, not individual shareholders),
- employees,
- group to which the company belongs, and
- creditors.

Dealings with company / conflicts

A conflict of interests will, in principle, only affect a company’s internal decision-making. The authority of the board and its directors to represent the company remains unaffected.

A director cannot take part in discussions and decision-making by the board if he / she has a direct or indirect personal interest in the business being considered that conflicts with the interests of the company or the business connected with the company.

If, as a result, no resolution can be adopted, the resolution must be adopted by the supervisory board. If there is no supervisory board, the resolution must be adopted by the shareholders’ meeting, unless the articles provide otherwise.

Any resolution adopted in violation of these rules can be nullified.

Actions taken as a result of such resolution, however, as a general rule, remain unaffected. This means that a company can only nullify such actions or claim damages in very specific circumstances, where a third party knew that there was a conflict of interests and took advantage of the situation.
**Netherlands**

**Liability**

The directors are collectively responsible for the management of the company. A director fails to properly perform his/her duties if it is established that he/she did not act in accordance with what can be expected of a reasonable and competent director in the same circumstances. If the company has been improperly managed, as a general rule each director is fully liable to the company, unless he/she cannot be seriously blamed and he/she did not fail to take measures to avert the consequences of such improper management. If duties have been allocated to other directors, this is also taken into account. In line with this general rule on liability, Dutch law explicitly provides for BVs that directors can be held personally liable if, as a result of a distribution or repayment on shares, the company is no longer able to satisfy its debts as they fall due, and the directors knew or reasonably should have known that this would be the case. As above, individual directors can avoid liability in certain circumstances.

A director can also be directly liable to third parties (such as individual shareholders or creditors) for breaching a personal duty of care towards them or indirectly liable if found responsible for unlawful acts which would otherwise be attributed to the company.

In addition, directors may incur liability under specific rules for matters such as tax liabilities and the publication of misleading annual accounts.

**Indemnities and protections**

A company may agree to indemnify its current and former directors against liabilities to third parties for acts done in the performance of their duties. Such an indemnity may also be provided by a major shareholder or direct or indirect parent company.

Companies cannot, however, indemnify directors against claims resulting from the intentional acts, gross negligence or seriously culpable conduct of the directors. Likewise, an indemnity cannot protect the directors if the company is declared bankrupt.

Damages which can be indemnified by the company may include payments to third parties as a result of civil, criminal or administrative claims. In addition, a director may be indemnified by the company for the reasonable costs of defending a claim.

The indemnity may be provided in the articles or in a separate agreement with each director.

Exoneration clauses which seek to limit the liability of the directors to the company are in general deemed null and void. The shareholders’ meeting can, however, resolve to release directors from liability towards the company. Directors cannot rely on such a release in circumstances where it would be unfair or unreasonable for them to do so. In addition, such release does not release directors from liabilities towards third parties or from criminal liabilities incurred.

**Insurance**

Dutch companies are permitted to take out insurance against liabilities which may be incurred by their directors.

Typically, such insurance policies cover amounts which may be payable by the directors insured because of a claim for damages made against them in relation to the performance of their duties as directors of the company.

The insurance will not cover:

- criminal, tax or administrative penalties,
- intentional damage, or
- damage resulting from the gross negligence of the directors.

Legal or investigative costs incurred in defending a prosecution may, however, be covered.

Most insurance terminates if a company is declared bankrupt. In most cases, however, it is possible for the directors to extend the period during which claims can be filed and will be covered following the termination of the insurance.

**Financial difficulty and insolvency**

If the company goes bankrupt, the directors are liable to the joint creditors, rather than to the company.

Each director, and each person who was involved in determining the company’s policy as if he/she were a director, is jointly and severally liable for a deficit in the insolvent company’s estate if the board appears to have performed its duties improperly in the three years preceding the bankruptcy and if it is apparent that the bankruptcy was to a large extent caused by such improper performance of duties.

An individual director can avoid liability if he/she can prove that he/she cannot be blamed for the improper management of the company and that he/she did not fail to take measures to avert the consequences of the company being improperly managed.

If the board has not complied with its obligation to keep proper books and records of the company or with the obligation to publish the annual accounts and annual report (if applicable) in a timely manner, it will be assumed that the company was improperly managed and the directors cannot contest this presumption. It will also be assumed that the improper management of the company was a major cause of the bankruptcy, although the directors can seek to prove that this was not the case.
Dutch law does not specify how board meetings should be convened or held. Procedural rules may, however, be laid down in a company’s articles or regulations. For tax purposes it may be necessary for board meetings to be held in the Netherlands or that a certain number of directors participates in board meetings from the Netherlands.

Unless the articles or regulations provide otherwise, board resolutions are adopted by an absolute majority of the votes cast, without a quorum being required, provided that all directors have been given the opportunity to participate in the decision-making.

As a general rule, directors have equal voting rights. The articles or regulations may, however, give certain directors more than one vote, provided that no director has voting powers that allow him / her to override the votes of all the other directors acting together.

A director may be represented at a board meeting by another director and may give a specific proxy to another director to vote on his / her behalf. Such proxy can only be granted for a specific meeting and not on a continuing basis.

Usually the articles or regulations allow for a board resolution to be adopted in writing, provided that all directors agree to the relevant resolution or that the proposal concerned is submitted to all the directors and none of them objects to it.

The board must keep a record of the resolutions it adopts.

Dutch law does not prescribe the form of such record. Resolutions adopted in a meeting are usually recorded in the minutes of the meeting. These minutes are usually signed by the chair and secretary of the meeting as evidence of their adoption.

The board must keep books and records of the company and store these for a period of at least seven years. The books and records must be set out in a way that, depending on the nature and size of the company, allows an accurate assessment to be made fairly quickly of its financial status.

The board must prepare the annual accounts and the annual report (if applicable) of the company and make them available to the shareholders within five months of the end of the financial year. In special circumstances, the shareholders’ meeting may extend this period by no more than six months.

The board must file the annual accounts with the Dutch Trade Register within eight days after they have been adopted, or if they are not adopted, within 13 months of the end of the financial year. The annual report (if applicable) must be deposited with the Dutch Trade Register at the same time.

Book 2 of the Dutch Civil Code sets out the general duties of directors and their responsibilities in relation to the management and external representation of a company.

In addition, corporate documents of the company (including its articles, regulations and any specific resolutions or agreements between a director and the company) may impose additional requirements or restrictions on the directors.
What type of company?

In the PRC, subsidiaries within a corporate group are usually limited liability companies. In particular, three types of foreign investment enterprise ("FIE") are used by non-PRC investors setting up a new PRC enterprise or acquiring an existing PRC enterprise. These include:

- **Equity Joint Venture ("EJV")**: a limited liability company with at least one foreign investor and one domestic investor.
- **Co-operative Joint Venture ("CJV")**: a limited liability company or unincorporated venture with at least one foreign investor and one domestic investor. In this section of the guide, we only focus on the limited liability form rather than unincorporated venture, which is not used often in practice.
- **Wholly Foreign Owned Enterprise ("WFOE")**: a limited liability company which is wholly-owned by foreign investors.

Non-PRC investors can also establish PRC holding (or investment) companies to invest in other entities, subject to specific qualification requirements in respect of registered capital / total asset value and number of FIEs held. A holding company is strictly for investment and not permitted to engage in manufacturing operations. Holding companies can be EJVs or WFOEs.

Other possible vehicles, not addressed by this section of the guide, include companies limited by shares.

Management structure

**EJV / CJV**

In an EJV or CJV, the board of directors is the highest decision-making authority of the company and exercises powers and functions which would normally be reserved for shareholders in other jurisdictions. There is no separate shareholders’ committee to which the board of directors is responsible.

**WFOE**

The board is responsible to the sole shareholder or the shareholders’ committee of the WFOE (made up of all of the WFOE’s shareholders). Accordingly, the sole shareholder / shareholders’ committee is the highest decision-making authority and makes decisions on major issues affecting the company. The board carries out the functions assigned to it by law as well as any powers and functions granted to it by the articles (see “Powers”). A WFOE with a “comparatively small” number of shareholders, or which is “comparatively small” in scale, may have one executive director instead of a board. There is no specific definition of what “comparatively small” means. In practice, if a WFOE has a sole shareholder, it is common to have one executive director instead of a board of directors.

All types of company may (and in practice almost always do) have a “general manager”, who is appointed / dismissed by the board, accountable to the board and in charge of the production, operation and management of the company.

Board composition

An FIE established as a limited liability company must have a board of between three to 13 members, except for a WFOE which is “comparatively small” (see “Management structure”).

Only natural persons over the age of 18 can be appointed to the board.

The board of directors may have employee representatives, elected by the employees.

The general manager of a company, if not a director, is entitled to attend meetings of the board of directors as a non-voting attendee.

In addition, a supervisor is entitled to attend meetings of the board of directors as a non-voting attendee and can raise queries or make suggestions on the matters discussed at the meetings of the board. A supervisor is an officer of the company who, sometimes as a member of a supervisory committee, performs the function of supervising the directors and calling them to account.

Appointment and removal

**EJV / CJV**

The term of office for a director of an EJV is limited to four years and for a director of a CJV to three years. Directors can stand for re-election.

**WFOE**

The term of office for a director of a WFOE cannot be longer than three years, although this is renewable upon re-election. Directors are elected and removed by the sole shareholder / shareholders’ committee.

For all types of company, it is necessary to file the letter of appointment / replacement and other supporting documents (such as the application form signed by the legal representative of the company) with the State Administration for Industry and Commerce. The legal representative is the officer of the company with the apparent authority to represent and enter into binding obligations on behalf of the company.
In an EJV or CJV, the board of directors is the highest decision-making authority of the company and therefore has wide powers to act.

**WFOE**

The directors of a WFOE can exercise the powers specifically granted to them by the articles. In addition, the law gives the directors the statutory power to:

- implement the decisions of the sole shareholder / shareholders’ committee,
- decide on the company’s business plan and investments,
- draw up the company’s annual financial budgets and final accounts,
- formulate the company’s profit distribution plans and plans for making up losses,
- plan any increase or reduction of the registered capital or issue of corporate bonds of the company,
- decide on any merger, division, dissolution, liquidation or change to corporate form of the company,
- set up a system for managing the company, and
- appoint or remove a general manager, deputy general manager and the person responsible for financial matters and decide on their remuneration.

**General duties**

The duties expressly owed by a director of a company by law are the duty of loyalty and the duty of diligence.

The duty of loyalty is not defined, but is generally understood to mean that directors must perform their duties so as to avoid conflicts of interest and to protect and act in the best interests of, and for the benefit of, the company.

The duty of diligence is not defined either, but is generally understood to mean directors must exercise due care and protect the interests of the company.

Directors must also discharge any additional obligations imposed on them by the company’s articles of association.

**Who are the duties owed to?**

The general duties of the director are owed to the company.

**Deals with company / conflicts**

Directors are expressly forbidden from carrying out certain acts which may cause them to act contrary to their duties of loyalty and diligence to the company. These include:

- accepting bribes or other illegal income or seizing the property of the company,
- misappropriating company funds,
- depositing company funds in an account opened in the name of the director or anyone else other than the company,
- breaching the company’s articles by lending company funds to a third party or using company property to provide security for a third party without obtaining shareholder and / or board approval,
- entering into a contract with the company in breach of the articles or without obtaining shareholder approval (in the case of a WFOE) or board approval (in the case of an EJV or CJV),
- using the director’s position to divert commercial opportunities of the company, or engaging in business similar to the business of the company, for the benefit of the director or another third party, without obtaining shareholder approval (in the case of a WFOE) or board approval (in the case of an EJV or CJV),
- accepting commissions for transactions between third parties and the company, and
- disclosing company secrets without authorisation.
Liability

Directors who breach their duties may be subject to civil liabilities, fines and administrative punishments in accordance with the procedures of the relevant PRC government authorities, disciplinary measures of the company set out in its articles or criminal liabilities for any crimes committed.

Civil liabilities may arise where directors violate PRC laws, administrative regulations or the company’s articles during the performance of their duties. If this results in a loss to the company, the supervisory committee / supervisor(s) or a shareholder may initiate legal proceedings against the director. If shareholders’ interests are adversely affected, those shareholders may initiate legal proceedings against the director.

Directors may incur criminal liabilities for misconduct contrary to PRC criminal laws (such as the giving or accepting of a bribe) or where an activity of the company is illegal and the director is directly responsible for such activity. Directors are not automatically considered liable for crimes committed by the company. Whether or not a director is considered responsible for such activity will depend on the circumstances of the case.

Indemnities and protections

Generally speaking, the personal liability (whether civil or criminal) of a director cannot be restricted or limited by contract or otherwise. The company or group may, however, agree specific terms with directors in relation to their engagement as directors (for example, that insurance cover will be provided).

To mitigate risk, it is advisable for directors to voice their objections if they are aware of decisions which are in breach of, or may breach, the law. This is because the law provides for directors to be collectively responsible for board resolutions passed in violation of PRC laws, administrative regulations or the articles of the company and which cause material loss to the company.

It is thought, however, that directors are likely to be released from such liability if proven to have expressed their opposition to such resolution when it was put to vote and their opposition was recorded in the minutes of the board meeting.

It is also advisable for directors to attend all board meetings or appoint a suitable person to act as their proxy if they cannot attend.

Insurance

The directors may request that the company put in place liability insurance.

Directors’ liability insurance in the PRC typically covers liability incurred by a director to third parties in the course of acting in the capacity of a director in respect of which the director is unable to obtain reimbursement from the company. It does not cover insider trading, bribery or any criminal offences committed by the director, or death, disease or personal injury directly or indirectly resulting from the acts of the director.

Financial difficulty and insolvency

Directors may be held personally liable for a company becoming insolvent if they are found to be in breach of their duties to the company and that this breach led to the company’s insolvency. Conversely, directors cannot be held personally liable for any decisions made or acts undertaken which are not in breach of their duties, even if these decisions or acts were, in hindsight, commercially unsuccessful and led to the insolvency of the company.

Directors found personally liable for the insolvency of a company will incur general liabilities. These may include responsibility for the company’s debts to the extent that the acts of the directors caused loss to the company.

In addition, these directors will not be permitted to act as directors of any company in the PRC for three years commencing from the date when the insolvent liquidation of the company is completed.
Decisions and meetings

The articles of association usually set out how decisions of the board are to be made and how board meetings are to be convened, constituted and held. Apart from resolutions passed at board meetings, the articles may provide for written resolutions. They may also allow for attendance at board meetings via conference call / video-conference.

Generally, there is no minimum notice requirement under PRC law (other than for a CJV), so this will be subject to a company’s articles. Each director generally has one vote.

**EJV / CJV**

Special requirements apply (subject to any higher threshold imposed under the articles of association of the company):

- a board meeting must be convened at least once a year by the chair or, failing which, the vice chair,
- directors making up one-third or more of the total may call a board meeting,
- the quorum for a board meeting is two-thirds or more of the total,
- at least ten days’ prior notice is required for a board meeting of a CJV, and
- certain statutory matters (such as amendments to the articles and increases or reductions of the company’s registered capital) require the unanimous approval of the directors present at the board meeting.

Minutes

The board is required to keep minutes of board meetings. These should be signed by all the directors who attended the meeting.

Under PRC law, there are no specific rules about the language in which the minutes should be written or which require the registration, publication or notarisation of the minutes.

Administration and accounts

The directors must ensure that the shareholders can inspect the company’s accounts.

Previously, companies were required to complete an annual inspection by the State Administration for Industry and Commerce between March and June of each calendar year. This requirement has been abolished from March 2014 and is in the process of being replaced by a requirement to submit an annual report to the State Administration for Industry and Commerce before 30 June. The annual report will be made available for public inspection.

If a company provides false information or conceals material information in any financial / accounting documents submitted to any authorities, the relevant authorities may impose a fine of between RMB 30,000 and RMB 300,000 on those who are directly responsible, including directors.

Relevant rules

The Company Law issued by the Standing Committee of the National People’s Congress of the PRC, as amended with effect from 1 March 2014, applies to EJVs, CJVs and WFOEs.

Other laws also apply as set out below.

**EJV**

- The PRC Sino-foreign Equity Joint Venture Law and Implementation Rules.

**CJV**

- The PRC Sino-foreign Cooperative Joint Venture Law and Implementation Rules.

**WFOE**

- The PRC Wholly Foreign Owned Enterprise Law and Implementation Rules.

**Holding company**


In addition, the directors of a company must comply with the constitutional document of the company, that is, the articles of association.

The contents set out above do not constitute any opinion or determination on, or certification in respect of, the application of PRC law. Any comments concerning the PRC are based on our transactional experience and our understanding of the practice in the PRC. Like all international law firms with offices in the PRC, Linklaters LLP and its affiliated firms and entities (including Linklaters in Hong Kong) are not licensed to undertake PRC legal services. We have standing arrangements with a number of PRC lawyers. If you would like advice on the application of PRC law or other PRC legal services, please let us know and we would be pleased to make any necessary arrangements on your behalf.
### Poland

#### What type of company?

In Poland, subsidiaries within a group are most likely to be limited liability companies (*Spółka z ograniczoną odpowiedzialnością* or "Sp. z o.o.").

#### Management structure

In most cases, the Sp. z o.o. is governed by the members of a management board only. The shareholders of the company may, however, choose to create a supervisory board or audit committee (*komisja rewizyjna*).

A supervisory board (or audit committee) must be created in a Sp. z o.o. if the share capital of the Sp. z o.o. exceeds PLN 500,000 (approx. €120,000) and there are more than 25 shareholders.

Details of any such arrangements will be set out in the company's articles of association.

#### Board composition

An Sp. z o.o. may have one or more members on the management board. There is no maximum number of board members.

Only individuals with full legal capacity to act may be appointed as board members.

Certain statutory reasons may prevent a person from acting as a managing director, for example, if they have been convicted of certain crimes under the Polish Criminal Code.

There are no age, nationality or residence restrictions applying to directors and nor do directors have to have any specific qualifications.

It is possible to serve as a member of the management board of more than one company within the same group. A member of a management board must not, however, without the consent of the company, engage in any business activity in competition with the company or serve as a board member of a competitor company.

Board members are allowed, but not required, to own shares in the company.

#### Appointment and removal

Board members are appointed by shareholders’ resolutions. The articles of association can delegate this power to another corporate body, for example, to a supervisory board or give individual shareholders the right to appoint a certain number of board members.

Board members can also be dismissed by shareholders’ resolution or resign before the end of their term in office. The articles of association may include additional provisions, for example, to limit the right to dismiss a member of the management board, unless this is done for important reasons.

The term of office of a member of the management board is determined by the company’s articles of association.
Poland

Powers

The management board has the power to run the affairs of the company and represent the company. Each member of the management board may, without a prior resolution of the management board, conduct the company’s affairs within the ordinary course of the company’s business. Certain management board decisions, however, require the prior consent of the shareholders or of the supervisory board.

Whilst a board member’s power to represent the company to third parties cannot be limited, their internal authority to act may be restricted. If the management board has more than one member, the company may be represented by two members of the management board, acting jointly, or by one member of the board acting together with a holder of a commercial power of attorney (prokurent). The articles of association may restrict powers of representation to some board members or grant powers of representation to a commercial proxy.

Acts carried out by the company which require a shareholders’ resolution (such as the acquisition / disposal of real estate) are considered null and void if the required resolution is not obtained. Acts which are carried out without consents required by the company’s articles are treated as valid under the law (although the members of the management board may incur liability for violating the articles of association).

General duties

The members of the management board have a general duty to manage the affairs of the company.

In doing this, the members of the management board must exercise diligence and carry out their duties in a professional way.

Who are the duties owed to?

Managing directors owe their general duties to the company and not to its shareholders or to the group to which the company belongs.

Deals with company / conflicts

The law regulates conflicts of interest between the company and

• a member of the management board,
• his / her spouse, relatives or relations up to the second degree, and / or
• persons with whom he / she has personal relations.

If such a conflict arises, the member of the management board cannot take part in making decisions on the relevant matters and may request that this be recorded in the minutes of the company’s proceedings.

In contracts between the company and a member of the management board and in disputes with him / her, the company is represented by the supervisory board or an attorney appointed under a resolution of the shareholders’ meeting.

The consent of the shareholders is required where the company and a member of the management board enter into certain agreements, including,

• loan agreements,
• credit agreements, and
• surety agreements.
# Liability

A member of the management board is liable to the company for any damage caused because of acts or omissions in breach of the law or of the company’s articles of association, unless the member was not at fault. The extent of the liability depends on the type, size and structure of the company.

Members of the board may also incur specific liabilities for corporate breaches (for example, for providing false data in their representation that contributions towards the share capital have been made by all shareholders in full when filing for registration of the company).

If the company does not bring an action for redress of damage caused to it within one year from the date on which the act causing the damage was discovered, any shareholder may file a statement of claim to redress such damage.

Members of the management board can also incur liability for criminal offences if, for example, they fail to file for bankruptcy, submit false data or authorise the acquisition by the company of its own shares.

# Indemnities and protections

In certain cases, it is possible to limit the liability of a member of the management board towards the company by way of a contract in which the liability for the damages caused to the company in connection with the member’s corporate duties is limited to a certain amount.

It is, however, not possible to indemnify members of the management board against damage caused to the company intentionally.

# Insurance

The company may enter into a directors’ civil liability insurance contract to protect members of its board from liability for damage caused in connection with their corporate duties.

Such insurance is usually only offered with a considerable liability excess and numerous exclusions and restrictions.

# Financial difficulty and insolvency

The board must convene a shareholders’ meeting if the balance sheet drawn up by the management board shows a loss exceeding the aggregated supplementary and reserve capitals and half of the share capital.

It is a criminal offence for the management board to fail to file for bankruptcy.

Liability will not attach to the board, however, if enforcement proceedings against the company prove ineffective, because the members can demonstrate that a petition for bankruptcy was filed at the appropriate time, or that they were not responsible for the lack of a filing, or that the creditor did not sustain any damage.
Poland

Decisions and meetings

The management board makes decisions by passing resolutions at board meetings.

The by-laws of the management board may allow members to attend board meetings via conference call / video-conference.

Resolutions of the management board will be adopted if all of the members have been properly notified of the meeting of the management board.

Resolutions are usually adopted by an absolute majority of votes, but the articles of association may provide otherwise.

Other issues such as the place of the meetings, quorum requirements and alternative methods of passing the resolutions are determined by the articles of association and by-laws of the management board.

Minutes

The law does not provide for any specific formalities with regards to the minutes of board meetings.

Certain board resolutions, however, must be recorded in minutes taken by a notary and published in the commercial register, therefore, will need to be set out in Polish.

The company’s articles or the by-laws of the management board may also provide that minutes of a board meeting are to be set out in writing and forwarded to the members of the board.

Administration and accounts

Each management board member has the right and the obligation to manage the affairs of the company.

The management board is required to keep due accounts and prepare annual financial statements after the end of each financial year.

The management board convenes shareholders’ meetings and must do so in certain circumstances (see “Financial difficulty and insolvency”). Further obligations to convene a shareholders’ meeting may be provided in the articles of association.

The board is also responsible for the company’s compliance with applicable laws, for example, by filing the company’s tax returns.

Furthermore, the management board is responsible for all necessary registrations and filings with the commercial register. Whenever the shareholder structure changes, the board must file an updated list of shareholders with the commercial register.

Relevant rules

The Polish Commercial Companies Code (Kodeks spółek handlowych) sets out the general duties for members of the management board and their responsibilities in relation to the representation and management of a Polish limited liability company.

A company’s constitutional documents (such as its articles of association or internal by-laws), specific resolutions and oral or written agreements between the management board and the company may impose additional requirements or restrictions on board members. Such arrangements, in some cases, may also override the provisions described in this section of the guide.
Portugal

What type of company?

In Portugal, a subsidiary within a group is most likely to be a joint stock company (sociedade anónima or “SA”). A subsidiary can also be a private limited company (sociedade por quotas or “Lda.”). A Lda. largely follows the same rules as are set out in this section of the guide for an SA, except where otherwise specified.

Management structure

SA
In an SA, the management and supervisory structure may follow one of three different models.

• **Traditional model**: board of directors / sole director (management) and a supervisory board.

• **One-tier model**: board of directors and an advisory Audit Committee (Comissão de Auditoria) with management responsibilities, and a statutory auditor / audit firm with supervisory responsibilities.

• **Two-tier model**: board of directors with executive responsibilities (Conselho de Administração Executivo) and a general supervisory management board (Conselho Geral e de Supervisão) and a statutory auditor / audit firm with supervisory responsibilities.

Shareholders may change the management structure at any time by choosing another one of these three models and modifying the company’s by-laws accordingly. Persons which have not been legally appointed as directors but act as such (administradores de facto) are bound by the criminal sanctions and civil liabilities which apply to directors.

Lda.
These are managed and represented by one or more managing directors (gerente).

The term “managing director” in this section refers to both the SA (administrador) and to the Lda. (gerente), as appropriate.

Board composition

Managing directors can be either individual persons with full legal capacity or corporate entities.

Corporate entities which act as managing directors must, however, appoint an individual with full legal capacity as their permanent representative. In this case, the individual and the legal entity which he / she represents are jointly and severally liable for the acts carried out by the individual.

In an SA, the number of directors is set out in the company’s by-laws.

If employees are appointed as directors of a company or of a company in the same group, this suspends or terminates the employment contract (see “Dealings with company / conflicts”).

Appointment and removal

Managing directors may be appointed in the company’s by-laws or elected by the general shareholders’ meeting.

SA
An SA’s managing directors are appointed for a renewable maximum term of four years and, as a rule, they should remain in place until a new appointment is made.

Managing directors may be removed at any time by a simple majority vote of the shareholders. Directors are entitled to receive compensation, however, if they are dismissed without a justified reason. It is also possible for one or more shareholders, representing at least 10% of the share capital, to apply to the Portuguese courts for removal of a managing director, as long as this is based on a justified reason.

Lda.
The managing directors of a Lda. are generally appointed without a maximum term and remain in place until they are removed or resign. The company’s by-laws may state otherwise.

As for an SA, the majority of the quotaholders can remove a director at any time. In addition, removal by the courts for a justified reason can be requested by any quotaholder.
Portugal

Powers

The managing directors are responsible for representing the company and managing its business.

SA
The SA’s managing directors have the power, among other things, to: choose the chair of the board, require a shareholders’ meeting to be convened, decide on the acquisition or disposal of real estate by the company, open or close commercial businesses, make major changes to the company’s organisation, sign agreements with other companies, decide on share capital increases (with some constraints) and plan mergers, divisions and transformations of the company.

Lda.
The managing directors of a Lda. have the power to carry out all acts deemed necessary or convenient for achieving the objects of the company, provided that they respect any resolutions of the shareholders.

In this type of company, however, the powers of the managing board may be more restricted by the shareholders’ meeting than in an SA.

General duties

The managing directors are responsible for representing the company and managing its business.

SA
Each director is under a duty of due care. This means that they must act in good faith and for proper purposes, in a manner which they believe to be in the best interests of the company and its shareholders. The actions of the directors are measured against the standard of care of a reasonable businessman.

The managing directors have to perform their duties with loyalty, in the best interests of the company, taking into consideration the long term interests of the shareholders and balancing other interests of other parties which may be relevant to ensure the sustainability of the company, including the company’s relationship with its employees, clients and creditors.

Directors are also subject to other general duties. These include the duty to:

• not compete with the company,
• maintain the company’s confidentiality,
and
• respect the principles of good corporate governance.

Directors may continue to be subject to certain duties, with regard to non-competition or confidentiality, after their term of office comes to an end, if so specified in their contracts.

Who are the duties owed to?

Managing directors owe their duties to the company, its shareholders, employees, clients and creditors.

Deals with company / conflicts

Managing directors should avoid conflicts between the interests of the company and their own interests.

Managing directors are also forbidden from taking loans or security or guarantees from the company.

As a rule, other contracts between the company and its managing directors are null and void unless:

• such contracts have previously been approved by non-conflicted directors, and
• a favourable report from the supervisory body is obtained.

Managing directors are, however, permitted to enter into contracts with the company without any restrictions applying to them if:

• the contract falls within the usual business of the company, and
• the managing director is not given any special benefit under such contract.

The managing directors cannot work under a subordinating contract for the same company or any other companies in a controlling or group relationship. This means that the appointment of any employee as a director of that company or in another group company will trigger the suspension or termination of the employment agreement.
Portugal

**Liability**

Managing directors are liable to the company for damage caused if the directors do not meet the standard of care of a reasonable businessman and / or act in breach of their duties or of the company’s by-laws. Directors will not be liable for a breach of their duties if they can prove that they acted without fault. In addition, the business judgement rule applies in Portugal, meaning that the decisions of the directors will be treated as valid as long as the directors act informedly, independently and in accordance with acceptable business criteria. The period for which directors can be held liable is, as a rule, five years following the term of the unlawful action or omission or of the occurrence of the damage.

If damage arises as a result of a decision of the management board, managing directors who are absent or who vote against the relevant decision are not liable for such decision.

Liability to the company’s creditors may be incurred when a managing director acts in a way that deprives the creditors of the return of their capital.

Managing directors may also incur subsidiary liability, if, as a result of the managing director’s conduct, the company fails to fulfil its tax obligations.

Furthermore, the directors are liable in general terms for damages directly caused to the shareholders and to third parties.

**Indemnities and protections**

A managing director cannot be indemnified for any liability incurred to the company itself.

In certain circumstances, it may be possible for a managing director to obtain a statutory indemnity from his / her own company for liability incurred towards third parties. Indeed, the liability of each director must be secured by any of the ways permitted by law.

This is only possible, however, if the managing director has not breached his / her duties to the company.

**Insurance**

In Portugal, the company can only pay directors’ and officers’ insurance premiums to the extent that the relevant indemnity exceeds the minimum coverage set out in the Portuguese Companies Code. This is because the premium for the minimum coverage has to be paid by the director. Minimum coverage rates may vary between €50,000 and €250,000.

This obligation of the directors may be dismissed by the shareholders’ meeting or by the by-laws, except where the company is listed or of a certain size.

Typically, such insurance policies cover amounts which may be payable by the directors who are insured because of a claim for damages made against them in relation to the performance of their duties as directors of a company. Most Portuguese policies, however, exclude liabilities deriving from actions qualified as “intentionally guilty” (doloso) and only cover negligence, thus significantly reducing the effect of such policies in what concerns the protection of the directors. Further, the insurance will not cover criminal or tax penalties and fines.

**Financial difficulty and insolvency**

Directors have specific duties when the company is in financial difficulty. These include, amongst other things, the obligation to apply for insolvency proceedings without undue delay, and at the latest within 30 days of the company becoming unable to settle its debts.

If a managing director fails to apply for insolvency, he / she will be liable for any damages caused.

If it becomes apparent from the annual financial statements or from a balance sheet set up in the course of the business year that half of the statutory share capital has been lost, a shareholders’ meeting must be called and the shareholders informed.

Managing directors may incur both civil and criminal liability for breach of insolvency rules.
### Decisions and meetings

**SA**

In an SA, board meetings should be held at least once a month, unless otherwise provided in the company’s by-laws. Meetings are convened by the chair of the board or by two other managing directors.

The law does not set out a specific notice period, but it states that it should be reasonable. The notice of meeting must be written and include an agenda, which directors must follow, unless all directors are present or represented at the meeting and agree otherwise. Usually, a majority of the directors must be present or represented at each board meeting and board resolutions are passed by a majority vote.

The managing board of an SA elects its chair, unless the company’s by-laws provide for the chair of the board to be elected by the general shareholders’ meeting.

Unless otherwise provided, meetings may be held by electronic means, as long as the company ensures that the means of communications used are secure.

**Lda.**

In a Lda., the managing board generally decides and acts by majority, unless the by-laws state otherwise.

### Minutes

Although not prescribed by law, the company’s by-laws or internal rules of procedure often provide that minutes of a board meeting are to be set out in writing.

### Administration and accounts

The managing directors are required to keep due accounts and to prepare and submit the annual financial report and the management report for the approval of the shareholder’s meeting.

The reports must be signed by all the acting managing directors. A managing director can, however, refuse to sign all or part of the reports as long as an explanation for this is provided in the report and by the director in person at the next shareholders meeting, even if he / she has already left office by then.

A managing director who has left office, but was in office during the year under review, may be required, if necessary, to provide information about such period to the shareholders’ meeting.

The managing directors must act to call a shareholders’ meeting if the company’s net assets fall below an amount equal to one-half or less of the share capital.

### Relevant rules

The Portuguese Companies Code (Código das Sociedades Comerciais) sets out the general duties of managing directors and their responsibilities in relation to the management and external representation of the company.

The company’s constitutional documents (such as its by-laws or any internal rules of procedure), specific resolutions and oral or written agreements between the managing director and the company may impose additional requirements or restrictions on managing directors. Such arrangements, in some cases, may also override the provisions described in this section on Portugal.

In a situation where a company may become insolvent, its managing directors may be subject to specific provisions of the Portuguese Insolvency Code (Código de Insolvência e da Recuperação de Empresas).
What type of company?

As of today, if a Russian company is used as a subsidiary within a multinational group, the choice is generally between a closed joint stock company (Закрытое Акционерное Общество or “closed JSC”) or a limited liability company (Общество Ограниченной Ответственностью or “LLC”). Another, though less common, entity used as a Russian subsidiary is an open joint stock company (Открытое Акционерное Общество or “open JSC”), which is similar to a UK public limited company or a French société anonyme. This form may be used, for example, if a Russian IPO is planned.

Russian civil legislation is currently undergoing a major reform. On 1 September 2014, amendments to the Russian Civil Code regarding legal entities will come into force. The amended Civil Code will differentiate between public and non-public JSCs, rather than between open and closed JSCs. This division is broadly similar to the existing division of companies, but has some substantial differences. The term “JSC” in this section on Russia means closed JSCs and, as of 1 September 2014, non-public JSCs. We do not cover provisions on open JSCs and public JSCs in this guide.

The amendments to the Civil Code are also likely to result in the revision of the subordinate legislation on JSCs and LLCs, which may directly affect any provisions described in this section on Russia.

Management structure

A JSC and an LLC can have up to four layers of governance, including:

- a general meeting of shareholders (JSC) or participants (LLC),
- a non-executive supervisory collective management body (referred to as a “supervisory board”),
- an executive collective management body (or “executive board”),
- an individual chief executive or CEO.

Each JSC and LLC must have a general meeting and a CEO. The executive board and the supervisory board are optional.

Supervisory boards and executive boards are typically used in entities which require an additional layer of corporate control at the local level. Specific management structure requirements may also be imposed on certain industries (for example, banks must have all four layers of corporate governance).

The term “directors” in this section on Russia includes the CEO, members of the supervisory board and members of the executive board.

Board composition

**JSC**

The minimum number of directors sitting on the supervisory board of a JSC is five. The executive board can have any number of directors.

**LLC**

An LLC’s supervisory board and executive board may include any number of persons.

For both JSCs and LLCs, only individuals can be appointed to the supervisory or executive board.

Under existing law, a sole individual may act as a company’s CEO, although the general meeting may resolve on the transfer of the CEO’s authorities to a management company. The forthcoming amendments to the Russian Civil Code expressly allow both an individual and a legal entity to act as a company’s CEO. Moreover, following these changes to the existing law, the CEO’s functions may be vested in two or more persons, acting jointly or separately.

There are no age, nationality or residence restrictions on directors and share ownership is neither required nor prohibited. Specific qualifications may be required, however, for directors in particular industry sectors, such as banking or professional participants in the securities market. In addition, there are certain restrictions in relation to directors simultaneously holding positions in the supervisory board and executive bodies.

Appointment and removal

**JSC (supervisory board)**

Members of a JSC’s supervisory board are elected by the shareholders on a “cumulative voting” basis for a term until the next annual general meeting. “Cumulative voting” means that the number of votes of each shareholder is multiplied by the number of persons who should be elected to the board. Each shareholder is entitled to give all its votes so calculated to one candidate, or to distribute them among two or more candidates. The candidates with a majority of votes are elected to the supervisory board.

The general meeting also has the power to remove a JSC’s directors. The removal or resignation of a single director requires the re-election of the whole supervisory board.

**LLC (supervisory board)**

Members of an LLC’s supervisory board are, by default, appointed and removed by the general meeting by a majority vote of the participants for a term specified in the company’s constitutional document (or charter). The company’s charter may, however, require a supermajority or establish “cumulative voting” or other procedures for this resolution (for example, the right of each participant to appoint a particular number of directors).

**JSC and LLC (executive board)**

The CEO and executive directors may be appointed by the general meeting or supervisory board, depending on the charter.
**Powers**

The executive board deals with the management of the company’s day-to-day activities, alongside the company’s CEO, and effectively limits the powers of the latter to the extent established by the company’s charter.

The supervisory board is a non-executive body intended to control the activities of the CEO and executive board. The main function of the supervisory board is to call general meetings and to pass certain specific resolutions reserved for its competence, for example, the company’s significant and related party transactions.

The supervisory board may create board committees, but these will not have any independent decision-making power. Their purpose is usually to carry out a preliminary analysis of matters for which the supervisory board is responsible and to provide relevant recommendations and proposals to the supervisory board.

The powers of the supervisory board and executive board are strictly limited to the issues specified by law and the company’s charter. All residual power (potentially a great deal) lies in the hands of the CEO.

**General duties**

A director of a JSC or LLC in the course of exercising his / her rights and performing his / her duties must act in the interests of the company and carry out such rights and duties with regard to the company, reasonably and in good faith.

There is no statutory definition of the obligation to act “reasonably and in good faith” that can be applied to the acts of the directors. According to recent court practice, it means taking all necessary and sufficient measures to achieve the purposes for which the company has been created.

**Who are the duties owed to?**

The law applying to both a JSC and an LLC expressly states that a director must exercise his / her rights and perform his / her duties in the interests of the company.

This means the interests of that particular company, and not the interests of its shareholders / participants, the group or the ultimate holding company.

**Dealings with company / conflicts**

### JSC

Potential conflicts of interest must be notified by a director to the company’s supervisory board and to the internal and external auditors.

The following information should be provided:
- entities in which the director alone, or with affiliates, holds 20% or more of the voting shares,
- entities in whose management bodies the director holds positions, and
- details of transactions in which a director may be interested.

Directors are considered interested in a transaction if they / their affiliates are a party, beneficiary, intermediary or representative in such transaction or hold management positions or more than 20% of the voting shares in any such party, beneficiary, intermediary / representative, as well as in other cases provided by the charter.

Transactions in which directors are interested require specific approvals which can be given by disinterested directors or by disinterested shareholders, depending on the value of the transaction and certain additional criteria.

### LLC

The rules are broadly similar to those applying to a JSC. Conflicts must be notified to the general meeting. Approvals for interested party transactions are given by the general meeting or the supervisory board.
Russia

Liability

If directors fail to disclose interests in transactions by the company they may be liable to the company for damages, including lost profit.

Administrative fines of up to RUR 30,000 can be incurred and directors can be disqualified for up to a year for failing to:

• call a shareholders’ meeting,
• include certain agenda items, and
• properly prepare a list of permitted attendees.

Directors may also incur criminal liability for illegally failing to convene a shareholders’ meeting or preventing the free exercise of voting rights at a meeting of shareholders or the board.

Specific liabilities which may be incurred where directors fail to comply with insolvency legislation are described in “Financial difficulty and insolvency”.

If more than one director is liable in respect of a particular act or matter, the liability of all directors will be joint and several.

Indemnities and protections

Under Russian law, it is not possible for companies to indemnify directors against liabilities they may incur as a result of carrying out the duties of a director.

The amendments to the Russian Civil Code which are due to take effect in September 2014 arguably provide for a possibility of limiting directors’ liability for acting unreasonably (but not in bad faith).

Insurance

The company may take out and pay for insurance for directors to cover any civil liability which they may incur.

Such insurance is not, however, very typical for the Russian market.

Financial difficulty and insolvency

Directors of a company are liable for losses caused by their violation of the provisions of the Russian insolvency legislation.

If a company becomes insolvent because of the acts or omissions of the directors, an arbitration manager acting for the creditors, or the creditors themselves, may bring an action against the directors. Directors will be liable for a company’s debts on insolvency only if it is proved that the insolvency was "caused" by their actions. In this case, the liability of directors will be secondary and will not arise unless the creditors’ claims cannot be satisfied out of the company’s property.

The law also establishes administrative and criminal liability for:

• premeditated bankruptcy, where directors have intentionally acted in a way which makes the company unable to perform its monetary obligations in full,
• fictitious bankruptcy, where directors make a deliberately false declaration of bankruptcy, and
• unlawful actions on insolvency, including the concealing, transferring to others, disposing of and destruction of property and information.

It should be noted that, in practice, liability for causing bankruptcy, as well as liability for premeditated and fictitious bankruptcy, is more likely to be imposed on the company’s CEO than on the members of the supervisory or executive board.
Decisions and meetings

**JSC (supervisory board)**
Resolutions of the JSC’s supervisory board are generally passed by a simple majority of votes, although there are exceptions set out by law. The charter may also require a supermajority of votes for specific resolutions and provide for the chair of the board to have a casting vote. A director cannot delegate the right to vote at a board meeting to any other person, even if they are also directors.

Board meetings are convened by the chair of the board at his/her own discretion or at the request of any director, the auditing committee, the external auditor, the CEO or any other persons provided for by the charter. The quorum for the meeting is established by the charter and may not be less than half of all directors.

Directors may take part in meetings by conference call/video-conference if permitted to do so by the charter.

**LLC (supervisory board)**
The decision-making process of the supervisory board of an LLC is not regulated by law. The necessary procedures should be set out in the charter.

**JSC and LLC (executive board)**
As in the case of the LLC’s supervisory board, provisions regarding decisions and meetings of the company’s executive board are established by the charter.

Minutes

Minutes of the meetings of the JSC supervisory board must be kept and must be in writing and in the Russian language. They do not need to be registered, published or notarised.

Amendments to the Russian Civil Code, which came into force on 1 September 2013, introduced specific provisions regarding decisions of meetings which arguably apply to meetings of the executive and supervisory boards of a JSC and an LLC. Under said amendments, written minutes of all meetings must be kept.

Administration and accounts

**JSC**
The general meeting is responsible for approving the company’s accounts. In practice, the supervisory board carries out the preliminary approval of the annual accounts prior to their approval by the general meeting.

The supervisory board of a JSC is also responsible for calling annual and extraordinary general meetings, approving the agenda of the general meetings, fixing the date for compiling a list of persons who have the right to participate in a general meeting and certain other matters relating to the convening and holding of such meetings.

**LLC**
The law does not specifically set out directors’ duties regarding the administration of the company and its accounts. The extent of their duties will, therefore, depend on the responsibilities of the board, as set out in the company’s charter.

Relevant rules

The key rules governing JSCs and LLCs are established by the Russian Civil Code, federal laws on JSCs and LLCs and certain subordinate legislation.

These rules may be expanded by the company’s charter and by-laws.

As mentioned above, Russian civil legislation, including provisions on legal entities, is currently undergoing substantial reform.

It should be noted that these changes are very likely to result in a substantive revision of all the subordinate legislation on LLCs and JSCs. Specific advice on Russian law should, therefore, be taken, wherever necessary.
What type of company?
In Singapore, subsidiaries within a group are most likely to be private limited companies.

Management structure
Each company is governed by a board of directors. There is no supervisory board.

Any person occupying the position of director of a corporation is treated as a director, regardless of the title such person is given.

Directors also include:
• persons in accordance with whose directions or instructions the directors of a corporation are accustomed to act, and
• any alternate or substitute directors appointed by the existing directors.

Board composition
Every company must have at least one director who is ordinarily resident in Singapore.

Where the company only has one member, that sole member may also be the sole director of the company.

Only individuals who are aged at least 18 years and have full legal capacity can be appointed as directors of a company.

Undischarged bankrupts may not be appointed as directors or be directly or indirectly concerned with the management of the company. This restriction applies whether they were adjudged bankrupt by a Singapore court or by a foreign court.

The articles may provide that directors must hold a prescribed number of shares. In this case, the director should obtain these shares within two months of appointment or such shorter period as is set out in the articles. The relevant director must also vacate his / her office if he / she ceases to hold the specified number of shares and the shares must be held by the director alone and not as one of several joint holders.

It is possible, and quite common, for a director to be appointed to several companies in the same group, although any such director must avoid conflicts of interest.

Appointment and removal
The procedures for appointing and removing directors are generally set out in the company’s articles. Articles typically provide that the shareholders of a private company may appoint directors by majority vote. The board of directors usually also has the power to appoint additional directors.

Shareholders may typically under the articles also remove directors. Currently, the Singapore Companies Act itself does not provide for shareholders to be able to remove directors from office, although such provisions are due to be introduced.

No specific term of office is provided for by law, although this may be set out in the articles.

In practice, most private companies have tailored articles which do not require directors to retire from office each year. If Singapore’s default articles apply to the company, at the first annual general meeting of the company, all the directors of a company must retire from office and, at the annual general meeting in every subsequent year, one-third must retire from office. Retiring directors are eligible for re-election by shareholders.
The business of a company shall be managed by or under the directors. The directors may, therefore, exercise all the powers of the company, except any power that the law or the articles of the company require the shareholders to exercise in general meeting.

It is possible for directors to delegate their powers to other directors, committees and non-directors, such as employees. The articles usually provide for the delegation of powers to committees. The board, however, remains responsible for exercising proper supervision and managerial control over the company.

In the absence of bad faith or fraud, the acts of the directors remain valid, notwithstanding any defect that may afterwards be discovered in the appointment of such directors.

Directors must at all times act honestly and use reasonable diligence in the discharge of their duties as directors.

Directors shall not use any information acquired by virtue of their position as directors improperly to gain an advantage (directly or indirectly) for themselves or for someone else or to cause detriment to the company.

A director is regarded as a fiduciary of a company and, accordingly, he/she is bound to observe all fiduciary duties imposed by the common law.

The fiduciary duties mean that directors should:
• act in what they honestly believe are the company’s best interests,
• avoid placing themselves in a position of conflict between their duty to the company and their personal interests, and
• exercise for proper purposes the powers and assets with which they have been entrusted.

As a general rule, directors owe their duties to the company, that is, the shareholders of the company collectively and not individual members of the company.

In exercising their powers, directors are entitled to have regard to the interests of the company’s employees generally, as well as the interests of its members.

Where the company is insolvent, the directors need to take into account the interests of the creditors of the company when exercising their powers.

A limited company must keep a register of each director’s interests in shares in the company or in related corporations (unless these are wholly-owned subsidiaries).

Directors have a duty to avoid conflicts of interests. Certain specific conflicts (such as the granting of loans to directors, payments for loss of office and concerning directors’ fees/ emoluments) are prohibited and require shareholder approval.

Direct or indirect interests in transactions or proposed transactions with the company must be disclosed to the board. Directors must also declare any office or property which may lead to a conflict of interest. The rules extend to interests of the director’s family.

Where the board waives a conflict in advance, this must be recorded in the meeting minutes. Disclosure must also be made to the shareholders in general meeting, although the articles may waive this requirement.

A failure to disclose interests means that directors, if convicted, may have to pay a fine not exceeding SGD 5,000 or be jailed for up to 12 months. The company may also have the option of voiding the relevant transaction and directors may have to account for any profits made.
Singapore

Liability

If a director fails to carry out the statutory obligations imposed on him / her, he / she may be criminally liable and subject to a jail sentence and / or a substantial fine. Less serious offences carry a fine only, sometimes coupled with a default penalty. For example, directors who breach their duties to act honestly and use reasonable diligence in the discharge of their duties to the company are liable to the company for any profit made or for any damage suffered by the company as a result, as well as liable on conviction to a fine not exceeding SGD 5,000 or to imprisonment for up to 12 months.

In addition to being criminally liable, directors who breach their fiduciary duties or wilfully breach statutory provisions (for example, by paying a dividend otherwise than out of profits or allowing a company to incur obligations which it cannot meet as the company is insolvent) may also be liable to the company or to third parties for losses incurred. The company may take action against the directors for such breaches.

Since, as a general rule, directors do not owe fiduciary duties to the members, members cannot sue the directors to enforce the company’s rights, except by a derivative action. A member whose interests are affected by the director’s conduct may, however, apply for an injunction to restrain the director from engaging in such conduct.

Indemnities and protections

A company cannot, in the articles or in any contract with a company or otherwise, exempt its directors from, or indemnify them against, any liability which by law would otherwise attach to them in respect of any negligence, default, breach of duty or breach of trust in relation to the company. Companies can, however, indemnify directors against liability which the directors may incur in defending civil or criminal proceedings where judgment is given in their favour or where the court decides to grant them relief.

The shareholders may also by majority vote release directors from their duties and excuse them from liability for breach of such duties. Any such release means that the company may not subsequently sue the director. The release is only effective, however, where:

• it does not amount to fraud on the minority, or oppression or disregard of interests of the minority shareholders,
• the transaction which the members are ratifying is not illegal,
• the release is not made on fraudulent or incomplete facts, and
• the company is solvent at the time of the release.

The Singapore court may also relieve a director from proceedings or anticipated proceedings for negligence, default, breach of duty or breach of trust.

Insurance

The law does not prohibit a company from purchasing directors’ and officers’ liability insurance for its directors against any liability which would otherwise attach to them in respect of any negligence, default, breach of duty or breach of trust in relation to the company.

It is common practice for a company to arrange for directors’ and officers’ liability insurance for its directors.

Financial difficulty and insolvency

Aside from their general powers to disqualify persons convicted for certain offences, the Singapore courts may disqualify a person from being a director or in any way taking part in the management of a company for up to five years if that person was a director of a company which went into liquidation while he / she was a director or within three years of ceasing to be a director and he / she is deemed unfit to act as director.

In deciding whether a person’s conduct as a director makes that person unfit to manage a company, the court will take into account:
• breaches of duties to the company,
• misapplication or retention of company property,
• the director’s responsibility for any failure by the company to comply with its obligations to keep registers, make filings and produce accounts,
• the director’s responsibility for the company becoming insolvent,
• the director’s responsibility for failures by the company to supply goods or services which have been paid for,
• the director’s responsibility for the company entering into any transaction to dispose the property of the company after the commencement of the winding-up, and
• whether the causes of the company becoming insolvent are attributable to its carrying on business in a particular industry where the risk of insolvency is generally recognised to be higher.
Decisions and meetings

The law does not dictate how the board should regulate its meetings and, therefore, this is typically set out in the articles. It is possible, and common, for directors to pass written resolutions and to attend meetings via telephone or video-conference, as these would typically be expressly provided for in the articles. Sole directors make decisions by signing a declaration in line with the law. If the articles do not require prior notice of meetings to be given, then it is not necessary to do so. Under Singapore’s default articles, the board can regulate the frequency of its meetings as it sees fit. Decisions are taken by a majority of votes, with the chair having a casting vote. The quorum for a board meeting is two directors, unless otherwise fixed. The default articles do not allow the votes of directors with a personal interest in a contract, or proposed contract, with the company to be counted. In practice, articles adopted by private companies allow directors to vote on transactions in which they are interested and count in the quorum for such meetings, provided they disclose their interests in the transaction / proposed transaction / other office / property held which may create a conflict. The Singapore Institute of Directors has, however, stated that it is good practice for conflicted directors to refrain from voting on conflict-related matters, even if there is no such prohibition. A local decision also suggests that, if conflicted directors take part in a decision, the transaction’s validity may be “impaired”.

Minutes

The law requires every company to cause minutes of all board meetings and written resolutions to be entered in the minute books of the company within one month of the meeting being held or the written resolution being passed.

Minutes of board meetings must be signed by the chair of the relevant meeting (or the chair of the following meeting).

There is no specific period for which the minutes must be kept.

Administration and accounts

The directors have a duty to ensure that the company’s accounts are properly prepared. In addition, they must take all reasonable steps to ensure that statutory provisions regarding accounts are complied with by the company.

The directors are required to present at the annual general meeting of the company a profit and loss account and a balance sheet, as well as a directors’ report. The accounts should cover the period since the preceding accounts were laid and not more than six months before the date of the meeting.

A company is required to hold its annual general meeting no later than 18 months after the incorporation of the company and subsequently at least once in every calendar year at intervals of not more than 15 months.

The law imposes numerous obligations on the directors to maintain statutory registers and prepare, file or distribute various documents or returns with the Registrar of Companies or to the company’s shareholders.

It is generally an offence for directors to fail to comply with these statutory obligations.

Relevant rules

The rules which are relevant to directors are set out in Chapter 50 of the Companies Act of Singapore. The Companies Act is currently in the process of being updated. Proposed changes to the Companies Act are wide ranging and intended to reduce regulatory burdens and compliance costs, provide greater flexibility for companies and improve corporate governance.

The Companies Act does not dictate how the board of directors should be organised, hence the structure and organisation of the board of directors of a company (such as the composition of the board and the regulation of board meetings) are usually provided for in the articles of association of that company.

The Companies Act sets out default “Table A” articles which a company can adopt. In practice, it is more common for companies to be governed by a tailored set of articles prepared by their legal advisers.

Under the proposed changes to the Companies Act, the articles will be combined with the company’s memorandum to become a composite corporate constitution.
What type of company?

In South Africa, subsidiaries within a group are most likely to be private companies. A private company’s memorandum of incorporation must prohibit it from offering any of its securities to the public and must restrict the transfer of its securities.

Management structure

South African companies are managed by a single board of directors. The board has the authority to exercise all company powers and functions unless legislation or the company’s memorandum of incorporation provides otherwise.

Executive directors are involved in managing the company and may also be employed by the company. A non-executive director is not involved in the day-to-day management and is also not a full-time employee of the company.

The law does not distinguish between executive and non-executive directors and decisions must be taken by the board acting collectively.

Persons who occupy the position of a director but are not designated as such will be treated as directors. Additionally, persons exercising significant control and management, despite not being a director, have the same duties as directors in some respects (for example, in relation to the disclosure of personal financial interests and standards of conduct).

Board composition

A private company must have at least one director. The memorandum of incorporation may specify a greater number.

Any natural person over the age of 18 can be appointed as a director, unless they are:

- prohibited by a court or any public regulation, or declared a delinquent by a court,
- an unrehabilitated insolvent,
- removed from an office of trust for misconduct or dishonesty,
- convicted and imprisoned, or fined over R1000, for offences involving theft or dishonesty, or offences under other South African legislation,
- the auditor of the company.

Directors are not required to have specific qualifications unless imposed by the memorandum of incorporation. There are no share ownership requirements, or nationality or residency restrictions.

A director may serve as a director of several companies in the same group, although directors should avoid conflicts of interest.

Appointment and removal

The first directors are the incorporators of the company. Thereafter, the directors are appointed or elected in accordance with the company’s memorandum of incorporation, provided that at least 50% of the directors must be elected by shareholders.

The memorandum of incorporation may provide for the direct appointment of a specified person or for a person to be a director due to holding a particular office or title.

On appointment or election, details about the director will be entered into the company’s record of directors which is available for inspection by the shareholders and the public. These details include: the director’s name and any former names, identity or passport number and nationality. Details of the appointment must also be notified to the South African Companies and Intellectual Property Commission.

Shareholders may remove a director by majority vote (ordinary resolution). For private companies, the default position is for notice to be given to the shareholders and the director concerned at least ten business days before the meeting. The memorandum of incorporation may alter this, however.

Directors may serve indefinitely or for a term set out in the memorandum of incorporation (typically three years).
Powers

Generally, the board is given wide powers to manage the company and to delegate to others. The South African Companies Act 2008 and the memorandum of incorporation may, however, limit the powers of the directors in relation to certain actions (such as amending the authorised share capital, issuing shares, reclassifying shares and authorising financial assistance).

The directors must exercise their powers and take decisions collectively as a board. This means that where the law requires or allows directors to do certain things, such as calling a general meeting of the shareholders, issuing shares or authorising the company to provide financial assistance, such actions should usually be approved by the board and not by a sole director.

Directors can, however, act individually where specific powers and functions have been delegated to them by the board, for example, so that one director can act as chief executive officer or managing director of the company.

It is also common for the board to delegate specific powers and functions to committees, officers, agents and the company secretary. The directors remain responsible, however, and are not absolved from their own duties. The board should, therefore, set up systems to supervise those acting under their authority.

General duties

The duties of directors are determined by common law, legislation, the company’s memorandum of incorporation and any contracts with the company.

Fiduciary duties of directors include, amongst others, the duty to:

- act in good faith and for a proper purpose,
- not exceed a director’s own or the company’s powers,
- act in the best interests of the company,
- account for profits, and
- exercise an independent and unfettered discretion.

A director must exercise the necessary skill and diligence in performing his / her duties. This depends on the nature of the business, the obligations on that director and the degree of skill that could reasonably be expected of a person with the director’s knowledge, skill and experience.

Other statutory duties include the duty:

- not to use the position of director to gain a personal advantage,
- to disclose any material information, and
- to avoid conflicts of interest.

Who are the duties owed to?

Directors’ fiduciary duties are owed to the company and not to the company’s shareholders, or to the group to which the company may belong.

It is important to bear this in mind, in particular, where a director is also a director of another company within the group, or has been nominated by a specific shareholder.

Directors may only sanction a company from incurring debt if the company is in a position to repay the debts in question. As such, the directors have a duty (whether it be directly or indirectly) to take creditors’ interests into account. Additionally, where a company is in business rescue proceedings (which are specified statutory proceedings to facilitate the rehabilitation of a company that is financially distressed), the directors have a duty to the company to exercise any management function within the company in accordance with the express instructions or directions of the appointed business rescue practitioner.

Dealings with company / conflicts

A director may not use his / her position of director or any information obtained in that position to gain an advantage or to cause harm to the company.

A director must also not place him / herself in a position where he / she has or may have a personal interest conflicting with his / her duty to the company. Directors must disclose conflicts of interest when contracting with the company. If the director fails to make the required disclosure, the contract is voidable against him / her.

If a director has a personal financial interest or knows that a related person has a personal financial interest, he / she must disclose that interest to the board and recuse him / herself from voting on the matter. If a director fails to do so, he / she may be liable for breach of his / her fiduciary duties or statutory obligations. The decision of the board or the agreement approved by the board will be invalid if the director fails to comply with his / her obligations. The shareholders or the court may, however, ratify such decision or agreement.

Certain transactions between a company and its directors must be approved by shareholders. These include loans, guarantees and security.
Liability

If a director breaches his / her duties to the company, he / she may be held personally liable for losses or damages caused to the company. A director may also be liable in delict if he / she failed to perform his / her functions as director with due care, skill and diligence. Further remedies against a director for breach of his / her duties include interdict, the right to set aside agreements concluded in breach of duties, the right to claim the profit or benefit arising from the breach and damages. If there is an employment contract between the director and the company, he / she may also be liable for breach of contract.

Any person (this includes the company and any shareholder) who has suffered a loss or damage as a result of a breach by a director of his / her duties, provisions of the company’s memorandum of incorporation and other provisions in the South African Companies Act 2008 may bring a claim against a director.

It is a criminal offence for a director to be party to fraudulent activities or to sign or authorise financial information containing false statements.

The court has the power to relieve the director from any liability if it appears to the court that the director acted honestly and reasonably and it would be fair, having regard to all the circumstances, to excuse the director.

Indemnities and protections

The provisions of a memorandum of incorporation or any other agreement with the company seeking to relieve a director from his / her duties or from liability for breach of his / her duties to the company are void.

A company can, however, indemnify a director in respect of any liability to both the company and third parties, except for liability for willful misconduct or willful breach of trust, lack of authority or carrying on the company’s business in a fraudulent manner.

A company can also indemnify or make an advance to a director for expenses incurred in defending any litigation against the director. The director is not required to repay such expenses if the proceedings are abandoned or absolve the director or arise in respect of a liability for which the company may indemnify the director.

A company cannot pay any fines imposed on a director who has been convicted of an offence in terms of any national legislation.

Insurance

A company may purchase insurance to protect a director against any liability or expenses for which the company is permitted by law to indemnify a director. A company may also take out insurance to protect itself against any liability for which it is permitted to indemnify a director.

A director may also, in his / her personal capacity, purchase insurance for an indemnifiable event.

Financial difficulty and insolvency

Directors have a duty to acquaint themselves with the financial position of the company.

Directors should not irresponsibly incur debts and liabilities, particularly if the company is in a near insolvency situation.

Directors are personally liable for loss, damages and costs sustained by the company where they engage in reckless or fraudulent conduct of the company’s affairs. It is also an offence for a director to participate in reckless or fraudulent trading.

A shareholder is able to apply for the winding-up of the company if the directors are acting in a fraudulent or illegal manner or if the company’s assets are being misapplied or wasted.
Decisions and meetings

Legislation sets out the default procedure in relation to meetings of directors, however, the memorandum of incorporation may alter the default position.

Meetings may be conducted by electronic communication as long as it enables effective participation, and decisions may be adopted by written resolution instead of at a board meeting, unless the memorandum of incorporation provides otherwise.

Generally, any authorised director may call a board meeting. Notice of a meeting must usually be given to all directors. There are no minimum notice requirements and the board may determine the manner of giving notice, provided it complies with any requirements under the memorandum of incorporation.

The quorum for a board meeting is generally a majority of the directors, however, the memorandum of incorporation may specify a different quorum.

Generally, each director has one vote, however, the memorandum of incorporation may alter this and provide that each director has an equivalent number or percentage of votes as that of the shareholder who nominated such director. Decisions are usually taken by majority vote unless altered by the memorandum of incorporation. The chair of the board, who will usually be elected by the other directors, is often given a casting vote to be used when votes for and against a resolution are equal.

Minutes

A company must keep minutes of all meetings of the directors.

There is no set form for directors’ minutes. The minutes must, however, be kept in writing and must include any declaration of personal financial interest made by a director (see “Dealings with company / conflicts”) and every resolution adopted by the directors.

The minutes must be signed by the chair of the meeting or by the chair of the next meeting of the directors. The signed minutes serve the purpose of verifying the business that was adopted by the directors.

A company must retain the minutes of all meetings of the directors for seven years after the date of each meeting or on which each resolution was adopted (if it was adopted in writing).

Minutes of the directors’ meetings are not accessible for inspection by shareholders of the company unless the memorandum of incorporation of the company permits it.

Administration and accounts

The law grants the directors the power to manage the business and affairs of the company subject to the provisions of the company’s memorandum of incorporation.

Directors must approve matters such as the:

• issue of shares,
• provision of financial assistance to directors or to certain persons acquiring shares in the company,
• distribution of dividends, and
• acquisition by the company of its own shares.

Directors have access to the financials and accounts of the company.

Annual financial statements must include a report by the directors on the state of affairs, business and profit and loss of the company. It must be approved by the board and signed by an authorised director.

Directors are liable to the company for any false or misleading statement or information in the financial statements of the company if they knew that the statement was false or misleading.

Relevant rules

The South African Companies Act 2008 and the Companies Regulations 2011 set out the duties of directors and their responsibilities in relation to their service to the company.

The directors’ general duties and liability are also governed by South African common law that must be read in conjunction with the Companies Act 2008.

The company’s memorandum of incorporation may contain provisions imposing additional obligations on the directors or restricting the directors’ powers or delegating their powers. The memorandum of incorporation may not, however, negate or limit the duties of the directors.

If a company faces financial difficulties, the provisions of the repealed Companies Act 1973 in relation to winding-up and liquidation of companies continue to apply until further notice from the legislature.
Spain

What type of company?

In Spain, a subsidiary company is most likely to be a public limited company (Sociedad Anónima or “SA”) or a private limited liability company (Sociedad de Responsabilidad Limitada or “SL”).

An SA is required if the company will be listed or will issue any kind of securities. The SA is also the required form if the company is to carry on certain regulated activities (for example, banking or insurance services).

The SL has a more flexible legal framework.

In this section on Spain, references to the company include both SAs and SLs, unless otherwise stated.

Management structure

The management of a company can be entrusted to:

- a sole director,
- two or more directors, acting jointly, or
- two or more directors, acting separately, or
- a board of directors (made up of a minimum of three members), acting collectively.

Where there is a board of directors, all or part of the board’s authority can be delegated to one or more of the board members (save for those powers and authorities which cannot be delegated by law or under the articles of association). These are usually referred to as the Managing Director(s) or the Managing Committee (acting collectively).

Persons who have not been formally appointed as directors, but in fact have major influence over the actual directors and effectively control the company (in certain cases, outwardly appearing as the actual directors), will be treated as directors under the law for the purpose of potentially incurring civil and criminal liabilities.

Board composition

In principle, unless the company’s articles of association set out any particular restrictions, any person over the age of 18 can be appointed as a director. Certain people cannot, however, act as directors because of misconduct or bankruptcy or because they hold a position (meaning certain public offices) which is considered incompatible with carrying out the duties of a director.

Directors are not required to have specific qualifications and there are no nationality or residency restrictions or share ownership requirements (unless otherwise provided in the company’s articles of association).

Directors not resident in Spain must, however, obtain a Foreign Resident Card Number (Número de Identificación de Extranjero) before being appointed as directors.

It is possible to serve as a director of several companies in the same group, although, where there is a conflict of interests, the affected director(s) cannot participate in or vote on any decision related to such transaction (see “Dealings with company / conflicts”).

Corporations can act as directors, but they must nominate an individual to represent them.

If an employee of the company is to be appointed as a director, specific advice should be taken on any employment law issues which may arise.

Appointment and removal

Directors are ordinarily appointed by the shareholders in general meeting (or by the sole shareholder, as the case may be) and can be freely removed by them at any time, according to the voting majorities set out in the law and / or the articles.

In SA companies, when there is a vacancy, directors can be also appointed by the board itself. The appointment of any such director (who needs to be a shareholder) must be ratified by the shareholders at the next general meeting.

It is customary to include the term of appointment of the directors in the company’s articles of association. Such term shall not exceed six years for an SA. Directors can, however, be re-appointed for further terms.

There are no time limits on the appointment of directors of SL companies.
Powers

As a general rule, the directors have authority to manage and represent the company and to deal with any matters which are not reserved for the decision of the shareholders by the company’s articles or by law (such as the approval of the annual accounts, appointment and removal of the directors, amendments of the articles and increases and decreases in capital).

Third parties who deal with the company in good faith are entitled to rely on the acts of the directors. They may also be able to rely on those who appear to have authority to bind the company.

General duties

Directors must comply with general duties set out by law. These include a duty on directors to carry out their role with the diligence expected from an orderly businessman. This means directors should act with due care, attention and prudence.

Directors also have a duty to act as loyal representatives in the best interests of the company. This means that, where there is a conflict between the interests of the director and those of the company, the director must put the company’s interests ahead of his / her own (see “Dealings with company / conflicts”).

Directors are also required to comply with the duty of secrecy, safeguarding all confidential information to which they have access in their position, even after they leave office.

Who are duties owed to?

Directors owe their duties to the company and must act in the best interests of the company.

This is generally understood to be the shared interests of all the shareholders, taken as a whole, and not the interests of only one, or some, of the shareholders or the directors’ own interests.

Dealings with company / conflicts

Directors must notify the company’s management body (or, if none, the shareholders) of any direct, or indirect, potential conflict of interest in which they or any related party may be involved. This should consist of a detailed description of the conflict. In addition, the affected director must not participate in or vote on any decision related to such transaction.

Directors must also disclose details of any investments they or related parties hold in other companies engaged in the same or similar activities to those of the company, as well as any positions or duties that they perform in such companies. Any conflicts of interest must also be disclosed in the annual report included in the company’s annual accounts.

Directors are not, for their own benefit or that of a related party, allowed to use the company’s name or their office for personal purposes. Directors should not take advantage of business opportunities they have become aware of by acting as directors, unless the company decides not to participate in the relevant transactions. Shareholder approval is needed where a director, or anybody related to the director, intends to engage in a business that is materially the same as, or closely related to, the business of the company.
Spain

Liability

As a general rule, directors are jointly and severally liable to the company, the shareholders and third parties (including the company’s creditors) for any damages caused by breaches of the law, the company’s articles or their duties as directors.

Directors may also incur criminal liability for crimes arising out of their duties as directors, as defined by the Spanish Criminal Code. These include the falsification of company information, the adoption of harmful or abusive agreements or fraudulent management.

Protections and indemnities

Generally speaking, it is not possible for a company to exempt a director from legal liability.

Directors will not be liable for damages caused if they can prove that they did not participate in the approval or execution of the decision causing the damage and were not aware of it. It is also a defence for directors to show that, even though they were aware of such decision, they took every available measure to avoid the damage, or at least expressly opposed it.

The authorisation or ratification by the shareholders of acts of the directors which led to damage having been caused does not release the directors from liability.

Insurance

It is common for large companies to take out directors’ and officers’ liability insurance for the benefit of the directors.

Policies are usually taken out to cover all the directors as a group and not individually. Premiums are usually paid by the company.

The insurance protects the director’s personal assets if claims are made against him / her. Legal costs and any sums that have to be paid are also usually covered.

The cover provided will protect against wrongful acts (actuaciones culposas) carried out by the director. It will not, however, protect directors from acts carried out in bad faith, wilful misconduct or any criminal liability incurred by the director.

Financial difficulty and insolvency

Specific obligations arise in cases of financial difficulty and appropriate legal advice should be taken.

Directors must call a shareholders’ meeting to decide on a share capital increase or decrease (for SA companies only) or to wind-up the company if losses have reduced the company’s net worth below certain thresholds. If the company is insolvent, the directors must request the start of insolvency proceedings.

In a winding-up scenario, if the shareholders’ meeting is not held or the shareholders fail to pass the appropriate resolutions, the directors must apply for the judicial winding-up of the company. This should be done within two months of the date on which the meeting should have been held or on which the resolution was not adopted, as the case may be. Failure to do so means that the directors in breach incur joint and several liability for all the company’s obligations which arise after the legal requirement to wind-up the company was met.

In addition, when directors have generated or increased the insolvency with malicious intent or gross negligence, they could be ordered to pay, from their own assets, a portion or all of the outstanding debts following the liquidation of the company.
### Decisions and meetings

Where the company is run by a board of directors, the articles will normally set out how meetings of the board are to be convened and decisions made. The articles may also allow for written resolutions without a physical meeting needing to be held, as long as no director opposes this procedure.

Notice of a board meeting must be sent to all directors (unless it is a universal meeting with all directors attending). Meetings can be convened by the chair of the board or by a third of its members if the chair refuses to convene a meeting on request and without reason. There is no minimum notice requirement, as long as reasonable notice is given.

A meeting of the board will usually be quorate if a majority of the directors attend the meeting. A higher quorum may be stated in the company’s articles, although the articles cannot stipulate that all members of the board must attend.

Each director has one vote. Usually, each decision of the board will be adopted by a majority of the votes of the directors present / represented at the meeting.

The articles may give the chair of the board a casting vote to be used when the votes for and against a resolution are equal.

### Minutes

The law requires companies to keep minutes of all meetings and decisions of the directors.

Minutes must be in the Spanish language and should comply with the requirements established by law. These include making reference, among other things, to the names of the attendees, the date, place and time of the meeting, the business transacted and the decisions adopted.

Depending on the decisions adopted, such minutes must be formalised in a public deed granted in front of a notary and registered with the Commercial Registry.

### Administration and accounts

The directors are responsible for the management of the company.

The directors must ensure adequate accounting records are kept and annual accounts are prepared, as well as carry out any public filings required by law.

In addition, the directors must prepare a directors’ report for each financial year. Both the annual report and accounts must be drawn up by the board and submitted to the shareholders’ meeting for approval.

### Relevant rules

The Companies Act 2010 (Ley de Sociedades de Capital) sets out the general duties of directors and their specific responsibilities for managing an SA or an SL.

It should be noted that regulations in the Companies Act 2010 as regards directors’ duties and liabilities are being reviewed. Proposed changes are intended to improve the efficiency of the management of Spanish companies by reinforcing the role of shareholders and establishing more control over the board.

In addition, the Insolvency Law 2003 sets out a specific regime for the obligations and liabilities of directors of companies in financial difficulty.

The company’s articles of association may impose additional requirements or restrictions on directors. Directors should, therefore, make themselves aware of and comply with the provisions in their company’s articles of association.
**Sweden**

### What type of company?

In Sweden, a subsidiary company is most likely to be a private limited company (*privat aktiebolag*)

### Management structure

Swedish companies are governed by a single board of directors.

If the board has more than one member, one director must be appointed as chair to preside over the work of the board and ensure that it performs its duties.

There is no specific legislation concerning the liability of a person who acts as director without having been formally appointed to this role. It should be assumed, however, that a person will not be able to escape from liability by not being formally appointed as a director if he / she in practice carries out the role of a director.

Further, the law does not permit a person to be appointed as director if such person does not intend to participate in performing the duties of the board, unless there is an acceptable reason for this. This restriction aims to prevent companies being used for criminal activity. It does not prevent directors from acting in a supervisory rather than an executive role in the company.

### Board composition

Private limited companies must have at least one director. If the board has three directors or less, at least one alternate director must be appointed. The number of directors and alternates or maximum and minimum numbers of directors and alternates must be set out in the company’s articles of association.

In companies with at least 25 employees, the employees are entitled to have two representatives on the board and one alternate for each such representative. In companies with at least 1,000 employees, the employees are entitled to three representatives and three alternates. Exemptions from this mandatory rule may be granted in particular circumstances. Employee representatives have the same obligations and responsibilities as other members of the board.

The following cannot be directors: non-physical persons (such as companies), minors, persons under guardianship, persons subject to a ban on trading and persons who are bankrupt. In addition, only those who plan to take part in the activities of the board may be appointed as directors (see "Management structure").

At least half the board must be domiciled within the EEA, unless otherwise permitted by the Swedish Companies Registration Office (*Bolagsverket*).

### Appointment and removal

The board of directors is appointed by the shareholders at the general meeting, usually by a majority vote. The articles of association may also provide for one or more directors to be appointed by a third party or by a particular shareholder.

The right to appoint members cannot be delegated to the board or to an individual director.

Employee representatives on the board are appointed by a local union that is bound by a collective bargaining agreement with the company.

Directors may at any time resign or be removed by the person who appointed them. A change in the composition of the board does not take effect, however, until the Swedish Companies Registration Office (*Bolagsverket*) has received notification of the change.

The term of office for a board member is until the close of the first annual general meeting held after the year in which the board member was appointed. A longer period may, however, be set out in the articles of association. The maximum period is four years.
Powers

The board of directors has the power to organise the company and manage its affairs.

The board may delegate certain duties to one or more directors or to other persons, but must act with care and regularly monitor that the delegation can be maintained.

The allocation of work between directors, if any, must be set out in the board’s rules of procedure. These rules must be adopted each year to govern the work of the board.

The board may also appoint a managing director to take care of the day-to-day management of the company in accordance with the guidelines and instructions issued by the board. The allocation of work between the board of directors and the managing director should be set out in written instructions.

The board of directors may authorise a board member, the managing director or any other person to represent the company and sign its name (this is referred to as a special company signatory). Such authorisation does not, however, delegate any management rights to the special company signatory.

General duties

Directors must perform their duties with care and loyalty and in the best interests of the company.

The directors also have an obligation to individual shareholders, the company’s creditors and other third parties to act in accordance with the Swedish Companies Act, the Swedish Annual Reports Act, certain other regulations and/or the articles of association.

This means, for instance, that the board may not make a resolution that is likely to provide an undue advantage to one shareholder or another person to the detriment of another shareholder.

Who are the duties owed to?

Directors owe their duties to the company and not to the company’s shareholders.

It is especially important to bear this in mind where a director has been appointed by a particular shareholder and where conflicts of interest may arise.

The directors also have general obligations to shareholders and to other third parties, including an obligation to treat all shareholders fairly and equally (see “General duties”).

Dealings with company / conflicts

A director cannot deal with any agreement or legal proceeding between the company and

• the director,
• a third party, where the director has a material interest which conflicts with that of the company, or
• a legal person, which the director, alone or together with another, may represent.

The conflict of interest rules mean that the director may not even be present in the room when the matter is discussed.

These rules do not apply, however, if the director is the only, direct or indirect, shareholder of the company or if the agreements are made intra-group. The restrictions in the second and third bullet points may also be set aside where all shareholders agree.

As a general rule, a decision made in violation of the conflict of interest provisions is void. If the decision concerns an agreement with a third party, the agreement is void if the third party acted in bad faith with regard to the conflicting interest.

The Swedish Companies Act also prohibits companies from making loans to persons closely related to the company, including the directors and their family members. To intentionally violate this prohibition is a criminal offence.
Directors may become personally liable to compensate the company if they intentionally or negligently cause the company damage. Liability is incurred on an individual basis, so it is possible that only certain directors may be found liable, depending on matters such as the expertise or knowledge which a certain director has and the allocation of duties within the board. The chair has an increased personal liability and is, for example, responsible for planning the work of the board so that all directors can participate properly.

Civil liability may also be incurred to third parties such as shareholders, creditors or employees, but only if the directors intentionally or negligently breach the Swedish Companies Act, the Swedish Annual Reports Act, certain other regulations and/or the company’s articles of association. If more than one person is held liable, their liability is joint and several.

Directors can also incur criminal penalties under the Swedish Companies Act, for example, for:
- attempting to distribute shares or securities to the general public,
- failing to maintain and keep available a share register, or
- making loans from the company to persons related to the company.

At each annual general meeting, the shareholders must vote on whether or not to discharge the board from liability for the preceding financial year.

Even where the shareholders have resolved to discharge the directors from liability, a claim for damages may still be made where the shareholders were not given true and complete information by the directors, for example, in the annual report.

If shareholders representing at least 10% of the shares vote against this discharge resolution, an action in damages can be commenced, but this must be done within one year of the relevant general meeting.

If there is reason to believe that the company’s equity has fallen to less than one-half of the registered share capital, the board must prepare, and an auditor appointed by the company must review, a balance sheet for insolvency purposes (kontrollbalansräkning). The board must also convene a general meeting of shareholders to determine whether the company should go into liquidation. If the general meeting does not resolve to liquidate the company, the company has eight months to solve its financial difficulties. Within this time, a new balance sheet for insolvency purposes must be prepared, which must show that the share capital has been restored in full. If the company fails to meet this demand and the general meeting does not resolve to liquidate the company, the board of directors must submit a petition to the District Court that the company be placed into liquidation.

The directors may become personally liable for obligations incurred by the company if the board fails to:
- prepare and have audited a balance sheet for insolvency purposes,
- duly convene a general meeting for insolvency purposes, or
- apply for liquidation in time and continues to run the company.

Liability is limited to obligations incurred during the period of such failure to act.
Sweden

Decisions and meetings

There are no formal requirements for how and where meetings should be held, but the frequency should be stated in the board’s rules of procedure.

The chair of the board must ensure that board meetings are held as often as required. In addition, any director or the managing director may request that a meeting be convened at any time.

There is no minimum notice requirement, as long as reasonable notice is given. Non-compliance with this rule is penalised to preserve the rights of the employee representatives.

The meeting is quorate when more than half of the directors are present, unless the articles of association prescribe a higher number.

For a decision to be approved, more than half of the directors present at the meeting and more than a third of all directors must vote in favour. The chair has a casting vote if the votes are tied.

The managing director is entitled to attend and speak at board meetings even if not part of the board, although the board can exclude him/her from specific meetings.

The board may also make resolutions by circulating board minutes, which should then be signed by all directors.

Minutes

Written minutes must be taken at board meetings and must include a record of the decisions made at the meeting.

The minutes should be signed by the keeper of the minutes and by the chair of the meeting, as a minimum. If decisions are taken by written resolution, the minutes should be signed by all board members.

There is no legal obligation to draft the minutes in the Swedish language. Where a resolution needs to be filed with the Swedish Companies Registration Office, however, (for example, in connection with a share issue) Swedish language minutes are required.

The board minutes must be kept in numerical order and stored in an adequate manner, so that the directors can access them. The minutes do not have to be published or notarised.

Administration and accounts

The board of directors is responsible for the organisation of the company and the management of the company’s affairs.

In particular, the board must ensure that the company’s organisation is structured so that accounting, management of funds and the company’s finances in general are monitored in a satisfactory manner.

The obligations of the board of directors also include specific actions such as preparing the annual report, convening shareholders’ meetings and keeping the share register up to date.

Relevant rules

The Swedish Companies Act (Aktiebolagslagen ((2005:551)) sets out the general duties of directors and their responsibilities in relation to the management and the external representation of a Swedish private limited company.

The Swedish Annual Reports Act (Årsredovisningslag (1995:1554)) sets out reporting requirements which the directors must comply with.

In addition, corporate documents of the company, including its articles of association, its internal rules (such as the board’s rules of procedure) and any specific resolutions may impose additional requirements or restrictions on directors.

Where permitted by the Swedish Companies Act, these rules may take precedence over the provisions of the Companies Act.
Thailand

What type of company?
In Thailand, subsidiaries within a group are, generally, private limited companies.

Management structure
A private limited company is managed by the board of directors.
The directors may, however, delegate any of their powers to managers or to committees consisting of members of the board of directors.

Board composition
A private limited company must have at least one director, with a maximum number fixed by a shareholders’ meeting.
There is no nationality restriction for directors of a private limited company in Thailand, unless the company is deemed to be a foreign company under the Foreign Business Act and conducts certain types of business. For example, businesses related to Thai national safety or security and businesses affecting arts and culture, tradition, folk handcrafts or natural resources and the environment are required to have a board comprised of at least 40% Thai nationals.

If a director becomes bankrupt or incapacitated, his / her office is vacated.
A director can serve on the board of several companies in the same group. Directors must, however, avoid any conflicts of interest and have time for each company in order to maximise shareholder wealth.
A director is allowed to own company shares.
Companies are not allowed to have corporate directors under Thai law.
An employee can be appointed as a director of a Thai private company.

Appointment and removal
A director can be appointed or removed only by a resolution of the shareholders’ meeting.
There is no specific term of office under Thai law, however, at every general shareholders’ meeting after the company is registered, one-third of the directors, or the number nearest to one-third, must retire from office. A retiring director is eligible for re-election.
A shareholders’ meeting may remove a director before his / her term of office has expired, and the replacement director can retain such office only for the remainder of that term.
If there is a vacancy on the board of directors, other than by rotation, the board can appoint replacement directors to fill the position. The replacement director can retain such office only for the remainder of that vacating director’s term.
A private limited company must be managed by a director, or directors, under the control of the shareholders and according to the company’s articles of association and applicable laws.

The board of directors may delegate any of their powers to managers or to committees, as long as these are also members of the board of directors.

In conducting the company’s business, directors must act with care to preserve and protect the interests of the company as a whole. Directors should also comply with the company’s memorandum and articles of association, any resolutions of the shareholders’ meeting, applicable laws and their contracts with the company.

Although the standard of care required for directors is not specifically provided by law, the Thai Civil and Commercial Code states that a director must act with the same care as a prudent businessman.

It is relatively difficult to establish a standard, since this depends upon the nature of the company, its business and the relevant circumstances. Nevertheless, if a director acts in accordance with the company’s objectives, the company’s articles of association and the resolutions of a general meeting of shareholders and does not violate the law, he/she is unlikely to be liable to the company for any damage which occurs as a result of his/her actions.

A director, in general, owes his/her duties to the company.

A director must not, except with the consent of a shareholders’ meeting, undertake commercial transactions of the same nature as, and competing with, the company, either on his/her own account or on behalf of a third person.

Further, directors may not be a partner with unlimited liability in another commercial concern carrying on a business of the same nature as, and competing with, the company.

In addition, a director must perform his/her duties in good faith in the best interests of the company and act with proper purpose and not in a way significantly in conflict with the company’s interest.
<table>
<thead>
<tr>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Liability</strong></td>
</tr>
</tbody>
</table>
| Compensation claims against directors for injury they have caused the company can be made by the company or, if the company fails to do so, by any of the shareholders. 

Other than the civil liability mentioned above, a director may also be subject to criminal liabilities, such as fines, penalties or imprisonment, if he/she fails to comply with duties specified by Thai law. For example, if a director who is responsible for the company’s management acts to gain unlawful interests for him/herself/another, or fails to prevent this occurring, and the company is damaged as a result, the director will be liable to a fine not exceeding Baht 50,000. |
| **Indemnities and protections** |
| After any action of a director has been approved by a shareholders’ meeting, the director is no longer liable for these acts to the approving shareholders or to the company. 

Shareholders who did not approve the acts of the director in question can file a lawsuit against the director for his/her actions within six months from the date of the approval. 

A company’s articles of association are allowed to include a provision to protect directors from liabilities related to their position, except where these have been caused by the director’s negligent actions or wilful misconduct. |
| **Insurance** |
| The law does not prohibit a company from purchasing directors’ and officers’ liability insurance. |
| **Financial difficulty and insolvency** |
| The Thai courts have the power to cancel any asset transfers or actions taken by a debtor which were intended to give undue preference to a creditor who was an insider of the debtor during the year before a petition for business reorganisation was filed or an application for a declaration of bankruptcy adjudication was made. 

Insiders for this purpose can include the debtor’s directors. |
Decisions and meetings

A director may, at any time, call a meeting of the board of directors.

The quorum for a board meeting is usually specified in the articles of association. If a quorum is not specified in the articles of association and the company has more than three directors, the quorum must consist of at least three directors.

Minutes

Minutes of all proceedings and resolutions of a meeting of the board of directors must be prepared and kept at the company’s registered office.

Any minutes signed by the chair of that meeting or by the chair of the next successive meeting are deemed to provide true evidence of the proceedings at that meeting.

Administration and accounts

Directors must ensure that a balance sheet is prepared at least once every 12 months, at the end of the company’s financial year. The balance sheet must contain a summary of the company’s assets and liabilities and a profit and loss account. Balance sheets must be audited by an auditor and submitted for approval to a general shareholders’ meeting within four months after completion of the balance sheet.

When the board of directors proposes the balance sheet to the general shareholders’ meeting, the board must report on the company’s business operations during the year under review.

Directors must ensure a general shareholders’ meeting is held within six months after incorporation of the company and subsequently at least once every 12 months.

Relevant rules

The Civil and Commercial Code, Act on Offences Relating to Registered Partnership Limited Partnership Limited Company Association and Foundation B.E. 2499 (1956), including its regulations and orders, and the articles of association of the respective company set out the duties, responsibilities and liabilities of a private limited company in Thailand.

Additionally, there are several provisions that impose criminal liability upon directors in a number of other acts, such as the Foreign Business Act. B.E. 2542 (1999) and the Building Control Act B.E. 2522 (1979), as amended. Hence, all relevant laws should be examined before activities are undertaken.

Relevant insolvency legislation is set out in the Bankruptcy Act B.E. 2483 (1940).
#### What type of company?

A limited liability company ("LLC") is the most common form of corporate entity used by foreign investors in the UAE.

#### Management structure

If the LLC has more than one manager, its memorandum of association may provide for the formation of a board of managers.

"Managers" are the closest equivalent to directors and the legal provisions relating to the liabilities of directors of a UAE Joint Stock Company apply equally to managers of an LLC.

Any LLC with more than seven shareholders must also have a supervisory board. This is appointed under the memorandum of association for a specified period and must consist of at least three shareholders.

UAE law does not expressly provide for people who act as directors but have not been formally appointed as such. Nevertheless, the concept may be recognised by the UAE courts in certain circumstances. For example, if an LLC does not appoint a board of managers but relies instead on a single “General Manager”, that person is likely to be treated as a “manager” for the purposes of the law and subject to all of the duties and obligations which apply to managers.

#### Board composition

LLCs must have between one and five managers.

There are no specific rules about who can be appointed to the board, specific age restrictions on managers of LLCs or any nationality or residence restrictions (whereas, in a UAE Public Joint Stock Company, the chair and a majority of the directors must be UAE nationals).

The law does not require managers of LLCs to have any specific qualifications (although a certain level of expertise may be required for directors of specific types of companies, such as regulated insurance companies).

It is possible to serve as director of several companies of the same group (although note that there are restrictions on directorships in Public Joint Stock Companies).

Managers are allowed to own shares in LLCs, but there is no legal requirement for them to do so.

#### Appointment and removal

Managers of LLCs may be appointed in the memorandum of association or by separate agreement (for example, in a shareholders’ agreement relating to the LLC) for a limited or unlimited period. They may also be appointed by the shareholders in general assembly.

If a manager is appointed in the LLC’s memorandum of association for an indefinite period, he/she shall remain as a manager for the duration of the LLC, unless the memorandum provides that he/she may be dismissed.

If the memorandum provides that a manager may be dismissed, unless a different majority is stipulated in the memorandum, the dismissal requires the approval of shareholders representing at least 75% of the capital.

If the memorandum does not provide that a manager may be dismissed, he/she may only be dismissed by a unanimous vote of the shareholders or by a court order.
United Arab Emirates (excluding Dubai International Financial Centre)

Powers

Subject to any specific provisions in the LLC’s memorandum of association, the managers have “full authority” to manage the LLC and to bind the company.

Notwithstanding this broad authority, the managers of LLCs are not entitled to undertake all activities. Certain powers, such as opening bank accounts, signing cheques, obtaining loans and initiating legal proceedings, should be explicitly described in the appointment mandate of the managers.

Subject to any specific provisions in the LLC’s memorandum of association, it is possible for managers to delegate their powers to third parties. Any such delegation would typically be evidenced by a power of attorney or other written authority in a form approved by the board.

General duties

UAE law does not contain express provisions on directors’ duties.

Managers of LLCs must not engage in fraud, abuse of power or violations of law or the company’s constitutional documents, or mismanage the company.

In addition, managers:

- must not be convicted of a crime against honour or involving dishonesty (unless pardoned by the authorities), and
- shall be considered to have resigned for failing to attend more than three consecutive board meetings without a justifiable excuse acceptable to the board.

In practice, therefore, a manager must:

- adhere to loyal behaviour, taking into consideration the company’s and shareholders’ interests, and
- take such due care, diligence and skill as taken by a normal person in similar circumstances to comply with applicable laws and regulations, as well as the company’s constitutional documents.

Who are the duties owed to?

As already noted, UAE law does not contain express provisions on directors’ duties.

The chair and the managers of LLCs are liable to the company, the shareholders and third parties for all acts of fraud, abuse of power, violation of the law or the company’s constitutional documents and for mismanagement.

In this context, “third parties” are not defined but could include creditors and employees and could, in theory, also include any other person who has suffered loss as a result of the actions of the managers.

Deals with company / conflicts

Managers may not participate in any business that might be in competition with the company’s business nor conduct any business for their own account, or for the account of others, in any of the branches of activities practised by the company without the prior consent of the shareholders.

In the event that a manager breaches this provision, the company may either claim compensation or consider such business performed by the manager as conducted on behalf of the company.

In addition, any manager with a conflict of interest in respect of a transaction presented to the board for approval must disclose it to the board. The disclosure must be documented and the manager should abstain from voting where they have a conflict.
United Arab Emirates (excluding Dubai International Financial Centre)

**Liability**

The chair and the managers of LLCs are liable to the company, the shareholders and third parties for all acts of fraud, abuse of power, violation of the law or the company’s constitution and mismanagement. Managers will be liable for voting in favour of any resolution which results in the above (or being aware of such resolution and not objecting to it). Opposing / dissenting managers will not be held responsible for such actions.

In addition, the law sets out a number of areas that may expose a manager to criminal penalties, including:

- entering false information on corporate documents or knowingly circulating the same,
- inviting the public to subscribe for shares in an LLC,
- distributing profits / dividends to the shareholders in breach of the law or the company’s constitutional documents,
- intentionally falsifying the company’s accounts to conceal the real financial position of the company, and
- divulging company secrets for personal gain or for the benefit of third parties.

Potential criminal liability for managers also exists under the UAE Penal Code (for matters such as fraud) and the UAE Commercial Code (in circumstances where the company is in financial difficulty / insolvent).

**Indemnities and protections**

There are no limits on the liability of managers for breaches of their responsibilities.

An LLC is permitted to indemnify managers in respect of proceedings brought by third parties (meaning persons other than the company or an associated company).

Any resolution adopted by the general assembly of shareholders to release the board of directors from liability will not result in the discharge of civil liability of the board for offences / breaches committed by them in the performance of their functions. If, however, the act causing civil liability was presented to the general assembly and ratified by it, then proceedings for liability will be time barred one year after the date of the assembly.

Claims against managers regarding the performance of their activities whilst in office will, on denial and the lack of legal excuse, be time barred on the expiration of five years unless a shorter period is provided by law.

**Insurance**

An LLC can purchase and maintain insurance for managers, although, as far as we are aware, this is not common practice for LLCs in the UAE.

**Financial difficulty and insolvency**

Managers may incur both civil and criminal liability if a company is in financial difficulties / insolvent.

If an LLC sustains losses amounting to 50% of its capital, the managers must refer the question of dissolving the company to the shareholders.

It is a crime for the managers to fail to file for the company’s bankruptcy within 30 days from the date on which the company ceases to pay its debts as a result of financial instability or a lack of available credit. Other criminal offences in the context of an insolvent company include:

- concealing, destroying or altering books,
- misappropriating or concealing property to inflict damage on creditors,
- obtaining special arrangements for the company by fraud,
- providing fictitious financial information,
- honouring the debts of any creditor to the detriment of others, and
- disposing of goods at less than market price with the intention of delaying insolvency.

These offences are punishable by imprisonment.

Where the company’s assets are insufficient to satisfy at least 20% of its debts and the managers are held responsible, the court may order them, jointly or severally, to pay all or part of the debts.
## Decisions and meetings

Rules for the operation of the board, including the required majority for making decisions / adopting resolutions, will be set out in the LLC’s memorandum of association. The law does not contain any provisions in this regard.

Typically, the memorandum would provide for prior notice of meetings to be given to all managers (unless the notice requirements have been unanimously waived by the managers) and for decisions of the board to be taken by a majority vote of the managers present (or represented) at a meeting. Unanimous written resolutions are also likely to be permitted as an alternative to meetings.

There is no specific legal requirement for board meetings to be held in the UAE and, subject to the provisions of the memorandum of association, managers should be permitted to attend meetings using conference call / video-conference facilities.

## Minutes

The formalities applying to minutes of board meetings are often set out in the LLC’s memorandum of association.

The law does not contain any provisions in this regard.

## Administration and accounts

The managers of LLCs must prepare the company’s balance sheet and profit and loss account, together with an annual report of the company’s activities, its financial position and their recommendation regarding the distribution of profits to shareholders.

Within ten days of the ratification of the balance sheet and profit and loss account, the managers must deliver copies to the UAE Ministry of Economy and Commerce and the local economic department in the Emirate in which the LLC is registered.

## Relevant rules

LLCs are governed by UAE Federal Law No. 8 of 1984, the Commercial Companies Law and by the provisions set out in their memorandum of association.

There is no unified statement of directors’ duties, but UAE companies must comply with the corporate governance provisions in the Commercial Companies Law.
### What type of company?

In the UK, subsidiaries within a group are most likely to be private companies limited by shares.

### Management structure

UK companies are managed by a single board of directors. Executive directors are in charge of managing the business and may also be employed by the company. If there are any non-executive directors, these are generally expected to fulfil a supervisory role. The law does not, however, distinguish between executive and non-executive directors and decisions must be taken by the board acting collectively.

Persons who have not been formally appointed as directors but act as such will be treated as directors. Similarly, persons in accordance with whose directions or instructions the directors of a company are accustomed to act will be treated as directors for certain purposes.

### Board composition

A private limited company must have at least one director, although the company’s articles may specify that there should be a greater number. Employees do not have the right to be represented on the board. As a general rule, anyone over the age of 16 can be appointed as a director, unless he/she is:
- an undischarged bankrupt,
- disqualified from acting as a director,
- prohibited for failing to pay amounts owed under a court judgment or order,
- the auditor of the company, or
- a director of an insolvent company and the appointment is to a company with a name similar to that of the insolvent company.

Corporates can act as directors of subsidiaries, although at least one director of the company must be an individual. Directors are not required to have specific qualifications and there are no nationality or residency restrictions or share ownership requirements.

It is possible to serve as a director of several companies in the same group, although directors must avoid conflicts of interest.

### Appointment and removal

The first directors are appointed on incorporation and, thereafter, under the company’s articles. These often provide for appointment by a majority vote of the shareholders or by a decision of the existing directors.

On appointment, details about the director will be entered into a company register, which is available for inspection by the shareholders and the public. The details include: the director’s name and any former names, country of habitual residence, nationality, occupation and date of birth. The director’s residential address will be recorded but does not have to be made available to the public. Details of the appointment must also be notified to the UK Companies Registrar.

The law allows shareholders to remove directors at any time by a majority vote. Special notice of an intention to remove a director in this way must be given to the company 28 days before the relevant meeting. It is not possible to use a written resolution for this purpose. The articles usually also provide an alternative, and simpler, way of removing directors, as well as circumstances in which a directorship automatically terminates (such as bankruptcy or severe ill health).

There is no maximum limit on a director’s term of office.
Powers

Generally, directors are given wide powers under the articles to manage the company and to delegate to others. The articles are also likely to specify that the powers of the directors are subject to the law, the articles and to any specific action which the shareholders, by resolution, may direct them to take.

The directors must exercise their powers by taking decisions collectively as a board. This means that where the law requires or allows directors to do certain things, such as calling a general meeting of the shareholders or issuing shares, such action should usually be approved by the board and not by a sole director.

Directors can act individually, however, where specific powers and responsibilities have been delegated to them by the board. For example, one director can act as chief executive officer of the company.

It is also common for the board to delegate specific powers to committees, agents and a company secretary, if the company has one. The directors remain responsible, however, and should, therefore, set up systems to supervise those acting under their authority.

General duties

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 the members as a whole. In doing so, the directors must have regard, amongst other matters, to:

- the likely long term consequences of their decisions,
- the impact on the environment,
- the company’s reputation for high standards of business conduct,
- employees’ interests,
- fostering business relationships, and
- the need to treat members fairly.

It is for the directors, not the courts, to decide what success means and how to achieve it. The factors listed above highlight areas of particular importance. Directors must do more than pay lip service to these, but can decide what weight to give to each one.

Directors must also act in accordance with the company’s constitution and exercise independent judgement. They should use reasonable skill, care and diligence, as well as any actual knowledge and skills that they have, for example, in financial management.

Directors must not accept benefits from third parties. They should avoid conflicts between the interests of the company and their personal interests and declare any interests in transactions with the company (see “Dealings with company / conflicts”).

Who are the duties owed to?

Directors owe their duties to the company and not to the company’s shareholders, or to the group to which the company may belong.

It is important to bear this in mind, in particular, when a director is also a director of another company within the group or has been appointed by a specific shareholder.

In a situation where a company may become insolvent, its directors must also have regard to the interests of the company’s creditors.

Dealings with company / conflicts

Directors are under a general duty to avoid conflicts of interest and must notify the board of these. The other directors usually have the power to authorise such conflicts and / or they can be authorised by shareholders. Separately, directors have a duty to declare direct or indirect interests they may have in transactions involving the company. It is a criminal offence not to declare an interest in an existing transaction so it should be done as soon as reasonably practicable, at a meeting or in writing, unless the other directors already know, or should know, about this interest.

Certain transactions with directors must also be approved by shareholders, unless a subsidiary is wholly-owned or an exemption applies. Restricted transactions include arrangements for a director to buy / sell a “substantial non-cash asset” from the company. All assets above £100,000 are caught, as are those above 10% of the company’s net asset value (and worth at least £5,000). In addition, the company needs approval to lend or advance money to a director, or to provide a guarantee.

Exemptions include intra-group transactions and defence funding (see “Indemnities and protections”). Likewise, shareholder approval is needed for long term service contracts of directors guaranteeing a term of office of more than two years or for payments made to directors to compensate them for a loss of office.
If directors breach their duties to the company, they may be personally liable to compensate the company for losses caused. They may also have to restore company property and pass any profits they have made to the company.

Depending on the circumstances, the company may be able to terminate any contracts with, or involving, the director which have been entered into.

As the directors owe their duties to the company, it is the company who should bring a claim against a director. It is possible for a claim to be brought by one or more shareholders on behalf of the company, but in the shareholder’s own name. Such “derivative actions” are relatively rare.

It is generally a criminal offence to fail to comply with statutory administrative requirements for accounts to be prepared and public filings to be made. As noted above (see “Dealings with company / conflicts”), it is also a criminal offence for a director to fail to declare his / her interest in a transaction involving the company.

In proceedings against directors for negligence, default or breach of duty / trust, the court may relieve the director of liability where it considers that the director acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused.

It is not possible for a UK company to exempt a director from liability for breach of duty, negligence or other default in relation to the company. There are various protections, however, that can be given against liabilities arising from the role of the director.

A company can indemnify its directors against civil claims brought by third parties for negligence, default, breach of duty / trust. Indemnities cannot cover legal action taken by the company itself, criminal or regulatory penalties imposed on a director, the cost of defending proceedings where the director is found guilty or where a court refuses to grant relief. The company can also make a loan to a director to meet the costs of defending criminal or civil proceedings or seeking court relief or to help the director to avoid incurring such expenditure (for example, by engaging lawyers on the director’s behalf). The loan must be repaid if the director is convicted in the proceedings, judgment is given against the director or the court refuses to grant an application for relief.

Finally, the shareholders can resolve to ratify the conduct of a director amounting to negligence, default or breach of duty / trust in relation to the company.

UK companies are permitted to take out directors’ and officers’ liability insurance. This insurance may protect a director’s personal assets if claims are made against him / her. Criminal penalties and sanctions cannot be insured against, but legal or investigative costs incurred in defending a prosecution may be covered.

Where a company is in financial difficulties or insolvent, its directors must protect the interests of the company’s creditors as a whole.

In particular, when directors become aware that there is no reasonable prospect that the company will avoid becoming insolvent, they must take every step to minimise the creditors’ losses.

Appropriate legal advice should be taken in these circumstances. The directors may be required to repay creditors with whom the company traded while they were aware that insolvency was probable.
United Kingdom

Decisions and meetings

The articles, rather than the law, usually set out how decisions of the board are to be made. Apart from regulating board meetings, these generally allow for written resolutions and for decisions to be made where directors are in separate locations but able to communicate effectively with each other.

Notice of a board meeting must usually be sent to all directors. Generally, any director can convene a meeting and there is no minimum notice requirement, as long as reasonable notice is given.

The quorum for a board meeting will normally be stated in the company’s articles and will be at least two directors. If the articles do not provide for a quorum, this will be a majority of the directors.

Typically, each director has one vote and each decision is decided by a simple majority. The chair of the board, who will be elected to act as such by the other directors, is often given a casting vote to be used when the votes for and against a resolution are equal.

Minutes

The law requires companies to keep minutes of all proceedings at meetings of directors for ten years.

There is no set form for directors’ board minutes. Apart from including basic details (such as the names of the chair and the attendees, the date, place and time of the meeting and the business transacted) these must, however, refer to any interests of directors in transactions involving the company which are disclosed at the meeting, as required by law (see “Dealings with company/conflicts”).

Once the minutes have been signed by the chair of the meeting, they are treated as evidence of what took place at the meeting. This means that, unless the contrary is proven, it is assumed that the meeting was duly held and convened, all proceedings duly took place and all appointments made were valid.

Administration and accounts

The directors are responsible for the administration of the company, including such matters as:

- making public filings,
- appointing and removing company officers (such as directors, any company secretary and the auditors),
- maintaining statutory books and records and allowing these to be inspected and copied,
- displaying the company’s details at places of business and in business communications,
- paying dividends, and
- taking measures to prevent money laundering, anti-competitive behaviour, bribery or corruption and breaches of health and safety legislation.

The directors must also ensure that adequate accounting records are kept and annual accounts are prepared. In addition, the directors must prepare a directors’ report and a strategic report each financial year. The directors’ report, the strategic report and the accounts must be approved by the board.

Relevant rules

The UK Companies Act 2006 sets out the general duties of directors and specific responsibilities in relation to the administration of companies, including as to the preparation and publication of accounts.

A company’s constitutional documents, including its articles of association and any specific resolutions, may impose additional requirements or restrictions on directors, and in some cases may override the provisions of the UK Companies Act 2006, as described in this section of the guide.

In a situation where a company may become insolvent, its directors may be subject to provisions of the Insolvency Act 1986.
In the United States, the general duties and responsibilities of directors are primarily governed by state law (the law of the state where the company was incorporated) rather than by US federal law.

Delaware is the most important state for business law, with more than 50% of all US publicly traded companies and more than 60% of the Fortune 500 incorporated there.

Under the laws of Delaware, subsidiaries within a group are most likely to be private corporations or private limited liability companies ("LLCs").

**Management structure**

**Corporations**

Unless the certificate of incorporation provides otherwise, a Delaware corporation is managed by a board of directors, which is permitted to designate committees. To the extent provided by the by-laws or by resolution of the board of directors, a committee may exercise all the powers of the board of directors, except for approving, adopting or recommending to stockholders any matters required to be submitted to stockholders for approval, or adoption, amending or repealing any by-laws.

**LLCs**

A fundamental policy of the law governing LLCs is to provide maximum freedom of contract, meaning that LLC members have broad discretion to draft their LLC agreement to manage the LLC.

Management of a Delaware LLC is initially vested in the members, who may delegate management to a managing member, non-member manager or board of managers.

The manager(s) may, but are not required to, designate officers to manage day-to-day operations, though certain major decisions typically have to be approved by the members.

**Board composition**

**Corporations**

The board of directors of a Delaware corporation must consist of at least one or more members, each of whom must be a natural person. The number of directors is fixed by the by-laws or certificate of incorporation.

Directors are not required to have specific qualifications, and there are no age, nationality or residency restrictions or share ownership requirements, unless the certificate of incorporation establishes such requirements. There are no independence requirements for directors of private Delaware corporations similar to those imposed on US public companies. The law does not establish a right for employees to be represented on the board.

Directors do not have to serve for a specific term, and may resign at any time upon notice given in writing or by electronic transmission to the corporation.

**LLCs**

A Delaware LLC may, but is not required to, vest management in a manager. A manager does not have to be a natural person and does not have to be resident in Delaware.

**Appointment and removal**

**Corporations**

Directors may be first named in the certificate of incorporation, and, thereafter, are elected at the annual meeting of stockholders. A corporation's charter documents may provide for up to three classes of directors, with the term of each first class director expiring after the first year following election, the second two years after and the third three years after, so that the term of any class may not be more than three years.

A majority of shares entitled to vote constitutes a quorum and the affirmative vote of a majority of shares present (in person or by proxy) will elect a director, unless the charter documents specify otherwise (though a quorum must consist of at least one-third of the shares entitled to vote).

Any number of directors (including the entire board) may be removed, with or without cause, by the holders of a majority of the shares entitled to vote, unless the charter documents provide otherwise. If the board is divided into classes, however, a director may not be removed without cause, unless the charter documents provide otherwise.

**LLCs**

The LLC operating agreement governs the procedures for the appointment and removal of managers.
### Powers

#### Corporations
Generally, directors have wide powers to manage the company and to delegate to others.

Third parties who deal with the company are entitled to rely on those who have actual authority to act on behalf of the company. They may also be able to rely on those who have apparent authority to act for the company.

#### LLCs
Managers have wide powers to manage the LLC and delegate powers to others, unless the LLC agreement provides otherwise.

Unless otherwise provided in the LLC agreement, each member and manager has authority to bind the LLC. If the members do not want each of the members or each of the managers to be permitted to bind the LLC to third party contracts, the default rule needs to be modified in the LLC agreement.

### General duties

#### Corporations
Directors owe fiduciary duties to the corporation and its stockholders. The core fiduciary duties are as set out below.

- **Duty of care**: a director must use the amount of care an ordinarily careful and prudent person would use in similar circumstances.

- **Duty of loyalty**: a director must act in good faith for the benefit of the corporation and its stockholders.

Under the business judgement rule, there is a presumption that a director acted on an informed basis and in the honest belief that the action was taken in the best interest of the corporation. There may be greater scrutiny of a director’s decision in connection with certain transactions, such as a change of control of the company or where the director has a conflict of interest.

#### LLCs
It is not clear whether managers of Delaware LLCs owe fiduciary duties to their investors (see “General duties”).

### Who are the duties owed to?

#### Corporations
Directors owe their duties to the company and shareholders as a whole, even when they are also directors of another company within the group, or appointed by a shareholder. In the case of a wholly-owned subsidiary, however, the directors of the subsidiary are only obliged to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.

#### LLCs
It is not clear whether managers of Delaware LLCs owe fiduciary duties to their investors (see “General duties”).

### Dealings with company / conflicts

#### Corporations
Transactions with interested directors are permitted if the material facts are disclosed to the other directors or to the stockholders, and the transaction is approved by a majority of the disinterested directors or by a shareholder vote. Such a transaction is also permitted if it is fair as to the corporation at the time it is authorised or approved by the board of directors, a board committee or the stockholders.

#### LLCs
Except as provided in the LLC agreement, a member or manager may transact business with the limited liability company. The LLC operating agreement will govern the procedures for the approval of transactions, which may (or may not) specifically cover the approval of transactions with interested directors.
Liability

**Corporations**
If a director breaches his / her duties to the company, he / she may be personally liable to the corporation and its stockholders (although, to a certain extent, directors may be indemnified by the corporation for such breaches – see “Indemnities and protections”). Derivative suits can also be brought by stockholders on behalf of the company, provided that certain conditions are met. Under Delaware law, however, directors are generally protected under the business judgement rule, which provides significant protection to directors from personal liability for their good faith, informed business decisions. One study has found that, from 1980 to 2006, there have only been two instances of directors of Delaware corporations being required to personally pay for their misconduct.

Personal liability may also be imposed on directors for unlawful payment of a dividend or an unlawful stock purchase or redemption.

**LLCs**
A manager may be liable for breach of fiduciary duties if the LLC agreement does not restrict or eliminate such duties. Under the law, a member who receives an unlawful distribution, and who knew at the time of the distribution that the distribution was unlawful, is liable for the amount of the distribution. The law does not, however, provide that managers are personally liable for approval of wrongful distributions.

Indemnities and protections

**Corporations**
A corporation may eliminate or limit the directors’ personal liability to the corporation or its stockholders for breaches of fiduciary duties, but not for: breaches of the duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, certain unlawful issues of dividends, stock purchases and stock redemptions or any transaction from which the director derived an improper personal benefit. Claims for which directors are typically indemnified involve the waste of corporate assets, failure to act on adequate information, inadequate disclosure to stockholders and decisions about mergers. Indemnification of a director is permitted even where a director is not successful in proceedings and is mandatory if the director is successful. The charter documents may provide for the advance of expenses on an undertaking to repay.

**LLCs**
LLCs have broad authority to include indemnities in the LLC agreement. An LLC agreement can also eliminate or limit liability for breach of contract or duties (including fiduciary duties) of a member, manager or other person to an LLC or another member or manager or to another person bound by the LLC agreement, as long as there is no bad faith violation of the implied contractual covenant of good faith and fair dealing.

Insurance

**Corporations / LLCs**
Delaware corporations and LLCs are permitted, but not required, to take out directors’ and officers’ liability insurance.

A company or an LLC may provide insurance to directors, managers or members, regardless of whether the company is permitted to indemnify such person under Delaware law, to supplement the protections provided under the law. The primary limitations on such insurance will be in the insurance policy itself.

Financial difficulty and insolvency

**Corporations**
Where the company falls in the so-called “zone of insolvency” (and, in at least one case, the “vicinity of insolvency”), Delaware courts have held that directors owe fiduciary duties to the corporate enterprise, which includes both shareholders and creditors. The courts have not provided much guidance, however, as to how conflicts in the duties should be resolved or whether a primary fiduciary duty is owed to a particular constituency.

Legal advice should be taken to determine whether the corporation falls in the “zone” or “vicinity” of insolvency, as the definitions are not clear or consistent.

**LLCs**
The law prohibits an LLC from making a distribution if, after the distribution, the LLC would be insolvent under a “balance sheet” insolvency test (that is, a test that determines whether the total assets of the LLC would be less than its total).
United States (Delaware)

Decisions and meetings

**Corporations**
The charter documents usually set out how decisions of the board are to be made. Unless the charter documents provide otherwise, board members may participate in meetings by telephone or through other communications equipment, and board action can be taken without meeting if all board members consent in writing and the consents are filed with the minutes.

Unless the charter documents provide otherwise, a majority of the total number of directors constitutes a quorum and a vote of a majority of directors present constitutes an action of the board. A quorum may not, however, be less than one-third of the total number of directors.

Delaware law does not set out any notice requirements for the meetings of directors.

**LLCs**
The LLC operating agreement will govern the procedures for decisions and meetings by members and / or managers.

Minutes

**Corporations**
Delaware law does not expressly require minutes to be taken of meetings, but it is common practice to do so.

Any minute books (as well as any other records maintained by a corporation in the regular course of its business, such as its stock ledger and books of account) must be kept in a form such that they can be converted into clearly legible paper form within a reasonable time.

**LLCs**
The LLC operating agreement will determine whether minutes of meetings are required.

An LLC may maintain its records in other than a written form if such form is capable of conversion into written form within a reasonable time.

Administration and accounts

**Corporations**
The directors are responsible for the administration of the company. Delaware law does not impose any specific requirements with respect to directors and accounts.

**LLCs**
Unless otherwise provided in the LLC agreement, management of an LLC is initially vested in the members, who may delegate management duties (see “Management structure”). Delaware law does not impose any specific requirements with respect to administration and accounts.

Relevant rules

In general, Delaware law is permissive and flexible, imposing minimal restrictions on how an entity chooses to organise and govern itself.

**Corporations**
Directors of corporations incorporated in Delaware are governed by the Delaware General Corporation Law and by the corporation’s charter documents (the certificate of incorporation and by-laws).

**LLCs**
LLCs are governed by Delaware’s Limited Liability Company Act. The Act does not require an LLC to have a board of directors. An LLC’s management structure and governance is primarily set out in the LLC agreement, and there are few “default rules” under the Act that would cover issues not addressed in the LLC agreement.
What type of company?

In Vietnam, the entities most commonly used for subsidiaries within a corporate group are single-member or multiple-member limited liability companies ("LLCs").

Members of an LLC hold capital contributions in the company. An LLC cannot issue shares and cannot be listed.

The other common corporate entity is the shareholding, or "joint stock", company ("SC"). An SC must have three or more investors, who hold shares in the company. An SC must have ordinary shares but may also issue preference shares, including voting preference shares, dividend preference shares and redeemable preference shares.

Management structure

**LLC**

For an LLC with more than one member, the highest decision-making authority is the Members Council, which comprises all of the members (that is, owners of charter capital) of the company. A member may authorise another person or persons to represent it on the Members Council, and must do so if it is a corporate entity. The Members Council must appoint one of its members to be the Chair and must also appoint a General Director, the equivalent of a CEO, who manages the day-to-day business of the company. The same person can be both Chair of the Members Council and the General Director.

An LLC with more than 11 members is also required to have an Inspection Committee, the primary role of which is to keep a check on the Members Council.

**SC**

An SC has a "Board of Management", akin to a board of directors in other jurisdictions. If an SC has more than 11 individual shareholders or more than 50% of the shares are held by corporate shareholders, it must also have an Inspection Committee which supervises the Board of Management and the General Director.

Board composition

**LLC**

The number of persons on a Members Council will depend on the number of members in the company, as well as how many authorised representatives those members choose to nominate.

**SC**

An SC Board of Management must have at least three, and not more than 11, members. Additionally, for an SC Board of Management, if they are not a shareholder with at least 5% of the total number of ordinary shares, then they must have professional expertise and experience in business management or in the line of business which is the main business of the company or satisfy other standards and conditions set out in the charter of the company. Some industries may also require the members of the Board of Management to have specific qualifications.

For both LLCs and SCs, members of the Members Council / Board of Management must be individuals over the age of 18 with full legal capacity. They must not be currently in jail, not have certain involvement with Vietnamese state bodies and not be barred by the courts or the bankruptcy laws.

There is no general nationality or residence restriction, unless the particular member is also the legal representative of the company, in which case they must reside in Vietnam.

Appointment and removal

**LLC**

Each member of an LLC has a place on the Members Council and may appoint one or more authorised representatives to represent them on the Members Council.

Such appointment must be made in writing, notified to the company and the business registration body within seven days, and is effective until revoked.

**SC**

Investors holding specified percentages of an SC have the right to nominate candidates for the Board of Management.

Members of the Board of Management are appointed by the shareholders by way of "cumulative voting". This means each shareholder may "accumulate" their votes, (the total of which is determined by multiplying the total of shares owned by the number of members to be elected to the Board) in favour of one or more candidates.

The term of office of members of the Board of Management cannot exceed five years, but is renewable on re-election for an unlimited number of terms.
### Vietnam

#### Powers

**LLC**

The Members Council is the highest decision-making authority of an LLC with broad powers to act, including specified matters which must be decided by the Council. The Members Council also appoints the General Director and the General Director is responsible to the Members Council.

**SC**

The Board of Management manages the company and has full authority to make decisions in the name of the company and to exercise the rights and perform the obligations of the company, other than those expressly reserved for shareholders.

The law specifically tasks the Board of Management with various rights and duties, including:

- making decisions on medium term development strategies and annual business plans,
- the offering of new shares and other fundraising,
- making recommendations on matters, including classes of shares offered and dividends and appointment, and
- the supervision and direction of the General Director.

#### General duties

Each member of the Members Council, the Board of Directors and the General Director has general duties set out by law, which include the duty to:

- act in accordance with laws and the company’s charter,
- act honestly and prudently to their best ability to maximise the interests of the company and the owners of the company,
- be loyal to the interests of the company and the owners of the company, to not use information, secrets, business opportunities of the company or abuse the position and powers and assets of the company for their own personal benefits or for the benefit of a third party, and
- notify the company of enterprises in which they, or their related persons, own or control capital or shares.

Additionally, an authorised representative of a member of the Members Council is required to perform their rights and obligations in an honest and prudent manner and to their best ability for the legitimate interests of that member and the company.

#### Who are the duties owed to?

The general duties of the Board of Management, Members Council and General Director, as the case may be, are expressed to be owed to both the company and the shareholders or owners of the company.

#### Dealings with company / conflicts

**LLC**

Members of the Members Council are required to notify the company of any enterprise in which they, or their related persons, hold an interest.

Additionally, transactions between the company and a member of the Members Council, or their related persons, must be specifically approved by the Members Council, with the conflicted member prevented from voting.

**SC**

Members of the Board of Management must also notify the company of any enterprise in which they, or their related persons, hold an interest.

Transactions between the company and a member of the Board of Management, or their related persons, must be approved by the Board of Management or the shareholders (depending on the value of the transaction). The conflicted member is not able to vote.
**Vietnam**

**Liability**

The law provides generally for disciplinary action, administrative penalty or criminal prosecution for any person found to have breached the law, depending on the severity of the breach, including the duties set out in it for Members Council and Board of Management members.

Moreover, if the Board of Management passes a resolution which is contrary to law or the company’s charter and which causes damage to the company, the members of the Board of Management who agreed to pass the resolution will be jointly liable and must compensate the company for the damage. Those opposing the resolution will be exempt from liability.

The law also provides for a general basis for compensation for non-contractual damages where loss arises due to an “illegal act”, which is generally defined as any breach of the law.

Vietnam’s criminal code also contains various offences which may be relevant to a director, including in relation to abuse of position and negligent performance of duties.

**Indemnities and protections**

Generally, Vietnamese laws provide no specific provisions on indemnities and protections, so any indemnification of personal liability of officers would be a contractual arrangement between the company and the officer.

**Insurance**

There are no general laws regulating directors’ and officers’ liability insurance in Vietnam.

While insurers have started offering cover for officers, it remains relatively unusual in Vietnam, where the majority of companies do not take out such insurance. In any case, such insurance will not cover criminal activities.

**Financial difficulty and insolvency**

The law provides that if the owner of a company or the legal representative (that is the General Director) of a company fails to file a petition to commence bankruptcy procedures within three months of observing that the company has become insolvent, they will be liable in accordance with law.

Separately, the law stipulates that the rights and duties of the Board of Management include requesting the bankruptcy of the company.

There are no other express obligations on directors and other officers to provide notice of certain events during bankruptcy proceedings, although this may not stop a court (or creditors) claiming against an officer for failure of the company to provide such notice.
Decisions and meetings

**LLC**

The Members Council must hold ordinary meetings at least once a year. Extraordinary meetings are convened by the Chair at any time or if requested by member/s owning 25% of the company, or minority members where one member holds 75+. All members must be given written notice of the meeting, including the agenda, issues to be discussed and documents tabled. The quorum is 75% of the charter capital at the first convening. If inquorate, the meeting is reconvened within 15 days with a quorum of 50% and, if again inquorate, within ten days and with no quorum. Resolutions are passed by at least 65% (sometimes 75%) of the aggregate capital of attending members. The charter can prescribe higher (but generally not lower) thresholds and permit written resolutions and attendance at meetings by electronic means.

**SC**

The Board must meet regularly (at least every quarter). The Chair can convene meetings at any time and if requested by the Inspection Committee, General Director, two Board members, five other management personnel or as stipulated in the charter. Generally, five business days' written notice of the meeting is given. The quorum is 75%, attending in person or by proxy. If inquorate, the meeting is reconvened within 15 days and the quorum is then 50%. Resolutions are passed by a majority of the attendees. If votes are tied, the Chair decides.

Minutes

All meetings of the Members Council or Board of Management must be recorded in a minute book archived in the head office of the company.

The minutes must be prepared in Vietnamese but can also be prepared in a foreign language, if required, and both versions will have equal validity.

The Chair and the appointed secretary (who may, but need not, be a member) are jointly responsible for the accuracy and truthfulness of the minutes.

Administration and accounts

**LLC**

The Members Council has the right and duty to approve annual financial statements and plans for use and distribution of profits or plans for dealing with losses of the company.

**SC**

The Board of Management is required to submit annual final financial reports to the general meeting of shareholders for approval.

Relevant rules

The Law on Enterprises and its subordinate regulations are the main source of regulation for corporate enterprises in Vietnam and their directors.

Specific laws and regulations apply to certain types of companies, including public companies.

In addition, corporate documents of the company (primarily the charter) may impose additional requirements or restrictions on directors.