

GUIDE FOR DIRECTORS AND OFFICERS OF COMPANIES IN BERMUDA

CONTENTS

PREFACE	1
1. Introduction	2
2. Companies and their Directors and Officers	2
3. Role of Directors	7
4. Directors' Duties	10
5. Indemnification and Insurance	14
6. Conclusion	15

PREFACE

This Guide concerns itself with the responsibilities of directors and officers of Bermuda companies as they relate to the company, both under statute and at common law.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

Appleby

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1. INTRODUCTION

All Bermuda companies must have at least one director and a secretary. The directors manage the affairs of the company and the secretary maintains the company's records and statutory registers. This Guide concerns itself with the responsibilities of directors and officers as they relate to the company both under statute and at common law.

The responsibilities of directors must be understood in the broader context of what a company is as a matter of Bermuda law – and why directors are appointed to oversee their affairs.

2. COMPANIES AND THEIR DIRECTORS AND OFFICERS

Not all businesses are companies. Many businesses function satisfactorily as sole traders or partnerships. However, there are a number of reasons that the corporate structure is favoured for most businesses. The corporate structure is universally accepted as one of the most convenient ways for a business to hold property, obtain investment from a variety of sources, manage contractual relationships and manage risk. There may also be tax, accounting or regulatory reasons for the use of the corporate structure.

What distinguishes the corporate structure from many other forms of business is that a company is a separate entity – a legal person in its own right, quite separate from those who own it (the members) and those who run it (the directors). Many problems – and court cases – arise from the failure to recognise the difference between business people and the companies with which they are involved.

As a separate legal person, a company can itself:

- own property;
- employ people;
- enter into contracts;
- be bought and sold;
- sue in the courts; and
- be sued.

However, a company is not a living being with the physical ability to act. It must act through agents. For that reason, every company requires at least one director to act as its operating mind and hand, and other officers to perform required tasks.

The primary statute pertaining to companies in Bermuda is the Companies Act 1981 (as amended) (the **Companies Act**). The Companies Act is based in large part on English law and will be immediately recognisable to anyone familiar with English company legislation. While the Companies Act provides the statutory framework for the creation and administration of companies in Bermuda, it is not a complete codification of the law. The Companies Act is supplemented by the common law and each company's own bye-laws. Companies carrying on regulated businesses, such as mutual funds and insurance companies, will also be governed by industry specific legislation. Appleby has prepared Guides on such matters and we invite you to go to www.applebyglobal.com for more information.

2.1 Who may act as a Director of a Bermuda Company?

Individuals, companies, partnerships and other associations of persons whether incorporated or unincorporated may be directors of Bermuda companies.

2.2 Who may not act as a Director?

Undischarged bankrupts may not act as director, except with leave of the court.

Bermuda has no equivalent of the UK's Company Directors Disqualification Act 1996; however, where the court convicts any person of an offence relating to the affairs of a company, which, in the opinion of the court, involves dishonesty, it may order that such person shall not, directly or indirectly, take part in or be concerned in the management of any company without leave of the court.

2.3 Nationality

Except for occasional restrictions imposed by the government on the activities of certain foreign nationals, a director or officer can be of any nationality and can live anywhere in the world. However, a Bermuda company must have at least one Bermuda-resident statutory officer, and if there are no Bermuda resident directors then at least the secretary or an additional officer known as the **Resident Representative** must be ordinarily resident in Bermuda.

2.4 Types of Directors

For a company's internal purposes, the bye-laws may provide for different types or levels of director. However the Companies Act makes no legal distinction between them. Specifically, there is no distinction between executive and non-executive directors: non-executive directors are directors for all purposes of the Companies Act. Further, the definition of **director** in the Companies Act includes "any person occupying the position of director by whatever name called".

Managing or Executive Directors

While decisions about the management of a company are a matter for the board as a whole, subject to the company's bye-laws the board may appoint one or more managing executives or directors with authority to commit the company without reference to the board.

Associate Directors

There is no legal standing for the term "Associate Director" commonly used in the UK and the USA, although it is used to broadly encompass other directorial positions such as "assistant", "divisional", "regional" or even "special" directors, who are normally senior executives who have no place on the board of directors. This title, because it has no legal standing, is a risky one to use because it could lead to confusion in dealings with third parties. Officers who take on the role, however incorrectly, of a director in dealings with third parties may also be liable as a *de facto* director (see below).

Nominee Directors

It is not uncommon for a class of members, debenture holders or a major creditor to have authority, either expressed in the company's bye-laws or in a supplementary agreement such as a shareholders' agreement, to appoint or remove a director. Such a nominee director is nonetheless obliged to act in the best interests of the company, and he cannot allow the interests of his appointer to conflict with this duty.

De Facto Directors

A **de facto director** is one who assumes the role of a director, is held out by the company as a director and who claims to be a director when he has not been appointed so.

Alternate Directors

An **alternate director** is a person appointed by either a director himself, or by the members in respect of a particular director, to stand in for that director in his absence. An alternate director has all the rights and powers of the director to whom he is alternate, but is not entitled to attend and vote at any meeting of the directors otherwise than in the absence of such director.

The bye-laws of a Bermuda company typically provide that a director may appoint and remove his own alternate director. Any appointment or removal of an alternate director by a director is effected by depositing a notice of appointment or removal with the secretary at the registered office, signed by that director, and the appointment or removal is effective on the date of receipt by the secretary. Any alternate director may be removed by resolution of the board. Subject to that, the office of alternate director continues until the next annual election of directors or, if earlier, the date on which the relevant director ceases to be a director. An alternate director may act as alternate to more than one director.

Every person acting as an alternate director is (except as regards powers to appoint an alternate and remuneration) subject in all respects to the provisions of the bye-laws relating to directors. The alternate director is solely responsible to the company for his acts and defaults and is not deemed to be the agent of or for any director for whom he is alternate. An alternate director may be paid expenses and is entitled to be indemnified by the company to the same extent as if he were a director.

Representation of a Director by another Director

A director may, in his own absence, be represented by another director whom he has appointed to do so. Such representation extends to voting on behalf of the appointing director. The appointment must be in writing, lodged with the secretary. Such an appointment can be either in respect of a particular meeting or meetings, or can be more general in nature, and in any event may be revoked in writing at any time by notice to the secretary. A director so appointed to represent another director can do so only in the absence of the appointing director, but the director so appointed may, in such circumstances, vote on his own behalf as well as on behalf of the appointing director.

2.5 Appointment of Directors

Typically, the bye-laws of a company will deal with matters relating to the appointment of directors. Subject to the Companies Act and any special provisions in the bye-laws, the directors are elected or appointed by the members by resolution. The company's bye-laws will normally provide that all directors will serve indefinitely until their retirement, or until the end of the next annual general meeting. The bye-laws may provide for a rotating or staggered board of directors whose constituent members retire at different, pre-set intervals. All directors, upon election or appointment (except upon re-election at a meeting), must provide written acceptance of their appointment, in such form as the board thinks fit, by notice in writing to the registered office within thirty days of their appointment.

The company must set a minimum and maximum number of directors. The company may also determine that one or more vacancies on the board are deemed casual vacancies for the purposes of the bye-laws. Without prejudice to the power of the company by resolution in pursuance of any of the provisions of the bye-laws to appoint any person to be a director, the board, so long as a quorum of directors remains in office, has the power to appoint any individual to be a director so as to fill a casual vacancy.

2.6 Directors' Fees and Additional Remuneration and Expenses

The amount, if any, of directors' fees is determined by the company by a members' resolution and in the absence of a determination to the contrary such fees are deemed to accrue from day to day. Each director

may be repaid for his reasonable travel, hotel and incidental expenses in attending and returning from meetings of the board or committees constituted pursuant to any bye-laws or general meetings that may have relevance. Also, he may be paid all expenses properly and reasonably incurred by him in the conduct of the company's business or in the discharge of his duties as a director. Executive directors can, of course, be paid a salary.

2.7 **Qualifying Shares**

Directors and other officers generally are not required to own shares in the companies which they manage, although there is nothing to prevent them from doing so (provided always that, as with all members of Bermuda companies, they have been vetted and approved as members in accordance with the policies of the Bermuda Monetary Authority). In some cases, the company's own bye-laws may require the directors to hold shares.

2.8 **Chairman**

It is customary for a Bermuda company to have a president and a vice-president or a chairman and a deputy chairman. The president or chairman would ordinarily serve as the chairman of board meetings. Whether the most senior officer of a company is known as the chairman or the president, no specific legal duties, rights or powers attach to the title other than those that the bye-laws may provide.

The chairman or president is also generally responsible for chairing members' meetings. It is not uncommon for the chairman to have a casting vote in the event of a voting deadlock, both at directors' and members' meetings; but the approach to this issue embodied in the standard bye-laws developed by Appleby is for the chairman not to have a casting vote, and instead for any proposed resolution not gaining the necessary majority of votes to fail.

2.9 **Ceasing to Act**

Directors may retire at the end of their appointment, they may resign, be removed or be disqualified. They may die or in the case of a corporate director cease to carry on or transact business. Where a vacancy occurs during the board's term of office, then so long as a quorum remains in office (and unless the company's bye-laws otherwise provide), the vacancy can be filled by resolution of the remaining directors. If, however, the vacancy results in an inquorate board, the vacancy must be filled by a resolution passed at a general meeting of members (or by a written resolution of the members).

The cessation of a director's appointment, however it occurs, must be recorded in the register of directors and officers.

2.10 **Removal of Directors**

The bye-laws of the company will typically set out the circumstances in which a director may be removed. In some cases a director can only be removed for misconduct, but in most cases the power to remove a director without cause rests wholly with the members. The company may remove a director by specifically convening a special general meeting of the members. The notice of any such meeting must be served on the director concerned no less than 14 days before the meeting. The affected director is entitled to be heard at that meeting. Any vacancy created by the removal of a director at a special general meeting may be filled at that meeting by the election of another director in his place or, in the absence of any such election, by the board at a subsequent board meeting.

2.11 Public Information about Directors

Anybody is entitled to know who the directors of a particular company are. Bermuda law does not provide, however, for them to know whether a director holds, or has recently held, directorships of other companies.

2.12 Other Officers

All directors of a Bermuda company are, by definition, officers. The bye-laws of a Bermuda company usually provide for the appointment of additional officers, either by specifying the required offices or providing that the directors may appoint such officers as they from time to time see fit. As noted, it is customary (but no longer required) to appoint officers with the titles of president and vice-president or chairman and vice-chairman.

2.13 The Secretary

As mentioned, each Bermuda company is required by statute to have a secretary. The secretary need not be (and usually is not) a director.

The Companies Act sets out in a number of sections roles that the company secretary must perform. While the operation of the company is in the hands of the directors, they delegate certain tasks which must be performed by the company secretary. For many Bermuda companies, these duties are typically outsourced to specialist corporate administration companies. The services typically comprise the following:

- Establishment and maintenance of the statutory register of directors and officers of the company, and, as required by law, making it available for inspection by members of the public upon request.
- Establishment and maintenance of the statutory register of members of the company, and, as required by law, making it available for inspection by members of the public upon request.
- Keeping of the company's minute book. This includes issuing shares certificates when share capital has been paid.
- Attendance at formal meetings of the directors and members of the company, and minute taking. As to meetings where the secretary is not in attendance, the minutes taken by the person acting as secretary to the meeting will be reviewed by the company secretary, and filed in the minute book, in Bermuda.
- Provision of boardroom and other support facilities for the meetings of the company.
- Preparation of draft minutes for approval, engrossment of minutes in final form for signature and distribution of copies to those entitled to receive them.
- Liaison with those authorised to speak for the company and its members and with the company's bankers, third-party managers (where applicable, e.g. for many captive insurance companies which outsource their insurance affairs), legal counsel, accountants and auditors.
- Handling of the day-to-day administrative affairs of the company which can include the signing or countersigning of cheques, and dealing with correspondence, faxes and telephone calls.
- The completion of such other duties as the secretary of the company is required by law, or by the bye-laws, to carry out, such as:
 - preparation and filing of documents, as necessary, with the governmental authorities (for example, in relation to an increase in the company's authorised share capital, as well as the annual declaration of principal business and assessable capital and payment of the annual government fee);

- preparation of notices and agendas for meetings and their distribution; and
 - preparation of share transfers, share certificates, proxies, declarations of trust and other miscellaneous documents.
- Handling of documentation relating to the company's bank accounts, including the preparation of certified resolutions and the obtaining of specimen signatures for completion of bank mandates.

3. **ROLE OF DIRECTORS**

The directors manage the business and affairs of the company. These tasks may be delegated to others to the extent permitted under the bye-laws of the company, so long as the delegation is done in a manner consistent with the directors' overriding duties. Except insofar as powers may be delegated to a committee of directors or to a managing or executive director, the directors act collectively as a board. Individual directors do not have the authority to commit the company unless authorised to do so by the board.

The directors are the agents through whom the company primarily acts. As agents, directors incur no personal liability on contracts made by them on behalf of the company which fall within the scope of their authority. If a director acts in excess of the powers under the memorandum of association or bye-laws he may be personally liable for breach of warranty of authority. Where his actions are only in excess of the powers conferred by the bye-laws, the members in general meeting may ratify his actions.

While the powers of the directors can be restricted by the company's bye-laws they can, in most cases, do anything that the company can do. Since the directors are the ones empowered to act as and for the company, they must ensure that the company does everything that it is obliged to do by law (as summarised herein).

The powers given by the bye-laws are not generally limited by any further special powers given to the board by the bye-laws. If a quorum is met, then a meeting of the board is deemed to be competent to exercise all the powers, authorities and discretions for the time being vested in or exercisable by the board.

3.1 **Rights of Directors**

A director has many statutory and common law duties and responsibilities. To facilitate the director's ability to fulfil his obligations and to comply with his duties and responsibilities, the director is given rights and powers which make his job possible.

Inspection of Records

Although the company may impose reasonable restrictions, the minutes of general meetings of a company may be inspected by any member or director of the company. If a director makes a request to the company he is entitled to be furnished with a copy of any such minutes. If any inspection is refused or if any copy required is not sent within the proper time, the company and every officer of the company who is in default will be liable for a fine. In the case of any such refusal or default, the court may by order compel an immediate inspection of the minutes or direct that the copies required shall be sent to the persons who required them.

Financial Information

The Companies Act requires the directors to lay before the members certain financial statements of the company not less than annually (unless waived). In order to fulfil this obligation, the directors have the right on demand to inspect the books of account maintained by management pursuant to section 83(2) of the Companies Act. In particular, directors have the right to be supplied with such financial statements not

less frequently than every three months, where the records are kept outside of Bermuda (every six months, if the company is listed on an appointed stock exchange).

Attending Meetings

The directors of a company are entitled (upon lodging a written request in that behalf) to receive notice of, and to attend and be heard at, any and all general meetings of the members.

3.2 Powers of Directors – Specific Examples

Borrowing

Among the powers of the company which the board may exercise, the board is allowed to borrow money and to mortgage or charge all or any part of the undertaking, property and assets (present and future) and uncalled capital of the company. The board may also issue debentures and other securities (whether outright or as collateral security for any debt, liability or obligation of the company or of any other persons). Unlike in some other jurisdictions, the board generally has the power to issue shares in the company without reference to the members, but subject to any pre-emption rights, which may be contained in the bye-laws.

Cheques and Financial Instruments

The board determines the format and manner of issue of all cheques, promissory notes, drafts, bills of exchange and other instruments, whether negotiable or transferable or not. In the same way, the board determines how all receipts for money paid to the company are signed, drawn, accepted, endorsed or otherwise executed.

Benefits

The board on behalf of the company may provide benefits, whether by the payment of gratuities, pensions or otherwise, for any person including any director or former director who has held any executive office or employment with the company. Employment with the company generally includes employment with any body corporate which is or has been a subsidiary or affiliate of the company or with a predecessor in the business of the company or of any such subsidiary or affiliate. Benefits may also generally be paid to any member of a director's family or any person who is or was dependent on him, and the company may contribute to any fund and pay premiums for the purchase or provision of any such gratuity, pension or other benefit, or for the insurance of any such person.

3.3 Delegation

Directors are, to some extent, entitled to delegate their powers of management to professionals and to their fellow directors. Directors will not be liable when they delegate their powers if they rely in good faith upon:

- financial statements of the company represented to him by another officer of the company; or
- a report of an attorney, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

Directors are also entitled to trust their fellow directors unless there are grounds for suspicion.

The board may appoint under a power of attorney any company, firm or person or any fluctuating body of persons, to be the attorney(s) (for legal purposes) of the company. The board will determine the powers,

authority and duration of the appointment. However the power of attorney may not attempt to confer powers exceeding those vested in or exercisable by the board itself under the bye-laws. Any power of attorney may contain provisions for the protection and convenience of persons dealing with the appointed attorney and of the attorney himself. Where appropriate, a power of attorney may also authorise any such attorney to sub-delegate all or any of the powers, authorities and discretions vested in him.

The board has the ability to give to any director or officer any of its powers with any restrictions or conditions that it may deem necessary. This conferred power may be to the exclusion of the power held by the board, or may be held collaterally with it. The board may of course revoke or vary such powers as it sees fit. However, there must be notice given of such revocation or variation, as, without such notice, no person dealing in good faith will be affected by it.

The board may also delegate any of its powers, authorities and discretions to committees of the board. Any committee of the board will have to abide by any regulations which the board imposes, and if there are no regulations specifically for the committee, the bye-laws of the company will regulate the committee as far as it is practicable.

3.4 **Directors' Interests**

A director may hold any other office or place of profit with the company (except that of auditor) in conjunction with his office of director for any period and upon whatever terms the board may determine. Also, he may be paid extra remuneration for the additional office (whether by way of salary, commission, participation in profits or otherwise). This extra remuneration, again, is normally in addition to any remuneration provided for serving as a director.

A director may act by himself or through his firm in a professional capacity for the company (otherwise than as auditor) and he or his firm is entitled to remuneration for professional services as if he were not a director.

Subject to the provisions of the Companies Act, a director may, notwithstanding his office, be a party to, or otherwise interested in, any transaction or arrangement with the company or in which the company is otherwise interested. He may also be a director or other officer of, or employed by, or a party to any transaction or arrangement with, or otherwise interested in, any body corporate promoted by the company or in which the company is interested. In appropriate circumstances, the board may also be able to appoint its directors or other trusted persons to the position of director or officer in any other company in which the company has shares.

If the bye-laws allow a director to hold an office or employment, the director is not, by reason only of his being a director, accountable to the company for any benefit derived from holding that office or employment, provided he declares the nature of his interest at the first opportunity (either at a meeting of the board or by writing to the directors), as required by the Companies Act. This is also true for any transaction or arrangement which the bye-laws allow him to be interested in. No such transaction or arrangement is liable to be avoided on the ground of any disclosed interest or benefit.

A general notice by a director or officer declaring that he is a director or officer of, or has an interest in, a person and is to be regarded as interested in any transaction or arrangement made with that person is a sufficient declaration of interest in relation to any such transaction or arrangement. This is subject to the Companies Act and any further disclosure required by the Companies Act.

4. DIRECTORS' DUTIES

There is no statutory prescription in Bermuda setting out all of the duties of directors of Bermuda companies. Generally, a company's memorandum of association and bye-laws will delimit and describe the powers and duties of the board and officers. These provisions, together with the Companies Act and relevant case-law, describe the scope of the directors' powers.

4.1 Who owes the Duties?

Every officer of the company (apart from any **Resident Representative**, whose statutory duties are owed chiefly to the Registrar of Companies rather than to the company itself) owes statutory and fiduciary duties and statutory duties of skill and care:

- Every officer of a company in exercising his powers and discharging his duties shall:
 - act honestly and in good faith with a view to the best interests of the company; and
 - exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

4.2 To whom are Duties owed?

As a general rule the duties of a director are owed to the company as a whole and not to the individual members. When a company is solvent the directors' duties include having regard to the interests of the general body of members. However, when a company is insolvent or in danger of becoming insolvent, the directors must have consideration for the interests of the company's creditors.

In a particular transaction a director, expressly or by his conduct, may constitute himself as an agent for one or more of the members and he may thereby be subject to a duty to the members concerned. Such duty may arise in circumstances where the directors advise members on the suitability of a takeover bid.

Difficulties may arise where a director is appointed by a special class of member pursuant to the bye-laws or shareholders' agreement. While the intention may be that such director represents the interests of the appointees, he is, however, nevertheless bound to exercise his judgment in the interests of the company as a whole. Further, in the case of a single controlling member, it is not always the case that the interests of the company will coincide with the interests of that member.

A director should not fetter his discretion by agreeing to exercise his decision making power in accordance with the directions of some other person, and must always act in his judgment in the best interests of the company.

4.3 Fiduciary Duties

Each director of a Bermuda company has certain fiduciary duties at common law which he must exercise in good faith for the benefit of the company as a whole. In so doing, he must use his powers for the purposes for which they are intended, and fulfil the duties of his office honestly.

The director's fiduciary duty has four aspects:

- A duty to act in good faith in what the director considers is the best interests of the company and not for any collateral purpose.
- A duty to exercise powers for a proper purpose. In the context of a Bermuda company a "proper purpose" means a purpose which advances the interests of the company itself as a separate body corporate, as distinct from its members.
- A duty to avoid conflicts of interest with the company. A director should not put himself in a position in which his duties to the company and his personal interests may conflict. Unless the conflict is fully disclosed, any contract entered into by the company and a third party in which a director has an interest may be voidable at the instance of the company, and any profit made recoverable by the company.
- A duty not to profit improperly. Unless the bye-laws specifically provide, a director may not make a personal profit from any opportunities arising out of his directorship, even if he is acting honestly and for the good of the company. Any profit made in such circumstances must be paid over to the company.

A director of a Bermuda company must exercise whatever skill he possesses with reasonable care. This duty has three aspects:

- **Degree of Skill** – The standard required from the director is that of a person of his particular knowledge and experience. His performance will be judged by the way he applies any skills which he actually has.
- **Attention to the Business** – A director should attend to the affairs of the company diligently. Unless he is an executive director, he is not expected to devote all of his time and attention to the management of the company, or to be an expert in its field of business, but in performing his duties, he must display reasonable care that an ordinary man may be expected to take in the same circumstances.
- **Reliance on Others** – A director is not liable for the acts of co-directors or company officers solely by virtue of being a director. Rather, a director may rely in good faith on executives who have been appointed specifically for the purpose of attending to the detail of management. However, directors cannot absolve themselves entirely of their responsibility by delegation to others.

The Bermuda courts will have regard to English common law authorities when considering cases involving directors' fiduciary duties or directors' duties of skill and care.

4.4 **Specific Statutory Duties**

The general principles governing a director's conduct set out above are augmented by a range of specific duties imposed by the Companies Act. Some of these duties are imposed not on the directors in their own right, but on the company. However, since the directors are responsible for the performance of the statutory duties imposed on the company, it is they who must ensure that the company does everything that is required of it. Other duties are imposed directly on directors themselves, generally taking the form either of the restriction of a particular activity or a requirement to disclose it, or both.

4.5 **Operational Responsibilities**

The directors and secretary are responsible in law for ensuring that key changes in the company's structure and management and certain other events are notified promptly to the Registrar of Companies. Failure to do so is an offence.

The information required includes:

- Change of company name
- Change of share capital or its currency
- Change of registered office
- Alteration of Memorandum of Association
- Amalgamations
- Charges over company property
- Continuations
- Annual returns
- Changes in officers stipulated by other legislation

Obligations include:

- Ensuring that quarterly accounts are prepared (this is each director's personal responsibility);
- Recording changes of members, directors and secretaries as they happen; and
- Ensuring that action is taken on mail sent to the registered office and that the Registrar is notified if notifiable information changes.

4.6 **Statutory Liabilities of a Director**

The Companies Act provides for certain situations where directors and others may be liable for civil or criminal penalties.

Untrue Statement in a Prospectus

Where persons who have subscribed for shares in a Bermuda company have suffered loss by reason of untrue statements in the prospectus which preceded the subscription for such shares, then, in certain circumstances, the directors who authorised the issue of the prospectus may be liable for damages.

Contravention of Share Allotment Provisions in the Companies Act

A director may be liable to compensate his company and any allottee of shares in that company for any loss, damages or costs which they have suffered if the director knowingly contravenes (or permits or authorises the contravention of) provisions in the Companies Act relating to the allotment of shares.

Receiving Loans

Directors are prohibited from receiving loans from their company unless they have had the consent of members having between them not less than nine-tenths of the voting rights of the issued share capital of the company.

Interest in any Material Contract or Person Party to a Material Contract

A director will be deemed not to be acting honestly and in good faith, in accordance with his statutory duty of good faith and his common law duty to avoid a conflict of interest and not to make a secret profit, if he fails to disclose at the first opportunity his interest in any material contract with the company (or its subsidiaries) or his material interest in any person which is a party to a material contract with the company (or its subsidiaries).

Offences by Officers of Companies in Liquidation may create Criminal Liability

In certain circumstances (such as failing to disclose or deliver assets to the liquidator, falsifying or destroying records or obtaining on credit or disposing of property obtained on credit under false pretences)

a director of a company which is in (or subsequently goes into) liquidation may commit offences and on conviction may be liable to imprisonment.

Fraudulent Trading

If, in the course of a winding up of a company, it appears that any business of a company has been carried on with the intent to defraud creditors, the court (on application of the liquidator, the Official Receiver or any creditor of a company) may declare, that any persons who were knowingly parties to the fraudulent trading are personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

Prosecution of Delinquent Officers and Members of a Company

If it appears to the court in the course of a winding up by the court that any director or former director or a current member of the company has been guilty of an offence in relation to the company for which he is criminally liable, the court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator to refer the matter to the Attorney-General.

4.7 Specific Financial Responsibilities of Directors

Duty to Maintain Accounts

The Companies Act imposes a fine on every officer of a company who fails to keep proper records and books of account.

Audit

Unless the members of the company waive the requirement in respect of a particular financial year, the company's accounts must be audited and the auditor's report included with the accounts made available to the members.

Approval of Accounts and Report

Before the financial statements are laid before the members, they must be signed on the balance sheet page by a director of the company. It is customary practice for a Bermuda company to provide at each annual general meeting a director's report reviewing the statement of results of operations of the company.

Circulation of Accounts and Reports

The accounts must normally be considered by a general meeting of the company, usually the annual general meeting. A copy of the accounts and reports must be sent to every member prior to the meeting taking place.

It is the duty of the directors to call the meeting at the appropriate time. A general meeting must be held annually unless the company has elected to dispense with the holding of one or more of its annual general meetings. A company may pass a resolution to dispense with the laying before a general meeting of accounts and reports and appointment of an auditor, but this requires unanimity of all directors and members.

Where a particular company has waived the requirement to hold annual general meetings, but has not dispensed with the laying of accounts and the appointment of an auditor, statutory provisions provide for the distribution of the required materials to the members by other means.

4.8 Enforcement

Taking legal action to enforce directors' duties is a complex matter that is well beyond the scope of this brief guide. However, it should be noted that a breach of a director's duty amounts to a harm done to the company itself and in respect of which the company itself may sue. The general rule is that members do not necessarily always have a direct path to a remedy. If the company were to decide not to proceed against a director for what a member sees as a perceived breach of duty, then the member can only bring an action on behalf of the company if he can bring himself within certain exceptions to the general rule.

4.9 Punishment of Directors

The court has the power to assess damages against delinquent officers. It also has the power to grant relief if the liable officer acted honestly or reasonably.

5. INDEMNIFICATION AND INSURANCE

5.1 Exoneration and Indemnity

The Companies Act permits a company to exempt and indemnify its directors and officers from liability in the following terms:

- A company may in its bye-laws or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempt such officer or person from, or indemnify him in respect of, any loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of any duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof.
- Any provision, whether contained in the bye-laws of a company or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempting such officer or person from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company shall be void.

It is therefore typical to see an indemnification and exculpation clause in the bye-laws of a Bermuda company which serves as protection for all liabilities, loss, damage or expense (including but not limited to liabilities under contract, tort and statute). Some bye-laws set the threshold for indemnification at **negligence, default, gross negligence, breach of duty, breach of trust, or wilful default**. Regardless of the standard of care applied, note that no provision in the bye-laws can exempt or indemnify a director or officer from his own fraud or dishonesty.

The determination of whether a bye-law indemnity is effective in any given situation entails a factual and legal analysis of the claim made against the director and an interpretation of the bye-law to see whether the claim falls within the ambit of indemnity. The Bermuda Court of Appeal has established that the onus is on a company or its liquidator to plead and prove at trial a case of wilful default or dishonesty in order to overcome the obstacle imposed by a bye-law indemnity.

This indemnification may also cover any liabilities which the officer incurs in defending any proceedings (criminal or civil) where relief is granted to him, where he is acquitted, or where judgement is given in his favour. A company may advance money to an officer for the costs of defending proceedings, on the condition that the advance shall be repaid if any allegation of fraud or dishonesty is proven.

5.2 Insurance of officers of a company

A company may itself take out a policy of insurance for the benefit of any director against any liability incurred for his failure to exercise the **care, diligence and skill** of a reasonably prudent person. Insurance may also be purchased to cover any liability arising from any negligence, default, breach of duty or breach of trust of such director, other than breaches involving fraud or other dishonesty.

6. CONCLUSION

Directors of companies must be fully aware of their powers, rights, duties and responsibilities so that they can avoid liability to the company and third parties. In addition to their duties under common law and the statutory regime in Bermuda, directors must have regard to the company's memorandum of association and bye-laws. This area of law is complex, and the consequences for breach or default are significant. As such, anyone acting as director to a Bermuda company should proceed with care and caution and take legal advice when necessary.

For more specific advice on for directors and officers of companies in Bermuda, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).