

# The International Bar Association Company Director Checklist – Uruguay

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The Uruguayan Business Companies Act (Law Nr. 16.060) establishes that the directors or the manager of the corporation shall be directly and jointly and severally liable, from the financial point of view, with the remaining members of the board of directors and without any limitation whatsoever as to the amount of such liability, for the damages and losses directly or indirectly caused to the corporation, to the shareholders or to third parties (i.e., creditors) by reason of their wrongful acts.

Scholars and case law have been conclusive when stating two key aspects of financial liability: (i) they are not obligations related to the ends desired, but obligations related to the means used to achieve such ends (i.e., the directors must make their greatest and best efforts, but they cannot guarantee any result); and (ii) they are not an objective but a subjective liability, and therefore, it is necessary that the claimant proves that there has been fraud or gross fault (considered the latter as the negligence, imprudence, unskillfulness or failure to fulfill mandatory duties when holding the office). Since the board of directors may be composed of more than one director, as it is in most cases, the LSC imposes joint and several liability on the members of the board of directors. To the extent that the directors are jointly and severally liable for the damage caused to the corporation or to third parties, claims may be filed against all the directors and this joint and several liability extends to the current and former directors. In accordance with the article 83.2 of the "LSC", the judge may determine the share of responsibility of each director in the reparation of the damage. The latter is considered in doctrine to be an imperative for the judge to determine the liability, whether for gross fault or willful misconduct. Once this stage has been verified, the directors will have the possibility of proving that they have not acted in such a manner, since it is a simple presumption that admits proof to the contrary, therefore there is a reversal of the burden of proof to establish the extent of liability to which each director is responsible for the damage. The proof of inexistence of gross fault or fraud on the part of the director concerned also exempts him from liability.

It has been finally stated that there is a professional liability depending on the company's business, in whose case, the required level is higher than that of an average or ordinary person and it shall be proportional to the requirements established for administrators of similar companies (for example, the requirement shall not be the same for a bank's director as for a director of a small enterprise organized as a corporation).

In the following table we will analyze the different responsibilities in which Directors can incur in the different types of legal entities in Uruguay,

<b>DUTIES AND OBLIGATIONS OF THE DIRECTORS</b>		
<b>CORPORATIONS</b>		
	<b>Regulations</b>	<b>Notes</b>
<b>1. Legal status of directors</b>	<p>Sections 375 to 386 of Law No. 16,060 on Commercial Companies (hereinafter "LSC"), regulate the general form in which company's are administrated and represented before third parties. As from section 387, the liability regime of the directors is enumerated. These rules must be complemented with the general rules set forth in section 79 of the LSC and the provisions of the bylaws of the company (hereinafter, the "statutory framework").</p> <p>The concept of liability comes into effect in the event of the violation of any legal provision. The broad scope of application means that the violation of any kind of rule can give rise to liability. They can be rules relating to any subject matter, such as environmental, tax, civil, labour, etc.</p> <p>Given the difficulty of enumerating all the duties incumbent on directors, the law emphasises the loyalty and diligence with which directors must perform their duties.</p>	<p>The conduct of the board of directors affects the assets of the company and should therefore give rise to liability of the directors before the company, its shareholders and third parties.</p> <p>If the board fails to act in accordance with the rules governing its actions, it is liable for any damage it causes to the company or the shareholder.</p> <p>The mere fact that the company loses does not make directors liable. The directors will be liable according to how they acted unless proven otherwise.</p>
<b>2. Duties and Obligations of Directors</b>	<ul style="list-style-type: none"> <li>• <b>Diligence of a good businessman</b></li> </ul> <p>The standard of what a "good businessman" means must be defined in each specific case and for each company. It is a more severe duty of diligence that does not only consist of the company's assets, but is more complex. To monitor the compliance of this standard, each corporation, its assests and activities have to be analyzed.</p> <p>It consists of a diligence that is governed by specific rules, with a more rigorous assessment of the directors' conduct. The directors' obligation is one of means and their performance will be evaluated based on this standard.</p>	<p>To act with the diligence of a good businessman directors must:</p> <ul style="list-style-type: none"> <li>• Perform acts within their competence.</li> <li>• Act within the object of the company.</li> <li>• Attend meetings of the Board of Directors.</li> <li>• Be informed and seek advice on matters not within their knowledge.</li> <li>• Investigate and evaluate the performance of the company.</li> </ul> <p>In our jurisdiction the Business Judgement is applicable to the Board of Directors of the corporations. By principle, the board of directors has the right to make its daily decisions without the fear of prosecution by shareholders who might object.</p> <p>It is important to bear in mind that the reference to the good businessman is not to a wise trader but to a normal businessman who</p>

		<p>is susceptible to the inevitable mistakes that are inherent in good business performance.</p>
	<ul style="list-style-type: none"> <li>• <b>Duty of loyalty</b></li> </ul> <p>Directors must prioritize and make the interests of the corporation prevail over their own interests; if they prioritize their personal interests over those of the corporation, they will be liable.</p> <p>They should not obtain their own benefits to the detriment of the company.</p>	<p><b>Different hypotheses are contemplated within the Duty of Loyalty:</b></p> <ul style="list-style-type: none"> <li>• <b>Conflict of interest of the directors with the company</b> (Article 387 of the LSC).</li> </ul> <p>This situation occurs when the directors have an interest contrary to the company's one, either on their own behalf or on behalf of third parties. When this hypothesis arises, it is necessary to interpretate how the directors refrain from intervening.</p> <p>The majority of the doctrine considers that at this point, the director is not computed for voting majority and should not attend the meeting. The quorum should be taken on the directors entitled to be present and vote. Failure to comply and in stead to participate of the decision in question makes the Director liable for the damages caused on the corporation.</p> <ul style="list-style-type: none"> <li>• <b>Prohibition to contract with the company</b> (Section 388 of the LSC).</li> </ul> <p>Section 388 of the LSC regulates the contracting between the directors and the corporation. Directors are not prohibited from doing so, provided that certain circumstances are met:</p> <ol style="list-style-type: none"> <li>1) contracts corresponding to the normal activity of the company, i.e., to the line of business of the company. In the event that the contracts do not correspond to the normal activity of the company, the prior authorization of the shareholders' meeting will be required, being null and void those that are granted in violation of the provisions.</li> <li>2) Contracts must be entered into under the same conditions as with third parties, i.e. under market conditions.</li> </ol>

		<ul style="list-style-type: none"> <li>• <b>Competitive activities performed by the director in competition with the company</b> (Section 389 of the LSC).</li> </ul> <p>Article 389 of the LSC regulates the competition of the directors with the company, unless expressly authorized by the Shareholders' Meeting.</p> <p>In order to incur in this hypothesis of lack of duty of loyalty:</p> <ul style="list-style-type: none"> <li>- They must be acts of competition on a habitual basis, a conduct that lasts over time unlike the previous hypotheses.</li> <li>- Competition implies providing the same goods or services, developing the same business, targeting the same client portfolio.</li> </ul> <ul style="list-style-type: none"> <li>• <b>Business opportunity</b></li> </ul> <p>Directors may not take advantage of a business opportunity which arises from the company, which comes to them as a result of holding that position. This hypothesis is not expressly contemplated by the LSC, but has been taken up by the American doctrine.</p> <ul style="list-style-type: none"> <li>• <b>Insider Trading</b></li> </ul> <p>Directors must refrain from making transactions with securities issued by the company (shares, negotiable obligations, etc.), in order to obtain a benefit based on confidential information that they obtain by holding the position of directors. Privileged information consists in information which is complete and private, as contemplated in Article 6 of the Securities Market Law No. 18,627.</p>
	<ul style="list-style-type: none"> <li>• <b>Abuse of powers</b></li> </ul> <p>The LSC refers to the abuse of powers as those behaviors of the directors that are exercised in a deviant or abusive manner, and the common parameter to measure this is the corporate interest. These are those</p>	<p>The use of company's goods for a personal purpose is a clear example of Abuse of Powers. (For example: corporates cards)</p>

	<p>conducts that exceed the powers that the directors have in the exercise of their functions; this hypothesis can occur, for example, when the directors act outside the purpose of the company or perform acts that are align to it.</p> <p>It is similar to the abuse of rights in civil law, also taking into consideration the intentionality of the directors.</p>	
	<ul style="list-style-type: none"> <li>• <b>Dolo or gross negligence</b></li> </ul> <p>Article 391 of the LSC establishes these grounds for liability. It does not refer to willful misconduct or gross negligence due to violation of the law, bylaws or regulations, but rather it establishes the standard of culpability required by law for the directors' liability to arise.</p> <p>These issues will be analyzed according to the duty of diligence of a good businessman.</p>	
	<p><b>Joint and several liability of the directors</b></p> <p>Since the board may be composed of more than one director, the LSC imposes joint and several liability on the board.</p> <p>Part of the doctrine considers that in cases where individual liability actions are brought, the directors' liability regime does not apply because the LSC does not regulate the individual action..</p> <p>The directors are jointly and severally liable, i.e., all the members of the board of directors are liable, and a claim may be filed against all the directors, including former directors, for all the compensation for the damage caused.</p> <p>The shareholder or third party may claim from any director of the company, the total amount of the compensable damage.</p>	
	<p><b>Extinction of liability</b></p> <p>The liability of the administrators and directors with respect to the company shall be extinguished by the approval of their discharge, express resignation or settlement, as resolved by the meeting, if such liability is not due to a violation of the law, the bylaws or the regulations and if there is no opposition from shareholders representing at least five per cent (5%) of the paid-in capital, and provided that the acts or facts giving rise to such liability have been specifically raised and the matter has been included in</p>	

	the agenda. The termination shall be ineffective in the event of compulsory liquidation or bankruptcy.	
	<p><b>Fiscal Liabilities</b></p> <p>From the fiscal point of view, the directors of the corporation are jointly and severally liable for the social security obligations of the same, when they have not acted with diligence, as established in article 21 of the Taxation Code (hereinafter “TC”). This liability is limited to the value of the properties being administered, provided that no fraud has been involved.</p> <p>According to article 21 of the TC, legal or voluntary representatives of a corporation are jointly and severally liable for the tax obligations of the same. Therefore, fiscal authorities may claim, both from the corporation and from the representatives, the total amount of the fiscal debts.</p> <p>Jurists and case law have considered that directors, administrators and managers of companies are included within the concept of representative.</p>	<p>The mentioned fiscal liability is subject to two limitations:</p> <p>a) it would not be applicable to those directors who prove they have performed their duties with due diligence; and</p> <p>b) it has as maximum limit the value of properties administered or disposed of, except in case they have acted fraudulently, in whose case the liability is unlimited.</p> <p>Although it is not expressly regulated by law, the interpretation that the liability of directors who were representatives of the corporation is limited to those taxes accrued and that should have been paid in the period in which they held such offices is accepted.</p> <p>In Law Nr. 18.083 it is established, as regards the “Impuesto a las Rentas de las Actividades Económicas (IRAE)” (Economic Activity Income Tax), that the partners of partnerships or directors of taxpayer companies shall be jointly and severally liable for the payment of the tax (article 95). To the extent that the legal provision establishes the joint and several liability, it may be certainly concluded that the fiscal liability of directors under this tax is objective, being the behavior of the director irrelevant.</p>
<b>Sociedades por Acciones Simplificadas – Simplified Stock Companies</b>		
<b>1. Legal status of directors</b>	<p>Simplified stock companies (hereinafter, SAS) are regulated by the Law for the Promotion of Entrepreneurship (hereinafter, LFE) regulated by Decree 399/019 which came into force on January 1, 2020.</p> <p>In the case of the SAS, the board of directors and the legal representative of the company are personally liable before the company for all violations of the legal or bylaw regulations, and of</p>	<p>The conduct of the board of directors affects the assets of the company and should therefore give rise to liability of the directors before the company, its shareholders and third parties.</p> <p>If the board fails to act in accordance with the rules governing its actions, it is liable for any damage it causes to the company or the shareholder.</p> <p>The mere fact that the company loses does not make directors liable. The directors will be liable according to how they acted.</p>

	<p>their fiduciary duties of loyalty and diligence, which have caused damage to the company's assets, with intent or gross negligence.</p> <p>In the event that the damage arises from decisions taken by a collegiate body, the liability is joint and several. However, in these cases, there are also procedures that can be followed by the directors to exonerate themselves from liability.</p>	
<b>2. Duties and obligations of directors</b>	<p>Article 9 of the LFE establishes that in all matters not provided for in said law, the following shall apply:</p> <ul style="list-style-type: none"> <li>- The provisions of the bylaws</li> <li>- In the legal norms governing corporations.</li> </ul> <p>Duties and responsibilities of the directors of SAS entities are the same as those of the directors of corporations.</p>	<p>To act with the diligence of a good businessman directors must:</p> <ul style="list-style-type: none"> <li>• Perform acts within their competence.</li> <li>• Act within the object of the company.</li> <li>• Attend meetings of the Board of Directors.</li> <li>• Be informed and seek advice on matters not within their knowledge.</li> <li>• Investigate and evaluate the performance of the company.</li> </ul> <p>It is important to bear in mind that the reference to the good businessman is not to a wise trader but to a normal businessman who is susceptible to the inevitable mistakes that are inherent in good business performance.</p>
<b>Partnerships (Sociedades Colectivas)</b>		
<b>1. Legal status of directors</b>	<p>These are partnerships formed by two or more partners jointly and severally and unlimitedly liable for all the debts of the partnership, in the administration of which they always have the right to intervene.</p> <p>Law doesn't mandate for this types of entity's to have a board of directors. In cases where the contract does not provide otherwise, this type of company is managed by its partners</p>	<p>The administrators and representatives of the corporation must act with loyalty and with the diligence of a good businessman. Those who fail to fulfill their obligations shall be jointly and severally liable to the corporation and the partners for the damages resulting from their action or omission.</p>
<b>Limited Liability Companies</b>		



<p><b>1. Legal status of the entity</b></p>	<p>The Limited Liability Company is a type of partnership characterized by the limitation of the liability of the partners and the integration of the capital in installments.</p> <p>Its regulatory framework is found in Articles 223 to 243 of Law No. 16,060 "LSC".</p>	
<p><b>2. Duties and obligations of directors and partners</b></p>	<p>The partners only have the obligation to contribute and are not liable for corporate debts.</p> <p>Labor and tax regulations have established the personal liability of the partners.</p> <p>Article 12 of Decree-Law No. 14,188 for labor lawsuits establishes the liability of the partners in limited liability companies for the obligation to pay salaries. The second clause provides: "In such case, the partners will be liable in a subsidiary, personal and joint and several manner, for the totality of the salaries owed, with their accessories of the law". Decree-Law No. 14,358 modifies the second paragraph, eliminating the subsidiary liability of the partners.</p> <p>Law No. 18,083 creates and regulates the Income Tax on Economic Activities in article 3, which replaces article 4 of the Orderly Text 1996. Within the substitute regulations, Article 95 is included, which establishes: "The partners of partnerships or directors of taxpaying companies shall be jointly and severally liable for the payment of the tax".</p>	