

**Ghana
School of Law**
Board of Legal
Education



STUDY MANUAL

COMPANY & COMMERCIAL PRACTICE

Second Edition

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General Legal Council
Ghana School of Law

A MANUAL ON
COMPANY & COMMERCIAL PRACTICE
(second edition)



By: Felix Ntrakwah

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PREFACE

This manual is intended to guide you in the study of Company and Commercial Practice at the Ghana School of Law.

The manual deals with the basics and no attempt is made to provide a comprehensive or comparative analysis of concepts and procedures underlying company and commercial practice.

It should however be possible for you as a student to follow the required practical procedures and practices in company formation and governance, company litigation or liquidation of companies as well as the legal aspects of different commercial transactions, among others.

The course is intended to prepare you for the corporate world generally. You may one day find yourself in a statutory corporation, co-operative society, company, partnership and other bodies corporate.

Some of the expertise you acquire, especially in corporate governance, company secretarial practice, minutes taking, legal due diligence, lending transactions, commercial agreements and liquidation of companies may be required in your service to other corporate bodies apart from companies incorporated under the repealed Companies Act 1963 (Act 179), and the Companies Act 2019, Act 992 (hereinafter referred to as the Act 992 or the Companies Act). Of course, Act 992 will feature prominently in the course of your training.

It is presumed that you offered Company Law at the undergraduate level. To refresh your memory on company law the relevant provisions of the “Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana” by Prof. L.C.B Gower and the supplement to the commentary on the Companies Act 2019, Act 992 will be of immense help. Your knowledge of the law of contract comes in handy.

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Chapter 1

Introduction

The manual is organized into fifteen chapters. It is not a substitute for lectures or practical exercises which you require. This chapter summarizes the contents of the manual.

The author shares his experiences with you in Chapter 2. Chapter 3 summarizes some of the changes introduced by the Companies Act 2019, Act 992. Chapter 4 reminds you of the types of companies incorporated in Ghana and also recognises the possibility of a company incorporated abroad registering in Ghana as an external company.

The mechanics of incorporation of a company is treated in chapter 5. In the event that you are called upon to advise on foreign participation in business, chapter 6 will be relevant. Chapter 7 deals with the legal and regulatory aspect of Corporate Governance.

The issues which confront lawyers in the prosecution or defence of cases involving the enforcement of director's duties or the rights of members through the court are considered in chapter 8. Chapter 9 introduces you to company secretarial practice.

Capital Markets is treated in chapter 10 and is followed by Commercial Agreements in chapter 11.

Chapter 12 is about lending transactions in Ghana followed by legal due diligence in chapter 13.

The last two chapters, that is, 14 and 15 have been devoted to Liquidation of Companies. Chapter 14 takes you through private liquidation and Chapter 15 deals with the various approaches to official liquidation. There is a brief introduction to the Insolvency Bill which will replace the Bodies Corporate Official Liquidations Act 1963, Act 180 when the Bill eventually becomes law.

Chapter 2

The Practitioner

Very often when some law students and young lawyers are asked to give reasons why they would like to go into company and commercial practice, they talk about their expectation of quick or big money.

There is no money in any vault in the Bank of Ghana or anywhere set aside to be collected by lawyers who claim to be experts in company and commercial practice.

It may sometimes take a relatively short time for someone to earn 5% or more of the purchase price of a property by finding a purchaser or showing the purchaser the location of a property. Company and commercial practice takes a lot more than that.

Your integrity, knowledge, hard work, reliability, competence, experience and other factors may account for your success. You must be very meticulous. You require good drafting and communication skills. Two things that can easily expose you very early in your practice are what you may consider as ordinary letter writing and the drafting of minutes.

Even though your concentration may be on company and commercial practice, your corporate client in Ghana may from time to time seek your advice on the acquisition or disposal of property. The advice you give or the document you draft may be a major source of embarrassment unless apart from being extremely careful, you effectively apply the knowledge you acquire in legal due diligence.

A number of clients would always like the opportunity to express themselves freely when in conference with you and they expect that you, their lawyer, will be patient enough to hear them. They are uncomfortable when they find that you are more interested in your own voice because you feel that you must lecture them instead of listening to them. You must be tactful in dealing with such clients.

As you grow in the practice or when you are perceived to have made a name, you may sometimes receive invitations to serve on boards. This is another instance where you may put your major asset, that is, your integrity, at stake unless again, you are extremely careful. Different clients may require your services but not all your corporate clients deserve your presence in their boardrooms.

Various commercial transactions may require your knowledge and experience in different areas of law, and sometimes outside the law. This means that you must not only be widely read but also, you must develop other skills. Besides, you may sometimes find that in some areas of practice you may be competing not only with lawyers but also non-lawyers. Different

consultants are engaged in advising on company formation, corporate governance, capital markets, among others.

Chapter 3

Some of the Changes Introduced By the Companies Act 2019, Act 992

The Companies Act 2019, Act 992 repealed the following:

- a. the Companies (Amendment) Act, 1994 (Act 474),
- b. the Companies (Amendment) Act, 1997 (Act 531),
- c. the Companies (Amendment) Act, 2012 (Act 835), and
- d. the Companies (Amendment) Act, 2016 (Act

Some of the changes introduced by Act 992 are:

- a. an application for the incorporation may be made on the prescribed form and delivered to the Registrar¹
- b. the application may be made online²
- c. it is not obligatory for an applicant to deliver a constitution (previously known as regulations) to the Registrar before a company is incorporated
- d. the deemed constitution of a company which does not deliver a constitution to the Registrar is the applicable schedule to the Companies Act (schedules 2, 3 and 4). For example the deemed constitution of a private company limited by shares is the second schedule
- e. a constitution which is delivered to and registered by the Registrar at or after incorporation is known as “registered constitution”³
- f. it is not obligatory for a company to state the nature of its business or objects in its registered constitution
- g. particulars of beneficial owners must be disclosed and registered⁴
- h. the name of every type of company incorporated in Ghana must end with a suffix⁵
- i. a breach of some of the provisions of the Companies Act attracts administrative penalties payable to the Registrar⁶
- j. an aggrieved shareholder may ask to be bought out in appropriate cases⁷
- k. a member or director may bring a derivative action in the name and on behalf of the company⁸
- l. there are additional provisions for mergers⁹
- m. the qualifications and duties of the company secretary have been prescribed¹⁰

¹ s. 13 (1)

² s. 378 (1) (a)

³ ss. 18 (3), 19 (1), 23

⁴ s. 13 (1) (m)

⁵ s. 21

⁶ s. 352

⁷ s. 220

⁸ s. 201

⁹ ss. 241-251

¹⁰ ss. 211 - 212

- n. the office of the Registrar of companies is created as a body corporate with a board of directors¹
- o. keeping of statutory books may be done electronically²
- p. filing of returns may be done online.³

¹ s. 351

² s. 378

³ s. 378 (1) (e)

Chapter 4

Types of Companies in Ghana

A company may be incorporated in Ghana pursuant to the Companies Act 2019, Act 992.

Background

In 1958 the government of Ghana appointed Prof. L.C.B Gower as commissioner, to make proposals for a company law for Ghana. In 1961, Prof. Gower submitted his final report entitled “Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana” (Gower’s Report). For his report Prof. Gower presented a draft bill with commentaries. The draft bill became the Companies Code, 1963 (Act 179); an Act to codify and amend the law relating to companies.

One significant observation made by Prof. Gower in his report can be found at page 6 of the said report. He observed:

“As stated above, I believe that most small African Businesses are not yet ready for limited liability trading. What they need is a fundamentally different organisation analogous to the partnership with unlimited liability and without any separation of ownership and control”

He therefore introduced the Incorporated Private Partnerships Bill which was enacted in 1962 as the Incorporated Private Partnerships Act 1962, Act 152 which requires a minimum of two and a maximum of twenty individuals as partners. It is still true today to remark that most small African businesses in Ghana are not yet ready for limited liability trading. Regrettably, the partnership with unlimited liability has not been embraced as much as the limited liability company.

As noted earlier the Companies Code 1963, Act 179, which was renamed many years later as the Companies Act 1963, Act 179 was repealed in 2019 by the Companies Act 2019, Act 992.

Section 7 of Act 992 provides for four types of an incorporated company. The first is a **company limited by shares**.¹ In this type of company, the liability of the members is limited to the amount payable on the shares respectively held by them.² The information to be provided on the prescribed form for incorporation and the registered constitution (if any) of this type of company must state the company’s authorised shares. The authorised shares of a company which does not register a constitution is deemed to be the authorised shares disclosed on the prescribed application form.³

The second type of company is a **company limited by guarantee**.⁴ The members of this company undertake in their company constitution to contribute specific amounts each to the assets of the

¹ s. 7 (1) (a)

² s. 7 (2) (a)

³ ss. 7(1) (a), (2) (a), 26 (5)

⁴ s. 7 (1) (b)

company in the event of the company being wound up while it is indebted.¹ A company limited by guarantee cannot be incorporated with shares and so cannot create or issue shares.²

The third type of company known as **unlimited company**³ has no limit on the liability of its members. An unlimited company must be incorporated with shares.⁴

A company limited by shares, a company limited by guarantee and an unlimited company incorporated in Ghana may be a private company or a public company.⁵

A private company is one which by its constitution restricts the right to transfer shares, if any, limits the total number of members and debentureholders to fifty and prohibits the company from making an invitation to the public to acquire shares or debentures of the company or to deposit money for fixed periods or payable at call. Any other company shall be a public company.⁶

A company incorporated outside Ghana may establish a place of business in Ghana.⁷ This fourth company is required to deliver copies of its documents of incorporation outside Ghana together with the prescribed forms to the Registrar for registration under Act 992 as an external company.⁸

¹ s. 7 (2) (b)

² s. 7 (8)

³ s. 7 (1) (c)

⁴ s. 7 (3)

⁵ s. 7 (4)

⁶ s. 7 (5)

⁷ s. 7 (1) (d)

⁸ ss. 329-342

Chapter 5

The Mechanics of Incorporation of a Company

In the course of your practice, a client may seek your advice or assistance regarding the incorporation of a company. Your role as a lawyer is not just to ask your client to sign the prescribed form and the constitution (if any) to begin the process of incorporation.

For a number of clients, you have to ask various questions and explain the options available in order to find out whether the client's desire is really to have a company incorporated and if so, the type of company.

You may sometimes find that even though your client may talk about a company, all that your client is looking for is not exactly what is called a company within the meaning of Act 992 but the registration of a business name or partnership under the registration of Business Names Act 1962, Act 151 or the Incorporated Private Partnership Act 1962, Act 152.

Prescribed Form and Incorporation

A person who is eighteen years and above may apply for the incorporation of a company in accordance with the provisions of the Companies Act 2019, Act 992.¹

The process of incorporating a company pursuant to Act 992 commences with the completion and delivery of the prescribed form to the Registrar of Companies (the Registrar).²

The prescribed form requires information about the name of the company, specified particulars of proposed directors, subscribers, beneficial owner, auditors, company secretary, proposed stated capital, the proposed number of authorised shares, registered office of the company, among others.

The application shall be signed by the subscriber or each subscriber.

Where the Registrar is satisfied that the application for incorporation is complete, the Registrar shall after payment of the prescribed fee certify that the company is incorporated.³

The certificate of incorporation or a copy of that certificate certified as correct by the Registrar, is conclusive evidence that the company has been incorporated.⁴

¹ s. 12

² s. 13

³ s. 14 (1)

⁴ s. 15

Powers of the Company

A company has the full capacity to carry on or undertake any business or activity, do any act or enter into any transaction.¹

It is therefore optional for a company to set out the nature of business or objects in its registered constitution.

Limits of Authority of Company

There is deemed to be a restriction in the registered constitution on the business or activities of a company where the registered constitution sets out the nature of business or objects.

As part of the process for incorporating a company, you may have to draft the constitution of the company in accordance with your instructions and the law otherwise the incorporation of a company requires only the completion and delivery of the prescribed form to the Registrar

The Constitution

Section 26 of Act 992 requires that the following be stated in the registered constitution of a company or be deemed to be part of the constitution of a company which does not deliver a constitution for registration:

- i. The name of the company.
- ii. That the company has for the furtherance of its businesses or objects, all the powers of a natural person of full capacity except insofar as such powers are expressly excluded by the constitution.
- iii. That the powers of the directors are limited in accordance with section 189 of Act 992
- iv. The number of shares with which the company is to be registered, in the case of a company with shares.

Additional provisions required under section 27(3) to be stated in the constitution of a company limited by guarantee are the following:

- i. That the income and property of the company shall be applied solely towards the promotion of its objects, and that no portion thereof shall be paid or transferred directly or indirectly to the members of the company except as therein permitted
- ii. That each member undertakes to contribute a specified amount to the assets of the company in the event of its being wound up while he is a member for the payment of the debts and liabilities of the company and the costs of winding up.

¹ s. 18 (1) (a)

- iii. Upon the winding up of the company any assets of the company which remain after the settlement of all debts and liabilities shall not be distributed among members. Such assets are to be transferred to another company limited by guarantee having similar objects or applied to some charitable objects determined by the members prior to the dissolution of the company.

In addition to the foregoing provisions the registered constitution of a company may contain any other lawful provisions regarding the structure and administration of the company.

The second schedule, Third schedule and fourth schedule to Act 992 contain provisions which may be adopted in appropriate cases in order to complete the registered constitution.

Assuming that your instructions are to draft the constitution of a private company limited by shares which has to carry on specific businesses, a typical example may be the following:

THE COMPANIES ACT 2019, ACT 992

THE CONSTITUTION OF A PRIVATE COMPANY LIMITED BY SHARES

1. *The name of the company is Onipa Nua Limited*
2. *The nature of the businesses which the company is authorized to carry on are:*
 - a. *Real estate development*
 - b. *Importers and distributors of building materials*
3. *Pursuant to section 18 of the Companies Act, 2019 (Act 992), the company has the powers of a natural person of full capacity.*
4. *The first directors of the company are Kwesi Asamoah and Mary Mensah.*
5. *The powers of the board of directors are limited in accordance with section 189 of the Act.*
6. *The liability of the members of the company is limited.*
7. *The company is to be registered with two hundred thousand shares of no par value.*
8. *The company is a private company and accordingly;*
 - (a) *the right to transfer shares is restricted in that the directors may, in their absolute discretion and without assigning a reason, decline to register a transfer of a share;*
 - (b) *the number of members and debenture holders of the company, exclusive of persons who are genuinely in the employment of the company and of persons who having been formerly genuinely in the employment of the company were while in that employment and have continued after the determination of the employment to be members or debenture holders of the company, is limited to fifty, but where two or more persons hold one or more shares or debentures jointly, they shall for the purposes of this clause be treated as a single member;*
 - (c) *the company is prohibited from making an invitation to the public to acquire any of the shares or debentures of the company;*

- (d) the company is prohibited from making an invitation to the public to deposit money for fixed periods or payable at call whether bearing or not bearing interest.

After clause 8 above, you may continue your constitution by the adoption of the entire clause 5 to 76 of the second schedule of Act 992 or introduce other provisions of the constitution of a private company which are not contrary to Act 992. If you are departing from the second schedule, you have to state expressly that you will not follow the second schedule or specific provisions of the second schedule.

The registered constitution shall be printed, typewritten or in any other legible form acceptable to the Registrar. Section 28 of Act 992, requires that the registered constitution shall be signed by one or more subscribers in the presence of, and it shall be attested by, at least one witness.

Since the example we have given is a company with shares, each subscriber, if there is more than one, shall write opposite to the subscriber's name the number of shares the subscriber takes, and the cash price payable for the shares and shall take at least one share. There is only one subscriber in our example so one person will sign the registered constitution.

The last page of the registered constitution of this company which requires signatures will look like the following:

I the undersigned am desirous of forming an incorporated company in pursuance of this constitution and I agree to take the number of shares in the company set opposite my name and to pay for the shares in cash the consideration stated.

Name, Address and Description or Occupation of Subscriber	Number of shares	Consideration Payable in Cash
Kwesi Asamoah (Ghanaian) of F. 37 Kanda Estate P.O. Box 929, Accra Businessman	100,000	(GH¢100,000)

Dated the 2nd day of June, 2016.

Witness to the above signature:

Name..... Kweku Manu
Address..... 25 Korsah Street, Adabraka-Accra
Description or Occupation..... Administrative Assistant

The registered constitution when signed by the subscriber and duly witnessed may be submitted to the Registrar of Companies for registration. If the Registrar is satisfied that the name of the company is neither misleading nor undesirable and there are no issues with any of the provisions

of the registered constitution he will incorporate the company. The constitution constitutes a contract between the subscriber, the directors, officers and the company. The Registrar will then issue a certificate of incorporation.

Download the Registrar's prescribed form from the official website of the Registrar General's Department at:

<http://rgd.gov.gh/wp-content/uploads/2016/01/Company-Limited-By-Shares-Re-Registration-Form-3.pdf> and <http://rgd.gov.gh/wp-content/uploads/2016/01/Company-Limited-By-Shares-Registration-Form-4.pdf> respectively.

Chapter 6

Foreign Participation in Enterprises

Registration with the Ghana Investment Promotion Centre

The Ghana Investment Promotion Centre Act, 2013 (Act 865) requires every enterprise with foreign participation to register with the Ghana Investment Promotion Centre (GIPC). The application must be on the prescribed form.

Minimum Capital Requirements for Foreign Investors

The minimum capital required to be invested by a non-Ghanaian is as follows:

- a. In a joint enterprise with a Ghanaian partner, the minimum capital requirement is Two Hundred Thousand United States Dollars (\$200,000.00) or its equivalent in capital goods¹;
- b. In a wholly foreign-owned enterprise, the minimum capital requirement is Five Hundred Thousand United States Dollars (\$500,000.00) or its equivalent in capital goods²;
- c. In the case of a trading enterprise irrespective of whether it is wholly or partly owned by a non-Ghanaian, the minimum capital requirement is One Million United States Dollars (\$1,000,000.00) and the enterprise shall be required to employ at least twenty (20) skilled Ghanaians.³

Other Laws

The incorporation of a company followed by the issuance of a certificate of incorporation is no authority for a company to carry on any business. The company must comply with industry specific procedures, rules and permits before it can carry on business; for example, the registration with Ghana Revenue Authority, Social Security and National Insurance Trust (SSNIT), Data Protection Commission, Environmental Protection Agency, Food and Drugs Authority, etc.

Restrictions on Foreign Direct Investment

Act 865 reserves certain enterprises for Ghanaians only. A non-Ghanaian can neither invest nor participate in any of the reserved enterprises. The enterprises reserved for Ghanaians only include the following⁴:

- a. The sale of goods or the provision of services in a market, petty trading or hawking or selling of goods in a stall at any place;

¹ s. 28 (1) (a) Act 865

² s. 28 (1) (b) Act 865

³ s. 28 (2) Act 865

⁴ s. 27 Act 865

- b. The operation of a taxi or car hire service in an enterprise that has a fleet of less than twenty-five (25) vehicles;
- c. The operation of a beauty salon or a barber shop;
- d. The printing of recharge scratch cards for the use of subscribers of telecommunication services;
- e. The production of exercise books and other basic stationery;
- f. The retail of finished pharmaceutical products;
- g. The production, supply and retail of sachet water; and
- h. All aspects of pool betting business and lotteries, except football pool.

A “Ghanaian” is defined in Act 865 as a citizen of Ghana or a company, partnership or association or body, whether corporate or unincorporated, which is **wholly owned** by a citizen of Ghana.¹

¹ s. 43 Act 865

Chapter 7

Corporate Governance

Definition

There are various definitions for corporate governance. It is a system of administering a body corporate. The key words used to describe good corporate governance include transparency, accountability, compliance, disclosure, social responsibility and fairness.

Legal and Regulatory Framework

The legal and regulatory framework for corporate governance includes the Companies Act 2019, Act 992. The governance of the State Owned Enterprises (SOEs) must take account of the relevant provisions of other specific Acts such as the Public Finance Management Act, 2016 and the State Interests and Governance Authority Act 2019, Act 990 and the regulations made under these Acts.

Corporate Governance Codes and Guidelines

Some countries like the UK have adopted corporate governance codes. In Ghana, Bank of Ghana and other institutions have adopted corporate governance codes or directives.

Financial Reporting

The IFRS (International Financial Reporting Standards) has been adopted by a number of countries including Ghana.

Distribution of Corporate Power

A company acts through;

- a. its members in general meeting
- b. the board of directors (the board)
- c. other officers or agents appointed by or under authority derived from the members in general meeting or the board of directors.

The Board

The business of the company shall be managed by the board who may exercise the powers of the company which have not been given to the members in Act 992 or the constitution of the company.

The board is responsible for policies, human resource development, risk management, financial statements, among others.

There are however limitations on the powers of the board.¹

The board shall not be bound to obey the directions or instructions of the members in general meeting. However, the members may;

- a. act where the directors are disqualified or deadlocked
- b. institute legal proceedings in the name of the company where the board fails or refuses
- c. ratify or confirm actions taken by the board
- d. make recommendations to the board

Officers: The officers of the company are usually the following:

- a. Chairperson
- b. Other non-executive directors
- c. Managing Director
- d. Other Executives or officers including employees as the company may determine
- e. Company Secretary

Appointment and removal of Directors

A company must have a minimum of two directors.² The first directors of a company must be named in the application for incorporation. Other directors may be appointed by the members in general meeting.³ The constitution of a company may also provide for the appointment of directors by classes of members or by persons who are not members of the company.⁴

A company may by ordinary resolution at a general meeting remove from office all or any of the directors despite anything in its constitution or in an agreement with the director. Notice of the intention to move a resolution for the removal of a director must be given to the company not less than 35 days before the meeting at which it is to be moved.⁵ The company is required to give the director concerned a copy of the notice.⁶ The director is entitled to be heard on the resolution at the meeting and to send to the company a written statement to be circulated to members together with the notice of the general meeting.⁷

¹ s. 189 (1)

² s. 172 (1)

³ s. 172 (5) (b)

⁴ s. 172(4)

⁵ s. 176 (2)

⁶ s. 176 (5) (a)

⁷ 176 (5) (b)

*Duties of Directors*¹

Directors stand in a fiduciary relationship towards the company.

They must observe utmost good faith in any transaction with or on behalf of the company.

They must act in what they believe to be in the best interest of the company, which includes the interest of the company, employees, shareholders, and creditors.

Directors must:

- a. promote the business
 - b. preserve assets
 - c. act in such a manner as faithful, diligent, careful and ordinarily skillful persons.
- i. Directors may give special attention but not exclusive consideration to the interest of the persons who appointed or nominated them
 - ii. Without the consent of the company, a director's duty to the company must not conflict with the director's personal interests or the duties to other persons. A director must not use confidential information or company property or money or be interested in a business which competes with that of the company without the consent of the company.²

*Conflict of Interest*³

A director shall be entitled to enter into a contract with the company. However, a director who is in any way materially interested in a contract directly or indirectly must disclose the nature and extent of the interest⁴, the disclosure shall be at the meeting⁵, the director will not be counted towards the quorum and shall not vote in respect of the contract.

Civil Liabilities of Directors

A director who commits a breach of duty is not only liable to compensate the company for the loss it suffers but must also account for the profit the director has made. The company may rescind a contract entered into in breach of duty.⁶

¹ s. 190

² s. 193

³ s. 192

⁴ s. 195 (1)

⁵ s. 195 (b)

⁶ s. 199

Alternate and Substitute Directors

Alternate Director

A director can neither assign his office to another person nor merely give a proxy or a power of Attorney to another director or a stranger to enter a board room in his name.¹ A director can however appoint another director or a total stranger as an alternate director.²

This appointment must be made in writing and should be signed by both the appointor and the appointee and lodged with the company.³ If the appointee is a person other than a director, the appointment should be approved by a resolution of the board of directors. The term of office of the alternate director should not exceed six months at a time.

Substitute Directors

A substitute director is one who is appointed by the members in general meeting to act as a deputy for another named director and as his substitute in his absence. A substitute director shall not be counted as a director for the purposes of any provision in the Companies Act or the company's constitution prescribing a minimum or maximum number of directors other than a provision relating to a quorum.⁴ A substitute director shall not be entitled to vote at any meeting of directors or any committee of the board at which the director for whom he is a substitute is present.⁵

A substitute director is deemed to be a full director and may be appointed and removed in the same way as directors are required to be appointed and removed.⁶ He may continue to be a director even when the director for whom he is a substitute has ceased to be a director.⁷

Proceedings and Minutes of Meetings of Directors

Section 188 deals with the proceedings and minutes of meetings of directors.

Summoning Board Meetings

Directors must meet at least once every six months in Ghana or anywhere for the conduct of their business.⁸ A board meeting may be summoned by a director at any time. A company secretary

¹ s. 187

² s. 181 (1)

³ s. 181 (2)

⁴ s. 180 (3)

⁵ s. 180 (4)

⁶ s. 180 (5)

⁷ s. 180 (6)

⁸ s. 188 (1-2)

who receives from a director a requisition for a board meeting is under obligation to summon the meeting. But on his own, a secretary has no power to summon a meeting of the directors.¹

Notice

The notice for a board meeting must state the place, time, date and agenda for the meeting. It is however not necessary to give notice of a board meeting to a director who is for the time being absent from the country.²

Quorum

The minimum number of persons who should be present at the board meeting before proceedings can begin is known as the quorum. The quorum for the board meeting may be fixed by the directors and until so fixed shall be two.³

The company is prohibited from proceeding with a board meeting unless it has the requisite quorum. If in respect of a particular resolution a member is disqualified from voting resulting in the absence of a quorum, no business should be transacted.⁴

Voting

Decisions of the board of directors are arrived at on a show of hands by majority votes of members present. However, on non-controversial issues decisions are often by consensus. Where the votes or views are equally divided the chairman has a second or casting vote.⁵ The company may however by its constitution deny a chairman the right of a second or casting vote.

Minutes⁶

The minutes of both directors' and general meetings are to be kept by the company. The directors normally make the company secretary responsible for taking the minutes of meetings. The drafting of minutes after the meeting is influenced by many factors including the secretary's own skills. The directors expect the minutes to be concise. The minutes are not the same as a report which may be detailed.

¹ s. 188 (2) (b)

² s. 188 (2) (c)

³ s. 188 (2) (d)

⁴ s. 188 (2) (e)

⁵ s. 188 (2) (h)

⁶ s. 188 (3)

Written Resolutions of Directors¹

Directors may lawfully and conveniently sign written resolutions without the formalities of a meeting. Such written resolutions are as valid as the minutes of a meeting duly convened provided they are signed by all the directors for the time being entitled to receive notice of directors' meetings.

Committees of the Board

The directors may appoint one or more of their number at a meeting duly convened as a committee of the board and give it such powers of the board as they may consider necessary. For good corporate governance, the Audit Committee seems to be the most popular in Ghana and many other jurisdictions.

Chairperson

The chairperson of the board of directors is elected by the directors.² The main business of the chairperson is to preside at both directors and general meetings so as to direct affairs. A non-executive chairperson has no direct involvement with the day-to-day administration of the company. The non-executive chairperson must not micro-manage.

The Managing Director³

The Managing Director of a company is appointed by the board of directors from among their number. In practice, however, a number of Managing Directors are appointed from outside the existing board of directors. Most of the powers of the board are delegated to the Managing Director. The appointment is by a contract which must provide for his remuneration and other conditions of service. The Managing Director is not entitled to be paid any remuneration apart from director's fee, if fixed, unless the terms of the employment have been approved by an ordinary resolution of the members.⁴

General Meetings

The Eight schedule (sections 157,160,164,168,169,176,299,324(5)) sets out the procedure for general meetings. General meetings maybe convened by the board of directors by giving a minimum of 21 days' notice to the members of the company. General meetings are to be held in Ghana unless the constitution of a company otherwise provides.⁵ The notice of a general meeting shall specify the place, date and hour of the meeting and the general nature of business to be

¹ s. 188 (2) (j)

² s. 188 (2) (g)

³ s. 184

⁴ s. 185 (4)

⁵ s. 159

transacted at the meeting in sufficient detail to enable those to whom it is given to decide whether to attend or not. The quorum for a general meeting is two unless the constitution of a company otherwise provides.

There are two types of general meetings. A company is required to have an Annual General Meeting (AGM) once a year to consider the directors' report, auditors' report, the financial statements, dividends, election of directors among others.¹ Any other meeting of members which takes place in the course of the year is called an Extraordinary General Meeting (EGM).² Members of the company may also requisition an EGM in appropriate cases.

The persons entitled to notices of general meetings are the members, directors, secretary, auditors and legal personal representative, receiver or a trustee in bankruptcy of a member.

A resolution put to the vote at general meetings is decided on a show of hands unless a poll is demanded. On a poll each member entitled to vote shall have one vote for each share.

A company shall cause the minutes of the proceedings of general meetings and meetings of a class of members to be entered in a book or books kept for the purpose.³

Written Resolutions of Members⁴

Like directors, the members of a company may also lawfully and conveniently sign a written resolution without the formalities of a meeting. Such a written resolution is as valid as the minutes of a meeting duly convened and held, provided they are signed by all members for the time being entitled to attend and vote on such a resolution. However, a written resolution cannot be used for the removal of a director or auditor from office.⁵

¹ s. 157

² s. 158

³ s. 166 (1)

⁴ s. 163

⁵ s. 176 (1)

Chapter 8

Practical Issues in the Enforcement of Directors' Liability or Members' Rights through Litigation

The company is the proper plaintiff when a wrong is done to the company. But the company or a member may sue to enforce directors' liability. The member may sue in a representative capacity.¹

A member may apply to the court for relief when the member's personal rights have been infringed upon.²

A member may also apply to the court to prevent the company from passing or acting on a resolution.³ Sometimes, some lawyers make the wrong decision regarding whether an action should be commenced by a motion or a writ of summons and whether the action should be a personal action or a representative action.

The courts have made various pronouncements on a member's right to sue.

- Foss v. Harbottle [1843] 2 Hare 461;67 ER 169
- Pinaman v. Abrokwah [1991] 2 GLR 384,CA
- PS Investments Ltd v. Central Regional Development Corporation & 13 ORS [2012] 1 SCGLR 611

Representative Action

A member may sue in a representative capacity in appropriate cases.

Derivative Action with Leave of the Court⁴

A member or director may with leave of the court commence a derivative action by suing in the name and on behalf of the company. This is an additional right introduced by Act 992.

¹ s. 200

² s. 219

³ s. 218(1) (b)

⁴ s. 201

Chapter 9

Company Secretarial Practice

Obligation

Section 211 of Act 992 provides for the qualifications of the company secretary and makes it obligatory for every company to appoint a company secretary. It is an offence for a company to carry on business for more than six (6) months without a company secretary. There are sanctions for non-compliance with this statutory requirement.¹

The Past

In the past the company secretary was viewed merely as a clerk and his acts could not bind the company.

The Present

The case of **Panorama Development (Guildford) Ltd. v Fidelis Furnishing Fabrics Ltd. [1971] 3 All ER 16** established the position of the company secretary as an officer of the company whose acts could bind the company.

The company secretary is appointed by the directors unless the constitution of a company otherwise provides.² The company secretary must give his written consent prior to his assumption of office.³

The company secretary may be an individual or body corporate and may have a deputy or an assistant secretary.⁴

The company secretary may be removed by the directors subject to his right to claim damages if removed in breach of contract.⁵

A person may be a director and secretary. But one person cannot play the dual role of director and secretary in respect of a thing that is required to be done by two persons, that is, a director and a secretary.⁶

¹ s. 211 (6)

² s. 211 (5)

³ s. 211 (8)

⁴ s. 211 (1-2)

⁵ 211 (5)

⁶ s. 213

Duties of the Company Secretary¹

The company secretary is required to issue notices and attend board and general meetings, draft minutes of meetings of directors, members, committees, sometimes management and write correspondence. The company secretary is required to provide the Board with guidance as to the duties, responsibilities and powers of the Board.

He is also responsible for keeping statutory books of the company including share register, register of members, minutes book, register of directors, secretaries, debenture holders among others, unless the board otherwise directs.²

Statutory Returns³

Returns required to be delivered to the Registrar of companies are usually filed by the company secretary.⁴

¹ s. 212

² s. 215

³ s. 126

⁴ s. 212 (e)

Chapter 10

Capital Markets

Raising of Capital

A company may raise capital through:

- a. issuing shares in exchange for cash or payment in kind; or
- b. transfer from reserves to stated capital¹; or
- c. debt, which may take the form of debentures (bonds) or bank loans

a. Issuing Shares

A company may issue shares for cash or payment in kind by any of the following means:

i. Rights Issue

A company may decide to raise capital by issuing shares to existing shareholders. In order to give every existing shareholder an opportunity to make a decision, section 98 of Act 992 provides that no new or unissued shares of the company shall be issued unless they are offered to existing shareholders in the proportion as nearly as may be to their existing shareholdings.

ii. Private Placement

A company may target a few persons outside the company who are considered to be capable of bringing investment into the company (high net worth) by purchasing its shares. This is a private arrangement not meant for the public as a whole. The company prepares an information memorandum including a brief history, issued shares, stated capital, number of shares to be issued, the amount of money required and what it is to be used for. A prospective investor may be required to sign a non-disclosure agreement at the initial stage. Relevant agreements are eventually signed.

iii. Invitations to the public²

It is only a public company that may make an invitation to the public to acquire or dispose of any of its shares or bonds or to deposit money with it for a fixed period or payable at call whether bearing or not bearing interest.³ There are sanctions in Act 992 for breach.⁴

¹ S. 68 (c)

² s. 295

³ s. 294 (1)

⁴ s. 294 (3)

In addition to Act 992, invitations to the public are also regulated by the Securities Industry Act 2016, Act 929 and the Ghana Stock Exchange rules in the case of listed companies.

Prospectus on Invitation to the Public to Acquire or Dispose of Securities

An invitation to the public to acquire or dispose of shares or debentures of a public company may be made if within six (6) months prior to the making of the invitation there has been delivered to the Registrar and registered by the Registrar a prospectus in accordance with section 308 of Act 992. There must be a copy of the prospectus bearing a statement on its face, the fact of registration and the date of registration.

b. Transfer from Reserves to Stated Capital

On the recommendation of the directors the shareholders may pass a special resolution to transfer directly from surplus to stated capital¹.

At the time of passing the special resolution or at a subsequent date the shareholders, may pass another special resolution to the effect that in respect of the amount to be transferred to stated capital, shareholders who would have been entitled to dividend had the amount been distributed should be credited with fully paid up shares in the same proportions as they hold shares. This is called capitalization issue.²

c. Debt

A company may raise a loan capital by the issue of a debenture (bonds) or of a series of debenture stock. A debenture is a written acknowledgment of indebtedness by a company setting out the terms and conditions of the loan.³

This may be by private placement or by invitations to the public. Debt securities raised by invitations to the public are regulated by the Securities Industry Act 2016, Act 929 and the Companies Act 2019, Act 992.

A company may also borrow from banks and other financial institutions.

Regulatory Framework

The Companies Act 2019, Act 992

Central Securities Depository Act (Act 733) 2007

¹ Section 77

² Section 77

³ Section 83

Laws relating to specific industries

The Securities Industry Act 2016, Act 929 and Regulations made thereunder

Securities and Exchange Commission

The objective of the Securities and Exchange Commission (SEC) is to regulate and promote the growth and development of an efficient, fair and transparent securities market in which investors and the integrity of the market are protected.

The functions of the SEC as provided for in section 3 of Act 929 include the following:

- a. advise the Minister on matters relating to the securities industry
- b. maintain surveillance over activities in securities to ensure orderly, fair and equitable dealings in securities;
- c. register, license, authorise or regulate the various operators in the market in accordance with the Act or the Regulations made under it.

Chapter 11

Commercial Agreements

Pre-Contractual Understanding

Before entering into a binding agreement, some businessmen would like to sign a document which is not binding. This may take place after brief discussions. The documents which are signed before a binding agreement may be any of the following:

- a. Letter of Intent (LOI)
- b. Heads of Agreement (HOA)
- c. Term Sheet (TS)
- d. Memorandum of Understanding (MOU)
- e. Heads of Terms (HoTs)
- f. Comfort Letter (CL) or Letter of Comfort (LOC)
- g. Letter of Agreement or Agreement Letter.

They are all not intended to be binding unless expressly provided in any particular case that it is binding. Usually, a provision will be made in the document that provisions on confidentiality, non-disclosure and exclusivity are binding.

It must be noted that it is always better to state whether a pre-contractual document is binding; not binding; or subject to contract.

Negotiating a Commercial Agreement

The matters to be taken into account when negotiating a commercial agreement include the following:

- The negotiation process can take a few days to a few weeks and perhaps months.
- One of the parties will first draft the definitive agreement based on the LOI or MOU (if any) etc.
- The first draft and the other party's initial observations are the basis for the negotiation of the terms of a binding agreement.
- Each party must outline their key strategies

Key Elements of a Commercial Agreement

The key elements of a commercial agreement may include the following:

- i. Date of the Agreement.
- ii. Names, legal status and addresses of the parties including places of incorporation (in the case of a body corporate)

- iii. Recitals (Background or whereas clauses)
- iv. Main Provisions (Operative Provisions) include:
 - Definitions;
 - Conditions precedent (if any);
 - Main commercial obligations e.g. provision of services, manufacturing of product, supply of goods, price payment terms, specifications, delivery;
 - Secondary commercial issues e.g. risk, possession of property and retention of title, intellectual property, confidentiality, term, breach, termination, warranties and liability.
- v. Miscellaneous: Boilerplate clauses: Law and jurisdiction, notices, assignment, entire agreement, interpretation, amendment, etc.
- vi. Schedules or appendices
- vii. Signatures

Sometimes the courts rely on the conduct of a party in the absence of boilerplate clauses such as waiver or entire agreement.

- Social Security Bank Ltd v. CBAM Services Inc. [2007-2008] 2SCGLR 894

Legal Opinion

Apart from drafting or reviewing documents in a commercial transaction a lawyer in corporate and commercial practice may be instructed by clients to undertake the following:

1. Writing of letters
2. Writing of memorandum
3. Writing of legal opinion on a given set of fact or facts and legal issues
4. Writing of legal opinion in relation to a loan transaction at the request of the lender.

Chapter 12

Lending Transactions in Ghana

Lending transactions in Ghana are governed by various laws including the Banks and Specialized Deposit-Taking Institutions Act, 2016 Act 930; the Borrowers and Lenders Act, 2008 (Act 773); the Non-Bank Financial Institutions Act, 2008 (Act 774); the Companies Act, 2019 (Act 992); the Loans Act, 1970 (Act 335); Central Securities Depository Act, 2007 (Act 733); Land Title Registration Act, 1986 (PNDCL 152); Mortgages Decree, 1972 (NRCD 96); Foreign Exchange Act, 2006 (Act 723); and the Stamp Duty Act, 2005 (Act 689).

It is the type of lending transaction and the terms of the agreement which determine whether your client will need to comply with a particular law or not.

You may be involved in a lending transaction because you are the lawyer for the lender(s) or the borrower(s). There are other persons who may also require your services in connection with a lending transaction if there is a mortgage or guarantee by another person. The mortgagor or guarantor may not necessarily be the borrower.

Apart from the initial correspondence and discussions a typical loan transaction documentation will include the following;

- a. Term sheet
- b. Loan or facility agreement
- c. Mortgage
- d. Directors joint and several guarantee (if required by the lender)
- e. A charge on the assets of the borrower
- f. Other documents like legal opinion of the borrower's counsel depending on the nature of lending transaction and whether or not it is a foreign or syndicated loan.

The lawyer for the lender, will usually be instructed to draft the loan agreement, and the first approach of this lawyer may be to find a precedent instead of reinventing the wheel. Precedent is good but care should be taken as to the precedent to be used.

In Ghana, it is not unusual to find lenders issuing what they consider to be a standard document for the consideration of borrowers.

The loan agreement may be short or long depending on the provisions and the particular precedent which is used. Most of the key elements of a commercial agreement apply to the loan agreement.

If you are the lawyer for the borrower your client may require you to review the draft loan agreement and other documentation as part of the negotiations. You do this by raising issues about law, drafting and facts, where necessary.

The completed and signed loan documentation requires stamping under the Stamp Duty Act, 2005 (Act 689). A mortgage or charge on the assets of the borrower must be registered at the Collateral Registry of the Bank of Ghana as required by the Borrower's and Sender's Act 2008, Act 773 and the Registrar-General's Department under section 110(1) of Act 992. In addition, a mortgage must be registered at the Land Title Registry or the Deeds Registry of the Lands Commission where the land is located in a place which has not been declared a Land Title Registration area.

Chapter 13

Legal Due Diligence

What Is Legal Due Diligence?

A legal audit

Checks information about a company or transaction

Seeks information about legal compliance

Seeks information about potential risk

Seeks information about assets and liabilities among others

Why Legal Due Diligence?

To verify available preliminary information in respect of a company or transaction

To verify assumptions

To identify errors, omissions or factual representations

To help directors give assurance to shareholders, among others things

Who Does the Legal Due Diligence?

The lawyer for the purchaser of property or the lawyer for the acquirer of a company

The lawyer for the seller, may also do the seller's legal due diligence before the buyer brings its shopping list

The Process and Report

The process involves:

Gathering information and documents

Reviewing information and documents

Talking to people

Writing a report to the client

Checklist

A prepared list of the matters to be investigated is helpful.

Chapter 14

Private Liquidation

Introduction to Winding Up of Companies

S. 274 of Act 992– The life of a company may formally be brought to an end by one of two modes of winding up.

The first is by private liquidation in accordance with part V of the Companies Act 2019, Act¹ 992.

The second is by official liquidation in accordance with the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180).²

From the date of commencement of winding up the company should cease to carry on business even though it will remain a body corporate.³

Private Liquidation under Act 992

S.275 – Affidavit of Solvency made by Directors

Majority of directors should make an affidavit at a meeting of the directors and state the following;

- That they have made a full enquiry into the affairs of the company
- That they have formed an opinion that the company will be able to pay its debts and liabilities in full within twelve months from the commencement of winding up.

The affidavit will take effect if⁴;

it is made five weeks immediately preceding the date of the passing of the resolution for the winding up and is delivered to the Registrar on or before that date

it embodies a statement of the company's assets and liabilities at the latest practicable date before the making of the affidavit.

S. 276 – Procedure

1. A company may be wound up by way of private liquidation if:

¹ s. 274 (1) (b)

² s. 274 (1) (a)

³ s. 274 (2)

⁴ s. 275 (2)

- a. a special resolution is passed by the members to the effect that the company will be wound up by Private Liquidation
 - b. Affidavit is made to the effect that the company is solvent in accordance with section 275
2. Private liquidation commences at the time of the passing of the special resolution
 3. The company must within 14 days after the passing of the special resolution, send a copy of the resolution to the Registrar for publication.

S. 278 – Appointment of Liquidator

The special resolution passed for the private liquidation of a company should include a resolution to appoint a liquidator.

S. 282 – Cessation of the Directors' Powers

- On the appointment of a liquidator the powers of the directors are vested in the liquidator
- The powers and authority of every director shall cease except authorised by the liquidator or the general meeting.

S. 288 – Dissolution

- The Registrar shall strike the name of the company if satisfied that the winding up is complete and notify the fact of the strike off in the companies bulletin.¹
- The court may at any time within 2 years after the date of the dissolution, on the application of a member, make an order on appropriate terms declaring the resolution void and ordering the name of the company to be restored to the register.²
- The court may make orders and give directions and make provisions that seem just.

¹ s. 288 (1)

² s. 288 (3)

Chapter 15

Official Liquidations

The Bodies Corporate (Official Liquidations) Act, 1963 Act 180 was enacted to provide for

- a. the official liquidation of companies
- b. the official liquidation of other bodies corporate and
- c. other matters connected with official liquidations

Commencement of Proceedings

The official winding up of a company may be commenced by;¹

- a. a special resolution of the company
- b. a petition addressed to the Registrar
- c. a petition to the court, or
- d. a conversion from a private liquidation

Procedure on Passing Special Resolution

A company may pass a special resolution for the winding up of the company by way of an official winding up. A copy of the resolution shall be immediately thereafter as may be practicable delivered to the Registrar. The Registrar shall publish the resolution in the gazette.²

Procedure on Petition to the Registrar

A petition for the official winding up of a company may be presented by

- a. a creditor or
- b. a member or contributory of a company³

The Registrar may order the official winding up of the company on such petition if satisfied that the company is unable to pay its debts.⁴

A company shall be deemed to be unable to pay its debts:⁵

- a. if a creditor has served on the company a written demand and the company has for 21 days neglected to pay, secure or compound for it to the satisfaction of the creditor an amount due exceeding Ten Thousand Ghana Cedis.

¹ s. 1 (1)

² s. 2

³ s. 3

⁴ s. 3 (2)

⁵ s. 3 (5)

- b. if in Ghana, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of a company is returned unsatisfied in whole or in part.
- c. if it is proved to the satisfaction of the Registrar that the company is unable to pay its debts

See **Billy v Kuwor [1991] 1 GLR 522**

In determining whether a company is unable to pay its debts, the Registrar shall take into account the contingent and prospective liabilities of the company.

A copy of the petition shall be served on the company on or before it is presented.¹

- The Registrar shall place a copy of the winding up order in the file of the company and shall publish the order in the gazette.²

*Procedure on Petition to Court*³

A petition to the court for the official winding up of a company may be made by;⁴

- a. the Registrar
- b. a creditor
- c. a member or contributory of company
- d. the Attorney General

The court may order the official winding up of a company on the following grounds⁵:

- a. a company does not within a year of its incorporation commence to carry on all its authorised businesses or suspends any of such businesses for a whole year
- b. a company has no members
- c. the business or objects are unlawful; the company is operated for an illegal purpose, the business being carried on by the company is not authorised
- d. the company is unable to pay its debts
- e. the court is of the opinion that it is just and equitable that the company be wound up.

The Liquidator

- s.8 - The Registrar shall be the liquidator⁶

¹ s. 3 (4)

² s. 3 (7)

³ s. 4

⁴ s. 3 (7)

⁵ s. 4 (2)

⁶ s. 7

- The liquidator stands in a fiduciary relationship to the company like a director¹

Effects of Commencement of Proceedings

An official winding up order shall be deemed to have commenced²:

- on the passing of a special resolution for the winding up of the company or
- on the making of a winding up order

The functions of the directors shall vest in the liquidator on the making of a winding up order unless the liquidator sanctions the continuation of any function.³

The company shall cease to carry on business except as may be required for the beneficial winding up.⁴

No action or civil proceedings against the company apart from an action by a secured creditor for the realization of the security, shall be proceeded with or commenced except by leave of the court.

Insolvency Bill

The Insolvency Bill which is before Parliament has provisions on Administration, the insolvency practitioner cross-border insolvency proceedings among others in addition to incorporating the provisions of the Bodies Corporate (Official Liquidations) Act 1963, Act 180 which will be repealed.

¹ s. 8 (1)

² s. 13

³ s. 25

⁴ s. 26