Directors' Liability

A Worldwide Review
Third Edition

Edited by
Alexander Loos

the global voice of
the legal profession®

International Bar Association Series

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5835-2

Printed in the United Kingdom.

International Bar Association

The Global Voice of the Legal Profession

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

It has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community as well as being a source of distinguished legal commentators for international news outlets.

Grouped into two divisions – the Legal Practice Division and the Public and Professional Interest Division – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information.

Through the various committees of the divisions, the IBA enables an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of business law around the globe.

Employment and Industrial Relations Law Committee

The aims of the committee are to develop and exchange knowledge of employment and industrial relations law and practice. Members support each other through the provision of innovative ideas and practical assistance on day-to-day issues. In addition,

through its journal and through presentations, conferences, the committee ensures the dissemination of up-to-date law and practice in this highly important business area.

International Bar Association Global Employment Institute

The IBA Global Employment Institute (IBA GEI) wasformed in early 2010 for the purpose of developing for multinationals and worldwide institutions a global and strategic approach to the key legal issues in the human resources and human capital fields.

Drawing on the resources and expertise of the IBA membership, the IBA GEI will provide a unique contribution in the field of employment, discrimination and immigration law, on a diverse range of global issues, to private and public organizations throughout the world. The IBA GEI is designed to enhance the management, performance and productivity of these organizations and help achieve best practice in their human capital and management functions from a strategic perspective.

The IBA GEI will become the leading voice and authority on global HR issues by virtue of having a number of the world's leading labour and employment practitioners in its ranks, and the support and resource of the world's largest association of international lawyers.

Editor

Dr Alexander Loos (editor and author Germany), is an 'of Counsel' with Hogan Lovells International LLP at Düsseldorf. He has considerable experience as counsel and arbitrator in post M&A and construction disputes especially for power plants and infrastructure projects. After legal studies at the Universities of Marburg and Münster, he was admitted to the German Bar in 1978, was head of the firm's international corporate practice group until 2001 and joined Hogan Lovells LLP as a partner in 2002. He is a Fellow of the Chartered Institute of Arbitrators, London and a member of the International Bar Association (IBA), of the German-Brazilian Law Association, of the German-Japanese Law Association (DJJV), of the International Chamber of Commerce (ICC), of the Swiss Arbitration Association (ASA), as well as of the German Institute of Arbitration (DIS).

Contributors

Ignacio M. Aguirre U. (author Bolivia), is a Managing Partner at Bufete Aguirre Soc. Civ. After legal studies at the Bolivian Catholic University, La Paz, 1996, he obtained an LLM in Law and Development of the London School of Economics and Political Science – University of London, London (1999). His main practice areas are general commercial, corporate and business law, especially for mining and hydrocarbons, respective financing and environmental matters. He is a member of the Board of Directors of Credibolsa S.A. and of the Executive Committee of the Arbitration Center of the National Chamber of Hydrocarbons and Energy.

Estefanía Alarcón (co-author Ecuador), is a member of the oil & gas, infrastructure, contracts, and corporate teams at FERRERE's office in Quito, Ecuador. She studied law at Universidad de Navarra and graduated as attorney in 2015. In addition to her law degree, she completed the university's Global Law programme that includes diplomas in Anglo American Law and International Business Law.

Derek Alexander (co-author South Africa), has been with Werksmans Attorneys since 2014. He is currently a candidate attorney in the firm's Mergers and Acquisitions Practice. He has experience in corporate mergers and acquisitions and restructurings.

Lia Alizia (author Indonesia), is a partner with Makarim & Taira S. She graduated from Jayabaya University, Indonesia in 1999 and has been a lawyer ever since. She has extensive knowledge and experience in employment matters and disputes in Indonesia. Her area of expertise also covers corporate and commercial law and litigation, including foreign investment, restructuring companies, mergers and acquisitions, competition law, compliance issues and intellectual property rights. She has assisted several major transactions involving multinational companies in Indonesia. She is also the author of various published articles and speaker in many conferences. She has earned awards and accolades such as 'Employment Expert from Indonesia' as selected by Employment Law Experts from UK in 2014 and a 'recommended lawyer for Employment, Corporate and M&A, Dispute Resolution and Real Estate in Legal 500 Asia Pacific 2015. She is also a member of various organizations, such as the

Indonesian Advocates Association (PERADI); a registered Intellectual Property Rights Consultant.

Niels Bang (author Denmark), is co-head of Gorrissen Federspiel's Corporate/M&A practice Group. He has an extensive practical experience and expertise within corporate law, foundations, M&A, venture capital and incentive schemes. Niels is the Danish representative in the Company Law Committee of the Council of Bars and Law Societies of Europe (CCBE). He is also the chairman or member of the board of a large number of Danish companies.

Svetlana Barinova (co-author of The Russian Federation), is of Counsel in Dentons' Moscow office. She specializes in Russian corporate, antimonopoly and securities law. She has a wide experience in structuring foreign investments in Russia; developing finance schemes for Russian companies; establishing commercial and non-commercial organizations in various legal forms; reorganization and liquidation of Russian companies; protecting shareholders' rights; conducting due diligence; advising on acquisitions of shares, participatory interests and assets of Russian companies.

Timur Bondaryev (author Ukraine), is a Managing and founding partner at Arzinger Law Firm. He specializes in advising on real estate and construction transactions, corporate/M&A, antitrust, and privatization issues.

Every year Mr Bondaryev is highly recommended by international ratings (i.e., Best Lawyers, Legal 500, and Who's Who Legal) in the sphere of arbitration and mediation, corporate law and management, compliance, mergers and acquisitions, real estate, antitrust and competition.

Matthew Bousfield (co-author Singapore), is a Senior Associate in the Corporate team of Hogan Lovells' Singapore. Matthew has significant experience advising on mergers and acquisitions, private equity transactions and a range of commercial matters across South East Asia. He also advises on employment and data privacy matters. Matthew acts across key industry sectors, focusing on consumer, life sciences and financial institutions.

Stephen Brown-Okruhlik (co-author Canada), is a litigation associate with McMillan LLP, Toronto. He practices complex commercial litigation with a focus on insolvency and corporate governance issues. He has a BA from McGill University, a Master's Degree from the University of Toronto and an LLB from the University of Ottawa. He is the winner of the 2012 Werner Zdouc Prize for Top Oralist in the grand final round of the World Trade Organization Moot Court competition in Montpellier, France.

Jacques Buhart (author France), is head of the Paris office of McDermott Will & Emery and focuses his practice on corporate mergers & acquisitions and EU/French competition law. Jacques has handled a broad range of complex competition matters as well as litigations in the European Courts. He also has considerable experience in advising French and international clients in their M&A transactions. Jacques received his legal education from the Sorbonne, Paris, the Hague Academy of International Law, the Institute of Comparative Law, Paris, and the University of Paris, DESS in 1976. He

also read for an MBA from the Ecole Supérieure de Commerce de Paris (ESCP). Jacques has been a visiting professor of EU competition law at the University of Aix-en-Provence since 1995 and at the University of Tokyo, faculty of law since 2004. He was the chairman of the International Bar Association's section on business law from 2001 to 2003. Jacques is admitted to practice in Paris and Brussels.

Willem Calkoen (co-author Netherlands), is senior advisor in the Rotterdam office of NautaDutilh. He specializes in M&A work – both public offers and private transactions – and in securities law and corporate governance. He graduated from Utrecht University in 1970 and joined NautaDutilh in 1972, where he became a partner in 1980. He was chairman of the Company Law Committee of the Section on Business Law ('SBL') on the International Bar Association from 1988 to 1992, an officer of the SBL from 1993 to 1998 and chairman of the SBL from 1997 to 1998. He publishes regularly on topics such as joint venture and corporate governance. He defended his thesis in 2011 on Corporate Governance, responsibility and liability of directors in US, UK, and the Netherlands.

Jesse Collin (co-author Finland), is an associate in Hannes Snellman's M&A group. He specializes in corporate and securities market law. He has experience from capital market transactions, mergers and acquisitions as well as corporate governance matters. Jesse graduated from the University of Helsinki in 2014 with a Master of Laws degree. He is also a doctoral candidate in the University of Helsinki and prepares a doctoral dissertation in the field of company and securities market law.

Miguel de Avillez Pereira (author Portugal), is a partner at Abreu Advogados since 2002. He graduated from the University of Lisbon Law School, in 1989 and has an LLM – Master's of Law, Europa Institute, University of Edinburgh. Miguel has been involved over the years in some of most significant transactions that Abreu assisted in Portugal, Angola and Mozambique.

Alan G. de Saram (co-author Cayman Islands), is a partner with Collas Crill, Attorneys at Law, George Town, Cayman Islands. He specializes in corporate and commercial law, including hedge funds and capital markets. He obtained a BA (Hons.) from the University of London in 1992, a Diploma in Law from the College of Law, and a Diploma of Legal Practice in 1995. He was admitted as a Solicitor in England and Wales in 1998. Since 2004, he has been an Attorney-at-Law in the Cayman Islands. He is a member of the Cayman Islands Law Society and the Law Society of England and Wales.

Daniel Del Rio (author Mexico), As head of Basham's Corporate and Mergers and Acquisitions Areas, Daniel's practice focuses on inbound foreign investment in Mexico, and outbound Mexico investment abroad. His work includes Corporate, Environmental, Mergers and Acquisitions, Health, Foreign Investment, International Transactions, Real Estate, Associations, Banking and Cross-Border Investments.

Doran Doeh (author The Russian Federation), is a partner in Dentons' Moscow office. He currently focuses broadly on matters where English-law-governed

documentation is used for cross-border transactions relating to Russia (M&A, JVs, commercial agreements), on cross-border regulatory issues and on oil and gas. Doran advises on virtually all areas of law relating to energy and natural resources including a very wide range of corporate and financing transactions. Doran is also developing his practice as an arbitrator.

Christian Dorda (author Austria), is the founding partner of DORDA Attorneys at Law, Vienna. He specializes in corporate law and M&A, including related arbitration matters. He graduated from the University of Vienna in 1971 and was admitted to the Austrian Bar in 1976. He is a member emeritus of the ICC International Court of Arbitration, Vice-President of ICC Austria, member of the Board of Trustees of the American Chamber of Commerce in Austria, permanent legal counsel to the French-Austrian Chamber of Commerce, and past chairman of the M&A commission of the Union Internationale des Avocats.

Dagmar Dubecká (author Czech Republic), is the Managing Partner and head of M&A at law firm Kocián Šolc Balaštík. Consistently acclaimed by international rating directories as a leading specialist in M&A, as well as in Corporate Law and Corporate Restructuring, she has been ranked three times as one of the TOP 25 Women of Czech Business in a poll held by the leading Czech financial newspaper *Hospodářské noviny*.

Antony G.D. Duckworth (author Cayman Islands), is a partner with Collas Crill, Attorneys at Law, George Town, Cayman Islands. He specializes in commercial law, including banking, insurance, company, and trust. He studied at Marlborough College and obtained a degree in mathematics and law from the University of Cambridge and studied at the College of Law, Lancaster Gate in 1968. He was admitted as a Solicitor in England in 1971. Since 1974 he has been an Attorney-at-Law in the Cayman Islands. He is a member of the Cayman Islands Law Society, of the Law Society of England and Wales, of the IBA, of the International Academy of Estate & Trust Law and of the Society of Trust and Estate Practitioners.

Karla Dudek (author United Kingdom), is a Counsel in Hogan Lovells LLP's corporate practice, based in the London office. She specializes in public and private M&A including cross-border transactions, joint ventures, debt equity swaps, equity capital markets, and general corporate law advice. She obtained a Bachelor of Commerce and a Bachelor of Laws with honours from the University of Auckland and joined the London office of Hogan Lovells in 1999. She has also spent two years in the firm's New York office.

Pip (Philip) England (author New Zealand), has been a partner in the Auckland office of Chapman Tripp since 2001 and is the Head of the Auckland Corporate team. He specializes in corporate and commercial law, with a particular focus on mergers and acquisitions, property syndications, securities and corporate advisory work. Pip holds LLB (Hons.) and B.Com degrees from the University of Canterbury, New Zealand. Pip is recognized *by Legal 500 Asia Pacific 2016*, *Chambers Asia Pacific 2015* and *Chambers Global 2015*.

Gabriele Fagnano (author Italy), is a co-founder and partner of Pavesio e Associati, an independent law firm in association with Allen & Overy. He advises some of the major national and multinational groups and financial institutions located in Italy in M&A, joint ventures, and general corporate and commercial law. He has also gained considerable experience in competition and real estate law. He has written a number of articles and attended various conferences as speaker in corporate and real estate law. Gabriele Fagnano gained his J.D. degree from the Catholic University of Milan in 1995. After graduating he was awarded, with distinction, a Diplôme d'études complémentaires in EU Law from the University of Brussels and an LLM in European Business Law from the Pallas Consortium, University of Nijmegen. Prior to co-founding Pavesio e Associati he was Senior Associate of Allen & Overy, where he had been working for eight years. He is a member of the Turin Bar.

Coro Fernández-Rañada (co-author Spain), is a senior associate in Cuatrecasas, Gonçalves Pereira's Corporate & Finance Knowledge Management Group. She has ample experience in merger and acquisition transactions, and securities-market transactions. She has participated in many company sale transactions, mergers, business restructurings, public offerings for sale or subscription of securities, and takeover bids, and has advised publicly traded and private companies on corporate matters. She holds an LLM in International Business Law from London School of Economics and Political Sciences (LSE) and a Bachelors of Law (specializing in Competition and EU law) from *Universidad San Pablo* (CEU).

Jānis Gavars (author Latvia), is a talented and determined young lawyer, who concentrates his work on mergers and acquisitions and general corporate and securities matters. He advises clients on due diligence, drafting contracts and other legal issues with respect to domestic and cross-border M&A transactions as well as general corporate law matters.

David Gewer (co-author South Africa), has been a director at Werksmans Attorneys since 2000 in the firm's Mergers and Acquisitions Practice. David was named as a leading lawyer in Mergers & Acquisitions in the 2015 and 2016 editions of IFLR 1000 (Finance and Corporate) – The Guide to the World's Leading Financial Law Firm, and was named as a recommended lawyer in Corporate and Mergers & Acquisitions, 'who is smart, thorough and very responsive,' by The Legal 500 (2015).

Martin Grablowitz (author The Netherlands), is a partner in NautaDutilh's corporate practice, a member of the firm's International Strategy & Business Development Committee and heads the German Desk. He specializes in takeovers, joint ventures, acquisitions and all aspects of corporate (re)structuring. With a double degree in Dutch and German law, Martin has focused his practice on German-Dutch cross-border matters. Martin joined NautaDutilh in 1998 and became a partner in 2003.

Pablo Guerrero V. (author Chile) is a co-Managing Partner and also heads the Mergers and Acquisitions and Financing practice of Barros & Errázuriz Abogados. His experience covers an array of areas, including capital markets, securities, foreign investment,

and international business transactions generally. He graduated from Catholic University of Chile School of Law, and obtained his Master of Comparative Jurisprudence degree from New York University School of Law, New York, in 1995. Mr Guerrero is currently Professor of Commercial Law at the Chilean Catholic University School of Law. He is one of the founders and current President of Fundación Pro Bono. He is a member of the Chilean Bar Association.

Laura Lavia Haidempergher (co-author Argentina), is a partner with M. & M. Bomchil, Buenos Aires, law firm, which she joined in 2003 as a member of the M&A department. She has been actively involved in M&A, reorganizations, companies counselling, complex arbitrations, financing transactions, capital markets, and corporate, bankruptcy, and commercial law matters. She obtained her law degree from Universidad de Buenos Aires in 1993. In 2002, she obtained a Master in Business Administration (MBA) degree at Universidad del CEMA, which she completed at San Diego State University (USA) due to her academic merits. Her final thesis obtained an honourable mention. She is a PhD candidate at the Law School of Universidad de Buenos Aires. In addition, she has attended several relevant courses, conferences, and seminars on business and corporate law, giving lectures in those topics as well. She is also an active contributor to a number of local and international publications.

Nastascha Harduth (author South Africa), has been with Werksmans Attorneys since 2008. She is currently a director in the firm's Insolvency, Business Rescue and Restructuring Practice. She has a wide-ranging experience in dispute resolution and commercial litigation, as well as insolvency, business rescue and restructuring. She regularly delivers seminars and writes for various publications on these topics among others. She is a member of the South African Restructuring and Insolvency Practitioners Association (SARIPA) and the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL).

Stephen Hegarty (author Ireland), has specialized in corporate and securities laws regulation for over twenty years. Stephen has considerable experience in acting for large public companies in stock exchange work and securities. Prior to joining Arthur Cox, Stephen spent a number of years working in the Commercial Department of an international firm in London, where his practice was mainly focussed on corporate finance.

Kyung-Taek Jung (author South Korea), is a senior partner of Kim & Chang. He is the chair of the firm's Corporate Department and Antitrust & Competition Practice Group. Mr Jung practices in a wide range of areas of corporate law with a focus on mergers and acquisitions and antitrust law. He also has extensive experience advising clients in the pharmaceutical, IT, energy and automobile industries. Mr Jung is the recipient of numerous notable awards and citations for distinguished service to clients. Mr Jung was selected numerous times as a Chambers Global Leading Corporate/M&A Lawyer, as a Leading Competition Lawyer by The Global Competition Review, and as a Leading Competition Lawyer in Asia by AsiaLaw. Mr Jung has also taught competition law at

the graduate school of law at Seoul National University and has served as an outside legal advisor to the Korea Fair Trade Commission.

Stephanie Keen (author Singapore),is the Managing Partner of Hogan Lovells' Singapore office, leading the firm's private equity practice in Asia. Having previously worked in New York and London, she has significant international deal experience advising corporates, lenders and private equity houses on leveraged buy-outs, cross-border transactions, mergers and acquisitions, equity offerings and corporate restructurings.

Pavlo Khodakovsky (author Ukraine), is a partner at Arzinger Law Firm. He specializes in corporate/M&A, employment and tax/international tax issues. Mr Khodakovsky has extensive experience in European law, human rights, employment law, M&A, insurance law, and securities issues. According to the results of the reputable international rating Best Lawyers 2015, 2014, 2013 Mr Khodakovsky was recommended as leading expert in labour law.

Ariungoo Khurelbaatar (co-author Mongolia), is an associate with Hogan Lovells (Mongolia) LLP. Her practice area includes general corporate and commercial law, and employment law. Prior to joining Hogan Lovells, Ariungoo worked as a lawyer for a major Australian law firm, and before that as a head of the business development division at Ochir Undraa LLC. Ariungoo earned her LLM in comparative law from Nagoya University, Japan and her LLB from School of Law, National University of Mongolia. She speaks Mongolian, English, Japanese and Russian. Ariungoo is qualified to practice law in Mongolia.

Hye-Sung Kim (co-author South Korea), is a partner of Kim & Chang. Her practices primarily focus on corporate and securities law, including mergers and acquisitions, corporate governance, and capital market transactions. She has advised both financial institutions and corporate clients. She completed an LLM programme at Harvard Law School in 2010 (degree waived) and holds a Master of Business Management from Korea National Open University (2009) and an LLB from Seoul National University, College of Law (2000). She was admitted to the Korean Bar and joined Kim & Chang in 2003.

Alexander Koch (author Luxembourg), is a senior associate in the corporate practice of Hogan Lovells (Luxembourg) LLP, where he assists mainly international clients from a wide range of industries on all corporate related matters including M&A, private equity, corporate finance, general corporate and commercial advice. Before joining Hogan Lovells for the opening of its Luxembourg office, he had worked in the corporate practice of a renowned Benelux law firm in Luxembourg for numerous years. He is a member of the Luxembourg and Frankfurt/Main Bar Associations. He is multilingual and holds degrees in law and economics from German, French and Swedish universities. He is the author of publications notably on directors' liability and the Luxembourg rules on incorporation and capital of limited liability companies.

Markus Koehnen (author Canada), is a litigation partner with McMillan LLP, Toronto, whose practice in complex commercial litigation focuses on corporate governance. He has a BA and an LLB from the University of Toronto and a D.E.A. from the University of Paris, Panthéon-Sorbonne. He teaches at the Institute of Corporate Directors. He is also the author of 'Oppression and Related Remedies', a text on shareholder rights and directors' liabilities, quoted by courts throughout Canada.

Kaspar Kolk (co-author Estonia), is a lawyer specializing mainly in the field of Corporate and M&A. Kaspar is one of the few lawyers who in addition to the field of law has a know-how in business and corporate management consultancy. He has a previous working experience from PricewaterhouseCoopers Advisors where he was involved in various international projects and was active in performance improvement, financial advisory and specifically in financial sector and regulatory compliance consulting projects.

Björn Kristiansson (author Sweden), is a partner in Hannes Snellman's Public M&A group. He specializes in public M&A and corporate governance. He has extensive transaction experience and has been active in the Swedish Corporate Governance Board since its foundation in 2004 and since 2011 as executive member.

Nicolas Lafont (co-author France), is a partner in the Paris office of McDermott Will & Emery. His practice focuses primarily on corporate law and mergers and acquisitions. He advises international clients in negotiating acquisitions and disposals in a broad range of industries. He also has expertise negotiating joint ventures and advising on corporate restructurings and commercial transactions. Before joining McDermott in 2011, he worked for more than two years at Cravath Swaine & Moore in New York City, and then at Hebert Smith in Paris for four years. Nicolas is a member of the IBA. He is also a visiting professor at ICADE, Madrid. He is admitted to practice in Paris, New York and Madrid.

Allan Leung (author Hong Kong), heads the litigation practice of Hogan Lovells in Hong Kong. He has over twenty-five years of experience handling international commercial disputes and is widely recognized by a number of legal directories as an outstanding litigator. He has held a number of public and professional offices and has recently been appointed by the Chief Executive as a member of the Law Reform Commission.

Danny Leung (co-author Hong Kong), as a counsel in the Hong Kong office of Hogan Lovells, Danny's practice covers complex commercial litigation and regulatory disputes and investigations. He has a special focus on anti-money laundering laws and regulations and sits on the Anti-Money Laundering Committee of the Law Society of Hong Kong. He is ranked as a leading individual by several legal directories.

Eric Levenstein (co-author South Africa), has been a director at Werksmans Attorneys since 1993 and is currently the head of the firm's Business Rescue, Insolvency & Restructuring Practice. He specializes in litigation and dispute resolution with a particular focus on business rescue, insolvency and restructuring. He is a member of

the South African Restructuring and Insolvency Practitioners Association (SARIPA) and sits on the National Board of SARIPA. Eric also sits on SARIPA's Restructuring, Business Rescue and Government Liaison Committees. In addition, Eric is a member of INSOL, a worldwide group of insolvency practitioners and attorneys. Eric has been ranked as a highly recommended lawyer in Dispute Resolution (Business Rescue) in Legal 500 in 2014. He has also been named as a recommended lawyer in restructuring and insolvency by PLC Which Lawyer 2013.

Juan José López-de-Silanes (co-author Mexico), is Managing Partner in charge and member of the Executive Committee in his firm Basham, Ringe y Correa, S.C. His experience focuses on the planning and execution of national and international transactions such as the formation of businesses, partnership agreements, M&A transactions, reorganizations, investments, public tenders, both at a national and international level, as well as a consultant in corporate governance matters.

Dr Haim Machluf (co-author Israel), is a partner in Herzog Fox & Neeman's (HFN) Litigation Department. He has significant experience in civil and commercial litigation, both in Israel and in the United States. Haim focuses his practice on commercial litigation, including corporate and securities litigation, antitrust litigation, as well as administrative litigation. Prior to joining HFN, Haim worked at a prominent US law firm, upon completion of his doctoral studies at Harvard Law School.

Philippe Malherbe (author Belgium), is both a practitioner and an academic, as professor at Université Catholique de Louvain, visiting professor at Université de Paris-Est Créteil and avocat in Brussels (partner at Liedekerke law firm). He holds a law and an economics degree from the Université Catholique de Louvain and an LLM from the University of California, Berkeley.

Som Mandal (author India), is the Managing Partner for Fox Mandal Little Group (FML). He specializes in corporate law, M&A, joint ventures, oil and gas, disinvestment, and infrastructure, and his current practice focuses on corporate transactional work, which includes M&A, joint ventures, commercial contracts, corporate restructuring, disposals of private companies, private equity, securities transactions, and real estate transactions. Mr Mandal obtained his law degree from University of Calcutta and was admitted to the bar in 1988. He has been recognized as one of the top performing lawyers for 2008 by Asian Legal Business (ALB). He has authored the chapter on 'FIDIC Applicability in India' published by Kluwers Publications. He is a member of the Supreme Court Bar Association, Delhi High Court Bar Association, IBA, American Bar Association (International Section), Union des Avocats, and Inter Pacific Bar Association. He is one of the Indian representatives at the Commission on Arbitration of the International Chamber of Commerce, Vice-Chair of the Asia Pacific Forum, and Council Member of Section on Legal Practice of the IBA and of the Committee on Corporate Law & Legal Affairs-FICCI.

Chris Melville (author Mongolia), is the Managing Partner of Hogan Lovells (Mongolia) LLP and has been based in Mongolia since 2012. Chris has a broad-based practice

in Mongolia, including advising foreign investors, Mongolian clients and the Mongolian government on energy and infrastructure projects, corporate and M&A, joint ventures, and banking and finance. Chris has extensive experience of emerging market jurisdictions, having advised clients on cross-border investments relating to the Russian Federation for over ten years. Prior to relocating to Mongolia, he spent two-year period in Moscow with the firm. He has been involved in some of the largest M&A and restructuring transactions in Russia and has a strong track record of successful project management. Chris has a BA (First Class) in history from University of Cambridge and graduated from the College of Law, Guildford. He is admitted as a solicitor in England and Wales.

Norio Mitsuuchi (author Japan), has been an associate with Kojima Law Offices in Tokyo, Japan since 2006. He specializes in the areas of corporate law, labour law, tax law, as well as commercial litigation. He has also much experience regarding legal advice on foreign direct investment to/from Japan. He received a Bachelor of Arts (ethics) degree from the University of Tokyo in 1998. After passing the Japanese Bar examination in 2004, he completed his legal training at the Legal Training and Research Institute of the Supreme Court of Japan and was admitted to the Japanese Bar in 2006.

Maeve Moran (co-author Ireland), specializes in corporate and commercial law issues for public and private companies and advises on mergers, acquisitions, cross-border transactions, private equity investments and corporate advisory work. Maeve is currently based in Arthur Cox's New York office.

Rory Moriarty (author Australia), leads the national Corporate/M&A Practice Group at Clayton Utz. He is a corporate partner with experience across a broad range of transactions, including Australian and cross-border mergers and acquisitions, take-overs, capital raisings and corporate structuring. In doing so, he regularly advises on Australian corporate law and ASX Listing Rule issues and has had extensive dealings with Government and other regulatory bodies, including the Australian Securities & Investments Commission, the Foreign Investment Review Board, ASX and the Take-over's Panel.

Lorenz Naef (co-author Switzerland), is a trainee with Bär & Karrer AG in Zurich. His particular practice areas are commercial litigation and international arbitration. He graduated from the University of Zurich in 2015; he also holds a Master of Laws degree in International Business Law from the Dickson Poon School of Law, King's College London.

Minh Nguyen (co-author Vietnam), is a Vietnam qualified lawyer in Hanoi office with over nine years of experience. Minh has acted for various private equity funds, sovereign and other funds, foreign and domestic investors in acquisition of equity and companies in Vietnam in a variety of companies, including foreign-invested companies, domestic companies (both publicly traded and private companies), and equitized State-owned companies and banks.

Lotanna Nwodo (co-author Nigeria), is an associate in the offices of Aluko & Oyebode in Lagos, Nigeria. Lotanna is a member of both the Capital Markets and Mergers & Acquisition practices of the firm. He obtained a Bachelor of Law from the University of Nigeria where he graduated with first class honours, and holds an LLM from the Harvard Law School. Lotanna was admitted to the Nigerian Bar in 2012.

Jeff Olson (author Vietnam), has more than ten years' experience representing major corporations and private equity firms on a broad range of corporate matters, including public and private M&A transactions, joint ventures, strategic investments and corporate finance. Having practiced in New York, Tokyo and currently Vietnam, Jeff knows what it takes to successfully execute transactions in challenging markets.

Daniel Robalino Orellana's (co-author Ecuador), practice focuses on antitrust and regulatory economic law, as well as foreign investment planning and foreign trade. Daniel has involved in international arbitration practice, both on investment and commercial disputes, under CIADI and UNCITRAL rules.

He graduated as attorney from Universidad San Francisco de Quito in 2010 and obtained a graduate diploma in antitrust law from The College of Law of England and Wales in 2011.

Ayodeji Oyetunde (author Nigeria), is a partner in the Corporate/Commercial Department of Aluko & Oyebode in Lagos, Nigeria. He is a member of both the Capital Markets and Mergers & Acquisition practices of the firm. He provides advice to the firm's clients principally on capital market transactions, mergers and acquisitions, corporate restructurings and regulatory compliance.

Ayodeji also provides advice on an ongoing basis on various project finance, energy, aviation and shipping transactions.

Deniz Özkan (co-author Turkey), is a corporate and commercial lawyer with extensive involvement in competition, corporate governance as well as mergers and acquisitions by foreign investors in Turkey.

Deniz is involved in a wide range of sectors including banking, insurance, telecommunications, petrochemicals, technology, energy, food and beverages, manufacturing and pharmaceuticals.

Serdar Paksoy (author Turkey), is the founding member and a senior partner of the firm. For over twenty-five years, he has been actively advising foreign investors and assisting them in their transactions and also disputes work in Turkey and abroad. Serdar's practice focuses on corporate governance, mergers and acquisitions, white collar crimes, investigations and dispute resolution.

Sven Papp (author Estonia), is one of the leading and most experienced corporate and M&A lawyers in Estonia. He has unique and broad international experience both as an attorney and as a general counsel having worked at White & Case in New York and in its Stockholm offices, the Swedish-French consulting company SIAR-Bossard in Stockholm and in Swedish Match East Europe in Stockholm. Sven has an unrivalled track record having over the past twenty years acted as lead legal adviser for a large number

of landmark local and international M&A transactions across the Baltic and Nordic region.

Alesya Pavlynska (co-author Ukraine), is a senior associate at Arzinger Law Firm. She is an expert in labour and corporate/M&A law issues. Alesya has vast experience in corporate reorganization procedures, supporting appointment and employment of companies' officials, as well as problematic dismissals, layoff, schemes of outstaffing and outsourcing of personnel, internships, preparing employment contracts and internal labour law documentation.

David William Peter Cooke (author Bermuda), is a Director and Head of the Corporate Department of Conyers Dill & Pearman in Hamilton, Bermuda. He was admitted to the Bar of England and Wales in 1987 and to the Bermuda Bar in 1989. He is involved in many areas of corporate and commercial law and has particular expertise in securities work, asset financing and mergers and acquisitions.

Javier M. Petrantonio (author Argentina), is M. & M. Bomchil's Managing Partner, head of the Litigation department and co-head of the M. & A. department. He specializes in complex commercial litigation, corporate reorganizations, contract law, and corporate advice. He joined the firm in 1996, became partner in 2000 and Managing Partner in 2011. He obtained his law degree at the University of Buenos Aires and was admitted to practice by the Buenos Aires Bar in 1990. In 1994, he obtained an LL.M. in International Commercial Law at the University of Nottingham, England. He is a member of the IBA, where he participates actively as speaker and author.

Enric Picanyol (author Spain), is a senior partner in the Corporate Group of Cuatrecasas, Gonçalves Pereira, Barcelona, and specializes in M&A and in corporate law. He also has a substantial practice in the area of acquisition finance and project finance as well as serving as arbitrator in commercial arbitration. He completed his studies at the University of Barcelona with a law degree and an MSc in Economics. He obtained a Diplôme du 3e cycle from the Faculté Internationale de Droit Comparé, Strasbourg, France and an LLM from the London School of Economics, University of London. He is a member of the Barcelona Bar Association and of other professional organizations such as the IBA, where he was a council member from 1995 to 1999.

Riikka Rannikko (author Finland), is a partner at Hannes Snellman. Her fields of expertise include equity capital markets transactions and securities markets related regulatory matters. She has advised clients in a number of IPOs, share offerings and public tender offers, as well as represented both Finnish and foreign clients with regulatory filings and compliance questions. Her practice also includes public and private M&A transactions in various industries and a wide range of corporate work.

During the year 2015, she chaired the working group set by the Finnish Securities Market Association for the purpose of reviewing and revising the Finnish Corporate Governance Code, effective as of 1 January 2016.

Matthew T. Reiter (author Switzerland), Reiter is a partner with Bär & Karrer AG in Zurich. He specializes in commercial litigation and international arbitration, has

extensive forensic experience with regard to directors' liability, and heads the firm's litigation practice group. Being a graduate of Zurich University and holding a Master's degree from New York University (LLM) in General Studies, he was admitted to the Zurich Bar, Switzerland, in 1998 and to the New York Bar in 2001. In 1999, he joined Bar & Karrer and became a partner of the firm in 2005. He is a member of the Swiss Arbitration Association (ASA), of the Swiss Bar, and a past Chair of the Negligence and Damages Committee of the IBA.

Robert Ripin (author United States of America), is a partner in the New York office of Hogan Lovells US LLP. For over a quarter of a century, Rob has advised on cross-border securities offerings and other finance transactions. He received his BA from Columbia University in 1985, his J.D. from New York University School of Law in 1988 and was a visiting student at Oxford University from 1983-1984. He is admitted to the bar of the State of New York.

Javier Robalino-Orellana (author Ecuador), is a Managing Partner for FERRERE in Ecuador and co-chairs the arbitration practice. Mr Robalino represents multinationals in investment planning, investment disputes, and cross-border matters. He has been appointed as international arbitrator and has represented investors in investment and commercial disputes under ICSID, UNICTRAL, CIAC and ICC procedures. Mr Robalino graduated as Attorney from Universidad Católica in Ecuador and received an LLM from Duke University.

Valdano Ruru (co-author Indonesia), joined Makarim & Taira S. in 2012. He has handled several major projects, such as massive land acquisition for a power plant project in Jepara, Indonesia. He was also involved in a global acquisition of a telecommunication company in 2013. Valdano's areas of expertise also cover company acquisitions, foreign investments, banking products, financing and the operation of IT companies. He also has considerable experience in handling capital market matters in Indonesia. He is also a member of the Indonesian Advocates Association (PERADI).

Per Samuelsson (co-author Sweden), is an associate in Hannes Snellman's Public M&A group. He works mainly with corporate and capital markets law. His experience includes work in relation to several public tender offers and M&A transactions, as well as various corporate issues.

Martín Pallares Sevilla (co-author Ecuador), focuses on cross-border transactions with an emphasis on M&A and public procurement, with particular prominence of the energy and natural resources sector.

He obtained his LLB from Universidad de Salamanca, and received an LLM from the Superior Law and Economics Institute. Martín also obtained a Master's degree in Business Administration from the Financial Studies Center and from the Universidad a Distancia de Madrid with a partial scholarship from DLA Piper.

Imtiaz Shah (author United Arab Emirates), is head of Hogan Lovells' Middle East corporate commercial practice. With more than sixteen years' experience in the Middle

East based in the UAE and Oman, Imtiaz has advised on transactions in every country of the Arabian Gulf. His extensive practice comprises a mix of M&A, equity capital markets, investment funds (including Shariah-compliant funds), joint ventures, private equity, commercial, employment and regulatory advice, representing both regional and international clients.

Raimonds Slaidiņš (co-author Latvia), is a co-founder and partner in the firm Klavins Ellex. Over the years since Latvia's regained independence, Raimonds Slaidins has been advising a broad range of foreign investors and of institutional clients on major precedent-setting transactions and leads his firm's corporate and M&A practice group.

Reinis Sokolovs (co-author Latvia), specializes in corporate and commercial law, insolvency & restructuring and competition. He has more than ten years of experience in advising, conducting research and drafting of legal documents in a variety of business-related transactions.

Ehud Sol (author Israel), is a senior partner at Herzog Fox & Neeman (HFN) and heads the firm's Corporate and Securities Department. Ehud has led several of the most significant and notable M&A and Capital Market transactions in Israel. As one of the most creative minds in Israel's corporate legal market, Ehud's clients include renowned international and Israeli investors and corporations. Ehud also has considerable experience in Corporate and Securities litigation.

Wendy Stenning (co-author Cayman Islands), is an associate with Collas Crill, Attorneys at Law, George Town, Cayman Islands. She specializes in trust and general commercial law. She holds a law degree (LLB (Hons.)) from the University of Sussex. After she obtained her Legal Practice Certificate from Nottingham Law School, she was admitted as an Attorney-at-Law in the Cayman Islands in 2001. She is a member of the Cayman Islands Law Society, the Caymanian Bar Association and of the Society of Trust and Estate Practitioners.

Walter Douglas Stuber (author Brazil), is the founding partner of Walter StuberConsultoriaJurídica, in São Paulo, Brazil. He was admitted to the Brazilian Bar Association in 1973 and is the author of various articles for Brazilian and international law journals, magazines, and newspapers on his practice areas (corporate, M&A, joint ventures, financial transactions and capital markets).

Hugo Teixeira (co-author Portugal), is an Associate Lawyer at Abreu Advogados since 2007. He graduated from the University of Lisbon Law School (2003), has an LLM in Finance from the Goethe Universität, Frankfurt and a Post-Graduation Course in Commercial Law from the Portuguese Catholic University Law School. Hugo has been involved primarily in matters related to Mergers & Acquisitions, Maritime Law and Transportation and Private Equity.

Dmitry Viltovsky (author Belarus), is a leading Belarusian lawyer in corporate law, M&A, as well as Labour law, Investment law etc. In these spheres, he gave

consultations within biggest deals in Belarusian market. As a result, his highest level of qualification and professional approach was admitted by Chambers Europe, IFLR 1000, Who's who legal and other worldwide legal rankings. Apart from legal practice, Dmitry received post-graduate degree at the National Center of Legislation and Legal Researches of the Republic of Belarus.

Dr Thorsten M. Volz (author European Union), is a partner of Pinsent Masons and leads Pinsent Masons' German energy practice and their Düsseldorf office. He has specialized in corporate law, energy law and Mergers & Acquisitions. Thorsten is now advising in the energy sector for more than twelve years. During his academic education, Thorsten worked as a research assistant at the Institute for Energy Law at the University of Cologne, was junior research fellow at the University of Oxford and visiting researcher at the Centre for Energy, Petroleum and Mineral Law and Policy. His doctoral thesis (PhD) dealt with a comparison of the network unbundling in UK and Germany. He qualified as a lawyer in 1999 and was admitted to the German Bar in 2004.

Anthony Woolley (co-author Mongolia), is a Counsel at Hogan Lovells (Mongolia) LLP. Anthony trained and qualified at Freshfields Bruckhaus Deringer in London. Anthony has been resident in Ulaanbaatar since March 2012, where he relocated after many years practising in London and a short period spent in Iraq. In Mongolia, Anthony's practice includes advising both international and domestic clients on acquisitions, financing and security, real estate, incorporations, insolvency, liquidations and restructuring, licensing, product labelling and compliance. Anthony has a BA and BSc from University of Auckland, an MSc from Nottingham University, and he completed his legal studies at BPP Law School. Anthony is admitted as a solicitor in England and Wales.

Liang Xu (author The People's Republic of China), is a partner in Beijing Office of Hogan Lovells LLP. He focuses on cross-border mergers and acquisitions (both inbound and outbound), joint ventures, private equity and other corporate transactions or regulatory matters concerning China. He was nominated as one of the Chambers Global's leaders in the field of China Corporate/M&A. Liang is qualified of both New York Bar Association and China Bar Association. Prior to joining Lovells Beijing in 2004, he was an in-house counsel with China Eastern Airlines Corporation Limited in Shanghai.

Tomasz Żak (author Poland), as a counsel in Hogan Lovells Corporate Department in Warsaw, Tomasz focuses his practice on M&A, Private Equity, and commercial contracts. Widely recognized as an expert and an excellent legal mind, Tomasz advises not only on a spectrum of domestic and international issues but also anticipates and helps clients solving a range of cutting-edge challenges. He also gives lectures at MBA studies and seminars on business law.

Sarah Zhang (co-author The People's Republic of China), is a senior associate in Beijing Office of Hogan Lovells LLP. She graduated from Peking University in 2006 and obtained an LLM from Vanderbilt University in 2010. She is qualified of both New York Bar Association and China Bar Association. Her practicing areas include cross-border mergers and acquisitions, employment law and other general commercial or regulatory matters concerning China.

Summary of Contents

Table of Contents

Germany

Alexander Loos

I BASIC PRINCIPALS FOR DIRECTORS' LIABILITY

Managing directors and managing partners of German companies (hereinafter collectively referred to as 'Directors') have different job titles depending on the type of their company: for example, *Geschäftsführer* (GmbH, partnerships), *Vorstand* (AG, eG, AöR, and even for GmbH), or *geschäftsführender Gesellschafter* (partnerships). Directors may become personally liable for any culpable violation of their duties. Such duties may originate from a contract (articles of association or Director's employment contract) or from law (civil, corporate, criminal, environmental, tax or insolvency law). A Director's liability may lead to damage claims from the company (so-called internal liability) or to damage claims of the company's creditors (so-called 'external liability'). The personal liability of a Director may be joint and several with his or her fellow Directors and/or joint and several with a parallel liability of the company, especially in cases of tort.

[A] Single-Body Companies or Two-Tier System

In companies under the single-body system the entire control over the management is in the hands of the shareholders or partners. The nomination, election, and termination of a Director is decided by the shareholders or by a committee formed and controlled among the shareholders.

In the two-tier system the controlling powers of the shareholders are split between a supervisory board ('*Beirat' or 'Aufsichtsrat*') and the shareholders. The supervisory board appoints the management and decides upon its employment terms and upon its removal. Furthermore, the supervisory board is competent for approving or not approving financial statements and important strategic, industrial, and financial decisions as specified by law and, in addition thereto, by the company's articles.

The two-tier system is compulsory by law for an AG (*Aktiengesellschaft* = German joint stock corporation) and for an eG (*eingetragene Genossenschaft* = an incorporated cooperative association specially designed for business with its shareholders, preferably used for development enhancement banks like *Volksbanken* or *Raiffeisenkassen*). All other types of German companies are subject to this single-body system, but may, and very often do, opt for the two-tier system.

In companies under the two-tier regime, the control of shareholders over day-to-day business is remote. Consequently, shareholders have less influence on the management and Directors can protect themselves less often against personal liability by obtaining shareholder approval.

[B] Management Structure and Chairman

The management board may consist of one or more Directors. Directors share their managerial responsibilities collectively, regardless of how areas of competence are allocated among them, be it by the articles, by shareholders' resolution, or by agreement between the Directors. Except for individual responsibilities under criminal law, any external liability is a joint and several one. Typically, the shareholders or the supervisory board when appointing the Director(s), elect one of them as chairman ('*Vorsitzender*') or, if his or her functions are less dominant, as 'speaker' ('*Sprecher*'). In management boards comprising more than three Directors, it is customary to form committees ('*Ausschüsse*'), for example, for personnel, financial matters, audits, and so forth. Even if such committees within the management board may pass resolutions otherwise requiring a ballot from all Directors, any ensuing liability is a collective and therefore a joint and several one for all Directors.

[C] Delegation of Management Powers

Directors must be individuals and they may delegate their powers only in specific cases or transactions and not by way of a general power of attorney. Any such general delegation is deemed invalid. Even if a Director validly delegates his or her powers to another person for a specific transaction, any ensuing external liability of the delegating Director remains his or her own.

[D] Removal of Directors

Directors in the position of a managing partner of a partnership (civil law, limited or unlimited) can only be removed if the bylaws of the company so provide, for example, by partners' resolution with a qualified or simple majority. For Directors in corporations, the removal requires a resolution of the appointing body. In companies under the two-tier system, any removal prior to the end of a Director's term may only be resolved for cause or in consequence of a shareholders' resolution stating 'lack of confidence'. Any Director of a GmbH can be removed from his or her formal position at any time. Neither the articles of association nor any employment agreement of a Director may

validly stipulate otherwise. The law distinguishes between the formal position as Director and any existing employment relationship; one relationship may validly exist without the other, and termination of both (e.g., for cause) requires separate resolutions of the appointing body (shareholders' meeting or supervisory board) for each of them. The removal becomes effective immediately upon being communicated to the Director, even though subsequent registration may take longer.

II TYPICAL LIABILITY CASES

[A] Internal Liability towards the Company

Managerial duties of Directors in corporations exist towards the company and not towards its shareholders. The most frequent violations are breaches of compliance rules, of loyalty obligations (non-compete covenants during and after employment or the collection of kickbacks) and illicit disbursements from the company's equity (indirect refundment to shareholders/partners, distribution of hidden dividends).

[1] Violation of Compliance Rules

Directors have to protect first of all the company's interests and, as secondary obligation, the interest of the company's shareholders. As a basic rule the Directors must endeavour to conduct the company's business in full compliance with all applicable tax law, criminal law and every other pertinent legislation. Such legislation obliges the Directors to apply the proper diligence of an experienced business person e.g., when entering into a merger[1] or in public listed companies, when publishing ad-hoc reports[2] or generally when neglecting to supervise and enforce the compliant conduct of business by employees, so that in result administrative offences occur.[3] Such administrative offences may be fined heavily with up to EUR 10 million or, if the illicit advantage expected by the company is higher, then the fine may get increased accordingly.[4]

[2] Violation of Non-compete

Directors are subject to strict non-compete obligations towards the company, regardless of whether such is explicitly stipulated in their employment contract, in the company's articles, or even by law. Such non-compete obligation applies during their employment for all types of companies[5] and may be extended for a definite time

1. §25 Umwandlungsgesetz.
2. §§15.1, 37 b, 37 c *Wertpapierhandelsgesetz*; although any such violation will give rise to a liability of the company, the company may take recourse against the Director based on §93 *Aktiengesetz*.
3. §§30.1, 30 Gesetz über Ordnungswidrigkeiten.
4. §§17.4, 30.3 Gesetz über Ordnungswidrigkeiten.
5. §§112, 113 Commercial Code (HGB); §88 Joint Stock Corporation Act (AktG); BGH *Wertpapier-Mitteilungen* 1964, 1320.

thereafter by explicit agreement. Respective judicial practice is vague and therefore any post-contractual non-compete covenant should not extend beyond two years and must entitle the former Director to a compensation of no less than half of his or her former remuneration.[6] Violation of the Director's non-compete obligation (be it post-contractual or not) does not require any competitive activity as such: It is sufficient that the Director owns a controlling interest in a competitor, be it direct or indirect or through a close relative. Directors holding a managerial position in more than one company of the same group ('group' means companies being ultimately controlled by the same shareholder) may need an explicit exemption from their non-compete obligation in order to work for several group companies at the same time. Such exemption requires an explicit phrase in the articles of association or a unanimous shareholder resolution. Without such exemption the factual or agreed allocation of market sectors among companies of the same group can be regarded a preference for a 'competitor' and hence may be a violation of the Director's non-compete and loyalty obligation; moreover it may be deemed a violation of arm's-length principles (see section II[A][4]).

[3] Poaching of Business from the Company

No Director may take over from the company any business opportunity in order to use it for his or her own benefit or for persons close to him or her. This includes illicit synergies, such as negotiating favourable business conditions for his or her own private good or for his or her family's procurement, while the company enjoys less favourable terms with the same supplier.[7] Though the amount of damage suffered may be doubtful, the benefit obtained by such illicit arrangements must be refunded to the company, because judicial practice presumes that any such benefit was obtained at the expense of the company.

[4] Disbursements from Restricted Equity of the Company

The most frequently used types of German companies (GmbH, GmbH & Co. KG, AG, eG) are subject to rigid capital preservation rules, which, if violated by Directors, give rise to direct personal liability for restoring the full amount plus any ensuing damage.[8] Such capital preservation rules were somewhat weakened[9] in favour of cash pooling systems and upstream lending if and to the extent the company is subjected to a profit and loss assumption agreement if it is entitled to adequate receivables in return.[10]

6. Analogous to §§74 et seq. Commercial Code (HGB).
7. BGH *Wertpapier-Mitteilungen* 1967, 679; OLG Düsseldorf GmbH-Rundschau 1995, 227.
8. §§30, 43 Abs. 3 Limited Liability Company Law (GmbHG); §§57, 93 Abs. 3 Joint Stock Corporation Act (AktG); §172 a Commercial Code (HGB); §§ 22 Abs. 3, 34 Abs. 3 Cooperatives Act (GenG).
9. §57 Abs. 1 Joint Stock Corporation Act (AktG); §30 Abs. 1 Limited Liability Company Law (GmbHG), as revised by the so-called MoMiG of 23 October 2008 (BGBl. I S. 2026).
10. See Altmeppen 'Cash Pooling and Raising of Capital', NZG 2010, 361, 441 seq.

[5] Violation of Arm's-Length Principles

Directors are obliged to treat shareholders, fellow Directors, and third parties who are closely related to shareholders at arm's length. Any culpable breach of these loyalty duties will cause unlimited personal liability for restituting to the company any disadvantage suffered. Such liability is joint and several with any shareholder/fellow Director, who has enjoyed the preferential terms.[11]

[6] Knowing Disregard of Avoidable Risk

Fuelled by the so-called financial crisis since 2008, public prosecutors increasingly indicted Directors for tortuous breach of fiduciary duties.[12] Such tortuous breach of fiduciary duties is both a criminal offence and a tortuous breach of the Director's civil law obligations vis-à-vis his or her company.[13] Any risk knowingly accepted, when making a managerial decision, may, if causing subsequent damage at the expense of the company, cause respective responsibility of the Director under both criminal law and civil law on restitution of damages. Directors of an AG bear the burden of proof for establishing that the risk perceived for the company was acceptable for a diligently acting manager.[14] Their personal internal liability towards the company may be waived by prior shareholder approval, not, however if the company's claim for restitution of damage is required for compensating the company's creditors. In a GmbH, however, Directors, when asking for shareholder approval in preparation of risky business decisions, may get justified by such shareholder approval except if criminal offences such as, for example, incorrect tax filings or the omittance to file for insolvency in due course are concerned.

Directors, i.e., member of an executive board in an AG may justify their business decisions under a concept of a 'business judgment rule'. Even a risky business decision by a Director can be justified under this rule if it is 'based on reasonably sufficient information as reasonably suitable for obtaining beneficial effects for the company'.[15] However, except for the damage suffered by the AG, the burden of proof for all other facts of the 'business judgment' applied is on the Director regardless whether still holding such position or already retired.

[B] External Directors' Liability

Directors' personal liability towards external third parties requires a culpable violation of mandatory law (e.g., tax law, criminal law, insolvency law, environmental law). In

11. §43 Limited Liability Company Law (GmbHG); §93 Joint Stock Corporation Act (AktG); §34 Cooperatives Act (GenG).
12. §266 German Criminal Act, sentencing such breach with up to five years of imprisonment or respective fine.
13. §823 Abs. 2 German Civil Code.
14. §93 Abs. 2 Joint Stock Corporations Act (AktG).
15. *Ibid*.

addition, Directors may become liable for tort. Except for tort the external liability of Directors is only a secondary one supplementing the company's primary liability. Such secondary liability for Directors therefore has special importance, where the company later gets into bankruptcy.

[1] Gross Negligence to Pay Taxes and Public Levies

Directors are obliged to see to it that the company pays its taxes and public levies.[16] Any grossly negligent or intentional violation of this duty gives rise to personal liability, which can be enforced by the tax administration directly.[17]

[2] Illicit Non-payment of Social Security Contributions

Social security contributions in Germany are shared by the employer and by the employees, while the collection and payment of both shares must be effected and accounted for by the company. Non-payment of the employee's portion within the security contributions, as it may happen in times of financial crisis, leads to direct personal liability on the part of the Directors.[18] This obligation continues even after the Directors will have filed for bankruptcy as long as their managerial powers are not substituted by the appointment of an insolvency receiver holding appropriate managerial powers.

[3] Late Filing for Insolvency

Directors are obliged to file for insolvency proceedings within three weeks, once the liabilities of the company exceed its assets or once the company has stopped or interrupted its payments for lack of liquidity. Payments made from the accounts of a company, even though the filing for bankruptcy became due, oblige Directors to refund such payments to the bankrupt estate unless every single payment can be justified as necessary or as preventing further and higher damage to the company's estate.[19] In this context the most crucial question is, at which point in time the filing for bankruptcy was due. During the last two decades judicial practice continuously has intensified respective duties of care for Directors. Judicial practice has focused on the issues:

16. §34 Tax Code (AO).
17. §69 Tax Code.
18. §§14 Abs. 1, 266 a Criminal Code (StGB); §823 Abs. 2 Civil Code (BGB).
19. §92 Abs. 2 Joint Stock Corporation Act (AktG); § 64 Abs. 1 Limited Liability Company Law (GmbHG); Directors bear the burden of proof for justifying, item by item, any outgoing payments effected.

- The Directors are responsible for anticipating the necessity of organizational and financial restructuring measures well in time. Any respective negligence will make them personally liable.[20]
- After realizing that they must file for insolvency, the Directors may not reduce the equity/liquidity of the company until they get replaced by an insolvency receiver. This requires the Director to continuously monitor the availability of liquidity and, which seems more difficult, the valuation of liabilities and assets in order to avoid that liabilities exceed. In this context the valuation of assets under 'going concern principles' becomes the decisive criterion for ascertaining the point in time when the filing for bankruptcy becomes inevitable. Present judicial practice requires that the 'going concern assumption' must be based on a forecast covering the next two years. Furthermore, the going concern principles can no longer be applied if the company (though being able to pay the most part of its liabilities when due) comes into default with more than 10% of its liabilities for longer than three weeks; as soon as this shortage of liquidity becomes foreseeable, the three weeks commence to run. After such three weeks the management is liable to file for bankruptcy at the latest.[21]
- If Directors have filed for insolvency proceedings with delay, judicial practice awards different damage claims to 'old' and 'new' creditors. While 'old' creditors (i.e., creditors existing before the financial crisis) may only claim damages to the extent that their insolvency dividend would have been higher if the Directors had filed for bankruptcy in due time ('*Quotenschaden*'), 'new' creditors are entitled to compensation as if they would have avoided any dealings with the company at all ('*negatives Interesse*').[22]

Most recent judicial practice of appeal courts indicates that Directors shall be granted a widened scope of discretionary decision, how long they may see their chances for restructuring as still being realistic and for postponing the filing for bankruptcy; however, this new tendency still is lacking the necessary endorsement from the Federal High Court.

III LIABILITY ISSUES

[A] Enforcement of Director's Liability

[1] Who Can Sue?

In corporations (GmbH, AG, eG) all managerial duties of a Director exist only towards the company as a legal entity. Consequently, shareholders are not entitled to damage

20. §43 Abs. 2 Limited Liability Company Law (GmbHG); § 93 Abs. 2 Joint Stock Corporation Act (AktG).
21. §15a Insolvency Act (InsO); Federal High Court (BGH) judgment of 24 May 2005, IX ZR 123/ 04 (= *Entscheidungen des Bundesgerichtshofs in Zivilsachen* 163, 134).
22. BGH Zeitschrift für Wirtschaftsrecht 1993, 763, 1543.

claims except in special cases where Directors have neglected to properly handle the collection of capital contributions. In partnerships, where managerial duties of Directors exist towards the community of partners as joint and several 'employers', any partner may sue on behalf of the partnership against a Director in a derivative action *('actio pro socio')*.

For all cases of internal Directors' liability, the company is entitled to sue before the specialized chambers for commercial matters *('Kammer für Handelssachen')* in the district court *('Landgericht')* of the company's place of registration. The claiming company needs to be represented by one or more partners if being a partnership or, if a corporation, needs to be represented by someone specially authorized by the shareholders' meeting. Corporations under the two-tier system must be represented by the supervisory board.

Under the two-tier system the supervisory board has no discretion, but must enforce any existing claims against Directors in order to avoid its own liability[23] towards the company.

In cases of external liability (towards third parties), the damaged third party has the right to sue against the company as primary debtor and, if the company is unable to pay, against the Director as secondary debtor. Where 'new' creditors (being those who transacted business with the company without knowing its already imminent state of bankruptcy) sue for damage caused by late filing for bankruptcy, they may sue against every single Director for the full amount of their damage. In exchange for the Director's compensation payment, such claimants must assign to the Director any claims they may have for a respective bankruptcy dividend.[24] For damages of old creditors, resulting from illicit reduction of the bankrupt estate, the bankruptcy receiver sues the Directors and subsequently distributes the proceeds among the damaged creditors.

[2] Costs of Litigation and Class Actions

According to the German loser-pays principle, plaintiffs are entitled to full reimbursement of court fees and of costs for counsel in the amounts defined by German fee regulations; actual costs may exceed such refundment claims, especially if a counsel bills time-based as opposed to the statutory standard of the German lump-sum system under the *Rechtsanwaltsvergütungsgesetz* ('*RVG*'), which is related to the value of the dispute.

'Class actions' according to the American pattern are not possible under German law. However, as a first step towards class actions, Germany since 2005 has introduced[25] the option for securities actions to be put on hold when based on (nearly) the same facts and related to the same respondents until one or more exemplary pilot cases will be decided, thereby providing the parties with a lead ruling to be applied to all other pending cases. Such securities actions mainly deal with the issuance of

23. BGH *Neue Juristische Wochenschrift* 1997, 1926 (ARAG-Garmenbeck).
24. Entscheidungen des Bundesgerichtshofs in Zivilsachen 146, 264.
25. *'Kapitalanleger Musterverfahrensgesetz'* (abbreviated 'KapMuG'), BGBl 2005, IS. 2437.

information about public listed companies, be it either misleading information or be it the omittance to publish important news in due time.

[B] Joint Liability of Directors

Since the members of the same management board are held collectively liable due to the collective responsibility of every single Director for all matters of the company, a team of Directors can be held jointly and severally liable towards the company and/or towards third parties. Despite such joint liability the Directors may, among themselves, have entered into agreements splitting specific areas of responsibility; consequently in their internal relationship some of the jointly liable Directors may be entitled to full indemnification in their internal relationships towards their fellow Directors.

[C] Indemnification

In order to protect against internal liability (as in section II[A] above), the management board may seek precautionary indemnification from the shareholders' meeting and/or from the supervisory board. In partnerships, respective resolutions require unanimous consent unless the bylaws request simple or qualified majority; for corporations the requirements differ: In a GmbH, shareholders' resolutions with simple majority are sufficient, unless the articles provide otherwise, whereas for an AG, the shareholders cannot provide indemnification beforehand, but at the earliest three years after the origination of the damage and only unless (at least) 10% of the voting stock file a protest in opposition to such indemnification.

External liability of Directors cannot be reduced or avoided by resolutions of shareholders, partners, or supervisory boards; however, a respective shareholder resolution may oblige the partnership or GmbH to hold the Director harmless against the claiming third party, while his or her external liability remains unaffected.

[D] Time Limitation

The company's damage claims against its Directors will become time barred within five years after the damage claim originated. Such origination will be deemed to have occurred as soon as the company can sue for a judgment on the merits. In public listed stock corporations time limitation will run for ten years. Time limitation for external creditors of damage claims differs according to the statutory cause of action applicable in the individual case. Claims for tort will become time barred within three years following the end of the calendar year when the damaged party got knowledge about the damage and the Director's responsibility, latest however ten years after the causation of the damage, regardless whether the damaged party had knowledge of its claim.

Special attention should be applied in order to adjust deadlines for coverage claims to the duration of time limitation (cf. the preceding paragraph) as time limitation usually is much longer. This applies even more so to policies for former Directors as

deadlines for notifying coverage claims to the D & O insurer usually extend to two years only after the Director's end of appointment.

IV DIRECTORS' AND OFFICERS' INSURANCE

Insurers offer D&O policies since 1995. Their general terms are based on printed conditions introduced in 1997.[26] Premiums typically are paid by the company as contractual counterpart of the insurer. The policies provide coverage against costs and fees for defending against claims ('*Abwehrdeckung*') and/or for compensating any damage ('*Schadensdeckung*'). In joint stock corporations, directors' and officers' coverage protecting Directors is limited by law[27] in order to maintain a basic risk exposure as a kind of incentive for compliant conduct; the residual risk that may not be covered by the directors and officers' (D&O) insurance is the lower of 10% of the damage or of 150% of the Director's annual remuneration. Insurers typically try to force claimants into a difficult two-step sequence in order to reduce options for cross-claims (*'Streitverkündungen')*: State court litigation against the Director and, in a second step, arbitration for the Director's recourse against the insurer. Cases where insurers have provided voluntary coverage for compensation of damage are rare, and D&O policies of German insurers should be carefully analysed with a view to their complicated clauses on excluded risks.

V LAWYER DIRECTORSHIPS

There are no restrictions for lawyers admitted to the Bar *('Rechtsanwälte')* to become managing partners or managing Directors of companies. Once a free practicing lawyer has become a Director, he or she may not represent 'his' or 'her' company in state court litigation or in arbitration as counsel. Once a lawyer Director has worked on a case as counsel before he or she was appointed Director, he or she may not continue to work for and bill the company as counsel, even after having terminated his or her directorship.

VI THE EUROPEAN ACTION PLAN

Most issues of the European Action Plan dealing with Directors' liability already were part of German legislation before the European Union recommended respective legislation. For details, please see the contribution of Dr Thorsten Volz, "The European Action Plans of 2003 and 2012", Chapter […] in this volume.

26. So-called Allgemeine Versicherungsbedingungen für die Vermögensschaden-Haftpflichtversicherung von Aufsichtsräten, Vorständen und Geschäftsführern, abbreviated 'AVB – AVG'.
27. §93 Abs. 2 Joint Stock Corporation Act (AktG).