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

Singapore

Stephanie Keen & Matthew Bousfield

I 'NATIONAL BASICS' AND NATIONAL LEGAL THEORIES OF DIRECTORS' LIABILITIES

Directors' duties and liabilities are primarily regulated by the common law; legislation; policies, rules, codes, and guidebooks issued by Singapore's regulatory bodies; and the company's constitutional documents.

The Companies Act (Cap. 50) (the '*Companies Act*') is mandatory for all companies and is the key legislation governing corporate entities and directors. In addition, the Securities and Futures Act (Cap. 289) is mandatory for listed and other companies that offer securities to the public. There are also certain industry-specific statutes, such as the Banking Act (Cap. 19) and the Insurance Act (Cap. 142) that impose additional obligations on companies and directors in certain industries in Singapore.

The key policies, rules, codes and guidebooks informing this area include:

- the Code of Corporate Governance ('*Code*'), which contains non-statutory 'best practice' principles for listed companies to follow on a 'comply or explain' basis;
- the Singapore Code on Takeovers and Mergers, which contains non-statutory rules for takeovers and mergers, issued by the Monetary Authority of Singapore ('*MAS*') and administered by the Singapore Securities Industry Council ('*SIC*');
- the Singapore Exchange Securities Trading Limited ('*SGX*') Listing Manuals, which are non-statutory SGX rulebooks governing SGX Mainboard and Catalist companies, setting out criteria for listing and ongoing obligations;
- the Guidebook for Audit Committees in Singapore;
- SGX press releases and guidance; and
- SIC guidelines, practice notes and circulars.

[A] Two-Tiered or Unitary Company Structure

In Singapore, there are two types of companies, public and private. Both public and private companies have a single board structure, answerable to the shareholders of the company. Typically, all powers of management are vested in the company directors, save for those reserved for the shareholders under the memorandum and articles of association of the company (the '*Constitution*'), or under Singapore law.

It is common, especially for listed companies, to employ a mix of executive and non-executive directors on the board, with the executive directors managing the day-to-day operations of the company.

[B] Directors' Duties

Directors' duties, and consequently the potential to incur liability, are informed by a number of areas. Section 157(1) of the Companies Act provides that a director must at all times act honestly and use reasonable diligence in the discharge of the duties of his or her office. Section 157(1) is not an exhaustive statement of a director's duties, but is in addition to any duties that may be imposed by other written laws, common law or equity. At common law, a director is regarded as a fiduciary of a company and is bound to observe all fiduciary duties imposed by the common law. Breaches of duty may lead to criminal and civil liabilities.

The duties of a director may be classified in the following broad categories:

- To act honestly and in good faith in the best interests of the company – Directors must act bona fide for what they consider to be the best interests of the company and not for any collateral purpose. Provided that a director's motives are honest and it can be shown that he was satisfied in his own mind that the course of action was beneficial to the company, a director is generally immune from charges that they should have acted differently or that, with hindsight, a better judgment was possible.
- To exercise powers for a proper purpose – where a director is vested with a power, he must exercise that power for the purposes for which it is conferred. A director cannot exercise a power for a purpose which is illegal or contrary to public policy, nor can he exceed the powers expressly conferred on the company by its constitutional documents or implied by law, or those powers specifically delegated to him.
- Of delegation and discretion – a company's Constitution typically provides for delegation of powers of directors to committees. The board of directors cannot, however, delegate all of its responsibilities to the effect of absolving the board from exercising proper supervision and managerial control over the company. Nor can a director fetter his discretion by entering into a contract with fellow directors or a third party governing or restricting the manner in which he votes at future board meetings.

- Of care, skill and diligence – under section 157(1) of the Companies Act, a director shall, at all times, act honestly and use reasonable diligence in the discharge of his or her duties. The courts have expounded this standard of care through case law, as discussed in the following section, 'Cases Dealing with Directors' Liabilities'.
- To avoid conflicts of interest – a director has a common law fiduciary duty to the company and must not place himself in a position in which there is a conflict between his duties to the company and his personal interests or his interests to others. A conflict may arise in respect of his transactions with the company, through the making of secret profits, the misuse of company property, opportunity or information, or by competing with the company. Section 156 of the Companies Act provides that notwithstanding anything in the Constitution, a director who is directly or indirectly interested in a transaction or proposed transaction with the company must, as soon as he or she is aware of the relevant facts, declare the nature of his or her interest to the board. A failure to provide full disclosure and obtain the approval of shareholders, or perhaps of non-interested directors, renders the director accountable to the company for any profit made and the company may treat the contract as void.

[C] Chairman and CEO

For non-listed companies, there is no legal requirement for the roles of chairman and chief executive officer ('*CEO*') to be held by two separate individuals. However, the Code provides that for listed entities there should be a clear division of responsibility between the leadership of the board and the executives responsible for managing the company's business. As such, the chairman and the CEO should in principle be separate persons and the division of responsibilities between the two should be clear.

If the chairman and the CEO are the same person, related or members of the same executive management team, companies may appoint an independent director to be a lead independent director.

[D] Board Structures

Typically, all powers of management are vested in the company directors, save for those that are reserved for the shareholders under the Constitution or under Singapore law. Every company must have at least one director who is ordinarily resident in Singapore and is at least 18 years old. There are no nationality requirements for directors. Foreign companies seeking a listing on the SGX must have at least two independent directors resident in Singapore.

The Companies Act does not stipulate any particular board structure and companies are free to structure their boards as they wish.

Although only applicable to listed public companies, as a matter of good practice unlisted public companies are encouraged to follow the Code as far as possible. The

Code is not mandatory but instead adopts a 'comply or explain' approach; there are no direct consequences of a failure to comply with the Code (such as the imposition of fines) but listed companies must disclose deviations from the Code in their annual reports.

The latest version of the Code was issued by the MAS on 2 May 2012. The Code states that at least one-third of the board of listed companies should be independent and half of the board should be independent in certain circumstances (as discussed below). The chairman and the CEO should be different people and the board should consist of directors who as a group provide an appropriate balance and diversity of skills, experience, gender and knowledge. The board should also provide core competencies such as accounting or finance, business or management experience, industry knowledge, strategic planning experience and customer-based experience. The board should not be so large as to be unwieldy.

The Code also prescribes the establishment of three board committees with important corporate governance functions, namely: the Nominating Committee (NC), the Remuneration Committee (RC), and the Audit Committee (AC) (as discussed below).

[E] Directors' Elections

Directors are typically appointed by the shareholders in general meeting. The specific manner of appointment is set out in the Constitution. The board usually has the power to fill casual vacancies and appoint additional or alternate directors, in which case they hold office until the next general meeting and are subject to re-election by ordinary resolution of the shareholders.

Under the Code, listed companies should have a NC made up of a majority of independent non-executive directors whose function is to recommend all new director appointments.

[F] Directors' Term of Appointment

A company's Constitution may stipulate that one-third of the directors must retire by rotation at each annual general meeting, to then be re-elected by the shareholders. This is recommended for listed companies under the Code, although is not a legal requirement. The NC should be charged with re-nomination, having regard to the director's contribution and performance.

Under the SGX Listing Rules, all listed companies must have a Constitution which provides that any fixed term of a managing director or equivalent position must not exceed five years. The Code suggests that all directors submit themselves for re-nomination and re-election at regular intervals, and at least once every three years.

[G] Delegation

A company's Constitution typically gives the directors authority to establish committees of directors, and for those committees to decide on certain matters. The directors can also delegate to individual directors, although in both cases each director's statutory duties and liabilities remain, meaning the director's liability cannot be delegated. For listed companies, a company should delegate certain powers to the audit, nominating and RCs.

[H] Removal of Directors

Removal of a director is generally by ordinary resolution of the shareholders; the procedure will be set out in the Constitution. However, a public company can remove a director by ordinary resolution on special notice of at least twenty-eight days, regardless of anything to the contrary in the Constitution or pursuant to any agreement with the director. If the director was appointed to represent the interests of any particular class of shareholders or debenture holders, the resolution will not take effect until his or her successor is appointed.

II RECENT CASES DEALING WITH DIRECTORS' LIABILITY

[A] *Lim Weng Kee v. Public Prosecutor*[1]

The Singapore Court in *Lim Weng Kee* discussed the tests to be applied for civil and criminal breaches of directors' duties under section 157(1) of the Companies Act. It departs from the traditional subjective standard of care in common law enunciated in *In Re City Equitable Fire Insurance*,[2] which is measured against what an 'ordinary' director, sharing the same level of knowledge and experience as the defendant, would or would not have done on the facts of the case.

The court in *Lim Weng Kee* held that the civil standard of care expected of a director is objective, namely, whether he or she has exercised the same degree of care and diligence as a reasonable director found in his position. This standard is not fixed but a continuum depending on various factors such as the individual's role in the company, the type of decision being made and the size and business of the company. This standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience, but will be raised if he or she held him or herself out to possess (or in fact possessed) some special knowledge or experience.

It should be noted that Singapore law does not distinguish between nominee directors and any other director, and a nominee director will owe the same duties to the company.

1. High Court, Singapore [2002] 2 SLR(R) 848.
2. High Court, England [1925] Ch 407.

[B] *Ho Kang Peng v. Scintronix Corp Ltd* (Formerly Known as TTL Holdings Ltd)[3]

Even where a director's actions benefit the company, those actions may still amount to a breach of directors' duties. In the *Scintronix* case, the court noted that although the former CEO's actions brought short-term financial benefit to the company, he could not be acting 'honestly' in the commission of bribes and sham contracts and honesty is a core value of a director's fiduciary duty. Directors should view their obligation to act in the interests of the company broadly, and that short-term profit maximization at the risk of criminal liability for bribes is not in the company's broad interest. The fact that the CEO deceived other members of the board was also relevant, as full and honest disclosure within the management of a company was in the company's interest.

[C] Falmac Limited v. Cheng Ji Lai Charlie[4]

In the *Falmac* case, the Singapore High Court clarified the relationship between statutory duties and fiduciary duties, both at common law and under section 157(1) of the Companies Act.

Falmac Limited alleged that its former CEO breached his fiduciary duties in a number of ways, including by persistently failing to comply with basic company obligations such as signing off financial accounts to be filed. The court found that repeated failures could amount to unfitness to hold appointment as a director under section 155 of the Companies Act. However, a breach of fiduciary duty was fundamentally an accusation of dishonesty, over and above negligence or incompetence, and must be specifically alleged and proven by the plaintiff.

III CORPORATE GOVERNANCE

[A] Independent Directors

The Code provides that independent directors should make up at least one-third of the board. An 'independent' director must be someone who has no relationship with the company, its related corporations, its 10% or more shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment with a view to the best interests of the company. The board should identify in the company's annual report each director it considers to be independent and state its reasons if it determines that a director is independent despite the existence of circumstances suggesting otherwise. The Code sets out a non-exhaustive list of such circumstances.

3. Court of Appeal, Singapore [2014] SGCA 22.
4. High Court, Singapore [2013] SUHC 113.

The independence of any director who has served on the board for more than nine years should be subject to particularly rigorous scrutiny. Independent directors should make up at least half of the board where any of the following apply:

- The chairman and the CEO (or equivalent) is the same person.
- The chairman and the CEO are immediate family members.
- The chairman is part of the management team.
- The chairman is not an independent director.

This requirement is the only part of the Code that takes effect at a later date (for financial years commencing 1 May 2016 onwards).

[B] Executive and Non-executive Directors

Non-executive and independent directors are subject to the same duties and liabilities as executive directors. However, there is a distinction between executive and non-executive directors in terms of the level of skill expected. Where an executive director has specific management responsibilities and a contract of employment with the company, that director would contractually be required to act with reasonable skill, care and diligence and the level is assessed objectively against what can reasonably be expected of other individuals appointed to similar roles.

There is no objective standard of skill expected of non-executive directors, save the director is expected to make reasonable efforts to become familiar with the affairs of the company and understand what is required of them under the Constitution and Singapore law.

A nominee director will be viewed by the courts in the same way as any other non-executive director, and will owe the same fiduciary duties to the company; it is no defence to argue that an individual is only a nominee director, with the company in question being one of many nominee directorships, for example.

[C] Oversight Committees

The Code provides for three oversight committees: the 'NC', the 'RC' and the 'AC'. Independent directors are called to assume chairmanship in each of these committees and should comprise a majority of the members.

The NC is responsible for making recommendations to the board on all board appointments, assessing director independence annually. It also assesses the effectiveness of the board and of each individual director based on objective performance criteria.

IV LIABILITY ISSUES

[A] Who Can Sue?

Directors owe their duties to the company. As such, it is the company, through the board of directors (or, ultimately, the shareholders) that decides whether or not to take action against a particular director. If a director breaches his duties, the company can sue for damages; demand the return of a secret profit or specific property; or declare the act invalid.

Generally a shareholder cannot sue to enforce the company's rights against directors. A shareholder, however, may under section 160(2) of the Companies Act apply to court to restrain directors from entering into a transaction to dispose of the whole or substantially the whole of the company's undertaking or property where the transaction has not been approved by the company in general meeting. If a director has failed or omitted to do any act which he or she was required to do under the Companies Act, any member can apply to the court for an order requiring that director do such act immediately (or within such time as is allowed by the order).

In addition, a third party can bring an action against a director if the director has assumed personal responsibility for the actions of the company, and a director may in some cases be personally liable as a result of breach of statute.

[B] Who Can Be Sued?

Generally, the person who will be sued is the director responsible. The liability for a breach of section 157 of the Companies Act extends to directors who have resigned. In addition, 'shadow directors' will be equally liable under Singapore law (see below, 'De Facto Directors').

However, if the company has breached the law it will be the company, and not its shareholders or directors, that will be sued. This is because in Singapore a company is a separate legal entity to its shareholders and directors. Some legislation (including the Companies Act) makes officers criminally liable in addition to the company in instances where the company is in default of its statutory obligations.

[C] De Facto Directors

The definition of 'director' under section 4 of the Companies Act includes 'any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act'. As such, de facto (or shadow) directors are equally liable under Singapore law, even if they have not been formally appointed.

To become a shadow director, a person must exercise a real influence over the company's affairs and direct the acts of the directors, such that the majority of the board acts on those instructions, as a matter of practice, over a period of time.

[D] Thresholds and Limitations on Directors' Liabilities

If an action is brought against a director for breaching his or her duties to the company, there is no cap on the amount of damages that can be awarded against the director (although punitive damages will not be awarded). The company will only be awarded an amount equal to the loss that it has suffered as a result of the breach of duty, or for the amount of any undisclosed profit made by the director. Directors may also be fined under certain statutes.

[E] Joint/Several Liability

If two or more directors are guilty of the same act of negligence or breach of duty, they are jointly and severally liable to compensate the company. However, in an action to account for improper profits obtained as a result of a breach of duty, the directors are only liable to account for what they have each received, although they are all jointly and severally liable for costs.

[F] Derivative Actions

An aggrieved shareholder can seek redress from the High Court of Singapore if:

- the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the shareholders (including himself), or in disregard of his or their interests as shareholders; or
- some act of the company has been done or is threatened, or some resolution has been passed or is proposed, which unfairly discriminates against or is otherwise prejudicial to one or more of the shareholders (including himself).

A minority shareholder can bring a derivative claim under common law in limited circumstances for breach of duty of the company's directors (even if the director has not benefited personally from the breach) if a shareholder believes the action being taken is in breach of the directors' duty to the company, and a wrong has been done to the company and the wrongdoer has control which is or would be exercised to prevent a proper action being brought.

In addition, there is a statutory derivative action under section 216A of the Companies Act pursuant to which a minority shareholder may apply to court for permission to bring an action in the name of the company. Section 216A goes further than the common law by allowing a minority shareholder to take over the conduct of the company's defence if it can be shown that the directors are not doing a proper job. Section 216A of the Companies Act is not applicable to listed companies.

[G] Class Actions

The only form of group litigation recognized by the Singapore Rules of Court is representative action. This is prescribed by Order 15 Rule 12 of the Rules of Court which provides that where numerous persons have the same interest in proceedings, such proceedings may be brought by one of them (the representative claimant), unless the Court orders otherwise. There are two requirements: first, the representative claimant must demonstrate that the persons he is representing have the 'same interest' in the proceedings (this is distinguished from the US-style class action, where members of a class need not have the same interest in the claim). Second, the Court must be persuaded that it is appropriate for the case to proceed as a representative action given all the circumstances.

[H] Relevance of Bankruptcy of the Corporation

Directors will not generally be liable for the debts of a company unless they have given a personal guarantee. However, the duties of directors shift in an insolvency situation as directors have a duty to take the interests of the company's creditors into account when making decisions. A director can be personally liable if the company incurs a debt while insolvent or if it becomes insolvent by incurring the debt if there was no reasonable expectation of the company being able to repay that debt.

In the case of *Dynasty Line Limited (in liquidation) v. Sukamto Sia & Anor and another appeal,*[5] the Singapore Court of Appeal stressed that directors should not begin to consider the interests of creditors only once the company is technically insolvent. Instead, directors should pay greater attention to the interests of creditors as the company's financial position weakens. Conversely, directors are entitled to give greater consideration to the interests of shareholders when the company is in a strong financial position. Crucially, precedence given to shareholders or creditors is not binary; automatic preference should not be given to one group over another based on whether the company is solvent or insolvent.

V INDEMNIFICATION AND INSURANCE

It is not possible to restrict or limit a director's liability in relation to the company and any provision in the Constitution or elsewhere that attempts to exempt a director from, or indemnify him against, any liability in respect of any negligence, default, breach of duty or breach of trust is void (section 172(1) of the Companies Act). This is subject to limited exceptions, mainly in defending any proceedings in which judgment is given in the director's favour or in which he is acquitted (section 172(2)(b) of the Companies Act).

However, it is common for a company to take out directors' and officers' insurance for personal liability on a director's behalf (permitted under section 172(2)(a)) to cover

5. Court of Appeal, Singapore [2014] SGCA 21.

damages awarded by the court, any settlement with the claimant, and legal costs and expenses. However, the insurance generally does not cover fraudulent, criminal or dishonest acts, or wilful breach of duty.

VI OTHER METHODS OF PROTECTION

Under common law, the shareholders of a company acting together may generally release a director from liability for breach of his or her fiduciary duties. The shareholders may ratify and adopt an act of the directors which would otherwise be a breach of duty. There is a prevailing view that if the directors have exercised their powers irregularly, or acted without proper authority or for improper motives, full and frank disclosure of all material facts to the shareholders may absolve them of what would otherwise be a breach. There is also a view that different principles will apply depending on whether there is a release or a mere forbearance to sue. Release may be effected by a resolution passed by a majority of the shareholders. In the case of a forbearance to sue, however, the shareholders must have agreed unanimously to release the director from liability. The shareholders' power to release or ratify is effective only when the company is solvent.

The court has the power to relieve directors from the consequences of their negligence, default, breach of duty or breach of trust if the director shows that he acted honestly and reasonably, and it is fair to excuse him having regard to all the circumstances of the case (section 391 of the Companies Act). This power applies where the company is suing the director, but not in actions brought by a third party against the director to enforce a civil liability.

The power to release directors' liabilities is subject to limitations. A release must not amount to a fraud on the minority or the creditors or to oppression or disregard of a minority shareholder's interests. The shareholders cannot ratify a transaction that is illegal. The release will be ineffective if it is procured by fraud or concealment of relevant facts.

Section 157C of the Companies Act accords directors protection for reasonable reliance on advice and information from an employee whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned, a professional advisor or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence, or another director or a committee of directors upon which the director did not serve in relation to matters within that director's or committee's designated authority. Protection under section 157C of the Companies Act is available only if the director acts in good faith, makes proper inquiry where the need for inquiry is indicated by the circumstances, and has no knowledge that such reliance is unwarranted.

VII LEGISLATION DEVELOPMENT

On 8 October 2014, Singapore's Parliament amended the Companies Act, effective in two phases (1 July 2015 and 3 January 2016). The key changes are:

- The prohibition on the giving of financial assistance no longer applies to private companies. Public companies are permitted to provide financial assistance, provided that doing so would not materially prejudice the interests of the company and its shareholders and the company's ability to pay its debts, and provided the directors deem the terms of the assistance fair and reasonable.
- Small to medium enterprises (SMEs) now benefit from new, broader criteria for exemption from statutory audit.
- CEOs will be required to comply with certain disclosure requirements already applicable to directors. These include disclosing interests in securities of the company and conflicts of interest in proposed transactions.
- Public companies will enjoy greater freedom to decide the rights that attach to new shares, and the restriction providing that each equity share must have one vote will be lifted, subject to certain safeguarding provisions.
- Private companies will no longer be obliged to keep a register of members; ACRA's electronic register will be authoritative.