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A Worldwide Review
Third Edition

Edited by
Alexander Loos



the global voice of
the legal profession®

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International Bar Association

The Global Voice of the Legal Profession



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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.

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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.

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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. Scintronic 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 *Scintronic* 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. Sukanto 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.