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

Hong Kong

Allan Leung & Danny Leung

I INTRODUCTION

Hong Kong is a common law jurisdiction, with laws generally derived from English law.

The main sources are the Companies Ordinance[1] and case law. Since 1997 (when Hong Kong was handed back to China), English cases no longer bind the Hong Kong courts, but commonwealth cases remain persuasive, and pre-1997 cases are still good law.

From March 2014, a new legal framework for the incorporation and operation of companies has been in effect, following a comprehensive rewrite of the Companies Ordinance. Some of the major changes under the new Companies Ordinance relate to directors' duties.

The Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the Listing Rules) impose additional regulation on companies listed on the Hong Kong Stock Exchange. The Securities and Futures Ordinance (the SFO) is relevant to corporate entities that are involved in the sale or trading of securities.

The Articles of Association (Articles) of a company is a fundamental constitutional document of the company which governs the rights and obligations of that particular company and its internal operations. Under the old Companies Ordinance, companies were also required to file a Memorandum of Association, which set out its objects clause, but this requirement has now been abolished and an existing company's Memorandum is deemed to form part of its Articles.

There are also various best practice guidelines which, although not legally binding, are nonetheless useful in ascertaining the standard of care expected of company officers, and may be referred to by the court in determining liability issues.

1. Cap. 622.

The provisions governing corporate insolvency were not updated along with the Companies Ordinance and remained untouched but renamed as the Companies (Winding Up and Miscellaneous Provisions) Ordinance Cap. 32 (the CWUMPO). The corporate insolvency law is the subject of a separate review exercise that commenced in November 2011. In October 2015, a bill was introduced into the Legislative Council for scrutiny. It is expected to undergo several amendments before entering into force in a few years' time.

[A] One-System Body

Hong Kong follows the English 'one-system body' and thus there is no supervisory committee to oversee the board of directors (hereinafter 'Board'). The Board is a self-monitoring entity, and is only accountable to the company. As we will see later in this chapter, save for a few exceptions, only the company can bring an action against its directors for wrongs inflicted by the directors.

[B] Board Structure and Duality of Chairman and CEO

The Companies Ordinance requires that a private company must have at least one director, who is a natural person.[2] A public company or a company limited by guarantee is required to have at least two directors.[3] Corporate directors are not permitted for public companies, private companies in a group including a listed company, or companies listed by guarantee.

The Listing Rules further require that every listed company must have at least three independent non-executive directors (INEDs), representing at least one-third of the board. At least one of the INEDs must have appropriate professional qualifications or accounting or related financial management expertise.[4]

[1] Board Structure

There are no requirements for the structure of the Board of a private company, unless the Articles otherwise provide. Private companies are often seen as quasi-partnerships and directors are normally beneficial owners of those companies. In this regard, directors may be much more like business partners than a management team.

For listed companies, the Board would normally comprise of INEDs, executive directors, and non-executive directors.

2. Section 457 Companies Ordinance.
3. Section 453 Companies Ordinance.
4. Rules 3.10 and 3.10A the Listing Rules.

[2] Duality of Chairman and Chief Executive

There is no legal requirement for a company to have a chairman, but the Model Articles make provision for the appointment of a chairperson to chair the Board.

For Listed companies, the *Corporate Governance Code of the Listing Rules*[5] provides that the two key aspects of management aspects – the management of the board and the day-to-day management of the business be divided and not concentrated in any one individual. Accordingly, the roles of Chairman and Chief Executive should not be performed by the same individual and the division of responsibilities should be clearly established.

[C] Delegation

The Articles generally provide for the delegation of the Board's powers. In a private company, members of the Board are normally business partners and therefore delegation of the Board's powers to a particular individual may not be desirable.

By contrast, it is common for the Board of a listed company to delegate its powers to an executive director, often the managing director who is either a substantial shareholder or a nominee appointed by the substantial shareholders of the listed company.

[D] Elections

The procedures for appointing a director to the company are normally provided in the company's Articles. However, the Companies Ordinance places a number of restrictions on who may be appointed as a director, including restrictions on age and persons subject to a disqualification order, and bodies corporate.

The Articles generally confer powers to members in a general meeting to appoint directors, increase or decrease the number of directors, determine their rotation, fill a casual vacancy, and appoint additional directors by passing an ordinary resolution. The Board also enjoys specific powers to appoint a director to fill a casual vacancy and to appoint additional directors.

[E] Removal of Directors

The Companies Ordinance provides that a company may by ordinary resolution remove a director before the expiration of his or her period of office, despite anything in its Articles or in any agreement between it and him or her. However, the removal of a director may be subject to any contract of service between the company and the relevant director.

5. Appendix 14 the Listing Rules at A.2.

II LIABILITY ISSUES

[A] Directors' Duties

A director has some of the characteristics of an agent and some of the characteristics of a trustee. The duties of a director can generally be divided into fiduciary duties and general duties. While much of the law in this area is derived from case law and is complex, we set out the general principles below.

The Companies Ordinance[6] now codifies the general duties of a director to exercise reasonable care, skill and diligence, though they remain in fact unchanged from the previous position at common law. The mixed objective and subjective test for the standard of a director's duty to exercise reasonable care, skill and diligence is also now codified. The fiduciary duties of directors, which are generally based on equitable principles, remain uncodified.

There are also several non-statutory guidelines on the roles and duties of directors. For example, the Companies Registry 'A Guide on Directors' Duties'[7] outlines the general principles for a director in the performance of his or her functions and exercise of his or her powers.

[1] Fiduciary Duties

[a] Duty to Act in Good Faith in the Best Interests of the Company as a Whole

A director must act honestly and in good faith, in what he or she considers to be in the best interests of the company (meaning for this purpose the shareholders as a general body), and must exercise his or her powers for the proper purpose and not for any collateral purpose. This may involve balancing the interests of present and future shareholders.

The directors' duties are owed to the company in which they hold office. This may be problematic where the company is a member of a group. Consideration of what is in the best interests of the company may involve consideration of what is in the interests of the overall group, to the extent the group interests can be said to benefit, indirectly, the company. However, the directors should not assume that the interests of the company and the group are always identical.

[b] No Fetters on Discretion

As a general rule, a director must not agree in advance to exercise his or her discretion in a company matter in a particular way, or in any way that would compromise his or her duty to make an independent judgment. In certain circumstances, however, directors may restrict their discretion in the best interests of the company, for example,

6. Section 465 Companies Ordinance.
7. Published March 2014.

in committing themselves to particular actions in the future in order to enable the company to enter into a contract which is in the best interests of the company at the time.

[c] Duty Not to Compete

Although there is no legal prohibition on a person acting as a director of two directly competing companies, the duty of confidentiality and duty to act in the best interests of a company make it very difficult in practice for a director to sit on the Board of two such companies.

[d] Duty to Avoid a Conflict of Interest and Not to Make a Secret Profit

A director should avoid putting him- or herself in a position where his or her own interests conflict with those of the company. However, such conflict commonly arises where a director has an interest in a particular contract being contemplated by the Board to enter into for the company or where he or she has acquired a business opportunity for him- or herself by virtue of his or her office as director. Directors must not make a 'secret profit' by misapplying the company's property, or by exploiting for their own benefit confidential information or a corporate opportunity that came to them by virtue of the position of director. If a director does make a secret profit, then he or she is under a duty to account to the company for it, unless the company has approved his or her actions by ordinary resolution at a general meeting with full knowledge of the facts.

In furtherance of these general principles, the Companies Ordinance requires directors to disclose any interests in transactions, and prohibits transactions with connected entities or certain payments to directors without shareholder approval.

[e] Confidentiality

Directors must not misuse or disclose for unauthorized purposes any information derived from their position as directors.

The Listing Rules contain express provisions on confidentiality, especially in relation to the price-sensitive information obtained by the directors of a listed company and impose an absolute prohibition on directors to deal with any of the securities of a listed company at any time when the directors are in possession of unpublished price-sensitive information in relation to those securities.[8]

8. See '*Model Code for Securities Transactions by Directors of Listed Companies*', Appendix 10 of the Main Board Rules and 'Securities transactions by directors', Rules 5.54 to 5.60 of the GEM Rules.

[2] General Duties

[a] Skill, Care, and Diligence

Traditionally, a director need not exhibit a greater degree of skill than could reasonably be expected from a person of his or her knowledge and experience. However, developments in the law arising from a series of business failures in the early 1990s have led to the development of a more stringent test. The mixed objective and subjective test at common law is now codified in the Companies Ordinance, which requires directors to exercise reasonable care, skill, and diligence.[9] This means the care, skill, and diligence that would be exercised by a reasonably diligent person with: (a) the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and (b) the general knowledge, skill, and experience that the director has.

[b] Duty Not to Exceed Powers

Typically, the Articles will give the directors power to manage the business of the company, and to exercise all the powers of the company which are not required to be exercised by the shareholders. If a director acts outside the authority of the company, or outside his or her own authority, then the actions themselves will generally still be binding on the company as against a third party with whom the company is dealing provided that the third party was without notice of the lack of authority. However, as between the director and the company, the director would nonetheless be liable for any loss which the company suffers as a consequence of his or her actions.

[c] Duty to Creditors

Traditionally, directors owed no independent duties to the creditors of the company. However, modern case law suggests that when a company is close to insolvency, or is in fact insolvent, the interests of the company are identified with the interests of its creditors.[10]

[B] Who Can Sue?

Since a director's duty is generally owed to the company as a whole, it is the company who should sue the directors. However, there are exceptions where directors may owe a duty to individual shareholders and creditors.

9. Section 465 Companies Ordinance.
10. *Tradepower (Holdings) Ltd (In Liq) v. Tradepower (Hong Kong) Ltd & Ors* (2009) 12 HKCFAR 417 applied the principle in *Kinsela v. Russell Kinsela Pty Ltd* (1986) 10 ACLR 395, where Street CJ's judgment wrote that 'where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets'.

[1] Duties Owed to Individual Shareholder

Directors owe duties by virtue of their office to the company and do not generally owe a duty to shareholders.[11] However, this principle has been eroded to some extent so that, particularly in small private and family-owned companies, directors may be found to have assumed duties of a fiduciary nature to individual shareholders.[12]

In relation to large companies or listed companies, directors' duty towards shareholders may arise on a takeover, but such duty is minimal in the sense that they may only owe a duty not to mislead shareholders.[13]

[2] Duties Owed to Creditors

Directors do not generally owe fiduciary duties to the creditors of the company by virtue of their office. However, if a company is insolvent, the liquidator, and in certain circumstances the creditors themselves, may take action against the directors in order to maximize the assets of the company available for distribution. A company's insolvency does not per se give rise to a specific duty owed by the directors to the creditors, but any breach of duty by the directors or failure to consider the interests of the creditors whilst the company was insolvent would be actionable by the liquidator.

In winding-up proceedings, any creditor, shareholder, liquidator, or the Official Receiver may make an application to the court to examine the conduct of directors to compensate the company for any loss resulting from the directors' misfeasance or breach of duty. Although such an action may be brought by a creditor, any recoveries would fall to be distributed to all creditors, not to those who initiated the misfeasance proceedings to the exclusion of others.

[C] Who Can Be Sued?

Directors, shadow directors, or de facto directors are all liable to be sued for wrongs done to the company.

The Companies Ordinance defines 'director' to include any person occupying the position of director (by whatever name called) and a 'shadow director' as a person in accordance with whose directions or instructions the board is accustomed to act (excluding advice given in a professional capacity).[14]

11. See *Veron International Ltd v. RCG Holdings Ltd* [2015] HKEC 1432, following *Percival v. Wright* [1902] 2 Ch. 421.
12. Re Peregrine Investments Holdings Ltd [1998] 2 HKLRD 670.
13. See *Gething v. Kilner* [1972] 1 All ER 1164; *Goldex Mines Ltd v. Revill* [1974] 54 DLR (3d) 672; and *Dawson International v. Coats Patons* Plc [1988] SLT 854.
14. Section 2 Companies Ordinance.

[D] Derivative Actions

Under the rule in *Foss v. Harbottle*,[15] if a wrong has been inflicted on a company, the proper plaintiff is the company itself. Since directors' duties are owed to the company, an individual shareholder him- or herself cannot bring an action against a director. In practice, the right to determine whether or not the proceedings should be brought lies with the directors, or where applicable, the majority shareholders. This would mean that if the directors resolve against taking legal action, there is little likelihood of the minority shareholders receiving redress.

[1] Common Law Derivative Action

The 'majority rule' supports the principle that the will of the members of the company should, in general, prevail. However, the courts have developed exceptions to the rule in *Foss v. Harbottle* to allow minority shareholders to sue on behalf of the company. The most important exceptions are:

- where there has been 'fraud on the minority'; and
- the wrongdoers are in control of the company in general meeting.

There are, however, certain disincentives associated with the commencement of derivative actions by minority shareholders. First, the shareholder bringing the action risks being liable for costs even though he or she has no corresponding right to the potential damages awarded. Second, shareholders (who are not insiders) are unlikely to be able to gain access to the required information for the purpose of commencing a proper action.

[2] Statutory Derivative Action

The Companies Ordinance[16] provides for shareholders of a company or associated company to bring an action on behalf of the company for misconduct committed against the company where the company fails to do so. Misconduct is defined to mean fraud, negligence, breach of duty, or default in compliance with any law.[17]

The shareholder must first obtain leave of the court before bringing a derivative action. The court may grant leave if it is satisfied that the granting of leave is in the interest of the company, that there is a serious question to be tried and the company has not brought proceedings, and the prescribed written notice has been served on the company.[18] These requirements have been repeatedly applied in cases; and it is now established that the threshold for shareholders is relatively low and the court would not

15. [1843] 67 ER 189.
16. At Part 14 Division 4.
17. Section 731 Companies Ordinance.
18. Section 733 Companies Ordinance.

normally look into the merits of the proposed derivative action.[19] There is no requirement under the Hong Kong provisions for the applicant to show that he or she is acting in good faith in seeking to bring the derivative action (unlike some of the overseas provisions).

The courts are now given a very wide discretion to make orders which they think appropriate, including awarding costs to members bringing the action and to order the appointment of an independent person to investigate and report to the court on various matters relating to the company. In addition, the court can also order costs of the appointment of such independent person to be borne by, among others, the company.

[E] Unfair Prejudice

The Companies Ordinance provides another statutory remedy for minority shareholders, particularly in relation to private companies.[20] It is an alternative to the 'just and equitable' winding-up remedy under the CWUMPO[21] and entitles a member to make an application to the court for appropriate orders where the member has been unfairly prejudiced or an actual or proposed act or omission would be unfairly prejudicial.

The types of 'corporate wrongs' that can give rise to unfair prejudice include:

- payment of excessive remuneration to directors;
- diversions of business of the company;
- use of corporate assets to subsidize businesses of related persons; and
- use of moneys belonging to the company.

In Hong Kong, many listed companies are under the control of the founding family or families, which means that the issues in those companies often revolve around the tension between substantial shareholders and minority shareholders, as is the case with private companies.

The court has discretion to choose from a wide range of remedies, including:

- an order restraining the commission or the continuation of some act;
- an order providing for the majority shareholders or for the company itself to buy the shares of other members;
- an order regulating the affairs of the company in the future.

[F] Representative Actions

Unlike in the United States, class action is non-existent in Hong Kong. Instead, a 'representative action' could be brought. This does not give rise to a new cause of

19. See *Re Li Chung Shing Tong (Holdings) Ltd* [2011] 5 HKLRD 274 applying *Re F & S Express Ltd* [2005] 4 HKLRD 743.
20. Part 14 Division 2 Companies Ordinance.
21. Section 177 the CWUMPO.

action or remedy to the aggrieved shareholders against the directors of the company, but provides a procedural convenience for some shareholders to be selected to represent the rest, so that the rights as between all parties may be decided in a suit so constituted. It is not commonly used.

The Law Reform Commission of Hong Kong began work on reforming the class action regime in 2006 and published a *Report on Class Actions* in 2012. We are currently awaiting proposals to introduce a comprehensive class action regime in Hong Kong.

[G] Insolvency Context

Where a company is in financial difficulty, directors may be held personally liable in a number of different ways, both under the statutory provisions and under general law. Statutory claims against directors are for the most part available to the liquidator and in more limited circumstances to a company's creditors.

[1] Misfeasance

If in the course of winding up, the court considers that any past or present officer has misapplied, retained, or become accountable for any money or property of the company or has been guilty of any misfeasance or breach of duty which is actionable by the company, the court may order that person to repay or restore the money or property or otherwise contribute towards the assets of the company by way of compensation.[22]

[2] Fraudulent Trading

Where the court considers that the business of a company, if being wound up, has been carried on with intent to defraud creditors, or for any fraudulent purpose, the court may declare that anyone who knowingly carries on the company's business with such fraudulent intent is personally liable for all or any of the debts and other liabilities of the company as the court may direct.[23]

The corresponding criminal offence provides for up to five years of imprisonment on indictment and/or a fine (unlimited on indictment) for any person who knowingly carries on the business with fraudulent intent.[24] No winding up is necessary for criminal liability to arise.

[3] Disqualification Order

Directors acting in breach of duty may also be disqualified by the court under Part IVA of the CWUMPO. The primary purpose of disqualification is to remove delinquent

22. Section 276 the CWUMPO.
23. Section 275 the CWUMPO.
24. Section 275(3) and Sch. 12 the CWUMPO.

directors from office and general circulation, thereby protecting the public at large from future misconduct by these directors. Contravention of a disqualification order is a criminal offence.

[H] Costs and Fees in Liability Litigations

The general rule is that costs follow the event. In this regard, if a party loses its case in litigation, it would end up paying two sets of legal fees, that is, his or her own and part of the opponents' legal costs. Similarly, a liquidator is potentially exposed to personal liability for costs should the company's action against its directors for misfeasance fail.

III INDEMNIFICATION

The Companies Ordinance now expressly permits the company to indemnify directors for liability to third parties.[25]

However, the Companies Ordinance renders void any provision purporting to exempt a director from any liability to the company itself.[26] The Companies Ordinance also prohibits the company from indemnifying directors for fines and penalties, as well as criminal proceedings, unless the director is acquitted or judgment is given in his favour.[27] The Companies Ordinance does permit companies to take out insurance to cover this (see below).

IV PROTECTION AGAINST WRONGS OF DIRECTORS

The courts have moved towards a stringent approach when considering duties owed by directors and are mindful to ensure that directors do not put themselves in a position where their duties and interests conflict. Where there has been a breach, however, there are nonetheless mechanisms to rectify the default and to minimize loss.

[A] Ratification

As a general principle, mere breaches of fiduciary duties such as self-dealing or dealing to the exclusion of the company (as opposed to misapplications of company property), can be ratified by an ordinary resolution of the general meeting after the director has made full and frank disclosure.[28] The Companies Ordinance also allows a company to ratify a director's conduct involving negligence, default, breach of duty or breach of

25. Section 469 Companies Ordinance.
26. Section 468 Companies Ordinance.
27. Section 469 Companies Ordinance.
28. *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All ER 378.

trust in relation to the company by unanimous resolution of the disinterested members of the company.[29]

[B] Directors' and Officers' Liability Insurance

The Companies Ordinance permits a company to take out insurance for a director against any liability to any person in connection certain types of breach and liability. In line with initiatives to strengthen directors' accountability and increased regulatory scrutiny, the demand of directors' and officers' (D&O) liability insurance has increased, as has the level of coverage.

V CORPORATE GOVERNANCE

[A] Existing Corporate Governance

The rewrite of the companies' framework took over six years to complete. One of the four major objectives for the rewrite of the new Companies Ordinance was to enhance corporate governance.

Under the new Companies Ordinance, a 'Responsible Person', (which includes directors) will be liable for a contravention of the Companies Ordinance, without any requirement for knowledge or wilfulness – in contrast to the old regime. This is seen to be potentially increasing the risk for directors and individuals.

The Listing Rules have also been updated and now require the Board of a listed company to have a minimum of three INEDs representing at least one third of the board, an audit committee and a remuneration committees. The Listing Rules also stipulate that the majority of the audit committee members should be INEDs.[30]

[B] Corporate Governance Reform: Difficulties in Hong Kong

[1] Family-Controlled Companies

Family control is a significant feature of Hong Kong listed companies. Typically, a single extended family owns a significant proportion of the listed company's shares, with the controlling family members or their nominees occupying senior management positions. It is not uncommon for the CEO and chairman to be the same person representing the interests of the controlling family. Given the timeline of development in Hong Kong's history, shareholder disputes are now commonly arising amongst third generations who have inherited interests from companies built up by the business founders.

29. Section 473 Companies Ordinance.
30. Rules 3.10 and 3.21 the Listing Rules.

[2] Quality of INEDs

The corporate governance system introduced in Hong Kong relies heavily on INEDs. These INEDs are said to bring to the company specific expertise, objectivity, and the ability to monitor and assess the Board's performance at the highest level without fear or favour.

Given the relatively small business community and the fact that many companies are family controlled, in reality it is very difficult for Hong Kong to have truly independent INEDs. In practice, INEDs, who are well qualified in terms of business expertise and experience, are usually connected to the company's chairman or managing director.

[C] Going Forward

The development of corporate governance issues in Hong Kong faces challenges different to other jurisdictions owing to the unique Hong Kong business environment.

The codification of the standard of care expected of a director in a company now places greater scrutiny of the duty to understand company's affairs and to be proactive in its management, and the extent of time commitment and attention required to act as a director. Given the trend in Hong Kong for prominent members of the community to sit on the boards of multiple companies, we may see more failures to meet the minimum standard of care by way of negligent omission.

The lack of independence of the Board in some large companies will also continue to expose the minority to unfair prejudice and the effectiveness of legislative initiatives to provide redress remains to be tested.