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Edited by  
Alexander Loos



the global voice of  
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# International Bar Association

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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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## Contributors

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## Summary of Contents

Editor	vii
Contributors	ix
Preface	lxix
List of Abbreviations	lxxi
Argentina <i>Javier M. Petrantonio &amp; Laura Lavia Haidempergher</i>	1
Australia <i>Rory Moriarty</i>	15
Austria <i>Christian Dorda</i>	27
Belarus <i>Dmitry Viltovsky</i>	39
Belgium <i>Philippe Malherbe</i>	51
Bermuda <i>David William Peter Cooke</i>	63
Bolivia <i>Ignacio M. Aguirre U.</i>	73
Brazil <i>Walter Douglas Stuber</i>	85

## Summary of Contents

---

Canada <i>Markus Koehnen &amp; Stephen Brown-Okruhlik</i>	97
Cayman Islands <i>Antony G.D. Duckworth, Alan G. de Saram &amp; Wendy Stenning</i>	109
Chile <i>Pablo Guerrero V.</i>	117
Czech Republic <i>Dagmar Dubecká</i>	127
Denmark <i>Niels Bang</i>	137
Ecuador <i>Javier Robalino-Orellana, Daniel Robalino Orellana, Martín Pallares Sevilla &amp; Estefanía Alarcón</i>	147
Estonia <i>Sven Papp &amp; Kaspar Kolk</i>	157
The European Action Plans of 2003 and 2012 <i>Thorsten M. Volz</i>	169
Finland <i>Riikka Rannikko &amp; Jesse Collin</i>	179
France <i>Jacques Buhart &amp; Nicolas Lafont</i>	189
Germany <i>Alexander Loos</i>	203
Hong Kong <i>Allan Leung &amp; Danny Leung</i>	213
India <i>Som Mandal</i>	227
Indonesia <i>Lia Alizia &amp; Valdano Ruru</i>	239
Ireland <i>Stephen Hegarty &amp; Maeve Moran</i>	251
Israel <i>Ehud Sol &amp; Haim Machluf</i>	263



---

Summary of Contents

Italy <i>Gabriele Fagnano</i>	275
Japan <i>Norio Mitsuuchi</i>	287
Latvia <i>Jānis Gavars, Reinis Sokolovs &amp; Raimonds Slaidiņš</i>	297
Luxembourg <i>Alexander Koch</i>	309
Mexico <i>Daniel Del Rio &amp; Juan José López-de-Silanes</i>	323
Mongolia <i>Chris Melville, Anthony Woolley &amp; Ariungoo Khurelbaatar</i>	335
The Netherlands <i>Willem Calkoen &amp; Martin Grablowitz</i>	345
New Zealand <i>Pip England</i>	355
Nigeria <i>Ayodeji Oyetunde &amp; Lotanna Nwodo</i>	369
The People's Republic of China <i>Liang Xu &amp; Sarah Zhang</i>	379
Poland <i>Tomasz Żak</i>	391
Portugal <i>Miguel de Avillez Pereira &amp; Hugo Teixeira</i>	401
The Russian Federation <i>Doran Doeh &amp; Svetlana Barinova</i>	411
Singapore <i>Stephanie Keen &amp; Matthew Bousfield</i>	421
South Africa <i>Nastascha Harduth, Eric Levenstein, David Gewer &amp; Derek Alexander</i>	433
South Korea <i>Kyung-Taek Jung &amp; Hye-Sung Kim</i>	445
Spain <i>Enric Picanyol &amp; Coro Fernández-Rañada</i>	457

## Summary of Contents

---

Sweden <i>Björn Kristiansson &amp; Per Samuelsson</i>	469
Switzerland <i>Matthew T. Reiter &amp; Lorenz Naef</i>	479
Turkey <i>Serdar Paksoy &amp; assisted by Deniz Özkan</i>	493
Ukraine <i>Timur Bondaryev, Pavlo Khodakovsky &amp; Alesya Pavlynska</i>	505
United Arab Emirates <i>Imtiaz Shah</i>	517
United Kingdom <i>Karla Dudek</i>	529
United States of America <i>Robert Ripin</i>	541
Vietnam <i>Jeff Olson &amp; Minh Nguyen</i>	553
Index	565

# Table of Contents

Editor	vii
Contributors	ix
Preface	lxix
List of Abbreviations	lxxi
Argentina	
<i>Javier M. Petrantonio &amp; Laura Lavia Haidempergher</i>	1
I 'National Basics' and National Legal Theories of Directors' Liabilities	1
[A] Corporations Legal System in Argentina	1
[B] Board's Authority and Structure	2
[1] Rules - Meetings	2
[2] Duties of the Board	2
[3] Composition of the Board	3
[4] Directors' Compensation	3
[C] Directors' Appointment and Conditions	4
[1] Election of Directors	4
[2] Individuals Precluded to Be Appointed as Directors	5
[D] Delegation	5
[E] Removal of Directors	6
II Recent Cases Dealing with Directors' Liabilities	6
[A] Nature of Directorss' Liabilit	6
[B] Directorsshe been Aware of Said Misconducts	6
[C] Cases Related to the Administration of the Company	7
[D] Delegation and Activities in Competition with the Company	7
III Judicial Review (Tightening of Standards?)	7

## Table of Contents

---

	[A] Tightening of Standards?) Interests If They Engaged in a Business	7
	[B] Standard of Diligence	8
	[C] Damages to the Company and Liability: General Conditions	10
	[D] Judicial Procedure	10
IV	Corporate Governance	10
V	Liability Issues	11
	[A] The Responsibility Actions Ruled by the Companies Act	11
	[1] Corporate Liability Action Filed by the Company ('Acción de Responsabilidad Social')	11
	[2] Corporate Liability Action Filed by Any Shareholder	12
	[3] Individual Responsibility Action	12
	[B] Limits (Caps)	13
	[C] Directors' Joint Liability	13
VI	Indemnification	13
VII	Lawyer Directorship	13
Australia		
	<i>Rory Moriarty</i>	15
I	Introduction	15
II	'National Basics' and National Legal Theories of Directors' Liabilities	15
	[A] Two-Tiered or Unitary Company Structure	15
	[B] Chairman and CEO (One or Two People/Checks and Balances)	15
	[C] Board Structures	16
	[D] Elections/Staggering	16
	[E] Delegation	16
	[F] Removal of Directors	17
III	Recent Cases Dealing with Directors' Liability	17
IV	Judicial Review (Tightening of Standards?)	18
V	'Socio-Anthropological Issues'	18
	[A] Is Board Composition Changing in Australia in Light of Recent Developments?	18
	[B] Are the Decision-Making Mechanisms Changing in Australia in Light of Recent Developments?	18
	[C] Board/Management Relationship	19
VI	Corporate Governance	19
	[A] Board Procedures	19
	[B] Structures of Oversight (Mechanisms, Etc.)	20
VII	Liability Issues	20
	[A] Who Can Sue?	20
	[1] The Company and Individual Shareholders	20
	[2] Australian Securities and Investments Commission	21
	[3] Creditors	21
	[B] Who Can Be Sued?	21

## Table of Contents

	[C] On What Basis Can a Director Be Sued?	22
	[D] Thresholds and Limitations/Caps of Liabilities in Australia (Statutory Limitations on Directors' Liability)	22
	[1] Duty of Care and Diligence	22
	[2] Duty to Prevent Insolvent Trading	23
	[E] Joint Liability/Solidarity	23
	[F] Derivative Actions	23
	[G] Class Actions	24
	[H] Bankruptcy and a Directors' Liability Suit	24
	[I] Costs and Fees in Liability Litigation	25
VIII	Indemnification	25
IX	Directors' and Officers' Insurance	25
X	Other Methods of Protection	26
XI	Lawyer Directorship	26
	Austria	
	<i>Christian Dorda</i>	27
I	'National Basics' and National Legal Theories of Directors' Liabilities	27
	[A] Composition and Structure of Boards	27
	[B] Appointment, Election, Delegation and Removal of Directors	28
	[C] General Principles of Directors' Liability	28
	[1] Liability of Directors towards the Company	29
	[2] Liability of Directors towards Third Parties	29
II	Recent Cases Dealing with Directors' Liability	30
III	Judicial Review: Tightening of Standards?	31
IV	Typical Schemes to Avoid Director's Liability	32
	[A] Changing Composition of Boards	32
	[B] Changing Decision-Making Mechanism	32
	[C] Relationship Board/Management	32
V	Corporate Governance	33
VI	Liability Issues	34
	[A] Who Can Sue?	34
	[1] The Company	34
	[2] Shareholders	34
	[3] Third Parties	34
	[B] Who Can Be Sued?	35
	[1] Directors	35
	[2] The Company	35
	[C] Thresholds and Limitations	35
	[D] Joint Liability/Solidarity	35
	[E] Derivative Actions	35
	[F] Class Actions	36
	[G] Relevance of Bankruptcy	36
	[H] Costs and Fees in Liability Litigations	36

## Table of Contents

---

VII	Indemnification	36
VIII	Directors' and Officers' Insurance	36
IX	Other Methods of Protection	37
X	Lawyer Directorship	37
Belarus		
	<i>Dmitry Viltovsky</i>	39
I	National Legal Framework and Theoretic Aspects of Directors' Liability	40
	[A] One-Level or Two-Level Company Structure	40
	[B] Chairman of the Board of Directors/Director	40
	[C] Collective Executive Body	41
	[D] Appointment/Election of Directors	41
	[E] Requirements for Appointment of the Director	42
	[F] Delegation of the Director's Powers	42
	[G] Termination of the Director's Activity	42
II	Case Law on the Directors' Liability	42
III	Estimation of the Legal Regulation of the Directors' Liability	43
	[A] Liability before the Shareholders (Owners) of the Company	43
	[B] Disciplinary Responsibility	43
	[C] Liability for Damages	44
	[D] Administrative Responsibility	44
	[E] Criminal Responsibility	45
IV	Standard Behavior Models to Avoid the Directors' Liability	45
V	Corporate Governance	45
VI	Liability Issues	46
	[A] Who Can Be a Plaintiff?	46
	[1] Company	46
	[2] Shareholders	46
	[3] Crisis Manager	47
	[4] Creditors and Third Parties	47
	[5] Government	47
	[B] Who Can Be a Defendant?	47
	[C] Factual Director	48
	[D] Limitation and Excess of Liability	48
	[E] Joint and Several Liability	48
	[F] Derivative Suits	48
	[G] Collective/Class Action Suits	48
	[H] Suits Against the Director within the Bankruptcy	49
VII	Compensation of Damages by the Company That Are Inflicted by the Director to a Third Person	49
VIII	Director's Insurance	49
IX	A Lawyer as the Director	49
X	Predictions on Future Legislation Development	49

Belgium		
	<i>Philippe Malherbe</i>	51
I	National Basics and National Legal Theories of Directors' Liability	51
	[A] Two-Tiered or Unitary Company Structure	51
	[B] Chairperson/CEO	52
	[C] Board Structures	52
	[D] Directors' Elections	53
	[E] Directors' Term of Appointment	53
	[F] Delegation	53
	[G] Removal of Directors	54
	[H] Representation of the Company	54
II	Liability Issues	54
	[A] Who Can Be Sued?	54
	[1] Permanent Representatives	55
	[2] Managing Director or Delegate to Daily Management	55
	[3] De Facto Director	55
	[B] Who Can Sue?	55
	[C] Liability Grounds	56
	[1] Criminal Liability	56
	[2] Civil Liability	56
	[a] Contractual Liability	56
	[b] Tort Liability	57
	[c] Bankruptcy Related Liability	57
III	Corporate Governance	58
IV	Recent Cases	58
	[A] Grounds of Liability	59
	[B] Directors' Liability for Tax Debts	59
	[C] Sellers' Liability as Former Directors of the Target	60
	[D] Information Duties	60
	[E] False or Inexact Balance Sheet	60
V	Judicial Review	60
VI	Directors' Liability Insurance	61
VII	Indemnification	61
VIII	Other Methods of Protection	61
	[A] Reporting Faults	61
	[B] Exonerated Clauses	62
IX	Lawyer Directorship	62
Bermuda		
	<i>David William Peter Cooke</i>	63
I	'National Basics' and National Legal Theories of Directors' Liabilities	63
	[A] Role of Chairman and CEO	63
	[B] Board Structures	64

## Table of Contents

---

	[C] Directors' Election	64
	[D] Delegation	65
	[E] Removal of Directors	65
II	Recent Cases Dealing with Directors' Liability	65
III	Judicial Review	65
IV	Typical Approach to Avoid Directors' Liability	66
	[A] Composition of the Board	66
	[1] Are the Decision-Making Mechanisms Changing?	66
	[2] Board/Management Relationship	66
V	Corporate Governance	66
VI	Liability Issues	67
	[A] Who Can Sue?	67
	[B] Who Could Be Sued?	68
	[C] 'De Facto' Directors	68
	[D] Thresholds and Caps on Liability	68
	[E] Joint Liability/Solidarity	69
	[F] Derivative Actions	69
	[1] Class Actions	69
	[2] Relevance of Bankruptcy of Company with Regard to Bringing a Directors' Liability Suit	69
	[3] Costs and Fees in Liability Litigation	70
VII	Indemnification	70
VIII	Directors' and Officers' Insurance	70
IX	Other Methods of Protection	70
X	Lawyer Directorships	70
XI	Forecast on Future Legislation Development	71
Bolivia		
	<i>Ignacio M. Aguirre U.</i>	73
I	National Basics and National Legal Theories of Directors' Liabilities	73
	[A] Introductory Aspects: Corporate Governance Issues	73
	[B] Board of Directors	75
II	Board Members' Liabilities	80
	[A] General Issues	80
	[B] Indemnifications of Directors and Liability Insurance	82
	[C] Recent Cases Dealing with Directors' Liability	83
	[D] Typical Schemes/Behaviour to Avoid Directors' Liability	83
	[E] Forecast on Future Legislation Development	83
Brazil		
	<i>Walter Douglas Stuber</i>	85
I	"National Basics" and National Legal Theories of Directors' Liabilities	85
	[A] Overview	85



Table of Contents

	[B] Limitada	85
	[C] <i>Sociedade Por Ações</i> (“SA”)	87
II	Recent Cases Dealing with Directors’ Liability	89
III	Judicial Review (Tightening of Standards)	89
IV	Typical Schemes/Behavior to Avoid Directors’ Liability	89
V	Corporate Governance	90
VI	Liability Issues	92
	[A] Who Can Sue?	92
	[B] Who Can Be Sued?	92
	[C] “De Facto” Director	93
	[D] Thresholds and Limitations/Caps of Liabilities	93
	[E] Joint Liability/Solidarity	93
	[F] Derivative Actions	94
	[G] Class Actions	94
	[H] Relevance of Bankruptcy of Corporation	94
VII	Indemnification	95
VIII	Directors’ and Officers’ Insurance	95
IX	Other Methods of Protection	95
X	Lawyer Directorship	96
XI	Forecast on Future Legislation Development	96
Canada		
	<i>Markus Koehnen &amp; Stephen Brown-Okruhlik</i>	97
I	‘National Basics’ and National Legal Theories of Directors’ Liabilities	97
	[A] Two-Tier or Unitary Company Structure	97
	[B] Chairman/CEO	97
	[C] Board Structures	98
	[D] Elections/Staggering	98
	[E] Delegation	98
	[F] Removal of Directors	99
II	Recent Cases Dealing with Directors’ Liability	99
III	Judicial Review (Tightening of Standards?)	101
	[A] Judicial Deference to Directors’ Business Decisions	101
	[B] Are Decision-Making Mechanisms Changing in Light of Recent Developments?	102
	[C] Relationship between Board and Management	103
IV	Corporate Governance	103
	[A] Board Procedures	103
	[B] Structures of Oversight	104
V	Liability Issues	104
	[A] Who Can Sue?	104
	[B] Who Can Be Sued?	105
	[C] De Facto Directors	105
	[D] Thresholds and Limitations/Caps of Liabilities	105

## Table of Contents

---

[E]	Joint Liability	106
[F]	Derivative Actions	106
[G]	Class Actions	106
[H]	Relevance of Bankruptcy	107
[I]	Costs and Fees in Liability Litigation	107
VI	Indemnification	107
VII	Directors' and Officers' Insurance	107
VIII	Other Methods of Protection	108
IX	Lawyer Directorship	108
Cayman Islands		
	<i>Antony G.D. Duckworth, Alan G. de Saram &amp; Wendy Stenning</i>	109
I	Introduction	109
II	Board Structure	110
	[A] Appointment of Directors	110
	[B] Delegation	110
	[C] Removal of Directors	110
III	Duties of Directors	111
	[A] General Duties of Directors	111
	[B] Duty of Honesty and Good Faith	111
	[C] Duties of Care and Skill	113
IV	Liability Issues	113
	[A] General Points	113
	[B] What Can Be Recovered?	113
	[C] Costs	114
V	Indemnification of Directors	114
VI	Directors' Reliance on Outside Professionals and Professionally Qualified Directors	114
VII	Winding Up	115
Chile		
	<i>Pablo Guerrero V.</i>	117
I	National Basics' and National Legal Theories of Directors' Liabilities	117
	[A] The Board of Directors	118
	[B] Composition of the Board	118
	[C] Powers of the Board and How They Are Used	118
	[D] Independent Directors and Directors' Committee	120
	[E] Executive Officers	121
II	Duties of Directors	121
	[A] Duty of Care	121
	[B] Duty of Loyalty	122
	[C] Duty of Disclosure	123
III	Directors' Liability	124

Table of Contents

IV	Directors' Insurance	125
V	Actions to Pursue Redress of the Company	125
VI	Conclusion	125
Czech Republic		
	<i>Dagmar Dubecká</i>	127
I	'National Basics' (New Civil Code and New Corporation Acts Effective since 1 January 2014)	127
	[A] Basic Powers of the Statutory Bodies	128
	[1] Board of Directors/Statutory Director	128
	[2] Supervisory Board/Administrative Council	129
	[B] Basic Duties of the Members of the Company's Statutory Bodies	130
	[C] Liability for a Breach of Duties	131
	[1] Civil Liability	131
	[2] Liability in Insolvency	132
	[3] Basic Criminal Law Aspects	133
	[D] Composition of Company Statutory Bodies, Membership and Requirements for the Performance of Office	133
	[1] Composition of Company Statutory Bodies	133
	[2] Election and Removal, Membership Requirements	133
	[3] Parallel Performance of Functions and Ban on Competition	134
	[E] Protection for Members of Company Statutory Bodies	135
Denmark		
	<i>Niels Bang</i>	137
I	The Danish Management System	137
	[A] General	137
	[B] Election of Directors and Managers	137
	[C] The Division of Power	138
II	Directors' Liability	138
	[A] Legal Prerequisites to Liability	138
	[B] Tasks and Duties	139
	[C] Directors in Listed Companies	140
III	Recent Cases Dealing with Directors' Liability	140
	[A] Introduction	140
	[B] Liability for Violation of the Companies Act	141
	[C] Liability for Predecessors' or Successors' Acts	141
	[D] Liability for Violating the Financial Statements Act	142
	[E] Duties in Pursuance of Special Legislation	143
	[F] Operation of a Company in Difficulties	143
IV	Developments in the Liability of Directors	144
V	Limitation of Liability	144
	[A] Introduction	144

## Table of Contents

---

	[B] Agreed Exemption From Liability	144
	[C] Discharge from Liability: Adoption of Accounts	145
	[D] Reduction of Liability	145
VI	Insurance	145
	[A] Common Directors' and Officers' Liability Insurance	145
	[B] Lawyers' Liability Insurance	145
	[C] Effect of Insurance Coverage	146
Ecuador		
	<i>Javier Robalino-Orellana, Daniel Robalino Orellana, Martín Pallares Sevilla &amp; Estefanía Alarcón</i>	147
I	National Basics and National Legal Theories of Director's Liabilities	147
	[A] Two-Tiered or Unitary Company Structure	147
	[B] Chairman/CEO	147
	[C] Board Structures	148
	[D] General Shareholders' Meetings	148
	[E] Director's Elections	149
	[F] Director's Term of Appointment	149
	[G] Removal of Directors	149
II	Typical Behavior to Avoid Director's Liability	149
III	Corporate Governance	150
	[A] Andean Community's Corporate Governance Code	150
	[B] Corporate Governance in the Banking Regulatory System	150
	[C] Ecuadorian Institution of Corporate Governance	151
IV	Liability Issues	152
	[A] "De Facto" Director	152
	[B] Limitations of Liabilities	152
	[C] Responsibility Action	153
	[D] Relevance of Bankruptcy of Corporation	154
V	Indemnification	154
VI	Director's and Officer's Insurance	155
VII	Other Methods of Protection	155
VIII	Lawyer Directorship	155
IX	Forecast on Future Legislation Development	155
Estonia		
	<i>Sven Papp &amp; Kaspar Kolk</i>	157
I	Basic Principles for Directors' Liability	157
	[A] Corporate Governance Structure	158
	[B] Management Structure, Chairman and Delegation	159
	[C] Election and Removal of Directors	159
II	Directors' Duties and Typical Liability Cases	160
	[A] Liability vis-à-vis the Company	161

Table of Contents

	[1] Inaccurate Valuation of the Non-monetary Contribution	161
	[2] Causing the Payment of Unlawful Distribution to Shareholder	161
	[3] Payments after Insolvency Has Become Evident	162
	[4] Non-compete	162
	[5] Disclosure of Business Secrets	162
	[B] Liability under Tort Law	162
	[1] Late Filing of a Bankruptcy Petition	162
	[2] Failure to Organize Accounting	163
	[3] Failure to Provide Information to Creditors	163
	[C] Criminal Liability and Liability Arising from Specific Laws	163
III	Liability Issues	164
	[A] Enforcement of Directors' Liability	164
	[1] Who Can Sue?	164
	[a] Company	164
	[b] Bankruptcy Trustee	164
	[c] Creditors (Derivative Action)	165
	[d] Third Persons	165
	[2] Costs of Litigation and Class Actions	165
	[B] Limitations and Joint Liability of Directors	165
	[C] Indemnification and Other Methods of Protection	166
IV	Directors' and Officers' Insurance	166
V	Lawyer Directorships	167
VI	Forecast on Future Legislation Development	167
	The European Action Plans of 2003 and 2012	
	<i>Thorsten M. Volz</i>	169
I	Introduction	169
II	The Scope of the European Action Plan	170
III	The Proposed Time Schedule of the European Action Plan	171
IV	The Second European Action Plan of 2012	172
V	Provisions on Directors' Liability within the European Action Plan	172
VI	The Implementation within the European Community	174
VII	The Implementation within Member States' Legislation	174
	[A] Austria	174
	[B] Belgium	175
	[C] Czech Republic	175
	[D] Denmark	175
	[E] Finland	175
	[F] France	175
	[G] Germany	176
	[H] Ireland	176
	[I] Italy	176
	[J] Luxembourg	177
	[K] Netherlands	177

## Table of Contents

---

[L]	Poland	177
[M]	Portugal	177
[N]	Spain	177
[O]	Sweden	178
[P]	Switzerland	178
[Q]	Ukraine	178
[R]	United Kingdom	178
Finland		
	<i>Riikka Rannikko &amp; Jesse Collin</i>	179
I	‘National Basics’ and National Legal Theories of Directors’ Liabilities	179
	[A] Company Organs	180
	[B] Board of Directors	181
	[1] Number of Board Members, Their Election, and Term of Duty	181
	[2] Duties of Board Members under the Companies Act	182
	[3] Finnish Corporate Governance Code and Finnish Panel on Takeovers and Mergers	183
II	Liability of Board Members	183
	[A] Liability under the Companies Act	183
	[B] Damage, Negligence, and Causality	185
	[C] Scope of Liability	185
	[D] Amount of Compensation and Legal Costs	185
III	Division of Liability	186
	[A] Delegation	186
	[B] Adjustment and Allocation of Damages	186
IV	Limitation of Liability	187
France		
	<i>Jacques Buhart &amp; Nicolas Lafont</i>	189
I	“National Basics” and National Legal Theories of Directors’ Liabilities	189
	[A] Two-Tiered or Unitary Company Structure	189
	[B] Chairman and CEO (One or Two People/Checks and Balances)	189
	[1] Unitary Structure	189
	[2] Two-Tiered Structure	190
	[C] Board Structures	190
	[1] Unitary Structure	190
	[2] Two-Tiered Structure	190
	[D] Director’s Elections/Staggering	190
	[1] Unitary Structure	190
	[2] Two-Tiered Structure	191
	[E] Directors’ Term of Appointment	191
	[1] Unitary Structure	191
	[2] Two-Tiered Structure	191

Table of Contents

	[F] Delegation	191
	[G] Removal of Directors	191
	[1] Unitary Structure	191
	[2] Two-Tiered Structure	192
II	Judicial Review (Tightening of Standards?)	192
III	Corporate Governance	192
	[A] Composition of the Board of Directors/Recent Developments	192
	[1] Independent Directors	192
	[2] Parity	193
	[3] Employee Board Member	193
	[4] Vice-Chairman/Senior Director	193
	[B] Are the Decision-Making Mechanisms Changing in France in Light of Recent Developments?	193
	[C] Board/Management Relationship	194
	[1] Unitary Structure	194
	[2] Two-Tiered Structure	194
IV	Corporate Governance	194
	[A] Board Procedure	194
	[B] Structures of Oversight	195
V	Liability Issues	195
	[A] Who Can Sue?	195
	[1] Shareholders	195
	[2] The Company Itself	196
	[3] Third Parties	196
	[B] Who Can Be Sued?	196
	[1] Individual Liability	196
	[a] Civil Liability	196
	[b] Criminal Liability	196
	[2] Collective Liability	197
	[a] Collective Liability of the Board of Directors	197
	[b] Liability of Members of the Supervisory Board	197
	[C] “De Facto” Manager	197
	[D] Thresholds and Limitations/Caps of Liabilities/Caps of Liabilities in France (Statutory Limitations on Directors’ Liability)	198
	[E] Class Actions	198
	[F] Relevance of Bankruptcy of Corporation with Regard to Bringing a Directors’ Liability Suit	198
	[1] Directors’ Liability	198
	[a] Insufficiency of Assets	198
	[b] Personal Bankruptcy	199
	[c] Banqueroute	200
	[2] Liability of Supervisory Board Members	200
	[3] Costs and Fees in Litigations	200
VI	Indemnification	200

## Table of Contents

---

VII	Directors' and Officers' Insurance	200
VIII	Lawyer Directorship	201
	[A] French Lawyers May Not Directly Run a Company	201
	[B] French Lawyers May Be Appointed as Director	201
IX	The "European Action Plan"	201
Germany		
	<i>Alexander Loos</i>	203
I	Basic Principals for Directors' Liability	203
	[A] Single-Body Companies or Two-Tier System	203
	[B] Management Structure and Chairman	204
	[C] Delegation of Management Powers	204
	[D] Removal of Directors	204
II	Typical Liability Cases	205
	[A] Internal Liability towards the Company	205
	[1] Violation of Compliance Rules	205
	[2] Violation of Non-compete	205
	[3] Poaching of Business from the Company	206
	[4] Disbursements from Restricted Equity of the Company	206
	[5] Violation of Arm's-Length Principles	207
	[6] Knowing Disregard of Avoidable Risk	207
	[B] External Directors' Liability	207
	[1] Gross Negligence to Pay Taxes and Public Levies	208
	[2] Illicit Non-payment of Social Security Contributions	208
	[3] Late Filing for Insolvency	208
III	Liability Issues	209
	[A] Enforcement of Director's Liability	209
	[1] Who Can Sue?	209
	[2] Costs of Litigation and Class Actions	210
	[B] Joint Liability of Directors	211
	[C] Indemnification	211
	[D] Time Limitation	211
IV	Directors' and Officers' Insurance	212
V	Lawyer Directorships	212
VI	The European Action Plan	212
Hong Kong		
	<i>Allan Leung &amp; Danny Leung</i>	213
I	Introduction	213
	[A] One-System Body	214
	[B] Board Structure and Duality of Chairman and CEO	214
	[1] Board Structure	214



Table of Contents

	[2] Duality of Chairman and Chief Executive	215
	[C] Delegation	215
	[D] Elections	215
	[E] Removal of Directors	215
II	Liability Issues	216
	[A] Directors' Duties	216
	[1] Fiduciary Duties	216
	[a] Duty to Act in Good Faith in the Best Interests of the Company as a Whole	216
	[b] No Fetters on Discretion	216
	[c] Duty Not to Compete	217
	[d] Duty to Avoid a Conflict of Interest and Not to Make a Secret Profit	217
	[e] Confidentiality	217
	[2] General Duties	218
	[a] Skill, Care, and Diligence	218
	[b] Duty Not to Exceed Powers	218
	[c] Duty to Creditors	218
	[B] Who Can Sue?	218
	[1] Duties Owed to Individual Shareholder	219
	[2] Duties Owed to Creditors	219
	[C] Who Can Be Sued?	219
	[D] Derivative Actions	220
	[1] Common Law Derivative Action	220
	[2] Statutory Derivative Action	220
	[E] Unfair Prejudice	221
	[F] Representative Actions	221
	[G] Insolvency Context	222
	[1] Mifeseance	222
	[2] Fraudulent Trading	222
	[3] Disqualification Order	222
	[H] Costs and Fees in Liability Litigations	223
III	Indemnification	223
IV	Protection Against Wrongs of Directors	223
	[A] Ratification	223
	[B] Directors' and Officers' Liability Insurance	224
V	Corporate Governance	224
	[A] Existing Corporate Governance	224
	[B] Corporate Governance Reform: Difficulties in Hong Kong	224
	[1] Family-Controlled Companies	224
	[2] Quality of INEDs	225
	[C] Going Forward	225

## Table of Contents

---

India		
<i>Som Mandal</i>		227
I	Introduction	227
	[A] Appointment of Directors	227
	[B] Shareholder Rights	228
	[C] Government's Right to Appoint Directors	228
	[D] Removal of Directors	228
	[E] Power of Directors May Be Amended	229
II	Recent Cases and Anthropological Approach to Directors' Liabilities	229
	[A] Financial Scams	230
	[B] Judiciary	231
III	Government's Approach towards Ensuring Greater Corporate Accountability	231
IV	Liability Issues	234
	[A] Officer in Default	235
	[B] Contractual Liabilities	235
	[C] Tortious Liability	235
	[D] Apprehension of Prosecution	236
	[E] Compounding Offences, a Way Out?	236
	[F] Managing Director/Whole-Time Director/Nominee Director/ Professional Director	236
	[G] Object and Scope of Section 633	237
	[H] Directors' Liability Insurance	237
Indonesia		
<i>Lia Alizia &amp; Valdano Ruru</i>		239
I	General Legal Theories on the Board of Directors	239
	[A] Two-Tier System or One-Tier System	239
	[B] Structure of the Boards	240
	[C] Chairman/CEO	240
	[D] Appointment	240
	[E] Authorities	241
	[F] Delegation	242
	[G] Termination	242
II	Liability Issues	243
	[A] Who Can Sue?	243
	[B] Who Can Be Sued?	243
	[C] 'De Facto' Directors	243
	[D] Thresholds and Limitations/Caps on Liabilities	244
	[E] Joint Liability/Solidarity	244
	[F] Derivative Actions	244
	[G] Class Actions	244

Table of Contents

	[H] Relevance of the Bankruptcy of a Corporation	245
III	Corporate Governance	245
IV	Indemnification	245
V	Directors' and Officers' Insurance	246
VI	Lawyer Directorships	246
VII	Criminal and Civil Liabilities of Directors under the Company Law and Company Registration Law	246
	[A] Criminal	246
	[B] Civil	247
VIII	Precautions Directors Should Take to Avoid Liability	247
IX	Recent Cases Dealing with the Liability of Directors	248
	[A] The <i>Videotron</i> Case	248
	[B] The <i>PT MAJU</i> Case	249
X	Future Legislation Forecast	249
	Ireland	
	<i>Stephen Hegarty &amp; Maeve Moran</i>	251
I	National Basics and National Theories of Directors' Liabilities	251
	[A] Two-Tiered or Unitary Company Structure	251
	[B] Chairman/CEO	251
	[C] Board Structure	252
	[D] Directors' Election/Staggering	252
	[E] Directors' Term of Appointment	252
	[F] Delegation	252
	[G] Removal of Directors	253
II	Recent Cases Dealing with Directors' Liability	253
III	Typical Schemes/Behaviour to Avoid Directors' Liability	253
IV	Corporate Governance	254
	[A] UK Code	254
	[B] Directors' Compliance Statements	254
V	Liability Issues	254
	[A] Duties & Obligations Owed by Directors	254
	[1] Compliance with the Act	254
	[2] Fiduciary Duties	255
	[3] Securities Laws	255
	[4] Other Duties/Obligations	256
	[5] Delegation of Duties or Responsibilities	257
	[B] Who Can Sue?	257
	[1] The Company	257
	[2] Members	257
	[3] Employees	258
	[4] Creditors	258
	[5] Other Parties	258

## Table of Contents

---

[C]	Who Can Be Sued?	258
[D]	Thresholds and Limitations/Caps on Liabilities	259
[E]	Derivative Actions	259
[F]	Class Actions	260
[G]	Relevance of Bankruptcy of Corporation	260
[H]	Tribunals of Inquiry	261
VI	Indemnification	261
VII	Directors' and Officers' Insurance	261
VIII	Other Methods of Protection	261
IX	Lawyer Directorship	262
X	Forecast on Future Legislation Development	262
Israel		
	<i>Ehud Sol &amp; Haim Machluf</i>	263
I	National Basis: The Israeli Companies Law	263
[A]	History of the Israeli Companies Law	263
[B]	The Board's Principal Role under the Law	263
[C]	The Company's Structure: Organs and Their Powers	264
[1]	The General Meeting	264
[2]	The BOD: Its Authority and Duties	265
[3]	Composition of the BOD	265
[a]	General	265
[b]	External Directors	266
[c]	Independent Directors	266
[d]	Board Committees	267
[i]	Audit Committee	267
[ii]	Compensation Committee	267
[4]	Appointment and Removal of a Director	267
[a]	Appointment of Directors	267
[b]	The Power to Dismiss a Director	267
[5]	The Chief Executive Officer	268
II	Directors' and Officers' Liability	268
[A]	Liability Towards the Company	268
[1]	Duty of Care	268
[2]	Duty of Loyalty	269
[B]	Liability Towards the Shareholders	269
[C]	Liability Towards Third Parties	269
[D]	Criminal Liability	270
[E]	Liability under Specific Laws	270
[1]	Liability under the Securities Law	270
[2]	Presumption Set Out in Various Laws Concerning Directors' and Officers' Liability	271

Table of Contents

III	Claims Against Directors and Officers	271
	[A] Type of Claims	271
	[1] Regular Action by an Individual	271
	[2] Derivative Actions	271
	[3] Class Action	271
	[B] Procedural Aspects of Shareholders' Claims	272
IV	Judicial Review: The Business Judgment Rule and the Entire Fairness Doctrine	272
V	Exemption, Indemnification, and Insurance	273
	[A] General	273
	[B] Exemption	273
	[C] Indemnification	273
	[D] D&O Insurance	274
	Italy	
	<i>Gabriele Fagnano</i>	275
I	Corporate Governance Structure and Directors' Liability	275
	[A] Traditional, Single-Body, and Two-Tier System; Structures of Internal Control	275
	[B] Appointment and Removal of Directors	276
	[C] Board Structure and Main Executive Roles	277
	[D] Delegation and Information Flow within the Board of Directors	278
	[E] Directors' Interests in Relation to Company Action	279
II	Directors' Duties and Recent Cases Dealing with Directors' Liability	279
	[A] Directors' Duties	279
	[B] Judicial Approach to Directors' Standard of Care and Diligence and Limits to Judicial Review of Directors' Business Errors: Tightening of Standards	280
III	Liability Issues	282
	[A] Who Can Sue?	282
	[1] Company Action Against Directors and Relevant Indemnification	282
	[2] Action of Company Creditors and Relevant Indemnification	283
	[3] Action of Third Parties and Individual Shareholders, Relevant Indemnification	283
	[B] Who Can Be Sued?	284
	[C] Statute of Limitations and Other Limitations of Liability	284
	[1] Statute of Limitations	284
	[2] Other Limitations	284
	[D] Joint and Several Liabilities	285
	[E] Derivative Actions and Class Actions	285
	[F] Directors' Liability Suit in the Context of Bankruptcy	286

## Table of Contents

---

Japan		
<i>Norio Mitsuuchi</i>		287
I	Introduction	287
II	'National Basics' and National Legal Theories of Director's Liabilities	288
	[A] Basic Structures (To Have a Board or Not, Etc.)	288
	[1] KK without a Board	288
	[2] KK with a Board	288
	[a] KK with a Corporate Auditor or a Board of Corporate Auditors	288
	[b] KK with an Audit and Supervisory Committee	289
	[c] KK with Three Committees	289
	[B] CEO, President, and Other Officers	289
	[C] Structures of Boards and Committees	290
	[D] Elections	290
	[E] Director's Term of Appointment	290
	[F] Delegation	291
	[G] Removal of Directors	291
III	Judicial Review	291
	[A] Relationship between KK and Directors/Corporate Auditors/ Executive Officers	291
	[B] Business Judgment Rule	292
IV	Corporate Governance	292
	[A] Convocation of the Board	292
	[B] Resolutions	292
	[C] Structure of Oversight	292
	[D] Corporate Governance Code	293
V	Liability Issues	293
	[A] Who Can Sue?	293
	[1] Company	293
	[2] Shareholder	293
	[3] Third Party	294
	[B] Who Can Be Sued?	294
	[C] Thresholds and Limitation of Liabilities	294
	[1] Negligence Requirement	294
	[2] Exemption from Liabilities	295
	[3] Partial Exemption from Liabilities	295
	[4] Prior Exemption by Articles of Incorporation and Prior Agreement to Limit Liabilities	295
	[D] Relevance of Bankruptcy of a KK with Regard to Bringing a Directors' Liability Suit	295
	[E] Costs and Fees in Liability Litigations	296
VI	Director's and Officer's Insurance	296
VII	Lawyer Directorship	296

Table of Contents

VIII	Conclusion	296
	Latvia	
	<i>Jānis Gavars, Reinis Sokolovs &amp; Raimonds Slaidiņš</i>	297
I	National Basics and National Legal Theories of Directors' Liabilities	297
	[A] Two-Tiered or Unitary Company Structure	297
	[B] Chairman/CEO	298
	[C] Board Structures	298
	[D] Directors' Elections/Staggering	299
	[E] Directors' Term of Appointment	299
	[F] Delegation	299
	[G] Removal of Directors	300
II	Recent Cases Dealing with Directors' Liability	300
	[A] Judgment of 15 January 2014 in Case No. SKC-101/2014 of the Civil Case Department of the Supreme Court of Republic of Latvia	300
	[B] Judgment of 27 May 2014 in Case No. SKC-102/2014 of the Civil Case Department of the Supreme Court of Republic of Latvia	301
	[C] Judgment of 13 June 2014 in Case No. 2014-02-01 of the Constitutional Court of Republic of Latvia 'On the Compliance of Para 4 of Section 17 of Deposit Guarantee Law with the First Sentence of Article 91 of the Constitution of the Republic of Latvia'.	301
III	Judicial Review (For Example, Tightening of Standards?)	301
IV	Typical Schemes/Behaviour to Avoid Directors' Liability	302
	[A] Compliance with the Principle of an Honest and Prudent Manager	303
	[B] Release from Liability by Means of a Decision of the Shareholders' Meeting	303
	[C] Good Faith Compliance with Shareholders' Decisions	303
V	Liability Issues	303
	[A] Who Can Sue?	303
	[1] Private Liability	303
	[2] Public Liability	304
	[B] Who Can Be Sued?	304
	[C] 'De Facto' Director	305
	[D] Thresholds and Limitations/Caps of Liabilities	305
	[E] Joint Liability/Solidarity	305
	[F] Derivative Actions	306
	[G] Class Actions	306
	[H] Relevance of Bankruptcy of Corporation	306
VI	Indemnification	306
VII	Directors' and Officers' Insurance	306
VIII	Other Methods of Protection	307
IX	Lawyer Directorship	307
X	Forecast on Future Legislation Development	307

## Table of Contents

---

Luxembourg		
<i>Alexander Koch</i>		309
I	National Basics and National Legal Theories of Directors' Liabilities	309
	[A] One-Tier and Two-Tier System	309
	[B] Chairperson and CEO	310
	[C] Board Structures	311
	[D] Directors' Elections and Term of Appointment/Staggering	312
	[E] Delegation	312
	[F] Removal of Directors	313
II	Recent Cases Dealing with Directors' Liability	313
III	Judicial Review (For Example, Tightening of Standards?)	313
IV	Corporate Governance	314
V	Liability Issues	314
	[A] Who Can Sue?	315
	[1] Liability for Mismanagement (Article 59(1) of the Law)	315
	[2] Liability for Breach of the Law or the Articles of Association (Article 59(2) of the Law)	315
	[3] Liability in Tort (Articles 1382 and 1383 of the Civil Code)	315
	[4] Liability under Criminal Law	316
	[B] Who Can Be Sued?	316
	[1] Liability for Mismanagement (Article 59(1) of the Law)	316
	[2] Liability for Breach of the Law or the Articles of Association (Article 59(2) of the Law)	316
	[3] Liability in Tort (Articles 1382 and 1383 of the Civil Code)	316
	[4] Liability under Criminal Law	317
	[C] De Facto Directors	317
	[D] Thresholds and Limitations/Caps of Liabilities	317
	[E] Joint Liability/Solidarity	317
	[1] Liability for Mismanagement (Article 59(1) of the Law)	317
	[2] Liability for Breach of the Law or the Articles of Association (Article 59(2) of the Law)	318
	[3] Liability in Tort	318
	[4] Liability under Criminal Law	318
	[F] Derivative Actions	318
	[G] Relevance of Bankruptcy of the Company with Respect to Directors' Liability	319
VI	Indemnification	319
VII	Directors' and Officers' Insurance	320
VIII	Other Methods of Protection	320
	[A] Discharge	320
	[B] Resignation	320
IX	Forecast on Future Legislation Development	321



Table of Contents

---

Mexico		
	<i>Daniel Del Rio &amp; Juan José López-de-Silanes</i>	323
I	Introduction	323
	[A] Investment Promotion Companies (“ <i>Sociedades Anonimas Promotoras de Inversion</i> ”)	323
	[B] Stock Exchange Investment Promotion Companies (“ <i>Sociedades Anonimas Promotoras de Inversion Bursatil</i> ”)	324
	[C] Stock Exchange Companies (“ <i>Sociedades Anonimas Bursatiles</i> ”)	324
II	“National Basics” and National Legal Theories of Directors’ Liabilities	324
	[A] Two-Tier System or One-Tier System	324
	[B] Chairman and CEO (One or Two People/Checks and Balances)	325
	[C] Board Structures	326
	[D] Elections/Staggering	326
	[E] Delegation	326
	[F] Removal of Directors	327
III	Judicial Review (For Example Tightening of Standards?)	327
IV	“Socio-Anthropological Issues”	327
	[A] Is the Composition of the Board of Directors Changing in Mexico in Light of Recent Developments?	327
	[B] Are the Decision-Making Mechanisms Changing in Mexico in Light of Recent Developments?	328
	[C] Board/Management Relationship	328
V	Corporate Governance	328
	[A] Board Procedures	328
	[B] Structures of Oversight	328
VI	Liability Issues	329
	[A] Who Can Sue?	329
	[B] Who Can Be Sued?	330
	[C] Thresholds and Limitations/Caps of Liabilities in Mexico: Statutory Limitations on Directors’ Liability	330
	[D] Joint Liability/Solidarity	330
	[E] Derivative Actions	331
	[F] Class Actions	331
	[G] Relevance of Bankruptcy of Corporation with Regard to Bringing a Directors’ Liability Suit	332
	[H] Costs and Fees in Liability Litigation	332
VII	Indemnification	332
VIII	Directors’ and Officers’ Insurance	332
IX	Other Methods of Protection	333
X	Lawyer Directorship	333
XI	The “European Action Plan”	333

## Table of Contents

---

Mongolia	
<i>Chris Melville, Anthony Woolley &amp; Ariungoo Khurelbaatar</i>	335
I National Basics	335
[A] Three-Tiered Corporate Governance System	336
[B] Chairman/Chief Executive Officer	338
[C] Board Structure	338
[D] Directors' Elections	338
[E] Directors' Term of Appointment	339
[F] Delegation	339
[G] Removal of Directors	339
II Recent Cases Dealing with Directors' Liability	339
III Judicial Overview	339
IV Corporate Governance	340
V Liability Issues	341
[A] Who Can Be Sued?	341
[B] Who Can Sue?	341
[C] 'De Facto' Directors	342
[D] Thresholds and Limitations/Caps of Liabilities	342
[E] Joint and Several Liability	342
[F] Derivative Actions	342
[G] Class Actions	342
[H] Relevance of Bankruptcy of Corporation	342
VI Indemnification	343
VII Directors' and Officers' Insurance	343
VIII Other Methods of Protection	343
IX Lawyer Directorship	344
X Forecast on Future Legislation Development	344
The Netherlands	
<i>Willem Calkoen &amp; Martin Grablowitz</i>	345
I 'National Basics'	345
[A] Two-Tier System or One-Tier System	345
[B] Chairman and CEO	346
[C] Board Structures	346
[D] Elections/Staggering	346
[E] Delegation	347
[F] Removal of Directors	347
II Directors' Liability	347
III 'Socio-Anthropological Issues'	348
[A] Composition of the Board of Directors	348
[B] Decision-Making Mechanism	348
[C] Board/Management Relationship	349
IV Corporate Governance Code	349

Table of Contents

V	Liability Issues	350
	[A] Who Can Sue?	350
	[1] The Company	350
	[2] The Shareholder	350
	[3] Trustee in Bankruptcy	350
	[4] Creditors and Third Parties	351
	[5] The Government	351
	[B] Who Can Be Sued?	351
	[C] Thresholds and Limitations/Caps of Liabilities in the Netherlands (Statutory Limitations on Directors' Liability)	351
	[D] Joint Liability/Solidarity	351
	[E] Derivative Actions	352
	[F] Class Actions	352
	[G] Relevance of Bankruptcy of Corporation with Regard to Bringing a Directors' Liability Suit	353
	[H] Costs and Fees in Liability Litigations	353
VI	Indemnification	353
VII	Directors' and Officers' Insurance	354
VIII	Lawyer Directorship	354
IX	Pending Legislation	354
	 New Zealand	
	<i>Pip England</i>	355
I	'National Basics' and National Legal Theories of Directors' Liabilities	355
	[A] Two-Tiered or Unitary Company Structure?	355
	[B] Definition of 'Director'	356
	[C] Separation of Chairperson and CEO	356
	[D] Board Structures	356
	[E] Directors' Elections/Staggering	357
	[F] Directors' Term of Appointment	357
	[G] Delegation	357
	[H] Disclosure of Conflicts of Interest	357
	[I] Removal of Directors	358
II	Recent Cases Dealing with Directors' Liability	358
	[A] Reckless Trading	358
	[B] Directors' Duties	359
	[C] Silent Directors	360
	[D] Directors of Finance Companies	360
III	Judicial Review (Tightening of Standards?)	360
IV	Corporate Governance	361
	[A] Overview of New Zealand Governance	361
	[B] FMA Corporate Governance Handbook	361
	[C] NZX Discussion Document	362
	[D] Use of Board Committees	362

## Table of Contents

---

	[E] Other Oversight Structures	363
V	Liability Issues	363
	[A] Who Can Sue?	363
	[1] The Company	363
	[2] Shareholders	364
	[3] Creditors	364
	[4] Regulatory Bodies	364
	[B] Who Can Be Sued?	365
	[C] Statutory Limitations on Directors' Liability	365
	[D] Joint Liability	365
	[E] Derivative Actions	365
	[F] Class Actions	365
	[G] Relevance of Liquidation	366
	[H] Costs in Liability Litigation	366
VI	Indemnification and Insurance	366
	[A] Indemnity	366
	[B] Insurance	367
VII	Forecast on Future Legislation Development	367
Nigeria		
	<i>Ayodeji Oyetunde &amp; Lotanna Nwodo</i>	369
I	Overview of Nigeria's Corporate Governance Regulation	369
II	National Basics and National Legal Theories of Directors' Liabilities	369
	[A] Unitary Company Structure	369
	[B] Separation of Chairman and CEO	370
	[C] Board Structures	370
	[D] Directors Elections/Staggering and Term of Appointment	371
	[E] Delegation	371
	[F] Removal of Directors	372
III	Liability Issues	373
	[A] Duties of a Director	373
	[B] Who Can Sue?	373
	[C] Who Can Be Sued?	374
	[D] De Facto Director	374
	[E] Thresholds and Limitations/Caps of Liabilities	374
	[F] Joint Liabilities	375
	[G] Derivative Actions	375
	[H] Class Actions	375
	[I] Liabilities of Directors on Winding Up	375
IV	Recent Cases Dealing with Directors' Liability	376
	[A] Joint Responsibility of the Board	376
	[B] Misappropriation of Funds	376
	[C] Duty to Render Accurate Accounts	376
V	Judicial Review	377

Table of Contents

VI	Schemes/Behaviours to Avoid Directors' Liability	377
VII	Indemnification and Liability Insurance	377
VIII	Lawyer Directorship	378
IX	Forecast on Future Legislation Development	378
The People's Republic of China		
<i>Liang Xu &amp; Sarah Zhang</i>		379
I	Introduction	379
	[A] Three-Tiered Corporate Governance Body	379
	[1] Shareholders	380
	[2] Board of Directors or Executive Director	380
	[3] Board of Supervisors	381
	[B] Board Structure and Concurrent Offices	381
	[1] Board Structure	381
	[2] Concurrent Office	381
	[C] Delegation	382
	[D] Elections	382
	[E] Removal of Directors	382
	[F] Qualification of Directors	383
II	Liability Issues	383
	[A] Directors' Duties	383
	[1] Fiduciary Duty	383
	[2] General Duties	384
	[3] Legal Representative	384
	[4] Apparent Authority	385
	[B] Who Can Sue?	385
	[1] Duties Owed to the Company	385
	[2] Duties Owed to Shareholders	385
	[3] Duties Owed to Creditors	386
	[C] Who Can Be Sued?	386
	[D] Derivative Actions by Shareholders	386
	[E] Unfair Prejudice	386
	[1] Compulsory Buy Back	386
	[2] Compulsory Winding Up	387
	[F] Representative Actions	387
	[G] Liquidation Context	387
	[H] Costs and Fees in Liability Litigations	388
III	Indemnification	388
IV	Protection Against Wrongs of Directors	388
	[A] Ratification	388
	[B] Directors' and Officers' Liability Insurance	388
V	Corporate Governance	388

## Table of Contents

---

Poland	
<i>Tomasz Żak</i>	391
I	'National Basics' and National Legal Theories of Directors' Liability 391
	[A] Two-Tiered or Unitary Company Structure 391
	[B] Chairman and CEO 392
	[C] Board Structure 392
	[D] Directors' Election/Staggering 392
	[E] Directors' Term of Appointment 393
	[F] Delegation of Powers 393
	[G] Removal and Suspension of Directors 393
II	Typical Schemes/Behaviour to Avoid a Directors' Liability 394
III	Corporate Governance 394
	[A] Management Board 394
	[B] Supervisory Board 395
IV	Liability Issues 395
	[A] Liability Towards the Company 395
	[B] Liability Towards Third Parties 396
	[C] Derivative and Class Actions 398
	[D] Costs 399
	[E] Criminal Liability 399
V	Indemnification 399
	[A] Liability Towards Third Parties 399
	[B] Liability Towards the Company 399
VI	Directors' and Officers' Insurance 400
VII	Lawyer Directorship 400
Portugal	
<i>Miguel de Avillez Pereira &amp; Hugo Teixeira</i>	401
I	National Basics and National Legal Theories of Directors' Liabilities 401
	[A] Two-Tiered or Unitary Company Structure 401
	[B] Chairman/CEO 402
	[C] Board Structures 402
	[D] Directors' Elections/Staggering/Term of Appointment 402
	[E] Delegation 403
	[F] Removal of Directors 403
II	Recent Cases Dealing with Directors' Liability 404
III	Judicial Review (For Example, Tightening of Standards?) 404
IV	Typical Schemes/Behaviour to Avoid Directors' Liability 405
V	Corporate Governance 406
VI	Liability Issues 406
	[A] Who Can Sue? 407
	[1] Liability Towards the Company 407
	[2] Liability Towards Shareholders (and Other Third Parties) 407

Table of Contents

	[3] Liability Towards Creditors of the Company	407
	[4] Liability Before Tax Authorities and Social Security	407
	[B] Who Can Be Sued?	408
	[C] The De Facto Directors	408
	[D] Thresholds and Limitations/Caps of Liabilities	408
	[E] Joint Liability/Solidarity	408
	[F] Derivative Actions	409
	[G] Class Actions	409
	[H] Relevance of Bankruptcy of Corporation	409
VII	Indemnification	409
VIII	Directors' and Officers' Insurance	410
IX	Other Methods of Protection	410
X	Lawyer Directorship	410
XI	Forecast on Future Legislation Development	410
The Russian Federation		
<i>Doran Doeh &amp; Svetlana Barinova</i>		
		411
I	“National Basics” and National Legal Theories of Directors' Liabilities	412
	[A] Two-Tier or Unitary Company Structure	412
	[B] Chairman/General Director	412
	[C] Board Structures	412
	[D] Election of Directors	413
	[E] Directors' Term of Appointment	413
	[F] Delegation	413
	[G] Removal of Directors	414
II	Recent Cases Dealing with Directors' Liability	414
III	Judicial Review (Tightening of Standards?)	414
IV	Typical Schemes/Behavior to Avoid Directors' Liability	415
V	Corporate Governance	415
VI	Liability Issues	415
	[A] Who Can Sue?	416
	[B] Who Can Be Sued?	416
	[C] “De Facto” Director	417
	[D] Thresholds and Limitations/Caps of Liabilities	417
	[E] Joint Liability/Solidarity	417
	[F] Derivative Actions	417
	[G] Class Actions	418
	[H] Relevance of Bankruptcy of Corporation with Regard to Bringing a Director's Liability Suit	418
VII	Indemnification	418
VIII	Directors' and Officers' Insurance	419
IX	Lawyer Directorship	420
X	Forecast on Future Legislation Development	420

## Table of Contents

---

Singapore		
<i>Stephanie Keen &amp; Matthew Bousfield</i>		421
I	'National Basics' and National Legal Theories of Directors' Liabilities	421
	[A] Two-Tiered or Unitary Company Structure	422
	[B] Directors' Duties	422
	[C] Chairman and CEO	423
	[D] Board Structures	423
	[E] Directors' Elections	424
	[F] Directors' Term of Appointment	424
	[G] Delegation	425
	[H] Removal of Directors	425
II	Recent Cases Dealing with Directors' Liability	425
	[A] <i>Lim Weng Kee v. Public Prosecutor</i>	425
	[B] <i>Ho Kang Peng v. Scintronix Corp Ltd</i> (Formerly Known as TTL Holdings Ltd)	426
	[C] <i>Falmac Limited v. Cheng Ji Lai Charlie</i>	426
III	Corporate Governance	426
	[A] Independent Directors	426
	[B] Executive and Non-executive Directors	427
	[C] Oversight Committees	427
IV	Liability Issues	428
	[A] Who Can Sue?	428
	[B] Who Can Be Sued?	428
	[C] De Facto Directors	428
	[D] Thresholds and Limitations on Directors' Liabilities	429
	[E] Joint/Several Liability	429
	[F] Derivative Actions	429
	[G] Class Actions	430
	[H] Relevance of Bankruptcy of the Corporation	430
V	Indemnification and Insurance	430
VI	Other Methods of Protection	431
VII	Legislation Development	431
South Africa		
<i>Nastascha Harduth, Eric Levenstein, David Gewer &amp; Derek Alexander</i>		433
I	Introduction	433
II	National Basics and National Legal Theories of Directors' Liabilities	434
	[A] Board Structures	434
	[B] Chairperson and Chief Executive Officer	434
	[C] Directors' Election, Staggered Rotation and Terms of Appointment	435
	[D] Delegation and Board Committees	435
	[E] Removal of Directors	436
III	Recent Cases Dealing with Directors' Liability	437



Table of Contents

IV	Socio-Anthropological Issues	438
V	Behaviour to Avoid Director's Liability	439
VI	Liability Issues	440
	[A] Who Can Sue and Who Can Be Sued	440
	[B] The 'De Facto' Director	440
	[C] Joint Liability	441
	[D] Derivative Actions	441
	[E] Insolvency and Financial Distress	441
VII	Indemnification, Directors' and Officers' Insurance, Other Methods of Protection	441
VIII	Lawyer Directorship	442
IX	Forecast on Future Legislation Development	442
	South Korea	
	<i>Kyung-Taek Jung &amp; Hye-Sung Kim</i>	445
I	National Basics and Legal Theories of Directors Liabilities	445
	[A] Two-Tiered or Unitary Company Structure	445
	[B] Representative Director/Executive Officer	445
	[C] Board Structures	446
	[D] Director's Elections/Staggering	446
	[E] Director's Term of Appointment	447
	[F] Delegation	447
	[G] Removal of Directors	447
	[H] Duties of Directors	447
	[1] Duty of Care	447
	[2] Duty of Loyalty	447
	[3] Duty of Confidentiality	448
	[4] Duty of Non-compete with the Company	448
	[5] Duty Against Usurpation of Business Opportunity of the Company	448
	[6] Duties as to Transactions between Directors and the Company (i.e., Self-Dealing)	448
	[7] Duty to Report to Audit Committee	449
II	Recent Cases Dealing with Directors' Liability	449
III	Judicial Review	450
IV	Typical Schemes/Behavior to Avoid Directors' Liability	450
V	Corporate Governance	451
	[A] General Principles of Corporate Governance in Korea	451
	[B] Recent Developments in the Law, Codes and Rules of Corporate Governance	451
	[C] The Law Enforcement Agency in Charge of Enforcing Corporate Governance in Korea	452
VI	Liabilities Issues	452
	[A] Who Can Sue & Who Can Be Sued?	452

## Table of Contents

---

[B]	De Facto Director	453
[C]	Thresholds and Limitations/Caps of Liabilities	453
[D]	Joint Liability/Solidarity	453
[E]	Shareholders' Derivative Actions	453
[F]	Class Actions	454
[G]	Relevance of Bankruptcy of Corporation	454
VII	Indemnification of Directors' Liability	454
VIII	Directors' and Officers' Insurance	454
IX	Lawyer Directorship	455
X	Forecast on Future Legislation Development	455
Spain		
	<i>Enric Picanyol &amp; Coro Fernández-Rañada</i>	457
I	'National Basics' and Legal Theories on Directors' Liabilities	457
[A]	Two-Tier versus 'One-System' Body	457
[B]	Chairman/CEO	458
[C]	Board Structure	458
[D]	Elections/Staggering	458
[E]	Delegation	459
[F]	Removal of Directors	459
II	Recent Cases Dealing with Directors' Liabilities	459
[A]	General Rules	459
[B]	Liability for Corporate Debt	459
III	Judicial Review	460
IV	Socio-Anthropological Issues	461
V	Corporate Governance	461
VI	Liability Issues	462
[A]	Who Can Sue?	462
[1]	Corporate Action	462
[2]	Individual Action	462
[B]	Who Can Be Sued?	463
[1]	Directors	463
[2]	Corporate Entities as Directors	463
[3]	De Facto Directors	463
[4]	Liquidators	463
[5]	Persons Holding Powers of Attorney	463
[C]	Thresholds and Limitations	464
[1]	Time-Barring Term	464
[2]	Negligence	464
[D]	Joint Liability/Solidarity	464
[E]	Derivative Actions	465
[F]	Class Actions	465
[G]	Directors' Liability in the Event of Insolvency	465
VII	Indemnification	466

Table of Contents

VIII	Directors' and Officers' Insurance	467
IX	Lawyer Directorship	467
Sweden		
	<i>Björn Kristiansson &amp; Per Samuelsson</i>	469
I	'National Basics' and National Legal Theories of Directors' Liabilities	469
	[A] Forms of Association and Legal Context	469
	[B] Company Structure and Representation	470
	[C] Board Structure	470
	[D] Directors' Election and the Nomination Committee	471
	[E] Directors' Term of Appointment and Removal of Directors	471
II	Recent Cases Dealing with Directors' Liability	472
III	Judicial Review	472
IV	Corporate Governance	473
	[A] Legal Framework	473
	[B] Directors' Duties Towards the Company	473
	[C] Directors' Duties Towards Majority and Minority Shareholders	474
	[D] Directors' Duties in Case of Bankruptcy	475
V	Liability Issues	475
	[A] Who Can Be Sued?	475
	[B] Who Can Sue?	476
	[1] The Company	476
	[2] Shareholders: Derivative Actions	476
	[3] Creditors and Other Third Parties	476
	[C] 'De Facto' Directors' Liability	477
	[D] Limitations	477
	[E] Class Actions	477
VI	Indemnification and Directors' Insurance	477
VII	Other Methods of Protection	478
VIII	Lawyer Directorship	478
IX	Forecast on Future Legislation Development	478
Switzerland		
	<i>Matthew T. Reiter &amp; Lorenz Naef</i>	479
I	Directors' Liability in Switzerland: The Basic Legal Regime	479
	[A] Introduction	479
	[B] Flexible One-Tier System	480
	[C] Board Structures, Chairman and CEO	480
	[D] Election and Removal of Directors, Nationality and Domicile Requirements	481
	[E] Delegation	481
II	Recent Cases Dealing with Directors' Liability	482
	[A] Claims of the Company in Good Standing	483

## Table of Contents

---

	[B] Late Filing for Insolvency	484
	[C] Liability for the Issuance of Prospectuses	484
III	Standards of Judicial Review	485
IV	Corporate Governance	485
V	Liability Issues	485
	[A] Grounds for Liability and Prerequisites in General	485
	[B] Who Can Sue?	486
	[C] Derivative Actions in Particular	487
	[D] Who Can Be Sued?	488
	[E] No Thresholds and Limitations on Directors' Liability	488
	[F] Joint and Several Liability	489
	[G] Class Actions	489
	[H] Costs and Fees in Liability Litigations	489
VI	Indemnification	490
VII	Directors' and Officers' Insurance	490
VIII	Other Methods of Protection for Directors on the Board of a Swiss Corporation	491
Turkey		
	<i>Serdar Paksoy &amp; assisted by Deniz Özkan</i>	493
I	Introduction	493
II	Who Can Be Elected as Director?	493
	[A] Becoming a Director	493
	[B] Qualifications of Directors	494
III	Composition of the Board	494
IV	Fiduciary Duties of Directors	495
V	Liabilities of Directors	496
	[A] Situations in Which Directors Are Held Liable	496
	[1] Incorrect Payments of the Shareholders for Their Capital Contributions	496
	[2] Unlawful Documents and Statements of the Company	497
	[3] Non-existing or Unduly Kept Corporate Books and Company Records	497
	[4] Shareholders Resolutions That Are Not Implemented without a Just Cause	497
	[5] Directors' Deliberate or Negligent Failure to Perform Other Duties Delegated by the TCC or the Articles of Association	498
	[6] Failure to Appoint Capable Executives	498
	[B] Liability of Legal Entity Directors and Their Representatives	498
	[C] Differentiated Joint Liability Principle	498
	[D] Who Can Sue the Directors?	499
	[1] Company	499
	[2] Shareholders	499
	[3] Third-Party Claims	499

Table of Contents

[E]	Directors' Liability Insurance	500
[F]	Liability of Directors under the CML	500
[G]	Liabilities of Directors Arising Out of Extraordinary Transactions	500
	[1] Capital Increases	500
	[2] Issuing Bonds	501
	[3] Liability in Case of Bankruptcy	501
[H]	Liability of Directors under the Tax Laws	501
[I]	Liability of Directors under Social Security Law	502
[J]	Liability of Directors under the Banking Law	502
[K]	Liability of Directors under Criminal Law	502
VI	Defences of Directors	502
VII	Ceasing to Be a Director	502
Ukraine		
	<i>Timur Bondaryev, Pavlo Khodakovsky &amp; Alesya Pavlynska</i>	505
I	'National Basics' and National Legal Theories of Directors' Liabilities	505
	[A] Two-Tiered or Unitary Company Structure	505
	[B] Chairman/CEO Executive Body	506
	[C] Board Structures	506
	[D] Directors' Elections	507
	[E] Directors' Term of Appointment	507
	[F] Delegation of Authorities (Powers)	507
	[G] Removal of Directors (Dismissal, Recalling and Suspension)	508
II	Recent Cases Dealing with Directors' Liability	508
III	Judicial Review	509
IV	Typical Schemes/Behaviour to Avoid Directors' Liability	509
V	Corporate Governance	510
VI	Liability Issues	510
	[A] Who Can Sue?	511
	[B] Who Can Be Sued?	511
	[C] 'De Facto' Director	512
	[D] Thresholds and Limitations/Caps of Liabilities (Limits of Directors' Liability)	512
	[E] Joint Liability/Solidarity	513
	[F] Derivative Actions	513
	[G] Class Actions	513
	[H] Relevance of Bankruptcy of Corporation	513
VII	Indemnification	514
VIII	Directors' and Officers' Insurance	514
IX	Other Methods of Protection	514
X	Lawyer Directorship	514
XI	Forecast on Future Legislation Development	515

## Table of Contents

---

United Arab Emirates	
<i>Imtiaz Shah</i>	517
I UAE Legal Regime	517
[A] Introduction	517
[B] Free Zones	517
[C] Permitted Corporate Vehicles	518
II 'National Basics' and National Legal Theories of Directors' Liabilities	519
[A] Company Structure	519
[B] Chairman/CEO	519
[C] Board Structures	520
[D] Directors' Elections	520
[E] Directors' Term of Appointment	521
[F] Delegation	521
[G] Removal of Directors	521
III Corporate Governance	521
[A] Decision 518	522
IV Liability Issues	523
[A] General Concept	523
[1] General Liabilities: Onshore Companies	523
[2] Criminal/Other Liabilities: Onshore	524
[3] General Liabilities: DIFC Companies	524
V Who Can Sue?	525
VI 'De Facto' Director	525
VII Threshold and Limitations/Caps of Liabilities	526
VIII Relevance of Bankruptcy of Corporation	526
IX Indemnification	526
X D&O Insurance	526
XI Forecast on Future Legislation Development	527
United Kingdom	
<i>Karla Dudek</i>	529
I 'National Basics' and National Legal Theories of Directors' Liabilities	529
[A] Two-Tiered or Unitary Company Structure	529
[B] Chairman and CEO	530
[C] Board Structures	530
[D] Directors' Elections/Staggering	531
[E] Directors' Term of Appointment	531
[F] Delegation	531
[G] Removal of Directors	532
II Recent Cases Dealing with Directors' Liability	532
III Judicial Review	533
IV Typical Schemes/Behaviour to Avoid Directors' Liability	534
V Corporate Governance	534

Table of Contents

	[A] Board Procedures	534
	[B] Structure of Oversight	535
VI	Liability Issues	535
	[A] Who Can Sue?	535
	[B] Who Can Be Sued?	536
	[C] ‘De Facto’ Director	536
	[D] Thresholds and Limitations/Caps of Liabilities	537
	[E] Joint Liability/Solidarity	537
	[F] Derivative Actions	537
	[G] Class Actions	538
	[H] Relevance of Bankruptcy of the Corporation	538
VII	Indemnification	539
VIII	Directors’ and Officers’ Insurance	539
IX	Other Methods of Protection	539
X	Lawyer Directorship	540
XI	Forecast on Future Legislation Development	540
United States of America		
	<i>Robert Ripin</i>	541
I	National Framework for US Corporate Boards	541
	[A] Regulatory Structure	541
	[B] Board Composition	541
	[1] Board and Corporate Structure	541
	[2] Number of Directors	542
	[3] Age and Nationality Restrictions	542
	[4] Independence	542
	[C] Multiple Roles	542
	[D] Board Procedures	542
	[E] Board Elections	543
	[1] Classified Boards	543
	[2] Cumulative Voting	543
	[3] Staggered Board	543
	[4] Weighted Voting	543
	[F] Delegation	543
	[G] Removal of Directors	544
II	Standards Applicable to Directors	544
	[A] General Duties	544
	[B] State Statute, Securities Exchange, and Common Law Duties	544
	[1] Duty of Care	544
	[2] Duty of Loyalty	545
	[3] Business Judgment Rule	545
III	Cases Dealing with Directors’ Liabilities	545
	[A] Quadrant/Gheewalla	545
	[B] Krasner	545

## Table of Contents

---

	[C] WorldCom/Enron/Emerging Communications	546
	[D] Disney/Van Gorkom	546
	[E] Observations/Recommendations	547
IV	Corporate Governance	548
	[A] Regulation	548
	[B] Board Composition/Independence	548
	[1] Independence of Majority of Board Members	548
	[2] Application to Foreign Private Issuers	549
	[3] Corporate Governance Guidelines/Code of Ethics	549
	[C] State Law Requirements (Delaware)	549
V	Liability Issues	549
	[A] Who Can Sue?	549
	[1] Shareholder Derivative Lawsuits	549
	[2] Creditors' Rights	550
	[3] Regulator Actions	550
	[B] Grounds for Liability	550
	[1] Criminal and Civil Liability	550
	[2] Securities Law	550
	[3] Antitrust	551
	[4] Theft and Fraud	551
	[5] Other	551
	[C] Thresholds and Limitations/Caps of Liabilities	551
	[D] Shareholder Liability	551
VI	Indemnification	551
VII	Insurance	552
	Vietnam	
	<i>Jeff Olson &amp; Minh Nguyen</i>	553
I	“National Basics” and National Legal Theories of Directors’ Liabilities	553
	[A] Legal Framework and the Enterprise Law	553
	[B] Company Forms under the Enterprise Law and Two-Tiered or Unitary Company Structure	554
	[1] Limited Liability Company	554
	[2] Joint Stock Company	555
	[C] Definition of “Director”	556
	[D] Chairman/CEO (General Director)	556
	[E] Board Structures	557
	[F] Directors’ Elections/Staggering and Directors’ Term of Appointment	557
	[G] Delegation	558
	[H] Removal of Directors	558
II	Recent Cases Dealing with Directors’ Liability	559
III	Judicial Review	559
IV	Typical Schemes/Behavior to Avoid Directors’ Liability	560
V	Corporate Governance	560



## Table of Contents

---

VI	Liability Issues	560
	[A] Who Can Sue?	561
	[B] Who Can Be Sued?	561
	[C] “De Facto” Director	561
	[D] Thresholds and Limitations/Caps of Liabilities	562
	[E] Joint Liability/Solidarity	562
	[F] Derivative Actions	562
	[G] Class Actions	562
	[H] Significance of Bankruptcy of Corporation	563
VII	Indemnification	563
VIII	D&O Insurance	563
IX	Other Methods of Protection	563
X	Lawyer Directorship	563
XI	Forecast on Future Legislation Development	563
	Index	565



# Vietnam

*Jeff Olson & Minh Nguyen*

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Despite substantial progress in recent years, Vietnam's legal and regulatory environment is still developing. Many key corporate law concepts, well developed in other jurisdictions, are still in their infancy in Vietnam. The concept of directors' and officers' liability is one of them.

Vietnam's new Enterprise Law,<sup>1</sup> which took effect in July 2015, merely continues the ongoing debate regarding sound corporate governance of commercial enterprises and their owners, directors and managers. It is hoped that the new Enterprise Law, once fully implemented, will bring additional clarity and transparency to this area.

Perhaps somewhat unjustly, Vietnam was ranked 122 out of 189 countries in terms of investor protection in the recent World Bank report *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, and received a score of 3 out of 10 in the sub-category "Extent of the director liability index".<sup>2</sup> By contrast, Vietnam was ranked 74 (again, out of 189 countries) in the category of "Enforcing contracts." It is therefore advisable in practice to address the specific obligations of directors and officers, as well as the consequences for breaches thereof, in the relevant appointment or assignment documentation. Even where the Enterprise Law sets out a basis for director or officer liability, this approach can help to mitigate the deficiencies of unclear regulations.

## **I "NATIONAL BASICS" AND NATIONAL LEGAL THEORIES OF DIRECTORS' LIABILITIES**

### **[A] Legal Framework and the Enterprise Law**

Historically, in Vietnam's socialist-oriented market economy, different legal frameworks governed State-owned enterprises, domestic Vietnamese enterprises and

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1. Law on Enterprises 68/2014/QH13 passed by the National Assembly dated November 26, 2014.  
2. World Bank. 2016. *Doing Business 2016: Measuring Regulatory Quality and Efficiency*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0667-4. License: Creative Commons Attribution CC BY 3.0 IGO.

foreign-invested enterprises. Vietnam's new Enterprise Law and new Investment Law, both of which were approved in November 2014 and took effect from July 1, 2015,<sup>3</sup> apply to both foreign-invested and domestic enterprises and, in principle, provide for relatively equal treatment in most sectors of the economy. However, State-owned enterprises remain a dominant force in the Vietnamese market and investment restrictions continue to exist in sectors that the Vietnamese government considers sensitive or crucial for the country's economy (e.g., oil and gas, telecommunications, transport and media).

#### **[B] Company Forms under the Enterprise Law and Two-Tiered or Unitary Company Structure**

Legal entities permitted under the Enterprise Law include limited liability companies (LLCs), joint stock companies (JSCs), partnerships, State-owned enterprises and private enterprises. This article addresses directors' and officers' liability with regard to LLCs and JSCs, as these are by far the most common types of enterprises in existence in Vietnam.

##### **[1] Limited Liability Company**

The Enterprise Law provides for two types of LLCs, namely, a multimember LLC ("MMLLC") and a one-member LLC ("OMLLC").

As its name implies, an MMLLC must have at least two, but may not have more than fifty, investors (referred to as "members"), with each member being liable for the debts and other commercial obligations of the company up to the amount of capital that the member has undertaken to contribute to the company. Members of an MMLLC may be either organizations or individuals.

An MMLLC attains its legal entity status from the date of issuance of its enterprise registration certificate (which, in the case of foreign investors, must be preceded by the issuance of a separate investment registration certificate).

An MMLLC is managed by a members' council (which includes each of the members or their authorized representatives) and its general director. The general director is responsible for the company's day-to-day operations while the members' council provides oversight over the general director's management and the affairs of the company and also retains substantial decision-making authority over its strategy and certain fundamental decisions.

In addition to its management role, the members' council also has certain rights and obligations that go beyond those of a board of directors and are more similar to those of a "general meeting of shareholders". To separate the members' council from

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3. The new Enterprise Law and Investment Law replaced the older versions of these laws which had been in effect since 2006.

its management role, larger, and in particular foreign-invested, MMLLCs often elect to establish a separate board of directors to fill the governance gap between the members' council and the general director.

An MMLLC with eleven or more members must have an inspection committee.<sup>4</sup> Where there are fewer than eleven members, the company's charter may still provide that a "voluntary" inspection committee be established within the company's governance framework. The inspection committee's role is in some ways similar to that of an audit committee, although its reports are submitted directly to the members. Whilst the broader governance of an MMLLC thus closely resembles that of a unitary company structure, MMLLCs with a larger number of members (i.e., eleven or more) or those that have opted to establish a voluntary inspection committee bear certain elements of a two-tiered management structure.

Also evident from its name, an OMLLC is an LLC with a single member, such as a 100% foreign-owned enterprise with only one parent company. An OMLLC may choose to establish a members' council or may be governed by a single chairman. An OMLLC is also required to appoint one or more supervisors to perform a function similar to that of an inspection committee in an MMLLC.

Finally, both MMLLCs and OMLLCs must appoint a "legal representative" (typically the chairman of the members' council or the chairman or general director of the company) to represent the company before the courts, in dealings with the authorities and so on. Although previously a company was only permitted to have a single legal representative, the new Enterprise Law permits the appointment of multiple legal representatives if the company so desires. In the event a company appoints more than one legal representative, the company's charter must specify the number of legal representatives and their respective titles, rights and obligations.

## **[2] Joint Stock Company**

A JSC (or shareholding company) is a company whose charter capital is divided into shares. Shareholders may be either corporate entities or individuals. A JSC must have a minimum of three shareholders, with no restriction on the maximum number of shareholders. JSCs may be closely held as well as listed or public companies (in Vietnam, a JSC is the only corporate form that may be a listed and/or public company).

The highest decision-making body of a JSC is its general meeting of shareholders. A JSC is managed by a board of management<sup>5</sup> and a general director. A JSC with more than eleven individual shareholders, or one shareholder who owns more than 50% of the total number of shares, is required to have an inspection committee that has a role similar to the equivalent body in an MMLLC and reports directly to the shareholders.<sup>6</sup>

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4. Sometimes also referred to as a "supervisory board".

5. Although referred to as a "board of management" in the Vietnam context, the role is similar to that of a board of directors in common law jurisdictions. For the sake of consistency with Vietnamese legal terminology, the term "board of management" is used throughout this chapter when referring to the board of a JSC.

6. Article 134 of the Law on Enterprises.

If a JSC does not have an inspection committee, at least 20% of the members of the board of management must be independent and there must be an internal auditing committee under the board of management.<sup>7</sup> The chairman of the board of management or the general director – as determined by the company’s charter – serves as the legal representative of the company, and if the charter is silent then the chairman of the board of management is the legal representative by default. If the company elects to have more than one legal representative, then both the chairman of the board of management and the general director will be legal representatives of the company.<sup>8</sup>

**[C] Definition of “Director”**

No general definition of “director” exists under Vietnamese law. However, the respective role, authority and obligations of the various directors and officers of LLCs and JSCs are set out in the Enterprise Law as well as its implementing regulations and certain sector-specific legislation (e.g., the securities regulations applying to listed and/or public JSCs and banking laws applying to credit institutions). By way of example, Article 160 of the Enterprise Law provides that the members of the board of management, the general director and other managers of a JSC are under the obligation to, *inter alia*, act in accordance with the law, the company’s charter and shareholder resolutions; exercise their rights in a fiduciary and diligent manner to maximize the benefits for the company; avoid using company information for their own benefit or the benefit of third parties; and disclose personal investments and holdings in other companies.

Given the still nascent state of Vietnamese corporate law, there is no concept of “shadow director” or that of a director without appointment or election.

**[D] Chairman/CEO (General Director)**

In Vietnam, there is with limited exception (e.g., in the case of a JSC in which the State holds more than 50% of the total number of shares) no legal or statutory requirement that the roles of chairman and general director of a company must be separate.<sup>9</sup> A company’s charter may, however, prescribe that the general director may not concurrently be the company’s chairman. As is not uncommon in Southeast Asia, numerous leading private companies are family owned and often dominated by a single person or founder who serves as both chairman and general director. However, for listed and/or public companies it is more common to separate these roles.

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7. Article 134 of the Law on Enterprises.

8. Article 134 of the Law on Enterprises.

9. Article 152.2 of the Law on Enterprises.

**[E] Board Structures**

For MMLLCs, there is no minimum or maximum number of members<sup>10</sup> or authorized representatives of members to constitute the members' council.<sup>11</sup> For OMLLCs that have established a members' council to manage their operations, however, the members' council must have a minimum of three and a maximum of seven members appointed by the sole member.<sup>12</sup> In each case, the chairman of the members' council is elected from among its members.

Members of LLCs appoint authorized representatives to represent a specific portion of the equity held by the appointing members, and such representatives' voting rights on the members' council are proportional to the equity that each of them individually represents. If more than one supervisor is appointed within an OMLLC, these supervisors do not form a board in its proper meaning but share joint liability to the company owner in exercising their duties.

The board of management of a JSC must be comprised of at least three and a maximum of eleven members. The JSC's charter may prescribe the specific number of board members or leave it to the general meeting of shareholders to determine the number from time to time. The chairman of the board of management is elected from among its members. Members on the board of management of a JSC have one vote each, and the chairman has a casting vote.

Inspection committees of a JSC have a minimum of three and a maximum of five members. The chairman of the inspection committee is elected from among its members and, except where the company's charter sets higher standards, must be a professional accountant or auditor and must work full-time in the company. More than half of the members of the inspection committee must reside permanently in Vietnam.<sup>13</sup>

As regards the board of management, the concept of "independent directors" is relatively new to Vietnam. As noted above, a JSC without an inspection committee must have at least 20% independent members on its board of management, while at least half of the members of the board of management of a commercial bank must be nonexecutive and independent according to certain specified criteria.<sup>14</sup>

**[F] Directors' Elections/Staggering and Directors' Term of Appointment**

An investor/member who is an individual and serves directly as a member of the members' council of an MMLLC or OMLLC is not subject to appointment. Authorized representatives (who represent the relevant investors/members on the members'

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10. Save that the maximum number of investors is fifty, cf. s. I[B] above.

11. Note, however, that specific requirements apply to credit institutions whose board of management must have a minimum of five and a maximum of eleven members. (Article 62.1 of the Law on Credit Institutions 47/2010/QH12 passed by the National Assembly dated June 16, 2010.)

12. Article 79 of the Law on Enterprises.

13. Article 163.2 of the Law on Enterprises.

14. Decree 59/2009/ND-CP of the Government dated July 16, 2009 on the organization and operation of commercial banks.

council), on the other hand, are appointed directly by such investors/members and are registered with the local business registration authorities. The term of the latter is not limited in time unless specified as such in the company's charter. The chairman of the members' council is elected to a five-year term and may be re-elected from time to time.<sup>15</sup>

The term of inspectors/supervisors may be from one to five years as set out in the company's charter, with reappointment possible from time to time.<sup>16</sup>

The members of the board of management and the inspection committee of a JSC are elected by the general meeting of shareholders. It is common for the charter of a JSC to provide that the election is carried out by way of cumulative voting. However, the default provisions under the Enterprise Law are such that "major shareholders" (those holding individually or jointly at least 10% of the voting shares for at least six months) are given broad rights to nominate candidates to both the board of management and the inspection committee.<sup>17</sup> Under the Enterprise Law, the term of the members of the board of management may not exceed five years.<sup>18</sup> The term of the inspection committee is also a maximum of five years, with the specific term to be detailed in the charter. However, individual members of both the board of management and the inspection committee may be re-elected without limitation, and it is therefore a matter of discretion of the shareholders to decide on the continuity in the activities of the board of management and/or inspection committee by way of re-electing individual members.

#### **[G] Delegation**

Members of the members' council of an LLC as well as members of a board of management of a JSC may delegate their management and voting rights as members to another person. This is normally done on an ad-hoc basis rather than in a comprehensive manner. Members of the board of management of commercial banks, however, are not entitled to delegate their rights and obligations to nonmembers. The chairman of either the members' council of an LLC or the board of management of a JSC may only authorize another member to act as chairman in his or her absence.

Supervisors and members of the inspection committee may not delegate their legal obligations to other persons. They may cooperate with employees in fulfilling their duties, but remain responsible for the proper discharge thereof.

#### **[H] Removal of Directors**

The removal of directors (including authorized representatives, members on the board of management, supervisors and members of the inspection committee) is generally possible at any time by the member or members (for LLCs) or by the general meeting

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15. Articles 57 and 79.3 of the Law on Enterprises.

16. Article 82 of the Law on Enterprises.

17. Article 114.2 of the Law on Enterprises.

18. Article 150 of the Law on Enterprises.



of shareholders (for JSCs). Whether it is a legal requirement to appoint a new director concurrently with the removal of an existing director depends on the specific details of the company's governance system. This may be relevant, for example, where the charter provides for a specific number of members of the board of management or where, absent a new appointment, the number of remaining members would fall under the minimum threshold set out by the Enterprise Law or the company's charter.

## **II RECENT CASES DEALING WITH DIRECTORS' LIABILITY**

Vietnamese courts are not required to publish their judgments or decisions, but do, however, occasionally issue press releases or have the content of their rulings reported by the media.

In a case reported in January 2010, the former general director of Jetstar Pacific JSC, a State-owned airline in Vietnam with Australian Jetstar as a minority shareholder, was arrested and prosecuted for "lack of responsibility causing serious consequences" on the grounds that the airline lost approximately USD 31 million through its fuel hedging operations. Because of its partial State ownership, the basis for the prosecution arose from criminal provisions requiring the diligent use of State assets rather than the provisions of the Enterprise Law, although the general director may also be liable under the provisions of the latter. Two foreign directors of the airline (the chief operating officer and one financial officer) were ordered not to leave Vietnam so as to cooperate with the Vietnamese authorities in their investigations. Reportedly, the Vietnamese State audit agency had concluded that the general director did not apply industry-acknowledged principles for fuel hedging, did not strictly comply with the board of management's decision specifying how the company was to limit its exposure to kerosene price fluctuations and failed to fully report the financial situation of the airline to the board of management when the company started incurring losses.

More recently, in April 2014, the former general director of Bao Viet Group and Bao Viet Insurance Corporation (a majority State-owned banking and insurance company) was arrested and charged with "irresponsible behavior causing financial loss to the State" after an investigation revealed that the company illegally paid commissions to its insurance agents, causing a loss to the State budget of VND 4.5 billion (approximately USD 214,200). The illegal commission payments and the resulting loss to the State were attributed to the general director's failure to adequately supervise the company's activities.

## **III JUDICIAL REVIEW**

The concept of directors' liability is not well developed in Vietnam and, in practice, remains relatively untested. As noted above, court rulings are not typically published and it is therefore difficult to undertake any empirical evaluation of the issue with a reliable degree of precision. Although there have been a small number of reported cases where directors have been held personally liable (in most cases facing

administrative or criminal prosecution) for a company's failure to comply with tax and social insurance obligations, civil cases brought by a company against a current or former director remain rare.

#### **IV TYPICAL SCHEMES/BEHAVIOR TO AVOID DIRECTORS' LIABILITY**

As noted above, companies would be well advised in practice to set out the specific obligations of directors and officers, as well as the consequences for breaches thereof, in the relevant appointment or assignment documentation. These documents frequently include director/officer indemnification provisions (cf. also section VII below), and it is also becoming more common for companies to take out directors' and officers' (D&O) insurance for the benefit of directors and senior management (cf. also section VIII below).

#### **V CORPORATE GOVERNANCE**

The continuing refinement of the Enterprise Law has kept the issue of corporate governance in the spotlight. In practice, however, Vietnamese companies rarely go beyond basic regulatory requirements in structuring their internal governance framework. Domestic companies with significant foreign ownership are an exception, as foreign investors (in particular foreign investment funds) often seek to pass along their own "best practices" to their Vietnamese partners and portfolio companies. Foreign-invested companies will also tend to follow the corporate governance regime of their home or head office jurisdiction, at least to the extent such regime does not conflict with local legal or regulatory requirements.

Neither the State Securities Commission (the regulator of listed companies) nor the Vietnamese stock exchanges in Ho Chi Minh City or Hanoi have instituted any governance codes. In 2014, the Hanoi Stock Exchange published a handbook of recommended principles for corporate governance, although it is unclear to what extent (if at all) it has influenced local governance practices.

#### **VI LIABILITY ISSUES**

As noted in section I[C], the Enterprise Law sets out a number of principal obligations owed by directors to the company. These include, among others, fiduciary duties and the obligation to act in a lawful manner. In particular, members of the board of management of a JSC are required to comply with Vietnamese law, the company's charter and the resolutions of the shareholders in exercising their duties to the company.<sup>19</sup> In addition to this general requirement to act only within the legal framework binding the company, the liability of directors is also addressed in various civil, administrative and criminal provisions and regulations.

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19. Article 149 of the Law on Enterprises.

**[A] Who Can Sue?**

Directors owe duties first and foremost to the company and not to its owners or shareholders. A company is represented in court proceedings by its legal representative (typically either the general director or the chairman of its board of management, as determined by the charter); however, in cases where the company is alleging breaches by the legal representative him- or herself, the company would be represented by either the chairman of the board (where the general director is the legal representative) or its general director (where the chairman is its legal representative).

A shareholder or group of shareholders owning at least 1% of the number of ordinary shares of the company for six consecutive months or more has the right, on its own behalf or on behalf of the company, to initiate a legal action against a member of the board of management or the general director.<sup>20</sup> Shareholders who have owned shares in the company for at least one year may also require the board of management to suspend the implementation of a resolution of the board of management that has been adopted in breach of legal or statutory requirements. A member of an MMLLC may bring a claim against a director who fails to fulfill his or her obligations and thereby causes losses to either the company or the relevant member directly.

The Enterprise Law contains a number of provisions aimed at protecting creditors of the company (e.g., Article 115.1 of the Enterprise Law prohibiting shareholders from withdrawing their share capital), and the company's directors may be liable in the event any of these provisions are breached. However, in principle only the company is authorized to bring an action against the relevant directors in these circumstances.

**[B] Who Can Be Sued?**

Any director and certain officers may be sued by the company for breach of their duties. This includes, in particular, members of the members' council, the general director and the legal representative of an LLC as well as its supervisor(s). For JSCs, the members of the board of management, the members of the inspection committee, its general director and its legal representative may be sued. Although the circumstances giving rise to liability will vary for each of these positions, by way of example, in the event the board of management adopts a resolution in breach of legal or other requirements and the implementation of such resolution causes damages to the company, the board members who voted in favor of the resolution may be jointly liable to compensate the company for its loss.

**[C] "De Facto" Director**

In Vietnam, only formally appointed or elected directors have the status of directors and potential liability as such. There is no concept of de facto or shadow directors in Vietnam.

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20. Article 161 of the Law on Enterprises.

**[D] Thresholds and Limitations/Caps of Liabilities**

No statutory thresholds or limitations apply to the liability of directors in civil matters (save for typical limitation periods). Criminal or administrative fines, on the other hand, are subject to the respective maximum set out by law for the relevant breach. It is also possible for the company and its director to agree contractually (e.g., in the director's appointment letter or service contract) that the directors' liability vis-à-vis the company will be capped at a certain amount. Such limitation would not, however, protect a director where he or she is held directly liable to a creditor of the company and would have no effect against third parties pursuing a claim.

**[E] Joint Liability/Solidarity**

Vietnamese law specifically provides for joint liability of directors in certain circumstances. For example, Article 149.4 of the Enterprise Law makes board members who vote in favor of a resolution in breach of the law or the company's governing statutes jointly liable to compensate the company for any loss resulting therefrom. Vietnam's Civil Code also provides generally for joint liability of multiple persons who have jointly caused damage, although amongst themselves they are only liable to the extent that their action or omission has contributed to the damages.<sup>21</sup>

**[F] Derivative Actions**

Shareholders have limited rights to bring a suit against the company's management. However, as noted in section VI[A] above, shareholders owning at least 1% of the company's ordinary shares for six consecutive months or more may initiate a legal action against the company's management, either on their own behalf or on behalf of the company, while those who have owned shares for at least one year may require the board of management to suspend the implementation of a resolution adopted in breach of legal or statutory requirements.

**[G] Class Actions**

Vietnam's civil procedure code does not recognize any class action in its strict meaning. Multiple plaintiffs may, however, pursue a joint claim against a director in the same proceedings under Article 163 of Vietnam's Civil Proceedings Code.

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21. Article 616 of the Civil Code No. 33/2005/QH11 passed by the National Assembly dated June 2005.

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**[H] Significance of Bankruptcy of Corporation**

Under Articles 5.3 and 5.4 of the Law on Bankruptcy, a company's legal representative, chairman of the board of management (for a JSC) and chairman of the members' council (for an LLC) are obliged to file for bankruptcy if the company falls into insolvency. Failure to do so can expose such individuals to administrative sanctions.

**VII INDEMNIFICATION**

There is no general statutory indemnification for a director who is held liable to the company or a third party in connection with the performance of his or her duties. It is common, however, for the company to agree contractually with its director(s) that the company will indemnify the director(s) in the event he or she is held liable to a third party for debts or obligations that were initially those of the company.

**VIII D&O INSURANCE**

As with the concept of directors' and officers' liability, D&O insurance is only gradually taking hold in Vietnam. Previously, mainly foreign-invested companies provided such insurance coverage for their management personnel in Vietnam with the insurance policies being part of a regional D&O insurance arrangement and underwritten by international insurers. Although Vietnamese insurers now offer D&O insurance coverage directly to both domestic and foreign-invested enterprises in Vietnam, it is not yet the norm for domestic Vietnamese enterprises to provide such coverage to their directors and senior management personnel.

**IX OTHER METHODS OF PROTECTION**

See sections IV, VII and VIII above.

**X LAWYER DIRECTORSHIP**

Lawyer directorship is not common in Vietnam, although lawyers are at times appointed as "temporary" members of the board of management or even as a company's general director when a company is newly formed.

**XI FORECAST ON FUTURE LEGISLATION DEVELOPMENT**

Implementation of the new Enterprise Law is ongoing and, with time, is hoped to bring additional clarity and transparency to the interpretation and application of matters of directors' and officers' liability.