the Corporations Act. Section 251A of the Corporations Act requires that signed minutes be kept of all board meetings. Section 248D of the Corporations Act allows a meeting of directors to take place using any technology that has been consented to by all of the directors.

[B] Structures of Oversight (Mechanisms, Etc.)

The appointment by the board of a secretary under section 204D of the Corporations Act is designed to ensure that the company complies with certain statutory obligations such as maintaining a registered office (as required by section 142 of the Corporations Act), lodging notices of the names and addresses of the company's directors and secretaries with ASIC (as required by section 205B of the Corporations Act), notifying ASIC of the issue of shares (as required by section 254X of the Corporations Act), lodging the company's annual financial reports (as required by section 319 of the Corporations Act), and complying with the Listing Rules.

Shareholders who hold more than 5% of the votes that may be cast at a general meeting, or a group of 100 shareholders acting together, have the right to:

- call meetings under section 249D of the Corporations Act;
- propose to move a resolution at a general meeting under section 249N of the Corporations Act; and
- under section 249P of the Corporations Act, provide a statement to be circulated to all members either about a resolution or about any other matter that may be properly considered at a general meeting.

VII LIABILITY ISSUES

[A] Who Can Sue?

[1] The Company and Individual Shareholders

The company may, via its board of directors, bring an action to seek compensation for a breach of fiduciary duties by an officer of the company or a director under section 1317J(2) of the Corporations Act.

Current or former shareholders or officers of the company also have a limited right to bring an action against a director or other officer of the company under section 237 of the Corporations Act. A court will grant leave to bring an action if, among other things:

- it is probable that the company itself will not bring proceedings; and
- the applicant is acting in good faith and has notified the company in advance; and
- it is in the best interests of the company that leave be granted; and
- there is a serious question to be tried.

[2] Australian Securities and Investments Commission

ASIC may apply to the court for a declaration that a director or other officer has breached a duty imposed by the Corporations Act. If ASIC is successful, civil penalties may be imposed or an order to pay compensation to the company may be made under section 1317J(1) of the Corporations Act against that director or other officer. ASIC may also seek an injunction to restrain a director or officer from engaging in specific conduct or to require a person to do a specific act or thing under section 1324 of the Corporations Act. ASIC is most likely to take action in circumstances where the company has become insolvent or is experiencing financial difficulties.

[3] Creditors

Creditors generally have no legal right to take action against a company's directors or other officers for an alleged breach of fiduciary duties, although this is not settled and action may be possible under section 1324 of the Corporations Act. Where insolvency is an issue, a creditor does have a limited right against the former directors and officers of the company to seek compensation under sections 588R-588U of the Corporations Act.

[B] Who Can Be Sued?

Directors are subject to all fiduciary duties whilst alternate directors are subject to those duties to the extent of their participation as directors. There is case law which suggests that the chairperson of a listed company holds duties and liabilities specific to that role that are additional to those owed and borne by other directors (*ASIC v. Rich and Ors*).[5]

De facto directors are also subject to all of the fiduciary duties of directors. Under section 9 of the Corporations Act, one may be considered a de facto director even if there was a procedural defect in his or her appointment as a director, if he or she acts in the position of a director or the directors of the company are accustomed to acting in accordance with the person's instructions or wishes. Depending on reporting and operational parameters, the CEO (if not a managing director) and senior executives of a company may well be considered de facto directors.

'Shadow directors' are people who are able to have directors act in accordance with their instructions or wishes and, under section 9 of the Corporations Act, are also subject to all the fiduciary obligations as though they were actually a director of the company. Other officers of the company (including the company secretary, CEO, and senior executives) are subject to most of the fiduciary duties of directors. These duties apply to anyone who makes or participates in decisions that substantially affect the business or financial standing of the company.

5. [2004] NSWSC 836.

[C] Sellers' Liability as Former Directors of the Target

In the context of an acquisition, the Court of Appeals of Brussels (Brussels, 8 September 2011, *RPS*, 2011, p. 563) held the sellers liable in their quality as former directors of the target. The buyers discovered unreported liabilities after the acquisition and as new shareholders successfully argued that the sellers in their quality as former directors of the target had not duly performed their mandate in regards to the accounting and tax obligations of the company and could thus be held liable towards the company and be condemned to indemnify that loss.

[D] Information Duties

The chairperson and the managing director of a listed banking group have been imposed an administrative fine of EUR 400,000 each for improper information of the market. Indeed, the Belgian Financial Services and Markets Authority (FSMA) ruled that the two directors violated several provisions of financial law by failing to communicate to the market information which would have influenced the stock exchange prices and instead knowingly communicating false or misleading information. On appeal, the Court of Appeals of Brussels (Brussels, 24 September 2015, *www.fsma.be*) affirmed but halved the fines.

[E] False or Inexact Balance Sheet

The directors and the statutory auditor of a bankrupt listed company have been condemned for false or inexact balance sheet and to corresponding damages. In the (in)famous 'Lernout & Hauspie' case, the Court of Appeals of Ghent (Gent, 22 September 2010, *www.juridat.be/beroep/gent/images/arrest_H_L.pdf*) sentenced several company directors and officers to up to five years of prison and corresponding damages for fraud, forgery, false or inexact balance sheet and for manipulating the stock exchange prices. The auditor was held criminally liable for negligent discharge of his duties to control the accounts because he gave an unqualified certification to the financial accounts without ensuring that all applicable accounting provisions and standards had been respected. The Court held the condemned parties in principle liable for civil damages but reserved to rule on the amount thereof.

V JUDICIAL REVIEW

As already observed, through the influence of the Corporate Governance Codes and due to more extensive financial regulation, the rules by which the directors must abide have become stricter and more numerous.

However, when assessing the liability of a director, the Court must at all times exercise a 'marginal' assessment, meaning that it can only hold directors liable for wrongful behaviour when that behaviour exceeds the leeway enjoyed by every director. The judge must not only not exercise hindsight: he should not substitute his

own assessment to the one of the director. Subsequent events such as the bankruptcy of the company can under no circumstances be taken into account by the judge.

Those principles have as a consequence that the courts essentially hold directors liable only when the fault is rather clear-cut. The intention is to avoid that directors fear the *a posteriori* appreciation of their management decisions, to the point that they would end up choosing the safer option, although the riskier one could bear more profits and thus be in the interest of the company.

VI DIRECTORS' LIABILITY INSURANCE

The financial consequences of the liability of directors can be limited by subscribing a directors' liability insurance. Directors and officers insurance has become quite common in Belgium and it is typically subscribed to by the company, rather than directors themselves. While wilful misconduct is excluded by law from any insurance coverage, faulty negligence can be covered.

Criminal fines cannot be covered by insurance; damages due as a consequence of crimes can be covered, but only if the crime was not committed with fraudulent intent (*intention frauduleuse/ bedrieglijk opzet*).

VII INDEMNIFICATION

The financial consequences of the liability of directors could also be covered by an indemnification granted by one or more shareholders. Indeed, as often directors represent the majority shareholding of the company, if the latter did not bring proceeding against them, it could wish to make a 'friendly gesture'.

This indemnification can be for instance granted based on a 'hold harmless clause', i.e., a provision transferring the financial consequences of the liability, but the scope thereof cannot include criminal offences, wilful fault and fraud.

VIII OTHER METHODS OF PROTECTION

[A] Reporting Faults

Each director can protect himself against being held liable for faults to which he did not partake by denunciating them either at the first shareholders' meeting or board meeting after the moment he became aware of the said fault. Such denunciation shall be recorded in the meeting's minutes.

A belated denunciation of absence of recordation in the minutes does not always preclude from invoking this cause of excuse if, for instance, the director can prove that particular circumstances prevented him from attending the said meeting or that the recordation of the denunciation was refused.

The board is responsible of the safekeeping of the corporate books and records. It must ensure that they are being kept in order and with the regularity required by law.

[D] Independent Directors and Directors' Committee

Public corporations which have a market capitalization equal to or higher than 1,500,000 *unidades de fomento* (U.F.) (approximately USD 58 million at the beginning of 2016), and in which at least a 12.5% of their outstanding voting shares belong to shareholders or groups holding less than 10% each, must have at least seven directors; in which case, at least one board member must be an independent director and the board of directors must constitute a directors' committee composed by three board members in which the independent director must participate.

Independent directors are elected in the same shareholders' meeting as the rest of the directors, but in order to present their candidacy they have to submit to the company before their election affidavits declaring that they comply with the law requirements to qualify as independent and that they agree to keep their independency during the whole term of office.

To qualify as an independent director, the candidate shall not: (i) maintain any link, interest or any relevant economic, professional, credit, or commercial dependency with the corporation, its affiliates, its controller or its main executives, and should not have been director, manager, administrator, main executive or consultant of them; (ii) be kindred to the persons mentioned in (i) above; (iii) served as a high level executive of a not-for-profit organizations that have had a relevant contribution from the persons mentioned in letter (i) above; (iv) be or have been partners, shareholders, directors, managers or main executives of entities that have rendered legal consultancy or external auditing, to persons mentioned in letter (i) above; and (v) be or have been partners or shareholders holding directly or indirectly, 10% or more of the equity or; directors; managers; administrators or main executives of the main competitors, suppliers or clients of the corporation.

The director's committee is comprised by three directors; independent directors must be part of the directors committee, unless they are more than three, in which case the board shall decide among them, who will become members of the committee, giving preference to those members elected without the votes of the controlling shareholder or its related persons. If the company has only one independent director, the other two are appointed by the independent director among the rest of the board members. If the company has only two independent directors, the third member is appointed by the board.

The director's committee shall: (i) examine the reports from auditors, as well as financial statements to be submitted to the shareholders; (ii) propose to the board of directors potential candidates for external audits and rating agencies; (iii) review related party transactions before their approval by the board or the shareholders' meeting; (iv) examine compensation systems and plans for executives; (v) prepare an annual report of its activities, which will include their recommendations to shareholders; (vi) advice the board of directors whether it is convenient or not to hire the

company's external auditing company for additional services; and (vii) other matters that may be included in the bylaws, or required by the shareholders' meeting or board of directors.

[E] Executive Officers

The board of directors shall appoint one or more managers or executive officers and set their attributions, responsibilities, and duties. The position of manager is incompatible with the one of chairman, auditor or accountant of the company, and, in public corporations, even with the position of director. The board may replace managers at its discretion.

The general manager represents the company judicially. He or she has the right to speak at the board and the shareholders' meetings and will be the secretary of those meetings unless another person is especially appointed. He or she has to report on the course of the company's business to the board and to each director in particular (as requested).

The law imposes to the managers the same rules of liability that the ones upon directors, to the extent compatible with the functions and duties inherent to their positions. They must act with the care and diligence that normal people use ordinarily in their own businesses. The general manager is liable for all resolutions that he makes that are detrimental to the company and to the shareholders, together with the board members, unless his or her opposition is recorded in the minutes.

II DUTIES OF DIRECTORS

Chilean law seeks that directors adopt appropriate resolutions pursuing the best interest of the company, and not of a specific shareholder; board decisions must come as a result of a diligent procedure, based on sufficient information and good faith.

[A] Duty of Care

The LSA provides that board members must use in performing their role the care and diligence that normal people use in their own businesses, and shall be joint and severally liable of any damage caused to the corporation and its shareholders for any fraudulent or negligent actions.

The directors must dedicate the necessary time and effort to follow the matters proposed by the company's management and gather and obtain sufficient information, collaboration, or assistance as they deem appropriate. In order to perform the duty of care, each director has the right and obligation to request information about the company in any moment and such information shall be promptly delivered to him by the management. The board of directors can hire experts in order to determine if a specific transaction in which one or more directors have interest is being executed pursuant to market conditions. Also, a director has the right to request board meetings when he deems it appropriate.

or European Economic Area (EEA), which must have an audit committee. Where committees exist, they will not, as a point of departure, serve to exonerate the directors of the board of directors, supervisory board, or management of liability either. However, should committee members become privy to information which they do not share with the remaining board or management, this may well serve to exonerate the remaining board members. The establishment of a committee may also clarify the division of tasks on the board of directors and this may affect the assessment of each board member's liability, as this is assessed individually.

[C] Directors in Listed Companies

In addition to the Companies Act, a number of special regulations, which are, in all essentials, the result of an incorporation of the EU directives within the capital market area, apply to companies with shares listed or traded on the Copenhagen Stock Exchange. The capital market regulations applying to listed companies all reflect a tightening-up in relation to the rules in the Companies Act and the Presentation of Accounts Act applying to unlisted companies. The main scope is capital market regulation in order to ensure that relevant and correct information is accessible not only to shareholders but also to the capital market as such.

The capital market regulation does not contain rules on liability specifically applicable to listed companies and their corporate directors. A special problem relates to a public offering where the prospectus later proves to have been misleading or incorrect. Court practice (although scarce), shows that the liability of corporate directors regarding prospectus liability will be judged according to the general rule of negligence in Danish law (cf. UfR 2002, 2067). In this case, after the subscription of shares in a public limited company (Hafnia), the company went bankrupt. The Supreme Court stated that the prospectus could be criticized. However, the Court held that it was a prerequisite for incurring liability that missing or incorrect information in the prospectus had been of material importance to the assessment of the company. The prospectus contained information regarding the severe situation of the company, and the Supreme Court held that such defects of material importance were not present. The Supreme Court therefore did not impose liability on the issuing house or the accountants.

III RECENT CASES DEALING WITH DIRECTORS' LIABILITY

[A] Introduction

The general rule on liability in the Companies Act only states the scope and main terms for imposing liability on the company directors. Accordingly, it is left to the courts of law to complete the rules as cases on liability are submitted to them. Below are listed some of the recent cases dealing with directors' liabilities.

[B] Liability for Violation of the Companies Act

Liability is incurred if, for instance, the board either does not appoint a manager or allows the company to carry out activities in conflict with its objectives. It is important to emphasize that failing business acumen, incorrect estimates, and similar matters are usually only subject to liability if it is subsequently established that the board at an earlier time saw or ought to have seen that the operation was or would be unprofitable and despite that failed to interfere. An assessment of risk made on reasonable and informed basis will not incur liability even if the subsequent actions prove to be the wrong course of action. Thus, the 'business judgment rule' applies in Danish law. However, in UfR 1995 (p. 43), although the manager believed that the company's problems were temporary, the Supreme Court held that the manager was liable for the continued operations of the company.

Liability may also accrue due to lack of control or inadequate control if the board fails to exercise supervisory management in relation to strategic planning and the duty to set out the policy of the company (cf. UfR 2005, 918). A Danish lawyer was a member of the board of directors in a Canadian company, which had marketed a number of investment projects to Danish investors. Later it turned out that their investments had been lost. The board member had earlier received documentation stating that the investment projects could be without financial substance. The Supreme Court held that the board member should have realized this possibility and that the lawyer had an obligation to investigate the substance of the projects. By not conducting such investigations, the board member had neglected his duty as a board member and was therefore held liable.

In one of the latest cases, UfR 2015 (p. 2075), (Memory Card), the Supreme Court held that a single failure – even though the failure was a material misjudgement – may in certain circumstances be insufficient to incur liability. The chief executive officer and major shareholder of the company had exercised fraudulent financial reporting and made unauthorized stock appreciation on the inventories, which resulted in accounts showing a false positive result in the years leading up to the bankruptcy of the company. The chief financial officer informed the chairman of the board of the fraudulent financial reporting before his resignation and the chairman asked the chief executive officer for a written statement on this which he shortly after received. The written statement was a well-reasoned explanation why the chairman omitted to inform the accountants and the other board members on the alleged fraudulent financial reporting. Based on an overall assessment, the Supreme Court found that a single failure of such a nature could not lead to liability for the chairman.

[C] Liability for Predecessors' or Successors' Acts

It is a prerequisite that the liability for damages due to negligence, which may be advanced against a board member or a manager, can be tracked back to the period

IV THE SECOND EUROPEAN ACTION PLAN OF 2012

In 2012 the European corporate law saw a revival. On 12 December 2012 the European Commission presented a new second European Action Plan.[13] This new plan shall focus on a new modern corporate law and on corporate governance. Overall it deals sixteen new initiatives. The main reason for focusing especially on corporate governance was the financial crisis and the apparently leak of well-functioning corporate governance procedures especially within the financial sector. The European corporate governance approach is based on the principle 'comply or explain'.[14]

The second European Action Plan tries to achieve more transparency between companies and their shareholders, a stronger inclusion of the shareholders into the corporate governance procedures of a company and last but not least to support the growth and cross-boarder business of smaller and midsize companies.[15]

With regard to director's liability the first European Action Plan provided the relevant European basis already.

V PROVISIONS ON DIRECTORS' LIABILITY WITHIN THE EUROPEAN ACTION PLAN

The first European Action Plan includes provisions on:

- capital maintenance and alteration;
- groups and pyramids;
- corporate restructuring and mobility;
- the European private company;
- the European cooperative society and other EU legal forms of enterprises; and
- enhancing the transparency of the national legal forms of enterprises.

In addition, the European Action Plan deals with corporate governance and in particular with the modernizing of the board of directors' structures. The Commission explains its view on directors' liability within this chapter on the European Action Plan.

The Commission confirmed four issues dealing with directors' liability as a matter of EU law to be necessarily harmonized in all Member States:

- the collective responsibility of directors for financial and key non-financial statements;
- a special investigation right of shareholders;

13. Commission of the European Communities, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies', Brussels, 12 December 2012 (COM (2012) 240/2) – hereinafter: The second European Action Plan.
14. *Supra* n. 13, 2 et seqq.; for more details in German: Hopt, Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012, ZGR 2013, 165-215.
15. *Supra* n. 13, 3 et seqq.

- a wrongful trading rule; and
- the directors' disqualification recognized across the EU.

In order to enhance directors' responsibilities, the Commission prefers to introduce in all Member States a collective responsibility/liability of all board members for financial and key non-financial statements (including the annual corporate governance statement of listed companies, which the Commission recommended as a matter of corporate governance in the European Action Plan).[16]

Under the national law of all European Member States, the prevailing principle of collective responsibility has strengthened the collective role of the entire board and has enhanced self-discipline within the board. Individual responsibility of board members could allow some members to have a 'free ride'. Scrutiny of the directors is also enhanced by collective responsibility.[17] Thus such collective responsibility of the administrative, the management, and the supervising board has been extended to financial and key non-financial statements such as the disclosure of the annual accounts, the annual report, and of the corporate government statement, including any consolidated annual accounts and reports.[18]

Hereby, the directors shall at least be liable towards the company for any breach of such disclosure obligation.[19]

Additionally, the Commission, following the recommendations of the high-level expert group, is planning:

- to introduce a special investigation right of shareholders; shareholders holding a certain percentage of shares within a company shall have the right to appeal to the courts or to a special authority for admitting investigations of the company's affairs;
- to develop a wrongful trading rule; directors shall be held personally liable for the consequences resulting from the company's failure, if it was foreseeable that the company could not continue to pay its obligations and the directors did neither decide to protect the company against bankruptcy nor to ensure its ability to pay nor to liquidate the company;
- to establish a directors' disqualification recognized across the EU as a sanction for issuing misleading financial or important misleading non-financial statements or other forms of misconduct.[20]

16. *Supra* n. 7, 16.
17. European Commission, 'European Commission proposal for amending the Accounting Directives – Frequently Asked Questions', Brussels 28 October 2004 [Memo/04/246], 1.
18. Article 50b in connection with Art. 50c of Directive 78/660 EEC; Art. 36a in connection with Art. 36b of Directive 83/349 EEC; Art. 1 of Directive 86/635/EEC; Art. 1 of Directive 91/674/EEC.
19. Article 50c of Directive 78/660 EEC; Art. 36b of Directive 83/349 EEC.
20. *Supra* n. 7, 16.

- The offence in question was committed without his or her consent/knowledge/connivance and he or she was not negligent in ensuring that laws were obeyed.
- An allegation is vague and not specific.
- The company has not been prosecuted along with the director.
- The prosecution is time barred under section 468 of the Code of Criminal Procedure of 1973.
- Under section 633(1) of the Companies Act, the director can seek relief from the court by proving that he or she has exercised all due diligence to prevent the occurrence of the offence, and acted honestly, reasonably, and having regard to all circumstances, ought to be fairly excused.

[D] Apprehension of Prosecution

A director may fear prosecution in case of his or her negligence, default, breach of duty, misfeasance, or breach of trust, and may want to take preventive action. He or she is permitted to make an application to the High Court, under section 633(2) of the Companies Act, seeking grant of relief.

[E] Compounding Offences, a Way Out?

A director against whom prosecution has been launched, or before such action, has the option of seeking compounding of offence under section 621A of the Companies Act. He or she is permitted to make an application to the authority and, if allowed, can avoid prosecution by paying a sum in lieu of a fine. A Company Law Board is empowered to compound offences punishable with a fine and regional director is authorized in respect of a fine up to INR 50,000. Offences punishable with imprisonment or a fine or with both can only be compounded with the permission of the court.

[F] Managing Director/Whole-Time Director/Nominee Director/Professional Director

The positions of managing director, whole-time director, and professional director are different:

- In the case of managing director, courts have usually held that he or she is, prima facie, deemed to be in charge and responsible for the conduct of business and management of the company and therefore liable for defaults.
- Whole-time directors are also in charge of management and affairs of a company and will similarly be held responsible for offences.
- Nominee directors of creditors, institutions, government, joint venture partners, and so forth, generally, do not enjoy any special immunity. Financial

institution nominee directors, however, get immunity under the State Financial Corporation Act. But it must be established that the accused person has acted in good faith.
- The directors who are on the Board by virtue of their technical skill and professional competence are no different from other directors.

[G] Object and Scope of Section 633

In Re Prestolite of India Ltd, the Court observed that the object underlying section 633 of the ICA obviously is to avoid hardship to officers of the company in deserving cases and to relieve them of their liability in cases where they are technically guilty provided they are able to convince the court that they had acted honestly and reasonably and having regard to the circumstances of the case, and they ought in all fairness to be excused from charges or charges made against them. *Acting reasonably* means acting in the way in which a person of a fair dealing with his or her own affair with reasonable care and circumstances could reasonably be expected to act in such case.

Section 633 is comprehensive and includes a large number of officers and employees of the company. Under this section, both the Civil Court as well as the Criminal Court can grant relief. Relief could be given even in respect of acts which are wholly *ultra vires* the company.

[H] Directors' Liability Insurance

It is a widely held misconception that legal action cannot be taken against individual directors or limited liability companies. After the recent corporate developments at Infosys and Polaris, the liability of directors is no longer considered to be limited. Directors' liability insurance policies cover directors, officers, and employees in a managerial or supervisor capacity, for claims made against them in their personal capacity, arising out of their wrongful acts, in their capacity as director, officer, or employee. Such policies reimburse the company to the extent that the company has reimbursed the individual insured in the event of a claim.

Such policy, generally, does not cover:

- deliberate, criminal, dishonest, fraudulent acts or violations of law;
- any liability which the insured was or ought to have been aware of prior to the policy date;
- claims brought by any insured or the company except for employment practice claims;
- discharge or escape of pollutants;
- any act or omission in the insured's capacity as director (etc.) of any entity other than the company; and
- fines and penalties imposed by the competent court on a director.

his/her term or in case the director is disqualified by a court or prohibited from continuing his/her service as a consequence of a decision of the Administrative Enforcement Committee of the ISA (the "AEC").

An external director can be dismissed by the General Meeting before the end of his/her tenure, but only in the event that the director no longer meets one of the conditions required under the Law or if he/she has violated the duty of loyalty.

[5] The Chief Executive Officer

The CEO is appointed by the BOD and is responsible for the day-to-day operations of the company's business. The CEO has all the powers of management and operational powers, which were not designated to another company organ. The CEO is supervised by the BOD, and is obliged to report to the BOD of any extraordinary matters affecting the company.

II DIRECTORS' AND OFFICERS' LIABILITY

[A] Liability Towards the Company

Directors and officers owe fiduciary duties that are comprised of the duty of care and the duty of loyalty. These duties are owed, primarily, towards the company itself, and not towards its shareholders. However, the fact that the primary duty is towards the Company does not preclude similar duties towards another person. Thus, under certain circumstances, directors and officers of the company may also consider the interests of shareholders, creditors, employees and the general public, and may therefore owe such duties to these stakeholders. Still, where there is a conflict between the interests of the company and the interests of other parties, directors and officers must act for the benefit of the company.[3]

[1] Duty of Care

The duty of care of directors and officers towards the company is based on the principles of negligence.[4] Accordingly, directors and officers are expected to act with the standard of care and skill that a reasonable director or officer would exercise in the same position and under the same circumstances. Directors and officers have an obligation to use reasonable means to gather information which is relevant to any action they are required to approve or carry out by virtue of their position.[5]

3. Irit Haviv-Segal, *Corporate Law in Israel* 551 (4Balance Production Ltd. 2007).
4. Section 252 of the Companies Law 5759-1999.
5. Section 253 of the Companies Law 5759-1999.

[2] Duty of Loyalty

Due to the inherent risk of promoting other parties' interests (mainly the interests of the controlling shareholders) over the company's interests, the Law imposes a duty of loyalty on directors and officers.[6] Such duty is imposed in order to ensure that the directors and the officers will act in good faith and in the best interests of the company. This duty includes, *inter alia*, the duty to refrain from any conflict of interest, the duty not to compete with the company, the duty not to personally take for themselves any corporate opportunity which could benefit the company, and the duty to disclose to the company any information relating to its affairs that came into the possession of the director or officer by virtue of his/her position in the company.

[B] Liability Towards the Shareholders

Despite the general principle that the duties of directors and officers are directed towards the company, it appears that under certain circumstances, Israeli corporate law and case law recognize that such duties may also be owed to the shareholders. For instance, according to section 329 of the Law, the BOD is required to express its opinion with regard to the advantages and advisability of a "special tender offer." Accordingly, in certain circumstances, directors and officers may be liable towards the shareholders if they fail to act as expected under the Law. Another example is section 31 of the Securities Law 5728-1968 (the "Securities Law"), which provides that the signatories of a prospectus are liable towards any person who purchased the securities and suffered damages arising from a misleading detail included in the prospectus. This imposes a heavy burden on the BOD's members, a majority of whom are required to sign the prospectus.[7]

Under certain circumstances, where minority shareholders' rights are oppressed, the Israeli courts have allowed the filing of personal claims by the shareholders also against directors and officers. In this regard, it should be noted that the Law also imposes certain duties on the shareholders themselves both towards the company and other shareholders. These include the duty of shareholders to act in good faith and the fairness duty imposed on a controlling shareholder.

[C] Liability Towards Third Parties

According to the Law, the attribution of an action or intent of an organ of the company to the company itself, does not derogate from the personal liability imposed on the individuals serving in one of the company's organs. Thus, if a director or an officer breached his/her duties towards a third party, then such director or officer can be held personally liable for the damage which has been caused.

6. Joseph Gross, *Directors and Officers in an Era of Corporate Governance* 190 (2nd ed., The Israel Bar-Publishing House 2011).
7. Section 22 of the Securities Law 5728-1968.

accordance with Article 1995 of the Civil Code, there is no joint liability among directors for any director's mismanagement pursuant to Article 59(1) of the Law. Where several directors are involved in a specific misconduct, any of them could be held severally liable (*'in solidum'*) for the entire damage caused.

[2] *Liability for Breach of the Law or the Articles of Association (Article 59(2) of the Law)*

The directors are as such jointly and severally liable for any damage caused by their breach of the Law or the articles of association. Any director may be discharged of this liability only if: (i) they were not party to the misconduct, (ii) it was not attributable to them and (iii) they have reported such breach to the first general meeting after he has acquired knowledge thereof. Good faith in itself is therefore insufficient for a director to be discharged from this liability.[20] The directors may not invoke against third parties that any misconduct had been approved by the company's general meeting of shareholders.

[3] *Liability in Tort*

Liability in tort is personal and a director is therefore individually liable for any wrongdoing committed by him/her under Article 1382 of the Civil Code.

[4] *Liability under Criminal Law*

Criminal liability is personal and may thus be incurred by any *de iure* or de facto director whose conduct meets the criteria of any given crime or criminal offence.

[F] Derivative Actions

Creditors of a company may under certain circumstances institute an action on behalf of the company if the latter fails to do so and if such failure harms the company's creditors (Article 1166 of the Civil Code). Since creditors merely exercise a right of their debtor (i.e., the company), any profit from the action returns to the debtor. Creditors may also challenge, in their own name, any fraudulent actions taken by the company depriving them of their rights (Article 1167 of the Civil Code).

The bill no. 5730 relating to the modernization of the Law and the Luxembourg law of 19 December 2002 on the trade and companies register and the accounting and annual accounts of companies (hereinafter the *'Voted Bill'*), which was voted on by the Luxembourg Parliament on 13 July 2016 but yet has to enter into force, entitles any minority shareholder(s) and holder(s) of beneficiary certificates having, at the general

20. Cour d'appel Luxembourg, Cour, 27 February 1973, *Pas. lux.* 23, 482, 485.

meeting resolving on the discharge, at least 10% of the voting rights attached to all such securities to take legal action against the directors or members of the supervisory board on behalf of the company.

[G] Relevance of Bankruptcy of the Company with Respect to Directors' Liability

In the vicinity of a company's bankruptcy, specific duties are incumbent on the directors and the specific liability rules set forth in the Luxembourg Commercial Code may apply notably where it is established that the directors' misconduct has contributed to the bankruptcy of the company.

The directors of a company that is unable to pay its debts when they become due (*'cessation de paiements'*) and is no longer able to raise any credit (*'ébranlement du credit'*) shall, within one month thereof, file for the bankruptcy of the company at the clerk's office of the competent commercial court. If the directors omit to act in accordance herewith, they may be sued, under certain circumstances, for negligent or fraudulent bankruptcy, both of which constitute criminal offences under Luxembourg law (Articles 573-578 of the Commercial Code).

Where a director has contributed to the company's bankruptcy by gross and manifest negligence (*'faute grave et caractérisée'*), the competent commercial court may pursuant to Article 444-1 of the Commercial Code declare that this director be prohibited from exercising any commercial activity or function as director, auditor or any function conferring a power to bind a company during a period ranging from one to twenty years.

In the event of the company's bankruptcy, a director may be deemed personally accountable for the bankruptcy and consequently liable for all debts of the company if the conditions set forth in Article 495 of the Commercial Code are met. In particular, the directors may be declared personally liable if they: (i) on behalf of the company, acted in their own interest; (ii) disposed of the company's property as their own; or (iii) improperly pursued, for their own benefit, an operating deficit when it was clear that this would lead to a suspension of payments.

Moreover, in the event of a deficiency of assets, the court may, upon request of the bankruptcy trustee, order the directors to bear, jointly or severally, the debts of the company if their gross and manifest negligence contributed to the bankruptcy of the company (Article 495-1 of the Commercial Code).

VI INDEMNIFICATION

Indemnification of directors against financial consequences of legal actions aiming at the directors' personal liability is, within certain limits, permitted under Luxembourg law. Any such indemnification must be in the corporate interest of the company providing it and may not cover gross negligence, wilful misconduct, fraud or criminal sanctions. In view of the considerable liability and financial risks inherent to a

[C] 'De Facto' Directors

Unlike in some other jurisdictions, there does not exist a notion of de facto or 'shadow' directors as opposed to de jure directors. In practice, for smaller companies, a shareholder may act as both the shareholder and the executive director, or in some cases as a go-between for the actual management team and the other shareholder(s). In terms of larger companies, these structures are generally more clear.

[D] Thresholds and Limitations/Caps of Liabilities

While the Company Law sets out provisions regarding the liability of governing persons, including directors, it does not provide for a mechanism under which members of the Board can limit their liability. In practice, such limitation of liability of the members of the Board may be implemented by including relevant language in the company's charter, internal regulations and/or contracts with Board member(s).

[E] Joint and Several Liability

Article 84.6 of the Company Law establishes personal liability for governing persons for their unlawful actions. Article 84.8 states that in the event the company has suffered a loss as a consequence of a resolution of the Board, those Board members who voted against such resolution or who did not participate in the meeting shall be freed from liability. Article 84.9 of the Company Law also acknowledges that liability can be jointly imposed.

[F] Derivative Actions

The Company Law does not provide for procedures under which a derivative action can be taken by shareholders of a company to bring a court claim. However, as noted above, a holder of 1% or more of a company's common shares may file a claim with the court against a governing person of the company for any loss or damage caused to the company.

[G] Class Actions

Mongolian law does not contemplate class action suits, although shareholders may combine their claims before the court at the judge's discretion.

[H] Relevance of Bankruptcy of Corporation

The Law on Bankruptcy ('*Bankruptcy Law*'), enacted on 20 November 1997 governs the commencement and determination of bankruptcy proceedings and the restructuring or liquidation of an insolvent business entity. Under the Bankruptcy Law, a debtor

is considered insolvent when it is unable to fulfil its obligations in the amount equal to or higher than the value of 10% of its equity by the deadline specified by law or contract. A creditor's request for starting voluntary bankruptcy proceedings needs to describe the grounds for considering the debtor to be insolvent, proposals for restructuring or liquidation, and other provisions as specified in the Civil Code. However, due in part to the fact that the legislation has not been updated, there is little precedent on bankruptcy proceedings in Mongolian commercial practice. Individual bankruptcy is not recognized under Mongolian law.

VI INDEMNIFICATION

Governing persons are liable for 'losses' arising from a violation of the Company Law. The concept of 'losses' is defined broadly under Article 227.3 of the Civil Code.

Where a person has had his or her rights violated, he or she may claim losses, including expenses incurred by such a person to restore violated rights, actual monetary losses or damage to property, as well as lost profits.

Under the Civil Code, a person who has not performed an obligation or has performed it improperly is liable when there is fault (intentional or negligent), unless another basis for liability is established in a specific law or a particular contract. This liability standard applies to acts and omissions of governing persons. Accordingly, fault includes both negligent and intentional conduct.

VII DIRECTORS' AND OFFICERS' INSURANCE

As noted above, a company's charter may limit the personal liability of directors for monetary damages related to breach of duty. In practice, it is not common for domestic companies to enter into insurance policies offered by insurance companies that provide for protection in the event of any actual or alleged error, misstatement, omission, misleading statement, or breach of duty by the directors and officers of the company. However, we note that insurances for contractual and legal liability are included in the list of voluntary insurances permitted in Mongolia adopted by the Financial Regulatory Commission.

VIII OTHER METHODS OF PROTECTION

An agreement between the governing persons and the company could attempt to contractually limit the liabilities of the governing persons, but it is not clear whether such agreement would be legally enforceable.

- Shareholder relations: the board should foster constructive relationships with shareholders that encourage them to engage with the entity.
- Stakeholder interests: the board should respect the interests of stakeholders within the context of the entity's ownership type and its fundamental purpose.

[C] NZX Discussion Document

In November 2015, NZX released its own governance discussion document.[13] NZX has drawn upon the FMA Corporate Governance in New Zealand Principles and Guidelines and the Australian Corporate Governance Council Corporate Governance Principles and Recommendations.

NZX proposes to implement a corporate governance reporting model that has three levels:

- Principles – broad, thematic concepts that are used to organize the more specific materials below them.
- Recommendations – issuers would be required to comply with these under the revised NZX Code, or explain why not (the model that currently operates in Australia).
- Best practice commentary – issuers could choose to report against these additional standards if they wish to meet best practice in all areas, or where a commentary is of particular relevance to them or their industry.

NZX has largely followed the FMA principles, although there are some areas where they have deviated to take an approach that is more relevant for listed issuers.

[D] Use of Board Committees

While the Companies Act specifically acknowledges (subject to some limited exceptions) that a board may delegate its powers to a committee of directors, there are no mandatory requirements for board committees in the Companies Act.

The IOD's Code of Practice for Directors (hereinafter 'IOD's Code of Practice') recommends that each widely held company should have an audit committee. The IOD's Code of Practice notes also that, depending on the size of the company and its board, committees other than audit committees may be appointed to assist with issues such as remuneration and nomination of directors. Listed companies are required by NZX Listing Rules to have an audit committee (comprising non-executive directors) and a remuneration and nominations committee.

13. Review of corporate governance reporting requirements within NZX Main Board Listing Rules: Discussion Document, NZX, 2 November 2015.

[E] Other Oversight Structures

Publicly listed companies' boards are facing greater scrutiny from institutional and other investors, such as the New Zealand Shareholders' Association (an advocate investor group) and the New Zealand Corporate Governance Forum (comprising New Zealand institutional investors).

V LIABILITY ISSUES

The Companies Act sets out the principal duties of directors. These are: to act in good faith and in the best interests of the company; to exercise powers for a proper purpose; to comply with the Companies Act and the company's constitution; not to trade recklessly; not to agree to the company incurring certain obligations; and to exercise reasonable care, diligence, and skill. These duties essentially restate directors' traditional common law duties.

The Companies Act also imposes various duties for which directors may be liable both civilly and criminally relating to the administration of the company, for example, to keep accounting records.

Directors' liability also commonly arises from a failure to comply with the significant number of statutes that provide for both civil and criminal liability for acts committed by the company or by the directors in their role as directors.[14] In some circumstances, directors can also be liable to third parties in tort arising from their acts as directors.[15] Recent amendments to the Companies Act mean that directors will now be held liable where, with the intent to defraud a creditor or creditors of the company, a director does anything that causes material loss to any creditor. Also, directors of failed companies are banned for a period of five years from being a director of, or directly or indirectly involved in, a phoenix company.[16]

[A] Who Can Sue?

[1] The Company

The Companies Act, reflecting the traditional English approach, provides that the directors' duties described above are owed to the company and not to shareholders individually. Accordingly, only the company can bring an action against a director for breach of those duties.

14. For example, Building Act 2004, Commerce Act 1986, Fair Trading Act 1986, Financial Reporting Act 2013, Health and Safety at Work Act 2015, Income Tax Act 2007, Resource Management Act 1991 and Financial Markets Conduct Act 2013.
15. For example, *Trevor Ivory Limited v. Anderson* [1992] 2 NZLR 517.
16. Companies Amendment Act 2006.

For instance, directors are obliged to ensure that the company's financial statements and annual activity reports meet all the requirements applicable under accounting law,[2] and are jointly and severally liable to a company for any loss resulting from the non-fulfilment of this obligation.

Management board members are also liable for payments made to shareholders contrary to the law or the provisions of the company's articles. Members responsible for such undue payments are liable for a refund of the same to the company jointly and severally with the recipient of the payment.

The aforesaid rules are applicable to both an SA and an Sp. z o.o. Additionally, with regard to an Sp. z o.o. alone, in a situation where the value of non-cash contributions is substantially overestimated, the shareholder who made said contribution and those management board members who, while aware of this, applied for the registration of the company, are liable jointly and severally to make up the deficit to the company.

An action against supervisory board members should be brought by persons authorized to represent the company (i.e., management board members or commercial proxy holders), but in the case of an action against management board members, the company must be represented by the supervisory board or a proxy appointed by the company shareholders' meeting.

As regards the statute of limitations, it is three years from the day the company discovered the damage and person liable, but in any event no more than ten years from the occurrence of the injurious event.

[B] Liability Towards Third Parties

Under Polish law, a director's liability towards third parties is, as a rule, excluded, but there are certain situations where directors may be held liable. Most of them relate to the potential liability of management board members.

A Polish company has a legal personality from the moment of its registration in the relevant register, nonetheless it may commence its activity, incur obligations, and so forth from the very moment of its incorporation, that is, the execution of the articles. In the aforesaid period, it acts as a 'company in organization' *('spółka w organizacji')* and is represented by the management board or a proxy appointed by the shareholders' meeting. The liability for the obligations of a 'company in organization' is borne jointly and severally by the company and the persons that act on its behalf. The liability of such persons towards the company ceases with the approval of their performance by the shareholders' meeting, but does not cease vis-à-vis third parties. This means that even after the approval of the management board members' performance, a third party may bring an action directly against them. However, if such a member pays the third party as a consequence of such an action, he or she would have a claim against the company for repayment.

2. The Act dated 29 September 1994, the Accounting Law.

Where management board members have deliberately or negligently made false statements to the registry court that the payments for shares were made as stipulated in the articles or in respect of a share capital increase, and as regards an SA, also in the case of such a statement confirming that the transfer of the contributions in kind to the company is ensured in the prescribed time, they are liable to the company's creditors jointly and severally with the company, for three years from the company's registration date, or the share capital increase registration date. This liability relates to all company obligations, but if a member pays a third party as a consequence of an action brought directly against him or her, he or she would have a claim against the company for repayment, unless he or she caused damage to the company as a result of such false statement.

The KSH also provides for separate grounds for liability with regard to an SA, namely, that whoever participated in the company's issuance of shares, bonds, or other titles to the participation in profits or the distribution of assets is liable for damage caused, if he or she inserted false data in announcements or records, or otherwise disclosed such data, or, while furnishing data on the financial standing of the company, concealed circumstances subject to disclosure under the relevant provisions. This liability also relates to the relevant activity of the management board members.

The KSH provides rules on the management board members' liability towards the company's creditors; however, these only apply to an Sp. z o.o. If a debt collection against the company has proved ineffective, the management board members are jointly and severally liable for the company's obligations. A management board member can release him- or herself from such liability by proving that: (i) a petition for the declaration of bankruptcy was filed or arrangement proceedings were instituted in due time; or (ii) the failure to file a petition for the declaration of bankruptcy or institute arrangement proceedings was not his or her fault; or (iii) the creditor suffered no damage even though no petition for the declaration of bankruptcy was filed or no arrangement proceedings instituted. It is sufficient that the creditor proves that the enforcement would not make possible the satisfaction of his or her claims. Additionally, the creditor should submit to the court a valid enforcement title confirming the creditor's claim against the company.

In addition to the liability under KSH provisions, directors are liable vis-à-vis third parties under the general rules of tort law – namely, if they, through their own fault, cause damage to another person, they are obliged to repair it. If damage has been caused by two or more persons, they are liable on a joint and several basis.[3] In such a situation, the third party has a choice, to bring an action either directly against the relevant director, or against the company, which is obliged to redress the damage caused through the fault of its statutory body. In the latter situation, the company might then bring a corresponding action against the liable member of its body.

There are also provisions in other laws providing for the liability of management board members in explicitly defined circumstances. In particular, under the Bankruptcy Law,[4] each management board member, irrespective of the company's

3. See the Act dated 23 April 1964, the Civil Code.
4. The Act dated 28 February 2003, the Bankruptcy Law.

[A] Two-Tiered or Unitary Company Structure

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

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

[B] Directors' Duties

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

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

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

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

[C] Chairman and CEO

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

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

[D] Board Structures

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

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

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

represent the company in dealings with third parties, to execute commitments in the name of the company, and to manage the general affairs of the company in the ordinary course of business subject to the general policy and resolutions of the board and general meeting of shareholders. If the company has adopted an executive officer system, the executive officers, who are not members of the board, are required to carry out the executive role.

[C] Board Structures

The Korean Commercial Code ("*KCC*") requires that a company have at least three directors in principle. A listed company must have at least a quarter of its board comprised of outside directors. If a listed company's total asset as of the end of the immediately preceding fiscal year exceeds KRW 2 trillion, then such company must have at least three outside directors with the outside directors representing a majority of the total number of directors.

Outside directors in Korea are referred to as "*Sa-Woe-Ee-Sa*" (with "*Ee-Sa*" meaning "director" in Korean). The definition of an outside director under Korean law is a director who does not engage in the business of the company on a full time basis and who does not meet any of the disqualification criteria listed in the relevant statute (such as being the largest shareholder or an officer of the company).

The board may establish committee(s), consisting of two or more members, and delegate certain of the Board's authority to such committee. Once a board committee adopts a resolution, such resolution should be notified to each director who may request that a board meeting be convened for a separate resolution at the board level.

In case of a listed company or a financial institution, the KCC and other applicable laws and regulations mandate the establishment of an audit committee and an outside director nomination committee. For audit committees, at least two-thirds of the members must be outside directors.

The boards of listed and nonlisted companies have the discretion to establish other types of committees composed of a sub-set of the board members. In practice, large companies will generally establish a number of committees under the board for efficiency purposes (e.g., establishing a management committee or executive committee) or to secure independency of supervision or decision-making functions with respect to certain specific matters (e.g., establishing an inter-affiliate transaction committee or compensation committee).

[D] Director's Elections/Staggering

Directors are appointed at the general meeting of shareholders with affirmative votes of a majority of the voting shares present at the meeting and at least one-fourth of the total number of issued and outstanding shares of the company.

Some companies adopt staggering terms for their directors as a defense mechanism against hostile M&A attempts and such staggering terms of directors are not prohibited under Korean law.

[E] Director's Term of Appointment

The term of office of directors cannot exceed three years in principle.

[F] Delegation

Under the KCC, there is no limitation on the delegation of directors' right. However, the liabilities or duties of directors cannot be delegated as such and the directors should remain responsible for the performance of duties and bear liabilities.

[G] Removal of Directors

Under the KCC, dismissal of directors is subject to a special resolution of the general meeting of shareholders, such special resolution requirement being affirmative votes of at least two-thirds of the voting shares present at the meeting and at least one-third of the total number of issued and outstanding shares of the company. If the director has a definitive term but is dismissed before expiration of such term without just cause, the director may claim damages compensation against the company.

In addition, in the event a director has engaged in fraudulent acts or otherwise has violated laws or the articles of incorporation of the company but his/her dismissal is rejected at the general meeting of shareholders, a shareholder holding 3% or more of the total issued and outstanding shares of the company may file for dismissal of the director with a court within one month from the date of such general meeting of shareholders.

[H] Duties of Directors

[1] Duty of Care

Directors owe a duty of due care to their company, the applicable standard of care being that of a good manager. As in other jurisdictions, the concept of "duty of care" under Korean law is broad. The standard of care of a director is generally described as "the same degree of fidelity and care needed generally and objectively as an ordinarily prudent man."

[2] Duty of Loyalty

The KCC requires directors to perform their duties faithfully for the good of the company in accordance with applicable laws and regulations and the company's articles of incorporation. In this respect, the Supreme Court has held that the duty of loyalty requires directors to act in the best interest of the company as opposed to that of the shareholder(s) of the company. Even when the company is a wholly-owned

board members as well as the managing director have an overall duty in all matters to act in accordance with the interests of the company.

Another one of the board's key tasks is to appoint and dismiss the managing director. Whereas the board is responsible for the overall management of the company's affairs, the managing director shall attend to the management of the day-to-day operations pursuant to guidelines and instructions issued by the board. Listed companies are required to have a managing director, who shall be in charge of the aforementioned day-to-day operations. As regards non-listed companies, it is however optional to appoint a managing director.

Thus, the board in Swedish companies has an extensive decision-making authority but it also has its limitations, primarily by way of the legal provisions giving the general meeting exclusive powers as regards specific matters. Provided that it is not in conflict with the Swedish Companies Act or the applicable articles of association, the board is obliged to follow any specific instruction decided by the general meeting.

[C] Directors' Duties Towards Majority and Minority Shareholders

Board members have a fiduciary duty to act in good faith and in the best interest of the company, which entails a duty to act in the interest of all shareholders. The general principle under the Companies Act is that the company or its management must not make any decisions or perform any legal acts that would give one shareholder an undue advantage to the disadvantage of another shareholder or the company. An important protection mechanism for the minority shareholders of a company thus is the principle of equal treatment, which is established in the Companies Act and is thus applicable to both listed and non-listed companies.

The principle entails that shares of the same class have the same rights, unless otherwise specified in the articles of association. A dividend that results in a difference in the pay-out per share is therefore in conflict with the principle of equal treatment. In cases were the minority shareholder is unfairly treated vis-à-vis a majority shareholder, for example if the company enters into an unfavourable agreement with a majority shareholder, the minority shareholder will not be able to rely on the principle of equal treatment in order to invalidate the transaction, because in such situation all shareholders are affected equally. However, the minority shareholders are in such cases protected by other provisions in the Companies Act. For example, the general meeting may not adopt any resolution, which is likely to provide an undue advantage to a shareholder or another person to the disadvantage of the company or another shareholder. If a minority shareholder manages to show that it has been unfairly treated the transaction may be invalidated and the minority shareholder may receive damages. The transaction will not be regarded as unfair should the majority shareholder be able to show that the transaction was entered into in the normal course of business.

[D] Directors' Duties in Case of Bankruptcy

In the event that there exists reason to believe that the company's shareholders' equity is less than one-half of the registered share capital, the board shall immediately prepare and cause the company's auditors to examine a balance sheet for liquidation purposes. Provided that the sheet shows that that the equity is less than half, the board shall, as soon as possible, issue notice to attend a general meeting which shall consider whether or not the company shall be liquidated. Where the balance sheet presented at the initial meeting fails to show that the shareholders' equity is restored, a second meeting for liquidation purposes shall, within eight months of the initial meeting, reconsider the liquidation issue. Unless the meeting resolves to voluntarily liquidate the company, the board shall submit a petition to the court for a liquidation order. If the members of the board do not fulfil the aforementioned duties, the members of the board shall be jointly and severally liable for such obligations as are incurred by the company during the period of such failure to act. However, liability shall not be incurred by any person who proves that he or she was not negligent.

V LIABILITY ISSUES

[A] Who Can Be Sued?

According to the Companies Act, a board member as well as a managing director may be liable for damages to the company, the shareholders and third parties (e.g., creditors). If he or her, in the performance of his or hers duties, intentionally or negligently causes damages to the company he or her shall compensate such damage. Liability towards the company does not only include clear violations of the Companies Act, the articles of association or other applicable acts but also breaches of confidentiality and the fiduciary duties. Liability towards a shareholder or a third party may however only arise when damage is caused as a consequence of a violation of the Companies Act, the applicable annual reports legislation or the articles of association. The board may delegate specific tasks to individual board members or other employees but is thereby not able to avoid liability for the company's organization or the duty to ensure satisfactory control of the finances of the company.

Further, a member of the board and the managing director may also be held liable under general principles on tort and, if applicable, the Swedish Tort Liability Act (Sw. *Skadeståndslagen*). Regardless of the fact that the board operates as a collective corporate body, there is no collective liability per se and an *in casu* judgment must be made. Thus, each member of the board is individually liable for every measure or decision made by the board. The legal basis for the liability, in that capacity, is found in the Companies Act, the Swedish Tort Liability Act and general legal principles on tort. If more than one board member participates in a decision or measure that leads to damages, the board member will be held jointly and severally liable.

[E] Directors' Liability Insurance

The TCC allows the members of the board of directors to be insured against the damages incurred by the company due to their negligent acts or omissions. If the coverage of the insurance amount exceeds 25% of the share capital of public companies, such matter shall be announced in Capital Markets Board's bulletins, as well as in the stock exchange bulletin if it is a listed company and shall be taken into consideration for evaluation with regard to compliance with the corporate governance principles.

[F] Liability of Directors under the CML

Directors serving on the board of a public company with a registered capital system are delegated certain specific duties, such as issuing bonds and other debenture certificates, issuing convertible bonds, issuing shares without voting rights, deciding on the distribution of dividends, and issuing bonus shares. Alongside those duties, the CML introduces certain criminal sanctions against breach of the duties delegated to directors.

Pursuant to the CML, directors are not allowed to issue privileged shares or share certificates representing more than nominal values, to limit pre-emptive rights of the shareholders, or to obtain resolutions limiting pre-emptive rights of the shareholders unless they are vested with the specific authority to do so by the Articles of Association.

Shareholders whose rights are weakened as well as newly appointed directors can file a lawsuit against the above-mentioned resolutions of directors within thirty days from the announcement of the board resolution. If there is such a lawsuit filed, the directors are required to notify the CMB within ten days from the date they have been notified about the lawsuit.

Insider trading rules for public corporations are also covered under the CML. Pursuant to the CML, a person entering into transactions on stock exchanges in order to gain benefit for him or herself or for third parties and obtaining material advantages to the detriment of others is described as an insider trader. Accordingly, any director who is found to be involved with insider trading activities shall receive a monetary fine or sentenced to imprisonment between two and five years. The monetary fine amount, however, shall not be less than two times of the benefit gained through the insider trading.

[G] Liabilities of Directors Arising Out of Extraordinary Transactions

[1] Capital Increases

Capital increases, by way of issuing new shares, are subject to the same procedures as the incorporation of the company. This procedure requires an amendment to the Articles of Association of the company. Directors are required to observe that 75% of the increase to capital is paid up within twenty-four months following the registration

of the capital increase – 25% of the increased amount should be paid before the registration and monitored by the trade registry. If the capital increase procedure has not been completed in accordance with the TCC or the CML, all transactions made in this respect shall be void and directors shall be held liable against the company, the shareholders, and the third parties.

[2] Issuing Bonds

Pursuant to the TCC, joint stock companies may issue bonds to meet their financial needs and, accordingly, certain procedures need to be followed. Directors, failing to obey such procedures provided by the TCC, shall be held liable against the holders of the bonds and the creditors of the company.

[3] Liability in Case of Bankruptcy

Directors are required to return unreasonable and excessive payments they may have received in the form of sharing profits or allowances against their services within three years prior to the date the bankruptcy of the company is announced, provided that those payments are too high to be determined as reasonable payments. Pursuant to the CML, directors causing the company to go bankrupt due to unlawful conduct can also be declared bankrupt by the court upon demand of the related Ministry.

With regard to directors' liability before a bankruptcy situation, as per the TCC, if a company's net assets fall below a certain level (i.e., half or two-third of the share capital), the company's board of directors is required to follow procedure specified in the TCC aimed at preventing companies from going into bankruptcy and improving the company's financial condition.

[H] Liability of Directors under the Tax Laws

Joint stock companies are taxed under the 'Corporate Tax Law'. Pursuant to the Corporate Tax Law, tax liability belongs to the company. In addition to the corporate tax, a company can also be under different tax liabilities, such as immovable property tax, motor vehicle purchase tax, motor vehicle tax, value-added tax, and so forth. Pursuant to the Tax Procedure Law, tax obligations of the companies should be fulfilled by the directors and/or representatives of a company. As a general rule, directors of a joint stock company are responsible for the fulfilment of the company's tax obligations in a timely manner. In the event of a breach of tax obligations due to negligence of a director, all directors shall be jointly liable for the payment of such taxes, which cannot be collected from the company. The important point here is the fact that the taxes, partly or completely, should be non-collectable from the company. That is to say that if such tax obligations are paid by the company, directors cannot be held liable. The second important point is that the director's negligence should result in the tax loss. Unless it is established that the tax loss has occurred due to the director's negligence, the directors cannot be held liable. In case the directors are held liable and required to