

# SPECIAL NEWSLETTER: DIRECTORS LIABILITY IN CORPORATE LAW

Just prior to the Dubai conference we are very proud to present you this special newsletter. This newsletter contains articles from our member firms from 13 different countries concerning 'directors liability in corporate law'.

This is the result of the workshops held during the Barcelona conference held in October 2013 organised by our member firm 'Miliners Lawyers and Consultants'.

I want to thank all member firms who made this possible, but especially Dr. Rodolfo Fernandez of Miliners Lawyers and Consultants from Barcelona, Spain and Dr. Katarzyna Malinowska of BMSP LEGAL ADVISORS from Warsaw, Poland.

If you have any additional comments or questions please feel free to contact our IPG members.

Jens Langendorff Langendorff@grahamsmith.com

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# Directors liability in corporate law

Article by Rodolfo Fernandez and Katarzyna Malinowska

Dear IPG friends, in this issue of our Newsletter we have the pleasure to present the outcome of the Barcelona IPG Conference held in Autumn 2013 and hosted by Miliners Lawyers and Consultants. As we well remember, the conference included various workshops, one of which consisted of a comparative discussion regarding the Director's Liability in Corporate Law. Through this interaction between the international law and tax professionals, we gained an insight into the kind of responsibility in the various jurisdictions, as well as being able to appreciate the difference in legislation and case-law depending on each country.

The success of this particular workshop has led to the development of a survey on fully analyzed practical way to rules regulating the liability of directors and their application by the courts in Europe. For those who are interested in this topic, the surveys will surely constitute an excellent tool, broadening the horizon of our legal knowledge. Learning the way how the issues in question are treated by other jurisdictions can also be very practical. We believe that exchanging and sharing the knowledge and views on the practical and material aspects of our professional practice plays a significant role among the goals of IPG.

The survey has been coordinated by Dr. Rodolfo Fernandez, Miliners partner, alongside some of the workshop participants.

The European firms which have contributed in drafting this survey are:

- Advokatfirman Engström & Co AB (Sweden)
- Aston Société D' Avocats (France)
- Belina & Partners (Czech Republic)
- BMSP Boryczko Malinowska Światkowski i Partnerzy Adwokaci i Radcowie Prawni (Poland)
- Bolliger Treuhand AG in cooperation with Herzer Rechtsanwälte (Switzerland)
- CNCM Sociedade de Advogados (Portugal)
- De Wolf & Partners (Belgium)DFA Studio Legale Associato (Italy)
- H&M LEGAL (Hungary)
- Hoens & Souren Keereweer Advocaten (The Netherlands )
- LLC "Law Firm" (Russia)
- Miliners Lawyers and Tax Consultants (Spain)
- Papakyriacou & Partners Ltd (Cyprus)
- Silverman Sherliker LLP (United Kingdom)

We want to express our gratitude for their cooperation with this survey and this important and useful work has given a great insight into corporate responsibility in the European area. Though not all members contributed, we think that collecting 14 surveys from all over

Europe can still be perceived as a success and therefore it is worth publishing the result of our joint effort. We also take this opportunity to invite the other members not only to read the surveys but also to take an active part in this initiative. At our website, you can find links to the particular surveys together with the contact to the authors and their firms. The manner adopted for publishing the surveys makes it possible to add other contributions and make our collection as complete as possible. We strongly encourage you to do so, so that it includes not only Europe but also other continents! Apart from its usefulness to the members, it could make IPG more and more visible as an organization, ensuring an added value to the world of complicated legal relations.

We do hope that this survey, though not being intended as an advice, can serve you and your clients as a first guide to the liability of directors around Europe and an international comparative of the liability procedure.

Rodolfo Fernandez Katarzyna Malinowska

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## Directors' Liability in Sweden Article by Lars Engström



Are directors liable for management decisions under Swedish law?

The purpose of this workshop was to compare the applicable law in different jurisdictions related to the liability of the directors and board members of the companies.

We have prepared some key questions that we consider are the practical approach for comparing the legal actions and situations in each jurisdiction.

The objective is to have a good range of information of the situation and opportunity of success of the legal actions against directors and the liability consequences. We know that the criteria could vary substantially from one country to another and also the time for obtaining a judgment, the feasibility of certain processes, the arbitration as a good solution...

We will discuss the information offered by participants during the workshop, and in the following days or weeks we will publish the results of the workshop on the IPG web site.

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# Directors' Liability in France Article by Olivier Sanviti



Are directors liable for management decisions under French law?

The responsibility of directors in France is laid down in the Commercial Code.

According to articles L223-22 and L225-25 of the Commercial Code directors may be held liable for the following categories of breaches towards the company and third parties:

- breaches of laws and regulations applicable to companies;
- · breaches of the articles of association of the company; and
- mismanagement.

Concerning the damage caused by the directors to third parties, the directors will only be found personally responsible if they have intentionally breached their duties towards those parties and if such breaches were committed outside the course of their duties.

The shareholders that have suffered personal damage as a result of the fault of the directors may bring an individual action against them but they will have to prove that the injury they suffered was *independent* from the damage suffered by the company. This "personal" injury does not include for instance the loss of value of his shares which it is considered just an effect of the damage suffered by the society (Cass. 3 civil, 16 Nov. 2011, n° 10-19.538). Unlike the case of third parties, if the action is brought by the shareholders, the tribunals don't require that the directors' breach has been committed outside the course of their duties (Cass. Com., 9 March 2010, n° 08-21.547).

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# Directors' Liability in Czech Republic Article by Tomáš Belina



Are directors liable for management decisions under Czech law?

The liability of directors is in the Czech Republic regulated since January 1, 2014 by a new legislation. The acceptance of this new legislation is considered as the biggest legal recodification in the history of independent Czech Republic. Apart from citizens of Czech Republic these changes will also naturally affect foreign persons running a business in Czech Republic.

The liability of directors in the Czech Republic is understood as a liability of the Executive Directors in a Limited Liability Company and as a liability of the members of the Board of Directors in a Joint Stock Company

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Directors' Liability in Portugal Article by Teresa Nogueira



Are directors liable for management decisions under Portugese law?

Directors may be held liable for losses and damages sustained by the company, the creditors, the shareholders or third parties as a consequence of the breach of his/her legal or contractual duties as a Director.

Under Portuguese Company Law, Directors are subject to two general duties – the duty of care (by demonstrating willingness, technical capability and an understanding of the business of the company that are appropriate to the performance of their functions and by using the diligence that may reasonably be expected from a careful and organised Director) and the duty of loyalty (namely, not competing with the company, avoiding conflicts of interests, not to use corporate opportunities or business information, confidentiality, etc.).

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# Directors' Liability in Poland Article by Katarzyna Malinowska



Are directors liable for management decisions under Polish law?

Under Polish law, the management board members bear the liability on the basis of the Code of Commercial Companies (hereinafter referred to as 'the CCC'). The CCC deals with the following basis of the liability: towards a company, for liabilities of a company towards third parties, as well as connected with restructuring of a company (mergers, divisions and transformation of companies).

The management board members can also bear liability on the basis of the bankruptcy law or tax law. The liability on the basis of the bankruptcy law generally applies in case the company becomes insolvent (i.a. ceases paying its debts) and the management board members fail to perform their duty to file a bankruptcy petition within two weeks of the day on which the basis to declare the company bankrupt appeared.

Besides the liability of an entity on which a tax duty is imposed directly, provisions of the tax law regulate also the liability of persons other than a legal entity directly obliged to pay taxes (so called the liability of the third parties – i.e., in some cases the management board members). Polish accountancy law also regulates such liability.

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Directors' Liability in Switzerland Article by Stefan Bolliger and Matthias Meister



Are directors liable for management decisions under Swiss law?

As distinguished from other Law Systems, Swiss Law does not provide a specific supervisory body. Although the members of the board of directors have supervisory tasks, they also are charged with executive and management decisions for which reason the board of directors cannot be described as a proper supervisory body.

The members of the board of directors are not only allowed to act in their given sphere of competences but are as well empowered to delegate management functions and the day-today business to specific members or to third parties. The members of the board of directors therefore can be held liable not only for their own acts but also for the acts of a third party which causes a loss or damage.

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Directors' Liability in Belgium Article by Jannick Everaerdt



Are directors liable for management decisions under Belgium law?

1. Article 262-527 Belgian Company Code ("BCC"): internal liability

 = directors and daily managers are according to common law liable for the fulfilment of mandates they have been empowered with and for the shortcomings in their management
 Common law = article 1382 Belgian civil code

- Error damage causal link needs to be proven
- Error = violation of law or the reasonable care principle (comparison with a director carrying out the necessary reasonable care required by the circumstances)
- Test of reasonability: only liable when exceeding the limits of the reasonability
- · Individual liability
- · Claim by the company not a third party
- Examples
- · Signing a contract for the company with adverse conditions
- Delegation of powers to incapable persons
- Lack of bookkeeping or VAT and social security declarations
- Lack of having a fire insurance

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# Directors' Liability in Italy Article by Roberto Santoro



Are directors liable for management decisions under Italian law?

In our legal system the director can be liable for his/her conduct towards the company, the members and the creditors.

The article 2392 of the Italian Civil Code, with respect to the liability towards the company, states that "the directors must carry out their duties, imposed by the law and the bylaws, with the <u>diligence</u> required by the nature of the task and by their specific skills. The directors are jointly liable towards the company for the damages caused by the non-observance of these duties, unless they must be carried out by the Executive Committee or represent functions concretely committed to one or more directors".

The breach of such duties, both specific (established by the laws and/or by-laws, such as the call of the meeting, the submission of the balance sheets or the prohibition of undertaking new operations in particular cases) and general (such as the duty of diligence without conflict of interests) implies the liability of the director towards the company and the members and the extra contractual liability towards the creditors and third parties. On one side, the mere diligent conduct of the director is able to prevent the non-fulfillment of general duties; on the other side, regarding the specific duties, the liability can be excluded only if the non-fulfillment was caused by facts not imputable to him/her (which could not avoid the diligence requested to the debtor).

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Directors' Liability in Hungary Article by Ákos Menyhei





Are directors liable for management decisions under Hungarian law?

Although Hungary has not yet ratified The Hague Convention on Trust, the Hungarian International Private Law Act recognizes trusts as a foreign legal solution and directs one to apply the foreign regulation in legal disputes in the case of a lack of similar Hungarian solutions. In relation to the recognition of foreign trusts in Hungary, there is no known case and if there were it would have no bearing on other cases; nevertheless, some Hungarian lawyers use foreign trusts as participation owners in company structures. The recognition of trusts is uncertain in real estate ownership registration as well; therefore, the Hungarian practitioners try to avoid this kind of uncertainty by solving the problem firstly by registering a holding company owned by the trust, then secondly, acquiring the real estate by the holding company. The real challenge for the trusts is distribution in Hungary, as the current tax regime treats it as 'other income' and levies the flat rate of 16% personal income tax and 27% health insurance contribution, which is very disadvantageous compared to income from dividend distribution as that is exempted from the extra health insurance surcharge.

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# Directors' Liability in The Netherlands Article by Pierre van Voorst



Are directors liable for management decisions under Dutch law?

Workshop Director's Liability, IPG - Barcelona October 2013 Questions and answers from The Netherlands

## Question 1 to 4

- 1) Are directors liable for management decisions?
- 2) What are the general criteria for being liable?
- a) Can directors be directly liable for company debts in front of the company's creditors without proving that directors have been guilty? In which cases?
  b) Can direct a blick is a company is a company of the company's creditors are a company is a company of the company's creditors are a company of the company of the company's creditors are a company of the company.
  </u
- 4) Can directors be liable in case of insolvency of the company? Is this situation of responsibility frequent in your insolvency cases?

Under Dutch Law directors – as well in one tier as in two tier boards – can be held liable as described below. The response is related to all kinds of corporations with some exceptions. Directors of legal entities are only in exceptional cases personally liable for the debts of the legal entity.

In principle, liability of a director is joint and several with any other director who is or may be held liable for the same act.

a. Liability towards the company itself (which power can be exercised by the trustee in the event of bankruptcy) (article 2:9 of the Civil Code ("Burgerlijk Wetboek"; hereinafter referred to as "CC"))

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# Directors' Liability in Russian Federation Article by Alina Yakhlakova



# Are directors liable for management decisions under Russian law?

Are directors liable for management decisions?

Yes, directors of the company bear material responsibility for direct damages and loss of expected profit caused to the company. Director(s) may be liable accordingly for breach of Labour law, Civil and Criminal Law, Tax law and other legislation of Russian Federation. Particularly, under Insolvency (bankruptcy) law, Securities law and others.

What is the general criteria for being liable?

Grounds for bringing director to responsibility:

- 1. breach of the principle of good faith and reasonableness while managing the company 2. breach of certain laws and statutes
- Grounds for claiming damages (all grounds shall take place together):
- Wrongful/guilty actions (omissions). The burden of proof is on the claimant.
- The fact of damages
- Causation (link between the damages and actions of director)

Moreover, according to the court practice, judges insist on proving the exact amount of damages and losses, otherwise, the judge may reject the suit entirely. The practice is very poor as it is very hard and difficult to prove the amount of damages.

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# Directors' Liability in Spain

Article by Rodolfo Fernandez



#### Are directors liable for management decisions under Spanish law?

The purpose of this workshop is comparing the applicable law in different jurisdictions related to the liability of the directors and board members of the companies. We have prepared some key questions that we consider are the practical approach for comparing the legal actions and situations in each jurisdiction. The objective is to have a good range of information about the situation and opportunity of

success of the legal actions against directors and the liability consequences. We know that

the criteria could vary substantially from one country to another and also the time for obtaining a judgment, the feasibility of certain processes, the arbitration as a good solution... We will discuss the information offered by participants during the workshop, and in the following days or weeks we will publish the results of the workshop in the IPG web site.

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# Directors' Liability in Cyprus Article by Sozos Papakyriacou



Are directors liable for management decisions under Swiss law?

Yes they are. They are liable if they are found to have acted in a manner inconsistent with their common law duty of care, or in breach of fiduciary duty or if they have acted against the best interests of the company. The Directors are liable in tort to the company if they are found to have acted in a manner inconsistent with their common law duty of care. Furthermore they are also liable for breach of fiduciary duty if they are held to have acted against the best interests of the company especially if they have sought to gain personal benefits and profits out of their position, without first disclosing such an interest to the shareholders and/or other directors.

In cases of gross misconduct, negligence (liable in tort), fraud in relation to assets, they are liable vis-à-vis third parties for example if they have intended to enter into contracts with the purpose to defraud those third parties

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Directors' Liability in the United Kingdom Article by Jonathan Silverman, Adam Powell and Paul Collins



Europe

#### Are directors liable for management decisions under British law?

Directors Duties under the Companies Act 2006 (the Act)

- Directors must comply with the general duties for directors under the Act (s.170-177);
- Although directors may delegate certain tasks and responsibilities they retain overall responsibility;
- If the directors breach their duties, the company will have a claim against them under Statute; and
- Shareholders can bring a derivative action against the directors seeking relief on behalf of the company (s.260).

#### Common law duties

- The following duties apply to the extent that they are not expressly provided for in the Act:
- 1. Duty to act bona fide in the interests of the company:
- 2. Duty to act for proper purposes;
- 3. Duty not to misapply company property; and
- 4. Duty to account for a secret profit.

#### Civil and Criminal liability

- Fraud under the Fraud Act 2006 and/or Theft Act 1968;
- Insider dealing under the Criminal Justice Act 1993;
- Money laundering under the Proceeds of Crime Act 2002;
- Market abuse, making misleading statements or carrying on regulated activities without authorisation under FSMA 2000;
- Wrongful and fraudulent trading under the Insolvency Act 1986; and
- Bribery offences under the Bribery Act 2010.

# Additional duties

- The Articles of Association and any Shareholders' Agreement may include additional duties and potential liability for directors.
- Directors are responsible for the prospectus when listing a company (see <u>PR 5.5R</u>) and may be liable to compensate an investor if it is misleading or inaccurate (see S90 FSMA).
- For listed companies, directors are subject to the relevant listing rules and corporate governance obligations e.g. FRC UK Corporate Governance Code and the Transparency Directive (EC Directive).

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You can now start discussions with your fellow members and leave your company messages in the IPG-Linkedin groups!

# Paris

START: Thursday 7th may 2014 END: Sunday 10th may 2014

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# Agenda

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If you would like to <u>contribute</u> to the newsletter or if you have any comments, please feel free contacting us via the secretariat. or

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- <u>General IPG member discussions</u>: the name says it all, this group for members-only discussions: technical or leeds, tell us what you have to offer.

 <u>IPG-Dubai conference group</u>: in this group you can find information and leave messages about the Dubai conference. After the conference, the idea is to provide links to the various speakers and their presentations. Similar groups will be created for every next conference. You do not need to be a delegate of a conference to become a member of this group.

We are still learning to become experienced Linkedin-moderators, so please let me have your feedback: should there be another group for specific members or subjects, any comment about the handling, anything to share but you do not know how-to? Send me a message <u>directly</u>or via the secretariat. See you soon on Linkedin!

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