



# Minimising Corporate Liability: Advice from Outside Counsel

IR Global members offer their unique jurisdictional perspective on Director Duties and Liabilities & Reporting to the Board.

# Minimising Corporate Liability: Advice from Outside Counsel

Corporate Governance, reputation management, ethics and regulatory compliance.

Board responsibilities in these risk areas have always been important, but they have grown more prominent in our connected world of social media, increased regulation and ethical capitalism.

High profile scandals involving Fortune 500 companies have increased in number and notoriety over the past few years with Wells Fargo and Volkswagen, particularly well-known examples. The opportunities for violation of Corporate Governance and compliance or ethical standards are further amplified by greater complexity in areas such as cybersecurity, data protection and applied technology.

Regulatory regimes such as the Sarbanes Oxley Act of 2002 have sought to deal with some of these weaknesses within complex organisations by seeking to ensure a meaningful separation of power between management and the board. The act recognises that a corporation's board and its senior management may have conflicting responsibilities and objectives, and expects that board to be an independent watchdog.

In this evolving landscape the role of General Counsel has become more important and arguably more influential at the top level of organisations. The General Counsel should be a key ally and partner in establishing a corporate culture that supports corporate performance without compromising ethical behaviour, and legal and regulatory compliance.

In the Association of Corporate Counsel's (ACC) recent survey - Skills for the 21st Century General Counsel - 54 per cent of directors ranked 'ensuring a company's compliance with relevant regulations' as one of the top three ways General Counsel provide value to the company. Further, in the association's 2017 Chief Legal Officers Survey, 74 per cent of General Counsel rated ethics and compliance as 'extremely' or 'very' important over the next 12 months – the highest ranked concern in the survey.

Given these results, a pertinent question must be how General Counsel can carry out their jobs most effectively, ensuring directors understand their liabilities and are held accountable for them.

One major issue seems to be the access some General Counsel have to the CEO and their ability to speak frankly at high level meetings with c-suite executives.

A recent white paper conducted by the ACC into General Counsel influence, entitled Leveraging Legal Leadership, also quotes the Chief Legal Officers 2017 Survey. It shows that just 72 per cent of General Counsel reported directly to the CEO in 2017, compared to 64 per cent in a survey carried out in 2004.

The paper concludes: 'the movement of less than 10 percentage points (over 13 years) is a concern given how much more global and complex the challenges businesses face have become.'

Clearly there is a need for General Counsel to exert more influence given the unique position they hold in a business. They sit between a board and senior management, with oversight of operations, as well as detailed understanding of legal, ethical and regulatory roadblocks.

One way of doing this is to bring in independent outside counsel to bolster the in-house legal position on risk, adding weight to arguments over director liability and the importance of proper officer reporting. The value of such counsel is largely in its impartiality, distinct as it is from other outside corporate counsel, and not embedded within the business as is General Counsel.

Now, more than ever, it would seem critical to fortify legal counsel to the board. Having more legal minds in direct contact with the CEO and board, ensures that sophisticated arguments don't get distorted before they reach decision makers.

The following IR Global report includes contributions from 23 outside counsel across multiple jurisdictions. It touches on the key areas of director liability and governance mechanisms between board and c-suite executives; as well as current trends within regulatory agencies and courts of which in-house counsel should be aware.

We hope you find it useful.



## About IR Global

IR Global is the fastest growing professional service firm network in the world; providing legal, accountancy and financial advice to businesses and high net worth individuals across 155+ jurisdictions.

The group's founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward thinking clients now have a credible alternative, which is open, cost effective and flexible.

IR Global is committed to working with like-minded member firms, clients and strategic partners to make a positive difference in business and society.

[rachel@irglobal.com](mailto:rachel@irglobal.com) / +44 1675 443 017  
<https://irglobal.com>

## IN THIS PACK

<b>AUSTRALIA:</b> Ross Koffel, Koffels Solicitors & Barristers .....	4
<b>AUSTRIA:</b> Dr. Clemens Völkl, Völkl. Rechtsanwälte .....	6
<b>BELGIUM:</b> Maarten Van Staeyen & Michiel Roovers, QUORUM.....	8
<b>BRAZIL:</b> Adriano Chaves, CGM Advogados .....	10
<b>CHINA:</b> Jian Zhang, Pamir Law.....	12
<b>CYPRUS:</b> Soteris Flourentzios, Soteris Flourentzos & Associates LLC .....	14
<b>CZECH REPUBLIC:</b> Aleš Eppinger, Schaffer & Partner .....	16
<b>DOMINICAN REPUBLIC:</b> Juan Manuel Cáceres, Cáceres Torres .....	18
<b>ENGLAND:</b> Dominic Holden & Richard Voke, Ashfords LLP.....	20
<b>FRANCE:</b> Caroline Joly & Géraldine Brasier Porterie, Baro Alto .....	22
<b>GERMANY:</b> Thomas Nitsche, nitscheLegal LLP.....	24
<b>HONG KONG:</b> Dominic Wai, ONC Lawyers.....	26
<b>INDIA:</b> Seema Jhingan, LexCounsel.....	28
<b>IRELAND:</b> James Sherwin, Sherwin O'Riordan Solicitors.....	30
<b>ITALY:</b> Lorenzo Bacciardi, Bacciardi and Partners.....	32
<b>KUWAIT:</b> Fawaz Alkhateeb, Taher Group Law Firm.....	34
<b>LUXEMBOURG:</b> Benoît Duvieusart, duvieuart ebel, avocats associés .....	36
<b>NETHERLANDS:</b> John Wolfs, Wolfs Advocaten.....	38
<b>PAPUA NEW GUINEA:</b> Michael Sullivan, Leahy Lewin Lowing Sullivan.....	40
<b>SOUTH AFRICA:</b> Carlo Messina, Messina Inc. ....	42
<b>SPAIN:</b> Sönke Lund, Monereo Meyer Marinelo Abogados .....	44
<b>SWITZERLAND:</b> Diego Benz, Zwicky Windlin & Partner .....	46
<b>US:</b> Douglas Park & Reza Dibadj, PARK and DIBADJ.....	48





AUSTRALIA

## Ross Koffel

Principal, Koffels Solicitors & Barristers

-  +61 2 9283 5599
-  [rosskoffel@koffels.com.au](mailto:rosskoffel@koffels.com.au)
-  [koffels.com.au](http://koffels.com.au)
-  [irglobal.com/advisor/ross-koffel](http://irglobal.com/advisor/ross-koffel)

Ross Koffel is the principal, legal practitioner director, and founder of Koffels Solicitors & Barristers. He is also the firm's supervisor and senior commercial practitioner. Having spent a significant part of his working life as proprietor of a multi-national business, and now maintaining a variety of independent board positions, Ross Koffel knows the importance of providing relevant, business-orientated, success-driven advice.

*Koffels Solicitors & Barristers is a Sydney-based law firm established in 1990. Its lawyers represent businesses ranging from Australian entrepreneurs to established industry leaders with turnover in excess of EUR 1 billion per annum.*

*The firm practices in most areas of law including; corporate law, commercial law, intellectual property law, and international business transactions.*

### Top three things to consider in Australia with regard to director liabilities / reporting to the board?

- 01.** In Australia, there are separate jurisdictions for each state and territory, as well as the commonwealth jurisdictions which govern the whole of Australia. It is important for individuals or companies to understand that law and regulations may be different depending on which state or territory they are residing or trading in.
- 02.** Changes to safe harbour and ipso facto legislation aim to protect businesses from immediate liquidation by creating safe harbour from personal liability for company directors of an insolvent trading, if the company is undertaking a restructure outside formal insolvency processes. Reforms impose restrictions on the enforcement of ipso facto clauses in contracts, to facilitate restructures through voluntary administrations, schemes of arrangement, and during receiverships.
- 03.** In order to set up a company in Australia, the company requires a local director and a public officer in Australia, who would be the point of contact for the company. Even if the local director doesn't have an active role in the company, they will still be regulated under the same laws and regulations as any other directors of the company.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We would initially assist General Counsel in developing an effective Corporate Governance framework that would allow the board to manage the business without impacting on business development. This would involve actions such as development of corporate codes of conduct, internal employment policies, and review of the company constitution. We would also make sure to set out the obligations all boards have to shareholders of the company, the Australian Securities and Investments Commission ('ASIC'), Australian Stock Exchange, ('ASX') and any other relevant regulatory bodies. If the company becomes the subject of any ASIC investigations or enquiries, we would assist in internally investigating the matter and also advising the General Counsel as to how they should respond to ASIC.

We would also periodically update the company as to any laws and regulatory changes which may impact on the board's structure or the operation of the company. We assist in making sure the board is aware of the current developments, to avoid any future breaches.

We provide assistance to General Counsel in making sure they can manage possible conflicts of interests at board level. The board members have a fiduciary duty to act in the best interest of the company, and exercise their powers in a manner that is in the organisation's interest. We assist General Counsel in making sure they take precautionary measures when decisions are being made by boards in regards to directors and/or the company in general. We advise them to consider circumstances such as; involvement of a board member's family in decision making, indirect financial interest by the board, and internal corporate culture.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

The directors of the company must be aware of their duties under the Corporations Act 2001.

In Australia, the directors are vicariously liable for a company's actions or omissions in certain circumstances. Whenever a company has been managed responsibly by a director, he or she will not be liable for the debts of the company. Directors who breach the law however, can become personally liable for the company's debts.

The Corporations Act 2001 is the main act that covers the duties of a director. Directors may be acting illegally and be in breach of the civil and criminal provisions of this act, which could make them personally liable for the debts of their company.

The directors may also be vicariously liable in certain circumstances such as; a company's breach of taxation requirements, failure by directors to adequately implement and/or supervise environmental compliance programs for the company, and/or failure by directors to implement appropriate

occupational health and safety procedures as required under Occupational Health and Safety (OHS) legislation.

Besides the Corporations Act 2001, there are additional sources to consider as to a director's liabilities. These include the Competition and Consumer Act 2010, the Crimes Act 1914, the Work Health and Safety Act 2011 and the Anti-Money Laundering & Counter-terrorism Financing Act 2006.

One of the current trends among the regulatory agencies in Australia is investigation of corporate culture. The regulatory bodies are now trying to prosecute companies who have an internal culture which tacitly authorises non-compliance.

This would include situations where, despite existence of formal procedures and documents that appear to create a complying environment, the reality within the company demonstrates that non-compliance is expected. An example of this would be where employees are pressured to act in a non-compliant way due to concern for their employment.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

We would advise the General Counsel to first review the terms of appointment and any executive services agreement entered into with the C-level executives. It is recommended that these documents contain terms which clearly set out their duties and responsibilities to the board.

They should also include special precautionary requirements, such as prohibition from having interests in competing companies and clarifying matters of the company which must be referred to the board for decision or approval.

Commitment to always promote the interests of the organisation and not to engage in any conflicting interests should be stipulated, as should the obligation to return and delete all organisational information, including any access to the company's email or database server when leaving the company.

The General Counsel should be aware of each C-level executives' reporting responsibilities. It is recommended that their reports be provided in writing, and if the report is presented during a meeting to the board, then minutes of such meeting should be recorded in writing.

The General Counsel should remind C-level executives that they should only report to the board at a time arranged and where proper records can be kept. They should avoid speaking to the board or board members at a place outside the work environment, or by personal telephone and/or email.

There are occasions where C-level executives would also sit on the board. In such cases, we would recommend the General Counsel take precautions to make sure these executives still carry out their reporting requirements to the rest of the board members. Also the General Counsel should be ready to advise the board as to the possible conflict of interest that such executives may have in certain board proceedings.



AUSTRIA

## Dr. Clemens Völkl

Partner, Völkl. Rechtsanwälte

☎ +43 1 317 71 01  
✉ [clemens@ra-voelkl.at](mailto:clemens@ra-voelkl.at)  
📍 [ra-voelkl.at](http://ra-voelkl.at)  
🌐 [irglobal.com/advisor/dr-clemens-voelkl](http://irglobal.com/advisor/dr-clemens-voelkl)

Clemens is a partner at Völkl. Rechtsanwälte and a lecturer at the Vienna University of Economics and Business.

He studied in Vienna, London and Stockholm and worked as an assistant professor at the Institute of Civil Law of the University of Vienna. Clemens has published extensively on issues of banking and insurance law, management liability and corporate law. He ranks among the best lawyers in Austria for banking, finance and investment disputes.

Clemens has a personal commitment to clients, and is able to handle large transactions through an extensive network of experts.

*Völkl. Rechtsanwälte was founded in Vienna in 1933. The firm places strong emphasis on the strategic approach, working with its partner strategy consultancy ([www.stadtt.at](http://www.stadtt.at)) in order to maximise client benefit and test legal strategies toward their feasibility in an overall context.*

### Top three things to consider in Austria with regard to director liabilities / reporting to the board?

- 01.** Austria has a very strict and often opaque set of rules for directors concerning civil and criminal liability. It also has increasingly strict case law, therefore the line between legal and inadmissible management is often hard to draw.
- 02.** If good quality compliance mechanisms and internal controls are put in place, management liability becomes less likely. This applies to all businesses, but is most crucial in regulated industries (i.e. banking and environmentally sensitive areas). At times, the documentation of mechanisms can seem more important than actual results and vice versa.
- 03.** Having insurance against liability risks (e.g. directors and officers) is essential and has to be managed appropriately (including cover for the relevant risks, monitoring and reporting duties vis-a-vis the insurers). Insurers do tend to be more reluctant to cover claims lately.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We work closely with General Counsels and the Board of Directors on systematic issues, including structuring of internal controls, reporting systems and contact with authorities. We regularly render legal opinions on sensitive topics like capital maintenance and business judgement rules. We also provide updates on important developments on compliance issues for the board, and audit internal controls and compliance systems. Clients can refer to our work for proof of sound management.

We also provide services in the initial stages of new projects to help management avoid compliance risks. In many cases they are not aware of the possible legal consequences that transaction structuring can have and how to avoid them.

We recently advised on the formation of a joint venture company that had already been negotiated by the boards of the companies involved. The structure envisaged a very complicated governance model, including loan agreements for long-term financing.

When counsels were brought into the negotiations we had to point out that the loan would have violated Austrian criminal law (although management couldn't determine this fact without legal expertise) and would also need to be changed, since the governance was not compliant with national and EU cartel law. We were able to change the structure and avoid management liability.

If companies face investigations, we can help by wording responses to queries and organising responsibility for communications with investigators.

It can often be helpful to provide General Counsel with a wider perspective on the consequences of interaction between different areas like supervisory law, corporate law, liability and insurance law.

If liability claims are brought against the company, especially in mass-cases, we do not only represent the company, but help them monitor the status of each case and the compliance duties resulting from such developments.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Channels of communications and documentation standards are often not implemented properly, even in very large and otherwise very professional companies. Employees assuming others are responsible for a task is one of the most common reasons for management liability issues.

We represented a large bank in a score of investors claims. The bank had established a handful of service companies in various areas, each assuming the others would be responsible for evaluating the prospectus of securities sold to investors. It turned out that nobody had looked into the prospectuses.

If you have a clear structure of responsibility and reporting lines, employees are forced to evaluate what duties they have to fulfil and learn who is responsible in each case.

The implementation of internal (and anonymous) whistleblowing hotlines can also be used for early warning against company risks. It can also be important to structure compensation models in such a way that C-level executives are not induced to take inappropriate risks. This applies especially

to sales organisation where corruption can otherwise be encouraged.

For exporting and financial companies it is especially important to implement compliant structures to monitor international sanctions duties and act accordingly. This is achieved by using appropriate IT systems that are implemented on all company levels and their functionalities fully utilised. Legally it can be more damaging to ignore the full capabilities of state-of-the-art systems than use an older, more limited, system correctly.

In terms of cybersecurity, proper IT controls have to be established on a technical level. In many cases internal organisation is even more important, for example setting internal thresholds for transactions that automatically trigger certain controls.

Technical risks should be controlled by internal and external experts, whose work is documented on a regular basis with the relevant level of detail. This is important for insurance claims and thus management liability. External quality assessments can also be helpful.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

As director liability is usually a case of a prior breach of material duties by the company, all material laws that the company has to comply with are relevant.

Liability issues following from a breach are usually addressed under corporate, civil and criminal law, while special industries are targeted by very strict standards of internal risk management and reporting (for example banking or healthcare).

Such standards are applied by courts and authorities more and more, to industries where there are no special legal provisions. These standards are 'imported' for reasons of good governance.

In Austria, the trend definitely points to stricter liability rulings by courts against directors and a much higher probability of criminal action due to stricter rules and their interpretation. The Austrian legislator has tried to counter this by implementing the BJR, but so far it seems to no avail as there are a number of high profile political cases where the public opin-

ion is in favour of harsh penalties. Fines in a European context have also dramatically increased especially in banking (CRD, BRRD, MiFID) and capital markets (MAD and MAR).

In this environment, and due to a much more complex set of rules, regulatory agencies are very reluctant to cooperate with supervised companies to avoid mistakes. This leads to a very difficult situation, as companies cannot turn to authorities in order to seek advice or jointly develop solutions that they know will be compliant for the authority. As a consequence, proceedings before authorities and public courts are increasing.





BELGIUM

## Maarten Van Staeyen

Partner, QUORUM

☎ +32 3 337 35 20  
 ✉ [mvs@quorumlaw.eu](mailto:mvs@quorumlaw.eu)  
 📍 [quorumlaw.eu](http://quorumlaw.eu)  
 🌐 [irglobal.com/advisor/maarten-van-staeyen](http://irglobal.com/advisor/maarten-van-staeyen)

Maarten Van Staeyen obtained his law degree and a degree in business law from the universities of Antwerp and Ghent, respectively. Before joining Quorum as partner in 2016, Maarten was active in the M&A department of an international law firm in Brussels for almost ten years and headed the Corporate Services department.

## Michiel Roovers

Associate, QUORUM

☎ +32 3 337 35 20  
 ✉ [mr@quorumlaw.eu](mailto:mr@quorumlaw.eu)  
 📍 [quorumlaw.eu](http://quorumlaw.eu)

Michiel Roovers obtained his law degree at Antwerp University. He joined Quorum in December 2014 and is a key associate within the firm's M&A practice.

Both partners focus on corporate law and all types of M&A transactions. They both speak fluent English.

*Quorum supports its clients in a myriad of corporate law matters such as general corporate law matters, Corporate Governance, mergers and acquisitions, restructurings, buy-outs, joint ventures, private equity and venture capital transactions.*

*If necessary Quorum teams up with domestic and/or foreign specialists with which it has a close working relationship.*

### Top three things to consider in Belgium with regard to director liabilities / reporting to the board?

- 01.** Directors' civil liability in a limited liability company is based on general grounds (e.g. breach of fiduciary duties, breach of the Belgian Code of Companies (including the accounting laws) or the company's articles of association, and tort) on the one hand, and some specific cases of liability which aim at safeguarding the rights of third parties (e.g. by holding the directors liable for the company's outstanding VAT, wage taxes and social security contributions) on the other hand.
- 02.** Under Belgian corporate law directors' liability also extends to directors in fact, i.e. a person who, despite the fact that he, she or it is not a member of the board of directors, takes or is able to take decisions which may be qualified as management decisions and is able to do so in full independence.
- 03.** Belgian parliament is in the process of thoroughly revising Belgian corporate law. It is the general expectation that these statutory changes will enter into force in the second half of 2018 for newly incorporated companies and in 2020 for existing companies. For the time being, it has not been definitively decided to what extent the governance structures of Belgian companies will be modified.

#### QUESTION 1

**How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

We strive to gain an in-depth understanding of the business and decision-making process of our clients. This helps us to determine, in consultation with the General Counsel, how and what pre-emptive legal checks can be integrated into the existing procedures, or, indeed, which procedures should be put in place to cater for the required checks.

Also, we aim to build up a good working relationship with General Counsel based on direct communication lines via e-mail and (mobile) phone with the responsible partners. This allows the General Counsel to obtain legal guidance on an ad-hoc basis.

Finally, we provide our clients with pragmatic advice that considers all the relevant legal and business-related aspects of the case at hand. We aim to support the business of our client, not to impede it by raising legal obstacles.



## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

As a general rule, the Board of Directors needs to deliberate and formally decide on all business topics as well as represent the company in carrying out any decisions taken in this respect.

In small and medium-sized enterprises, it is not uncommon for the directors and managers to be identical, at least in part. In these cases, there is, in principle, no need for any formal governance mechanisms at all to manage officer reporting.

This one-tier governance structure is intended to optimise company governance structurally, although, in large enterprises, it is not workable because the size of the company requires management to be entrusted to an executive management team.

Belgian corporate law therefore allows the formation of one or more topical advisory committees within the Board of Directors, and/or a formal management committee ('directiecomité / comité de direction') responsible for the executive management.

The Board of Directors can set up one or more topical advisory committees under its supervision and responsibility. Because such advisory committees are set up within the Board of Directors they form an integral part of the board, and constitute a valuable link between board and management, facilitating information sharing and risk management.

The Board of Directors can also implement a formal two-tier governance structure, by setting up a formal management committee to which certain management powers can be delegated. That committee remains under the supervision of the

Board of Directors which is in charge of controlling its activity. The appointment, qualification or removal of the committee members, as well as the organisation and powers of the committee itself, are described in the articles of association or decided upon by the Board of Directors in internal rules.

The risk of two corporate bodies working alongside each other instead of together is innate to any form of two tier governance structure. This risk is mitigated by making sure that both directors and managers form part of the management committee, adequate organisational rules are drawn up and frequent meetings take place.

Needless to say, it is important to draw up minutes of the committee meetings, for ease of reference and evidence purposes.

Belgian listed companies are legally obliged to set up an audit and remuneration committee to monitor and assess financial and remuneration risks, respectively, and to inform the Board of Directors in respect of these topics. A further structural measure could be the appointment of a statutory auditor ('commissaris' / 'commissaire') entrusted with the statutory duty to audit the financial situation of the company and the reflection thereof in the annual accounts.

Finally, Belgian corporate law also encompasses a set of non-binding Corporate Governance guidelines for listed and non-listed companies. In essence, it is recommended to put in place a risk management policy devised by the Board of Directors on the one hand, and to create risk management procedures and to conduct internal audits by the executive management on the other.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Under a civil law system, Belgian legislation dictates an order of priority in how any legal analysis is conducted, (on the basis of the relevant statutory law, the relevant case law and the relevant legal literature).

Directors will normally not be held liable for good faith mistakes of judgment or poor business decisions, provided that the decision complies with the directors' fiduciary duties and

provided that acting on the decision is within the powers of the company. This doctrine, similar in content to the business judgment rule, is generally referred to as the theory of 'marginal appreciation' ('marginale toetsing' or 'appréciation marginale'). In addition, the courts as a general rule do not take into account circumstances that have occurred after the action has been taken.



BRAZIL

## Adriano Chaves

Partner, CGM Advogados

+55 11 2394 8910  
[adriano.chaves@cgmlaw.com.br](mailto:adriano.chaves@cgmlaw.com.br)  
[cgmlaw.com.br/en](http://cgmlaw.com.br/en)  
[irglobal.com/advisor/adriano-rapo-so-do-amaral-pinto-chaves](http://irglobal.com/advisor/adriano-rapo-so-do-amaral-pinto-chaves)

Adriano Chaves specialises in M&A, corporate law, foreign investments, contracts and data protection/privacy. He graduated from the University of São Paulo and concluded his LL.M. at Columbia University School of Law where he was a Harlan Fiske Stone Scholar.

Adriano is recommended by reputable publications (Chambers Latin America, Leaders League, LACCA and Análise Advocacia) and is co-rapporteur of the task force on B2C General Conditions of the Brazilian Chapter of the Commission on Commercial Law and Practice (CLP) of the ICC.

He is also a member of the Commission of Law Firms of the Brazilian Bar Association, São Paulo (OAB/SP).

*CGM is a full service law firm founded in Brazil in September 2014 by an experienced group of partners. CGM focuses on solving its clients' issues in a timely, efficient and business-oriented manner, with technical expertise and creativity, helping clients do business and achieve their targets.*

### Top three things to consider in Brazil with regard to director liabilities / reporting to the board?

- 01.** A corporate culture that values compliance, ethics, integrity and risk management is more efficient in mitigating liability than detailed policies and intricate Corporate Governance mechanisms. This is also key to convincing authorities of the commitment of the company in case of alleged violations of law.
- 02.** Clear allocation of responsibilities, accountability and an internal audit body that can work freely without interference are key to effective Corporate Governance controls. The remuneration of directors and officers should take into consideration their commitment to foment a culture of risk management and their results in implementing the risk management policies of the company.
- 03.** The Corporate Governance bodies provided for in corporation law are a starting point. In order to maximise Corporate Governance controls and reporting, other bodies – such as an audit committee, a risk committee and a compliance body - can be established following a case-by-case analysis of the company, its risks and needs.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

The recent corruption investigations in Brazil showed that many companies that have compliance programs in place were not applying them properly nor managing their risks satisfactorily. It is clear that the mere existence of good policies and programs is not sufficient. It is also clear that each company will have its own particularities and risks, which need to be identified and addressed on a case-by-case basis.

In our work with General Counsels, we focus on a two-fold approach.

We assist the General Counsel in evaluating whether their company has adequate mechanisms to pro-actively and continuously identify and address risks. We also assess whether such mechanisms are implemented with transparency and autonomy, and if the relevant information will reach the board in a complete, precise manner.

The internal audit plays a relevant role in the board's monitoring activities; therefore, we en-

sure it has unrestricted access to all employees and all operations within the company. It must be able to perform its activities free from interference from the company's officers or other high level executives and report to the board directly, or through the audit committee.

It is also particularly important to understand that the focus of work should not be limited to risks that arise from voluntary actions (such as fraud), but rather should involve those arising from involuntary actions or omissions (including hacking of systems and damage to the brand).

We also believe it is important to make the various bodies and stakeholders of the company aware of the importance of promoting a culture of integrity and a pro-active approach to risks, which is, in fact, more important than the processes and mechanisms themselves. This is achieved by continuous training, by reference to benchmarking against best practices in the market, and, naturally, by example from higher management.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

In our view, it is fundamental to have a clear allocation of responsibilities and accountability with regard to identification, management and reporting of risks. It is also important to prepare and enforce the policies of the company, subject to clear parameters and performance measurements.

The company should have specific bodies, such as an audit committee, a risk committee and a compliance body, and such bodies require access to the relevant information and personnel in the company (including internal and independent auditors). By the same token,

the board should have direct and open access to such bodies and the officers.

From time to time, each officer and body should report what active steps they have taken to proactively address risks and improve the ability to manage them, as well as to enforce the policies of the company.

Relevant bodies and executives should report on the activities, results, enforcement and improvements of the compliance program, risk management program, internal controls, code of conduct and whistle-blower channel.

The compliance program and its supporting elements, such as code of conduct and risk management program, should be continuously evaluated and, if necessary, adapted to face the challenges imposed by new laws and regulations, changes in government and stakeholder relationships and day-to-day experiences.

Situations of conflict of interest should be identified and avoided.

Finally, to ensure concrete results, the evaluation of the performance of the executives and board members and their remuneration should take in to consideration their commitment and achievements in all those areas previously mentioned.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

The corporation law and regulations of the Brazilian Securities and Exchange Commission (CVM) contain basic rules on director and officer liability. Several other laws, such as the Labour Code, Consumers Defence Code, Antitrust Law, Anti-corruption Law and Environmental Law, have specific provisions about director and officer liability and need careful examination.

If a company's shares are public traded under one of the special segments of the Stock Exchange (such as "Novo Mercado"), the respective regulations should also be observed.

For companies with cross-border operations, it is crucial to know at least the FCPA (Foreign Corruption Practices Act) and the UK Anti-Bribery Act, among others. It is also important to follow case law from Brazilian courts and precedents issued by CVM in administrative proceedings.

In order to pursue a more proactive approach, legal practitioners should also resort to benchmarking the best practices of other companies and the practices recommended by associations that address Corporate Governance issues in Brazil, such as IBGC (Corporate Governance Brazilian Institute), ABRASCA (Brazilian Association of Public Corporations), AMEC (Association of Investors in the Capital Markets), ABVCAP (Association of Private Equity and Venture Capital), or governmental bodies, such as CADE (antitrust authority) and the CGU (Union General Comptroller).

We see two clear trends among regulatory agencies and stakeholders in Brazil. Firstly, there is a clear pursuit of more disclosure and transparency from companies. Secondly, there is a clear effort to hold directors and officers personally liable in cases of misconduct or negligence.

The pursuit of more disclosure and transparency started many years ago and can be seen in the migration to the IFRS accounting rules and in the adoption by the CVM of more detailed provision of information. The CVM, the Stock Exchange, the body in charge of the accounting rules and ABRASCA are continuously working with a view to improve transparency and disclosure.

The effort to hold directors and officers personally liable can be seen in actual or proposed changes to the legislation and capital markets regulations which focus on the personal liability of the directors and officers.

For instance, an amendment to the Federal Constitution has been proposed to state that directors and officers should be held liable in case of lack of payment of social security contributions by a company.





CHINA

## Jian Zhang

Partner, Pamir Law

+86 21 3669 6955  
[jzhang@pamirlaw.com](mailto:jzhang@pamirlaw.com)  
[pamirlaw.com](http://pamirlaw.com)

Mr. ZHANG Jian supports clients in a full range of business advisory and dispute settlement matters. He helps clients build business capacity, sustainability, and protects their rights and interests by using his China-specific legal and business expertise to deliver practical solutions and win-win results to all stakeholders.

His practice includes market entry/expansion strategy, operational (tax, corporate, labor, supply chain, anti-counterfeiting and IP enforcement, anti-corruption, regulatory compliance), transactional (WFOE, JV, VIE), and dispute matters (negotiations, enforcement and collection, arbitration, litigation and administrative).

Jian is a native of China and fluent in English. He graduated from East China University of Politics and Law (华东政法大学) in 1997 and earned his LL.M. from the University of Nottingham in 2002. He is a member of the Administration Law Committee of the Shanghai Bar Association and is actively engaged in legislation consultation for the Shanghai Municipal Council.

*Pamir Law Group provides international business and legal advisory services in Asia with offices in Taipei, Shanghai and Beijing. Pamir has a long track record of successfully supporting clients to achieve their goals in a broad range of industries in the PRC and Taiwan.*

### Top three things to consider in China with regard to director liabilities / reporting to the board?

- 01. Perspective:** Successful governance transcends just mechanical and administrative relationships among shareholders, directors and officers; it is part of a series of systems, procedures and programs designed to protect the company and all aspects of its business in an increasingly challenging and deteriorating business ecosystem.
- 02. Layered Systems:** The General Counsel, together with all chief executive officers (CXOs), directors and officers must actively protect the business (key personnel, hard/soft assets, trade/business secrets, know-how and IP, supply chain (procurement and sales) and the integrity and reputation of the company). Failing to implement China-specific layered governance and anti-corruption systems generates scandals, plus huge monetary and reputational damage.
- 03. Protective Training:** Comprehensive governance standard operating procedures (SOPs) and anti-corruption training programs help inoculate a company against a corrosive and corrupting eco-system with external and internal threats. Today's General Counsels must be able to create and deploy comprehensive governance and anti-corruption systems, able to adapt to the evolving realities of China's ecosystem

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We support General Counsel to establish China-specific layered governance and anti-corruption systems, designed to protect all aspects of their business. We do not rely on knee-jerk mechanical applications of foreign approaches, unlikely to translate well in China. We work with the General Counsels to create a balance between global and China best practices, based on actual market realities.

At the most basic level, we create fixed fee secretarial services systems to meet all applicable annual/periodic company law and other regulatory governance and reporting requirements. In addition, we work with the General Counsels and other CXOs to plan, design and implement governance and anti-corruption educational/training programs tailored specifically for particular CXO audiences (e.g. leadership, management, procurement, sales/distribution, vendor/supply chain, government relations/regulatory approval).

We also implement programs targeted at collective SBU audiences since the impact of many real life situations are not compartmentalised by title.

We conduct programs on commercial bribery in the People's Republic of China (PRC), covering key elements and penalties, active compliance and forms of bribery. The program also summarises relevant PRC laws including liability for corruption and the implications of offering/accepting commercial bribes. We explain how to mitigate corruption risks through compliance programs and active risk management

and articulate the difference between official and commercial corruption.

The workshops are based on actual governance/anti-corruption cases dealt with by our firm, which are targeted to train particular CXO audiences (e.g. legal, human resources, financial/accounting, IT, leadership, management, procurement, sales/distribution, vendor/supply chain, government relations/regulatory functions/teams.)

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Passive old world static templates and models are not built for today's China. The market challenges are changing radically and rapidly and the General Counsel and CXO team must adapt to specific threats. Each company must tailor its plan.

China is home to many disruptive exponential growth companies and industries which are applying real time Big Data, C2B (Consumer to Business) models and cashless e-wallet transactions.

Data and privacy protection are threatened by the government, the military, industrial espionage and professional hackers. The complexity of the challenges facing the General Counsel and CXOs cannot be simplistically labelled and require a coordinated ecosystem of professionals to navigate them successfully. Winning complex trade secrets theft cases does not fall to selecting any legal team. Protecting a China-based business, much like a football game, now needs more than just a good quarterback or striker; it takes a team.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

The relevant applicable laws vary, based on each company's industry, operational needs and location (since national and local laws apply). A specific company approach needs to be tailored to protect in each case.

Many laws may apply, including company law, criminal code, EHS, customs, tax, securities and various administrative laws relating to food hygiene, chemical, waste handling, medical safety, storage and licensing. Navigating the right laws is required to safely address the question of director and officer liability risks and best practices.

Company law provides two basic duties for directors and officers: the duty of loyalty and the duty of care. The violation of either tenet could bring civil as well as criminal liability, meaning directors and officers may be held criminally liable for their own acts and omissions. This also extends to crimes committed by the company if they are 'the managers who are directly in charge' and/or the 'persons who are directly responsible.'

Examples include tax evasion and violation of food safety rules. Administrative laws set out a company's responsibilities which are enforced by civil penalties. If the violation is

serious, the case may be escalated and the person in charge could be criminally charged. Law enforcement authorities have significant discretion in assessing whether to bring criminal charges against an individual. In many prominent food and pharmaceutical safety cases, imprisonment and death penalties have been applied.

China is trending toward greater enforcement of its laws, with ignorance and neglect not considered to be effective defenses. Regulatory scrutiny will increase and companies who fail to comply, or do not have systems in place, will be at greater risk in the coming years. As indigenous competition grows and informational leakage continues to be a threat, lackadaisical companies, especially foreign businesses, may experience increasing legal exposure for lapses in focus. Many international companies have fallen victim to their own neglect and tardiness in implementing systems and programs fit for a constantly and rapidly evolving ecosystem. The passive western 'business as usual' approach will become more dangerous in the coming years.



## CYPRUS

### Soteris Flourentzios Managing Director, Soteris Flourentzios & Associates LLC

- +357 25 107242
- [sf@sflourentzos.com](mailto:sf@sflourentzos.com)
- [sflourentzos.com](http://sflourentzos.com)
- [irglobal.com/advisor/soteris-flourentzos](http://irglobal.com/advisor/soteris-flourentzos)

Soteris has more than 12 years of broad corporate and financial law experience, including nearly nine years at two prominent Cypriot law firms and three years at a leading corporate services provider. He represents and advises major multinational corporations, financial institutions and private equity firms in contentious and non-contentious corporate and financial law cases of great magnitude and scale.

*Soteris Flourentzios & Associates is a law firm based in Limassol, Cyprus, established in January 2015. The vision of the firm is to provide legal services to equity firms, entrepreneurs and family offices, getting the deals done quickly and efficiently.*

### Top three things to consider in Cyprus with regard to director liabilities / reporting to the board?

01. Cyprus' strategic geographical position at the crossroads of three continents (Europe, Asia and Africa), and its membership to the European Union have turned the island into a business and investment centre.
02. The Cypriot legal system is based on the English Common law system and, as a Member State of the European Union, it has implemented all EU Regulations and Directives into its domestic legislation.
03. Cyprus has a modern tax regime, with a corporation tax rate at 12.5 per cent, from which dividend income is exempt, and royalty income tax is paid at just 2.5 per cent. There is no withholding tax on payments to non-residents and non-resident entities are only taxed on their Cyprus-sourced income, exempting from corporation tax any profits from overseas permanent establishments. Therefore, the Cyprus Holding Company structure, where a Cyprus company is the shareholder of an overseas company, is regarded as one of the best holding regimes in Europe.

## QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

Proactivity and anticipation are the key elements of success in the business and financial world. Monitoring the Board of Directors is an important aspect of good General Counsel, that helps to achieve this.

General Counsel constitutes the backbone of a firm, because of their broad legal knowledge, up-to-date information on new laws, regulations and directives and their implementation. Continuous information on the current issues in the economy and the business sector is vital to good governance.

General Counsel sets the legal framework within which the firm must operate to meet its legal obligations and should always be prepared to provide any kind of strategic and legal advice to the management of the firm. General Counsel must ensure that the Board carries out its monitoring duties and that the decision-making process is based on ethics, integrity and practical internal governance policies.

General Counsel evaluates and weighs the impact of any decision or action and puts in place plans that can be adjusted to cover any kind of risks that may emerge. They must be able to take into account external factors, enabling the firm to foresee, avoid and prevent the riskiest situations and smoothly overcome any unforeseen and exceptional event. Apart from these duties, General Counsel creates associations of trust with key stakeholders and external parties, whose contribution in the general operation of any firm may prove to be valuable at times.



## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

It is really important for any firm to have governance mechanisms established, if they wish to perform effectively. These mechanisms must provide a direct incentive for the top management to perform well.

As a result, it is necessary for General Counsel to seek to establish efficient internal mechanisms of governance between the board and top management. In order to control top management, it is necessary to ensure that C-level executives do not hold a position in the board, so that duality is avoided. C-level executives require a strong relationship with the board, reporting frequently to it, so that the board has a better view of how each area of the firm runs.

The role of non-executives is crucial, as they give an independent and impartial view, ensuring the policies pursued by executives are aligned with the shareholders' interests. They also ensure that financial controls and systems of risk management are robust and efficient, offering a different perspec-

tion on factors that may affect the company's performance. Their expertise may contribute to a firm's technological advancement and aid decision-making with regard to appointments and remunerations.

It is also necessary to establish board sub-committees such as audit and remuneration committees, consisting of officers with expertise in their sector. This ensures that the firm follows accounting standards and regulations, improving the company's general standing.

Finally, for cybersecurity, it is important to appoint a Data Protection Officer who will be responsible for guarding against any probable leak by any officer of any data and information used by the firm, or concerning the firm.

With these internal mechanisms established, it should be much easier to manage reporting and liability as closer checks are performed. Any officers who do not improve the company's overall financial performance can be removed.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Businesses have a separate legal personality from their directors and officers. Codes of conduct and best practice issued by European and International organisations are generally applicable in Cyprus.

The main sources of law with regard to corporate actors' liability are the Companies Law 1951 (Cap.113) and the Companies Rules (396/1944). In these two pieces of legislation, provisions are contained stating the actions that should be taken to address issues of directors' and officers' liability under specific circumstances, such as in the case of liquidation of the company.

Normally, courts strictly follow the provisions of the laws and regulations, except when it is permitted by the law to exercise discretion.

With regard to regulatory agencies, it should be noted that, in Cyprus, the only regulatory agency is the Cyprus Securities and Exchange Commission (CySEC). This body is responsible, along with the Central Bank of Cyprus, for supervising the conduct of investment firms following the Investment Services and Activities and Regulated Markets Law 144(I)/2007.





This law empowers the Commission or the Central Bank of Cyprus to apply for a court order for the removal of a director from the board in the event of a breach of any provision of this law.



CZECH REPUBLIC

## Aleš Eppinger

Partner, Schaffer & Partner

-  +420 221 506 300
-  [eppinger@schaffer-partner.cz](mailto:eppinger@schaffer-partner.cz)
-  [schaffer-partner.cz](http://schaffer-partner.cz)
-  [irglobal.com/advisor/ales-eppinger](http://irglobal.com/advisor/ales-eppinger)

Aleš Eppinger is founding partner of the international law office Schaffer & Partner Legal and manages a growing team of young flexible attorneys. He has been registered at the Czech Bar Association since 2005.

Aleš is primarily focused on the area of business law, in particular mergers and acquisitions, civil law, property law, insolvency law and judicial and arbitration proceedings. During his professional career, Aleš has been involved in many international transactions, including important cross-border acquisitions by multinationals, the complex restructuring of important holdings and also in international arbitration.

Aleš provides important banks, engineering and energy companies with legal services in various business law matters. He speaks fluent Czech, German and English.

---

*Schaffer & Partner is an international group of tax advisors, auditors and lawyers with offices in Prague, Nuremberg and Bratislava and a team of more than 100 experts. The head office, located in Nuremberg, was established in 1987.*

*Associated law office Schaffer & Partner Legal s.r.o., advokátní kancelář is a member of the international legal network Cross Border Business Lawyers (CBBL), International Law Referral and Wiras.*

*The firm's advisors have long-term know-how and work hard to understand client problems. Close co-operation between experts from various fields and careful assessment of problems, is critical to building trust and the opportunity for long-term successful client relationships.*

### Top three things to consider in Czech Republic with regard to director liabilities / reporting to the board?

- 01.** Be aware of legal risks concerning the overlap of executive positions with the employment relationship required of a director or general manager.
- 02.** Implement the 'business judgement rule' doctrine in the daily routines of directors.
- 03.** Proper monitoring of jurisdictional case law is important, because it helps with the interpretation of unclear legislation.

#### QUESTION 1

**How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

Our firm is in regular touch with all our clients, through our newsletter "Schaffer News" or via social media platforms (LinkedIn, Facebook etc.).

We regularly publish information about important legislation changes, providing some of our clients with a special service called 'targeted legislation monitoring'. This requires a client to select specific pieces of legislation that are constantly monitored. If anything changes, we provide the client with high-level information about the scope of the changes and recommend next steps.

Although the legal system in the Czech Republic is not based on 'case law' as in Anglo-Saxon jurisdictions, we have a special provision in our Civil Code confirming the importance of particular judicial decisions, in cases where any provision of the Civil Code is unclear or the interpretation is problematic.

Our office is one of few law firms in the Czech Republic that monitors all judicial decisions issued in the country as a standard package for our clients. We also organise various seminars and workshops for General Counsels via our Schaffer & Partner Academy. We focus on identifying typical legal issues and providing effective ways to handle them, avoiding risks in day-to-day business operations.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Our firm offers two levels of cooperation when developing an effective governance mechanism for General Counsels.

Firstly, we help to implement the internal legal regulations necessary for smooth distribution of responsibilities within client the reporting procedures. As a preliminary step, our firm actively evaluates the existing Corporate Governance and internal procedures and identifies all weak spots.

It is vital for us to understand the particular business of each client, especially when we advise entrepreneurs from different business sectors (e.g. clients from secondary vs. tertiary sectors).

Secondly, General Counsel should always be aware of not only the text of a relevant legal regulation, but also any alternative interpretation of the laws, in order to offer the management of their business the best legal solution. Our firm works closely with General Counsels to provide them with top class information on a daily basis.

It is in particular important to identify any substantial divergence from previous interpretations of relevant laws to enable the management of the client to evaluate any given situation correctly. Unfortunately, in the vast majority of cases on which we advise, entrepreneurs come to us too late to seek sustainable legal advice.

A very typical example now is the implementation of GDPR in the 'daily life' of companies. This EU regulation on data protection is an extremely complex piece of legislation with many practical impacts on the daily business operations of almost all our clients. However, surprisingly, only a few of them are fully aware of the entire scope of this EU regulation and few have a tailor-made GDPR implementation plan.

Unfortunately, in the vast majority of cases on which we advise, entrepreneurs come to us too late to seek sustainable legal advice.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

We have quite new legislation in the Czech Republic concerning the liabilities of directors. By introducing 'business judgement rules' doctrine into our laws, directors feel more able to be 'flexible' in their business decisions. Despite this, they need to understand this doctrine well and always follow its basic principles. This includes decisions taken in good faith, based on the best information available and always in a company's best interests.

As the legislation is just a couple of years old, we do not have a sufficient amount of 'case law' in our jurisdiction to draw more general conclusions, but we are already seeing a clear trend of liability issues arising from breach of 'business judgement rules'.

A legal framework for the adoption of business judgement rules needs to be identified and implemented into the daily routine of the relevant director in charge. As an example,

we are seeing an increasing number of cases where the directors are held liable for the late filing of insolvency petitions.

Given the fact that the insolvency laws in our jurisdiction have been recently amended, we recommend all our clients pay appropriate attention to new rules that are already in effect. A big issue in the Czech jurisdiction is the overlap of the legal position of director (in an employment relationship) and statutory body (an executive or member of Board of Directors). This requires thorough analysis and a specific legal solution.





DOMINICAN REPUBLIC

## Juan Manuel Cáceres

Founding Partner, Cáceres Torres

+1 809 542 2012  
[juan.caceres@cacerestorres.com](mailto:juan.caceres@cacerestorres.com)  
[cacerestorres.com](http://cacerestorres.com)  
[irglobal.com/advisor/juan-manuel-caceres](http://irglobal.com/advisor/juan-manuel-caceres)

Juan Manuel is a founder partner and manager of Cáceres Torres and heads the corporate and business practice of the firm. He was admitted to the Bar (Colegio Dominicano de Abogados) in 1999.

His professional practice is focused mainly in corporate/commercial law with a specialisation in complex mergers and acquisitions, reorganisations, consolidations and liquidations. Juan Manuel has also worked in project financing cases, including representation of lenders, borrowers and construction companies for private and public infrastructure projects. On a customary basis he assists national and multinational companies and individuals in preparing and negotiating many forms of commercial agreements, acquisition of real estate and other types of assets.

---

*Caceres Torres is a full service law firm located in Santo Domingo, Dominican Republic, with emphasis in corporate and business law, commercial law, banking law, family law, tax law, litigation and arbitration.*

*The firm's lawyers have ample practice and experience in advising national and international clients with legal and business needs providing effective, challenging and innovative legal work in different areas of law and business in general.*

### Top three things to consider in Dominican Republic with regard to director liabilities / reporting to the board?

- 01.** Directors and Officers Insurance is not a product commonly offered by insurance companies in the Dominican Republic. If available, or offered by a particular insurance company, cost is high.
- 02.** Directors are required by law to keep confidential all privileged information which means a high standard of care rests on them to actively reduce all risks associated with the use of technology and data.
- 03.** Directors are responsible for ensuring that corporations have established appropriate risk management programs and for overseeing how management implements them.

QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor— not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

As external lawyers to corporations, our main goal is to ensure General Counsels act ethically and understands the company's risks and how to avoid them. It is also important that the General Counsel receives timely and practical advice on issues that can affect the company's businesses.

When seeking advice from external lawyers, General Counsels must receive all options available but adapted to the circumstances of the company. The external lawyer must make sure that the General Counsel understands the most recommendable option, presenting the least risk to the company. Our firm periodically informs General Counsels in relation to laws, regulations and administrative rulings that may impact future events, including the provision of workshops and presentations to General Counsels and executives.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Although we have not seen lawsuits in the Dominican territory as a result of risk management, cybersecurity and technology; companies must implement reasonable measures to protect trade secrets and sensitive data. Directors are required by law to keep all privileged information confidential, meaning a high standard of care rests on them to actively reduce all risks associated with the use of technology and data. In the Dominican Republic cyber insurance policies are not common.

Even though primary responsibility for risk management has historically belonged to management, the boards are responsible for overseeing that the corporation has established appropriate risk management programs.

According to the General Law of Commercial Companies and Individual Limited Liability Companies, No. 479-08 and its amendments, any commercial company that uses credit from financial intermediation entities; or issues obligations of any kind must have their financial statements audited. Consequently, the external auditors, by attesting the accuracy of the financial statements, have a significant role in Corporate Governance.

Sociedades anónimas (share companies) are required by law to appoint at least one 'Comisario de Cuentas'- vigilance officer. This person must have a bachelor's degree in accounting, business administration, finance or economics, with no less than three years of experience in their profession. The Comisario de Cuentas oversees the accounting documents

of the company, the annual management report submitted by the Board and the documents addressed to the shareholders regarding the financial status of the company.

If the Comisario believes the members of the Board could be held liable for any action they have executed on behalf of the company, the Comisario can request a legal opinion. If the legal opinion asserts there has been a violation of existing laws or that the company has been harmed, the Comisario will inform the directors and may convene an extraordinary general meeting of shareholders to determine the next steps to be followed.

The Board of Directors of share companies may also designate an audit committee to supervise policies and procedures. There are no rules of general application on the operation of audit committees, except for financial institutions in which audit committees are mandatory.

Directors must take seriously their responsibility to ensure that management has implemented effective risk management protocols. Boards of directors are already responsible for overseeing the management of all types of risk, including credit risk, liquidity risk, and operational risk and there can be little doubt that cyber-risk also must be considered as part of overall risk oversight.

Directors shall review annual budgets for privacy and IT security programs, assigning roles and responsibilities for privacy and security, and receiving regular reports on breaches and IT risks. Cyber-risk education for directors is also advisable.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Dominican laws typify the conducts and scenarios that may trigger both civil and criminal liability. Particularly, Law No. 479-08 and its amendments impose broad and detailed responsibilities upon directors.

The Chambers of Commerce and Production of the Dominican Republic (one for each province) do not have a supervision or regulatory role, as they only oversee the registration of corporate documents.

Regulatory agencies do have an important role, however, in the supervision and detection of risks. For example, the new Anti-Money Laundering and Terrorist Financing Law 155-17 names several regulatory agencies as responsible for money

laundering supervision and prevention such as the Insurance Superintendents, the Securities Superintendents, the Pension Fund Superintendents, the Financial Analysis Unit, the Monetary Board and the Casinos and Gaming Directorate among others. Courts do not supervise directors or officers but sanction them if a fault has been committed.

The general concept is that directors will be held liable if they authorised or approved the conduct that led to the violation. For example, the General Law on the Environment and Natural Resources provides that the responsibility will be constituted if the management or administration bodies of the company authorised the actions that caused the damage.



ENGLAND

## Dominic Holden

Senior Associate, Ashfords LLP

+44 207 544 2448  
d.holden@ashfords.co.uk  
ashfords.co.uk

Dominic is a senior associate in the Dispute Resolution Team at Ashfords. He has extensive experience dealing with a broad range of commercial disputes, mainly conducted in the High Court in London including shareholder/director's disputes. Dominic is also a part of the firm's Cyber Security Incident Response Team.

## Richard Voke

Partner, Ashfords LLP

+44 117 321 8098  
r.voke@ashfords.co.uk  
ashfords.co.uk

Richard is a partner and Head of the Business Risk and Regulation Team. The team advise organisations on how to deal with the law regarding corporate manslaughter, health and safety, environmental issues, bribery, fraud, food and trading standards. He regularly provides director's training and speaks at conferences.

Ashfords is a UK-wide provider of legal and professional services. Clear direction and strong leadership ensures clients always receive the service they deserve and expect. Ashfords is equally comfortable representing UK firms wishing to do business abroad, or overseas companies wanting to do business or resolve a dispute in the UK.

### Top three things to consider in England with regard to director liabilities / reporting to the board?

01. GDPR

This should be a key consideration for any organisation that processes the personal data of EU residents, regardless of where the processing occurs. It imposes significant new obligations on both controllers and processors and the maximum fine for non-compliance is 4 per cent of annual global turnover.

02. Brexit

The extent to which the UK's exit from the EU will impact on business in the medium to long term is unclear and will depend on the terms that are agreed during the ongoing negotiations between the UK and the EU.

03. Corporate accountability

The UK Government recently announced a package of Corporate Governance reforms which will see new laws being passed, to force listed companies to reveal the pay ratio between senior staff and workers. It will give a voice to employees in the board room as well as the requirement to publish the names of executives whose salary packages have been challenged by a significant number of shareholders.

QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor – not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

For publicly-listed companies, we assist General Counsel in understanding and ensuring compliance with the UK Corporate Governance Code and the Disclosure and Transparency Rules. This requires that a board maintains sound risk management and internal control systems, in relation to, financial, operational and compliance risks. It also provides a description of internal controls and risk management systems in their Corporate Governance statements.

There is no equivalent code which applies to private companies, although we do encourage companies to appoint a senior representative (e.g. director, non-exec director or General Counsel) to ensure that they have in place policies and procedures which are followed, monitored and regularly updated. This ensures that the board is alert to actual and potential business risks.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Governance mechanisms must be both practical and demonstrable. An overly complicated system hampers implementation and good practice. Likewise, mechanisms must produce actual documentary records that demonstrate compliance, since they will be the first line of defence against any investigation or prosecution. Their absence can be a tempting target to a regulator.

General Counsel should seek to establish an overarching crime management model as a starting point, which identifies relevant legislation and offences and assesses the risk for the business in question. This will ensure that proper time and resources are spent in proportion to the risk posed. The model should identify what sub-servient policies are in place, who they are managed by, and how they reduce the risk faced by the organisation.

Depending on the sophistication of existing crime management methods, General Counsel may look to undertake a formal risk review/gap analysis process to identify key areas of concern for the organisation.

The board should then receive regular updates on how criminal risk is being managed within the organisation, most commonly at board meetings. Board minutes are useful as evidence of a working compliance system.

Regular review of the system is critical. It will ensure that new offences are identified early on, and that historic risks are cleared away as both the law and organisational practices change. Practical implementation is often where the best policies and procedures fail - regular review, monitoring and auditing are the best methods to prevent bad practice or complacency entering governance mechanisms.

In relation to cybersecurity, the forthcoming GDPR will bring with it more onerous reporting obligations to the regulator and in, certain circumstances, to the public. Having an Incident Response Plan in place which is followed by senior management in the event of a breach should be high on the board agenda. Ensuring that the Board has in place adequate technological, organisational and physical measures to prevent a breach from occurring is also important.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Generally, under English law, a director is not liable for an act of the company.

There are, however, a number of exceptions where a director can be held to be personally, or criminally, liable. This includes theft, fraud, bribery or reckless breaches of the Data Protection Act.

It also includes failing to make regulatory filings in breach of the Companies Act and market abuse or manipulation offences under the Criminal Justice Act and Financial Services Act.

Other offences which would see a director held liable would include fraudulent trading under the Insolvency Act, price fixing, bid-rigging and computer misuse.

Directors and officers may also face liability arising from their conduct during investigations and prosecutions. Failure to co-operate with investigatory powers, or making misleading or false statements can have serious criminal consequences.

The last decade has seen the UK Government make directors personally liable for an array of new offences as a means of ensuring greater compliance with legislation. Newer legislation (for example the Bribery Act 2010) and the forthcoming Data Protection Bill (which will bring the GDPR into UK law) continues to adopt the principle that corporate offences committed with the 'consent, connivance or neglect' of a senior manager will make that manager personally liable.

This, coupled with higher penalties following new sentencing guidelines, make custodial sentences a much more realistic threat than in the past, particularly for smaller companies where directors are closer to the day-to-day operations of an organisation. Governance mechanisms as discussed below are a key defence to this liability.

We also anticipate that the rise of third-party litigation funding (making it easier for claims to get off the ground), combined with an increase in the number of group actions, will lead to growth in claims against directors.





FRANCE

## Géraldine Brasier Porterie

Partner, Baro Alto

+33 1 44 69 89 42

[gbp@baroalto.com](mailto:gbp@baroalto.com)

[baroalto.com](http://baroalto.com)

[irglobal.com/advisor/geraldine-brasier-porterie](http://irglobal.com/advisor/geraldine-brasier-porterie)

Géraldine Brasier Porterie is partner and co-founder of Baro Alto. She started her career in the litigation and insurance departments of PwC Law then headed the litigation department at Stehlin & Associés.

She practices complex French and international business litigations, particularly in banking and financial law, D&O liability and insurance law. She also provides advice on insurance regulations.

---

*Baro Alto specialises in litigation and promotes a thorough approach to conflicts from prevention to resolution. The firm aims to provide a unique full service offering to clients using legal expertise and an extensive knowledge of the business world.*

### Top three things to consider in France with regard to director liabilities / reporting to the board?

01. Check whether a company is listed or not listed
02. Has the company submitted to a specific regulatory body (e.g. banking, insurance, finance, construction)
03. Has the company implemented a specific professional set of rules for directors (Corporate Governance Code - example: AFEP/MEDEF)

## Caroline Joly

Partner, Baro Alto

+33 1 44 69 89 41

[cjo@baroalto.com](mailto:cjo@baroalto.com)

[baroalto.com](http://baroalto.com)

[irglobal.com/advisor/caroline-joly](http://irglobal.com/advisor/caroline-joly)

Caroline Joly is partner and co-founder of Baro Alto. She started her career in the litigation and risk management department of PwC Law Firm.

Caroline has extensive experience in advising corporations and individuals facing criminal proceedings. Her practice focuses on alternative dispute management in which she intervenes either as a mediator or as a lawyer.

She is highly skilled with experience of the prevention and management of disputes in both French and international jurisdictions.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We assist General Counsel in its mission to ensure that the Board satisfies its duty to monitor and address director and officer (D&O) liability issues and proactively minimise the risk of future events regarding director liability problems, as they emerge.

We conduct training for D&O and members of the board to help inform legislative evolution, to improve knowledge and to better apprehend risks and the steps to follow. The training also helps them to be prepared to face crises that may jeopardise the activity of the company and its D&Os, including investigations and searches.

We perform reviews of D&O insurance coverage and handle the negotiation of cover with insurance brokers. In France a company is not allowed to pay its directors' defence costs, therefore it is important that insurance covers all costs necessary to ensure the defence of a director. These costs are

not limited to lawyers' costs, but can be investigation costs, expert costs and external audit costs.

We also set up prevention plans. These plans may appoint members of the Board to monitor follow up procedures involving the management. Prevention plans should also involve undertaking all necessary steps to implement new compliance obligations resulting from a new French legislation (Law of 9 December 2016, regarding transparency and fighting against corruption...).

We review and set up compliance rules for the board and their composition, as regards the undertakings of the company on membership of the board, independents or non-independent directors and rules of inducement. We also set up compliance programs and delegation of powers.

#### QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

In areas such as risk management, cybersecurity and technology, we recommend that General Counsel apply the following governance mechanisms.

Develop independence rules on each level, identifying key managers at each level and centralising the reporting process.

Perform an audit of the existing reporting process and its efficiency.

Make sure the General Counsel has an overview of what's going on, for that purpose setting up prevention plans in each area including insurance, internal and external process of control.

Set up delegation of powers and procedures to minimise the liability of the directors and officers in charge.

#### QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

We navigate with a large number of sources of law in order to address questions of director and officer liability:

- i. French Commercial Code and French Civil Code which provide for multiple sources of D&O liability for each form of company
- ii. Criminal Law
- iii. Specific regulation per activity: bank, finance, insurance...
- iv. Competition Law
- v. Control Authority own regulation, bylaws, case law (AMF, ACP, Autorité de la Concurrence)
- vi. Judicial and administrative case law
- vii. Professional sets of rules (i.e. Code Afep Medef)



## Top three things to consider in Germany with regard to director liabilities / reporting to the board?

**01:** Director liability: Personal liability is related to the status of an individual within the entity, for example as managing director, part of the managing board or supervisory committee. Compensations claims can be considered by the company itself to the director, as well as claims from third parties to the director in case of damages deriving from their actions.

**02:** German legislation: German law records directors liability claims under special statutes legislations for each company form, so the GmbH (limited company), Aktiengesellschaft (company limited by shares) and the KG (limited partnership). Under the law of tort, directors can be held liable for their concrete actions.

**03:** Capital Legislation: The breach of capital regulations in terms of capital maintenance within the company itself; is very relevant in company group cases such as cash pooling, distressed and merger situations. It is very important to point that out in insolvency cases, especially in times of crisis.

GERMANY

## Thomas Nitsche

Partner, NitscheLegal LLP

+49 40 3006 6880

[thomas.nitsche@nitschelegal.com](mailto:thomas.nitsche@nitschelegal.com)

[nitschelegal.com](http://nitschelegal.com)

[irglobal.com/advisor/dr-thomas-nitsche](http://irglobal.com/advisor/dr-thomas-nitsche)

Thomas Nitsche has a background in corporate M&A and corporate litigation, he works on (distressed) transactions, represents clients in restructuring-related litigation cases and advises on crisis situations.

Thomas's work also includes advising clients on managing/supervisory director and shareholder liability issues and disputes; fraudulent conveyance; set-off and security rights, as well as financial regulatory matters. He has successfully litigated on high courts in Germany and two Supreme court cases together with a barrister.

Thomas often recommended to clients, particularly insolvency trustees in distressed situations or in dispute with the financial authorities.

---

*nitschelegal is a boutique firm focused on corporate and insolvency law. We focus on national and international affairs and have a good reputation, especially in Latin America. We are regularly hired by banks and private equity funds to execute due diligences for new projects.*

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We proactively minimise risk to our clients by reviewing new legislation and actual cases. By reporting the latest legal development to our clients, we assure awareness of relevant high risk items and issues.

We have had good feedback about the lectures and presentations given by our partners to directors, especially from foreign managers in Germany.

We have a special introduction to German laws and risks, which offers advice on tax liability issues using relevant key cases. The presentation focuses on questions of compliance, discrimination and unfair competition, including antitrust (cartel) legislation.

#### QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

The reporting mechanism is the most relevant tool. Corporate Governance and risk management for executives in the daily business, should be stated by corporate guidelines, combined with a model of risk points and latent defects.

Visibility of these items trains the executives in personal responsibility and management commitment, while spot tests and samples are the instrument to investigate these standards. In terms of cybersecurity and technology safeguards, we implement frequent information exchange circles, including face time sessions or personal meetings.

#### QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

In Germany, lawyers are categorised in a particular specialism, for example in commercial and company law, insolvency law or tax law. These qualifications must be renewed on a yearly basis, via special training which takes around fifty hours per year. We retain the knowledge relevant to the risk points of directors, and publish articles in specialist periodicals. We also have frequent exchanges on the latest developments in director liability.

Director liability is more public and visible than ever before. The risk of false facts and information leaks to discredit directors has to be considered as likely. Directors and Officers insurance is important to offset this, designed to cover the wrongful actions of executives.

German law in this area is very severe and straightforward, so, to avoid any personal harm, it is advisable to be prepared. Often damage cannot be repaired once it has emerged into the public sphere and the courts are often loath to rule in favour of a director. In a distressed situation, directors can be held liable by the courts on the spot.

---

**Director liability is more public and visible than ever before. The risk of false facts and information leaks to discredit directors has to be considered as likely.**





HONG KONG

## Dominic Wai

Partner, ONC Lawyers

☎ +852 3906 9649  
✉ [dominic.wai@onc.hk](mailto:dominic.wai@onc.hk)  
🌐 [www.onc.hk](http://www.onc.hk)  
🌐 [irglobal.com/advisor/dominic-wai](http://irglobal.com/advisor/dominic-wai)

Dominic's practice focuses on advising clients on matters relating to cybersecurity, data security and privacy law issues. He also specialises in anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong.

Dominic has given presentations on the new PRC Cybersecurity law and has written an article entitled 'China's New Cybersecurity Law and its impact on doing business in China' for the Fall 2017 edition of 'Paradigm', the magazine of the International Society of Primerus Law Firms.

---

*ONC Lawyers is one of the largest domestic law firms in Hong Kong. Since 2013, the firm has been designated by Asialaw Profiles as 'highly recommended', and ranked by Chambers and Partners as a 'leading firm in the Asia Pacific Region.'*

### Top three things to consider in Hong Kong with regard to director liabilities / reporting to the board?

- 01.** Hong Kong is part of China but under the 'One Country, Two Systems' principle. Hong Kong is a special administrative region with its own constitutional document, the Basic Law. It is a separate jurisdiction from China that practices common law with an independent judiciary.
- 02.** Hong Kong is a major global arbitration centre for resolving disputes and the Hong Kong International Arbitration Centre is one of the world's leading dispute resolution organisations in arbitration, mediation, adjudication and domain name disputes resolution.
- 03.** It is fast and easy to set up a business in Hong Kong. Hong Kong is one of the global major financial centres with low tax rates and one of the world's most competitive and freest economic environments.

QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

Our firm provides training to General Counsel and directors of private and listed companies via various professional bodies such as the Hong Kong Academy of Law, the Hong Kong Institute of Chartered Secretaries, the Hong Kong Institute of Directors and the Chamber of Hong Kong Listed Companies on Corporate Governance and directors' duties.

Such training raises the awareness of directors about their fiduciary duties and also the requirements under the listing rules (for listed companies) regulated by the Hong Kong Stock Exchange. We also work with General Counsel in drafting internal code of conduct and ethics covering Corporate Governance and risk management for the company's internal use, to help companies minimise the risk of future events.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

General Counsel should advise the board to consider setting up committees to oversee issues such as risk management, cybersecurity and technology and also to establish monitoring, evaluations and fast reporting/escalation channels between C-level executives and the board for information and decisions.

Boards may consider giving one director specific responsibility for oversight of a particular area, such as cybersecurity.

Proper responsibility and ownership should be identified and allocated appropriately to the responsible C-level executives and board members or board committee.

General Counsel may also ask the board to consider having regular independent assessments and tests on cybersecurity resilience.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

In Hong Kong, we look to the common law and equity (case law), statutes (ordinances) and the listing rules (for listed companies) to address questions of director and officer liability.

Under common law, directors have a fiduciary duty to act in good faith in the interests of the company, to exercise powers for proper purposes, to avoid conflicts of interest and not to make secret profits.

Under section 465 of the Companies Ordinance (Chapter 622 of the Laws of Hong Kong), a director of a company must also exercise reasonable care, skill and diligence. For listed companies, directors and senior executives of the listed companies need to comply with the Securities and Futures Ordinance (SFO) (Chapter 571) that is administered by the Securities and Futures Commission (SFC).

The SFC has wide enforcement powers under the SFO to ensure that directors and senior executives are held accountable for their actions.

Under Section 213, the SFC may seek injunctive and other orders for restitution, or damages against anyone, including a director or senior officer, who has contravened, or aided, abetted, induced or been involved in a contravention of, any provision of the SFO.

Under Section 214, the SFC may take action and obtain court orders for breaches by current and former directors and executives which resulted in losses to listed companies. Under Sections 258 and 307N, the SFC may seek civil sanctions directly against any officer who failed to take reasonable measures to establish proper safeguards to prevent market misconduct, even if the officer did not personally engage in the misconduct.

Under Section 390, if a company has been found guilty of an offence under the SFO, the SFC may seek to extend criminal liability to any of its officers where the offence was committed with their consent, involvement or otherwise attributable to their recklessness.

We are seeing a trend of more robust and active enforcement by the regulators with listed companies. According to the SFC Enforcement Reporter of May 2017, company directors and senior executives owe very important and serious duties to the company and its shareholders. Therefore, they have a key interest not only in ensuring that the company is profitable and well-run, but also in caring for minority as well as majority shareholders.

The job is complex and getting more so. Directors and senior executives must be inquisitive, professional and diligent to do their jobs properly and with integrity. Otherwise, they run a real risk of shareholder suits, regulatory investigations or even enforcement action.

---

**Directors and senior executives must be inquisitive, professional and diligent to do their jobs properly and with integrity. Otherwise, they run a real risk of shareholder suits, regulatory investigations or even enforcement action.**



INDIA

## Seema Jhingan

Partner, LexCounsel

☎ +91 11 4166 2861  
✉ [sjhingan@lexcounsel.in](mailto:sjhingan@lexcounsel.in)  
🌐 [irglobal.com/advisor/seema-jhingan](http://irglobal.com/advisor/seema-jhingan)

Seema Jhingan is senior partner and co-founder of Lex-Counsel Law Offices. She has more than twenty-three years of experience advising in areas including mergers & acquisition, education law, defence & aviation, venture capital & private equity, franchising, media & entertainment, software/information technology, general corporate and commercial.

She has substantial expertise in representing legal matters related to collaborative alliances and joint ventures, brand and technology license arrangements, cross-border mergers and acquisitions, corporate structuring, investment and divestment and capital repatriation. Additionally, Seema has been recently recognised as one of India's Most Trusted Corporate Lawyers of 2017 by the Indian Corporate Counsel Association.

*LexCounsel is a New Delhi based law firm, with associate offices across India (Mumbai, Bengaluru, Kolkata, Hyderabad, Chennai, Pune and Goa) and a satellite office in New York.*

*LexCounsel provides comprehensive legal services to both domestic and foreign clients and is recognized as a leading Indian law firm for its work in M&A, private equity & venture capital, labour & employment, telecommunication & IT, education, life sciences and IP, real estate, tax, dispute resolution etc.*

### Top three things to consider in India with regard to director liabilities / reporting to the board?

- 01. Limited Liability of non-executive and independent directors:** It is important to determine at the time of appointment the exact category of directorship (whether executive, non-executive or independent) depending upon the level of operational involvement in the company.
- 02. Disclosures of Conflict of Interest:** Appropriate and timely disclosures of conflict of interests/related party transactions is imperative to avoid allegations of misuse of position for personal benefit.
- 03. Statutory Liabilities:** Indian statutes may hold a director personally liable for a company's liabilities in certain circumstances – such as for unpaid taxes (if attributable to gross negligence, misfeasance or breach of duty). Other examples include, dishonored cheques under the Negotiable Instruments Act, if attributable to director's neglect/connivance; or for prescribed liabilities under the Companies Act, 2013 such as refund of share application money.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

As legal counsel to various corporates, our firm not only provides day to day legal/compliance advice, but also actively assists them in implementing risk management processes so as to limit the exposure of senior management and board to future liabilities. Our role becomes even more significant for publicly-listed companies, which invite a much higher level of scrutiny and Corporate Governance compliance.

For instance, we hold workshops and presentations for the senior management of our clients, advising them on issues such as the roles and responsibilities of directors, the possible liabilities and pitfalls facing them under the extant regulatory regime and practical safeguards and processes which can be implemented to mitigate the risks associated with their respective roles.

We advise the Directors to adopt a precautionary approach serving the twin objective of safeguarding the company's interest and ensuring compliance during the decision-making process, while, at the same time, exercising due care and diligence to avoid undue exposure to liabilities.

This approach can include measures such as directors attending meetings regularly; ensuring that any disagreements/dissenting views are appropriately recorded in the minutes; reporting concerns about any unethical behaviour, or actual or suspected fraud or violation of the company's code of conduct or ethics policy.

Directors should also seek professional advice wherever required and engage external agencies if the situation demands it (such as for addressing whistle-blowing issues).

Providing requisite disclosures of interests/conflicts and excusing oneself from participation in proceedings in cases of conflict is critical, as is having a separate compliance team responsible for ongoing and day-to-day compliance, and an internal committee for regular internal audits. Lastly including

indemnity provisions in the letter of appointment and obtaining Directors & Officers Liability insurance is also important.

Since a director may also be exposed to liabilities for non-compliance under certain legislations where liability typically falls on those in charge of the operations, a specific person should be designated.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Corporate Governance is of utmost importance in every corporate structure for its success, sustainable growth and investor protection. As day-to-day operations are typically undertaken by C-level executives (albeit under the overall supervision and control of the Board), it becomes imperative to implement clear systems of reporting and accountability.

This can be achieved by the demarcation of roles and responsibilities between the C-level executives, and written mandates for each executive setting out his/her respective functions, responsibilities and authorisations.

Formulation of policies for robust internal Corporate Governance codes of conduct for the board, senior management and executives; conflict of interest; information management and security must also be prioritised.

Other important aspects of Corporate Governance include the establishment of systems for periodic and timely reporting and meetings between the C-level executives and the senior management, regular internal audits, the review of risk management systems and suggestions for mitigating measures.

In this digital age, data security breaches can lead to huge financial and reputational implications. General Counsels should encourage a culture of reporting of cyber security breaches together with security breach response planning. Ensuring integration of data security policies with the current practices and requirements of the company's business and ensuring that the employees are aware of the security and privacy policies of the organisation is vital, as the cost of ignoring information security can be considerable.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Under general common law rules and equitable principles, director's duties are largely derived from the law of trusts and agency, imposing both fiduciary duties and duties of skill, care and diligence on the directors, while holding them liable for any breach in complying with their duties.

Accordingly, directors are the trustees of the company's money and property, and also act as agents entering into transactions on behalf of the company. The Companies Act, 2013 lays down the duties of directors in unequivocal terms and contains the concept of an 'officer who is in default' for the purposes of affixing liability on persons (including directors) in respect of contravention of Companies Act, 2013.

Directors of listed companies are also required to comply with certain additional regulations such as SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and SEBI (Prohibition of Insider Trading) Regulations, 2015. Being designated as a director in a company, also has a cascading effect with respect to exposure to liabilities under various oth-

er legislations, where duties and liabilities, for non-compliances by a company typically vests with the person in charge of the business (which includes directors).

As far as recent trends are concerned, Indian courts have been adopting a strict approach, affixing liability on directors for financial scams and frauds committed in the company. Even independent directors may not be immune and can be held accountable despite them not being in executive control of the company. For instance, the Supreme Court of India recently passed an order restraining independent directors and their family from alienating their personal assets where insolvency proceedings have been initiated against its group company. The growing trend is to fix liability on all directors for the mismanagement of a company.





IRELAND

## James Sherwin

Managing Partner, Sherwin O'Riordan Solicitors

 +353 1212 0450  
 [jsherwin@sor.ie](mailto:jsherwin@sor.ie)  
 [sor.ie](http://sor.ie)  
 [irglobal.com/advisor/james-sherwin](http://irglobal.com/advisor/james-sherwin)

James Sherwin is the managing partner of Sherwin O' Riordan.

James advises client companies on issues ranging from incorporation, shareholder structures, financing, leasing and contracting to mergers, acquisitions, and leveraged buyouts. He has been involved in multi-million euro mergers and acquisitions of manufacturing, service and financial organisations - participating in every aspect of the transaction from negotiation and structuring through to closing.

James applies his extensive experience on incorporation, dissolution, shareholder agreements and employment agreements when advising companies and their officers, directors and shareholders. He has written extensively on the issues that can arise in shareholders' agreements and on the importance and potential pitfalls associated with employee shareholder agreements.

He deals with the many issues surrounding minority shareholder rights (on both sides) and has substantial expertise in regard to non-compete agreements, restrictive covenants and resolving shareholder disputes.

---

*Sherwin O'Riordan solicitors law firm provides practical, focused, value-based solutions to businesses and private individuals. The firm specialises in four key business areas – Commercial & Corporate, Commercial Litigation, Employment Law and Commercial Property.*

*The firm has been instructed by many leading businesses in Ireland and is the preferred legal advisor to the members of the Small Firms Association in Ireland which has over 800 corporate members.*

### Top three things to consider in Ireland with regard to director liabilities / reporting to the board?

01. Director Accountability
02. Corporate Governance
03. Technology

QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor – not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

In-house General Counsel roles are among the most challenging, powerful and influential roles in law today. The demands on the in-house lawyer are increasing as they adapt to support businesses in meeting corporate objectives in an ever changing regulatory and compliance landscape.

The in-house lawyer must be able to help identify potential solutions and deliver an outcome that allows the business to achieve its objectives in a legally robust way. Therefore, while legal skills are important, business acumen, pragmatism and the ability to remain focused on the overall business strategy, is vital to ensure that the legal advice given supports the achievement of the business objectives.

The changes brought about by the Companies Act 2014, have brought Irish company law up to speed with the UK, making it more contemporary, but also putting greater focus and accountability on directors. We begin our work with General Counsel prior to the appointment of a new director, ensuring that the candidate has a comprehensive understanding of the role and their obligations before they accept the position as director.

Extensive training in the legal aspects of their role at the outset can save organisations and directors from difficulty, expense, and damage to reputation. We also work to implement processes that minimise the risk of breach of duty arising, as well as encouraging and enacting proactive reviewing and audit processes. We focus on the practical application of compliance measures to maximise the level of protection from risk for our clients, in order to protect their business.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

When it comes to Corporate Governance, there are some broad issues applicable to all sectors, however most of the challenges faced by General Counsel will stem from difficulties specific to the industry that they company they work for operates in.

There is no denying that getting in place mechanisms to support the board and c-level executives in officer reporting and liability matters is essential for all organisations. Getting compliance matters right can be a source of strategic advantage for an organisation, so it is essential for General Counsel to regularly audit regulatory agencies' guidelines and identify key areas of risk with possible solutions.

For example, Central Bank of Ireland (CBI) guidance recommends that the IT strategy adopted by FSPs should ensure IT

resilience and it should enable them to maintain, anticipate, detect and recover from cyber-attacks. These steps must be taken to ensure a good regulatory outcome from any CBI on-site inspection and from any enforcement action taken by the CBI in respect of IT failures. Keeping up with specific industry guidance, and auditing internal process in line with changes in best practice is an essential part of managing officer reporting and liability. But, this must also be communicated clearly to the board.

Implementing a process for internal and external audit, review and implementation, which, crucially is strictly adhered to, can greatly improve the inner workings and compliance level of any organisation.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

The challenge in ensuring compliance when it comes to directors' duties and officer liability is giving full consideration to all aspects of the legal framework, including the various requirements of the statutory bodies and that of key stakeholders.

First and foremost, understanding how the courts interpret the Companies Act 2014 in terms of directors' duties and officer liability is fundamental in addressing liabilities and risks. Case law can provide a more nuanced insight into difficulties that could potentially arise, and steps that General Counsel might take to avoid such situations.

Soft law also plays a big role in Corporate Governance, and arguably is the most useful resource for General Counsel. Corporate Governance codes provide a framework for best practice Corporate Governance for directors, officers and administrators across a number of sectors whilst codes are generally voluntary, the principles within the relevant code for the industry the company operates in can assist General Counsel in addressing questions of director and officer liability.

It is essential for General Counsel to regularly audit of regulatory agencies' guidelines and to identify key areas of risk with possible solutions.

Looking at trends in this area, technological trends are altering the relationship between industry innovators, policy-makers, legislators and consumers is taking precedence over speculative law making. The rise of social media has given the consumers a powerful platform to voice concern about company behaviour, and this has had a significant impact on the duty of directors both to the success of the company, but also in their obligations to stakeholders, shareholders and the environment.

Reacting to technological developments, including the rise of automation, digitalisation and new software that promises to transform not only the exchange of data but also the nature of consumer interactions with insurance companies, has also been a crucial function of regulatory agencies and the courts. Striking the balance between consumer protection and economic prosperity has been a priority and this has been reflected in court decision making.



ITALY

## Lorenzo Bacciardi

Partner, Bacciardi and Partners

☎ +39 072 137 1139  
✉ [lorenzo@bacciardistudiolegale.it](mailto:lorenzo@bacciardistudiolegale.it)  
📍 [bacciardistudiolegale.it](http://bacciardistudiolegale.it)  
🌐 [irglobal.com/advisor/lorenzo-bacciardi](http://irglobal.com/advisor/lorenzo-bacciardi)

Lorenzo Bacciardi heads the Cross Borders Corporate Law Department at Bacciardi and Partners, specialising predominantly in mergers and acquisitions, joint ventures, real estate law, international assignment of employees, strategic international tax planning, law of trusts as well as will and estate planning.

He is particularly experienced in corporate and tax issues related to outbound investments made by Italian clients abroad and to inbound investments made by foreign clients in Italy.

Lorenzo holds a Master of Laws (LL.M.) in International Corporate Transactions and International Taxation from the Temple University James E. Beasley School of Law in Philadelphia, USA and a Juris Doctor from University of Urbino School of Law, Italy.

*Bacciardi and Partners is a business and corporate law firm that embraces and conveys comprehensive practices based on forty years of work, with a team of more than fifteen attorneys and business consultants.*

*Bacciardi and Partners is organized in specialized departments in the following areas:*

- Domestic and International Trade and Contract Law;
- Cross-Border Corporate Law; Corporate Finance; Merger & Acquisition;
- International Tax Law; Expatriates and Inpatriates;
- Customs and Transportation Law;
- International Litigation and Arbitration.

### Top three things to consider in Italy with regard to director liabilities / reporting to the board?

- 01.** Directors can be made liable if there is a breach of their duties or obligations, an occurrence of damages following the breach and a direct connection between the director's breach and the occurrence of subsequent damages.
- 02.** The liability of the directors can further be triggered if directors delay or postpone reporting their company as insolvent to the competent bankruptcy courts. In this regard, new Italian rules pertaining to bankruptcy and insolvency have recently been approved.
- 03.** The liability of the directors may be prevented or limited if the company implements a structured Corporate Governance system in accordance with the provision of the Italian Legislative Decree n. 231/2001.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor – not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

We usually work with the General Counsels of our corporate clients to make sure the company adopts proper and efficient procedures during the decision-making process.

We assist in the implementation of Corporate Governance systems in compliance with the terms and conditions provided for by the Italian Legislative Decree n. 231/2001. We also help to assess and implement procedures necessary to monitor the timely and proper exercise of management powers granted to both the directors and the C-level executives.

When hired by General Counsels, Bacciardi and Partners will assist them to assess the compliance of the adopted Corporate Governance system to the applicable rules and legislation, in order to identify any gaps and risks that require monitoring by management or executives.

We deepen the legal analysis on specific issues and topics involving commercial, corporate, tax, labour, privacy and data protection, transportation and customs laws as well as litigation on which Bacciardi and Partners has developed strong experience and knowledge. We also provide General Counsels with practical and strategic solutions tailor-made to meet the needs of the company and of its management and Corporate Governance system.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

General Counsels frequently report that they are consulted by executives and/or the top management of the company only when a problem actually arises following a previous decision.

We strongly believe that a good governance system does require that the General Counsels be always involved early on in the decision-making process, particularly when the decision is strategic in nature. We believe that the sooner the General Counsel is involved in the decision-making process, the lower the risk of future claims or litigations.

The timely referral by C-level executives to General Counsel, is also necessary to allow them to source legal assistance from private practices when the decisions to be taken needs to be supported by specialised legal advice.

In light of the above, we strongly advocate for the implementation of a governance system placing General Counsels at the very top level of the management of the company and allowing them to be engaged by executives and top management early on in the process.

Involving General Counsel early may also help to prevent additional liability deriving from cyber-attacks and/or intrusion, in the event that the intruding party succeeds in getting access to confidential data.

In this regard, the governance mechanism to be established between the board and C-level executives should identify the cyber risks, pro-

tect and safeguard the IT system from intrusions and detect any intrusion into the IT system.

It should also implement plans and procedures aimed at containing damages resulting from cyber-attacks and/or intrusion, helping to resume normal operations and implement recurrent reports to the Board of Directors, in order to assess the vulnerability of the IT system of the company.

To achieve the above, a company should implement a best-in-class cyber security governance model involving the main governance functions of the company including, but no limiting to, the IT security, the HR and compliance, as well as the legal, regulatory and privacy department offices.

The implementation of the best-in-class cyber security governance model implies the delegation of powers and responsibilities to those holding the aforesaid offices, so that all of them are intimately involved in the cyber security management. To achieve such aim, the involved functions within the company must also be held accountable, based on the powers received and obligations assumed.

In light of the above, it is imperative that General Counsels commit time and resources to educate themselves, the board members and the C-level executives on the ongoing and dynamic cybersecurity and technologic threats posed by the present digital age.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

While addressing the questions raised on directors' liability, Bacciardi and Partners navigates several sources of law. These also include Italian business criminal law (and case law too) which has broadened the concept of 'duty of care' with regard to directors and officers.

Directors are, in fact, too often held criminally liable for conducts that they either have specifically and negligently carried out, or that they have failed to carry out or diligently monitor.

It is therefore crucial for Bacciardi and Partners to maintain and further enhance knowledge on specific fields of law addressing the sources of directors' liability such as company law, employment law, environment law and consumer law.

Directors are frequently found liable for submission of misleading financial statement or distribution of sham dividends. The main corporate offences in this field of legislation are set up within the relevant articles of Italian Civil Code and of Italian Criminal Code, as well as of the Legislative Decree n. 231/2001.

Directors are also bound to ensure full safety and hygiene on the premises of the company as well as on any production work-storage site used by the company, in compliance with Legislative Decree n. 81/2008. Within consumer law, directors may also be held liable should they be found in violation of the legal protection afforded to consumers, in compliance with the Italian Consumer Code provided for by Legislative Decree n. 206/2005.

Bankruptcy law is also important, since directors can be found liable in those cases where the company falls into pre-insolvency status followed by subsequent bankruptcy. The most recent reform on bankruptcy law aims at anticipating the occurrence of the corporate crisis by providing alert systems that can prevent corporate crisis from becoming irreversible as well as at giving space to the out-of-court settlement tools. The implementation of an efficient and timely assessment of the financial status of the company is an adequate tool and solution to ensure the directors may timely and preventively detect insolvency situations.





KUWAIT

## Fawaz Alkhateeb

Partner, Taher Group Law Firm

- +965 22552 590
- [fawaz@tahergrp.org](mailto:fawaz@tahergrp.org)
- [tahergrp.org](http://tahergrp.org)
- [irglobal.com/advisor/fawaz-alkhateeb](http://irglobal.com/advisor/fawaz-alkhateeb)

Fawaz holds a Bachelor of Law from Kuwait University, Faculty of Law and a Master of Laws from the University of Manchester, UK. He started work as an Administrative Manager at Taher Law Firm in 2004 and is now a senior partner.

*Taher Group Law Firm (TAG) is one of the oldest full service boutique law firms in Kuwait and was founded in 1969 by Mr. Abdulaziz Alkhateeb under whose patronage the firm still functions.*

*The firm is well known for its legal advice and litigation, with a proven track record over forty-eight years of providing first class legal advice.*

### Top three things to consider in Kuwait with regard to director liabilities / reporting to the board?

01. Wrongful and deceitful acts.
02. Errors that may cause gross damages.
03. Insider dealing and market manipulation in listed companies.

#### QUESTION 1

**How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

The Taher Group Law Firm (TAG) works closely with General Counsels to ensure timely attention to risk management, allowing the company to reach its desired goals.

TAG will also ensure the General Counsel is adept at anticipating and mitigating any risks before they attract stakeholder or shareholder scrutiny.

Scrutinising the minutes of all board meetings and analysing how risks are contained through legal measures and what steps are taken before roll out to prevent re-occurrence is also an important role we perform. We encourage the General Counsel to initiate and develop a relation with the legal, regulatory and government agencies, to ensure governance mechanisms are strictly adhered to by the board.

TAG will help General Counsels to ensure that no objectives are violated by any of the individuals in managerial positions or the board.

#### QUESTION 2

**What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?**

The main objective of Corporate Governance is to protect the shareholders' interests and draw a line between the executive management which is responsible for the operations of the company and the Board of Directors who prepare and review the company's plans and policies in such a manner that enhances confidence within the company and enables shareholders and stakeholders to supervise the company's course of business.

The 'Resolution No. 25 of 2013 of the Capital Markets Authority, Board of Commissioners concerning issuing regulations for companies regulated by the CMA as well as Law No. 7 of 2010 concerning the establishment of Capital Market's Authority and Regulating Securities and its bylaws regulate such mechanisms and should be followed by the General Counsel.

Sound Corporate Governance is based on various ideals, including ethical behaviour, accountability, transparency and disclosure. The imposition of sound managerial structures to guarantee allocation of authority and responsibilities are also important, as are segregation of powers.

The General Counsel provides an advisory service to the Board. The role involves advising the Board of the possible legal consequences of any decision they intend to take.

The General Counsel should look to establish officer reporting and liability avenues between the board and the C-Level executives. Communication lanes should also exist in areas such as risk management, cyber security and technology.

One of their roles is to ensure soundness and integrity in financial reporting, based on a written covenant between the Board of Directors and the executive management. They should also ensure the independency and integrity of the external auditor as well as check that they possess

the requisite professional qualifications and technical capabilities.

It is also important that a General Counsel ensures that the company establishes a department/office/independent unit for risk management to which shall identify measure and monitor the risks associated with the company's activities.

With regard to cyber security and technology, a General Counsel should ensure that a duly qualified IT team is in place. Draft procedures need to be developed concerning the manner in which IT related issues are conducted and that all systems remain free from malware and viruses.

It is vital that all Board members be involved while also overseeing the management's efforts to protect all digital assets. Cyber security must be elevated to a Board issue by developing a priority list outlining procedures within the framework of Corporate Governance.

Sound Corporate Governance is based on various ideals, including ethical behaviour, accountability, transparency and disclosure.

### QUESTION 3

## What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

Managers, directors and officers of an LLC, can be discharged by judicial rule on the request of a partner who owns at least a quarter of the shares. This can occur if the partner has committed deceitful acts, or an error that inflicts gross damage on the company.

As per article 201 of Kuwaiti Company Law, the chairman and the Board of Directors are responsible to the company, the shareholders and others for all actions deceit, misuse of authority, violation of the law or the contract of the company and error in management.

In listed companies, the responsibilities stipulated above are the personal responsibility of a n individual director or the Board of Directors. In the case of the latter all members are held jointly responsible.

Directors of listed companies must meet other rules related to Corporate Governance, as per decision number 72 of 2015 issued by the Capital Market Authority. The decision specifies eleven rules that must be considered.

- i. To build a balanced structure for the Board of Directors.
- ii. To provide a proper identification of tasks and responsibilities
- iii. To select competent persons for membership of the Board of Directors and Executive Management.
- iv. To ensure the integrity of the financial reports.

- v. To develop sound risk management and internal control systems.
- vi. To Promote professional conduct and ethical values.
- vii. Disclosure and transparency in an accurate and timely manner.
- viii. To ensure respect for shareholders' rights.
- ix. Recognise the role of stakeholders.
- x. Enhancement and improvement of performance.
- xi. Application of social responsibility as the new laws promote corporate social responsibility in listed companies as they should not only consider maximising their wealth but also consider morality, social responsibility and public policy.

The authorities that supervise and monitor director's liability are the Ministry of Commerce, Central bank, and for listed companies the Capital Market Authority.

Another law that must be navigated to avoid director's liability is Law no. 42 of 2014 on Environmental Protection which can impart criminal and civil liability on directors. Also, the Anti-Money Laundering and Combating the Financing of Terrorism Law No. 106 of 2013 raises director responsibility to trace any suspicious transactions in the company.



LUXEMBOURG

## Benoît Duvieuxart

Partner, duvieuxart ebel, avocats associés

+ 352 27 44 95 41

[benoit.duvieuxart@duvieuxartebel.com](mailto:benoit.duvieuxart@duvieuxartebel.com)

[duvieuxartebel.com](http://duvieuxartebel.com)

[irglobal.com/advisor/benoit-duvieuxart](http://irglobal.com/advisor/benoit-duvieuxart)

Benoît Duvieuxart has advised major international companies on the structuring of corporate reorganisations, mergers and acquisitions, leveraged buy-outs, private equity deals and group financings.

He previously acted as Senior Associate in the Corporate Law – M&A Practice of a major law firm in Luxembourg. Prior to joining the Luxembourg Bar, Benoît was General Secretary and member of the Executive Committee of a Luxembourg private bank. He has previous experience in investments funds, securities custody and administration and wealth structuring in one of the major Luxembourg banks.

Benoît is a member of ALFI, the Luxembourg Investment Funds Association, of ILA, the Luxembourg institute of Directors, and a founding member and director of the Luxembourg professional association of portfolio managers (ALGAFI). He is an occasional lecturer at the IFBL, the Luxembourg banking education institute.

He holds a Master's degree in law from the Université de Louvain-la-Neuve (UCL) (Belgium) and an LL.M. from the University of Cambridge (United Kingdom).

*Duvieuxart Ebel, is a Luxembourg boutique law firm, focused on regulated and non-regulated investment vehicles, with a particular focus on alternative investment funds (private equity, real estate, debt and hedge funds), financial (holding) companies and other entities active in the financial sector.*

### Top three things to consider in Luxembourg with regard to director liabilities / reporting to the board?

**01.** Independent directors are a must within boards of directors in the financial sector in Luxembourg.

For some years now, more and more companies have appointed Luxembourg resident independent directors to ensure a permanent local representation on the board. This allows a better interconnection between them and the local service providers and public authorities, and ensures compliance with Luxembourg governance rules.

**02.** Increased personal liabilities for non-executive directors.

The Luxembourg Tax authorities have recently attempted to sue individual non-executive directors for failure by the company to pay withholding tax on wages or VAT collected on their activities. The administration must however provide evidence of a personal breach of duty by the non-executive director.

**03.** Directorship: a truly organised profession

The "Institut Luxembourgeois des Administrateurs (ILA)" has recently celebrated 10 years of existence. It provides professionalising training programs and certification for board members and company secretaries and promotes the values, skills and expertise of its 1,200+ members.

#### QUESTION 1

**How does your firm work with General Counsel in making sure the board fulfils its duty to monitor – not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

Corporate Governance and directors' liabilities are a key subject in board agendas.

As legal counsel to many Luxembourg regulated and non-regulated companies, we continuously ensure that these subjects are appropriately addressed and documented in the minutes of board meetings.

We also often attend board meetings, or advise Chairmen or General Counsel, to ensure that board members are duly informed on critical topics such as the rules governing conflicting interests, the new personal data protection regime, or the increasing cyber-security risk exposing companies to operational risk.

We also advise on commercial risks and economic risks as well as reputational risk. The board has a duty to provide clear and regular reporting to the shareholders or local authorities, as well as to the employees. We stress the benefit of maintaining a permanent dialogue between the board members and the executive teams so as to proactively anticipate, identify, measure and monitor risks before they arise.

In the financial sector, a particular concern relates to the monitoring the risk of money laundering and terrorism financ-

ing, and the implementation of strict internal policies on Know Your Customer (KYC) and Know Your Transactions (KYT).

We can help to make these rules and regulations accessible to board members and assist them in the translation of these rules into action plans, internal policies or monitoring tools.

Professional training programmes provided by ILA focus the attention of executive and non-executive directors and company secretaries on these subjects, and give them the tools to appropriately manage the risks.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Among the many responsibilities of General Counsels (in the US) or Company Secretaries (in Europe), there are several that stand out.

Firstly, ensuring everybody is duly informed and trained on new regulation applicable to their functions, as well as on the internal code of governance adopted by the Board of Directors.

Secondly ensuring that the heads of the main functions of the company (finance, operation, IT, risk, compliance) are well aware of, and aligned on, the board strategies and guide-

lines. Board decisions must be accurately and timely communicated to the appropriate addressees, and reports regularly produced by the chief executives in the appropriate format.

We see our role as assisting General Counsels/Company Secretaries or board members in digesting new legal and regulatory rules, and in helping determine the perimeter and calendar of reporting by chief executives.

We do not intervene in matters of risk management, cybersecurity, and technology.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

In Luxembourg, the main legal sources in matters of director and officer liabilities are the law of 10 August 1915 on commercial companies, the law of 19 December 2002 concerning the commercial and companies register and the accounting and annual accounts of companies and the Commercial and Civil Codes, as primary general references.

Companies active in the financial sector are also regulated by either the law of 5 April 1993 on the financial sector, the law of 17 December 2010 on collective investment undertakings or the law of 12 July 2013 on alternative investment funds

managers. Circulars and regulations issued by the Commission de Surveillance du Secteur Financier, the Luxembourg financial regulator are also important.

EU directives and regulations, as well as guidelines issued by the main EU agencies (EBA, ESMA) and the codes of conduct promoted by the Luxembourg Stock Exchange, the Luxembourg association of investment funds (ALFI) or by ILA constitute also an important set of rules we must maintain acquaintance with.





NETHERLANDS

## John Wolfs

Managing Director, Wolfs Advocaten

+31 43356 1570  
[john@wolfsadvocaten.nl](mailto:john@wolfsadvocaten.nl)  
[wolfsadvocaten.nl](http://wolfsadvocaten.nl)  
[irglobal.com/advisor/john-wolfs](http://irglobal.com/advisor/john-wolfs)

John Wolfs is the founder of Wolfs Advocaten and has been working as an attorney for 25 years. Before founding Wolfs Advocaten in 2003 he worked for leading firms in Washington DC and Rotterdam.

John is well known for his creativity, specialist (sector) knowledge and the top quality service he provides. He is direct, proactive, constructive and able to analyse situations quickly. John Wolfs often lectures in the field of corporate advice and litigation, as well as director's liability and insurance law. In his private time, John enjoys playing squash and running and has completed several marathons.

Wolfs Advocaten consists of a young, dynamic team of around 20 attorneys, lawyers and support staff. The firm philosophy is that law is a tool that primarily has to be used effectively and practically and only serves one purpose: unhindered continuation of business activities. Clients often choose to enter into a long-term business relationship with the firm.

*With offices in Maastricht, Roermond and Venlo, Wolfs Advocaten specialises in legal solutions for entrepreneurs in the Netherlands and abroad. Wolfs Advocaten covers all areas of law and specialises in (international) transport law, business law, international commercial law, customs law and insurance law*

### Top three things to consider in The Netherlands with regard to director liabilities / reporting to the board?

- 01.** In cases of insolvency, directors are liable for the shortages in the insolvency estate, provided that the requirements of maintaining adequate financial accounting and yearly financial reports have not been met. Although rebuttal is possible, the fact remains that this puts a heavy burden on directors from a burden of proof aspect.
- 02.** Liability does not solely apply to official directors, but also extends to those who are not directors. These persons are called 'de facto managers'.
- 03.** Apart from insolvency situations, directors can be held internally liable, provided they have not properly met the director-related requirements the law and articles of association of the company have put on them. In addition, on the basis of the general provisions of Dutch tort law, directors can be held externally liable in relation to the claims of third parties.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

The General Counsel in principle bears the responsibility of presenting the legal findings identified by Wolfs Advocaten. If the board does not correctly assess the severity of its obligations concerning monitoring, the advice of our firm would be rendered obsolete.

As such, Wolfs Advocaten is always keen to stay in touch with the General Counsel, continuously informing on progress and putting emphasis on the need for compliance. During this process we maintain an open and friendly atmosphere with the General Counsel and the board, in which every matter can be discussed in full confidentiality.

Apart from advice concerning specific issues that have already occurred, Wolfs Advocaten also ensures that clients are aware of potential hazards and the precautions they can take in this context. We put a particular emphasis on anticipating and preventing the occurrence of possible liabilities.

In order to do this, we invest in insight concerning the business model and organisational structure of clients. This gives the advantage of knowing precisely what laws and regulations are of specific importance to clients and where the hazards lie. By doing so, we ensure precise, effective and efficient advice and support for a General Counsel concerning risk management.

John Wolfs frequently lectures on director liability, and is always monitoring relevant legal and non-legal market developments with the aim of proactively informing clients. In addition to this, we stress the importance of insurance coverage, having in-house specialist attorneys in insurance law.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

Wolfs Advocaten always respects the role of the General Counsel in relation to its company. Therefore, our approach is always that of a trusted advisor, instead of an imposer. Together with the General Counsel, we will look into the most suitable options for every situation in an open and a constructive manner.

We could, for example, investigate the possibility of a specific internal and corporate-related mechanism, if not yet (fully) in place. In doing so we will consider whether the General Counsel may be the best candidate for such a monitoring role from a cost efficiency perspective. This always, however, remains up to the General Counsel and the company to make the final decision and allocate the exact responsibilities.

In addition, we notice that General Counsels are often interested in the warranting of an ongoing flow of reports by the C-level executives and follow-ups concerning these reports. If the General Counsel needs specific legal expertise, we support them.

This could be, for example, a regime in which C-level executives could periodically be required to report on the state

of matters concerning risk evaluation and cyber security. A possible execution of the latter may be to require the C-level executives to regularly make a risk assessment and test systems that shield against cyber threats.

Lastly, when dealing with data technology, risk management and cyber threats in general, there are certain interfaces with the upcoming European General Data Protection Regulation.

Failing to meet this regulation can lead to liability, therefore, we are never surprised when General Counsels approach us for more information. As a response to them, we always say that, in specific circumstances, the abovementioned regulation can oblige an organisation to designate a so-called Data Protection Officer. It is this individual's responsibility to ensure that all data processing internal regulations are drafted and respected and that the relevant cyber hazards have been inventoried and protective precautions put in place.

Not all enterprises are obligated to appoint such an officer, but we emphasise that creating such a position can be beneficial with regard to data protection.

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

The codification of director and officer liability is of great importance, since The Netherlands has a civil law-based judicial system.

Relevant articles can be found in the Dutch Civil Code, but, specifically, there are articles explicitly dealing with liability in relation to the organisation (article 2:9) as well as in relation to the insolvency estate (article 2:248).

Furthermore, case law has is well proven to be a decisive source of law. For instance, with reference to case law, directors and officers have been held liable on the basis of the Dutch tort-liability provision (article 6:162).

We note that traditionally there has been a high threshold for holding directors personally accountable and liable for their actions. However, in recent years there is an undeniable change of approach visible.

The trend nowadays is that directors are increasingly being held personally liable. In this context, one can think of situations in which the director engages in commitments, knowing the company cannot fulfil these, acts contrary to the statutory goals of the company, omits to keep a proper accounting of the company or carries out unlawful and selective payments.

Apart from this, it is also becoming apparent that factual executives under certain circumstances can be held liable on equal footing with directors. There also seems to be more incentive to specifically regulate the behaviour of directors. An example of this can be found in the Dutch Corporate Governance Code. Directors and officers (D&O) liability insurances has also become more popular.



PAPUA NEW GUINEA

## Michael Sullivan

Partner, Leahy Lewin Lowing Sullivan  
Lawyers

+675 320 3333  
[sullivan@lls.com.pg](mailto:sullivan@lls.com.pg)  
[lls.com.pg](http://lls.com.pg)  
[irglobal.com/advisor/michael-sullivan](http://irglobal.com/advisor/michael-sullivan)

Michael Sullivan's main areas of practice are oil and gas, mining, securities, public companies and banking and finance. His work has included the negotiating, drafting and settling of complex documents used in the oil and gas industry including gas agreements with the State, joint venture agreements, unitisation agreements, cost sharing agreements, transportation and lifting agreements, gas sales agreements and farm-in and farm-out documents.

*Leahy Lewin Lowing Sullivan is the leading independent Papua New Guinea based commercial law firm advising a wide range of investors, institutions and governments in and about Papua New Guinea.*

*The firm's major areas of expertise include corporate advisory, banking and finance, energy and resources, aviation, construction and infrastructure and government and public company work.*

## Top three things to consider in Papua New Guinea with regard to director liabilities / reporting to the board?

### 01. Overview of Directors' Duties

Directors have the statutory duties specified in Part VIII and a few other sections of the Companies Act 1997. They are fiduciaries and therefore subject to the fiduciary obligations imposed by English common law which forms part of the underlying law of Papua New Guinea (PNG).

A director's principal statutory obligation is to act in good faith and in the best interests of the company; they also have a duty to comply with the Companies Act and the company's constitution, while exercising reasonable care, diligence and skill. They must not disclose company information.

### 02. Conflicts of Interest

A director who is interested in a transaction or proposed transaction with the company, must enter details of that interest in the company's interest register. They must disclose to the Board where the monetary value of the director's interest can be quantified and the nature of that interest understood.

Under the PNG Companies Act, a director is treated as being interested in a transaction with the company, if they are party to the transaction or could obtain a material financial benefit from the transaction.

This would also apply if the director had a material financial interest in another party to the transaction; is the parent, child or spouse of a person who is a party, may derive a material financial benefit from the transaction; or is otherwise directly or indirectly materially interested in the transaction.

Failure by a director to disclose an interest is an offence, but will not, of itself, affect the validity of the transaction. However, a transaction in which a director has an interest may be set aside within three months if not for fair value.

### 03. Personal Liability of Directors

In certain circumstances directors may be personally liable for the debts of their company.

Where a company does not satisfy the prescribed solvency test, and there are reasonable grounds to show this to be the case, directors come under a positive duty to stop the company incurring any further debts.

This duty involves an objective standard of whether in the circumstances there are sufficient grounds to cause a reasonable person (in the director's position) to believe the company does not satisfy the solvency test. Ignorance is no excuse and directors must be able to monitor the financial position of the company regularly. Any director who allows the company to incur further debts after the company is judged by this objective standard to have failed the solvency test, may be personally liable to repay the debts incurred.

#### QUESTION 1

**How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

We conduct regular training sessions for public and private company boards to educate directors on what their duties are. On request we review and advise on specific fact situations which may give rise to a breach of directors' duties.

#### QUESTION 2

**What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?**

Ideally, the board should approve the adoption of key governance policy (including policies in relation to personal conduct, share trading and use of technology in the workplace) that apply to all employees, including c-level executives.

General Counsel should ensure that each employee is provided with copies of all relevant governance policies when they join the company and subsequent updates to those policies. An obligation to comply with each of those policies should be incorporated by reference into the contract of employment.

Key executives should be required to sign an annual statement for presentation to the board stating that the executive is not aware of any breach of the key governance policies by employees for whom the executive is responsible.

#### QUESTION 3

**What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?**

In PNG, the relevant sources of law are the Companies Act, Securities Act and the English common law, while courts and regulatory agencies are seeking to impose ever more stringent standards on company directors and officers.

The trend is to place as much responsibility as possible on company directors and officers and to relieve third parties from any responsibility to take care in their dealings with companies.





SOUTH AFRICA

## Carlo Messina

Managing Director,  
Messina Inc.

- +27 11 447 6535
- [carlo@messinainc.co.za](mailto:carlo@messinainc.co.za)
- [messinainc.co.za](http://messinainc.co.za)
- [irglobal.com/advisor/carlo-messina](http://irglobal.com/advisor/carlo-messina)

Messina Inc offers clients the highest standards of service by demanding the highest standards from its team.

Messina Inc is an active member of the Corporate Lawyers Association, South African Institute of Directors, Italian and American Chambers of Commerce. The firm is constantly up to date with issues and developments pertaining to client corporate needs.

The firm only employs and works with dedicated professionals across all skill levels. The Managing Director is Carlo Messina, whose qualifications include a BComm LLB HDip Insolvency Law Company Law Competition Law (WITS).

*Messina Inc is a specialist firm dealing in corporate, commercial and business law, based in Johannesburg, South Africa. The firm is a Recognised Level 4 Contributor with 100 per cent Procurement Recognition.*

### Top three things to consider in South Africa with regard to director liabilities / reporting to the board?

01. Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency. It involves the anticipation and prevention, or otherwise improvement, of the negative consequences of an organisation's activities and outputs on the economy, society and the environment.
02. Act honestly and in good faith with a view to the best interests of the corporation, and ensure that the director has the requisite knowledge, experience and capacity required to discharge duties to a board.
03. Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

All companies should be headed by an effective Board of Directors which can both lead and control the company. It should have executive and non-executive directors (including independent directors) where appropriate. The board has a collective responsibility to provide effective Corporate Governance that involves a set of relationships between the management of the company, its board, its shareowners and other relevant stakeholders.

The board should be able to determine the company's purpose and values, while developing the strategy to achieve its purpose and to implement its values in order to ensure that it survives and thrives.

The board should also exercise leadership, enterprise, integrity and judgment, in directing the company, so as to achieve continuing prosperity for the business. It is also important to ensure that the company complies with all relevant laws, regulations and codes of best business practice.

Ensuring that technology and systems used in the company are adequate to run the business properly and for it to compete through the efficient use of its assets, processes and human resources is paramount.

The board should be composed of individuals of integrity who can bring a blend of knowledge, skill, objectivity, experience and commitment to the board. The board should guide and set the pace of the company's current operations and future developments. In so doing, the board should regularly review and evaluate the present and future strengths, weaknesses and opportunities of, and threats to, the company.

Good Corporate Governance is essentially about effective, responsible leadership. Responsible leadership is characterised by the ethical values of responsibility, accountability, fairness and transparency. Responsible leaders build sustainable businesses by having regard to the company's economic, social and environmental impact on the community in which it operates.

In terms of Section 76 of the Companies Act 71 of 2008 (The Act), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director in good faith and for a proper purpose, in the best interests of the company, and with the degree of care, skill and diligence that may reasonably be expected of a person.

## QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

The board is responsible for Corporate Governance and has two main functions. The first is to take responsibility for determining the company's strategic direction and, consequently, its ultimate performance.

Secondly, it is responsible for the control of the company. The board requires management to execute strategic decisions effectively according to the legitimate interests and expectations of stakeholders.

Companies should be headed by a board that directs, governs and maintains effective control of the company. Every board should have a charter setting out its responsibilities and it should meet as often as is required to fulfil its duties, preferably at least four times per year.

The board should collectively provide effective Corporate Governance that involves monitoring the relationships between the board and management of the company, and between the company and its stakeholders.

Information technology (IT) is essential to manage the transactions, information and knowledge necessary to initiate and sustain a company. In most companies, IT has become pervasive because it is an integral part of the business and is fundamental to support, sustain and grow the business.

Companies should understand and manage the risks, benefits and constraints of IT. As a consequence, the board should understand the strategic importance of IT, assume responsibility for the governance of IT and place IT governance on the board agenda. IT governance is a framework that supports effective and efficient management of IT resources to facilitate the achievement of a company's strategic objectives. It is the responsibility of the board.

---

**Companies should be headed by a board that directs, governs and maintains effective control of the company.**

## QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

According to Section 77 of the Act, a director of a company may be held liable, for any loss, damages or costs sustained by the company in accordance with the principles of the common law relating to breach of a fiduciary duty.

Section 78 of the Act is in operation and clarifies the scope of permissible director and officer insurance cover. The policy can pay the costs of any proceedings relating to an indemnifiable event. Except to the extent that the Memorandum of Incorporation of the company provides otherwise, the company may purchase insurance to protect a director against any liability or expense for which the company is permitted to indemnify a director in terms of the Act.

In terms of Section 76 of the Act, a director of a company must not use the position of director, or any information obtained while acting in the capacity of a director to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company. They must also never knowingly cause harm to the company or a subsidiary of the company, and communicate to the board at

the earliest practicable opportunity any such information that comes to the director's attention.

Private companies are encouraged to follow the guidelines of the King Report on Governance for South Africa 2009, as read with the King Code of Governance for South Africa 2009 (collectively King III).

Currently, there is no legislation in South Africa that allows for institutional investors or shareholder groups to monitor and enforce good Corporate Governance. However, there is an ever-increasing responsibility on companies to ensure they have good Corporate Governance structures in place and these groups are therefore becoming fairly influential in monitoring and enforcing good Corporate Governance.



SPAIN

## Sönke Lund

Partner, Monereo Meyer Marinello-  
Abogados

+34 934 875 894  
[slund@mmmm.es](mailto:slund@mmmm.es)  
[mmmm.es](http://mmmm.es)  
[irglobal.com/advisor/sonke-lund](http://irglobal.com/advisor/sonke-lund)

Sönke Lund has a degree in Law from the University of Hamburg and was admitted to the Hamburg Bar in 1991 and the Barcelona Bar in 1997.

He is specialised in intellectual property law, private international law, consumer law, distribution and international sales.

He is a member of the IBA – International Bar Association's International Sales, Franchising and Product Law Section and a former Chair of the International Sales Committee.

He has served on the International Intellectual Property Committee and the International Environmental Law Committee of the New York State Bar Association (NYSBA). He has also served on the ALAI/ALADDA (Association Littéraire et Artistique Internationale/Asociación Literaria y Artística para la Defensa del Derecho de Autor) and the German Association for Protection of Intellectual Property (GRUR).

Sönke speaks Spanish, German and English.

*Monereo Meyer Marinello is a full-service law firm with a talent for cross-border business. With close to 60 staff, including 33 lawyers, and a strong network of international contacts, the firm has the capability to deliver legal solutions in Spain and beyond.*

### Top three things to consider in Spain with regard to director liabilities / reporting to the board?

- 01.** Avoiding conflict of interest situations is one of the most important aspects of the duty of loyalty of directors and the corresponding liabilities. The conflict does not need to be current and may arise regardless of whether it is detrimental to the company. It suffices that the director is not acting in the company's best interest, but is acting for a third party or himself.
- 02.** All directors are liable for fulfilling their duties in performing their functions, depending on the applicable legal system – civil, administrative or criminal – which have different forms of liability. In general, directors are liable to any third party whose interests have been directly harmed, and for a breach of their duties, vis-à-vis the shareholders and the company itself.
- 03.** Directors can be liable for company debts in front of the company's creditors without proving that directors have been guilty or negligent, evidencing the effective damage of the outstanding debt and the causality between the damage and the act or omission of the director.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

Spanish law presumes that the board is acting diligently in relation to decisions which may affect the business of the company. General Counsel has to assure that the board is sufficiently informed and follows an adequate decision-making process, which very much depends on the structure of the management body. Working mainly in the area of competition and related topics, we recommend to implement and follow prevention procedures which depend on the particular risk faced.

The organisation has to assess the nature, and extent of, exposure to potential internal and external risks by persons associated with it. The assessment has to be periodic, informed and documented. Our firm regularly provides legal assessment and monitors legislation processes and helps General Counsel to conclude.

The organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform services for or on behalf of the organisation, in order to mitigate identified liability risks. We help to take care when entering into risk-related business relationships prior to any commitment.

The organisation needs to ensure that its liability risk prevention policies and procedures are embedded and understood through internal and external communication, including training, that is proportionate to the risk-faced. We propose training proportionate to risk, likely to be effective in establishing a compliance culture in terms of competition, tax, bribery, data protection and other relevant areas if needed (seminar format, e-learning and other web-based tools).

The organisation has to monitor and review procedures designed to prevent liability by persons associated with it, making improvements where necessary. We cooperate in setting up systems to deter, detect and investigate liability risks, and monitor the ethical quality of transactions, such as internal data and financial control mechanisms.

An important source of information are staff surveys, questionnaires and feedback from training. In addition to regular monitoring, we recommend a review of processes whenever it comes to commercial transactions in new countries or governmental changes in countries in which the company operates.

#### QUESTION 2

### What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?

General Counsel should look to apply the ISO 19600 compliance management systems guidelines and organise the efficient delegation of tasks and controls giving a specific mandate under a contract to a compliance officer

covering his competences and duties. The executive is not obliged to supervise and ensure the achievement of the company's object and to protect the company's interest beyond the mandate and functional scope conferred.

#### QUESTION 3

### What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?

In advising our clients, we take into account the Capital Stock Companies Act, reformed by Act 31/2014 of 3 December to improve Corporate Governance, and the Insolvency Act, which refers to duties and liability of company directors.

The changes introduced in the Capital Stock Companies Act, reformed by Act 31/2014, can be classified into two categories.

We also consider the recommendations for good Corporate Governance, as set out in the Code of Good Governance for Listed Companies, approved by the board of Spain's Securities Market Commission (Comisión Nacional del Mercado de Valores).

Firstly, those referring to the General Shareholders' Meeting, mainly aimed at reinforcing their role and encouraging the participation of owners (partners or shareholders) and, secondly, those relating to the Board of Directors.

As for the trends among the Spanish courts regarding director's liability, some recent case law from the Spanish Supreme Court has increased the responsibility of the directors. Apart from the responsibility of the director, the liability may affect the directors that have not been assigned, but that act as directors. In this sense, the judgement 455/2017 of July 18 of the Supreme Court has extended the responsibility for these social debts to the de facto director of a company.

**Recent case law from the Spanish Supreme Court has increased the responsibility of the directors.**

Among the main developments affecting the Board of Directors, it is important to highlight the regulation of the remuneration of administrators. The remuneration of administrations is a sensitive matter that has been exposed by the Spanish courts during the financial crisis. Legislators now require formulas that correctly reflect the real evolution of the company, in line with the interests of the company and its shareholders, avoiding bad practices that have a negative effect.





SWITZERLAND

## Diego Benz

Lawyer & Notary, Zwicky Windlin & Partner

☎ +41 41 728 71 61  
✉ [d.benz@zwplaw.ch](mailto:d.benz@zwplaw.ch)  
🌐 [zwplaw.ch](http://zwplaw.ch)  
🌐 [irglobal.com/advisor/diego-benz](http://irglobal.com/advisor/diego-benz)

Diego Benz studied law at the University in Zurich and was admitted to the bar as an Attorney-at-Law and Notary of the Canton of Zug in 2005.

He has extensive experience in practising, especially, but not limited to, corporate, commercial and contract law. Diego also gained profound knowledge in the area of finance and accounting at the University of Lucerne (CAS). He became a partner at Zwicky Windlin & Partners on 1 January 2015.

Diego is a member of SAV (Swiss Bar Association), Advokatenverein des Kantons Zug (Zug Bar Association), registered at the Cantonal Bar Register of Zug, Joint Chamber of Commerce Switzerland – CIS, British Swiss Chamber of Commerce – BSCC and the Crypto Valley Association.

*Zwicky Windlin & Partners is one of the leading law firms in the economic region of Zug. The firm offers individual and solution-oriented mandates, while helping to find economic and optimal outcomes for both our Swiss and international clients. Advice is offered in German, English, French, Turkish, Spanish and Italian.*

### Top three things to consider in Switzerland with regard to director liabilities / reporting to the board?

- 01. Non-transferable duties:** The Board of Directors has various non-transferable and inalienable duties, including management of the company and the issuing of all necessary directives. They must also organise accounting and financial control systems as required and appoint and dismiss people entrusted with representing the company on levels below the board.
- 02. Delegation of the business management:** The law states that the Board of Directors manages the business of the company, unless responsibility for such management has been delegated. Such delegation of the business management requires a corresponding background in the articles of association as well as a formal decision by the Board of Directors issuing Regulations on the Organisation.
- 03. Business Judgment Rule and shareholders' discharge:** Members of the Board of Directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith. They must afford the shareholders equal treatment in like circumstances.

#### QUESTION 1

### How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?

It is imperative that the Board of Directors has a clear reporting and signature Charta in place ('Bill of Authority'). We recommend that outside counsel is involved in finalising and drafting such documents, using internal input from clients, who remain responsible for the content.

We implement such specific internal organisational documents to the Regulations on the Organisation, the latter drafted by us.

Thereafter, we often join board meetings as external advisers, or are involved on a case-by-case basis, sharing our input in real time or delivering memos and further clarifications later. In addition, we also like to be involved when it comes to the invitation and organisation of board meetings, making sure that the specific regulations given by Swiss law, the articles of association and internal regulations are observed.

Several clients engage us to provide a Swiss law newsletter to be shared with members of the Board of Directors and involved General Counsels, highlighting legal changes or important decisions. We have found this helps foreign board members to have a better understanding of Swiss law, since the legal fields to be covered in such newsletters are determined together with our clients.

As an aside, it is worth noting that provisions dealing with the internal organisation of the company are only binding when they are embedded in the company's articles of association. This is due to the strict separation of the contractual rights and obligations of shareholders and the corporate rights and obligations of the company.

## QUESTION 2

### **What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?**

Governance mechanisms differ from company to company, depending on the activity or industry they are engaged in. When it comes to risk management, cybersecurity and technology, the Board of Directors should work closely together with C-level executives, since the latter often have the crucial information required to implement a process.

The Board of Directors must carry out risk assessments and cannot delegate this, since it is a non-transferable duty.

We assist our clients in drafting the template/structure to be used for risk assessments, which should be executed at least once per year. Usually, the minimal standard includes (i) the annual risk assessment to be performed, (ii) the annual risk assessment to cover risk that may impact on the company's financial statements, (iii) the annual risk assessment to cover key risk management areas (identification / assessment / control and governance), and (iv) the annual risk assessment to be referred to in the disclosures of the financial statements.

The areas of accounting, tax, legal and managing and controlling cash all have a risk rating for the corresponding year, the previous year and the next year as a forecast. The potential impact must be detailed in the assessment.

Cybersecurity is a very technical issue which the General Counsel may wish to delegate to specific professionals, while a similar approach applies to technology.

## QUESTION 3

### **What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?**

The Swiss Code of Obligations is the most important source of law with respect to duties and rights of directors.

Also, the different tax laws in Switzerland (including VAT), social security law and, of course, Federal Court decisions must be explored. A member of the Board of Directors is liable for any taxes and social security not paid by the company. In addition, we consult various other sources (books, legal newspapers and so on) and may even have a discussion with the authorities on a no-name basis.

We have noticed that recent regulations and court decisions have become stricter in some cases, for example with respect to use of the Business Judgment Rule and liability for taxes and social security. The Swiss Federal Government seems to have maintained its passion for updating winding-up regulations.

Information duties under new Swiss banking law and related regulations, are quite different from the old ones and clients must provide more substantial information than in the past.

---

**Information duties under new Swiss banking law and related regulations, are quite different from the old ones and clients must provide more substantial information than in the past.**



US

## Douglas Park

Managing Partner, PARK and DIBADJ

- +1 650 814 3933
- [doug@parkdibadj.com](mailto:doug@parkdibadj.com)
- [parkdibadj.com](http://parkdibadj.com)
- [irglobal.com/advisor/douglas-park](http://irglobal.com/advisor/douglas-park)

Douglas Park is a corporate and securities lawyer and business strategist who has been named in the Super Lawyers list for Business/Corporate in Northern California and the Rising Stars list in Corporate Governance. Holding both a PhD in Organisational Behaviour from the Stanford Graduate School of Business and a J.D. from the University of Michigan Law School, he has applied his business and legal insights to successfully help a broad array of clients with financing transactions, complex commercial transactions, Corporate Governance, securities law, strategy, and corporate policy.

Park & Dibadj clients raise money by implementing novel capital raises and forming investment funds. The firm excels in developing cutting-edge approaches to capital raises that combine the latest regulatory and technological developments. The aim is to help clients make money by managing the frontiers of regulation and compliance.

## Reza Dibadj

Managing Partner, PARK and DIBADJ

- +1 650 383 7397
- [reza@parkdibadj.com](mailto:reza@parkdibadj.com)
- [parkdibadj.com](http://parkdibadj.com)
- [irglobal.com/index.php/advisor/reza-dibadj](http://irglobal.com/index.php/advisor/reza-dibadj)

Reza Dibadj is a highly skilled attorney, adept at analysing and solving complex questions of business law and business strategy. After studying electrical engineering at Harvard College, Reza subsequently received his J.D. from Harvard Law School and M.B.A. from Harvard Business School. Since then, he has written extensively regarding issues in corporate development and corporate malfeasance, including crowdfunding, shareholder rights, broker-dealer and investment manager regulation, the Dodd-Frank Act, and civil and criminal securities fraud.

### Top three things to consider in the US with regard to director liabilities / reporting to the board?

- 01.** Increased reliance upon, and scrutiny of, the independence of board committees and their independent advisors, notably in the context of conflicted (e.g., self-dealing) and fundamental transactions (e.g., mergers & acquisitions).
- 02.** Gradual shift away from private class actions and toward criminalisation of business violations—with an emerging emphasis on individual director and officer liability under federal securities and criminal law. Examples include insider trading liability, foreign corrupt practices, and mail & wire fraud.
- 03.** Emerging Corporate Governance challenges posed by 21st century innovations and challenges—including fintech (e.g., blockchain and cryptocurrencies), environmental & sustainability reporting, and the super-imposition of transnational transactions upon national regulatory regimes.

*Park & Dibadj are trusted money and finance attorneys. The firm has one goal; to help clients raise money, make money, and stay out of legal trouble.*

*The firm creates a regulatory strategy that enables innovative business models, whether in fintech, regtech, artificial intelligence, blockchain, cryptocurrency, health-care, or biotech.*

#### QUESTION 1

### **How does your firm work with General Counsel in making sure the board fulfils its duty to monitor—not only in terms of addressing director liability problems as they emerge, but also in proactively minimising the risk of future events?**

Clients typically come to Park & Dibadj when they face a serious breakdown, real or perceived, in their governance structures—whether it be a lawsuit for breach of fiduciary duties, a private ‘fraud-on-the-market’ allegation, or a government investigation.

Our first and immediate goal is to stabilise the situation. In order to do so, we listen carefully to our clients and their concerns, then work proactively and rapidly with General Counsel, the Board, and senior executives to address the problem. We also increasingly find ourselves engaging with shareholders and government agencies in order to address problems promptly and decisively.

Our second goal is to work with our clients to fix reporting structures through solutions such as Corporate Governance check-ups. We assess how the board fulfils its duty to monitor and then recommend specific ways the board can minimise the risk of future events. The firm’s partners draw on decades of deep experience—not only in corporate and securities law, but also in business strategy and organisational behaviour. We are not afraid to ask for specialised assistance, because our firm benefits from relationships with world-class experts. As such, we draw on a variety of subject-matter specialists—from certified anti-money laundering experts, to attorneys in jurisdictions overseas—to deliver a unique service.

#### QUESTION 2

### **What governance mechanisms should General Counsel look to establish between the board and C-level executives in order to best manage officer reporting and liability – particularly in areas such as risk management, cybersecurity, and technology?**

Park & Dibadj recommends that General Counsel look to establish two levels of mechanisms to manage officer reporting and liability. The overarching level encourages disclosure and open dialogue between the board and the C-suite. We use our vast experience advising and defending directors and officers to help the General Counsel’s Office decide which topics to prioritise based on their potential to implicate officer reporting and liability. Once the General Counsel has decided the topics that officers should report to the board, we help

to develop governance structures and processes to regulate how information flows on these topics. At this stage, we help the General Counsel decide who will report information to the board, what specific information officers will report, and what format the information will take.

Our depth of experience in both business and law allow us to understand the concerns of both the board and C-level executives—this allows us to bring unique value when we work with General Counsel.

#### QUESTION 3

### **What sources of law do you navigate in order to address questions of director and officer liability, and what trends do you see among the regulatory agencies and courts that supervise these issues?**

We navigate a dizzying array of materials to address questions of director and officer liability. This includes state statutes and common law, federal statutes, regulations and common law, plus a welter of additional sources such as stock exchange listing requirements, standards of professional conduct, and aspirations for Corporate Governance.

We are also seeing an increased focus by regulatory agencies and courts on scrutinising compliance mechanisms and independent board committees, as well as a gradual shift toward criminalising violations under federal securities and criminal law.



# Contacts

## UK HEAD OFFICE

IR Global  
The Piggery  
Woodhouse Farm  
Catherine de Barnes Lane  
Catherine de Barnes B92 0DJ  
Telephone: +44 (0)1675 443396

[www.irglobal.com](http://www.irglobal.com)  
[info@irglobal.com](mailto:info@irglobal.com)

## KEY CONTACTS

**Thomas Wheeler**  
Managing Director  
[thomas@irglobal.com](mailto:thomas@irglobal.com)

**Ross Nicholls**  
Business Development Director  
[ross@irglobal.com](mailto:ross@irglobal.com)

**Rachel Finch**  
Channel Sales Manager  
[rachel@irglobal.com](mailto:rachel@irglobal.com)

**Nick Yates**  
Contributing Editor  
[nick.yates@scribereconsultancy.com](mailto:nick.yates@scribereconsultancy.com)  
[www.scribereconsultancy.com](http://www.scribereconsultancy.com)

## CONTRIBUTING FIRMS (A-Z)

20. Ashfords LLP • England  
Dominic Holden & Richard Voke  
[ashfords.co.uk](http://ashfords.co.uk)

32. Bacciardi and Partners • Italy  
Lorenzo Bacciardi  
[irglobal.com/advisor/lorenzo-bacciardi](http://irglobal.com/advisor/lorenzo-bacciardi)

22. Baro Alto • France  
Caroline Joly & Géraldine Brasier Porterie  
[irglobal.com/advisor/caroline-joly](http://irglobal.com/advisor/caroline-joly)  
[irglobal.com/advisor/geraldine-brasier-porterie](http://irglobal.com/advisor/geraldine-brasier-porterie)

18. Cáceres Torres • Dominican Republic  
Juan Manuel Cáceres  
[irglobal.com/advisor/juan-manuel-caceres](http://irglobal.com/advisor/juan-manuel-caceres)

10. CGM Advogados • Brazil  
Adriano Chaves  
[irglobal.com/advisor/adriano-raposo-do-am-ara-pinto-chaves](http://irglobal.com/advisor/adriano-raposo-do-am-ara-pinto-chaves)

36. duvieuxart ebel, avocats associés • Luxembourg  
Benoît Duvieuxart  
[irglobal.com/advisor/benoit-duvieuxart](http://irglobal.com/advisor/benoit-duvieuxart)

4. Koffels Solicitors & Barristers • Australia  
Ross Koffel  
[irglobal.com/advisor/ross-koffel](http://irglobal.com/advisor/ross-koffel)

40. Leahy Lewin Lowing Sullivan • Papua New Guinea  
Michael Sullivan  
[irglobal.com/advisor/michael-sullivan](http://irglobal.com/advisor/michael-sullivan)

28. LexCounsel • India  
Seema Jhingan  
[irglobal.com/advisor/seema-jhingan](http://irglobal.com/advisor/seema-jhingan)

42. Messina Inc. • South Africa  
Carlo Messina  
[irglobal.com/advisor/carlo-messina](http://irglobal.com/advisor/carlo-messina)

44. Monereo Meyer Marinel-Lo Abogados • Spain  
Sönke Lund  
[irglobal.com/advisor/sonke-lund](http://irglobal.com/advisor/sonke-lund)

24. nitscheLegal LLP • Germany  
Thomas Nitsche  
[irglobal.com/advisor/dr-thomas-nitsche](http://irglobal.com/advisor/dr-thomas-nitsche)

26. ONC Lawyers • Hong Kong  
Dominic Wai  
[irglobal.com/advisor/dominic-wai](http://irglobal.com/advisor/dominic-wai)

12. Pamir Law • China  
Jian Zhang  
[pamirlaw.com/en/professionals/jian\\_zhang](http://pamirlaw.com/en/professionals/jian_zhang)

48. PARK and DIBADJ • US  
Douglas Park & Reza Dibadj  
[irglobal.com/advisor/douglas-park](http://irglobal.com/advisor/douglas-park)

8. QUORUM • Belgium  
Maarten Van Staeyen & Michiel Roovers  
[irglobal.com/advisor/maarten-van-staeyen](http://irglobal.com/advisor/maarten-van-staeyen)

16. Schaffer & Partner • Czech Republic  
Aleš Eppinger  
[irglobal.com/advisor/ales-eppinger](http://irglobal.com/advisor/ales-eppinger)

30. Sherwin O'Riordan Solicitors • Ireland  
James Sherwin  
[irglobal.com/advisor/james-sherwin](http://irglobal.com/advisor/james-sherwin)

14. Soteris Flourentzos & Associates LLC • Cyprus  
Soteris Flourentzos  
[irglobal.com/advisor/soteris-flourentzos](http://irglobal.com/advisor/soteris-flourentzos)

34. Taher Group Law Firm • Kuwait  
Fawaz Alkhateeb  
[irglobal.com/advisor/fawaz-alkhateeb](http://irglobal.com/advisor/fawaz-alkhateeb)

6. Vökl. Rechtsanwälte • Austria  
Dr. Clemens Vökl  
[irglobal.com/advisor/dr-clemens-voekl](http://irglobal.com/advisor/dr-clemens-voekl)

38. Wolfs Advocaten • Netherlands  
John Wolfs  
[irglobal.com/advisor/john-wolfs](http://irglobal.com/advisor/john-wolfs)

46. Zwicky Windlin & Partner • Switzerland  
Diego Benz  
[irglobal.com/advisor/diego-benz](http://irglobal.com/advisor/diego-benz)

