CHAPTER 3

PERSONS COVERED BY D&O INSURANCE

I. DIRECTORS: WHO ARE THEY?

3.01 Companies, upon registration, are required to appoint a number of persons,[1] designated as directors, whose function is to carry out—whether acting jointly or individually—the obligations imposed on them by the companies legislation. Subsequent appointments are made by the shareholders in general meetings, following whatever procedure may be agreed in the articles of association or in the default provisions of article 73 of Table A[2] which establishes a rotation system.[3] While companies acquire personal and legal capacity[4] through the issuing of the certificate of incorporation by the companies registrar, they obviously need to be represented by human beings, that is, the directors.[5]

3.02 Although the Companies Act 2006 does not give a clear definition of a "director" as such, what little there is by way of definition[6] emphasises that the position of directors is not recognised merely because of the title given to them. Rather, the test is functional.[7] As a result, the actual name given to the persons operating the company's business does not present any obstacle to them being "directors" and thereby assuming the role, duties and liabilities which such position embodies. Consequently, directors may in fact be called, for example, governors,[8] trustees and even council members, without affecting the true nature of their relationship with the company and/or the level of liability they could incur.

3.03 There are few limitations on the persons who may become a director. The main limitation is the requirement that the person appointed enjoys full legal capacity. This principle may be used to explain why an undischarged bankrupt is not permitted to hold such office[9]—they are not considered to be in a position to carry out activities demanding the performance of a high level of fiduciary duties. Additionally, the Companies Act 2006 establishes that a person may not be appointed as director of a company unless he has attained the age of 16 years.[10]

1. See para 3.05, below.
2. Companies (Tables A to F) Regulations 1985, Table A.
3. At subsequent annual general meetings one-third of the directors retire by rotation, determined by length of service since appointment or reappointment.
4. *Salomon* v. *Salomon & Co* [1897] AC 22.
5. *Ferguson* v. *Wilson* (1866) LR 2 Ch App 77, Cairns, LJ: "The company itself cannot act in its own person . . . it can only act through directors".
6. The Companies Act 2006, s. 250: "In the Companies Act 'director' includes any person occupying the position of director, by whatever name called".
7. Davies, *Gower and Davies*', *op. cit.*, p. 381.
8. Farrar, *Farrar's Company Law* (Butterworths, 1997), p. 329.
9. Company Directors Disqualification Act 1986, s. 11(1).
10. The Companies Act 2006, ss. 157–159.

3.04 Special attention needs to be given to the issue of appointing corporate bodies as directors. In fact, contrary to the opinion of some scholars in this field, English legislation does not forbid companies from becoming directors of other companies and this can often be the case with, for example, parent and subsidiary companies and even in joint venture enterprises. The position has to some extent been clarified by section 155 of the Companies Act 2006 which requires companies to have at least one director who is a natural person.

3.05 However, the reality is that companies could be appointed as directors and the imposition of fiduciary and other duties on a corporate body director gives rise to difficult questions of agency and liability in terms of how the director itself acts. This is why policy wordings, in the vast majority of cases, exclude from the meaning of "directors and officers" any legal person or corporate body. So, for example, Lloyd's Form LSW 736 provides: "3(a)(i) Director or Officer shall mean: (i) any natural person who was or is or may hereafter be a Director or Officer of the Company."[11]

3.06 The number of directors a company is required to have is governed by section 154 of the Companies Act 2006, which provides that every private company must have at least one director and every public company at least two. Where there is more than one director, problems arise under D&O policies in relation to the allocation of defence costs.[12]

II. TYPES OF DIRECTORS

(a) *De jure* and *de facto* directors

3.07 The main difference between *de jure* and *de facto* directors surrounds their appointment. *De jure* directors are those designated according to the rules governing such appointment[13] to undertake the affairs of the company. An express appointment is thus required for a person to become a *de jure* director. Additional requirements include that the appointed director has agreed to hold office, enjoys full capability by not being disqualified and has not vacated office.[14]

3.08 On the other hand, *de facto* (or assumed) directors[15] are either individuals appointed as directors but with a defect in appointment, or unappointed persons who are treated as directors by reason of their assumption of directors' duties. The term covers those who have assumed the role of directors or have been so held out to the outside world. In determining whether a *de facto* directorship exists, the court will look at all relevant circumstances.[16] Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title of director, whether the individual had proper information (for example, management accounts) on which to base decisions, and whether the individual had to make major decisions. The essential question is

11. Lloyd's Form LSW 736.
12. Where some directors take individual cover and some do not, questions of whether the directors are individually or jointly and severally liable and the issue of allocation between insured directors, uninsured directors and the company can become very complex.
13. *Mayson, French & Ryan On Company Law*, 24th edn (Oxford, 2007–2008), pp. 406–407.
14. *Ibid.*
15. Ferran, *Company Law and Corporate Finance* (Oxford, 1999) p. 155: "A *de facto* director is a person who acts as a director but who has never been validly appointed to that position": see: *Re Hydrodam (Corby) Ltd* [1994] BCC 161, *per* Millett, J.
16. *Re Kaytech International plc, Secretary of State for Trade and Industry* v. *Kaczer* [1999] 2 BCLC 351 (CA).

whether the individual was part of the corporate governing structure,[17] such that they performed their functions in a manner consistent only with acting as a director.[18]

3.09 Regarding insurability, there is nothing in principle which prevents a *de facto* director from insuring against liabilities incurred in that capacity. Nevertheless, the policy itself may require, by way of a contractual provision, that only duly appointed directors are covered in order to avoid the inconvenience of having to ascertain in the first instance precisely who is a director in order then to activate the potential indemnity. In some cases, insurers agree to cover "the board" as such and in this situation, whoever carries out the functions of a director—irrespective of any appointment—may be deemed to be the assured for the purpose of D&O insurance. In the absence of such deeming provisions, the position is plainly open to doubt.

(b) Shadow directors

3.10 A shadow director is someone never actually appointed but who is: " . . . a person in accordance with whose directions or instructions the directors of the company are accustomed to act."[19]

3.11 This definition has been incorporated within two of the most important statutory provisions namely, section 251 of the Insolvency Act 1986 and section 22(5) of the Company Directors Disqualification Act 1986.

3.12 The term "shadow director" includes persons who exercise a measure of regular control over the company (whether or not in some concealed or sinister manner), although the statutory definition set out above excludes professional advisers acting in that capacity. The general test is that shadow directors will be those, other than professional advisers,[20] who exercise real influence in the direction of the company's affairs. It does not have to be shown that the board was subservient to the alleged shadow director and this is a common misapprehension. Direction can include "advice" and does not have to be shown to be mandatory.[21]

3.13 In *Secretary of State* v. *Deverell*,[22] the Court of Appeal held that the term "shadow director" was to be construed so as to give effect to the parliamentary intention underlying it. The purpose of the legislation was to identify those, other than professional advisers, with real influence in a company's corporate affairs, although it was not necessary that such influence was exercised over the whole of its corporate activities. The court, therefore, had to ascertain objectively, in the light of all the evidence, whether any particular communication from an alleged shadow director, whether by words or conduct, was to be classified as a direction or instruction. While it would be sufficient to show that, in the face of directions or instructions from the alleged shadow director, the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions, it was not necessary to do so. Finally, a shadow director might act quite openly and certainly did not have to be shown to reside in the shadows. A good example was of a person resident abroad who owns all a company's shares but chose to operate the company through a local board of

17. *Ibid.* See also *Secretary of State for Trade and Industry* v. *Tjolle* [1998] 1 BCLC 333, *per* Jacob, J.
18. See *Re Hydrodam (Corby)* [1994] BCC 161, *per* Millett, J and *Secretary of State for Trade and Industry* v. *Deverell* [2001] Ch 340 (CA).
19. The Companies Act 2006, s. 251.
20. The Companies Act 2006, s. 251(2).
21. So, e.g., non-professional advice from consultants may suffice.
22. [2001] Ch 340 (CA). See also *Secretary of State for Trade and Industry* v. *Becker* [2002] EWHC 2200 ChD (Sir Donald Rattee sitting as a High Court judge).

directors and from time to time, to the knowledge of all concerned, gave directions to the local board as to what to do but took no part in the company's management. Such a person could be a shadow director despite the fact that he/she took no steps to hide the part they played in the affairs of the company.[23]

3.14 The question which arises is to what extent shadow directors may incur personal liability to the company and possibly to third parties. The point commonly arises in an insolvency context and the application of section 214 of the Insolvency Act 1986 (wrongful trading)[24] is of considerable importance here. Shadow directors may be liable to the same extent as appointed and *de facto* directors, either to account for profits or to compensate the company.[25] Wrongful trading has been the subject of extensive debate in the literature[26] and in practice it is a very common allegation in claims in which banks and parent companies are involved.[27] However, the issue, although significant in insolvency and company law, is of far less importance in the context of a D&O policy because insurers refuse to extend cover to entities acting in their capacity as director.[28]

3.15 The second important area concerning shadow directors is that of disqualification.[29] Under section 22(5) of the Companies Directors Disqualification Act 1986, shadow directors are subject to the disqualification jurisdiction to the same extent as appointed or *de facto* directors. Even though the disqualification sanction is, by its nature, uninsurable, there is nothing to prevent directors from indemnity in respect of defence costs incurred in contesting such proceedings (and whether successfully or not). So it cannot be said that disqualification proceedings are strangers to D&O coverage.

3.16 Finally, section 417(1)(b) of the Financial Services and Markets Act 2000 is to be interpreted as encompassing a shadow director and, therefore, identifying this form of directorship is relevant here.

(c) Executive and non-executive directors

3.17 Executive directors tend to work and manage the company's affairs on a full-time basis, usually pursuant to contracts of employment. Executive directors are in charge of the management of the company and exercise the powers conferred upon them by the articles of association.[30] The distinction between executive and non-executive directors is not defined in the Companies Acts,[31] but the January 2003 Review of the Role and Effectiveness of Non-Executive Directors ("the Higgs Report") described non-executive directors as "the custodians of the governance process". Non-executive directors will not be in charge of the daily management and are unlikely to have any responsibility for the company's employees. They are appointed because of the skills, knowledge and prestige that they may bring to the board of directors.[32] They may be entitled to a fee in respect of the role they perform.[33] Since the non-executive directors are not involved in the day-to-day running of the business, their role

23. *Ibid.*
24. See ch 5, below.
25. Insolvency Act 1986, s. 214(1).
26. See, e.g., Gregorian, "Shadow Director and Wrongful Trading: Shadow Directors" [1997] IBFL 125.
27. Davies, *Gower and Davies*, *op. cit.* at p. 197.
28. See ch 2, above.
29. Griffin, "Evidence Justifying a Person's Capacity as Either a *de facto* or Shadow Director: *Secretary of State for Trade and Industry* v. *Becker*" [2003] Insol LJ 127. See also Gregorian, *op. cit.*
30. Farrar, *op. cit.* at p. 332.
31. Nor, indeed, elsewhere.
32. Grier, *UK Company Law* (Wiley, 1998), p. 346.
33. *Mayson, French & Ryan on Company Law* at 401 *et seq.*

involves seeking to establish and maintain their own confidence in the conduct of the company, in the performance of the management team, the development of strategy and the adequacy of financial controls and risk management. The role of the non-executive director is, therefore, both to support executives in their management of the business and to monitor and supervise their conduct. There is an obvious tension between monitoring executive activity and contributing to strategic development: too much emphasis on the former casts the non-executive director in the role of policeman, on the latter, it can lead to undermining of the custodianship of the governance process.

3.18 Executive and non-executive directors in theory owe the same legal duties to the company, but as Langley, J noted in *Equitable Life Assurance Society* v. *Bowley and others*[34]:

> "... the extent to which a non-executive director may reasonably rely on the executive directors and other professionals to perform their duties is one in which the law can fairly be said to be developing and is plainly 'fact sensitive'. It is plainly arguable, I think, that a company may reasonably at least look to non-executive directors for independence of judgment and supervision of the executive management."

3.19 One of the main areas of the Higgs Report concerned the topic of "insurance and indemnification". As already noted, section 309 of the Companies Act 1985 and now section 233 of the Companies Act 2006 permits a company to insure its directors' liability to third parties and to the company itself. It is also permissible to indemnify the directors in respect of third party claims even where such claims succeed.[35] However, any provision in the company's articles of association that amounts to an indemnity against defence costs or liability contravenes section 232 of the 2006 Act and is therefore unenforceable. The Higgs Report proposed that companies be allowed to indemnify their directors in advance[36] in respect of the costs of contesting proceedings,[37] including those brought by the company, but where the director's liability was established they would be obliged to repay the costs.[38] The Report went still further in saying that D&O insurance was now necessary[39] and that companies should also be permitted to indemnify directors against any uninsured liability to the company by way of insurance deductibles or caps on liability.[40]

34. [2003] EWHC 2263 at 41.
35. See s. 234 of the Companies Act 2006.
36. I.e., without the completion of the case being a necessary pre-condition for indemnity and without trying to establish in advance the prospects of success of the case.
37. Including applications by directors to the court seeking relief from liability under s. 1157 of the Companies Act 2006. Section 1157 provides: "(1) If in proceedings for negligence, default, breach of duty or breach of trust against (a) an officer of a company, or (b) a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be liable but he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part from his liability on such terms as it thinks fit. (2) If any such officer or person has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust: (a) he may apply to the court for relief, and (b) the court has the same power to relieve him as if would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought."
38. A similar recommendation was made by the Company Law Review: Modern Company Law for a Competitive Economy, Final Report URN 01/942 and URN 01/943, para 6.3 "... the insurance exception should be extended to allow indemnity in advance against the cost of defending proceedings, or for a section 727 relief application, provided that the decision is made by disinterested members of the board on the basis of appropriate legal advice that the prospects of success are good, and that if the outcome is adverse the director is to be bound to reimburse the company."
39. If not virtually compulsory in practice,
40. In clear contradiction to what is now s. 232 of the Companies Act 2006.

CHAPTER 7

DIRECTORS' LIABILITY AT CIVIL LAW

I. INTRODUCTION

7.01 In this chapter we outline how directors' and officers' civil liability in civil law jurisdictions may arise in order to ascertain the effectiveness of D&O policies and their reinsurance. As we shall see, overly simplistic translations of the terms "directors" and "officers" into civil law jurisdictions and their corresponding liability principles result in difficulties in light of the variety of rules and differing tests of diligence in existence in civil law systems and the possibility that in such systems direct liability to third parties may be incurred in a manner not generally recognised by English law.

7.02 The origins of what is nowadays understood as civil liability are to be found in ancient Rome. Rome's jurisprudence and legal principles strongly influenced the development of later European law in relation to both contract and tort law. Those principles were also exported to and adopted by the vast majority of (if not all) Latin American countries.[1] The remainder of this chapter addresses particular aspects of civil law liability from the perspective of company directors and officers.

7.03 For these purposes, one of the most important principles of civil law liability is that the victim of a wrongdoing is entitled to claim an indemnity by means of compensation—not only in the form of a sum of money but also in kind—so as to put him, as far as possible, in the position he would have been in had the wrongful act never occurred. In other words, anybody who causes damage is obliged to make that damage good. That obligation may arise from two different sources: first, as a result of a breach of contract ("contractual liability"); and secondly, as a result of a failure to comply with the general duty of care not to cause damage to third parties (the resulting liability being termed "delictual" or "quasi-delictual").[2] We consider those two sources in turn.

II. CONTRACTUAL LIABILITY

7.04 Where a contractual relationship exists between the parties, one can ascertain the extent of the wrong and measure the damage thereby caused by assessing what the parties promised to each other and were, therefore, entitled to expect. In civil law a number of principles of contractual liability have developed as follows:

1. And, to a far lesser extent, by the US and Commonwealth jurisdictions.
2. Either species of liability giving rise to penalties or other remedies such as (where applicable) the return of an object. Taylor and Russell, *The Civil Law System*, 2nd edn (Little, Brown, 1997), p. 567.

(a) Good faith

7.05 Contracts must be executed in good faith.[3] This abstract concept, difficult to define with clarity, imposes upon the parties the duty to act fairly and reasonable in performing their contractual obligations, from the early stages and throughout the execution of the agreement. The duty, therefore, embraces the process of contract formation, seeking to ensure that anybody who has given their consent to enter into a contract, in so doing, has proceeded with absolute freedom and willingness and with knowledge of the subject-matter of the contract. The concept may have a further role to play in that there is "good faith" when due care is exercised while performing a contract. Having said that, a contract is performed in good faith when the parties in so doing proceed with due care and honesty.

(b) Equity, usage and law

7.06 The parties commit themselves not only to what is agreed upon in the contract but also to general principles of "equity, usage and law",[4] each of which is significant in relation to the construction of contracts.

7.07 The term "equity" is used here to denote a rule of contractual interpretation used to ascertain the substance and extent of the obligations agreed upon, with the understanding that a particular interpretation of a contractual term may lead to an unfair imbalance as between the parties.

7.08 As for "usage", it has long been accepted that the construction of contracts may be aided by looking at commercial practice, technical concepts, etc. Interpretative or conventional usage is concerned with commercial or professional practices which may help in ascertaining the will of the parties.[5]

7.09 Finally, as to the role of "law" in this context, there are two points to be made. First, the law may impose extra burdens upon the parties by regulating certain contractual areas, leading to the formulation of certain rules of conduct to be adhered to by the parties to a contract. In the modern context one example is the implication of contractual terms by statute. Secondly, the law may intervene notwithstanding the parties' wishes, not to impose extra contractual requirements but to prevent or prohibit certain practices, as with the concept of "public policy".[6]

III. DELICTUAL AND QUASI-DELICTUAL LIABILITY

7.10 It has long been accepted that, for reasons of public policy, criminal or delictual liability does not find a remedy in insurance. Nevertheless, it is worth considering the origin of this

3. This principle has been recompiled in a number of civil law jurisdictions, including France. Article 1134 of the French Civil Code provides: "*Les conventions legalment formess . . . Elles doivent etre executes de bonne foi*". See also, e.g., art 1160 of the Venezuelan Civil Code.
4. French Civil Code, art 1135: "*Les conventions obligent non seulement a ce qui y est exprime, mais encore a touts les suites que l'equite, l'usage ou la loi donnet a l'obligation d'apres sa nature*". Article 1434 of the Civil Code of Quebec: "A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law". The Venezuelan Civil Code follows the same principle (see art 1160). See also arts 242 and 157 of the German (Burgerliches Gesetzbuch) BGB.
5. Garrigues, *Curso de Derecho Mercantil, Temis, Tomo I* (Bogota, Colombia, 1987), pp. 117–125.
6. E.g., the oft-found public policy prohibition on contracts concluded to further "immoral purposes".

species of liability because of its implication in a reinsurance D&O policy issued as original or incorporating the insurance contract terms.[7]

7.11 Quasi-delictual liability[8] had its roots in unlawful acts which were not *per se* governed by any specific law, leaving the victim without a satisfactory remedy.[9] The law of delicts was a very important (if not the most important) source of obligations in ancient Rome, as appears from its classification in the *Corpus Iuris Civilis* in Justinian's period. Concepts of *furtum*, and *rapina*[10] gave birth to criminal acts such as theft and theft with violence, as well as lesser criminal or civil wrongs, for example, *iniuria* and *damnun iniuria datum*.[11] The first (*iniuria*) contains the foundations of what nowadays is known as libel and slander in common law. The second (*damnun iniuria datum*) consists of damage caused unlawfully,[12] the source of such liability not being found in either a contractual relationship or in a *delict* in the strictest sense.

7.12 The most important set of rules in respect of extra-contractual liability are to be found in the *Lex Aquilia*, which gathered together the principles of unlawful damage and made a vitally important contribution to the development of what is now known as tortious liability. This piece of legislation introduced concepts such as *damnun*, *iniura, dolus* and *culpa*, which in turn defined the circumstances in which such liability may arise. For example, the *Lex Aquilia* introduced the concept of loss or financial loss, "*damnun*"—albeit in a very peculiar sense[13]—arising as a result of culpable conduct "*iniuria datum*" which could be either deliberate or negligent.[14] Furthermore, the victim of a damage could recover additional losses or incidental to the damage "*Damnum Emergens*" and all the profits he had been prevented from obtaining as a result of it "*Lucrum Cesans*".[15]

7.13 Three basic pre-conditions for extra-contractual liability must be satisfied. First, there must be an act or omission on the part of the "agent of the wrong" (that is, the director or officer).[16] Secondly, such act or omission must be unlawful.[17] Thirdly, the wrongful act must have the effect of causing damage to the claimant.[18]

IV. REQUIREMENTS FOR DIRECTORS' AND OFFICERS' CONTRACTUAL LIABILITY

7.14 It is well accepted that the relationship existing between the company and its directors is a complex one; as in England there is controversy in respect of whether it is organic,

7. See ch 9.
8. Or extra-contractual or tortious liability.
9. Taylor, *op. cit.*, p. 567. It is thought that Roman delictual law contained traces of the approaches taken by earlier systems inspired by the idea of personal revenge or vengeance ("personal" in the sense that actions were not permitted against an offender's heirs).
10. For a complete explanation see Barry, *An Introduction to Roman Law* (Oxford, 1965), p. 211.
11. Barry, *op. cit.*, pp. 215–218.
12. Taylor, *op. cit.*
13. Daube, *Aspects of Roman Law* (Edinburgh, 1969), p. 66: one would expect the agent of a damage "to have to pay not the full value but only the difference between that and the reduced value after interference; plus expenses for cure, repair and the like".
14. Barry, *op. cit.*, p. 218.
15. Taylor, *op. cit.*, p. 567. Additionally see Spanish Civil Code, art 1106, Venezuelan Civil Code, art 1196.
16. "Financial Loss".
17. Giving rise to concepts such as *dolus* (or a maliciously executed wrongful act) and *culpa* (close in meaning to the modern concept of negligence).
18. Upon these legal precepts, the civil law system has built up the whole structure of extra-contractual liability. To this regard see French Civil Code, arts 1382 and 1383, Venezuelan Civil Code, art 1185 and BGB, 823–853.

managerial or purely contractual, although the preferred view is that the main feature is *mandate* or agency. One theory is that the relationship is *sui generis*, flowing from the requirement of company law for a managerial organ the existence of which makes it possible for the company to achieve its objectives. A second group of theories avoids the organic notion and prefers the managerial approach nevertheless, by nature and definition both theories seem very much alike.[19] What is important to emphasise is that less developed jurisdictions continue to assess directorship as purely contractual, deriving from the notion of mandate.[20]

7.15 It could be suggested that all of the acts carried out within the limits of the power conferred by the mandate, on behalf of the principal, produce legal effects either to the benefit or to the detriment of the latter. Hence, in exercising such activities directors do not undertake or assume personal obligations since it is the company itself which acts through this compulsory organ. Consequently, it is when directors either exceed or—negligently or fraudulently—fail to exercise their powers or duties, that contractual principles make them vulnerable.

7.16 Irrespective of the approach taken, it is a fact that there exists a contractual relationship between the director and the company; within this context, the director is compelled to follow a number of different sets of rules. First, he/she must follow those specifically applicable to the contract of mandate and the general principles of contract law. Secondly, there are the compulsory contents of the articles of association which are binding on directors, shareholders and the company. Thirdly, there are statutory provisions contained in commercial codes and statute laws. Fourthly, the director is subject to the general duty of care known as tort, *quasi-delict* or *hecho ilicito* depending upon the jurisdiction's adopted principles and languages.[21]

V. ACTS OR OMISSIONS (*CULPA IN FACIENDO* AND *IN NON FACIENDO*[22])

7.17 Unlawful acts or omissions are the triggers for the right of indemnity. The key point as far as D&O insurance is concerned is whether the act or omission in question is malicious, negligent or innocent.[23]

7.18 The duties to which directors are subject may be categorised into the following groups[24]:

(1) *Statutory duties*: the vast majority of directors' duties, which are in the main concerned with the protection of the company's capital, belong to this group.[25] Civil jurisdictions take the view that compliance with obligations of this nature is mandatory or "*orden publico*".[26] Any contravention of these rules of law leads to

19. Perez Carillo, *La Administracion de la Sociedad Anonima* (Marcial Pons, Madrid, Spain, 1999), p. 71.
20. Few examples are: Venezuelan Commercial Code, art 243 and art 157 of the Mexican Ley General de Sociedades Mercantiles.
21. E.g., *hecho ilicito* in Spanish.
22. Gutierrez Alviz, *Roman Law Dictionary* (Instituto Editorial Reus, Madrid, 1948).
23. And if malicious it is unsuitable for insurance, public policy considerations preventing recovery in respect of a director's own wilful misconduct.
24. Perez Carillo, *op. cit.*, pp. 123–131.
25. Examples of such duties include those governing the raising and reduction capital, payments made in cash by shareholders, declaration of dividends, accounting standards, the application of the insolvency regime, taxation, and public listings (stock exchange etc.).
26. "Public Policy".

strict liability (irrespective of fault), which in turn has a vital impact on questions of culpability[27] and subsequent insurability.[28]

(2) *Duties arising from the articles of association*: these duties usually complement statutory provisions which set down the minimum permissible legal standards.[29] For example, the articles may increase the quorum required to convene a general meeting or establish the structure of the board of directors and the number of directors. The effects of a failure to comply with these duties are comparable to those of a breach of statutory duties.[30]

(3) *The duty of care in exercising a directorship*: this issue is dealt with below[31] but is worthy of mention here. Civil law jurisdictions do not apply the same test of diligence as under English law; the tests applied range from what might be called the more demanding systems which are mainly in continental Europe to less severe ones in Latin America.

(4) *Complementary duties*: like executing shareholder's general meeting decisions. Now, whether or not directors are under any duty to accomplish general meeting decisions is a matter for debate. What could be said is that it is generally accepted that directors might discharge themselves from liability in executing an unlawful general meeting decision by recording in the corresponding minutes their non-conformity and giving subsequent notice to the company or auditor.[32]

VI. CULPABILITY: *DOLUS* AND *CULPA*

7.19 Once the relevant act or omission[33] has been identified, it is necessary to show that is the result of unlawful conduct. It follows that proving *dolus*, *culpa* (or as stated above, contravention either of stated law or the articles of association) may be the only means of fixing a director with liability.

7.20 Civil law recognises that directors' duties are not obligations to produce a given result for the company. Although directors are required to use their best endeavours to achieve a company's aims there is no liability *per se* if those objectives are not achieved.[34] This distinction is of major relevance when assessing the level of diligence demanded in the execution of a director's duties. In this regard "*culpa*" as a concept is somewhat ambiguous. Where an individual's duties encompass the obligation to achieve a particular result,[35] the standards of diligence are raised, rendering them liable for *culpa levissima* which corresponds with the standard of care to be expected of the best "*pater familiae*",[36] or a person

27. "Negligence".
28. In France, e.g., if the rules result in being imperative (ordre public), liability arises immediately upon the infringement irrespective of any loss that has resulted. See Campbell, *op. cit.*, p. 283.
29. Presumably because one cannot contract out of a statutory regime.
30. "Strict liability".
31. See paras 7.18 *et seq.*, below.
32. Venezuelan Commercial Code, art 268; art 178 of the Peruvian Law No 26.887; art 159 of the Mexican Ley de Sociedades Mercantiles; Brazilian Law No 6404, art 165 among others.
33. *Culpa in facendo and in non facendo*, see Gutierrez Alviz, *Roman Law Dictionary* (Instituto Editorial Reus, Madrid, 1948).
34. E.g., French civil law (as with the vast majority of civil law jurisdictions), draws a line between "obligations de moyens et des obligations de resultat".
35. E.g., to achieve specific financial targets.
36. *Pater familias*.