ALLEN & OVERY

Directors' duties and liabilities in financial distress during Covid-19

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A global perspective

Uncertain times give rise to many questions

The Covid-19 pandemic and the ensuing economic crisis has a significant impact, both financial and otherwise, on companies around the world. Boards are struggling to ensure survival in the short term and preserve cash, whilst planning for the future, in a world full of uncertainties.

Many directors are uncertain about their responsibilities and the liability risks in these circumstances. They are facing questions such as:

- If the company has limited financial means, is it allowed to pay critical suppliers and leave other creditors as yet unpaid? Are there personal liability risks for ‘creditor stretching’?
- Can you enter into new contracts if it is increasingly uncertain that the company will be able to meet its obligations?
- Can directors be held liable as ‘shadow directors’ by influencing the policy of subsidiaries in other jurisdictions?
- What is the ‘tipping point’ where the board must let creditor interest take precedence over creating and preserving shareholder value?
- What happens to intragroup receivables subordinated in the face of financial difficulties?
- At what stage must the board consult its shareholders in case of financial distress and does it have a duty to file for insolvency protection?
- Do special laws apply in the face of Covid-19 that suspend, mitigate or, to the contrary, aggravate directors’ duties and liability risks?

There are more jurisdictions involved than you think

Most directors are generally aware of their duties under the governing laws of the country from which the company is run. However, individuals may also be directors of subsidiaries in other jurisdictions, either personally or indirectly through holding or management entities of which they are directors. And even if they are not, the laws that govern the subsidiaries may classify them as shadow directors of the subsidiary. All this may expose directors to duties and liability risks at local levels.

To complicate matters, liability may not only arise under local company law, but also under tort laws of countries where contracts are entered into that later cannot be performed, causing damages to the company's counterparties. Insolvency proceedings may be opened in yet more jurisdictions where the company or its subsidiaries do business and local insolvency laws may contain specific directors' duties and liability regimes.

Guidance to navigating these risks

We have put together an overview of the main issues facing directors in financially uncertain times in a number of key jurisdictions across the globe. This includes a brief general description of directors' duties and key areas of potential directors' liability in each country, as well as some answers to the questions listed above.

Obviously, the duties and liabilities that may arise will always be dependent on the circumstances. Therefore, this publication should not be used as legal advice when faced with a specific dilemma. However, we hope it may help to alert directors and their in-house advisors to the duties, pitfalls and liability risks that exist in major jurisdictions across the globe.

The jurisdictions we surveyed

Contents – Click on region

Europe

Belgium 05
England and Wales 13
France 23
Germany 31
Italy 37
Luxembourg 44
The Netherlands 50
Poland 56
Russia 65
Slovakia 74
Spain 80

Americas

The United States (Delaware) 86

Asia Pacific

People's Republic of China 91
Hong Kong SAR 98
Singapore 106
Thailand 115

Middle East and Africa

UAE 124

Belgium

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Directors are under an obligation to properly fulfil their mandate to manage the company, as well as under a general duty of care not to harm the company or any other third party. When taking decisions, directors must act in the 'best interest of the company', referring primarily to the interest of the shareholders, but also of other stakeholders (such as employees, customers, suppliers, creditors), as they also have an interest in seeing the company succeed and continue. Directors therefore need to strike a balance between the short-term benefits to the company of their decisions, and the long-term impact that those decisions might have on the extended group of stakeholders. When the company gets into financial distress, the above-mentioned regime will still apply and directors will still be bound by a general duty of care and diligence. However, the focus of directors will shift from shareholders to creditors (including employees and debt providers) as financial difficulties worsen and shareholder value evaporates.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	Under Belgian company law, there are two types of directors' liability: (i) *internal liability*, meaning that the directors are liable vis-à-vis the company and its shareholders for management mistakes that occurred in the performance of their duties, and (ii) *external liability*, meaning that the directors are liable vis-à-vis third parties for non-contractual faults. Intentional or negligent acts or omissions may lead to a director's personal liability. Liability will be assessed according to the minimum standard of a normal, prudent and diligent director with the same professional qualifications, thus allowing the director a reasonable degree of latitude. Courts and tribunals can sanction only gross and obvious faults that fall outside the said margin of discretion (*marginale toetsing*). In addition, a director is vis-à-vis the company and third parties jointly and severally liable for all damage resulting from non-compliance with the Belgian Code of Companies and Associations (**BCCA**) and the company's articles of association. Aside from these general principles, the BCCA and the Belgian Criminal Code contain a number of provisions that specifically deal with a director's liability in the context of a company's bankruptcy or insolvency. There are seven main areas of concern for directors of companies in financial difficulty, each of which will be considered in turn below: (1) liability for failure to file for bankruptcy; (2) liability for apparent gross error contributing to the company's bankruptcy; (3) founders' liability if the company's assets or capital are insufficient at incorporation; (4) liability for failure to convene a shareholders meeting following a decrease in net assets; (5) liability for wrongful trading; (6) liability for social security contributions that remain unpaid when a director has already been involved in two bankruptcy proceedings in the previous five years; and (7) criminal liability.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	As clarified in the newly adopted BCCA, not only formally appointed managing directors, but also *de facto* or shadow directors (ie persons that – independently and without receiving any orders – perform positive acts of management without being properly bound to the company by a contractual mandate) can be held liable towards the company or third parties as explained in point 2 above. In addition, in groups of companies a parent or sister company may be considered a *de facto* or shadow director of another company in the same group, if the parent/sister organisation directly intervenes in the management decisions of that other company (that is, if it 'pulls the strings').

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Directors and *de facto* or shadow directors may be (personally or jointly and severally) held liable for (part of) the remaining debts of the bankrupt company in the event that those directors, prior to the bankruptcy, knew or should have known that there was no reasonable prospect of continuing the company's activities and of avoiding a bankruptcy – provided they failed to act as would normal, prudent and diligent directors in the same circumstances.
5.	What are the liability risks in the case of 'creditor stretching'?	Creditor stretching, through which a company makes the deliberate decision to pay critical suppliers ahead of others due to limited financial means, is not in and of itself a way to hold the managing directors personally liable, as it might be a way to gain more time to restructure the company. However – and this will have to be assessed on a case-by-case basis – personal liability could be triggered and managing directors will be strictly scrutinised should they purposely decide to pay a certain category of creditors (e.g. connected creditors) ahead of others (e.g. outside creditors) if there is no reasonable prospect of restructuring.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	As stated above, selective payments to some crucial creditors ahead of others is not, in and of itself, sufficient to establish personal liability, provided there is a reasonable prospect of restructuring. Managing directors are tasked with the management of the company and should be allowed to take strategic decisions in this regard. However, in the absence of a reasonable prospect of restructuring, there is no more justified reason to treat creditors differently, and directors should opt for equal treatment of all creditors.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	As stated above, selective payments do not necessarily establish liability, as long as there is a reasonable prospect of restructuring. As a general principle, directors should act in the way a normally diligent and prudent director would act if placed in the same circumstances. Directors will not fulfil this standard if they decide to pay certain creditors ahead of others with no prospect of restructuring, as this could amount to pursuing a loss-making activity, which is unreasonable.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	**Private limited liability company (*besloten vennootschap/sociétée à responsabilité limitée*) or limited partnership (*commanditaire vennootschap/société en commandite*)** For these companies, the BCCA provides that a general meeting of shareholders must be convened for the purpose of passing a resolution to wind up the company (i) if the company's net assets will or have become negative, or (ii) when management decides on the basis of reasonably foreseeable developments that it is uncertain whether the company will be able to pay its debts for at least the following twelve months. **Limited liability company (*naamloze vennootschap/société anonyme*)** For these companies, the BCCA provides that a general meeting of shareholders must be convened for the purpose of passing a resolution to wind up the company (i) when the company's net assets have fallen below 50% of the share capital, (ii) when the company's net assets have fallen below 25% of the share capital, and (iii) in the worst-case scenario, when the net assets are reduced below EUR 61,500. **Consequences of obligation to convene** If any of those scenarios occurs, directors have to convene a general shareholders meeting within two months after the loss has been ascertained (or should have been ascertained) by the directors. At the shareholders meeting, the shareholders must decide whether to wind up the company. If there is any breach of these provisions, the directors may be held jointly and severally liable for all or part of the losses occurring after the date the shareholders meeting should have been convened. Claims against directors on this basis can be made by the bankruptcy receiver as well as by third parties (such as individual creditors). When claims are initiated by third parties, a rebuttable presumption applies that the losses suffered by those third parties are caused by the fact that no shareholders meeting was held; the damage suffered by third parties shall, subject to evidence to the contrary, be deemed to result from the absence of a convening notice.

Back to contents

<table>
<tr><th>No.</th><th>Question</th><th>Answer</th></tr>
<tr><td>9.</td><td>Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?</td><td>A company is in a state of bankruptcy if two cumulative conditions are met: (i) the company has ceased to pay its debts, that is, when it can no longer pay its main creditors in a timely fashion (permanent cessation of payment), and (ii) creditors no longer trust the company (exhaustion of the credit).

The directors of a company are required to file for bankruptcy within one month after the moment these conditions are fulfilled. This obligation applies only to formally appointed managing directors.

At the moment the Business Court declares the company bankrupt, the directors no longer have control of the company and a court-appointed trustee will take over.

A failure to file for bankruptcy within one month after the company has ceased to pay its debts may result in the following liabilities for directors:

– personal liability for any increase in the level of indebtedness of the company because of the delay in filing for bankruptcy;

– joint and several liability for all debts of the company, if it can be shown that their actions have contributed to the company’s insolvency and that their actions constitute an apparent gross error (see further below); and/or

– criminal liability, but only if it can be shown that they had intent to postpone or avoid a bankruptcy order (see below).

The obligation to file for bankruptcy will be suspended if the indebted company’s directors have filed for judicial reorganisation, for as long as the moratorium period granted under it continues to run. These judicial reorganisation proceedings are intended to allow a company to restructure its business under the court’s supervision and to avoid an order of bankruptcy.</td></tr>
<tr><td>10.</td><td>Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?</td><td>A director can be held liable for unpaid tax debt if he has committed a fault, or has failed to exercise due diligence. The burden of proof is on the tax authorities. There is no automatic liability. As stated above, directors have a margin of discretion when taking decisions, and this implies that only gross faults will be sanctioned, with reference to the standard of the normally prudent and diligent director. A more special rule applies in case of continued failure to pay tax debts, in which case the burden of proof will be reversed: a presumption of liability will apply if tax debts have not been paid at least twice within a period of one year.

The (former) directors and de facto or shadow directors can also be held personally (as the case may be, jointly and severally) liable for all or part of the unpaid social security contributions owed at the time of the court’s bankruptcy order. Contrary to the liability regime applicable to unpaid tax debts, no fault on the part of the (former) director(s) should be proven. It suffices that, during the five years preceding the bankruptcy, such persons can be shown to have been involved – as a director or de facto or shadow director – in at least two bankruptcies, liquidations or similar operations wherein debts owed to an institution authorised to collect social security contributions were left unpaid.

Liability claims based on this ground can be made by the bankruptcy receiver or by the social security authorities.</td></tr>
</table>

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	When the board of directors forms a collegiate body, members will be held jointly and severally liable for any breach of directors' responsibilities. A director may exculpate themselves from other directors' acts or omissions if they can demonstrate that (i) they have not taken part in the faults committed by the others, and (ii) they denounced those faults to all members of the board of directors.
12.	Are there specific actions against directors under bankruptcy law?	We refer to the seven main areas of concern for directors of companies in financial difficulty, set out under point 2. More specifically, any current directors, former directors, and all other persons who had actual authority to manage and administer the company's business (*de facto* or shadow director) may be jointly and/or severally liable for all or part of the debts of the company to the extent that there is a deficit of the company's liabilities as against its remaining assets (which will almost always be the case). This liability will apply only insofar as it is found that these persons committed an apparent gross error that contributed to the bankruptcy. This liability does not require the error to be the determining cause of the bankruptcy (or underlying debts). It suffices that without the error the bankruptcy (or underlying debts) would not have occurred in the same way. The concept of an 'apparent gross error' implies that only serious errors which any reasonable person would consider wrongful will trigger liabilities. A court will need to show great deference in assessing the director's conduct, and it may not substitute its own judgment in hindsight for that of the directors, made in light of the facts available at the time. Serious tax fraud will always be viewed as an apparent gross error that contributed to the bankruptcy. In addition, case law has established that the following situations will generally trigger personal liability for the company's liabilities on bankruptcy: – the continuation of a significantly loss-making activity (in certain cases) *[NB: the liability for wrongful trading has now also been codified]*; – making investments which significantly exceed the company's financial means (in certain cases); – in the case of financial difficulty, drastically changing the company's business without any reasonable grounds for believing in its financial sustainability; – the total absence of any administration or book-keeping; or – a manifest disinterest in the company and total lack of control over the company's daily business.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Belgian law does not provide that financial difficulties trigger specific duties of, or consequences for, shareholders or group companies.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	At the moment, there is no special legislation in place to mitigate the liability risks of directors in view of the Covid-19 crisis. However, on 24 April 2020 a Royal Decree entered into force concerning the temporary suspension of enforcement measures and other measures during the Covid-19 crisis. This Royal Decree was applicable to all undertakings whose continuity was threatened by the Covid-19 crisis (e.g. due to a significant decline in turnover or activities, temporary or full technical unemployment; and/or mandatory temporary closure ordered by the public authorities), and which were not yet in a state of cessation of payments before 18 March 2020. A temporary moratorium was created and the Royal Decree provided, among other things, for a suspension of the director's statutory duty to file for bankruptcy within one month of the date of cessation of payments. These rules are no longer applicable: the suspension applied from 24 April 2020 until 17 May 2020 and was extended by Royal Decree to 13 May 2020 until 17 June 2020.

Back to contents

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Back to contents

England and Wales

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	When a company is solvent and trading normally, the directors' primary consideration remains to think of the interests of its shareholders. This duty is expressed as a duty to act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. When a company finds itself in financial difficulties (either insolvent[1] or likely to become insolvent – which in this context means insolvency is probable), there is a shift in focus to the interests of the company's creditors. Where a company is actually insolvent, the creditors' interests are 'paramount'. Short of actual insolvency, the extent to which creditors' interests are paramount or are merely to be considered (without being decisive) is a point on which clarification from the courts is awaited. That said, where a company is likely to become insolvent, the creditors' interests must, at the very least, be considered and taken into account. The directors' knowledge as to whether the company is insolvent or of doubtful solvency is a subjective matter but claims of 'blissful ignorance' can expect rigorous examination.

1_There is no one definition of insolvency under English law. The term (or similar terms such as 'insolvent administration', 'insolvent liquidation', 'becomes insolvent' or 'is insolvent') means different things depending on the legal context – see the four areas of risk for directors described below in question 2. A key 'insolvency' test may also be found in the context of whether a company may be wound up by the court (is the company 'unable to pay its debts'?) and as a prerequisite for the company to go into administration (is the company unable to pay its debts or likely to become so?). Inability to pay debts is analysed in two ways. The first way is whether the company can pay its debts now or in the short term: this is usually referred to as the 'cashflow test'. An unpaid creditor may issue a 'statutory demand' and if the debtor fails to pay that operates as evidence of the debtor's inability to pay its debts. Beyond the short term, while the question is still 'is the company unable to pay its debts' albeit over a longer timescale, the emphasis shifts to looking at the balance sheet and whether the company's liabilities exceed its assets. This is often referred to as the 'balance sheet test'.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	There are four main areas of risk: (i) wrongful trading; (ii) fraudulent trading; (iii) misfeasance (or breach of duty); and (iv) disqualification and compensation orders. We discuss these four main areas of risk below. **(i) Wrongful trading** ***Please note: in response to the Covid-19 pandemic, the UK Parliament has enacted the Corporate Insolvency and Governance Act, 2020 (CIGA) which entered into force on 26 June 2020. The CIGA contains a 'suspension' of the wrongful trading law described below in respect of acts or omissions by directors or shadow directors in the period from 1 March 2020 to 30 September 2020. The Secretary of State may by Regulation extend the expiry date. The 'suspension' provides that the court is to assume that the company's directors are not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period. The 'suspension' does not apply to a number of different types of company, including banks/investment banks, insurance companies, securitisation companies, and companies who have issued certain types of capital market instruments***. The wrongful trading provisions provide that, in certain circumstances, a director (or shadow director) will be liable for the debts and liabilities of the relevant company. It applies when a company has gone into insolvent administration or insolvent liquidation. 'Insolvent' for these purposes means that, at the time the company goes into administration or liquidation, its assets are insufficient to pay all creditors in full together with the costs and expenses of the procedure. The Wrongful Trading regime has two aspects. First, it focuses on a point in time. It asks of each director when they knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding an insolvent administration or liquidation (the **Critical Moment**). The second aspect comprises a statutory defence. No wrongful trading order may be made against a director or shadow director where, from the Critical Moment, that person took every step with a view to minimising the potential loss to the company's creditors as they ought to have taken. In assessing what a director should know and conclude as regards the Critical Moment having been reached and what steps ought to be taken to minimise losses to creditors from that point on, the law looks at the knowledge, conclusions and steps as would be known or ascertained, reached, or taken by a reasonably diligent person who has: (i) the general knowledge, skill and experience of a person carrying out the same functions as are carried out by that director in relation to the company; and (ii) the general knowledge, skill and experience of that director, where this is superior. The standard is thus composed of combined objective and subjective elements. A claim for Wrongful Trading can be brought by a liquidator or administrator or an assignee of such right or action. Liability for Wrongful Trading is civil and, although the court has wide discretion in determining the extent of personal liability, the essence of the law is to compensate creditors for the loss caused by the director's conduct. Therefore, the court will typically order the director to contribute to the company's assets in an amount equal to the amount by which the company's assets can be said to have been depleted by the director's conduct that gave rise to the Wrongful Trading. Some cases have imposed liability equal to all of the credit incurred but not paid from the Critical Moment. The facts in those cases have been that the accounting records of the company were so poor that the usual 'asset depletion' calculation was not possible.

Back to contents

No.	Question	Answer
		(ii) Fraudulent Trading Fraudulent Trading becomes relevant where a company has gone into insolvent administration or insolvent liquidation. 'Insolvent' bears the same meaning as in Wrongful Trading (above)[2]. Fraudulent Trading applies if, in the course of a liquidation/administration of a company, it appears that any business of the company has been carried on with the intent to defraud creditors of the company (or creditors of any other person) or for any fraudulent purpose. The court may declare that any person who was knowingly party to the carrying-on of the business in this manner (including, for example, the directors if they were party to the activities) is liable to make such contribution (if any) to the company's assets as the court thinks proper. This will require the court to consider whether the person concerned: (i) participated in the carrying on of the fraudulent business; and (ii) did so knowingly ie where they were participating with knowledge that the conduct was intended to defraud. Knowledge will extend to deliberately shutting one's eyes to the obvious. The person concerned must have been 'dishonest'. This is tested by reference to the standards of 'ordinary decent people'. A claim for Fraudulent Trading can be brought by a liquidator or administrator or an assignee of such right or action. Fraudulent trading may take many forms. A company running a Ponzi scheme is an example. But it may also apply where the directors of an insolvent company with no prospects of recovery carry on the loss-making business, incurring credit knowing it can never be repaid. **(iii) Misfeasance** There are two aspects to the law of misfeasance in the zone of insolvency. First, as mentioned above, when a company is insolvent or likely to become insolvent the directors' duty to the company requires that they consider the interests of creditors in addition to, or to the exclusion of, the interests of shareholders – depending on whether the company is actually insolvent or how close it is to that position. A director will be liable where a breach of this duty causes loss to the company. Secondly, where a company is in liquidation, there is a provision in the insolvency legislation which, while not creating any new duties for directors, provides a summary *remedy* for breach of duty. Under the summary misfeasance remedy, any past or present officer of the company who has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty including negligence causing loss to the company will incur liability. Those who may bring this misfeasance action include a liquidator of the company and a creditor of the company. Upon such an application, the court will examine the defendant's conduct and if thought appropriate, compel them to: (i) repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just; or (ii) contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty (again, as the court thinks just). So, even where an individual creditor brings a successful action, the remedy will be in favour of *the company* rather than the individual creditor. In that sense it is a class remedy. The court has a wide discretion with respect to the orders it may make under this provision. It is able to apportion the order made against individual directors in proportion to their involvement and culpability.

Back to contents

No.	Question	Answer
		(iv) Disqualification and compensation orders The court will make a ***disqualification order*** (of between two and 15 years) against a particular person where it is satisfied that: (i) the person is or was a director or shadow director of the company which has become insolvent during or after the time the person was a director (or shadow director); and (ii) the conduct of the person as a director is such that the person is unfit to be concerned in the management of a company. Disqualification means that the relevant person is barred from being a director of a company or otherwise being concerned in the management of a company without the leave of the court for the relevant period. A director who might otherwise face a court action for disqualification may give a statutory undertaking not to be a director or concerned in company management which has a similar effect to that of a court order. A company can become 'insolvent' in this context in one of three ways: (i) if it goes into liquidation at a time when its assets are insufficient for payment of its debts and liabilities, and the expenses of the winding-up; (ii) if it enters administration; or (iii) if it has an administrative receiver appointed to its assets and property. In deciding whether a person is unfit to be concerned in the management of a company, the court will consider the full range of the director's conduct, including the extent of the director's responsibility for: (i) the causes of the company (or any overseas company) becoming insolvent; (ii) having caused the company to breach the law; and (iii) breach of fiduciary duty or breach of the law by the individual. Mere commercial misjudgement is unlikely, on its own, to lead to disqualification. When finding a director or shadow director liable for wrongful or fraudulent trading, the court may also make a finding of unfitness and disqualify the director or shadow director. The court can also make a ***compensation order*** against a director being disqualified. Where a disqualification order has been made or a disqualification undertaking accepted, if the underlying conduct has caused loss to one or more creditors of the insolvent company, then the relevant person who is subject to the disqualification order or undertaking may be ordered to pay an amount as a contribution to the assets of the relevant company or for the benefit of a particular creditor or class of creditors. As with disqualification itself, the director may give an undertaking to make a compensation payment to avoid the need for a court case. Disqualification proceedings are initiated by the Secretary of State for Business, Energy and Industrial Strategy (**Secretary of State**).

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	The Companies Act, 2006 (**Companies Act**) defines a director as any person who occupies the position of director, by whatever name called. This covers more than just formally appointed (*de jure*) directors and extends to a person who acts as a director (a ***de facto* director**) or a person in accordance with whose directions or instructions the directors of a company are accustomed to act (a **shadow director**). As regards the main liability risks discussed above, the persons who can be held liable are, in summary, as follows: (i) Wrongful Trading: past and present *de jure, de facto* and shadow directors who held those positions during the period in which the wrongful trading occurred; (ii) Fraudulent Trading: any person who was knowingly a party to the carrying on of the business for a fraudulent purpose (this will include persons dealing with the company who receive property with knowledge of the fraud); (iii) the duty to consider the interests of creditors applies to de *facto and de jure* directors. The misfeasance remedy is available against any past or present officer; liquidator; administrator; administrative receiver; and any person involved in the formation, promotion or management of the company. Shadow directors are not caught by the remedy; (iv) disqualification and compensation orders: any person occupying the position of director, by whatever name called (including *de facto* directors and shadow directors).
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	The answer to this across the four main areas of liability risk discussed above in question 2 is as follows: (i) Where Wrongful Trading has occurred, the focus of a court order will be on imposing liability for losses incurred generally by the company after the Critical Time. But if a director wishes to rely on the statutory defence of having taken every step to minimise losses to creditors, they must show that no single creditor is worse off and that involves looking at whether the company incurred further credit from any creditor after the Critical Time which remains unpaid. (ii) Fraudulent Trading: to be liable a party has to be shown to be dishonest by the standards of a reasonable person with knowledge of the facts. There is a serious risk of being liable where credit is incurred at a time when the party knows or strongly suspects it will not be paid for/repaid. Distinct from Fraudulent Trading, a person who misrepresents the company's position to a creditor who then acts on the falsely optimistic picture painted for them and suffers loss as a result, may be personally liable for fraudulent or negligent misstatement. (iii) Misfeasance: directors who are by the relevant time required to think of the interest of creditors, generally, should not be increasing losses by continuing to trade including incurring further credit without a solution (light at the end of the tunnel) being reasonably likely. (iv) Disqualification and compensation order: causing the company to enter into contracts it cannot meet/comply with/satisfy may be a part of a picture showing the director is unfit to be concerned in the management of a company and should be disqualified. Where the conduct which has led to the disqualification has caused loss to a creditor or creditors, the court may order that the director or shadow director makes a compensation payment to the company or a particular creditor. Incurring credit when it ought not to have been incurred could lead to a compensation order being made against a director or shadow director.

Back to contents

No.	Question	Answer
5.	What are the liability risks in the case of 'creditor stretching'?	Absent particular facts (for example, where a director fraudulently or negligently misstates the company's financial position), managing a company's cashflow ('creditor stretching') in times of financial distress is a relatively normal way for a company to seek to find the time to restructure. The critical issue is whether it is reasonable to believe a restructuring can be achieved. Deliberately paying some creditors (particularly connected creditors) ahead of others may render the directors vulnerable to attack.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	As explained above, the key question here is whether there is a reasonable prospect of restructuring without a formal insolvency process. If there is such a reasonable prospect, and keeping in mind what is in the interests of creditors generally, directors have some flexibility in managing the company's cash. 'Ransom' payments to key creditors may be justifiable in such a scenario although equal treatment of the creditors of the same rank is usually the appropriate approach.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	As a general point, many legal rules make it inadvisable to pay connected persons in priority to others.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Section 656 of the Companies Act requires that if a public company's net assets drop to half (or less) of its called-up share capital, the directors must call a general meeting to consider whether steps need to be taken and how the situation should to be dealt with. The meeting must be called no later than 28 days from the earliest date on which the fact is known to a director of the company, and convened not later than 56 days from that date. Directors who knowingly authorise or permit the failure to convene the meeting are liable to a fine.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	English insolvency law does not have an express requirement to file at a particular time. The law operates by exposing directors to potential liability where filing is in the best interests of creditors and they do not file. It is therefore prudent for directors to file to avoid personal liability where that is the best outcome for creditors. Directors who are worried about Wrongful Trading risks might be inclined to file early, but there are risks for directors in so doing where it causes avoidable losses to creditors.

Back to contents

No.	Question	Answer
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	In some disqualification cases the courts have noted that HMRC (the UK's revenue authority) is an involuntary creditor and should not be ignored in favour of trade creditors. UK law requires that, as part of their payroll process, employers deduct tax at source in respect of income tax and national insurance contributions (the equivalent of social security payments). If directors are paid remuneration in their capacity as employees, it is important for them to ensure that the relevant tax payable is duly paid by the company as employees are personally liable to an assessment for unpaid tax if they receive payments from their employer knowing that the employer had wilfully failed to deduct and pay the relevant tax due on those payments. As directors are responsible for the management of the company and privy to the relevant information, in practice it will be easier for the tax authorities to prove to the satisfaction of the court that the directors had such knowledge and wilfulness. The Pensions Regulator, *acting reasonably*, may issue a contribution notice against an employer with a defined benefit pension scheme or someone connected or associated with the employer such as a director. The basis for issuing a contribution notice is that the person was party to or knowingly assisted activity whose main purpose was to avoid a pension liability or which caused material detriment to the likelihood of accrued scheme benefits being received by scheme members. The Regulator may also make a financial support direction. The grounds for making a financial support direction are that the employing company is 'insufficiently resourced'. Such a direction cannot usually be made against an individual director. These powers of the Regulator are called the 'Moral Hazard' powers. Before using them the Regulator must consider it *reasonable* to do so. There have been a number of recent high profile corporate collapses in the UK where there were found to be large pension fund deficits despite directors having received large salaries and the company having paid substantial dividends to shareholders. The UK has been trying to 'solve' this issue since the early 1990s when it transpired that Mr Robert Maxwell had been funding his empire (which went insolvent) by raiding the group pension fund. In January 2020, the UK government introduced a new Pensions Bill with draconian measures intended to address the problem of insolvencies with pension fund deficits. The Pensions Bill is designed to put pressure on directors and if it became law would create two new criminal offences of 'risking accrued scheme benefits' (**RASB**) of employees and 'avoidance of employer debt' (**AED**) to the pension fund. The elements of RASB are that a person engages in an act or course of conduct (or fails to act): in a way that has a materially detrimental effect on a defined benefit pension scheme; the person knew (or ought to have known) that the act or omission would have such an effect; and the person had 'no reasonable excuse'. 'Person' is of course a wide term and includes directors but also potentially advisers. The new criminal offence of 'avoidance of employer debt' would impose criminal liability where a person commits an act or course of conduct (or fails to act): in a way that prevents the recovery of the whole or any part of the scheme's employer debt (or otherwise compromises or settles such a debt); the person intended the act or course of conduct or omission to have such an effect; and the person had 'no reasonable excuse'. Rescue procedures such as schemes of arrangement and company voluntary arrangements (**CVA**) are compromises of debt and widely used. There is a concern that even a scheme or CVA that was duly approved by the statutory majorities of creditors could fall foul of the proposed new law. Even if pre-clearance of an action could be obtained from the Pensions Regulator, it might not be a defence to a criminal prosecution. The Regulator's Moral Hazard powers would also be strengthened. Further, there are to be increased obligations to notify the Regulator in certain circumstances and civil penalties of up to £1 million for failing to notify or giving false information. The view of insolvency professionals is that these new measures would, if passed into law, have a detrimental effect on corporate restructurings by making the risks too great for directors primarily. It remains to be seen what will happen to the draft Pensions Bill when we emerge from the Covid-19 pandemic (assuming the UK government has more important things on its mind currently than defined pension fund deficits and does not intend to press ahead with the legislation at this time). The UK government has regularly expressed concern about serial insolvencies where the tax authorities are left unpaid and has indicated an intention to legislate in this area in a way that will put pressure on directors to avoid such outcomes or face personal liability. However, the Covid-19 law reforms (see answers to question 14) have overtaken the tax-related reforms on the government's agenda.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Directors owe their duties individually as opposed to the board being collectively responsible. This means that each director has to form their own views independently as they consider appropriate. Directors may be allocated specific responsibilities – Finance Director or Sales Director, for example – and they will have primary responsibility in that area. But that does not absolve the other directors from responsibility for ensuring these duties are being discharged appropriately by the director concerned. This may involve challenging their actions and views in certain circumstances. As stated above, the minimum standard required of a director (both in terms of general statutory duties and in the context of the law of wrongful trading) is that of a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director. However, the actual standard by which a particular director is judged will be higher if that director's general knowledge, skill and experience is, in fact, greater. In practice, boards will try to reach a unanimous decision on major issues such as whether to file for insolvency. Where, say, one director feels strongly that the company should file and the rest of the board consider it is reasonable to continue trading, that director may feel compelled to resign as director. However, just resigning when matters become difficult is rarely appropriate: the judge in one case described it as 'the coward's way out'. There is a general defence under section 1157, Companies Act to a breach of duty claim where a director has acted honestly and reasonably and, in the circumstances, the court concludes that they ought fairly to be excused.
12.	Are there specific actions against directors under bankruptcy law?	Please see risks discussed above. It is worth noting in passing that in English law 'bankruptcy' is a term applied to the insolvency of individuals. 'Insolvency' is the term used for corporates.

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	English law does not have a general law of shareholder duties nor do we have thin capitalisation rules or a law of equitable subordination of shareholder loans. In an insolvency, for example, intercompany loans are not subordinated or converted into equity. There is a law of 'piercing the corporate veil' such that a parent company, say, may be made liable for the debts of its subsidiary but its scope is narrow and often involves other concepts such as fraud, agency, or sham transactions. A few specific points to note in the context of group companies: (i) If a director is on the board of a number of companies in a group, they must wear their hat as director of each company in turn, individually, and consider the financial position of **that** company alone when making decisions for each company. (ii) There is also a positive obligation for directors to avoid potential conflicts of interest. For example, a director should ensure that the financial difficulties have not caused a potential conflict of interest with their position as director of other companies within a group. Where there is a potential conflict of interest, consideration should be given to whether the relevant director might resign from one or more of their positions or recuse themselves and take no part in the board discussions or decision-making at one company or the other. (iii) A common director of two companies (for example, a director of a parent and its subsidiary) with confidential information at parent level which concerns the financial position of the subsidiary may be placed in an awkward position. First, there is the issue of conflict of interest and, secondly, for Wrongful Trading purposes at the subsidiary level the director will be judged by reference to personal actual knowledge which may be greater than that of other fellow directors. There are various measures that can be taken to address these concerns but those are beyond the scope of this survey. (iv) Where a parent company or the directors of such a parent operate a "hands on" approach to running the group and interfere persistently in the management of the subsidiary companies, the parent company (or, exceptionally, its directors) may be a shadow or *de facto* director of the subsidiary and accordingly the attendant duties and potential liabilities set out in the sections above will attach to them.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Yes. As explained above in question 2(i), the CIGA entered into force on 26 June 2020. Among other measures, it temporarily relaxes the Wrongful Trading regime applicable to directors. The court, in assessing whether a director should make a contribution to the assets of the company under the Wrongful Trading provisions, is to assume that the director is not responsible for any worsening of the financial position of the company or its creditors between 1 March 2020 and 30 September 2020. The expiry date may be extended by Regulation. The other laws described above remain in full force and effect. The CIGA has a number of temporary measures to help debtors survive the effects of Covid-19. These include making statutory demands void and providing that a court hearing a winding up petition based on grounds other than failure to meet a statutory demand is only to make a winding up order if the grounds for the presentation of the petition would have existed despite any negative financial effect on the company of Covid-19. For fuller coverage of the CIGA, please refer to this note – **https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-corporate-insolvency-and-governance-bill-the-most-significant-insolvency-reforms-in-the-uk-for-a-generation**.

Back to contents

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Back to contents

France

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders ('shareholder model' vs. 'stakeholder/Rhineland model', 'Revlon duties' in case of take-over bids) or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Under French company law, the duty of loyalty requires directors to act in good faith and to put the interests of the company and its shareholders ahead of any other interests he may have. Directors have to above all act and make decisions in the company's interest. In this respect, French company law adopts a stakeholder approach and social interest includes the interest of the company, its shareholders, employees, clients and certain third parties and takes into account the social and environmental effects of the company's activity.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	The risk depends on the level of difficulties the company is facing. – In general, the potential risks arise when directors do not file for bankruptcy within 45 days following the date on which the company becomes insolvent (as detailed in 9. below). – If the company is facing serious difficulties without being in cessation of payments, the directors can avoid liability by filing for a *mandat ad hoc* (amicable and speedy proceeding for companies not yet in cessation of payment) and ask the court's agent (*mandataire ad hoc*) to assist the company in the negotiations with its creditors. – If the company is in liquidation because of insufficient assets as a result of mismanagement by all or some of the directors, they can be (jointly or severally) liable for deficiency of assets, held criminally liable or even declared bankrupt/prohibited from managing a company by the Courts in case of fraudulent behaviour (as detailed in 12. below). A director (*de jure and de facto* as set out in 3. below) may also be sued on grounds of civil tort by the company (through the administrator). The conditions under which a director can be held liable vary for each of the grounds of liability listed above and detailed in 12. Since shareholders may also be considered as *de facto* managers, all the liabilities listed above can apply to shareholders in such capacity. In a group and despite the French law principle of separation of entities set out in 13, there is a risk that the company's administrator/liquidator could request the consolidation of the company's insolvency proceedings with another group member by demonstrating a commingling of assets (*confusion de patrimoines*). Another risk lies in the French law concept of co-employer. This is a strategy to make party to litigation a company which is not the formal employer but belongs to the same group, resulting in the joint liability of the two companies to pay the mandatory termination amounts to the employees and/or damages for unfair dismissal. Please note that directors' liability is significantly reduced when choosing to file for bankruptcy, by having the protection of the Courts as all payment post-filing must be co-signed by the administrator and the asset disposal must be authorised by the Courts.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	A de facto director may incur the same civil liability as the de jure director of a company (see question 11 infra). French law does not define the concept of de facto director, nor does it define the concept of "*de facto* management". These concepts have been developed under French case law and the characteristics of a de facto director are subject to the sovereign interpretation of French courts on a case-by-case basis. This quality is characterised by the free and independent exercise, either alone or in a group, on a continuous and regular basis, of positive management and leadership activities involving the company. The burden of proof is on the creditor.

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Directors of a company shall act diligently and in all circumstances in the best interest of the company. They will be liable in case of breach of duty of care or mismanagement. In particular they may be liable for operating a business which is loss-making or for having taken decisions which do not fit the corporate purpose or benefit of the company, aggravating its financial situation and eventually triggering its insolvency. In the event of liquidation proceedings (*liquidation judiciaire*), they may be held personally liable for all or part of the debts of the insolvent company if their mismanagement in the operation of the business contributed to the company having insufficient assets to cover its liabilities (see question 11 infra). Failing to establish the existence of a fault by the director, which is not committed in their capacity as a director, the wronged creditor may obtain compensation for their loss only by acting on the basis of the liability of the company. Only the company may be required to compensate the damage suffered by the creditor resulting from the non-performance of its contractual obligations.
5.	What are the liability risks in the case of 'creditor stretching'?	The same rule as discussed under 1. The mere fact that a director does not ensure compliance by the company with its payment obligations towards its creditors is not in itself sufficient to establish personal liability.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	In the event of insolvency proceedings: – the general principle is, during the proceedings, a prohibition on payment of existing debt, subject to certain exceptions; and – the proceeds of the realisation of the assets should be distributed among creditors on a *pari passu* basis by principle, subject to the statutory order of priority. In particular, the following claims will benefit from a preferential status: employees' wages, legal expenses incurred after the judgment commencing the insolvency proceedings, debts secured by new money privilege (ie new money provided by creditors at the time of a conciliation proceeding), claims of secured creditors with the benefit of mortgages/pledges, certain debts incurred by the company after the opening of the insolvency proceedings. A director may notably be subject to personal bankruptcy (as one of the possible sanctions against directors, amongst the ones mentioned in 11.) if he has deliberately paid any creditor of an ailing company after the date of the cessation of payments (*cessation des paiements*) as defined in 6. and caused damage to the other creditors. French law expressly provides that the Courts may declare personal bankruptcy of any person who has paid, or caused to be paid, a creditor to the prejudice of other creditors, after cessation of payments and with full knowledge of the company's situation. In that context, the Courts can indeed sanction a director that either has enriched themself at the expense of the company, or has seriously failed in their mission.

Back to contents

No.	Question	Answer
7.	Is there a distinction in this regard between preferential treatment of related entities and of other creditors?	The general principle is prohibition of any payment of existing debt except certain debts (employees' debts have a special status for example). Please refer to 3 but there should not be any compelling reason to give preferential treatment to related entities, except where the official receiver (*juge-commissaire*) authorises the debtor to pay prior debts, in order to release a pledge or to obtain the return of property and rights transferred as security in a trust, when such a release or return is justified by the continuation of the business.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Unless provided in the articles of association, there is no obligation to convene a shareholders' meeting in case of financial difficulties. However, a voluntary liquidation can only be opened upon an extraordinary shareholders' resolution deciding on the dissolution of the company and appointment of a private liquidator.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Under French law, a company is considered to be insolvent (*en état de cessation des paiements*) when it is unable to pay its debts as they fall due with its available assets, taking into account available credit lines and existing rescheduling agreements. This is a cash flow test. If the company is insolvent, its director must within 45 days following the date on which the company becomes insolvent either file for rehabilitation (*redressement judiciaire*) or liquidation proceedings or, if the company is insolvent for less than 45 days, conciliation (which are consensual/confidential proceedings not falling within the definition of "insolvency proceedings" within the meaning of the EU Insolvency Regulation). If the due date is violated, the legal representative is potentially exposed to various sanctions, including a prohibition on managing for up to 15 years. Please note that in order to avoid liability, directors will have to show that the insolvency is due to external causes and/or that they took every step they could to restructure the company such as filing for insolvency proceedings with the competent commercial court. Note that insolvency laws have been temporarily adapted in the context of the COVID-19 pandemic, including the following: until 23 August 2020, the solvency situation of companies is assessed as at 12 March 2020. This effectively means that the directors' obligation to file for insolvency is postponed until 23 August 2020 at the earliest if a cessation of payments occurred (as a matter of fact) between 12 March 2020 and 23 August 2020.

Back to contents

No.	Question	Answer
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Where a company director is liable for the serious and repeated failure to comply with tax obligations which have made it impossible to collect taxes and penalties owed by the company, corporate body or group, such director may, where he is not already bound to pay the debts of the company by virtue of another provision, be declared jointly and severally liable for the payment of such taxes and penalties by the president of the court. Except in the case of serious mismanagement or a commitment as joint and several guarantors, the director is not personally liable, out of their own assets, for the payment of the company's debt in respect of social security contributions and late payment penalties. However, French case law shows that a director may be ordered personally to pay damages for the prejudice, distinct from that already compensated by the late payment penalties, caused to URSSAF (Union for the Collection of Social Security Contributions and Family Allowances) by the non-payment on time of the contributions, such as, for example, the costs incurred by the opening of a litigation file. Moreover, as a single unpaid creditor may be sufficient evidence of a cessation of payments situation, it is common for insolvency proceedings to be requested by a single creditor such as the tax authorities or URSSAF if the debtor fails to pay an instalment on one of these debts.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	All directors are jointly and severally liable for any fault or negligence of the board. Indeed, directors have no individual decision-making power over the affairs of the company, but rather the board of directors takes action collectively, as a group, and it only takes decisions through votes. The only exception to the directors' joint and several liability is where civil liability arises out of specific actions taken by an individual director. Each member may avoid liability by establishing that he or she has behaved as a prudent and diligent director or member of the management board, in particular by opposing the decision taken by the collegiate body.

Back to contents

No.	Question	Answer
12.	Are there specific actions against directors under bankruptcy law?	Under French bankruptcy law, directors of an insolvent company may incur the following civil or criminal liabilities: (a) Liability for deficiency of assets (*responsabilité pour insuffisance d'actifs*): in the event of liquidation proceedings, a director may be held personally liable for all or part of the debts of the insolvent company where (i) there are insufficient assets to discharge liabilities and (ii) there has been a mismanagement in the operation of the business committed by the director which (iii) contributed to the company having insufficient assets to cover its liabilities. Please note that, while the proceedings relating to deficiency of assets are ongoing, the President of the court may freeze the director's assets, as well as the shareholders' assets when such shareholders are jointly and indefinitely liable for the debtor's liabilities. (b) Personal bankruptcy (*faillite personnelle*) can be ordered by the Courts at any stage where a company is the subject of rehabilitation or liquidation proceedings, and a director may be liable for personal bankruptcy leading to (i) a prohibition on managing, operating or controlling, directly or indirectly, any business and (ii) a prohibition on accessing certain professional activities as well as a deprivation of certain civic rights. A director may notably be subject to personal bankruptcy if he has deliberately paid any creditor of an ailing company after the date of the cessation of payments (ie causing damage to the other creditors). (c) Criminal bankruptcy (*banqueroute*): a director may be guilty of criminal bankruptcy (notably if (i) he has bought goods in order to resell them below market price, or has used inappropriate methods to obtain funds, in each case with the intention of avoiding or delaying the commencement of appropriate insolvency proceedings for judicial reconstruction, (ii) he has kept false accounts or caused accounting documents of the business or the incorporated body to disappear or has failed to keep any accounts at all when the law required them to do so or (iii) he has kept accounts manifestly incomplete or incorrect in accordance with the law.)

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Financial difficulties do not trigger specific duties of, or consequences for, shareholders or group companies. However, shareholders or group companies acting as de facto directors may be sought to cover the insufficiency of assets in the event that they mismanaged the company and such mismanagement has contributed to the creation of an insufficiency of assets. French law does not recognise per se the concept of a "group" and directors must focus on the state of their own company and not on the group as a whole. However, French courts developed the concept of co-employment, used by claimants attempting to challenge collective redundancies carried out within a group, in particular if the employer of the employees is under insolvency proceedings. Pursuant to case law, the concept of co-employment applies where there was either (i) a subordinate relationship between the dominant company and the employees of the subsidiary; or (ii) a "confusion of interests, activities and management between different entities". That can be the case whenever one company has no independence regarding the management of its assets, its finance, accounts, or its human resources; or if its management consisted partially or entirely of the management of another company. Notwithstanding the principle of separation of entities set out above, the company's administrator/liquidator could request the consolidation of the company's insolvency proceedings with another group member by demonstrating as a matter of fact that assets/liabilities of the company are commingled ("*confusion de patrimoines*") with another (solvent) member of the group and that these two companies are in fact one single entity and that they cannot be dissociated.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	No.

Back to contents

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Back to contents

Germany

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders ('shareholder model' vs. 'stakeholder/Rhineland model', 'Revlon duties' in case of take-over bids) or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Generally, managing directors *(Geschäftsführer)* of a German limited liability company *(Gesellschaft mit beschränkter Haftung* – GmbH) have to act in the interest of the company. It is disputed how the interest of the company is determined and to which extent stakeholder interests have to be taken into account. It is also debated in the literature, if there is a "shift of fiduciary duties" towards the creditors in the vicinity of insolvency. Although many voices are now in favour of such shift, the majority view is still against it. However, this obviously changes once the company is in insolvency proceedings in which managing directors have to secure the assets of the company in the interest of all creditors.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	There is a distinction between the internal and external liability of managing directors. Internal liability exists vis-à-vis the company and arises from the contractual and corporate relationship between the managing directors and the company. Internal liability results in claims of the company against a managing director; in insolvency proceedings, the insolvency administrator enforces such claims. Managing directors have to act with the care of a prudent businessman (*Sorgfalt eines ordentlichen Geschäftsmanns*). For business decisions (*unternehmerische Entscheidungen*), management can generally rely on the safe harbour of the business judgment rule if the prerequisites of this safe harbour are met. In particular, the managing directors need to decide on a full set of facts and free from a conflict of interests. Moreover, the business judgment rule is not applicable if management's decisions pose a threat to the viability of the business (*Existenzgefährdung*). In a crisis scenario, managing directors should thus in any event request independent advice and have the impact of relevant decisions clarified in light of the solvency of the company, e.g. by way of business judgment rule opinions and scenario analyses. External liability is an individual liability of managing directors towards third parties, such as creditors, individual shareholders, employees and the tax authorities. In particular, creditors can argue that the managing directors have delayed insolvency filing and thus they have suffered a loss, either in the form of a lower insolvency quota (*Quotenschaden*) or in the form of non-payment of contracts entered into after the insolvency of the company has occurred (*Neugläubigerschaden*). One of the key areas of potential liability for managing directors of companies in financial difficulties is the belated insolvency filing, which may lead to civil as well as criminal liability. In particular, a managing director is, *inter alia*, obliged to compensate the company for payments made after the company has become illiquid (*zahlungsunfähig*) or over-indebted (*überschuldet*) (see for more details no. 6).

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	According to German case law, many duties and liability risks associated with managing directors' duties also apply to so-called "shadow directors" (*faktische Geschäftsführer*). A shadow director is usually a person who is not a managing director but acts as a managing director towards third parties.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Under normal circumstances, only the company becomes contractually bound and thus owes contractual duties, such as the duty to inform the contract partner of a financial crisis, towards the relevant contract partners. Such obligation to inform contract partners of a Crisis only arises where the Crisis is so imminent that the feasibility (*Durchführbarkeit*) of the relevant transaction is already severely endangered (*schwerwiegend beeinträchtigt*), or it is to be expected that the purpose of the transaction (*Vertragszweck*) will be ultimately defeated by a later insolvency. The hurdles can be lower, if there is a particularly close business relationship, e.g. where goods are sold on a regular (running) basis, or where transactions are booked on current accounts (*laufende Rechnung*). However, there are very narrow special situations where a managing director could become personally liable for not informing contract partners of a financial crisis. Apart from the high hurdles of intentional fraud (*Betrug*) (in particular where the managing director has made false representations with regards to the solvency of the company), this may be the case where a managing director has either: (i) assumed the special personal trust of the contract partner (*besonderes persönliches Vertrauen*); or (ii) has acted with economic self-interest (*wirtschaftliches Eigeninteresse*). The liability risk on the basis of (ii) above is very limited and in normal circumstances a mere theoretical risk. An economic self-interest is usually only relevant in straw-man cases. In addition, personal liability risks associated with cases under (i) above are also practically rare. In normal circumstances, the courts treat managing directors as representatives of the relevant company and do not hold them liable for not informing a contract partner of a Crisis. However, this could be treated differently where a managing director has made personal representations, in particular, where a managing director (falsely) represents that the company is in good shape and that they personally stand up for (*persönlich eintreten*) the correct performance of the company's contractual obligations.
5.	What are the liability risks in the case of 'creditor stretching'?	In general, the mere fact that the company does not comply with its (payment) obligations towards its creditors is not in itself enough to establish personal liability for the managing director, except in the cases mentioned under no. 4 above and no. 10 below, or where the managing director is acting otherwise which needs to be qualified as *contra bones mores*. 'Creditor stretching' as a way to gain time for a refinancing will not typically lead to personal liability. The analysis, however, is very much dependent on the circumstances.

Back to contents

No.	Question	Answer
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Managing directors' of a company with limited liability are personally liable towards that company for "payments" which have been made by the relevant managing director or by an employee after the relevant company has become illiquid (*zahlungsunfähig*) or over-indebted (*überschuldet*). The aforementioned restriction does not apply to payments which are consistent with the diligence of a businessperson (*Sorgfalt eines ordentlichen Geschäftsmannes*). The definition of "payments" is very broad and encompasses every type of performance (*Leistung*) out of the company's assets, including payments by cheque, direct debits, set-off, non-monetary payments in kind or other forms of performances (e.g. the delivery of goods, the assignment of claims). This is also the case where the company receives funds from third parties on a company (current) account which is in-debt (*debitorisch geführt*), as the reduction of the debt-balance on such an account is considered a "payment" to the bank. The managing directors' must therefore ensure that after a company has become insolvent, payments by its customers or third parties are only made to accounts which stand to credit (*kreditorisch geführt*). On the other hand, payments from an in-debt account to third parties are possible, but only insofar the account is not secured by company assets. It is, however, possible to make "payments" or other types of performances which are directly (*unmittelbar*) and adequately compensated by a corresponding performance of or on behalf of the relevant recipient. It is important that the compensating performance is adequately usable (*verwertbar*) at the time of receipt by the company, ie it must not be immediately consumed or otherwise depleted. For instance, payments to employees are usually not adequately compensated as the performance of labour does not remain available to the company or its creditors. The compensation is calculated by using liquidation values (*Liquidationswerte*). It is further important that in case the compensation is directly paid into an in-debt (*debitorisch geführt*) account, such compensation payment must either be separated or directly used to acquire an adequately compensating asset. Hence, it must not be used to reduce the debt-balance towards the bank. A managing director is also liable for "payments" to shareholders (or their affiliated entities) which must have led to the company becoming illiquid (*zahlungsunfähig*) and where such payments are not protected by the businessperson privilege.
7.	Is there a distinction in this regard between preferential treatment of related entities and of other creditors?	Payments made by to a related entity may be subject to increased avoidance risks in insolvency, depending on the circumstances.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Generally, shareholders meetings are to be convened in the cases determined in the by-laws, as well as whenever the best interests of the company so require. The managing director of a GmbH is obliged to convene the shareholders' meeting immediately if it results from the annual balance sheet or from a balance sheet drawn up in the course of the financial year that half of the share capital has been lost. If a managing director omits this duty of disclosure, they can be criminally liable.

Back to contents

No.	Question	Answer
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Yes. The managing directors of a company with limited liability are obliged to file for insolvency as soon as (but in any event no later than three weeks after) it becomes illiquid (*zahlungsunfähig*) or over-indebted (*überschuldet*). The three week period may only be claimed (in full or in part) as long as promising negotiations on an out-of-court restructuring are underway. If an out-of-court restructuring can no longer be expected to succeed, the insolvency application must be filed immediately. Non-compliance with the filing obligation is a criminal offence by each managing director individually.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes. Non-payment of the employee's social insurance contributions (*Arbeitnehmeranteile zur Sozialversicherung*) to the relevant collection agency are a criminal offence under German law. Further, an employer has to transfer the collected wage taxes to the fiscal authorities within ten days after the end of each month. In the event of non-compliance, this is regarded as tax evasion, for which the managing director is personally liable. In case of partial retirement work agreements, the employer may be under the obligation to suitably safeguard (*absichern*) the credit balance including the employer's share of the total social insurance contribution attributable thereto against the risk of its insolvency. A director may be excluded from these liabilities under certain (rather strict) circumstances. Such analysis has to be made for each case individually.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	In principle, each managing director is liable individually. Whether a managing director can exculpate themselves is very much dependent on the individual circumstances of each case.
12.	Are there specific actions against directors under bankruptcy law?	Yes. Payments made after insolvency (see no. 6) can be claimed from each managing director by the insolvency administrator.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Generally, the managing directors of a GmbH are under a mandatory statutory duty to file for insolvency if the company has become illiquid or over-indebted in the meaning of the German insolvency code. However, if there is no management (e.g. the managing directors have resigned), such mandatory duty is applicable to each of the shareholders instead. According to German insolvency law, shareholder loans are subordinated in insolvency proceedings. Non-demand (*Stehenlassen)* of shareholders' claims against the company may also be considered as shareholder loans; generally, this is the case for non-demand for more than three months. Such loans may, for example, be unpaid intra-group receivables for goods and services. Payments made to a shareholder within one year before the insolvency filing may be contested by the insolvency administrator. Assets made available to the company by a shareholder may not be claimed back for the period of one year from the commencement of the insolvency proceedings if the asset is of considerable significance for the continuation of the debtor's business. The shareholder shall receive compensation for the continued use of the assets. In case of a cash pooling within the group, the managing directors have to ensure that the company has comprehensive rights to information against the parent company or other member of the group managing the cash pool. The managing directors must implement an "early warning system" by which they can monitors the financial situation of the parent and the wider group in order to assess regularly the full recoverability of outstanding loans or the probability of a default which may incur third parties to call on guarantees or enforce security. Equally, the managing directors shall ensure that they can react in a fast and adequate manner on any threats detected by way of the early warning system, e.g. to leave the cash management system and to claim any outstanding funds. Shareholders have to obey the applicable capital maintenance provisions (*Kapitalerhaltungsvorschriften*). A shareholder can become liable if they take actions which have caused (*kausal herbeigeführt*) the collapse of the company (*existenzvernichtender Eingriff*). This may be the case where a shareholder has instructed the managing directors to systematically transfer assets to affiliated entities, the so-called "cold liquidation cases" (*kalte Liquidation*). Liability of the shareholder would be, as in the other cases, towards the company. These cases are rather exceptional and may also fulfil a criminal offence.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Yes. Due to the Covid-19 pandemic, the insolvency filing obligations for companies were under certain circumstances initially suspended until 30 September 2020 (and the suspension may be extended up to 31 March 2021). Parliament decided to extend the deadline for over-indebted (but not illiquid) companies to 31 December 2020. The suspension of the obligation to file for insolvency may only be invoked by managing directors who succeed in proving two cumulative conditions: first, insolvency must have been triggered by the effects of the Covid-19 pandemic and, secondly, there must be a real prospect of eliminating any existing illiquidity. Since it will obviously be difficult to prove that both conditions apply, legislators have introduced an additional legal presumption in favour of managing directors, under which the existence of both conditions is presumed if the company concerned was not illiquid (*zahlungsunfähig*) on 31 December 2019. If the management can therefore prove that the company was not illiquid at the end of 2019, it can invoke the suspension of the obligation to file for insolvency. However, the legal presumption is rebuttable, meaning that if it can be shown that the Covid-19 pandemic was not the cause of the insolvency (ie a ground for insolvency would have occurred even without the Covid-19 pandemic) or the elimination of the illiquidity is excluded (e.g. because refinancing negotiations had already ultimately failed), the obligation to file for insolvency is not suspended. According to the explanatory memorandum to the legislative proposal for the COVInsAG, however, the "highest demands" must be placed on any refutation of the legal presumption in order to ensure that the purpose of the law (ie to relieve liability and to protect the managing directors) is honoured. In case insolvency filing obligations are suspended, payments which are made in the ordinary course of business (especially those which serve to maintain or resume business operations or to implement a restructuring), shall be deemed to be consistent with the diligence of a businessperson (see no. 6).

Back to contents

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Back to contents

Italy[1]

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Directors shall primarily act in the company's interest and they are subject to a duty of care towards all the company's stakeholders, including the shareholders, the creditors and other third parties. In particular, certain articles of the Italian civil code assign to directors a general duty of loyalty not to act against the company's interest, which is largely understood by scholars as an autonomous entity that is more than the mere sum of each shareholder's single interest. Moreover, pursuant to the Italian civil code, directors are responsible vis-à-vis creditors for the maintenance of the assets of the company and towards third parties for any wrongdoing which caused damage. The regime changes in the case of financial distress, where the company must act primarily in the best interest of its creditors. Lastly, the regime applicable when a cause for the dissolution of the company occurs provides that directors continue to keep their management power over the company with the only purpose of preserving the integrity and value of the company's assets. To such extent, directors are liable vis-à-vis the company, the shareholders, the company's creditors and third parties for any damage caused in violation of the aforementioned duty.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	The civil liability of directors in connection with financial difficulties may arise from the breach of both duties of prevention and management of the crisis. With reference to: – prevention matters, directors have two duties: (i) granting the maintenance of the assets of the company; and (ii) establishing an adequate organisational, administrative and accounting structure, appropriate to the nature and size of the company, such as to detect the company's state of insolvency and the loss of going concern status on a timely basis and be able to promptly adopt and implement one of the instruments provided for by law to enable undertakings to overcome financial difficulties and recover going concern status; – management of financial difficulties matters, directors have the duty to (i) timely adopt and implement one of the instruments provided by the law; and (ii) accord equal treatment to all creditors (unless benefiting certain creditors is the only way to preserve the company's value, see under 6). Criminal liability generally refers to activities or omissions carried out by directors that, wilfully or negligently, tend to deceive on the financial distress of the company and/or jeopardise the corporate capital.

1_This note relates only to the general provisions as the same are in force and construed at the date hereof (ie 3 July 2020). The following answers contain a high-level contribution also with regard to the criminal law aspects, which however cannot be considered in any way as legal advice and/or exhaustive inputs considering that A&O Milan does not have the capability to provide any criminal law advice whatsoever.

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	According to Italian case law and scholars, shadow directors are subject to the same duties and liabilities as directors vis-à-vis the company, the shareholders, the creditors and third parties. However, it is debated among scholars whether a shadow director can be held liable for not complying with duties which can be performed only by virtue of a formal appointment (e.g. calling a shareholders' meeting when mandatory according to Italian law). According to Italian case law, qualifying elements which may be relevant to determine whether an individual may be considered a shadow director are: – substantial (also in terms of economic significance) and continuous exercise of directors' typical powers, both internally and towards third parties (e.g. commercial, accounting and administrative activities); – performance of a variety of functionally and systematically coordinated acts of management; – involvement in decisions which affect the operation of the business; – actual involvement in relevant or strategic transactions (e.g. M&A transactions, real estate transactions and financial transactions); and – being recognised by third parties as an effective representative of the company.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	In general terms, Italian law does not provide for a specific hypothesis of liability of directors for entering into contracts that the company can later not perform ("wrongful trading"). In any event, in such circumstances, directors may be held liable and therefore be requested to compensate the relevant damages for the breach of duties they owe to the company's creditors for maintenance of the assets of the company (also for the cause of/increase in the status of insolvency of the company) and/or breach of the general duties of care which caused direct damages to shareholders and third parties pursuant to certain provisions of the Italian civil code. Such provisions set out the general principles on the conduct and behaviour of directors and therefore their liability pursuant to such rules shall be assessed on a case-by-case basis. Alongside their liability for damages vis-à-vis the relevant counterparty/the company, directors may personally also be held liable from a criminal perspective in the case where they have entered into new obligations on behalf of the company wilfully intending not to perform them in light of the dissimulated state of insolvency of the company ("fraudulent trading"). When the above-mentioned crime is integrated, from a civil perspective, directors may be held liable for damages arising from the commission of said crime. Please consider also that bankruptcy law provides for the criminal liability of, among others, directors for borrowing or continuing to borrow money, dissimulating the insolvency or the crisis of the company. Should the intention not to perform the relevant obligations arise later (e.g. at the time of the actual performance) or in consequence of a reason other than the insolvency of the company (e.g. a personal reason), there should not be criminal liability but directors may be held liable for damages anyway, according to case law. In any event, directors should take care not to mislead their counterparties in relation to the company's financial situation, paying due consideration to the distinction between wrongful trading and fraudulent trading which often tends to get blurred in light of factual circumstances.

Back to contents

No.	Question	Answer
5.	What are the liability risks in the case of 'creditor stretching'?	The directors' decision on behalf of the company not to comply with payment obligations with the intention to fulfil them at a later stage, through a refinancing or restructuring remedy, could expose them to personal liability should the company fail to fulfil such obligations or become insolvent before paying the obligations undertaken. Furthermore, directors have a specific duty to establish an adequate organisational, administrative and accounting structure, as specified under 2 above. Accordingly, depending on factual circumstances, "creditor stretching" may even amount to early warning of an upcoming crisis which should be detected by directors in order for them not to be held liable in the case of a deterioration in financial conditions resulting in a prejudice to the creditors' claims. If only third-party creditors are "stretched" but debts to related parties (such as subsidiaries, associated parties etc.) are paid on time, directors' liability for damages and, in the event of subsequent bankruptcy, also criminal liability (see under 6) may ensue, also considering that shareholders' financial claims against the insolvent company are in principle ranked junior with respect to external claims (see under 7).
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	The directors' decision to prefer one or some creditors over others may lead to both civil and criminal consequences in the event of bankruptcy. Should funds available to the company be insufficient to pay all creditors, directors should, insofar as possible, try to limit payments to those strictly necessary to the company's short-term survival, vis-à-vis creditors instrumental for the company to maintain going concern status (employees and certain suppliers), only as long as this decision is made from the realistic perspective of preserving value in the company's assets to the benefit of all creditors. Amongst such creditors, priority should be given to those whose claims are ranked senior under bankruptcy law (e.g. employees). In the absence of any credible perspective of preservation of the company's value, directors should strive to accord equal treatment to all creditors and, if possible, suspend all payments in light of imminent pre-insolvency or insolvency procedures. Ultimately, the precise moment when directors should decide to accord equal treatment to creditors varies and should be evaluated carefully by directors the more the company's struggle to pay all creditors intensifies.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	At least some of the related entities' financial claims, such as those of shareholders, are ranked junior to, by law, those of third-party creditors (for further details, see question 13 below); it follows that the decision to pay them and leave third-party creditors unpaid may undoubtedly result in director liability in the event of subsequent bankruptcy or failure to fulfil the company's other obligations. In any event, without prejudice to what is discussed under question 6 above, no distinction is made in principle between related entities and other creditors in relation to trade receivables deriving from transactions performed at arm's length with the company.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Under Italian law, directors shall immediately convene a shareholders' meeting when the company suffers losses as a consequence of which the corporate capital is decreased by more than one-third. The shareholders shall then adopt the appropriate measures to assess the financial situation of the company and:[2] – if within the following financial year the loss is not diminished to less than one-third of the corporate capital, then the shareholders' meeting shall reduce the corporate capital accordingly; – if, due to the loss of more than one-third of the corporate capital, said corporate capital falls below the minimum required pursuant to the law, the shareholders' meeting shall immediately restore it or transform the company. Moreover, in case neither the restoring of the corporate capital nor the transformation of the company are possible or resolved by the shareholders' meeting, directors shall timely file the winding up of the company with the Italian Companies' Register and convene the shareholders' meeting to resolve the liquidation of the company.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Although there is no specific deadline,[3] according to Italian bankruptcy law, within which the directors of a distressed company are required to file for insolvency proceedings, it is provided that: – directors must implement the structure described under 5 above; and – immediately implement one of the legal tools provided for by Italian bankruptcy law to overcome the crisis and safeguard the continuation of the business. Failure to comply with the above-mentioned obligations and, more generally, late detection and management of the crisis may generate some civil and criminal liabilities for directors.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	From a general perspective, non-compliance with mandatory payments (both from a tax and social security point of view) due to a decision of a director can result in his/her liability to pay damages to shareholders and/or the company. Joint liability of directors is also provided by the Italian civil code for non-compliance with obligations provided by the law (including payment of taxes and social contributions), in relation to certain types of legal entities (e.g. limited liability companies) unless they prove that non-compliance was not due to their fault, they could not avoid it and they expressly recorded their disagreement in the minutes of the board of directors' meetings (in this respect, specific duties/rules may be provided, depending on the type of legal entity). Finally, non-payment of taxes and social security contributions may also be punished from a criminal point of view, if certain thresholds are exceeded.

2_Covid-19 emergency legislation provides that, between 9 April and 31 December 2020, by way of exception to the ordinary rules, both the recapitalisation obligations of companies and the obligation to wind up companies as a result of the reduction in share capital below the minimum amount required by law are suspended. However, directors are still required by law to call shareholders' meetings in order to provide shareholders with appropriate information with respect to the company's economic and financial situation. However, due to its recent implementation and lack of case law it is unclear whether such rule would apply in cases where the crisis situation existed before the Covid-19 outbreak.

3_Please note that, in order to deal with the effects of the Covid-19 outbreak on business continuity of Italian companies as going concerns, certain temporary law provisions have been enacted by the Italian government. In particular, please note that any filings for the declaration of bankruptcy or for the ascertainment of the state of insolvency brought within the period between 9 March 2020 and 30 June 2020 were deemed inadmissible (improcedibili) and had to be filed again after the expiration of such period. However, there is some recent case law in such respect based on which it appears that this would not apply in cases where the crisis situation existed before the Covid-19 outbreak. In any case, it did not apply to the filing made by the company itself (ie not by any third-party creditor] in cases where the crisis situation existed before the Covid-19 outbreak.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Directors of joint-stock companies (*società per azioni*, **SPA**) can be considered as jointly and severally liable for damages deriving from non-compliance with their duties, except for functions vested solely in either the executive committee or one or more directors. SPA directors are jointly liable if, having knowledge of conduct being prejudicial to the company, they fail in doing what is in their powers to prevent that and either remove or reduce its harmful consequences. Any such liability does not extend to those directors who, being blameless, requested their dissent to be recorded without delay in the minutes of the company board of directors' meetings (*libro delle adunanze e delle deliberazioni del consiglio di amministrazione*) and immediately informed in writing the chairman of the board of statutory auditors. Also, directors of limited liability companies (*società a responsabilità limitata*) are jointly and severally liable towards the company for damages arising from their failure to comply with the duties imposed on them by law or company by-laws, except for directors who, being blameless and having knowledge of the occurrence of such act, requested their dissent to be recorded.
12.	Are there specific actions against directors under bankruptcy law?	In general terms, Italian bankruptcy law provides that the bankruptcy receiver (*curatore fallimentare*) may, with the prior authorisation of the delegated judge (*giudice delegato*), bring any liability actions against directors which, in the ordinary context, would be brought either by the company itself, the shareholders or the company's creditors.
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	The Italian civil code sets out a general rule according to which the loan granted to a limited liability company (*società a responsabilità limitata*) by the relevant quotaholders[4] shall be subordinated (*postergato*) to any other creditor of that company, if at the time the loan is advanced: – there is an imbalance between the company's indebtedness and its net asset value (also taking into account the corporate purpose of the company); and – the company's financial situation would have required an equity contribution instead of a loan. It is reasonable to argue that loans granted by quotaholder(s) under the above-mentioned circumstances are subject to an equitable subordination principle and if repaid by the company during the year before the bankruptcy declaration shall be returned back to the company. In addition, please consider that the above-mentioned rule applies with reference to loans disbursed during the year prior to the bankruptcy declaration. Indeed, under Italian bankruptcy law, the receiver is generally acknowledged to act for the ineffectiveness of the repayment of loans (and consequent obligation to repay them by quotaholders) disbursed up to two years before the bankruptcy declaration. In this case, however, the aforementioned imbalance situation must not exist only at the time of disbursement but also at the time when the repayment is made.[5]

4_In accordance with the prevalent scholars, this rule applies also when the loan is disbursed by any other company of the group (other than in the case of any upstream loans). Moreover, it is generally maintained that such rule also applies (at least in certain cases) when a loan is granted to an SPA by the relevant shareholder.

5_Please consider that, in order to deal with the effects of the Covid-19 outbreak on business continuity of Italian companies as going concerns, certain temporary law provisions have been enacted by the Italian government. In particular, some measures have been introduced which are currently applicable to quotaholder (or shareholder) loans made from 9 April to 31 December 2020, for the suspension of rules regarding subordination of such quotaholder (or shareholder) loans pursuant to the Italian civil code. However, please note that it is not clear whether such provisions would also apply in the case where the company's asset imbalance situation (squilibrio patrimoniale) already existed before 9 April 2020 and, considering the very recent enactment of those measures, please be aware that there is no specific case law in such respect.

Back to contents

No.	Question	Answer
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Although there is no specific legislation directly mitigating directors' liability risks, in addition to what has been already mentioned under paragraphs 8, 9 and 13, Covid-19 emergency legislation also provides for some temporary provisions on preparation of balance sheets. Indeed, with the aim of facilitating the continuation of businesses as going concerns, in the preparation of corporate balance sheets relating to the ongoing financial year (or, if such balance sheets are yet to be approved, relating to the financial period ending before 23 February 2020), directors' evaluations can be made as if the relevant business activity is still continuing if such continuation is shown in the previous balance sheet relating to the financial period ending before 23 February 2020 (being the date on which the first emergency legislation was enacted).[6]

6_The extent of application of the provision is unclear due to its recent implementation (and consequent lack of case law).

Back to contents

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Back to contents

Luxembourg

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Under Luxembourg company law, directors must act in the corporate interest of the company. While the exact width of this notion is debated in the Luxembourg legal doctrine, the prevailing view is that the board of directors, in doing so, must exercise due care towards the interests of the company's stakeholders such as its shareholders, employees, trade partners and creditors. The more a company gets into financial distress, the more the board of directors' duty of care arguably shifts from the wider group of stakeholders, including shareholders, to the narrower group of creditors (including employees and debt providers). If there is no more 'light at the end of the tunnel', shareholder value has evaporated and the focus must be on the interests of the creditors.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	Under Luxembourg law, a company, its shareholders and third parties can invoke different legal grounds to trigger directors' liability. Vis-à-vis the company, directors face liability in the event of mismanagement, a breach of the 1915 Law on commercial companies (the **1915 Law**) or the company's articles of association. Third parties are entitled to rely on a breach of the 1915 Law or the company's articles, in addition to liability in tort, to trigger directors' liability. **1. Mismanagement:** directors are individually liable towards the company for the performance of their mandate and any misconduct in the management of the company. Mismanagement is a fault-based concept. Directors commit mismanagement if their action or inaction can be characterised as deviating from the behaviour that would have been adopted by a normally prudent director. In other words, directors are expected to choose a course of action that a normally prudent director would choose in similar circumstances, including if the company is in financial difficulties.

Back to contents

No.	Question	Answer
		Examples of actions or inactions that have resulted in mismanagement, which are particularly relevant if the company is in financial difficulties, include: – Entering into contracts to the disadvantage of the company – Failing to collect receivables that are due and payable or waiving them – Paying a debt that is not due – Failing to inform the shareholders of the actual (financial) situation of the company – Not attending board meetings If the company is in financial difficulties, directors should also pay extra attention to intra-group transactions, as they need to make sure that such intra-group transactions are in the company's corporate benefit. **2. Breach of the 1915 Law and the company's articles:** directors are jointly and severally liable in the case of breach of the 1915 Law and the company's articles (with the possibility for individual directors to exculpate themselves in certain circumstances). This includes liability for damages sustained by third parties due to the breach of the regulations on annual accounts or in the case of payment of fictitious dividends. **3. Tort:** directors can also be liable in tort vis-à-vis third parties who can prove that the director's misconduct is personal. In addition, case law has set that third parties need to demonstrate that the misconduct is detached from the director's functions, which makes third parties' liability claims difficult to prove in most circumstances.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	If an officer, shareholder or other person who has not been appointed as a director commits factual acts of management, such '*de facto*' or 'shadow' director can be subject to and face some of the legal duties, responsibilities and liability as a formally appointed director. That person is deemed to be a '*de facto* director' if they commit such acts (ie positive actions) relating to management matters *in place of* the formally appointed directors or if they have been instructed by the appointed directors to act in a certain manner. This assessment is mainly a factual question, whose burden of proof is on the relevant interested party (such as creditors).

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Directors may be held liable if they enter into new obligations on behalf of the company when, at that time, they knew or should have realised that the company would not be able to fulfil those obligations and that the company would be unable to pay the resulting claim for damages (no 'light at the end of the tunnel'). In that case, directors can be *inter alia* held liable, generally at the initiative of the bankruptcy receiver, if their action (or omission) can be characterised as mismanagement (see above). In addition, directors can be held liable in the event of bankruptcy if they committed serious faults that contributed to the company's bankruptcy, e.g. if they entered into an agreement completely out of proportion with the company's financial position (and leading to its bankruptcy). Lastly, directors can be held personally liable in the case of wrongful trading conduct for their own benefit (see below). If there is no 'light at the end of the tunnel', directors will also have the obligation to file for bankruptcy (in normal times: cf. below for the specific measures adopted in light of the Covid-19 outbreak), ie when the company has (a) ceased its payments and is unable to meet its commitments (*cessation de paiements*) and (b) lost its creditworthiness (*ébranlement de crédit*), e.g. cannot obtain liquidities or arrange debt rescheduling with its creditors (the **Bankruptcy Conditions**). We refer to question 9 for further developments on the duty of directors to file for bankruptcy.
5.	What are the liability risks in the case of 'creditor stretching'?	Liability resulting from creditor stretching should be analysed on a case-by-case basis and depends on factual circumstances. As set out above, and assuming that the company has not yet met the Bankruptcy Conditions, creditor stretching is not as such sufficient to trigger a personal liability of the directors as such tactic could – in certain instances – save the company from bankruptcy: delaying of payments could for instance be used as a way to secure a refinancing. If, on the other hand, only related parties' debt is paid in time (and the debt of all external creditors is stretched) or if it was evident that the company could not have access to the financing (or debt rescheduling) necessary to survive, liability of the directors might be triggered in the case of bankruptcy.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	In the event there are insufficient funds available to pay all creditors, and without prejudice to subordination and security-related arrangements, companies are entitled to pay those creditors that are key for the company's short term survival (employees, certain suppliers) and delay payment to others, as long as there is a credible perspective of a refinancing/survival (and the Bankruptcy Conditions are not met). If there is no such 'light at the end of the tunnel' anymore, the company and its directors should aim for equal treatment of (unsecured) creditors. In the short interval prior to such bankruptcy declaration, selective payments should then only be made to imminent creditors and if there are compelling grounds to do so, such as preserving value in the company's assets for the benefit of all creditors. Directors should also take into account the clawback period provided by the Luxembourg Commercial Code: indeed, certain payments made (or transactions carried out) as listed in the Commercial Code (e.g. payment of debts which have not fallen due, transactions not at arm's length/with no or materially undervalued consideration, payments of matured debt if they were accepted with the knowledge of the company's cessation of payments, etc.) during a period of six months and ten days prior to the bankruptcy adjudication by the Commercial Court can be cancelled (upon proceedings initiated by the bankruptcy receiver).

No.	Question	Answer
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	The same rule as discussed under 6. will apply, but case law shows that courts may not easily be convinced that there was a compelling reason (in the interest of the company and its creditors) to give a preferential treatment to related entities.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Yes. If the net assets of a public limited liability company (*société anonyme*) have fallen below 50% of the share capital, the board of directors has an obligation (within two months from the date such losses were or should have been assessed) to convene a shareholders' meeting. Such meeting will resolve either (a) to dissolve the company (for a public limited liability company, with a quorum of 50% and majority of ¾) or (b) to continue the company's activities. The same obligation occurs when the company's net assets have fallen below 25% of the share capital, except that the dissolution only requires a ¼ majority. Articles of association can provide stricter thresholds than those set out above. Directors may face joint and several liability towards the Company for any increase of the loss suffered by the company after the date on which they should have convened the shareholders' meeting.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Yes. Directors have the obligation to acknowledge and file for bankruptcy (aveu de faillite) with the Commercial Court within one month from the date on which the company has ceased payments under the Bankruptcy Conditions (subject to criminal sanctions). However, in the context of the Covid-19 outbreak, the Luxembourg Government adopted a Grand Ducal Regulation providing for the suspension of such obligation, initially until the end of the state of crisis, i .e. on 24 June 2020. The suspension of this obligation has been extended for an additional period of six months as from the date of the end of the state of crisis.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes, with respect to tax debts. Directors are responsible to ensure that all tax obligations and duties relating to the company are duly complied with. Directors may be held jointly and severally liable if the tax administration can prove that the failure to comply with tax obligations is due to the directors' wrongful misconduct (*inexécution fautive*). Such assessment is based on factual circumstances and the mere fact that the company does not pay its tax debts is not sufficient as such to conclude to directors' wrongful misconduct. If successful, the tax administration can issue a notice of secondary recourse (*appel en garantie*) against the directors.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Directors are individually liable in the case of mismanagement (unless the wrongful action is common/joint, in such case there will be joint and several liability between the directors), jointly and severally liable in the event of a breach of the Companies Act or the company's articles of association and severally (or, as the case may be, severally and jointly) in the event of serious mismanagement that has contributed to the bankruptcy of the company. In a nutshell, where the liability is not individual, board members can exonerate themselves if they can evidence that such directors (i) did not take part/contribute to the wrongful action (or omission), (ii) actively distanced themselves from such fault and (iii) disclosed such wrongful action (or omission) at the next general meeting.
12.	Are there specific actions against directors under bankruptcy law?	Yes. Formally appointed or *de facto* directors can be held (either severally or jointly and severally) liable for all or part of the company's debts if they committed serious faults that contributed to the bankruptcy of the company (e.g. entering into out-of-proportion agreements). If held liable, an additional sanction that could be imposed upon such directors is the prohibition on practising trade or having a directorship's mandate. In exceptional circumstances, the bankruptcy can be extended to directors (who can be personally declared bankrupt, together with the company in order to constitute one single bankruptcy estate) if such directors (i) have entered into commercial transactions for their benefit, acting under the corporate veil, (ii) disposed of assets as if they were their own or (iii) have pursued, in their own interest and in an abusive manner, a loss-making business that was bound to lead to insolvency.
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	In limited liability companies, financial difficulties as such do not trigger specific duties of, or consequences for, shareholders or group companies. Shareholder receivables will not automatically be subordinated. However, a shareholder may be liable in exceptional circumstances if (i) it is considered as a *de facto* director (as set out above) or (ii) a court were to pierce the corporate veil (ie if the company has no separate economic existence from the shareholder – this will be a factual assessment based *inter alia* on various factors, such as intermingling between assets of the shareholder and subsidiary, important management decisions are taken by the shareholder (and not by the board)).
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Yes – cf. above as to the suspension of the obligation for the directors to file for the bankruptcy.

Back to contents

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Back to contents

The Netherlands

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Under Dutch company law, directors must focus on the 'enduring (ie, not just short term) success' of the company and the enterprise attached to it and, in doing so, must exercise due care towards the interests of the company's stakeholders such as its shareholders, employees, trade partners and creditors and, to some extent, society at large. The interests of those stakeholders may not be harmed disproportionately or unnecessarily. The more a company gets into financial distress, the more the management board's duty of care shifts from the wider group of stakeholders, including shareholders, to the more narrow group of creditors (including employees and debt providers). If there is no more 'light at the end of the tunnel', shareholder value has evaporated and the focus must be on the interests of the creditors.

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	There is a distinction between the internal and external liability of managing directors. Contractual liability exists vis-à-vis the company and arises from the contractual and corporate relationship between the managing directors on the one hand, and the company on the other hand. Internal liability is in principle a collective liability of the management board (with the possibility for individual directors to exculpate themselves). External liability is an individual liability of managing directors towards third parties, such as creditors, individual shareholders, employees and the tax authorities. In recent case law, the Dutch Supreme Court brought the various liability standards close to each other. With the exception of a number of specific legal provisions that create a quasi-strict liability (some of which are discussed below), a managing director is only liable, both internally and externally, if he can be made the subject of a 'serious reproach'. This threshold in all cases is high. Examples from (higher and lower courts) law of actions that have resulted in internal and/or external liability of managing directors include: – to enter into agreements on behalf of the company while knowing that the company will be unable to meet its obligations; – to procure without proper justification that the company does not meet an agreement, while it is foreseeable that this would result in damage to the opposite party; – to take major risks unnecessarily and make a rash assessment, from an economic standpoint, of the value of acquisitions, or to otherwise make important decisions without proper information/investigation; – to mingle private affairs with those of the company and/or appropriate corporate opportunities; – to frustrate recourse by splitting up a company into viable and nonviable units; – to use deducted pension premiums for business operations. There are a number of legal provisions that create liability for managing directors even if they do not act (seriously) in a way which is reproachable, some of which are discussed below. Each managing director is, for instance, in principle jointly and severally liable for damage sustained by third parties due to misleading statements in the annual accounts of the company. For BV companies, those managing directors allowing payment of dividends or other distributions to shareholders while at the time knowing (or reasonably able to foresee) that after the payment the company would not be able to pay its due debts, will be jointly and severally liable towards the company for the deficit created by the payment.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	If an officer, shareholder or other person who has not been appointed as a managing director, commits factual acts of management, they are liable on the same footing as a managing director for such acts (and, in principle, for such acts only) as a 'de facto director'. They are deemed a 'de facto director' only, however, if they commit such acts in place of the formally appointed managing directors or have instructed such appointed managing directors to act in a certain manner. The burden of proof is on the creditor (or the bankruptcy trustees, as the case may be).

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Managing directors will be liable if they enter into new obligations on behalf of the company when, at that time, they know or should have realised that the company will not be able to fulfil those obligations and that the company will be unable to pay the resulting claim for damages (no 'light at the end of the tunnel'). The burden of proof rests, in principle, on the prejudiced creditor. Even if there is 'light at the end of the tunnel', managing directors should be careful not to actively paint or endorse a misleadingly rosy picture of the company's financial situation.
5.	What are the liability risks in the case of 'creditor stretching'?	The mere fact that a managing director of a company does not ensure that the company complies with its (payment) obligations towards its creditors is not in itself enough to establish personal liability. 'Creditor stretching' as a way to gain time for a refinancing will not typically lead to personal liability. The analysis, however, is very much dependent on the circumstances. If only outside creditors are stretched but debts to related parties are paid on time, this may create directors' liability.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	In case there are insufficient funds available to pay all creditors, companies are entitled to pay those creditors which are key for the company's short term survival (employees, certain suppliers) and delay payment to others, as long as there is a credible prospect of a refinancing/survival. If there is no such 'light at the end of the tunnel' any more, the company and its directors should aim for equal treatment of creditors. In practice this means quickly seeking bankruptcy or 'suspension of payments' protection under the Dutch Bankruptcy Code. In the short interval prior to such bankruptcy declaration/suspension of payments, selective payments should then only be made if there are compelling grounds to do so, such as preserving value in the company's assets for the benefit of all creditors.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	The same rule as discussed under 6. will apply, but case law shows that courts will not easily be convinced that there was a compelling reason (in the interest of the company and its creditors) to give preferential treatment to related entities.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	No, unless there are specific provisions in the articles of association to that effect. On the other hand, the management board requires shareholder approval to file for bankruptcy, unless this has been excluded in the articles of association.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	There is no formal rule in Dutch law obliging a financially distressed company to apply for its own bankruptcy or suspension of payments at a given point in time. It would nevertheless be prudent to file for such court protection if there is no 'light at the end of the tunnel'. Filing under these circumstances would help to ensure that all creditors receive equal treatment.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes. Companies must make immediate written notification to the competent authorities in the event they are unable to pay specific taxes, social insurance premiums and/or compulsory contributions to company pension funds. If not, managing directors are jointly and severally liable for the taxes or premiums due and can exonerate themselves only by showing that (a) they are not to blame for the company having failed to (properly) fulfil its notification obligation as they themselves were physically or mentally unable to give the notice and (b) that they are not to blame for the non-payment of the various amounts. If the notification obligation has been fulfilled, a managing director is only liable if the relevant authorities can show that the non-payment is due to apparent improper management by the managing directors jointly in the period of three years preceding the time of the notification.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	In principle, as mentioned at 2., a management board member is liable only if their acts or omissions are seriously and personally reproachable. Note, however, that the members of the management board are collectively responsible for the company's policies and affairs. On the other hand, board members can exonerate themselves by proving that they cannot be blamed for the mismanagement and has not been negligent in taking measures to avert its consequences. In that context, they may point to a division of tasks within the board. The burden of proof lies with the managing director.

Back to contents

No.	Question	Answer
12.	Are there specific actions against directors under bankruptcy law?	Yes, in a bankruptcy each managing director is jointly and severally liable for the deficit in the bankruptcy estate in case of apparent mismanagement in the three years preceding the bankruptcy, if it is apparent that the insolvency has, to a large extent, been caused by that mismanagement. Individual managing directors can exonerate themselves by proving that they cannot be blamed for the mismanagement and have not been negligent in taking measures to avert its consequences. The court can furthermore mitigate liability on various grounds. There is a non-rebuttable presumption of mismanagement (and a rebuttable presumption of its causing the bankruptcy) if the company has failed to keep proper records of its rights and obligations or failed to publish its annual report and accounts within 12 months of the end of the financial year.
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Financial difficulties as such do not trigger specific duties of, or consequences for, shareholders or group companies. Shareholder receivables will not automatically be subordinated. Shareholders or group companies may however be liable towards the company in case of wrongful interference in the company's affairs, as de facto directors or otherwise. Shareholders of a B.V. company (*besloten vennootschap*) will be liable to repay dividends paid out by the company if they knew at the time (or should reasonably have foreseen) that the company would not be able to pay its due debts.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	No.

Back to contents

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Back to contents

Poland

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	While a company is solvent and trading normally, the directors' primary consideration is that of the interests of the company itself. Under Polish law, the interests of the company are not the equivalent of the interests of the shareholders. The interest of the company should be determined on a case-by-case basis, depending on the purpose of the company described in its articles of association, the shareholding structure of the company, the interests of shareholders and other factors which may be relevant to the company and its operations. Moreover, the management board is under no (legal) obligation to implement shareholders' resolutions, directions or suggestions. The management board may even refuse to provide explanations to the shareholders or to make the books and documents of the company available for inspection if there are reasonable grounds to believe that the shareholders will use the same for purposes contrary to the company's interest, thus causing material damage to the company. When a company finds itself in financial difficulty (either insolvent or likely to become insolvent), there should be a re examination of the company's interests which takes into account the interests of the creditors as well. Where a company is likely to become insolvent, the creditors' interests should, at the very least, be considered and taken into account.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	**Civil Liability** There is a distinction between the internal and external liability of managing directors. Internal liability exists vis-à-vis the company and arises from the corporate relationship between the managing directors on the one hand, and the company on the other. Internal liability may be individual or joint (of all or some of the management board members) depending on the situation. Under the Polish Commercial Companies Code (the CCC), management board members are liable to the company for any damage caused as a result of their: (i) unlawful act; or (ii) a breach of the company's articles of association, unless such damage was caused unintentionally. Furthermore, management board members are obliged to perform their duties with due professional care. The CCC sets out only general standards of due care, therefore any assessment of whether due professional care has been exercised or not must take account of all specific circumstances. Importantly, management board members cannot avoid liability by claiming that they have merely implemented a resolution of the general meeting, as the management board is under no obligation to implement a resolution if the board decides that the resolution violates the law, the company's articles of association or good practice, or is detrimental to the company's interests. In such case, the management board has the right to bring a court action for the resolution to be declared invalid or revoked. The management board members are also liable towards the company under various (specific) legal regulations. For example, under the Accountancy Act, management board members are obliged to ensure that the financial statements and management reports are compliant with the Accountancy Act regulations. Management board members are liable to the company for the damage caused by their actions or lack of action in breach of the above obligation.

Back to contents

No.	Question	Answer
		External liability of managing directors is liability towards third parties, such as creditors, individual shareholders, employees and the tax or other administrative authorities. Such external liability may be individual or joint (of all or some of the management board members) depending on the situation. Individual liability of managing directors towards third parties is based on the general rules of the Polish civil law (torts). Under those rules, anyone who intentionally inflicts damage on another person is obliged to redress such damage. The Civil Code stipulates that the injured person is responsible for proving the damage, the fault of the person who caused it and the causal link between the action or omission to act by the perpetrator and the occurrence of damage. On the other hand, pursuant to the CCC, management board members are jointly and severally liable with the company for the company's obligations if the enforcement against the company has proved to be ineffective. Joint and several liability means that the creditors may seek satisfaction directly from a management board member's assets. A management board member may be released from this liability if it is able to prove that: – a petition to declare the company bankrupt was filed at the appropriate time; – a decision on initiating restructuring proceedings with respect to the company was issued by the competent authority at the appropriate time; – a decision approving an arrangement was issued by the competent court as described in the Polish restructuring law; – failure to file a bankruptcy petition was not due to any fault on such member's part; or – despite: (i) the failure to file a bankruptcy petition; (ii) the competent authority not issuing a decision to open restructuring proceedings; or (iii) the court not approving the arrangement, the creditor has not incurred any damage. Notwithstanding any liability a management board member may incur under civil law in relation to their failure to file a bankruptcy petition in a timely manner, management board members may also be held criminally liable in connection with the company's bankruptcy. **Criminal Liability** The criminal liability of management board members is regulated by the relevant provisions of the CCC and the Criminal Code; however, specific regulations providing for criminal liability of management board members can also be found in certain other acts. The Criminal Code identifies a number of offences for which members of the management board of a limited liability company may be liable, which may be directly or indirectly related to the function performed by a member or the type of activity conducted by the company. Such offences include: – acting to the detriment of the company by abusing one's powers, failure to meet one's obligations, or engaging in corruption practices; – acting to the detriment of the company's creditors in the event of threatened insolvency by making it impossible for the creditors to satisfy their claims or reducing the company's assets (for instance by divesting, donating, destroying, or actually or purportedly pledging or damaging the company's assets, or transferring the company's assets to another company); and – failing to maintain the company's business documentation or maintaining such documentation in an unreliable manner or inaccurately.

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	A director's liability generally rests on the formally appointed management board members or liquidators of the company. However, other persons may bear similar liability depending on their function and the powers they have in/towards the company. The liability of such persons must always result from the specific provision of law or must be based on the general rules of civil law (torts).
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	The general rules of a director's liability shall apply. In particular, the management board members may bear civil liability towards the company and/or the creditor if they intentionally conclude an agreement or borrow new money to the detriment of the company or the creditor, or potentially even if they should have known that the company would not be able to repay or perform its obligations.
5.	What are the liability risks in the case of 'creditor stretching'?	The analysis is very much dependent on the circumstances. Depending on the given scenario, a director might be held liable under the general rules of the Civil Code or might be criminally liable under the Criminal Code. Please refer to question No. 2 for more details.

Back to contents

No.	Question	Answer
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	In principle, if there are no financial difficulties, there are no strict rules for satisfying the claims of the individual creditors and the order of their satisfaction (payment waterfall). However, individual legal actions causing harm to the creditors may be challenged under the Civil Code. If a company is declared bankrupt or restructuring proceedings with respect to the company are initiated, the legal actions carried out on the verge of bankruptcy/restructuring causing harm to the creditors may be declared invalid/annulled with respect to the bankruptcy/arrangement estate, and as a result the assets fraudulently conveyed out of the company's property are restored to the estate and are designated to be utilised to satisfy the creditors' claims. The Bankruptcy Law and the Restructuring Law include the principle of equal treatment of all creditors. A claim that arose before the bankruptcy/restructuring proceedings are initiated must not be satisfied selectively. The payment waterfall in bankruptcy proceedings is set out in the Bankruptcy Law. In the restructuring proceedings the terms on which the creditors are satisfied are set out in the arrangement. Under the arrangement, the creditors may be split into groups and the individual group's claims may be satisfied on different terms. Under the Restructuring Law, in certain events a creditor may be granted more favourable terms of having its claims satisfied, eg when following the initiation of the restructuring proceedings such a creditor has granted or is about to grant to its debtor the funding necessary to implement the arrangement. Claims arising in the course of the restructuring proceedings should be satisfied on an ongoing basis. The company's failure to satisfy its current liabilities in the course of the restructuring proceedings is the reason to discontinue the proceedings. As far as the liability of the directors, ie the Management Board members, is concerned, the selective satisfaction of individual creditors' claims might be subject to criminal liability under the Criminal Code, so long as the statutory requirements are met - please refer to question two above for details on these requirements.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	Legal actions in favour of related entities are subject to the special (easier) principles of their annulment. Namely, under Bankruptcy Law: – legal transactions executed by the bankrupt company within six months before the day of submission of a petition for bankruptcy with: (i) its shareholders or representatives or their spouses, (ii) the affiliated company or (iii) the shareholders or representatives (or their spouses) of the affiliated company, will be ineffective concerning the bankruptcy estate; and – the judge-commissioner supervising the bankruptcy proceedings may declare ineffective towards a bankruptcy estate a security established over the company's assets to secure a third party's debt if (i) this third party security is established between the date falling one year before the filing of the bankruptcy petition and the declaration of bankruptcy, and (ii) the companyhas received no consideration in return or the consideration received by the companyis of a lesser value than the security. If this third party security was established to secure the debt of a related entity, this third party security may be declared ineffective towards the bankruptcy estate regardless of the value of the consideration received by the company, unless the security receiver can prove that this transaction was not detrimental to the other company's creditors. Restructuring Law contains similar provisions relating to clawback.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Yes, when the balance sheet drawn up by the management board shows a loss in excess of the total of the spare and reserve capital and one-half (limited liability company) or one-third (joint-stock company) of the share capital, the management board shall immediately convene a shareholders' meeting to adopt a resolution on the further existence of the company.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Yes, bankruptcy should be declared regarding a debtor who becomes insolvent, ie fails to pay its due and payable obligations. There are two insolvency tests and it is sufficient if only one is satisfied: – the illiquidity test: the company is unable to meet its pecuniary obligations as they fall due, which is assumed if the company has ceased making payments on time for longer than three months; or – the over-indebtedness test: the company's assets no longer cover its liabilities for longer than 24 months, which is assumed if the company's balance sheet reveals such situation, even if the company performs its obligations on a day-to-day basis. The satisfaction of any of the above tests regarding the company would require its management board members to file an insolvency application within 30 days from the realisation of any grounds for insolvency. However, the management board members will not be liable if within that period restructuring proceedings were opened or an arrangement with creditors was approved.

Back to contents

No.	Question	Answer
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes. Management board members of a limited liability company may be held personally liable for tax arrears of the company, jointly and severally with the company, up to the full value of their assets, if enforcement of any fiscal debt against the company's assets proves to be ineffective in whole or in part and there are no grounds for management board members to be released from the liability. The management board members may be released from liability if they are able to: – demonstrate that a petition in bankruptcy was filed or restructuring proceedings were initiated with respect to the company at the appropriate time or an arrangement was approved under Restructuring Law; – demonstrate that the failure to file a petition in bankruptcy was not their fault; or – indicate the company's assets from which enforcement will cover tax arrears to a large extent. The same principles of liability apply to arrears in the payment of other public dues (eg contributions to the Social Insurance Institution for the company's employees). Management board members may also incur liability under the Fiscal-Penal Code as persons responsible for the company's economic and financial affairs. For instance, management board members may be held liable for: (i) failure to submit a tax return or declaration to the tax authorities when due; (ii) persistently failing to pay due taxes; or (iii) failure to keep accounts or keeping accounts in an unreliable or incorrect manner, failure to store accounting books where required. The liability arising under the Fiscal-Penal Code is criminal liability: the catalogue of possible penalties includes a fine, limitation of liberty, and deprivation of liberty.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Directors owe their duties individually as opposed to the board being collectively responsible. This means that each director has to form their own views independently as they consider appropriate. Directors may be allocated specific responsibilities – Finance Director or Sales Director, for example – and they will have primary responsibility in that area. But that does not absolve the other directors from responsibility for ensuring these duties are being discharged appropriately by the director concerned. This may involve challenging their actions and views in certain circumstances. The minimum standard required of a director is that of a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director. However, the actual standard by which a particular director is judged will be higher if that director's general knowledge, skill and experience are, in fact, greater. The type of liability (individual or joint and several) depends on the basis of such liability. The specific provisions of law differ to this end. However, in most cases, even if the liability is joint and several, the individual director may try to exculpate itself by proving that the given act or omission constituting the basis of liability occurred without their fault.

Back to contents

No.	Question	Answer
12.	Are there specific actions against directors under bankruptcy law?	Yes, board members can be held liable for damage caused by the failure to file an insolvency application within 30 days from the realisation of grounds for insolvency. However, a management board member may be released from the liability if they prove any of the following circumstances: – the failure to file an insolvency application was not their fault; and – restructuring proceedings were opened or an arrangement was approved. In addition, liability is excluded if enforcement has been carried out by way of administration or sale of the company's enterprise and the obligation to file an insolvency application arose at the time of such enforcement. Please also refer to question No. 14 for Covid-19 specific regulations.
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	In principle, there is no mechanism of automatic conversion of the shareholders' claims into the debtor's shares but such restructuring mode is often selected for this type of liabilities because it eliminates the need to make any distributions from the arrangement estate to the shareholders where the arrangement estate may be used to satisfy the claims of creditors other than the debtor's shareholders. Quite often the arrangement provides for cancelling the shareholders' claims, in full or in part. In the event of restructuring, the creditors who are shareholders have limited rights and are in a weaker position compared to the other creditors (limitations regarding sitting on the creditors council and requesting that the creditors council be appointed – the creditors council is the body that can significantly affect the course of the restructuring proceedings; limitations regarding the right to request that a supervisor/receiver be changed and limited ability to influence the contents of the arrangement proposals and the arrangement itself. The arrangement may provide for the conversion of claims into the debtor's shares. When such an arrangement becomes final and binding, they may be diluted. The legal writings and legal academics/scholars and commentators indicate that in certain events the procedure for initiating the restructuring proceedings and adopting an arrangement with the conversion of claims into the company's shares may be a tool of a hostile takeover. The arrangement may provide (and quite often it indeed does provide) for equity injections to the debtor/providing additional funds by the shareholders, which is the condition for adopting and implementing the arrangement. In the event of bankruptcy the claims of the creditors who are shareholders are usually included in the fourth (last) category of satisfaction. In practice, when the claims of the creditors included in the higher-raking categories have been satisfied, hardly anything is left for the creditors who are shareholders.

Back to contents

No.	Question	Answer
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Yes. The special Covid-19 legislation introduced a number of amendments to the bankruptcy rules. For instance, it suspended the running of time limits for a debtor to file a bankruptcy petition during a state of epidemic emergency or state of epidemic, and also added a fifth type of restructuring proceedings, ie the simplified arrangement approval proceedings. These proceedings allow a debtor to obtain a moratorium for the repayment of debt and protection against enforcement for at least four months although the proceedings themselves are less formal and are conducted with the limited participation of a court. The relevant provisions will be valid until 30 June 2021. During this period of time, a debtor will be allowed to resort to the simplified restructuring proceedings only once. Moreover, management board members will not be liable for the late filing of bankruptcy petitions or the ineffective enforcement against the debtor's assets if they evidence that the simplified restructuring proceedings were instituted within 30 days from the realisation of any grounds for insolvency and: – the arrangement is approved; or – it files a simplified petition to institute remedial proceedings or a simplified bankruptcy petition within the time limit for filing a complaint against the decision refusing to approve an arrangement or within seven days of the discontinuation of the proceedings, if the proceedings are discontinued following the filing of the petition to approve an arrangement; or – within seven days of the date on which the proceedings are discontinued by virtue of law, ie when the court does not receive a petition to approve an arrangement within four months of the date on which the announcement on instituting the proceedings is published, it files a bankruptcy petition or a petition to institute the restructuring proceedings which triggered the instituting of such proceedings.

Back to contents

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Back to contents

Russia

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	The Russian Civil Code and laws on joint-stock companies and limited liability companies impose on the chief executive officer (the **CEO**) or multiple general directors, the management company, a member of the board of directors or the management board of a Russian company (each, a **director**) the obligation to act reasonably and in good faith in the interests of the company and its shareholders. A director can be held personally liable for damages caused by breaching this obligation. A director also has to ensure that the company complies with its obligations to its creditors and employees. When a company finds itself in financial difficulties (either insolvent or likely to become insolvent (has signs of insolvency)), all directors, shareholders and other "controlling persons" of the company are obliged to act in the interests of the company's creditors (including employees and debt providers) from the day they knew or should have known about the signs of insolvency of that company.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	If a director breaches any of its general duties, it may: (i) be held personally liable to compensate the company or (in very rare cases) its shareholders and/or third parties for losses caused as a result of the breach, provided that the director was at fault; and/or (ii) become subject to employment liability where the director is an employee of the company (ie the members of the board of directors are not subject to employment liability); or (iii) become subject to administrative or criminal liability (where the director's action or omission constitutes a particular administrative or criminal offence). The CEO, general director or shareholder (the **participant**) may be held criminally liable under the Russian Criminal Code for: (i) intentionally taking (or failing to take) steps which led to the inability of the company to satisfy the monetary claims of its creditors or make mandatory payments in full if such actions or omissions resulted in serious damage; or (ii) making a fraudulent public declaration of the company's bankruptcy. Administrative sanctions may be imposed particularly for the following actions both before and during bankruptcy proceedings: (a) withholding, concealing, transferring or destroying assets or information on the assets of the company, falsifying accounting documents when the company displays signs of insolvency; (b) illegal satisfaction of creditors' claims with knowledge that such satisfaction is prejudicial to other creditors; (c) failure to file a bankruptcy petition by the CEO or general director; (d) illegally impeding the activities of the arbitration manager; and (e) failure to comply with the final court's ruling on subsidiary liability of a "controlling person" for the debts of the company. The consequences of administrative and criminal liability may include: dismissal, disqualification, fines or imprisonment. There is also a subsidiary liability of a "controlling person" of a company for the debts of that company if the inability of the company to satisfy all creditors' claims in full occurred as a result of actions (or inactions) of that "controlling person". For more details see answer under 3.

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	Any person having the authority to determine the actions of the company, including the ability to give instructions to the directors of the company, is liable for any damages incurred by the company due to that person's fault. There is also a concept of "controlling person" under Russian insolvency laws. A "controlling person" is a person or an entity which has, or had during the three-year period before the bankruptcy conditions actually occurred and, following that, before the acceptance by a court of the bankruptcy petition: (a) the right to give binding instructions to the company; or (b) the ability to determine the actions of the company (due to the associated ties with, or holding an official position in, or being a representative of, the company, or for any other reason (including applying force or pressure to the officials or governing bodies of the company)). The CEO, general director, chief accountant, financial director and any member of a governing body of the company, the parent company of that company or any of its officials or any beneficiary of any illegal actions of the company are presumed to be the "controlling persons" of the company, unless the relevant defendant proves otherwise. A court may also identify any other person as a controlling person based on any other proven ground (including classmates, co-habitants, long-term co-workers, etc.). A "controlling person" of a company bears subsidiary liability for the debts of that company if the inability of the company to satisfy all creditors' claims in full occurred as a result of actions (or inactions) of that "controlling person". A "controlling person" of a company could also be held liable for damages caused by its actions.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	There is a director's duty to take the company's financial position into consideration under Russian insolvency laws. A director (acting always within the scope of its powers) must prevent the company from carrying on trading or otherwise increasing its debts, unless there is no doubt that the company will be able to meet those debts and will continue to be solvent. Where a director anticipates or ought to anticipate the insolvency of its company and during the various insolvency procedures, it is expected to take special care when authorising any transaction. Any transaction involving borrowing new money or providing new security in the situation of financial difficulties for the company could be potentially challenged as a preferential or suspicious transaction and cause the relevant directors to be held liable. For more details see answers under 6.
5.	What are the liability risks in the case of 'creditor stretching'?	The mere fact that a director of a company does not ensure that the company complies with its (payment) obligations towards its creditors is not in itself enough to establish personal liability. "Creditor stretching" as a way to gain time for a refinancing will not typically lead to personal liability. The analysis, however, is very much dependent on the circumstances. If only some creditors are stretched but debts to other creditors are paid on time, this could result in the preferential satisfaction of certain creditors' claims and result in directors' liability.

Back to contents

No.	Question	Answer
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	In the case of financial difficulties, the company and its directors should aim for equal treatment of creditors. A director should bear in mind that any such selective payment could be challenged and reversed, should the bankruptcy proceedings commence, as a preferential or suspicious transaction and result in that director being held personally liable. In the short interval prior to the commencement of the bankruptcy proceedings, selective payments should only be made if there are compelling grounds to do so, such as preserving the value in the company's assets for the benefit of all creditors. A director may be held in breach of its duties if it authorises (or enters into on behalf of the company) a transaction that is subsequently reversed because it is found to have been: (i) preferential (ie to have resulted in the preferential satisfaction of the claims of particular creditors in the form of granting new security for existing obligations, changing the order of priorities for the satisfaction of creditors' claims, resulting, or possibly resulting, in the satisfaction of unmatured claims of certain creditors when unsatisfied matured claims of other creditors exist or conferring a preference in the satisfaction of a creditor's claims when compared to the order of the established priority), if it was concluded within a period of up to six months before the acceptance by a court of a bankruptcy petition or at any time after its acceptance; and (ii) suspicious ((a) effected at an undervalue (if concluded within a one-year period before the acceptance by a court of a bankruptcy petition or at any time after its acceptance); or (b) otherwise detrimental to the company's solvency (if concluded within a three-year period before the acceptance by a court of a bankruptcy petition or at any time after its acceptance)).
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	See answers under 4 and 6.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	No, unless there are specific provisions in the charter or other internal regulations of the company to that effect.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	The CEO or a general director of a company is obliged under Russian insolvency laws to initiate bankruptcy proceedings by filing a compulsory bankruptcy petition within one month of the following becoming evident or occurring: (a) the amount of the company's debts exceeds the value of its assets (**balance sheet test**); (b) the company fails to make payments because it has insufficient funds (**cash flow test**); (c) satisfying claims of one or more creditors may result in the company's inability to satisfy claims of all creditors; (d) the enforcement of claims against the company's assets will result in significant difficulties for the company in continuing its operations; (e) the company's shareholders instruct the CEO to file a bankruptcy petition; or (f) salaries or wages due to employees or former employees are overdue for over three months. The CEO or a general director of a company is liable for any delay in the filing of a bankruptcy petition as well as for any wrongful filing (ie filing when the company was capable of satisfying all creditors' claims). If a delay in filing of a bankruptcy petition by the company was caused due to the actions of the CEO or a general director, they bear subsidiary liability for the obligations of the company that arose after the date when such filing should have been made.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes. The CEO or a general director of the company and, in certain cases, the chief accountant and other responsible officers of the company could bear administrative and criminal liability for non-payment, late payment or miscalculation of due taxes and social security payments. In case of criminal liability, the criminal intention of the responsible person needs to be proved. In addition to that, the CEO or a general director may be required to reimburse the damages suffered by a company caused by their misconduct.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	As a general rule, a director is solely liable for that director's wrongful acts and omissions. However, if the company's damages are caused by the joint actions of several directors, their liability is joint and several. According to existing court practice, a director can be exculpated from other directors' acts or omissions and should not be held liable: (i) if that person was the CEO or a general director and refused to execute the loss-making transaction; (ii) if that person was a member of a collective governing body of the company and voted against a resolution to approve a loss-making transaction or abstained from voting, acting in good faith; (iii) in case of a conflict of interest, if the conflicted director disclosed the conflict in advance of entering into the unprofitable transaction and the latter was approved in accordance with established corporate procedure; (iv) in case of an "unfavourable" transaction, if a director could prove that: (i) such transaction was a part of a number of interrelated transactions that, taken together, would benefit the company; or (ii) such transaction was made to prevent a greater loss to the company; or (iii) that director acted in the best interests of the company (which would not be the case if the director was acting in the interests of one or several shareholders to the company's detriment); and (v) in case of liability for tax or other offences by the company, if a director could prove that that director's actions does not constitute an offence under the law in effect at that time, inter alia, for lack of a consistent interpretation of the law.

Back to contents

No.	Question	Answer
12.	Are there specific actions against directors under bankruptcy law?	Yes, in a bankruptcy each “controlling person” of a company, including directors, bears joint and several secondary (subsidiary) liability for the debts of that company if the inability of the company to satisfy all creditors’ claims in full occurred as a result of actions (or inactions) of that “controlling person”. A “controlling person” of a company could also be held liable for damages caused by its actions. The guilt of a “controlling person” is presumed if: (i) the detriment to creditors’ rights occurred as a result of any transaction(s) (including suspicious or preferential transactions) concluded by, in favour of, or approved by, such “controlling person”; (ii) certain obligatory accounting documents are missing or falsified (the second criterion relates only to the controlling persons responsible for the maintenance of such accounting documents in order); and (iii) the company or its CEO or a general director was found liable for an administrative, tax or criminal offence and the amount of the claims of third-order creditors caused by such offence exceeds 50 per cent of the total amount of the third-order creditors’ claims registered with the relevant register (the third criterion relates only to the CEO or a general director of the company at the time of the offence). A “controlling person” can be absolved from liability if it proves its innocence or if it acted in good faith and reasonably in the interests of the company. Alternatively, a court may reduce the amount for which a “controlling person” is liable if the detriment caused by them is significantly smaller than the amount claimed. The petition on liability of a “controlling person” could be filed with a court during the bankruptcy management of the company within one year of the petitioning person knowing, or should have known, about the grounds for such claim and within three years of the company declaring bankruptcy, but in any case, before the bankruptcy proceedings are finished. Unlike with the subsidiary liability, in practice, a claim for reimbursement of damages by “controlling persons” could be filed even after the bankruptcy proceedings are finished.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	The Russian insolvency laws impose a duty on the company's shareholders (owners) to undertake measures to restore the solvency of that company. The insolvency law does not provide an exhaustive list of such measures but it specifies that financial aid, in the amount sufficient to restore a company's solvency, might be regarded as one such measure. It is worth mentioning that despite the existence of this duty, the insolvency law is silent on any corresponding liability for its breach. Shareholders' claims to the company (as well as claims of other "controlling persons" or affiliates of the company) do not automatically become subordinated to the claims of other independent creditors in the course of bankruptcy proceedings of the company. However, according to recent court practice and clarification by the Russian Supreme Court, the claims of the "controlling persons" or affiliates of the company are likely to be subordinated by the courts if such claims are based on the financial aid (in the form of direct financing, additional security, rescheduling of debt, acquisition of the company's debt from an independent creditor or repayment of the company's debt to an independent creditor) provided to the company by the relevant "controlling persons" or affiliates where the company is in the situation of financial distress as a compensatory financing (with the aim to postpone bankruptcy proceedings). The burden of proof that the transaction in question was concluded within market conditions is upon the relevant "controlling person" or affiliate.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Yes. With the aim to protect the business sector during the Covid-19 pandemic, starting from 6 April until 6 October 2020, the Russian Government introduced the insolvency moratorium regime in respect of companies operating in the hardest-hit industries, as well as systemically important and strategic enterprises (other than those specifically opting out of the insolvency **moratorium regime**) (the moratorium debtors). During the insolvency moratorium period the obligation of a moratorium debtor and its directors to make a bankruptcy filing with an arbitrazh court (if there are signs of an insolvency) being suspended.

Back to contents

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Back to contents

Slovakia

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Under Slovak law, the general duty of loyalty provides for an **obligation to perform managerial functions in the best interest of the company and all its shareholders**. The provision is based on the premise that the interests of all shareholders and the interests of the company as a separate legal entity are aligned. That being said, the interests of the company and its shareholders may in particular cases differ (e.g. shareholders may not be interested in repaying the creditors of the company). The law then further elaborates that in performing their functions the directors may not put (i) their own interests, (ii) the interests of only some of the shareholders, or (iii) the interests of third parties, before the interests of the company. The law does not specify that the interests of other company's stakeholders (e.g. creditors or employees) should be followed. The criteria are not necessarily quantitative or prima facie financial. The best interests of the company can be ascertained by reference to various criteria, for example the aims with which the company was established, its shareholder structure and its short- and long-term business plans. In order to ensure this, directors must also necessarily take into account the interests of other stakeholders such as employees, trade partners and creditors, provided that they are compatible with the interests of the company. In general, in cases of financial distress, the above regime does not change and the directors' duties towards the company are even amplified. The specific regime under Slovak law applies if the company is in crisis (ie if the company is insolvent or at risk of insolvency). In that case, it is prohibited to make any repayments of loans or other obligations towards related parties so the focus of the company naturally shifts towards its creditors. If the company makes such repayment, it must be returned as unjust enrichment and directors are in a position of joint and several guarantors for return of such repayments. If the company enters into formal insolvency proceedings, the interests of its creditors have absolute priority.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	In general, directors are liable for damage caused to the company as a result of a breach of their duties, whether in cases of financial distress or not. For the liability to arise there has to be (i) a breach of a duty under the law or incorporation documents of the company; (ii) damage incurred by the company; and (iii) a causal link between the breach and the damage incurred by the company. A breach of duty can be based on a director's action or omission. The breach does not require a culpable act (ie negligence or intent of a director). The law provides for a rebuttable legal presumption that a director has breached their duties. This means that unlike in standard damage claims, where the claimant would bear the burden of proof regarding the breach, **in the event of a breach of duties the burden of proof rests on the director, who must substantiate that the duties were not breached**. There are several legal provisions that create directors' liability in the case of financial distress. For instance, if a director found out or, considering all circumstances, could find out that the company is in crisis (ie if the company is insolvent or at risk of insolvency), the director is obliged to procure all reasonably necessary steps to overcome the crisis. Further, directors may not distribute dividends or other distributions to shareholders if, considering all circumstances, it causes insolvency of the company and the company's equity to be lower than its share capital plus reserve funds. Furthermore, there are a number of other cases of specific personal liability of directors which are discussed in the following parts of this survey.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	In general, the liability rests mainly on formally appointed directors. However, there are some nuances outlined below. If a shareholder, or another person who has not been formally appointed as a director, commits factual acts which fall within the competence of a director, they are liable on the same footing as a director for such acts as a 'shadow director'. The person is deemed a 'shadow director' if they commit acts to the same extent that a director has the authority to perform in all areas of the company's management on a regular basis. Therefore, if, for example, a person is entrusted with a certain line of business management (authorized employee, manager), or is authorized to perform actions on behalf of the company, such person will not be automatically deemed a 'shadow director'. In this regard, the position of shareholders as controlling persons is also relevant, as further discussed under 13 below.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	If such acts would be performed in breach of duty of care or duty of loyalty, cause any damage to the company and, potentially, subsequent damage to creditors, a director would be potentially liable under general provisions on director's liability described under 2 above (not only to the company and its shareholders, but also to the creditors) and possibly for breach of their specific prevention duty under bankruptcy law as described under 12 below.

Back to contents

No.	Question	Answer
5.	What are the liability risks in the case of 'creditor stretching'?	There is no specific liability regime for this situation, but the general directors' liability (section 2 above) and insolvency-related liability applies. The mere fact that a director does not ensure that the company complies with its obligations towards its creditors does not in itself create personal liability of directors involved. Having said that, if the company gets into default with its obligations towards creditors, even if such obligations could have been duly and timely satisfied, directors taking such decision to delay payments to the creditors may be potentially liable for damage caused to the company as a result of such default (e.g. by obligation to pay default interest, contractual penalty, etc.). This would very much depend on whether directors acted in certain circumstances with due care or not.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Apart from potential liability discussed under 5 above, in general, making selective payments to creditors does not in itself create personal liability of directors, if it is to a certain degree beneficial for the company and only in cases where the company is not at the stage of crisis or bankruptcy as described below. If the company gets into the stage of bankruptcy, any preferential treatment of certain creditors is prohibited and directors have the obligation to file for bankruptcy within a certain deadline, as described in 9 below. Furthermore, such selective treatment of some creditors at the stage of bankruptcy may even have consequences under criminal law.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	The same applies as discussed under 6 above. In addition, if the company gets into crisis (ie if the company is insolvent or at risk of insolvency), there is a specific prohibition to make any repayments towards related parties, as discussed under 1 above.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	Yes, if the company's loss has exceeded the value of one-third of the company's share capital, however, this applies only to directors of a Slovak joint-stock company. In addition, members of the Supervisory Board of a Slovak joint-stock company or limited liability company are obliged to convene a shareholders meeting if the interests of the company so require, which will most likely apply also to cases of financial difficulties. Furthermore, a general obligation to convene a shareholders meeting in case of financial difficulties may also derive from the general duty of care of all directors of the company, provided that such shareholders meeting is necessary in terms of solving such financial difficulties.

Back to contents

No.	Question	Answer
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Yes, a director is obliged to file for bankruptcy within 30 days after a director finds out that the company is overindebted (ie the value of liabilities exceeds the value of assets of the company). If a director fails to file for bankruptcy within the set deadline, they are obliged to pay to the company a penalty of EUR 12,500. Furthermore, this does not prevent the company from claiming any damages exceeding this penalty.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	There are no specific liability risks in this regard in terms of civil law or administrative requirements. However, non-payment of due taxes, social security payments or similar contributions may potentially, under certain circumstances, create criminal liability of the company and its directors, in particular, if the company was solvent at the time when such contributions became due.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	All directors involved in an action are liable jointly and severally towards the company. Joint and several liability means that the company may seek full compensation from any or all of the directors involved, irrespective of their individual level of involvement, and each liable director has the obligation to provide the full amount of the compensation. If damage occurred as a result of a collective decision of all directors, all directors who voted in favour of the decision would be jointly and severally liable for its compensation. However, this does not mean that the directors that did not vote in favour of the decision are automatically relieved of liability. Their liability will be assessed in a broader context of all their previous and subsequent actions and omissions that could have contributed to or prevented the damage. E.g. if one of the directors clearly flagged at the relevant board meetings or communicated towards shareholders inappropriate or disadvantageous actions (detrimental to the company) and was not involved in resolving on or implementation of that action, they would have good grounds for exculpation.
12.	Are there specific actions against directors under bankruptcy law?	Yes. The general prevention duty under Slovak bankruptcy law provides for an obligation of each director to (a) constantly monitor the development of the company's financial situation, as well as the state of its assets and liabilities, and (b) take appropriate and proportionate measures to avert bankruptcy of the company. If not, a director is liable for any damage caused to the company under general director's liability provisions under Slovak company law. In addition to the liability towards the company as described under 9 above, a director who fails to file for bankruptcy within 30 days after they find out that the company is overindebted, is liable for any damage caused to the company's creditors by such late filing for bankruptcy.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	A controlling person (ie a shareholder with direct or indirect voting majority in the company) is liable towards the company's creditors if such controlling person significantly contributed to the bankruptcy of the company. The controlling person may be relieved of this liability if it proves that it acted in an informed manner and in good faith and that it is acting in favour of the company. In addition, direct or indirect shareholders may be liable towards the company as shadow directors, as described under 3 above. The specific regime under Slovak law applies if the company is in crisis (ie if the company is insolvent or at risk of insolvency). In that case, it is prohibited to make any repayments of loans or other obligations towards related parties so the focus of the company naturally shifts towards its creditors. If the company makes such repayment, it must be returned as unjust enrichment and directors are in a position of joint and several guarantors for return of such repayments. Furthermore, at the stage of formal insolvency proceedings, receivables towards related parties are subordinated by operation of law, and can be satisfied only after the satisfaction of all other creditors.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	No.

Back to contents

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Back to contents

Spain

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Under Spanish company law, directors shall act in good faith, with loyalty and solely in the company's best interest under the principle of personal responsibility, with freedom of criteria or judgement and independence with respect to instructions and third parties. Notwithstanding the foregoing, the statutory provisions set out the possibility that instructions to the management body are given through a General Shareholders' Meeting decision or that certain management decisions or resolutions are subject to the authorisation of the General Shareholders' Meeting. Such duties do not change in the event of financial distress.

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	In Spain, all directors should act as responsible businessmen. Directors must always act in the best interest of the company. These duties of care and loyalty to the company do not change, even in a situation of distress. Therefore, and without prejudice to the insolvency liability explained below, the directors of a company are subject to common corporate liability and will be liable towards the company, its shareholders or third parties by their acts or omissions which are contrary to law, the articles of association of the company, or by any act performed or omitted in breach of the duties arising from their position. As a matter of Spanish Corporate Law, directors have two main duties: (1) the duty of diligence requires that a director must perform their role and comply with the duties imposed by the laws and the articles of association, acting with the diligence of a proper businessman (*ordenado empresario*), taking into account the nature of their office and the duties entrusted to them, and (2) the duty of loyalty implies that directors shall perform their duties with the loyalty of a loyal representative, acting in good faith and in the company's best interest. Additionally, directors must also avoid acting in circumstances where their own interests may be in conflict with the corporate interest and with their duties towards the company. Broadly speaking, under Spanish law we would differentiate the following main liability areas: a. Corporate offences: Directors (current and previous, as well as *de jure* and shadow directors) may be liable for certain corporate offences relating to failure to provide the requisite level of supervision, monitoring and control of the company's activities. People that collaborated with the director in the commission of those offences or have directly induced the commission of those offences may also face liability. b. Insolvency obligations: Directors may also face liability if they fail to commence insolvency proceedings at the appropriate time (as required by law) or fail to notify the court of the initiation of negotiations with creditors to reach a refinancing agreement or obtain sufficient approval for an early composition when a company is not able to meet its payment obligations. The main focus in this area is whether directors caused or aggravated the company's insolvency. If that were the case, directors may have to bear any or part of the shortfall in the company's debts after completion of the liquidation. c. Tax infringements: Directors may be held liable for the company's: (i) tax infringements (including penalties); (ii) outstanding tax debts (excluding penalties); (iii) tax debts derived from taxes that must be levied on, or amounts that must be withheld from, employees, professionals or other businessmen in certain circumstances. d. Other legislation: Directors may also be liable for actions or omissions under other specific legislation such as: competition legislation, consumer, criminal, environmental and user protection laws. We refer in particular to the summary of environmental liabilities set out on the following page.
3.	Does a director's liability rest only with formally appointed managing directors, or also with others who perform managerial tasks?	Liability rests with both formally appointed and *de facto* directors and accomplices. As a matter of Spanish corporate law, *de facto* directors are those persons who perform the tasks and role of director without the title, or with a null or void title, or with another title. Pursuant to Spanish insolvency law, accomplices are those persons who, with either malicious intent or gloss negligence, have aided directors in the performance of any managerial tasks that are considered to infringe the laws of the company's articles of incorporation.

Back to contents

No.	Question	Answer
4.	What are the liability risks for directors if the company borrows new money or enters into new contracts but may not be able to perform the ensuing obligations?	Pursuant to Spanish insolvency law, the directors of a company are liable when they perform acts that have caused or aggravated the insolvency of the company and such insolvency is classified as tortious, triggering the possible pronouncements against directors as indicated above. In this regard, there is a risk that borrowing new money or the execution of new contracts may imply that the insolvency is classified as tortious by the insolvency judge, assuming that the directors had performed such acts with malicious intent or gross negligence and, in particular, in the knowledge that the company would be unable to assume its contractual obligations under such agreements in the future, leading to an aggravation of the insolvency situation. In any case, it is a situation that must be analysed on a case-by-case basis, with the burden of proof on the party asserting that such acts have aggravated the insolvency.
5.	What are the liability risks in case of 'creditor stretching'?	The mere fact that directors of a company do not ensure that the company complies with its (payment) obligations towards its creditors is not in itself enough to establish personal liability. In general, directors of the company are liable for the damage caused to any creditor by their acts or omissions which are contrary to the law, the articles of association or having failed to complete any duties inherent to their roles. Although directors will not generally be liable for 'creditor stretching', each scenario should be analysed in detail given the particular circumstances.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Notwithstanding the general liability regime briefly explained in question 2 above, directors are not generally liable for selecting payments to some but not all creditors in case of liquidity issues. On the other hand, all creditors will be treated equally once the insolvency judge initiates the insolvency proceedings. However, acts that are detrimental to the company's insolvency estate (*patrimonio*) which are performed by the company within the two years prior to the date of the insolvency declaration may be revoked by means of a claw-back action, even though there may not have been a fraudulent intention.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	There is not a specific distinction between preferential treatment of related entities and the treatment of other creditors. However, the insolvency shall be considered tortious (as explained above) when, among others, properties, goods or rights have fraudulently been detracted from the debtor's assets during the two years prior to the date on which insolvency proceedings are initiated.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders meeting and if so, at what stage of financial difficulties?	No, unless there are specific provisions in the articles of association to that effect.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	The company shall petition for a declaration opening the insolvency proceedings within two months following the date on which it became aware, or should have been aware, of its insolvency status. Pursuant to Spanish insolvency law, a company is insolvent when it cannot duly meet its payment obligations when due. In the event that directors fail to comply with their duty to file for the insolvency of the company within the statutory term provided, among others, they may be eventually subject to personal liability to cover all or part of the shortfall of creditors after the liquidation of the debtor's assets or disqualified from managing businesses for a term between 2 to 15 years in case such delay is deemed to have caused or aggravated the company's insolvency position. However, due to recent Covid regulations, directors would not be under an obligation to call for insolvency until 31 December 2020.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes, directors are jointly and severally liable for tax debts, criminal liabilities or tort arising from crime (including principal debt, surcharges, interest and penalties) under certain circumstances (e.g. when causing or actively cooperating in the commission of a breach or crime, or where they fail to comply with the obligation to apply for insolvency proceedings) and incur subsidiary liability for such debts when they have generally failed to perform the acts necessary to comply with such obligations. Regarding social security payments and contributions, directors may be jointly and severally liable for the principal debt, surcharges and interest accrued, and costs incurred in the collection of the debt (but excluding penalties).
11.	Are the liability risks of the directors collective (the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	According to Spanish company law, all members of the governing body adopting the harmful decision or performing the respective act are jointly and severally liable, unless they prove that they have not taken part in its adoption or implementation, were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or, at least, were expressly opposed to it.

Back to contents

No.	Question	Answer
12.	Are there specific actions against directors under bankruptcy law?	Yes, as explained in questions 2 and 4 above, directors are liable when they perform acts that have caused or aggravated the insolvency of the company and such insolvency is classified as tortious. Any creditor or person who provides evidence of a legitimate interest may appear before the insolvency judge and be a party, alleging in writing whatever he considers relevant for the classification of the insolvency as tortious (although the insolvency administrator and the public prosecutor would be the ones leading this accusation process).
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Financial difficulties as such do not trigger additional duties of (or consequences for) shareholders or group companies.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	There is no special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis (although, as previously noted, the duty to file for insolvency has been postponed).

Back to contents

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Back to contents

The United States (Delaware)

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	Directors owe their duties to the shareholders as a whole when the company is solvent and to the stakeholders as a whole when the company is insolvent. In rare circumstances, a creditor of an insolvent company may assert, on a derivative basis, breach of fiduciary duty claims the company may have against its directors. Creditor derivative standing is generally available only with respect to corporations, and not LLCs and partnerships, due to differences in the statutory regimes, but in at least one case, an amendment to the LLC agreement was made in bankruptcy to permit creditors to bring derivative claims (such claims may be brought derivatively on behalf of a solvent company only by the company's shareholders).
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	Whether the company is solvent or insolvent, directors have the protection of the business judgment rule. Under the business judgment rule, directors are generally insulated from liability for business decisions that were made on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company. As the directors' duties are those of loyalty and care, a director will be liable only for conduct that was self-interested, in bad faith or without due care (bearing in mind the significant deference to directors' judgment afforded by the business judgment rule) and resulted in loss of value for the company.

Back to contents

No.	Question	Answer
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	Corporate officers owe the same fiduciary duties as directors. Corporate officers include a company's president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer and chief accounting officer, or other position of similar seniority and responsibility. A controlling shareholder also owes fiduciary duties to minority shareholders such that it must put the interests common to all shareholders ahead of those interests which are exclusive to itself. Whether a given shareholder is "controlling" turns on its ability to influence corporate action (such as through a veto or blocking vote position) and possession of a majority or supermajority of shares is not required.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	There is no cause of action under US or Delaware law for 'wrongful trading'; directors are protected from liability for continuing to operate in the good faith belief that they are pursuing a strategy to return the company to profitability. As noted above, a director may be liable to the company, its shareholders and/or its creditors as a whole if they entered into the new obligations in violation of their duties of good faith and due care and incurring the new obligations caused damage to the company. A director will not be liable specifically to the counterparty of the new obligation.
5.	What are the liability risks in the case of 'creditor stretching'?	Directors are not personally liable for a company's failure to make timely payments to its creditors and may cause the company to delay payments to creditors if doing so is, as a matter of their business judgment, in the best interests of the company.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Directors may favour particular creditors if doing so is, as a matter of their business judgment, in the best interests of the company.

Back to contents

No.	Question	Answer
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	Preferential treatment of insiders or related parties may be subject to attack as breaching the fiduciary duty of loyalty to the best interests of the company and its stakeholders (including creditors).
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	No, unless there are specific provisions in the charter, bylaws or member agreement requiring such a meeting. The requirements to authorize a bankruptcy filing will generally be specified in the bylaws or member agreement.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	No, a company is not required to file for bankruptcy upon becoming insolvent and a company may file for bankruptcy protection even if it is not insolvent. However, directors may face liability for breach of fiduciary duty if they fail to take appropriate protective action, such as a bankruptcy filing, in the face of creditor enforcement actions such as foreclosure on significant company assets.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Yes, under the laws of certain states, officers and directors may be personally, and even criminally, liable for the failure to pay wages and benefits. The applicability of state employment laws will depend on the presence and number of employees in the state in question. Note also that state law may impose personal liability for unpaid wages, benefits, pension contributions and insurance premiums on a joint and several basis against shareholders of privately owned employers (even if they are incorporated elsewhere). In some circumstances, directors may be deemed "employers" under the federal Fair Labor Standards Act and be personally liable for the failure to pay a minimum wage; there is, however, a defense of good faith belief that the wages paid complied with the law.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Liability of directors is individual and not collective; however, a director may violate their fiduciary duty of loyalty or due care by failing to respond appropriately to another director's misconduct. Requiring recusal of interested directors or forming a special committee comprised solely of independent directors to consider a particular issue are common ways of ensuring that a board's decision-making can be protected by the business judgment rule even if certain members may have conflicts of interest.
12.	Are there specific actions against directors under bankruptcy law?	No, but breach of fiduciary claims under state law may be asserted in bankruptcy for the benefit of the creditors of the company.
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	There is no automatic conversion of debt to equity, but loans by shareholders or parent companies may be recharacterized as, and subordinated to the level of repayment of, equity in bankruptcy if such treatment is more consistent with the nature of the obligation, regardless of its formal structuring as a debt instrument.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	No.

Back to contents

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Back to contents

People's Republic of China

The discussions below are applicable to private limited liability companies incorporated in the People's Republic of China[1] (**PRC**), other than (a) state-owned or state-controlled enterprises, or (b) those that engage in regulated business activities which are subject to industry specific administrative rules (**PRC LLCs**).

These companies represent the vast majority of corporations in the PRC. Directors of state-owned or state-controlled companies (the **SOEs**), private companies limited by shares or public companies are subject to additional rules in terms of director duties and liabilities. For examples, directors of SOEs in general are more vulnerable to criminal liabilities for misconduct such as self-conducting of competing business, and directors of public companies are subject to additional duties under the PRC securities laws. For companies engaging in certain regulated business (e.g. financial institutions), special rules would apply which may subject its directors to extra duties and liabilities, such as personal attendance at more than two-thirds of the board meetings in a year and annual performance review.

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take the interest of other stakeholders (creditors, employees) into account as well? Does that regime change in case of financial distress?	Pursuant to the PRC Company Law, the directors of a PRC LLC report to the shareholders; hence they must act primarily in the interest of the shareholders of the company, provided that such activities should not harm the national interest, public interest and legitimate rights and interests of any other person (such as the creditors of the company) and comply with the requirements of the PRC Constitution Law and General Provisions of the Civil Law of PRC. In particular, when a PRC LLC finds itself in financial distress and consequently (i) undergoes liquidation, or (ii) is effectively bankrupt[2], there would be a shift in focus to the protection of "legitimate third party rights", which is demonstrated, among others, by the statutory order in the distribution of liquidation or bankruptcy proceeds. As a general remark, under both scenarios, the settlement of wages, social insurance payments, statutory employee compensations, tax payments and payments to third party creditors are given priority over shareholders. See detailed discussion in Q10. When a director is appointed as a member of the liquidation committee (which often is the case) for purpose of clearing the assets and liabilities of the PRC LLC, the creditors are entitled to claim damages against such directors for losses incurred due to a bad act on their part.

1_For the purpose of this discussion only, PRC excludes the Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan.
2_The PRC LLC is deemed bankrupt when unable to pay its debts due, having insufficient assets to pay off all its debts or becoming obviously insolvent (see article 2 of PRC Bankruptcy Law).

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	Pursuant to the PRC Company Law, directors of a PRC LLC have certain fiduciary duties to the company, including without limitation the duty of loyalty and the duty of diligence. Directors are prohibited from abusing their position in the company for personal gains to the detriment of the company, and will be liable to the company for any such actions. Such rules also apply to the directors of PRC LLCs that are in financial difficulties. Below is a non-exhaustive list of actions by directors that may be deemed to be breaches of the duty of loyalty under the PRC Company Law, regardless of whether the company is in financial crisis: (a) misappropriating company funds; (b) depositing company funds into an account in their own name or in any other individual's name; (c) loaning company funds to a third party or providing a guaranty to a third party by using the company's property in violation of the articles of association without consent of the shareholders or the board of directors; (d) entering into a contract with the company or conducting transaction with the company in violation of the articles of association or without consent of the shareholders; (e) seeking business opportunities for themselves or any other person by taking advantage of their powers, or operating for themselves or for any other person any similar or competing business of the company without consent of the shareholders; (f) misappropriating commissions of a transaction between another person and the company; (g) disclosing company secrets without permit; or (h) taking other actions inconsistent with the obligation of loyalty to the company. Any director who acts in violation of the preceding paragraph, or who violates any law, administrative regulation, or the company's articles of association during the course of performing his/her duties, shall be liable for any losses incurred by the company as a result of such actions. Moreover, if a director commits any of the acts stated above, the shareholder(s) may require the board of supervisors (or the supervisor if there is no board of supervisors) to file a derivative lawsuit in a PRC court. If a director harms the shareholders' interests by violating any law, administrative regulation or the articles of association, the shareholders also may file a lawsuit themselves in a PRC court. Please refer to our reply to Q12 regarding directors' liabilities under the PRC Bankruptcy Law.

Back to contents

No.	Question	Answer
3.	Does director's liability rest only on formally appointed managing directors, or also on others who perform managerial tasks?	Directors' liability only rests upon formally appointed directors and not on others simply because they have a managerial responsibility. It is worth noting that under PRC laws, the legal representative of a company enjoys a higher authority and meanwhile assumes greater liabilities compared to an ordinary director, because they are deemed an authorised representative of a PRC company with full authorisation to act on behalf of the company. Under the PRC Company Law, the position of legal representative may be taken by the chairman of the board of directors or the single executive director (if the company does not have a board) or the general manager. The legal capacity of the legal representative is effective upon registration with the company registration authority.
4.	What are the liability risks for directors if the company borrows new money or enters into new contracts but may not be able to perform the ensuing obligations?	Under the PRC Criminal Law, a person unable to perform its obligations is deemed to have committed a contract fraud if the person defrauds the counterparty into concluding the contract for illegal procession of its property. If established, where the company is the signing party, the company and the legal representative, or persons directly responsible for such conduct, may be held guilty of a criminal offence. However, the criminal *mens rea* has a high threshold. Under the PRC Contract Law, a contract is revocable on the grounds of fraudulent activities and the contracting party at fault should bear civil liabilities for compensation of loss, although a director of the company should not be personally liable simply because of their position.
5.	What are the liability risks in the case of 'creditor stretching'?	Creditor stretching may result in breach of contract by the company. PRC laws are silent on personal liabilities of directors in such a case.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Selective payments by the PRC LLC, when the bankruptcy liquidity test is met, to some but not all creditors within six months prior to the court's acceptance of its bankruptcy application can be revoked if requested by the administrator, who is appointed by the PRC court to control the assets of such a company. Moreover, the administrator is entitled to petition the court to revoke the company's advance repayment of debts not due within one year prior to the court's acceptance of the bankruptcy petition, as such conduct is deemed intentional transfer of company assets with detriment to the interested parties in the potential bankruptcy procedure. If such selective payment harms the creditors' interests and the director of the company is directly responsible for such a conduct, the director may be held personally liable for indemnifying the creditors. Please refer to our reply to Q12 for details.

Back to contents

No.	Question	Answer
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	No.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	To convene a shareholders' meeting in case of financial difficulties is not a legal requirement applicable to PRC LLCs.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	According to the PRC Bankruptcy Law, only if a PRC LLC is dissolved without liquidation or before completion of the liquidation process and its assets are insufficient to pay off its debts, the person who is responsible for liquidation (ie the shareholders of the PRC LLC) is legally obliged to apply to the PRC court to initiate a bankruptcy liquidation process.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	The PRC laws set out a hierarchy of debts to determine the order of distribution of bankruptcy proceeds but is silent on personal liabilities of directors. The bankruptcy proceeds must be paid in the order below, and shall be allocated pro rata among the interested parties of the same ranking: (a) debts in connection with the public interest as a statutory requirement (e.g. unpaid debts to construction contractors, in particular, the wages payable by a contractor to construction workers); (b) secured claims; (c) bankruptcy expenses; (d) common interest debts (ie certain debts incurred after the court accepts the bankruptcy petition); (e) employee claims, including unpaid salaries; (f) medical and disability subsidies, basic old-age and medical insurance premiums, and statutory compensations; (g) social insurance premiums and outstanding tax; and (h) common (unsecured) claims in bankruptcy.

Back to contents

No.	Question	Answer
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Usually collectively, if a decision is made in the form of a board resolution. If directors specifically disagree with a resolution (and this is documented), they should be exempted from the liabilities. It is worth noting that the PRC Company Law imposes a certain statutory duty on directors of a company limited by shares, whereby a director is personally liable for board resolutions in violation of laws and regulations, articles of association and shareholders' resolutions. Such a rule is not legally applicable to the directors of a limited liability company, although in practice it is not unusual for a limited liability company to adopt similar rules in its articles of association to limit the authority of the directors.
12.	Are there specific actions against directors under bankruptcy law?	A director will be liable for breaching the duty of loyalty and/or the duty of diligence, if this results in the bankruptcy of the PRC LLC. Moreover, if the PRC LLC is bankrupt or forced to shut down by PRC government authorities and the director is personally liable for such bankruptcy or closure of business, such director will be forbidden to serve as a director, supervisor or senior officer in another PRC LLC for the subsequent three years. Under the PRC Bankruptcy Law, if a PRC LLC commits any of the acts set out below and harms the interests of the creditors, the "directly responsible person" would be held liable for indemnifying the creditors. "Directly responsible person" is not explicitly defined, but can be generally interpreted as the person who plays a role to the extent of deciding on, approving, authorising, conniving at or directing such bad act implemented by the PRC LLC. A director of the PRC LLC can be deemed a "directly responsible person", and thus be held liable for indemnification, if falling within such interpretation. – Within one year prior to the court's acceptance of the bankruptcy application made by a PRC LLC, such PRC LLC: (i) transfers its assets for free; (ii) conducts transactions at a manifestly unreasonable price; (iii) provides collateral to unsecured debts; (iv) pays off debts that are undue; or (v) waives any creditor rights. – Within six months prior to the court's acceptance of the bankruptcy application, the PRC LLC makes selective repayment to certain creditors after it becomes unable to pay its debts when due, having insufficient assets to pay off all its debts or is obviously insolvent. – The PRC LLC conceals or transfers its assets to evade debts, fabricates debts or admits unreal debts.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Not under PRC laws.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	Not in the form of legislation or national policies as of the date of this discussion.

*Services in relation to the laws of the People's Republic of China are provided through Allen & Overy Lang Yue (FTZ) Joint Operation Office.

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Back to contents

Hong Kong SAR

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	While a company is solvent and trading normally, directors owe their duties to the company, that is, primarily to its present and future members. However, the obligations of the directors of a company change fundamentally once a company is insolvent. Where a company is insolvent[1] (or nearly insolvent), it is the creditors rather than the members who are likely to suffer as a result of breaches of directors' duties. Accordingly, in such cases, the directors must have primary regard to the interests of the creditors of the company and must exercise their powers with a view to minimising the potential loss to creditors.

1_Whether or not a company is insolvent is a question of fact. Under section 178 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO), a company is insolvent if it is proved to the satisfaction of the court that the company is unable to pay its debts (which is broadly speaking a "cash flow" test formulation even though the legislation does not go on to say "as they fall due") and in determining this, the court shall take into account contingent and prospective liabilities of the company (which is more of a "balance sheet" test). In practice, it appears that the court may apply either a "balance sheet" or a "cash flow" test when determining whether or not a company is unable to pay its debts within the meaning of section 178 CWUMPO.

Back to contents

<table>
<tr><th>No.</th><th>Question</th><th>Answer</th></tr>
<tr><td>2.</td><td>What are the key areas of potential liability for directors when a company is in financial difficulties?</td><td>
Despite repeated efforts by the government to implement legislation, Hong Kong SAR does not yet have a ‘wrongful’ or ‘insolvent’ trading regime.
There are five main areas of risk for directors under Hong Kong SAR law: (i) fraudulent trading; (ii) misfeasance; (iii) fraud by officers of companies which have gone into liquidation; (iv) offences by officers of companies in liquidation; and (v) disqualification order. We discuss these five main areas of risk below.
(i) Fraudulent Trading
Fraudulent Trading becomes relevant when a company has gone into insolvent liquidation. Under section 275 CWUMPO, liability for fraudulent trading applies if it can be shown in the course of the winding-up of a company that ‘any business of the company has been carried on with the intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose’. The court may declare that any person who was knowingly party to the carrying-on of the business in this manner (including, for example, the directors, shadow directors or other officeholders, if they were party to the activities) is personally liable to make such contribution (if any) to the company’s assets as the court thinks proper. This will require the court to consider whether the person concerned: (i) participated in the carrying on of the fraudulent business; and (ii) did so knowingly ie where they were participating with knowledge that the conduct was intended to defraud. Knowledge will extend to deliberately shutting one’s eyes to the obvious. The person concerned must have been ‘dishonest’. This is tested by reference to the standards of ‘ordinary decent people’.
A claim for Fraudulent Trading can be brought by the Official Receiver, a liquidator, or any creditor or contributory of the relevant company.
There must be actual intention to defraud creditors or to achieve a particular fraudulent purpose whilst running the business or recklessness as to whether the carrying on of the business would result in the creditors being defrauded. Given this high threshold for liability, it is relatively rare for persons to be found liable for fraudulent trading.
Fraudulent trading may apply where the directors of an insolvent company with no prospects of recovery carry on the loss-making business, such as deliberately incurring credit despite knowing it can never be repaid.
(ii) Misfeasance
There are two aspects to the law of misfeasance in the zone of insolvency. First, as mentioned above, when a company is insolvent, the directors’ duty to the company requires that they consider the interests of creditors in addition to, or to the exclusion of, the interests of shareholders. A director will be liable where a breach of this duty causes loss to the company.
Secondly, where a company is in liquidation, section 276 of CWUMPO provides a summary remedy for breach of duty. Under the summary misfeasance remedy, any past or present officer of the company who has misapplied or retained, or become accountable for, any money or other property of the company, or is found guilty of any misfeasance or breach of duty or breach of trust causing loss to the company, will incur liability.
Those who may bring this misfeasance action include a liquidator of the company and a creditor of the company. Upon such an application, the court will examine the defendant’s conduct and if thought appropriate, compel them to: (i) repay or restore the money or property or any part of it, with interest at such rate as the court thinks just; or (ii) contribute such sum to the company’s assets by way of compensation in respect of the misapplication, retainer, misfeasance, breach of duty or breach of trust (again, as the court thinks just). So, even where an individual creditor brings a successful action, the remedy will be in favour of the company rather than the individual creditor. In that sense it is a class remedy.
The court has a wide discretion with respect to the orders it may make under this provision. It is able to apportion the order made against individual directors in proportion to their involvement and culpability.
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Back to contents

No.	Question	Answer
		(iii) Fraud by officers of companies which have gone into liquidation An officer (including the directors, managers and secretary of the company) may have criminal liability under section 273 of CWUMPO if: i. at any time before the commencement of the liquidation of a company, such officer made any gift, or transfer of or charge on or caused or connived in the levying of any execution against the property of a company; or ii. such officer is said to have concealed or removed any part of the property of the company since, or within two months before, the date of any unsatisfied judgment or order for payment of money obtained against the company, in each case, with the intent to defraud creditors. However, this is a punitive measure, and not a means to compensate the company. In addition, it will be hard to prove intention to defraud creditors, especially to the criminal standard of proof (beyond reasonable doubt). **(iv) Offences by officers of companies in liquidation** There are also a variety of other criminal offences relating to conduct by officers of companies in liquidation, including fraud in anticipation of winding up, misconduct in the course of winding up, falsification of company books, and false representation to creditors but these are beyond the scope of this questionnaire. **(v) Disqualification order** Under Hong Kong SAR law, a Court may order that a person who is appointed as a director be disqualified or, if not holding such a position, be restricted from being a director or taking part in the management, formation or promotion of a company, for a period of up to fifteen years. Under section 168C of CWUMPO, "company" is widely defined to include unregistered companies, or registered companies, whether they may be incorporated in or outside of Hong Kong SAR. Disqualification means that the relevant person is barred from being a director of a company or otherwise being concerned in the management, formation or promotion of a company for the relevant period. There are six grounds for disqualification. The three grounds which can apply to a company outside of insolvency are: i. persistent breach of requirements under the Companies Ordinance (Cap 622) (the CO) (ie for filing of returns and accounts); ii. where a person is convicted of an indictable offence in connection with the promotion, formation, management or liquidation of a company or in connection with the receivership or management of a company's property or any other indictable offence which involves fraud or dishonesty; and iii. on the grounds of public interest. The three remaining grounds require that the company is insolvent at the time of the relevant conduct or subsequently becomes insolvent. These grounds are: iv. where, in the course of a winding up of a company, it appears that a person is guilty of fraudulent trading (of the criminal liability type) or otherwise guilty while being an officer or shadow director of the company of any fraud or breach of duty; v. the conduct of a past or present director or shadow director of an insolvent company, makes them unfit to be concerned in the management of a company; and vi. where a director is found liable for fraudulent trading (even if no application for a disqualification order was made).

Back to contents

No.	Question	Answer
		There is no statutory definition of 'unfitness'. In deciding whether a person is unfit to be concerned in the management of a company, the court will consider the factors listed in the Fifteenth Schedule of the CWUMPO. This non-exhaustive list includes a full range of the director's conduct, including the extent of the director's responsibility for: (i) the causes of the company (or any overseas company) becoming insolvent, and (ii) the company entering into any transaction or giving any unfair preference which is liable to be set aside. The court will also look at any matters or acts relevant to the conduct of the affairs of the company and its insolvency, such as: (i) the statutory requirements for keeping proper books of account, (ii) delivering the company's property to the liquidator, and (iii) compiling the statement of affairs. Disqualification orders are enforced primarily by the government regulators (particularly the Official Receiver's Office), however in some cases, it is possible that action for disqualification can be brought by the Financial Secretary, a liquidator or any past or present member or creditor of the relevant company. Under Hong Kong SAR insolvency law, there is no provision for automatic disqualification. It should be noted that where a person is found liable for fraudulent trading, the court has a discretion to make a disqualification order against such person irrespective of whether an application for a disqualification order is made.
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	Hong Kong SAR law recognises that a company's affairs during the twilight period may not only be influenced by those formally appointed as directors. The CO defines a director as any person who occupies the position of director, by whatever name called. This covers more than just formally appointed (de jure) directors and extends to a person who acts as a director (a de facto director) or a person in accordance with whose directions or instructions the directors of a company are accustomed to act (a shadow director). If such people have caused loss to the company and its creditors during this time, they may also be found personally liable for such loss. As regards the main liability risks discussed above, the persons who can be held liable are, in summary, as follows: (i) Fraudulent Trading: any person who was knowingly a party to the carrying on of the business for a fraudulent purpose (including persons dealing with the company who receive property with knowledge of the fraud); (ii) The duty to consider the interests of creditors applies to de facto and de jure directors. The misfeasance remedy is available against any past or present officer, provisional liquidator or liquidator, and receiver or manager of the property of the company; and any person involved in the formation, promotion or management of the company; (iii) Fraud by officers of companies which have gone into liquidation: in addition to directors, officers (ie a manager or a company secretary) may also be liable for this offence; (iv) Offences by officers of companies in liquidation: any officer or shadow director of the company at the time of the offence may be liable; (v) Disqualification order: any person occupying the position of director, by whatever name called (including de facto directors and shadow directors).

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	In the absence of wrongful or insolvent trading legislation, it is not necessary for directors to analyse, when incurring credit, whether the company is insolvent and has any prospect of avoiding insolvent liquidation. However, even in the absence of insolvent trading legislation, the directors must have regard to the interests of creditors if the company is or may become insolvent. Conceivably the incurring of further credit which cannot be satisfied in full when due, and which results in a reduction in creditors' recoveries, may result in a claim by a liquidator for damages for breach of duty. A reckless incurring of credit by directors during the twilight period, without proper consideration of the prospects of repayment in full, may lead to disqualification proceedings. In order to be free of the risk of personal liability or vulnerability to disqualification proceedings, a director should not incur credit during the twilight period unless, following proper consideration, he is satisfied that there is a reasonable prospect that the credit can be discharged in full when due. Provided that a director exercises reasonable care, skill and diligence and acts honestly and in good faith, however, for as long as there is no insolvent trading legislation in Hong Kong SAR it is unlikely that the incurring of credit during the twilight period will result in the director being personally liable or at risk of disqualification.
5.	What are the liability risks in the case of 'creditor stretching'?	Absent particular facts (for example, where a director fraudulently or negligently misstates the company's financial position), managing a company's cashflow ('creditor stretching') in times of financial distress is a relatively normal way for a company to seek to find the time to restructure. Deliberately paying some creditors (particularly connected creditors) ahead of others may render the directors vulnerable to attack.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Given the lack of wrongful / insolvent trading legislation in Hong Kong SAR, there is relatively low risk for the directors when managing the company's cash flow and 'ransom' payments to key creditors may be justifiable although equal treatment of the creditors of the same rank is usually the appropriate approach. Paying one creditor when knowing that the company is unable to satisfy all its debts at that time will not be considered fraudulent if the director believes that the company will be able to pay its debts in the future. However, to the extent that such selective payments constitute an unfair preference, the directors responsible for causing such unfair preference may be personally liable.
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	As a general point, many legal rules make it inadvisable to pay connected persons in priority to others. For example, under Hong Kong SAR law, if a transaction is challenged as an unfair preference, the court must not make an order against a person in respect of unfair preference unless the company who gave the unfair preference had a desire to give the preference to the counterparty. However, such desire is presumed if the counterparty is a connected person to the company.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	No, Hong Kong SAR law does not impose an obligation in case of financial difficulties to convene a shareholders meeting.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Hong Kong SAR insolvency law does not have an express requirement to file at a particular time.
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	Under section 23 of the Employment Ordinance (Cap 57) (**EO**), wages must be paid as soon as practicable but in any case not later than 7 days after the last day of a wage period. Wilful contravention of this section without reasonable excuse is a criminal offence. There is precedent for the courts holding that the financial difficulties of a company do not amount to a reasonable excuse. In addition, under section 31 of the EO, an employer must not enter into a new or continue a contract of employment unless they believe on reasonable grounds that they will be able to pay all wages due under the contract of employment as they become due (the contravention of which is also a criminal offence).
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Directors in Hong Kong SAR owe their duties individually and collectively (ie their duties of care, skill and diligence). This means that in addition to their individual duties, the directors have collective responsibility for the decisions they make. As stated above, the minimum standard required of a director is that of a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director (ie an objective test). However, the actual standard by which a particular director is judged will be higher if that director's general knowledge, skill and experience are, in fact, greater (ie a subjective test). In practice, boards will try to reach a unanimous decision on major issues such as whether to file for insolvency. Where, say, one director feels strongly that the company should file and the rest of the board consider it is reasonable to continue trading, that director may feel compelled to resign as a director. There is a general defence under section 903 of the CO to a breach of duty claim where a director has acted honestly and reasonably and, in the circumstances, the court concludes that they ought fairly to be excused.
12.	Are there specific actions against directors under bankruptcy law?	Please see risks discussed above. It is worth noting in passing that in Hong Kong SAR law 'bankruptcy' is a term applied to the insolvency of individuals. 'Insolvency' is the term used for corporates.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Hong Kong SAR law does not have a general law of shareholder duties nor do we have thin capitalisation rules or a law of equitable subordination of shareholder loans. In an insolvency, for example, intercompany loans are not subordinated or converted into equity. There is a law of 'piercing the corporate veil' such that a parent company, say, may be made liable for the debts of its subsidiary but its scope is narrow and often involves other concepts such as fraud, agency, or sham transactions. A few specific points to note in the context of group companies: (i) If a director is on the board of a number of companies in a group, they must wear their hat as director of each company in turn, individually, and consider the financial position of **that** company alone when making decisions for each company. (ii) There is also a positive obligation for directors to avoid potential conflicts of interest. For example, a director should ensure that the financial difficulties have not caused a potential conflict of interest with their position as director of other companies within a group. Where there is a potential conflict of interest, consideration should be given to whether the relevant director might resign from one or more of their positions or recuse themselves and take no part in the board discussions or decision-making at one company or the other. (iii) A common director of two companies (for example, a director of a parent and its subsidiary) with confidential information at parent level which concerns the financial position of the subsidiary may be placed in an awkward position (ie there may be a conflict of interest). (iv) Where a parent company or the directors of such a parent operate a "hands on" approach to running the group and interfere persistently in the management of the subsidiary companies, the parent company (or, exceptionally, its directors) may be a shadow or *de facto* director of the subsidiary and accordingly the attendant duties and potential liabilities set out in the sections above will attach to them.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	There is no special legislation in Hong Kong SAR mitigating the liability risks of directors specifically in view of the Covid-19 crisis.

Back to contents

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Back to contents

Singapore

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take the interest of other stakeholders (creditors, employees) into account as well? Does that regime change in case of financial distress?	Directors have a duty to act in the interests of the company. When a company is solvent and trading normally, this refers to the interests of the company as a separate commercial entity which in many cases are very readily identified with the interests of its shareholders as a whole. However, when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when making decisions for the company. While it is common to refer to the 'balance sheet test' or the 'going interest test' when speaking of insolvency in this context, Singapore courts have made clear that there is no bright line which, when crossed by the company, results in directors having to take into account the interests of the company's creditors. Instead, what constitutes the components of a company's interests has been framed as a continuum, where the greater the concern over the company's financial health, the more weight the directors must accord to the interests of creditors over those of the shareholders. In this context, the courts consider the general financial health and solvency of the company in order to ascertain if there was reason to doubt or to be concerned over the financial viability of the company.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	There are four main areas of risk: (i) insolvent/wrongful trading; (ii) fraudulent trading; (iii) misfeasance (or breach of duty); and (iv) disqualification and compensation orders. We discuss these four main areas of risk below. It should be noted that the provisions on insolvent/wrongful trading, fraudulent trading and misfeasance discussed below were migrated from the Singapore Companies Act to a new omnibus Insolvency, Restructuring and Dissolution Act with effect from 30 July 2020. Acts taking place prior to 30 July 2020 will be dealt with under the provisions of the Singapore Companies Act and acts taking place on or after 30 July 2020 will be dealt with under the provisions of the Insolvency, Restructuring and Dissolution Act. Except as discussed below, this does not give rise to any substantive difference as the provisions have not changed.

Back to contents

No.	Question	Answer
		(i) Insolvent/wrongful trading ***Please note that in response to the Covid-19 epidemic, the Singapore government has, in the COVID-19 (Temporary Measures) Act 2020, introduced a provision that provides a limited temporary relief from the offence of insolvent trading. This is discussed in greater detail in section 14 below.*** – Insolvent trading (applicable to acts prior to 30 July 2020) Under the offence of insolvent trading, an officer commits an offence if he is knowingly a party to the contracting by the company of a particular debt, having at that time no reasonable or probable ground to expect the company to be able to pay. An 'officer' includes not only directors, but also executive employees, privately appointed receivers and managers, and liquidators in members' voluntary winding up. The test is objective and does not require fraud or dishonesty. Breach of the provision is an offence rendering the officer liable on conviction to a fine not exceeding SGD2,000 or to imprisonment for a term not exceeding three months. A prosecution for the offence may be brought not only during in course of winding up but also in any proceedings against the company. Upon conviction, the liquidator, any creditor or any contributory to the company may apply to court for a declaration that the officer be personally responsible, without any limitation of liability, for the payment of the whole or any part of that debt. – Wrongful trading (applicable to acts on or after 30 July 2020) The offence of insolvent trading has been replaced with a prohibition against wrongful trading. The prohibition, which gives rise to both civil and criminal liability, applies to acts on or after 30 July 2020. Similar to the offence of insolvent trading, wrongful trading occurs if the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full. It also occurs if the company, when solvent, incurs debts or other liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent. However, while the offence of insolvent trading applied only to officers of the company, wrongful trading applies to any person who was a party to the wrongful trading if that person knew that the company was trading wrongfully. In addition, an officer of the company will also be liable if he or she was a party to the wrongful trading and, ought, in all the circumstances, to have known that the company was trading wrongfully. An 'officer' includes not only directors, but also executive employees, privately appointed receivers and managers, and liquidators in members' voluntary winding up. A court may declare any such person to be liable for all or any of the debts or other liabilities of the company as it directs. An application for such a declaration may be brought on its own and, as a civil matter, liability is determined on a balance of probabilities. Separately, that person may also be found criminally liable (and the standard of proof is the higher standard of beyond reasonable doubt). If criminally liable, the person may be liable to a fine not exceeding SGD10,000 or to imprisonment for a term not exceeding three years or to both.

Back to contents

No.	Question	Answer
		(ii) Fraudulent Trading Fraudulent trading applies if it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. Where there has been fraudulent trading, the court may declare that any person who was knowingly a party to the carrying on of the business in that manner be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as it directs. The application for such a declaration may be brought at any time in the course of winding up or in any proceedings against the company, and may be brought by the liquidator or any creditor or contributory of the company. In addition to civil liability, fraudulent trading is an offence rendering the persons responsible liable on conviction to a fine not exceeding SGD15,000 or to imprisonment for a term not exceeding seven years or to both. In order to establish the offence of fraudulent trading, it must be shown that the business of the company was carried out with the intention of defrauding the company's creditors or any other person or for any fraudulent purpose. This requires an element of dishonesty which results in an innocent party being deceived. The courts have held that the test is subjective but that they will test the defendant's claim against an objective standard. Accordingly, if a reasonable man would have found the actions dishonest, this will have a bearing on whether the court will accept the defendant's claim of honesty as credible. **(iii) Misfeasance** There are two aspects to the law of misfeasance in the zone of insolvency. First, as mentioned above, when a company is insolvent or likely to become insolvent the directors' duty to the company requires that they consider the interests of creditors in addition to, or to the exclusion of, the interests of shareholders. Liability for a breach of fiduciary duty is both civil (redounding in liability for damages to the company) and also, under Singapore law, a criminal offence. Secondly, where a company is in being wound up, the court may assess damages against an officer that has been has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company. This provision does not create any new rights but provides a summary mode of enforcing rights (ie, for the court make an order without a trial) in the winding up of the company. An application may be brought by the liquidator, any creditor or contributory. The court may order the officer responsible to repay or restore the money or property or any part thereof with interest at such rate as it thinks just. It may alternatively order the officer responsible to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as it thinks just.

Back to contents

No.	Question	Answer
		(iv) Disqualification orders Where a person is a director of a company which was insolvent at the time it went into liquidation and his conduct as a director makes him unfit to be a director of a company, the Minister for Finance or the Official Receiver may apply to court for a disqualification order against that person. A company is insolvent at the time it has gone into liquidation if it was unable to pay its debts at that time. In general, this may be established by showing that the company failed to satisfy a statutory demand for payment of a sum exceeding SGD15,000 (subject to our comments at section 14 below) or that the company was insolvent on the basis of the cashflow test (unable to satisfy its debts as they fall due) or the balance sheet test (its liabilities exceed it assets). It should be noted that these are also the grounds on which a company may be wound up by the court for being unable to pay its debts. In considering whether a person is unfit to be a director, the Singapore Companies Act sets out a list of matters that may be considered by the court. The list is not exhaustive and includes the following matters, among others: – whether there has been any misfeasance or breach of any fiduciary or other duty by the director in relation to the company; – whether there has been any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company; – the extent of the director's responsibility for the causes of the company becoming insolvent; – the extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part); and – whether the causes of the company becoming insolvent are attributable to its carrying on business in a particular industry where the risk of insolvency is generally recognised to be higher. A disqualification order may also be made against any person who was a director of the company during the three years before it went into liquidation but who was no longer a director of the company when it went into liquidation. If a disqualification order is granted, the person against whom it is made may not act as a director of a company, or be in any way, directly or indirectly, concerned in, or take part in the management of, a company. A court may make an order of disqualification for a period of up to five years from the date of the order. It is an offence to act in contravention of a disqualification order.

Back to contents

No.	Question	Answer
3.	Does director's liability rest only on formally appointed managing directors, or also on others who perform managerial tasks?	The Singapore Companies Act defines a director as any person who occupies the position of director, by whatever name called. This covers more than just formally appointed (*de jure*) directors and extends to a person who acts as a director (a ***de facto* director**) or a person in accordance with whose directions or instructions the directors of a company are accustomed to act (a **shadow director**). As regards the main liability risks discussed above, the persons who can be held liable are, in summary, as follows: (i) insolvent/wrongful trading: – (For acts prior to 30 July 2020) an officer of the company who was knowingly a party to the contracting of the debt may be held liable subject to the additional elements being satisfied (discussed below). The term 'officer' includes any director (whether de jure, de facto or a shadow director). It also includes any person employed in an executive capacity by the company, as well as a receiver and manager and any liquidator of a company appointed in a voluntary winding up. – (For acts on or after 30 July 2020) any person who was a party to the wrongful trading may be held liable subject to the additional elements being satisfied (discussed below). (ii) fraudulent trading: any person who was knowingly a *party* to the carrying on of the business for a fraudulent purpose (this will include persons dealing with the company who receive property with knowledge of the fraud); (iii) the duty to consider the interests of creditors applies to all directors (*de facto, de jure* or shadow directors). The misfeasance remedy is available against any past or present officer; liquidator; and any person involved in the formation, promotion or management of the company; and (iv) disqualification orders: any person occupying the position of director, by whatever name called (including *de facto* directors and shadow directors).
4.	What are the liability risks for directors if the company borrows new money or enters into new contracts but may not be able to perform the ensuing obligations?	The answer to this across the four main areas of liability risk discussed above at 2. is as follows: (i) Insolvent/wrongful trading: – (For acts prior to 30 July 2020) The issue is whether the officer responsible had no reasonable or probable ground to expect the company to be able to pay. While there have been no Singapore cases discussing this, it is generally accepted that the ability to pay must be determined in a realistic way, taking into account the extent and nature of the assets and liabilities of the business, cash available, whether it can be expected to pay by borrowing or realising assets, bearing in mind the possible illegality of any such processes, and any promises of new finance. – (For acts on or after 30 July 2020) For officers, the issue is whether the officer responsible ought, in all the circumstances, to have known that the company was trading wrongfully. The test is one of constructive rather than actual knowledge – what a reasonable man in the position of the officer should have known given the circumstances. The provision is new and there have been no cases on it as yet. For any other person, that person must have known that the company was trading wrongfully. This requires actual knowledge. (ii) Fraudulent Trading: As noted above, it must be shown that the business of the company was carried out with the intention of defrauding the company's creditors or any other person or for any fraudulent purpose. This requires an element of dishonesty which results in an innocent party being deceived.

Back to contents

No.	Question	Answer
		(iii) Misfeasance: directors who are by the relevant time required to think of the interest of creditors, generally, should not be increasing losses by continued trading including incurring further credit without a solution (light at the end of the tunnel) being reasonably likely. Disqualification order: causing the company to enter into contracts it cannot meet/comply with/satisfy may be a part of a picture showing the director is unfit to be concerned in the management of a company and should be disqualified. As noted above, the director's responsibility for the causes of the company becoming insolvent and the extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part) are among the matters that the courts will consider in deciding whether a disqualification order should be made.
5.	What are the liability risks in case of 'creditor stretching'?	Absent particular facts (for example, where a director fraudulently or negligently misstates the company's financial position), managing a company's cashflow ('creditor stretching') in times of financial distress is a relatively normal way for a company to seek to find the time to restructure. The critical issue is whether it is reasonable to believe a restructuring can be achieved. Deliberately paying some creditors (particularly connected creditors) ahead of others may render the directors vulnerable to attack.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	As explained above, the key question here is whether there is a reasonable prospect of restructuring without a formal insolvency process. If there is such a reasonable prospect, and keeping in mind what is in the interests of creditors generally, directors have some flexibility in managing the company's cash. 'Ransom' payments to key creditors may be justifiable in such a scenario although equal treatment of the creditors of the same rank is usually the appropriate approach.
7.	Is there a distinction in this regard between preferential treatment of related entities and of other creditors?	As a general point, many legal rules make it inadvisable to pay connected persons in priority to others.
8.	Is there an obligation in case of financial difficulties to convene a shareholders meeting and if so, at what stage of financial difficulties?	No. As a matter of practice, directors generally do keep shareholders' updated as to the financial status of the company prior to taking any concrete step of action with regards the company. Directors can apply for a moratorium over proceedings as part of a package to restructure the company's debts. There is no specific point at which this can be done but the directors should, at the least, have enough of plan to be able to provide the court with a brief description of the intended compromise or arrangement, containing sufficient particulars to enable the court to assess whether the intended compromise or arrangement is feasible and merits consideration by the company's creditors.

Back to contents

No.	Question	Answer
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Singapore insolvency law does not have an express requirement to file at a particular time. The law operates by exposing directors to potential liability where filing is in the best interests of creditors and they do not file. It is therefore prudent for directors to file to avoid personal liability where that is the best outcome for creditors.
10.	Are there special liability risks in regard of certain debts, such as tax debts, social security payments, pension contributions?	No.
11.	Are the liability risks of the directors collective (the whole board is responsible/liable) or individual? On what grounds can a director exculpate himself from other directors' acts or omissions?	Directors owe their duties individually as opposed to the board being collectively responsible. This means that each director has to form his/her own views independently as he/she considers appropriate. Directors may be allocated specific responsibilities and they will have primary responsibility in that area, but that does not absolve the other directors from responsibility for ensuring these duties are being discharged appropriately by the director concerned. This may involve directors challenging each other's actions and views in certain circumstances. As stated above, the minimum standard required of a director is that of a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director. However, the actual standard by which a particular director is judged will be higher if that director's general knowledge, skill and experience are, in fact, greater. In practice, boards will try to reach a unanimous decision on major issues such as whether to file for insolvency. Where, say, one director feels strongly that the company should file and the rest of the board consider it is reasonable to continue trading, that director may feel compelled to resign as director. There is a general defence under section 391, Companies Act to a breach of duty claim where a director has acted honestly and reasonably and, in the circumstances, the court concludes that he or she ought fairly to be excused.
12.	Are there specific actions against directors under bankruptcy law?	Please see risks discussed above. It is worth noting in passing that in English law 'bankruptcy' is a term applied to the insolvency of individuals. 'Insolvency' is the term used for corporates.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	Singapore law does not have a general law of shareholder duties nor do we have thin capitalisation rules or a law of equitable subordination of shareholder loans. In an insolvency, for example, intercompany loans are not subordinated or converted into equity. There is a law of 'piercing the corporate veil' such that a parent company, say, may be made liable for the debts of its subsidiary but its scope is narrow and often involves other concepts such as fraud, agency, or sham transactions. A few specific points to note in the context of group companies: (i) If a director is on the board of a number of companies in a group, he/she must wear his or her hat as director of each company in turn, individually, and consider the financial position of **that** company alone when making decisions for each company. (ii) There is also a positive obligation for directors to avoid potential conflicts of interest. For example, a director should ensure that the financial difficulties have not caused a potential conflict of interest with their position as director of other companies within a group. Where there is a potential conflict of interest, consideration should be given to whether the relevant director might resign from one or more of his or her positions or recuse himself or herself and take no part in the board discussions or decision-making at one company or the other. (iii) A common director of two companies (for example, a director of a parent and its subsidiary) with confidential information at parent level which concerns the financial position of the subsidiary may be placed in an awkward position as there is an issue of conflict of interest. (iv) Where a parent company or the directors of such a parent operate a "hands on" approach to running the group and interfere persistently in the management of the subsidiary companies, the parent company (or, exceptionally, its directors) may be a shadow or *de facto* director of the subsidiary and accordingly the attendant duties and potential liabilities set out in the sections above will attach to them.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	The COVID-19 (Temporary Measures) Act 2020 (**Covid-19 Act**) modifies the offence of insolvent / wrongful trading in respect of debts incurred during the period 20 April to 19 October 2020. The act states that where a debt is incurred during the period from 20 April to 19 October 2020, the officer is not to be treated as having no reasonable or probable ground of expectation that the company would be able to repay the debt if the debt was incurred in the ordinary course of business and before the appointment of a judicial manager or liquidator. A similar modification has been made to the offence of insolvent trading by officers of limited liability partnerships and trustee-managers of business trusts. Directors will continue to be liable where debts are incurred fraudulently. The Covid-19 Act also changes the threshold and time period for statutory demands (a precursor to a creditor winding-up), requiring that the demand be for a minimum of SGD100,000 and allowing a company up to 6 months to pay.

Back to contents

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Back to contents

Thailand

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	The duties and liabilities of directors are set out under the Civil and Commercial Code, as amended (the Code), for directors of a private company and the Public Limited Companies Act B.E. 2535, as amended (the PLCA), for directors of a public company. The Securities and Exchange Commission Act B.E. 2535, as amended (the SEC Act), also applies to directors of a public company whose shares have been offered to the public and/or listed in the Stock Exchange of Thailand. Under the CCC, the PLCA and the SEC Act, in managing the company's business operations, directors must manage the company within the scope of powers given to them under the company's objectives, articles of association and resolutions of meetings of shareholders. Directors must apply the same degree of diligence and care as may be reasonably expected of a careful businessperson. As a fiduciary, a director must act in good faith and with care to preserve the interests of the company. Accordingly, in normal circumstances, directors are required to act primarily in the interest of the company and its shareholders as a whole. Under Thai law, even when a company is in financial distress or insolvent, there is no provision which clearly provides that the interest of creditors outweigh those of shareholders or the directors shall act in the interest of the creditors instead of the shareholders. However, there are a number of provisions in the Bankruptcy Act, B.E. 2483, as amended (the Bankruptcy Act) which gives priority to creditors rights. For example: – under bankruptcy proceedings, creditors' rights to receive payment take priority over the rights of shareholders[1]; – once the company is placed under the receivership order, the company (including its shareholders) is prohibited from dealing with its assets or business; these rights are transferred to the court, official receiver or creditors' meeting[2]; – under rehabilitation proceedings, the rights of shareholders (except the right to dividends) are suspended and transferred to the interim manager, the official receiver or the plan preparer[3]; and – under rehabilitation proceedings, creditors have the right to vote on the business rehabilitation plan whereas shareholders do not[4].

1_Shareholders get paid out after all types of creditors are paid out (Section 130 (7) of the Bankruptcy Act).
2_Section 24 of the Bankruptcy Act
3_Section 90/21 of the Bankruptcy Act
4_Section 90/44 of the Bankruptcy Act

Back to contents

No.	Question	Answer
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	**General Director's Liabilities** Under Thai law, generally, a director is not liable for damage to the company and its shareholders for acts which accord with the articles of association of the company or shareholders' resolution, or acts done in good faith which are within the scope of their duties. In particular: – the Code provides that directors are not liable to the shareholders or the company for acts which have been approved by the shareholder's meeting[5] and a company must compensate third parties for damage caused by its directors in the course of performing their duty. However, if the act is not within the scope of powers of the company (ie ultra vires the company), the company's directors involved in carrying out the act must compensate third parties and/or the Company for the damage caused by that act[6]; – the PLCA provides that directors are jointly liable for a breach of their fiduciary duties but a director may be released from liability if (i) that director can prove that they did not participate in the act or the act was done without a board resolution[7] or (ii) that director objected at the board meeting and either the objection was noted in the minutes or made in writing and submitted to the chairman within three days after the meeting[8]; – the SEC Act provides that if the director or executive can prove that, at the time of considering a particular matter, their decision has met the following requirements, it shall be deemed that the said director or executive has performed their duty with responsibility and due care and the director shall not be liable for damages following an accusation of violation of the director's responsibility and duty of care: (i) the decision has been made with honest belief and reasonable ground that it is for the best interest of the company; (ii) the decision has been made in reliance of information honestly believed to be sufficient; and (iii) the decision has been made without the director having an interest, whether directly or indirectly, in such matter[9]. However, in the event that the director acted dishonestly, fraudulently or in bad faith, that director will not be discharged from such liability.

5_Section 1170 of the Code
6_Section 76 of the Code
7_Section 92(1) of the PLCA
8_Section 92(2) of the PLCA
9_Section 89/8 of the SEC Act

Back to contents

No.	Question	Answer
		Key Director's Liabilities in time of Financial Difficulties Below are key areas of potential liabilities of the directors in the event that the company is in financial difficulties or insolvent. *The Bankruptcy Act* The director may be subject to criminal liabilities if: – during a one-year period prior to the filing of bankruptcy petition and thereafter, but before the issuance of a receivership order, they undertake any of the following actions: (i) removing, concealing, destroying, causing damage to or altering the seal, accounting ledgers, or documents relating to the company's business or assets, or conniving in such action, unless it can be proven that there is no intention to conceal the actual status of the business; (ii) omitting to record material matters, or making false entries in the accounts or documents relating to the company's business or assets, or conniving in such action; (iii) pledging, mortgaging, or disposing of assets obtained by purchasing on credit for which the full price has not been made, unless it can be proven that it is in the normal course of business and there is no intention of fraud; or (iv) receiving goods on credit from third parties on false pretenses, or concealing, transferring, or delivering the company's assets dishonestly, or taking actions or permitting others to take actions to create encumbrance over the company's assets by dishonest means, or allowing or conspiring with others so that the court may issue a judgment against the company to pay a debt which the company should not have to pay[10]; – they remove, conceal, accept, dispose of or manage the company's assets with dishonest intent, while knowing that a receivership order has been or will be made[11]; – they cause the company to incur debts at the time when the company's assets are placed under receivership without reasonable grounds for believing that the company will be able to repay such debts[12]; – the company failed to keep proper books of account in the three-year period prior to the making of a receivership order[13].

10_Section 164 of the Bankruptcy Act
11_Section 173 of the Bankruptcy Act
12_Section 166(2) of the Bankruptcy Act
13_Section 167 of the Bankruptcy Act

Back to contents

No.	Question	Answer
		The Criminal Code – Any director who removes, conceals or transfers assets of the company to another person so that a creditor or the company's creditor, who has commenced or is about to commence legal action to enforce payment, is deprived of payment, could be liable to a fine of up to THB 40,000, imprisonment for a term of up to two years, or both[14]. – Any director who deceives another person by disclosing false information or omitting to disclose information which should have been disclosed and as a result of such deception (i) acquires assets from the deceived or a third person, or (ii) causes the deceived or third person to produce, waive or destroy documentary evidence of certain rights, may be liable for a fine of up to THB 60,000, imprisonment for a term of up to three years, or both[15]. – Any director who takes away, destroys or devalues a pledged asset in order to cause damage to the pledge may be liable for a fine of up to THB 40,000, imprisonment for a term of up to two years, or both[16].
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	The liabilities of directors are imposed on every director of the company. In addition, the liabilities under SEC Act also extend to executives[17] of the company.

14_Section 350 of the Criminal code
15_Section 341 of the Criminal code
16 Section 349 of the Criminal Code
17_ Executive refers to a manager or person responsible for the management of the company whether de facto or as authorized by the board of directors as prescribed in relation to the notification of the Capital Market Supervisory Board.

Back to contents

No.	Question	Answer
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	The director could be held liable to the creditors for a fraudulent transaction where they approve, with the intention of defrauding the creditor, that the company enters into new obligations when, at that time, they know or should have known that the company will not be able to fulfil such obligations. In addition, the directors could also be held liable to the company and/or the shareholders if the directors act with the knowledge that such transaction approved by them would cause damages to the company. The analysis in this regard is much dependent on the circumstances. Under the PLCA, the shareholders may request the Department of Business Development to appoint an inspector to investigate the company if there is any reason to believe that the company is trying to defraud its creditor or incurring debt whilst knowing that the company cannot repay those debts[18]. If the directors are found guilty, the inspector must report such findings to the relevant government official so that the official may bring a direct claim against those directors. In addition, under the Bankruptcy Act, any director who causes the company to incur debts at the time that the company's assets are placed under receivership without reasonable grounds to believe that the company will be able to repay such debts, is liable for a fine up to THB 100,000 or imprisonment for a term of not more than one year[19].
5.	What are the liability risks in the case of 'creditor stretching'?	Absent particular facts (for example, where a director fraudulently or negligently misstates the company's financial position), managing a company's cashflow ('creditor stretching') in times of financial distress is a relatively normal way for a company to seek to find the time to restructure. If the director has a reasonable ground for believing that 'creditor stretching' has been done in good faith and for the best interest of the company, and they applied the same degree of diligence and care as may be reasonably expected of a careful businessperson, it would not typically lead to personal liability of directors.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	If a director applies the same degree of diligence and care and has a reasonable ground to believe that the selective payments are for the best benefit of the company, it would not typically lead to personal liability of directors. However, the analysis is much dependent on circumstances. It is worth noting that if a company enters into bankruptcy proceedings under the Bankruptcy Act, the court may, on the application of the official receiver under Section 115 of the Bankruptcy Act, set aside a transfer of an asset or any act done or permitted to be done by the company with the intention of giving undue preference to any creditor over the others within three months before the bankruptcy petition is filed (or where the preferred creditor is an "insider"[20] of the company, one year before the filing of the bankruptcy petition or at any time after the filing of that petition).

18_Section 129 of the PLCA
19_Section 166(2) of the Bankruptcy Act
20_An insider means:
(1) a director, manager, managing partner, partner with unlimited liability, or person responsible for the operation of business or auditor of the debtor;
(2) a shareholder holding shares in excess of five percent of the total number of shares already sold of the debtor's undertaking;
(3) a spouse or a non sui juris child of the debtor or of the person under (1) or (2);
(4) an ordinary partnership of which the debtor or the person under (1) or (2) or (3) is a partner;
(5) a limited partnership of which the debtor or the person under (1) or (2) or (3) is a partner with unlimited liability or is a partner with limited liability and with the aggregate shares held in excess of 30 percent of the total number of shares of the limited partnership;
(6) a limited company or a public limited company with the debtor or the person under (1) or (2) or (3) or the partnership under (4) or (5) holding shares in the aggregate number in excess of 30 percent of the total number of shares already sold of such company;
(7) a limited company or a public limited company with the debtor or the person under (1) to (6) holding shares in the aggregate number in excess of 30 percent of the total number of shares already sold of such company;
(8) a director, manager, managing partner, partner with unlimited liability, person responsible for the operation of business or auditor of an ordinary partnership, a limited partnership, a limited company or a public limited company under (4) or (5) or (6) or (7),as the case may be, or the spouse and a non sui juris child of such person.

Back to contents

No.	Question	Answer
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	The same rule as prescribed in 6 above will apply.
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	The board of directors of a private limited company has a duty to call for an extraordinary general meeting of shareholders when the company is significantly at loss (ie loss equals to or more than a half of the company's capital)[21]. If they fail to do so, each director is criminally liable with a penalty not exceeding THB 20,000 under the Act on Offences Concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations B.E. 2499, as amended. For a public limited company, there is no requirement that the board of directors must convene a shareholders' meeting in the event of financial difficulties, unless there are specific provision in the articles of association to that effect.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	Under Thai law, there is no requirement for directors to commence bankruptcy and rehabilitation proceedings. Under Section 9 of the Bankruptcy Act, the creditor, only can file for bankruptcy against the debtor when certain conditions are met. Thai law does not allow voluntary bankruptcy to be initiated by the debtor. However, in rehabilitation proceedings, a company, as a debtor, can file for voluntary rehabilitation under the Bankruptcy Act if the following conditions are met: (i) it becomes insolvent or unable to pay its debt when due; (ii) it is indebted to one creditor or several creditors altogether in a definite amount of not less than THB 10 million, whether such debt is due immediately or at a future time; and (iii) there is a reasonable cause and prospect for the rehabilitation of the debtor's business.

21_ Section 1172 of the CCC

Back to contents

No.	Question	Answer
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	In addition to the general liabilities of directors under company laws of Thailand, directors also have liabilities under other specific laws which could result in administrative and/or criminal penalties, including: **(i) Liability under the Revenue Code** Generally, by virtue of Section 90/5 of the Revenue Code, the managing director, directors or any persons acting in a representative capacity for a company shall be personally liable to the same penalty imposed on the company for any violation by the company of the Revenue Code (including failure to pay tax), except where such person can prove that they did not consent or had no part in such wrongdoing of the company. **(ii) Liability under the Social Security Act B.E. 2533 (1990) (SSA)** By virtue of Section 110 of the SSA, where an offence is committed by a company and is penalised in accordance with the SSA, it shall be deemed that the representative(s), every director, and the person(s) responsible for the operation of the company shall also be penalised by the same punishment, except where it is proven that such person did not collude in the commission of the offence or had made reasonable endeavours to prevent the occurrence of the offence. In this connection, under the SSA, failure to pay social security contribution at the rate as required thereunder could result in a criminal penalty of up to six months' imprisonment and a fine of up to THB 20,000.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	Generally, the liability of the directors is collective, unless it can be proven that any director had no part in the commission of such offence.
12.	Are there specific actions against directors under bankruptcy law?	Please refer to our response in 2 under *Key Director's Liabilities in time of Financial Difficulties – The Bankruptcy Act*.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	No, there are no specific duties of the shareholders or other group companies at the stage of financial difficulties of the company under Thai law.
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	No, there is no legislation in respect of the mitigation of the liability risks of directors in view of the COVID-19 crisis.

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Back to contents

United Arab Emirates

This memorandum provides an overview of the duties and liabilities of members of the board of managers or directors (as applicable) of 'on-shore' limited liability companies (**LLCs**) and joint stock companies (**JSCs**) in the UAE, with a focus on those that may arise when an LLC or a JSC is in financial difficulties. A reference to a **company** or **companies** means an LLC and/or a JSC, as applicable. The memorandum does not provide a detailed overview of directors' duties and liabilities that may arise from sector specific legislation passed in the UAE, nor does it account for the additional duties and liabilities that may exist for directors of companies incorporated in one of the many UAE free zones.

No.	Question	Answer
Directors' Duties		
1.	Do directors have to act primarily in the interest of their shareholders or do they have to take in account other stakeholders' interests as well? Does that regime change in case of financial distress?	The duties and liabilities of UAE directors are derived from various sources. The main source is the Federal Commercial Companies Law No.2 of 2016 (the **CCL**), but provisions are also found in, amongst others, Ministerial Decision No.272 of 2016, the Federal Law on Civil Transactions 1985 (the **Civil Code**), and Federal Penal Code 1988 (the **Penal Code**). For companies in financial difficulties, Federal Decree-Law No.9 of 2016 concerning bankruptcy (the **Bankruptcy Law**) will also be important, and this is discussed in more detail below. The Securities and Commodities Authority has set additional corporate governance rules for the directors of public JSCs (Resolution No.3 R/M of 2020), and relevant legislation for private JSCs includes Ministerial Resolution No.539 of 2017, as amended. UAE directors' obligations are broadly in line with other jurisdictions, and include: (i) preserving the interests of the company and exercising the care of a diligent person in performing their duties; (ii) acting in accordance with the company's objectives; (iii) ensuring they do not act fraudulently, commit gross errors, improperly use the power granted to them, or otherwise contravene applicable law, the memorandum of association or any contract of appointment; (iv) declaring conflicts of interest, refraining from voting on conflicted matters and refraining from undertaking the management of a competing company without the prior consent of the shareholders; and (v) preserving the confidentiality of company information.

Back to contents

No.	Question	Answer
		Generally, directors are liable to the company itself, its shareholders (also known as partners) and to any other person to the extent that such liability arises from an act of fraud. This is codified in two articles of the CCL: (a) Article 84(1) provides that: *'every director in an LLC shall be liable against the company, the partners and the third parties for any fraudulent acts by such director and shall also be liable for any losses or expenses incurred due to improper use of the power or the contravention of the provisions of any applicable Law, the memorandum of association of the company or the contract appointing the director or for any gross error by the director. Any provision in the memorandum of association or the contract appointing the director in conflict with the provisions of this clause shall be deemed void'*; and (b) Article 162(1) provides that: *'directors of a JSC will be liable towards the company, its shareholders and third parties for all actions of fraud, abuse of authority, violations of the law or the company's articles of association and for any errors in management, and any provision to the contrary shall be void'*.[1] However, in our view, the overarching duty of directors of a company in financial difficulties would shift towards protecting the interests of all stakeholders, which includes creditors. The scope of these duties is not entirely clear under UAE law, and international best practice can provide a guide to a certain extent. However, it is likely that if the company's financial distress could be considered as insolvency under the Cash Flow Test or Balance Sheet Test (as defined in the response to question 9 below), then the directors may potentially be found to owe a primary duty to the interests of the company's creditors, even to the exclusion of the interests of its shareholders. The Bankruptcy Law imposes an obligation to file for a restructuring scheme or insolvent liquidation of a company when certain conditions are satisfied (as described in more detail in the answer to question 9 below). Directors must also remain continuously diligent in their assessment of the financial condition of the company (as discussed in more detail below). As a general comment, directors must ensure the company practises good corporate governance, especially at times when a company may be in financial difficulties, and a detailed record of decisions taken by the directors, including details as to the reasons why such decisions are taken, should be maintained. Regular meetings should be held to review decisions taken.
2.	What are the key areas of potential liability for directors when a company is in financial difficulties?	The key areas of potential liability for directors when a company is in financial difficulties include: (a) committing fraudulent acts and acting ultra vires (pursuant to Articles 84 and 162 of the CCL, as discussed in more detail in the response to question 1); (b) distributing fictitious profits to the shareholders of a company; (c) conducting related party transactions or 'preferred transactions' at an undervalue; (d) failing to call a general assembly meeting in situations where a company's losses have reached half of its capital, or issued share capital in the case of a JSC; (e) failing to refer the issues around the Cash Flow Test or Balance Sheet Test to the shareholders for the latter to resolve on the insolvency within the time limits set out under the Bankruptcy Law; and (f) if a court declares a company bankrupt and it is found that the company's assets are insufficient to settle at least 20 per cent of its debts, the Bankruptcy Law provides that the directors may be ordered to pay all of the company's debts where the directors are found to have breached their duties under the CCL.

1_Pursuant to Articles 24 and 167 of the CCL, it is not possible to exempt directors from liability. Therefore a special shareholders' resolution discharging a director from liability vis-à-vis the shareholders may not be enforced. In any event, such resolution would not discharge that director's liability towards other directors or third parties (including creditors of the company).

Back to contents

No.	Question	Answer
		Directors who fail to comply with the duties set out in the CCL (as summarised in the response to question 1) may be sued for their errors by the company or its shareholders, assuming any claimant can prove damages. A director who has breached the CCL may be subject to financial penalties and/or criminal sanctions. Penalties and sanctions set out in the CCL include: (i) fines of between AED20,000 and AED1,000,000; or (ii) imprisonment for between six months and three years. Chapter 2 of the CCL provides the detailed list of penalties and sanctions that a director may face if they have breached their duties under the CCL. It is also possible that directors could also potentially face liability under certain provisions of the UAE Civil Code. The Bankruptcy Law also prescribes additional criminal and civil sanctions that may be charged against a company's directors for breach of duty under the Bankruptcy Law. The response to question 12 lists the applicable civil and criminal sanctions in more detail. However, the Bankruptcy Law also provides for the concept of director disqualifications. Any director found to have breached the Bankruptcy Law may be disqualified from managing any other company (or any other form of company in the UAE) for up to five years. Further, directors will need to consider carefully the timing of any resignation. Under Article 667 of the Civil Code, a director is under a duty to resign their directorship only at a time which would not cause damage to the company. Arguably, if a director has experience in weathering economic cycles and/or is crucial to the operations of the business, the resignation of the director may potentially be found to have caused damage to the company. The Penal Code also provides that directors may face imprisonment for up to five years in the event that they accept a promise or a grant in return for performing or abstaining from undertaking acts that are required in their role as a director of a company (Article 236/1).
3.	Does liability rest only with formally appointed directors, or also with (other) officers or de facto directors? If so, what are the standards to qualify as such?	Article 22 of the CCL applies not only to directors but also to other persons authorised to manage a company. As a result, the obligations imposed under Article 22 of the CCL can potentially extend to non-directors (including, for example, a chief executive or similar officer who is not also a member of the board of managers). Liability rests not only with directors but also on other persons who are authorised to manage a company, and in the case of criminal sanction, any person under whose instructions or directives the managers act.
4.	What are the standards for directors' liability for the company having entered into contracts that the company can later not perform ('wrongful trading')?	Continuing to incur further credit or borrow further money when the company may be unable to repay the debt or pay for goods or services can lead to civil or criminal sanctions for the directors under the Bankruptcy Law, as discussed in more detail in the response to question 12 below. As discussed in the response to question 1, there is also a general duty upon directors to ensure that a company is not mismanaged and to ensure that the director performs their duties to the standard of a diligent person. Directors concerned about the financial position of the company should therefore ensure they assess it by reference to the insolvency tests set out in the Bankruptcy Law, discussed above, as soon as concerns arise. It will at this point be crucial that directors are conscious of their overall duty to act in the best interest of all stakeholders. It may be challenging for a director to argue that such duty has been discharged when further credit and borrowing is taken on by a company that is, or foreseeably may shortly be, in financial difficulties. Notwithstanding the above, the Bankruptcy Law does provide that new financing may be extended to a company that is subject to preventative composition or debt restructuring proceedings provided that the court approves the new financing arrangement.

Back to contents

No.	Question	Answer
5.	What are the liability risks in the case of ‘creditor stretching’?	The position on ‘creditor stretching’ is not entirely clear. As long as the directors are acting reasonably with the intention of maximising the possibility of a full recovery for creditors as a whole (or minimising losses to creditors where a recovery is not possible), we believe there should be some limited flexibility. As noted, the directors should ensure management decisions are reviewed regularly and comprehensively documented, in case of any subsequent challenge. However, directors should be aware of the company’s obligation to file for a restructuring scheme or insolvent liquidation when certain conditions are satisfied (as described in more detail at question 9 below) and the obligation to notify the shareholders of such. There is some uncertainty as to when such application must be made, however, and as the position under the Bankruptcy Law is untested, directors should be aware of the potential risks in these circumstances.
6.	What are the liability risks in case of selective payments to some but not all creditors in case of liquidity issues? Is there a stage at which directors must treat all creditors equally?	Once the restructuring or insolvent liquidation (ie, bankruptcy) process is approved/declared, the management of the company is normally precluded from making dispositions of the company’s assets and the management of the company would be handed to a trustee. That said, selective payments to creditors made in the two-year period prior to a trustee taking management of the company are at risk of being deemed unenforceable and may be unwound (Article 147 of the Bankruptcy Law) if the payment is found to be detrimental to the other creditors (Article 201(4) of the Bankruptcy Law). Further, creditors that enter into *‘secret agreements that give the creditor special benefits to the detriment of other creditors’* (Article 207(3) of the Bankruptcy Law), may face criminal sanctions and be punished by imprisonment. Given the above, directors of a company in the twilight zone should ensure they treat all creditors (within the same rank) equally based on the Bankruptcy Law’s provisions and their general duty of care legislated for under Article 22 of the CCL and Article 6 of the Ministerial Resolution. Additionally, directors should note that, if a payment by the company to a creditor is found to be of a selective nature that is detrimental to other creditors, in addition to the court ordering for the payment to be clawed back, the directors may face civil and criminal sanctions under the Bankruptcy Law (as set out in the response to question 12 below).
7.	Is there a distinction in this regard between preferential treatment of related entities and the treatment of other creditors?	The Bankruptcy Law designates the two-year period preceding the decision to accept the bankruptcy application as a ‘suspicion period’ for clawback purposes and reviews all transactions conducted by the debtor during this period. Transactions occurring during this period, which are determined by the court to have been carried out with no consideration or to have been undervalued or to be detrimental to the creditors (where the counterparty knew or should have known of the debtor’s insolvency or being in cessation of payment) will not be enforceable against other creditors and may be unwound, unless court authorisation for the transactions is obtained. Given the above, during uncertain economic times, related party transactions and potential ‘preferred transactions’, including those with shareholders or creditors, will need to be examined closely by directors to ensure they are executed on an arm’s length basis in order to avoid the potential risk of clawbacks by the UAE courts.

Back to contents

No.	Question	Answer
8.	Is there an obligation in case of financial difficulties to convene a shareholders' meeting and. if so, at what stage of financial difficulties?	If a company's losses reach half of its capital, or half of its issued share capital in the case of a JSC, the directors must refer the issue of dissolution to a shareholders' meeting and a resolution to dissolve the company can be passed by the same majority required to change the memorandum of association. If the losses in an LLC reach 75 per cent of its capital, shareholders holding only 25 per cent of the capital may request dissolution. Failing to call such shareholders' meeting may result in the chairman (and where there is no designated chairman, the directors) of the company being liable to pay a fine of between AED50,000 and AED1,000,000 (Article 344 of the CCL). The initiation of either of the processes set out in the answer to question 9 requires a resolution to that effect from the extraordinary general assembly of the shareholders.
9.	Is there an obligation at some stage to file for bankruptcy or other statutory insolvency protection regimes?	A company will be insolvent under the Bankruptcy Law if it ceases to make payments of due debts at maturity for more than 30 consecutive business days as a result of its unstable financial standing (the **Cash Flow Test**), or has assets that are insufficient at any point in time to cover its 'payable obligations' (current liabilities) (the **Balance Sheet Test**). According to the Bankruptcy Law, a company (following a decision to that effect from its extraordinary general assembly) facing financial difficulties: (a) can voluntarily file, pursuant to Article 6(1) of the Bankruptcy Law, for the commencement of the formal process of preventative composition when the company is solvent and has not failed either the Cash Flow Test or Balance Sheet Test; and (b) must mandatorily file, pursuant to Article 68(1) of the Bankruptcy Law, for the formal process of a restructuring scheme or liquidation where the company has failed the Cash Flow Test or Balance Sheet Test. It is not entirely clear from the Bankruptcy Law when an application must be made. A conservative approach would be to assume that this should be done as soon as practicable following the occurrence of the relevant event described in limb (b) above. That said, we consider that directors of a company should as soon as possible make the shareholders aware of this but the company is not obliged to file immediately upon the failing of the Cash Flow Test or Balance Sheet Test. Instead, the company should have some latitude on when to file, noting the duties of directors discussed above. It may be that continuing to trade could be in the best interests of the company's creditors (for example, if additional revenues are expected further down the line). The critical point is to ensure that any decisions of the directors and shareholders to that effect are taken for the right reasons, with the interests of the company's creditors in mind. Directors should also ensure there is an audit trail for such decisions being made so that they can be referred to in the case of any question over board decisions (the importance of good corporate governance is referenced in other responses in this note). However, the Bankruptcy Law is not a model of clarity on this point and it is possible to argue the contrary to the above. What is clear, however, is that any flexibility around the timing of filing is limited. For instance, it would be difficult to argue that a company may not file when there were limited prospects of improving its financial position for the benefit of its creditors.

Back to contents

No.	Question	Answer
10.	Are there special liability risks in respect of certain debts, such as tax debts, social security payments, and pension contributions?	The Bankruptcy Law does not provide special liability for specific categories of debts.
11.	Are the liability risks of the directors collective (ie the whole board is responsible/liable) or individual? On what grounds can a director exculpate themselves from other directors' acts or omissions?	In the UAE, a single person (a director) may manage an LLC. Alternatively, a board of managers (which is akin to a board of directors) may manage an LLC. A JSC, however, must be managed by a board of directors. All directors are liable if the fault occurs as a result of any resolution adopted unanimously, but if the resolution was adopted by a majority, the dissenting minority are not liable if their objections were entered in the minutes of the relevant meeting. Even if a director is absent from the meeting at which the resolution was adopted, that director will not necessarily escape liability unless they can prove that they were not aware of the resolution, or that they were aware of it but were unable to object to it. An action for damages in respect of loss suffered by the shareholders arising from errors of the directors may be initiated following a shareholders' resolution or by a liquidator. Even if the directors' actions have been ratified by the general assembly meeting, an independent shareholder may still sue the directors within one year of the date of the meeting. Upon the expiry of the one-year period, any proceedings against the directors will become time barred if the actions leading to the proceedings were previously ratified by the shareholders. However, if the action amounts to a criminal offence, the directors may be sued at any time.
12.	Are there specific actions against directors under bankruptcy law?	Breaches of the Bankruptcy Law may result in civil and/or criminal liability for a director of a company. The below sets out a high-level summary of the sanctions that directors may face: (a) Civil sanctions Where a company is declared bankrupt, the bankruptcy court may impose civil sanctions on the company's directors if, within the two years preceding the date of initiation of a formal process of preventative composition, restructuring scheme or bankruptcy procedures (the **Bankruptcy Procedures**), the company has entered into certain types of transactions. Broadly speaking, this applies where the company has entered into transactions at less than market value or transactions which prefer individual creditors to the detriment of other creditors. The bankruptcy court may also impose civil sanctions on directors in circumstances where the assets of a bankrupt company are insufficient to cover 20 per cent of its debts.

No.	Question	Answer
		(b) Criminal sanctions Criminal sanctions may be imposed on directors of a company either: (a) after the initiation of Bankruptcy Procedures; and/or (b) after the company is declared bankrupt. For these purposes, the Bankruptcy Law defines a 'manager' as *"every person who works for a company and who plays an active role in the decision making process in the company, and this includes any person under whose instructions or directives the managers act."* These criminal sanctions require a higher level of culpability than any of the civil sanctions. Generally, in order for a director to be criminally liable, an element of fraud or deceit is required. As a result of this, these sanctions carry large fines (up to AED 1,000,000) and prison sentences (up to five years). The acts which are subject to the criminal sanctions include: (i) concealing, altering or destroying all or part of the company's records with the intention of harming creditors; (ii) embezzling or concealing part of the company's money; (iii) knowingly acknowledging debts which are not owed by the company, whether in writing, orally or other conduct set out under the Bankruptcy Law; (iv) fraudulently obtaining a scheme of preventative composition or a restructuring scheme of the company; or (v) misrepresenting the amount of the company's paid-up or subscribed share capital, or distributing fictitious profits beyond the amount permitted by the company's constitution or the amount permitted by law. The civil and criminal sanctions set out above will not apply to a director where it is proven that the director in question has not been involved or has not participated in the act giving rise to the civil or criminal offence, or who has objected to the decision leading to that activity. For the purposes of mitigating the risk of liability, it is critical that the board keep accurate minutes recording board discussions and to ensure that any reservations about a particular course of action are fully discussed and expressly reflected in the minutes.

Back to contents

No.	Question	Answer
13.	Are there specific duties of (or consequences for) shareholders or other group companies at some stage of the financial difficulties, such as an automatic subordination or conversion into equity of debt to parent companies?	UAE law does not have a general law of shareholder duties nor are there thin capitalisation rules. There is no specific concept of equitable subordination. The corporate veil may be pierced in certain circumstances. Most relevant for these purposes is where a company is managed by one or more of its shareholders. Such shareholders could be held jointly or severally liable for the company's debts and liabilities if the company is declared bankrupt, if the shareholders are responsible for: (i) taking decisions that led to the company failing the Cash Flow Test or the Balance Sheet Test in accordance with the provisions of the Bankruptcy Law; and/or (ii) knowingly approving transactions at an undervalue (as discussed in the responses to questions 2 and 7 above).
14.	Is there special legislation mitigating the liability risks of directors specifically in view of the Covid-19 crisis?	There has been no special legislation limiting the liability risks of directors in response to the Covid-19 crisis. The UAE Federal Government has, however, taken measures to attempt to relieve financial difficulties for companies, and therefore indirectly mitigate the problems that directors may face when assessing the financial outlook of a company. Directors should also ensure they are aware of legislative developments and government schemes that a company may utilise to alleviate circumstances of financial difficulty. In the UAE, an example of such government scheme includes the federal Targeted Economic Support Scheme (the **TESS**). TESS was introduced in March 2020 with the objective of attempting to provide temporary relief for a period of up to six months on outstanding loans for private companies affected by Covid-19. The relief applies to principal amounts and outstanding interest on loans obtained through banks in the UAE, the administration of which is managed by participating banks in the UAE.

Back to contents

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Back to contents

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