

Abstract

„... being a director is a privilege be earned every day...“

This quote was taken from a decision rendered by the Australian court in the case of *ASIC v Rich*, where a substantial pecuniary fine and other sanctions were imposed upon a board member, John David Rich, for breaches of his duties towards the company.

The present-day directors of companies hold the positions of modern monarchs; their powers would remain unlimited if not for the current regulations in place.

Members of the board of directors and supervisory boards are bound by many duties towards their company as well as other parties. They are not only liable for breaches of their own duties; however, under certain circumstances, they also guarantee for the obligations of the company.

Nevertheless, the number of cases involving the enforcement of their duties is, in general, surprisingly very low.

a) Objective

The primary objective of this thesis is to examine the duties and liabilities of directors and members of the supervisory board on the basis of theoretical concepts and compare them with international law. Whereupon appropriate solutions in respect of Czech legislation will be proposed on the basis of such comparative analysis.

b) Applied Methods

Comparative analysis was the primary technique applied when constructing this thesis; more specifically, the application of German and English legal regulations served as the main starting point. .

This thesis also draws on theoretical concepts that are applicable in terms of the liability of members of governing bodies. Notably the analysis of theories of corporate governance (the so-called shareholder and stakeholder value theories), which have a direct impact upon the concept of duties and responsibilities of directors and the supervisory board.

Moreover, this thesis draws inspiration from the strategic regulation theory, which is applied towards the evaluation of liability and searching for the ideal model of sanctions.

In addition, empirical results from several international studies on this issue were used in evaluating the implementation of damage compensation practices.

c) Subject-matter

This work concentrates on the delineation of the position of members of the managing and supervisory boards towards the company while at the same time applying corporate governance theories, their general duties and limitations of liability. In addition, the reasoning and circumstances of the (non)- enforcement of directors' duties are analyzed as well as an examination of optimal model for sanctions. .

The first part explores the various corporate governance theories. These theories put forth basic conceptual insight concerning the relations amongst the directors, shareholders and other parties (stakeholders). The *shareholder value* model perceives the company as solely providing a contractual framework for relations between directors and shareholders. The only legitimate goal of the company is to satisfy the interests of the shareholders, *i.e.* by achieving profit. This perception is in stark contrast to the *stakeholder value* model, which perceives the company as a center of relations between the various stakeholders. The main goal of the company is to achieve profit as well as to observe the interests of the various stakeholders while doing so. At present the *enlightened value* model has become the predominant model, which represents a compromise between the abovementioned theories. The members of governing bodies have a duty observe the interests of all stakeholders, however, the persisting main goal of the company is achieving profit.

On the basis of these theoretical concepts of companies and their interests, greater in-depth analysis can be carried out in respect of the basic duties and responsibilities of members of the board of directors and supervisory board. Such fundamental duties are comprised of acting in the best interests of the company, duty of due care, as well as duty of confidentiality and non-competition.

When analyzing the obligation to act in the best interests of the company, it is worthy of putting considerable attention upon "the interests of society". Interpretation of this concept is dependent upon many factors, and in exploring this question, its analysis is largely based upon the theories of corporate governance and taking into account the overall legal culture. Amongst these factors, and as far as Czech law is concerned, such factors include *e.g.* the impact of EU legislation , structure of the respective financial market, protective legislation, historical and cultural roots, etc. . By drawing upon the basis of these varied factors the question can be examined as to which corporate governance theory is predominant in Czech law.

In the case of the general duty – duty of care – is examined with respect to the interpretation

of the term “care of a diligent manager” and the corresponding test of fulfillment of this requirement. An important aspect of this obligation is also the method used by the courts in assessing compliance with the obligations of due managerial care. The principle of the business judgement rule pertains to the most important aspects of this duty as it provides a “safe harbour” for the directors, whereby they are protected and insulated from any potential liability and responsibility in connection with business decisions. So far this rule has not been confirmed by the Czech courts, however, its refutation would have far-reaching negative consequences for the directors of companies.

The duty of confidentiality is examined in respect of its scope. In examining this question, it is necessary to consider the specific circumstances of the case and to determine whether the so-called confidential information is publicly available and whether it is in the interest of the company to conceal such information. The obligation to ensure confidentiality is given a concrete shape, in particular, as regards dealings with suppliers, customers and competitors. In this context, as in the example of screening companies (so-called *due diligence*) the issue is examined concerning the potential illegal exchange of information between competitors and the associated risk of a cartel.

The last fundamental duty to be analyzed is non-competition. The function of this duty is to protect the company against unfair dealings of the directors and to prevent directors from using all their time and effort for purposes other than the exercise of their functions. In connection with this obligation, the scope of this duty and the nature of sanctions and penalties for its violation are compared with its counterparts in both German and English law.

The debate concerning the general duties of members of the board of directors is concluded with an analysis from the standpoint of the duties of the supervisory board members. Despite the different nature of the duties of members of the board and supervisory board, their position towards the company is largely identical *i.e.* they owe the same general duties towards the company. In addition, they have specific duties that follow from their supervisory role. One of the most important aspects of their duties is that of claiming damage compensation on behalf of the company towards members of the board of directors.

The following section deals with the possibilities of preventing the risk of liability for damage caused to the members of the board of directors or the supervisory board. There are several ways in which the directors may prevent and/or hinder the application of any damages brought about against the company’s assets. This section deals with the possibilities of preventing damage, approval by the general meeting and the insured liability of a third party.

The final section deals with the enforcement of directors' duties and claiming for damages against directors for breaching their duties. This section is introduced with a debate on the need for regulation in the area of corporate governance with particular emphasis on the liability of directors. The section further examines the ideal model of sanctions to be imposed for the breach of directors' duties.

Based on this theoretical interpretation, the treatment of claims and enforcement against members of governing bodies in different jurisdictions is analyzed. This section also deals with pinpointing the reasons for the low number of complaints issued and the potential starting points for altering this figure. Various solutions are also put forth as regards Czech legal regulatory framework on the basis of a comparative analysis with the enforcement regulatory framework in common law countries.

d) Contribution of the work

The primary contribution of this work lies in the analysis of corporate law and doctrine, which have yet to be thoroughly examined by Czech legal doctrine. Especially, the analysis of corporate governance theories from the standpoint of Czech law and a comparative analysis of the regulatory framework and practice in the area of enforcing directors' duties are of beneficial use to the Czech corporate doctrine. Further topics which have not previously been examined in-depth, but which are explored in this work include the duties of members of the supervisory board as well as the duty of confidentiality from the standpoint of competition law.

e) Keywords

Liability, responsibility, obligation, the board of directors, supervisory board, theory of corporate governance, shareholder value, stakeholder value, a duty to act in the interests of company, the duty of loyalty, duty of due managerial care, confidentiality, non-competition, limitation of liability, insurance, compensation, shareholder action, enforcement, claims.