

PLUS International Conference 2010 The Top 10 Non-US-Jurisdictions Based Upon Maturity and Activity

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Introduction:

During my participation on a panel of the 2010 International PLUS Conference, I was asked to list the top 10 countries, aside from the US, which had mature systems in place to address the liabilities of corporate directors and officers. The following is my list with justification, including a description of three up-and-coming jurisdictions. Some of you may recall that I included Switzerland and Spain on my original list, which are omitted here. As respect to Spain, I believe that given its current economic problems, D&O liability issues will take a back seat to issues affecting its national interest. With respect to Switzerland, it's my sense that although Switzerland is a mature jurisdiction, most of the corporate liability activity we have seen to date, relates to financial institution losses. The following list includes an update of recent events in the jurisdictions discussed.

1. Australia

- a. *The Australian Securities and Investments Commission Act 2001 (ASIC Act)* provides for a right of civil recovery for “[a] person who suffers loss or damage by conduct of another person that contravenes a provision of **Section 12DA** of the Act.” The **ASIC Act** “provides for compensation as well as other orders designed to prevent or reduce such loss.” These “actions may be brought by ASIC on behalf of individuals or by individuals on their own behalf.” Individuals can also commence class actions, under the provisions of Part IVA of the **Federal Court of Australia Act 1976**, which provides that if seven or more investors have suffered loss, and their claims arise out of the same, similar or related circumstances and give rise to a substantial common issue of law or fact,

then a proceeding may be commenced by one or more of those persons representing some or all of them.

(“Australian Securities and Investments Commission Act 2001”, Commonwealth Consolidated Acts, AustLII, Oct 30, 2010)

- i. In the case of *Campbells Cash & Carry Pty Limited v. Fostif Pty Ltd. (August 30, 2006)* the Australian High Court validated the involvement of **litigation funding** resulting in the payment of litigation expenses by nonparties. In return, the **litigation funder** receives a percentage of the settlement amounts. Corporations like IMF (Australia) Ltd., which is a publicly listed company, are increasingly providing funding for Australian class actions.

(Campbells Cash & Carry Pty Limited v. Fostif Pty Limited [2006] HCA 41 (August 30, 2006))

- ii. A Sampling of Australian Securities Class Action Settlements:

<u>Company Name</u>	<u>Amount</u>	<u>Date Settled</u>
1. <i>GIO Australia Holdings</i>	AUD \$112 million	August, 2003
2. <i>Harris Scarfe Holdings</i>	AUD \$3 million	October, 2006
3. <i>Telstra Corp.</i>	AUD \$5 million	December 2007
4. <i>Aristocrat Leisure</i>	AUD \$144.5 million	August 2008
5. <i>Australian Wheat Board</i>	AUD \$39.5 million	February 2010

(“Trends in Australian Securities Class Actions: January 1, 1993 – 31 December 2009”, Greg Houston, Svetlana Starykh, Astrid Dahl, and Shane Anderson, NERA, May 2010)

- b. Under **Section 588G** of the **Corporations Act of 2001** and other key statutory provisions, a director of a company is under a duty to prevent the company from incurring debts *when it is insolvent*. Failure to do so will give rise to possible civil penalties and civil claims by liquidators against *de jure* directors as well as *de*

facto or “shadow” directors, and others who took part in the company’s management. The liquidator is entitled to seek recovery on behalf of the creditors for the losses sustained when the company incurred debts while insolvent.

2. Canada

- a. In Canada, securities class actions are governed under provincial law. The primary venue for Canadian corporate law is Ontario. **Reliance** is presumed under **Sections 130 and 131**, dealing with public offerings and **Sections 138.3(1) and 138(2)** addressing secondary market disclosures of the **Ontario Securities Act (OSA)**, and the burden of rebutting the presumption rests with the defendants.
 - i. **Section 130** of the **OSA** applies to market sales and provides that, where a prospectus or any amendments contains a misrepresentation, a purchaser who purchases a security offered by such prospectus ... has, *without regard to whether the purchaser relied on the misrepresentation*, a right of action for damages against directors and others specified in the section.
 - ii. **Section 131** of that **OSA** applies to public offerings and provides that, where a take-over bid circular, or any notice or variation in respect of the circular, contains a misrepresentation, a security holder may, *without regard to whether the security holder relied on the misrepresentation*, elect to exercise a right of action for rescission or damages against such persons offering the securities.
 - iii. **Section 138.3(1)** of the **OSA** applies to the release of documents, and provides that where a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer’s security...has, *without regard to whether the person or company relied on the misrepresentation*, a right of action for

damages....

- iv. **Section 138.3(2)** of the **OSA** applies to public oral statements and provides that where a person with actual, implied or apparent authority to speak on behalf of the responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security...has, *without regard to whether the person or company relied on the misrepresentation*, a right of action for damages.

- v. Before a securities class action can proceed in Canada, a court must first grant *Leave to Proceed*. Leave may be granted pursuant to **Section 138.8 (1)**, upon a finding by the court that:
 - 1. The action has been brought in good faith;
 - 2. There is a reasonable possibility that the action will be resolved at trial in plaintiffs' favor.

(Securities Act, R.S.O. 1990, Chapter S.5, Service Ontario e-Laws)

- b. On December 14, 2009, in the case of Silver vs. Imax, Judge Rensburg, of the Ontario Superior Court of Justice, granted Leave to certify a global class to assert claims under section 138.3 of the **OSA**. Judge Corbert affirmed this opinion on February 14, 2011. The impact of both decisions is that Plaintiffs need only establish a minimum evidentiary basis for a certification order. The decisions are noteworthy in establishing that a court may apply a low threshold in granting *Leave to Proceed* and in giving Canadian courts the authority to certify a global class of shareholders.

(Silver v. Imax Corporation, "Reason For Decision: Rule 21 Motion and Motions for Certification", Ontario Superior Court of Justice, Court File No. CV-06-3257-00, Date 12, 14.2009 and "Decision on Motion For Leave To Appeal To The Divisional Court", Dated 02,14,2011)

vi. A Sampling of Canadian Securities Class Action Settlements:

<u>Company Name</u>	<u>Amount</u>	<u>Date Settled</u>
1. <i>Southwestern Resources</i>	CD \$15.5 million	February 2009
2. <i>CPShips</i>	CD \$12.8 million	October 2009
3. <i>Aurelian Resources</i>	CD \$19.4 million	November 2009
4. <i>CV Technologies</i>	CD \$7.1 million	August 2010

(Suskins: The Law Firm. Class Actions: "Securities > Resolved Actions", <http://www.classaction.ca/index.aspx>)

("Trends in Canadian Securities Class Actions: 2009 Update New Wave of Canadian Securities Class Actions Reaches the Certification Stage", Mark Berenblut and Bradley Heys, NERA, January 2010)

("Trends in Canadian Securities Class Actions: 2010 Update Climbing to New Heights—the Number of Active Cases is at its Highest", Mark L. Berenblut, Bradley A. Heys, and Tara K. Singh, NERA, January 31, 2011)

- b. Canadian law provides for an "**Oppression Remedy**," which has been asserted against corporate directors and officers in the context of bankruptcy proceedings. Oppression is a civil remedy based on equitable principles. **Under Section 241 of the Canada Business Corporations Act**, the **Oppression Remedy** provides that where directors' business or affairs have been exercised in a manner that is prejudicial to or unfairly disregards the interests of any security holder or creditor, the court may issue a variety of equitable and legal orders of relief, including payment of the claimant's costs. The court need not find fault to provide an oppression remedy; it is sufficient that a stakeholder's interests has been prejudiced.

3. England

- a. The passage of the **Companies Act 2006** codified the common law duties of directors. The Act lists seven duties. They are: (1) to promote the success of the

company; (2) to exercise reasonable care, skill and diligence; (3) to exercise independent judgment; (4) to act within prescribed powers; (5) to avoid conflicts of interest; (6) to declare interests in proposed transactions; (7) not to accept benefits from third parties. The statute also eases the requirements for derivative actions and allows the filing of a derivative suit by a shareholder on behalf of the company against directors and/or other persons for negligence, breach of duty, or breach of trust.

(“Directors’ Duties Under the Companies Act 2006 A Summary”, By Chris Biggs, Lightfoots LLP, August 2010, <http://online.lightfoots.co.uk>)

A Sampling of recent cases filed under the New Companies Act:

<u>Company’s Name</u>	<u>Status</u>	<u>Date of Ruling</u>
1. <i>Franbar Holdings Ltd.</i>	Dismissed	2008
2. <i>Southern Landlords Assoc.</i>	Dismissed	2009
3. <i>Westrip Holdings Ltd.</i>	Dismissed	2009

Judges acting as gatekeepers have thus far typically refused permission to allow the case to continue, based upon the reasoning that a hypothetical director would not have sought to continue such action.

(“Recent Cases on Derivative Actions Under the Companies Act 2006 – Are Fears of ‘Activist Shareholders’ Unfounded”, By Emma Cameron, Matthew Arnold & Baldwin LLP, <http://www.mablaw.com/2010/01>)

- b. Pursuant to the **Financial Services and Markets Act of 2000**, the **Financial Services Authority (FSA)** may bring civil cases in UK courts seeking such remedies as: injunctions against future conduct, orders directing disgorgement of ill-gotten gains, restitution to victims for their personal losses, the freezing of assets, winding-up orders closing institutions, and disposition of an individual’s assets through a bankruptcy order. The FSA may also bring criminal actions with

penalties that include fines and imprisonment of up to seven years.

- c. Under **Section 214 of the Insolvency Act of 1986** and other key statutory provisions, a liquidator may request that the court order directors to contribute toward the shortfall of the company's assets if such directors knew, or ought to have concluded, that there were "no reasonable prospect(s)" of a company avoiding insolvent liquidation yet continued to do business. Under **Section 214**, dishonest conduct is not required. If the directors are found liable, damages are paid to the liquidator for distribution among the company's creditors. Two defenses are available: Directors may prove that they did not know, and could not have been expected to realize, that there were no reasonable prospects of avoiding insolvency, or they may prove that they took every effort to minimize the potential loss to creditors.

("Legal Developments for Directors and Officers in the United Kingdom", Andrew Barton, Trove Webster, Allen & Overy, LLP, Executive Risks: A Boardroom Guide 2010/11, Willis)

- d. Other key legislative provisions are: **The Corporate Manslaughter Act of 2008 (CMA)** and **The Bribery Act of 2010 (BA)**. The **CMA** replaced the common law principle of manslaughter. Although the Act does not apply to individuals, in at least one instance, *Safeway Stores Limited and Others v. Simon John Twigger and Others (2010)*, third party claims were asserted against former directors and employees for gross negligence, breach of fiduciary duty and negligence. The **BA** was enacted in April 2010 and is similar to the US Foreign Corrupt Practices Act. The **BA** affects UK nationals, residents and corporate bodies and provides for extra-territorial jurisdiction, where only part of the offense was committed in the UK. The **BA** has two general offenses.
- i. Offering, promising or giving financial or other benefits;
 - ii. Requesting, agreeing to receive or accepting a financial or other advantage.

It extends to bribery of a foreign public official and failure of a commercial organization to prevent bribery. One who has acquiesced to bribery could also be found guilty under the **BA**. Penalties include disqualifications from serving in a directorship, imprisonment and fines for individual directors and officers and severe fines for convicted corporations.

(“Corporate liability: The Bribery Act 2010”, Rob Elvin and David Williams, Review: Commercial and Dispute Resolution, April 2010)

4. France

a. In 1994, France established the right to bring joint representative actions for securities investors, allowing multiple individuals who suffered losses arising out of a common set of facts to sue the entity collectively, through an investors’ organization. French statutory law also recognizes derivative actions (“**ut singuli**”) with recovery directly benefiting the corporation. In addition, several criminal/regulatory cases have been brought, with parallel civil proceedings for the benefit of individual shareholders. Two examples appear below:

i. The *Sidel* case was first decided in 2006. In *Sidel*, more than 700 shareholders represented by two investor organizations joined a criminal proceeding brought by the French market regulator (**COB**). **COB** took action against the entity, which manufactures food and beverage packaging machines, and the chairman and CEO for making false financial statements. The proceedings resulted in findings that the CEO and two director defendants disseminated false and misleading accounts from 1998 through 2000. The three individuals were convicted and sent to prison, and the shareholders were awarded €1.9 million, representing a fixed damage amount of €10 per share, which was affirmed on appeal.

*(“Shareholders versus Directors: The New Rules of the Game”, Philippe Bouchez El Ghozi & Sylvie D’Arvisenet, Stay Current, A Client Alert From Paul Hastings, July 2010)
(Jones Day, “Class Actions in Europe: Reality or Myth?”October 2009)*

- ii. Two suits were brought in January 2004 before the Paris Commercial Court by certain shareholders of *Rhodia*:

In the first suit, an individual brought an *ut singuli* action challenging the terms and conditions of Rhodia's acquisition of Albright & Wilson. The plaintiffs demand that the defendants be ordered to pay the company €925 million as compensation for the alleged harm the company suffered. The second suit charges that information concerning Albright & Wilson's environmental risk and deferred tax assets disclosed to the public were inaccurate and misleading. Both proceedings were adjourned due to the existence of a criminal investigation conducted by examining magistrates of the financial division of the Paris Court of First Instance concerning the same facts. On January 25, 2006, Rhodia decided to join the criminal investigation as a plaintiff claiming damages ("*partie civile*"). The investigation is still in progress, with the expectation that shareholders will join the criminal investigation as facts obtained by the examining magistrate become known.

(*Rhodia*: "Consolidated Financial Statements Year Ended December 31, 2009", Page 70.)

- b. Under **Article L.651-2 of the Commercial Code Bylaw No. 2005-845 of July 26, 2005**, where a corporation's assets prove insufficient to cover its outstanding liabilities, any *de jure* or *de facto* manager may be held personally liable to make up the shortfall based on a finding that management fault contributed to the insolvency. A director may be held liable for the full amount of the insufficiency of assets even though he or she was only partially at fault. *Nasa Electronique, Cass. com., Jan. 3, 1995, Bull. July 1995, § 84, at 266*, decided by France's highest court, established that a permanent representative of a legal entity that held only 5 percent of the voting shares of a corporation could be held jointly and severally liable to pay for the entire insufficiency, despite having only caused a modest portion of the damages.

5. Germany

- a. In Germany there are two corporate structures, *limited liability companies* ('GmbH') and *stock corporations* ('AG'). The GmbH is the most common corporate structure in Germany. Its board consists only of managing directors – non-executive members do not exist under German law. Managing directors are required to apply the care of a prudent businessman in the conduct of his office. In addition, the business judgment rule applies to managing directors of GmbH companies.

(“Legal Developments For Directors and Officers in Germany”, by Wolfgang Schaller, Dirk Lorenz and Taylor Wessing, Executive Risks: A Boardroom Guide, 2010/11)

- b. German AG corporations, typically function under a dual board structure where the *Management Board* is responsible for managing the company and the *Supervisory Board* oversees and appoints the members of the Management Board. The *Management Board* and *Supervisory Board* are expected to comply with the rules of proper corporate governance. If a board member fails to exercise due care, which is comparable to the diligence of a prudent *Managing* or *Supervisory* director, he/she is liable to the company for damages. If members of the *Management Board* or *Supervisory Board* reasonably believe that they were acting in the best interests of the company (Business Judgment Rule), a breach of duty will not be established. When *Managing Directors* breach their duty and incur financial loss to the corporation, the *Supervisory Directors* are obligated to sue the managing directors responsible for incurring such loss. This has been identified as **Insured vs. Insured** claims.

(“Legal Developments for Directors and Officers In Germany”, By Wolfgang Schaller, Dirk Lorenz, Taylor Wessing, Executive Risks: A Boardroom Guide 2010/11, Willis)

- c. An example of a German **Insured vs. Insured** claim *Lufthansa* incurred significant losses from negligent acts by the former management of *LSG Holding AG* in connection with the ratification of a long-term catering agreement with

SAS. Arbitration involving the D&O carrier and indirectly the *Managing Directors* was pursued and completed. The arbitrators found that the D&O policy covered EUR 153m of the first layer of the damage. Part of the primary layer of coverage and a further EUR 102m in the second layer are the subject of litigation, to determine additional exposure and coverage.

(Note 46 to the Consolidated Financial Statements: "Contingencies and Events After the Balance Sheet Date", 2008 Lufthansa Annual Report)

- d. In 2005, as a result of the *Deutsche Telekom* litigation (*DT*), Germany introduced the **Capital Investor Sample Proceedings (KapMuG)**, which allows for a class action like proceeding where there are common issues of law and fact in cases of misleading disclosures. The **KapMuG** requires a minimum of 10 claimants to file suit within 4 months. The Court of Appeal (*Oberlandesgericht*) hears the common issues and the judgment is binding on all claimants. On February 15, 2007, the Higher Regional Court of Stuttgart rendered the first **KapMuG** decision dismissing the lawsuit of one of several investors who alleged that *DaimlerChrysler AG* failed to timely announce the resignation of its CEO. The ruling resulted in the dismissal of all similar investor claims. The original legislation included a "sunset" provision effective November 1, 2010. However, the German parliament extended the **KapMuG** until 2012.

("Class Actions and Mass Actions in Germany", IBA Legal Practice Division: Litigation and Committee Newsletter, September 2007)

("German Securities Class Actions: Status Quo Prevails", Luke Green, Securities Litigation, November 5, 2010)

- e. Generally in the context of German insolvency liability statutes, only companies, and not their managing directors, can be liable for wrongful acts. However, in at least one case the managing directors of a corporation that was insolvent were found liable for granting loans without performing sufficient solvency and collateral checks. More commonly, under **Section 15a of the German Insolvency Code**, a *Managing Director* can be held personally liable in tort if he or she is proven to have delayed the filing of a corporate bankruptcy petition.

The insolvent company or its creditors can claim damages for payments that were made by the managing directors when the company was in fact insolvent, preceding the filing of bankruptcy.

6. Hong Kong

- a. **Hong Kong Exchanges and Clearing Limited (HKEx)**, of which the **Stock Exchange of Hong Kong** is an affiliate, operates securities and derivatives markets as well as clearing houses for those markets. **HKEx** was listed in Hong Kong in 2000 and is now one of the world's largest exchanges based on the market capitalization. In 2010, it raised the largest aggregate amount of IPO equity funds of any equities market in the world and was the third largest market of total equity funds raised. Therefore, although Hong Kong has not been the source of extensive litigation activity, it is a very established and sophisticated commercial market.

(HKEx: "About HKEx > Corporate Information > Company Profile", website)

- b. Directors' duties in Hong Kong primarily arise from principles of equity and common law. Under classic common law a principle's duties are typically owed to the corporation rather than to individual shareholders. The primary duties are to exercise care, skill and diligence. Notwithstanding this common law framework, two statutory provisions that govern corporate and director and officer liability are the **Corporate Ordinance (CO)** and the **Securities and Futures Ordinance (SFO)**. A **New Companies Bill** is being developed and was introduced in the Legislative Counsel on January 26, 2011. The **Companies Bill** will focus on four main objectives: "... enhancing corporate governance, ensuring better regulation, facilitating business and modernizing the law."

("Chapter 9 Common Law Derivative Actions", Standing Committee on Company Law Reform, Financial Services Branch of the Financial Services and the Treasury Bureau of the Government of the Hong Kong Special Administrative Region, November 2009)

("Hong Kong Gazettes New Companies Bill", Mary Swire, Law And Tax News.com, Hong Kong, January 19, 2011)

- c. On July 15, 2005 the shareholder remedies-related provisions under the **CO** came into existence. **Section 168BC of the CO**, as amended, provides that: “a member of a specified corporation has a statutory right to bring proceedings on behalf of the corporation or intervene in proceedings to which that corporation is a party”. This statutory provision was interpreted to provide that a shareholder of a company might apply to the Court for leave to bring derivative proceedings on behalf of the company under **Section 168BC (3) of the CO**.

(TSANG WAI LUN WAYLAND suing on behalf of himself and on behalf of all the shareholders of Grand Field Group Holdings Limited, HCA300/2009, February 2009)

(“Hong Kong Securities Law – Can A Shareholder Bring Proceedings On Behalf Of The Company”, Angela Wang & Company, October 12, 2009)

- d. The **SFO** is both a civil and criminal regime, which regulates market misconduct. Under the **SFO** a court can impose fines or imprisonment. According to **Section 214**, a court may also issue orders disqualifying a person from serving as a company director or participating in managing a company for up to 15 years. Further, it provides that a person who has suffered a pecuniary loss as a result of another person’s misconduct may petition the court to award compensation. Its investigative arm is the **Securities and Futures Commission (SFC)**. It has the power to compel production of documents and interview witnesses. Recently, the **SFC** has focused on criminal prosecutions for acts of misfeasance and has secured numerous criminal convictions for insider trading. For example in April 2007, the **SFC** successfully prosecuted *Daido Group Limited (Daido)* and its chairman Mr. To Shu Fai for making a false or misleading statement to the Stock Exchange of Hong Kong. Both Daido and Mr. To appealed their convictions, which were upheld in the High Court.

(“Hong Kong: Risks Facing Directors And Officers In Hong Kong and China”, Anthony Sassi, Barlow Lyde & Gilbert, August 2, 2010)

- e. **Section 275** of the **CO**, addresses the issue of *fraudulent trading*, when a company is in the process of being wound up. It is not commonly used because of the high burden of proof required. It provides that:

(1) If in the course of the winding up of a company 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, the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(“Company Ordinances – Section 275: Responsibility of directors for fraudulent trading”, Hong Kong Ordinances, June 30, 1997)

- f. **Section 276** is commonly known as the *misfeasance provision*. When a company is in the process of being wound up, if in the course of an investigation, the court determines that any past or present officer or anyone who participated in the formation or promotion of the company is guilty of misfeasance or breach of duty, it may order him to pay restitution in the form of money or property, plus interest, or to contribute such sums to the assets of the company by way of compensation as the court thinks fit. This provision is also rarely used.

(“Hong Kong”, Declan McDaid, Directors' Liability and Indemnification: A Global Guide, Consulting Editor Edward Smerdon, 2007 [for both “e” and “f” above])

7. Italy

- a. Since the collapse of *Parmalat*, Italy has introduced legislation reforming corporate and securities laws, and regulatory agencies have been provided stronger investigative and sanctioning powers. The Italian parliament adopted

the **Investor Protection Act** effective January 12, 2006, which is a set of laws designed to enhance the rights of minority investors, by establishing accountability of corporate directors and officers, and requiring an adequate flow of financial information. **Article 140-bis** of the **Italian Consumer Code** became effective, January 1, 2010, and establishes a consumer class action proceeding that can extend to false statements in the issuance or trading of securities.

- b. Some of the characteristics of this proceeding:
 - i. Driven by not-for-profit consumer associations.
 - ii. It is an opt-in proceeding.
 - iii. Every individual consumer is entitled to sue for the failure to provide goods and services.
 - iv. The consumers may give a mandate to consumer associations to sue on their behalf.
 - v. Only companies can be named in the proceedings, but foreign companies as well as Italian companies can be sued.
 - vi. It gives plaintiffs the ability to seek *10b-5* like damages.

- c. Between January 1, 2010 and August 31, 2010 there have been 6 consumer actions filed by associations against Italian companies and Italian subsidiaries of foreign companies.

<u>Consumer Association</u>	<u>Company Sued</u>	<u>Issue</u>	<u>Status</u>
1. Codacons	Intesa San Paolo	Bank Fees	Dismissed
2. Codacons	Unicredit	Bank Fees	N/A

3. Codacons	Voden Medical	Flu Vaccines	Declared Admissible
4. Codacons	British Tobacco	Tobacco	N/A
5. Unione Nazionale	Wecantour	Travel	N/A

(“Italian Class Actions Eight months In: The driving Forces”, Dr. Renzo Comolli, Dr. Massimiliano De Santis, and Dr. Francesco Lo Passo, NERA, September 15, 2010)

d. In December 2010 an Italian court in the city of Parma sentenced the former *Parmalat* CEO, Calisto Tanzi, to eighteen years in prison for his role in the *Parmalat* scandal. Mr Tanzi’s lawyers have already indicated that they will lodge an appeal with the Italian Supreme Court, so his conviction remains uncertain. However, Italian regulators have been successful in prosecuting criminal charges against fifteen other former *Parmalat* executives who all received jail terms. They have also secured compensation orders, which require the former executives to pay €2 billion towards a fund, to be distributed to the defrauded investors.

(“Parmalat: Former Executives Handed Long Jail Terms”, Dibbs Barker, Wendy Jacobs and Masi Zaki, Association of Corporate Counsel, December 14, 2010)

e. Upon bankruptcy, a company’s D&Os are automatically terminated from office. Liability stems from the violations of their responsibilities for actions carried out while the company was still in good standing. The bankruptcy receiver most frequently sues the company’s former D&Os for their alleged violations of **Sections 2485 and 2486 of the Italian Civil Code**. These sections provide that whenever the company incurs losses that reduce its net equity to less than the minimum statutory level, the company is automatically placed in liquidation unless the shareholders provide the necessary capital injection. In liquidation, directors become solely responsible for preserving the value of the company’s assets. Directors and officers often try to “save” the company by continuing its operations, but where the company ultimately declares bankruptcy, such actions constitute a *per se* violation of their duties to preserve the company’s remaining value.

8. Japan

- a. In 2005, the **Japan's Commercial Code** was streamlined, and new corporate governance measures were added. The revisions created greater transparency and more internal controls. Those controls include statutory provisions under the **Companies Act** of Japan. For example **Article 423 Japanese Companies Act** provides that where a director neglects his or her duties, the director will be liable to compensate the company for losses incurred as a result of such neglect. It provides a right of redress against company directors through shareholder derivative actions. Directors can avoid liability by establishing they had no knowledge of the wrongful act or that it constituted a statutory violation, which in itself was not negligent (*Supreme Court, 7 July 2000, Minshu Vol. 54 No. 6: 1767*). However, directors of large publicly held companies have a duty to establish and maintain a system of adequate internal controls, and the failure to establish or maintain such could constitute a breach of duty.

("Company Act - Overview", Kenichi Osugi, Transparency of Japanese Law Project, Kyushu University, 2006-2010)

A Sampling of Recent judgment of Japanese Shareholder Derivative Actions:

<u>Company Name</u>	<u>Judgment Amount</u>	<u>Date</u>
1. Daiwa Bank	US \$775 million	September 2000
2. Hokkaido Takushoku Bank	US \$12.15 million	January 2008
3. Duskin Co. Ltd.	US \$64.255 million	February 2008
4. Janome Sewing Ltd	US \$70.11 million	October 2008

("Legal Developments For Directors and Officers In Japan", Sephen Bohrer, Yuko Inoue & Hiroko Jimbo, Executive Risks – A Boardroom Guide 2010/2011, Willis)

b. In addition to derivative actions, the Japanese **Securities and Exchange Law (SEL)**, was revised in 2004 to include a provision for estimating damages relating to disclosures. This has the effect of lessening the plaintiff's burden of proving loss. Since the introduction of this statutory revision, there has been an increase in securities litigation and plaintiffs' judgments arising from misstatements. Two of the more significant judgments are against *LDH (formerly known as Livedoor Holdings)* and *Seibu Railway*, which were both decided in 2009 and resulted in judgments of 9.9 billion Japanese Yen (approx. US \$120 million) and 23.7 billion Japanese Yen (approx. US \$ 286.4 million). The method of determining damages is based upon the court's interpretation of the causal link between the drop in the company's stock price and the misrepresentation. Notwithstanding the above judgments, most of the recent misstatement cases involve emerging companies with small market caps and damages obtained have been limited. Liability would appear to apply to directors who make misrepresentations in connection with financial statements (**Commercial Code, Article 429[2]**). However, directors can avoid liability by showing an absence of negligence. There have also been a number of lawsuits against broker-dealers under this statutory provision.

("Trends in Securities Litigation in Japan: 2009 Updated", Makoto Ikeya and Satouri Kishitani, NERA, August 2, 2010)

c. The 2004 revisions of the **SEL** also resulted in a new regime of civil penalties, which have been assessed in cases involving the dissemination of misleading information, including misrepresentations in disclosure documents. The regulatory body responsible for issuing penalties is the **FSA Commissioner**, subject to the recommendations of the **Securities and Exchange Surveillance Commission (SESC)**. Civil fines and orders can be issued to both corporations and its employees, and have ranged from JPY 50,000 – to JPY 730,000 (US \$ 600 – US \$ 8,750). The **SEL** also extends to criminal charges, but such charges have been rarely asserted.

("Civil Fines Under the Securities and Exchange Law Take Hold". Sadakazu Osaki, Nomura Capital market Review, Vol.10 No. 1 , 2007)

9. Korea

- a. Historically, South Korea's Public Prosecutor's Office, and the Korean Fair Trade Commission (KFTC) have actively taken action against Korean public companies and its directors and officers. One such action was against the *SK Group*, South Korea's third-largest "Chaebol" (industrial conglomerates). The Public Prosecutor asserted that SK engaged in accounting manipulations and criminal proceedings resulted in the convictions of SK senior executives.

("Korea's Free market and Chaebol Reform", Joongi Kim, Asian Perspectives Seminar Series/ South Korea's New Generation: Politics & Social Change, Washington, D.C., May 5, 2003)

- b. South Korea enacted a securities class action proceeding in January 2004, which took effect on January 1, 2005. It is intended to enhance minority shareholder rights and increase corporate accountability. Like the US, the **Korean Securities Class Action Act (SCAA)** has an **Opt-Out** feature, so that shareholders who share common questions of law and fact are automatically included in the class, unless such shareholders elect to opt-out. The **SCAA** limits class actions to instances where fifty class members bring the action collectively and hold at least 0.01 percent of the total securities in the defendant corporation. The **SCAA** became fully functional on January 1, 2007 for both large and small cap public companies. Prior to the **SCAA**, shareholders could only maintain individual actions. The **SCAA** restricts class action lawsuits to shareholders seeking to recover losses from accounting and price manipulation, insider trading, fraudulent disclosure or non-disclosures in annual, semi-annual, quarterly reports and prospectuses relating to securities traded in the Korea Exchange (**KRX**). The right of discovery is limited, so investors may only be able to obtain select corporate documents. Few securities lawsuits were filed under the old legal proceeding, 18 cases in 2000 and 326 cases in 2004.

("Class Action the Korean Way", Asialaw, April 2004)

(“A Primer on Korea’s New Securities Class-Action Suit Law”, Financial Supervisory Service, <http://www.fss.or.kr>)

- c. In April 2009, *Seoul Investment* filed a lawsuit against *Jinsung* alleging that it suffered losses due to inadequate public disclosure of its financials. *Jinsung*, is a manufacturer of construction equipment parts, and trades on the Kosdaq, part of the **KRX** exchange. On December 18, 2008 *Jinsung* revised its quarterly report. In its disclosure, *Jinsung* acknowledged that it had omitted losses due to valuation of foreign exchange transactions and that it actually suffered a KRW 5.47 billion (US \$4,847,780) loss instead of a reported KRW 4.67 billion (US \$ 4,138,790) profit, during the third quarter of 2008. The *Jinsung* action is the first reported complaint under the **SCAA**.

(“Securities Class Action Landmark”, Inhak Lee, Jun Ki Park, [Asialaw](#), September 2009)

10. The Netherlands

- a. The **Collective Settlement of Mass Claims Act (“Wet Collectieve Afwikkeling *Massaschade*” [WCAM])** was enacted on July 27, 2005. Pursuant to the **WCAM**, the parties to a settlement agreement may request the Amsterdam Court of Appeals to declare the agreement binding on all interested persons. The Act applies to court-endorsed, collective, out of court settlements. The Act extends to citizens of the European Union, and arguably beyond. If the Court ratifies a settlement agreement, all claimants to the litigation are bound by its terms, unless an interested person timely submits an “opt-out” notice. The Court will refuse to declare the settlement agreement binding if, among other things, the settlement amount is unreasonable, or the petitioners have not sufficiently represented all interested persons. The Court has declared settlement agreements binding in five cases, three of which are securities class actions.

(“Recognition of U.S. Class Action Settlement in the Netherlands”, Rob Polak, Rudd Hermans, Marnix leijten, [Legal Alert:De Braw Blackstone Westbroek](#), June 28, 2010)

- i. On June 23, 2010 the Amsterdam District Court issued a seminal decision ratifying *Royal Ahold's* global settlement of a consolidated securities class action, venued in the U.S. *Ahold* agreed to pay USD 1.1 billion to a fund for distribution to investors who had purchased *Ahold's* shares or ADRs from July 30, 1999 through February 23, 2003. The Dutch court recognized the U.S. court's judgment approving a worldwide class settlement under U.S. law, barring any class members who, did not-opt out, from ever bringing a claim against the defendants anywhere in the world. In view of this decision and the **WCAM**, the Netherlands has become an attractive jurisdiction for settling non-US collective actions, including securities class actions. In January 2011, US lawyers acting on behalf of a specially formed foundation filed a claim against the Belgian company *Fortis*.

("The Netherlands: US Style Class Action Settlement Creates Alternative Forum for Resolution of Mass Disputes", Annemieke Handrikse & Simone Hoogeveen, www.vandoorne.com)

("Plaintiffs' Lawyers Peruse Non-U.S. Securities litigation Alternatives After Morrison", Kevin LaCroix, The D&O Diary, January 11, 2010)

ii. Other Dutch Securities Class Action Settlements:

<u>Company Name</u>	<u>Amount</u>	<u>Date Settled</u>
1. <i>Royal Dutch Shell</i>	US \$381 million	April 2007
2. <i>SCOR Holding</i>	US \$58.4 million	May2008 (Hearing Pending)

- b. Under **Section 2:138 of the Dutch Civil Code for Public Companies**, bankruptcy trustees have the exclusive right to invoke **personal liability of corporate directors of bankrupt corporations**. Personal liability is established where directors have engaged in obvious mismanagement, defined as "a grave mistake that exceeds an entrepreneurial risk". *Ceteco N.V.*, Dist. Ct., Utrecht, Dec. 12, 2007, JOR 2008/10, is a highly publicized Dutch case addressing

liability under its bankruptcy statutes. *Ceteco* filed for bankruptcy and the trustee brought action against its former directors. The court ruled that a principal cause of the bankruptcy was improper management. It found that management unreasonably accelerated corporate growth by acquiring several other companies. The directors were held personally liable for the “deficit in bankruptcy.” Although the underlying judgment was criticized as, being incorrect, a settlement was reached and the appeal proceedings were withdrawn.

THE UP AND COMING JURISDICTIONS

The following is a list of large economic powerhouses that are economically more powerful than most, if not all of the countries listed above. I created this second tier category to account for the fact that these countries do not yet have active shareholder constituencies or effective laws sufficiently promoting such non-governmental corporate governance safeguards.

11. Brazil

- a. Brazilian law provides for several types of corporate structures. The two most common types are the “*Sociedade Anônima*” (S.A.) and the “*Sociedade Limitada*” (LTDA). The **Brazilian Civil Code (BCC)**, enacted in January 2003, governs both corporate structures. The S.A. is the structure applicable to larger companies and is governed by one or two corporate boards, each with specific authority and responsibilities: the Board of Directors (“*Conselho de Administração*”), which is similar to the board of managing directors under German law; and the Executive Board (“*Diretoria*”), which is similar to German supervisory directors. An S.A. will typically have a formal audit committee. The duties of the audit committee include: (i) overseeing the directors and officers; (ii) evaluating the issuance of corporate securities; (iii) reporting any corporate misconduct; and (iv) analyzing the company’s financial statements, including its balance sheet and the annual report.

The LTDA applies to smaller companies and has only a single class of partners, known as “quotaholders” (“Shareholders”). Depending on the nature of the

corporation's objectives set forth in the Articles of Association, the LTDA may be a commercial enterprise ("sociedade empresária") or a non-commercial organization ("sociedade simples").

("Legal Developments For Directors and Officers in Brazil", by Elizabeth Leonhardt, and Richard Hawkins, Executive Risk: The Boardroom Guide 2010/11, Willis)

(Legal Guide: Business in Brazil, Coordinated by Durval de Noronha Goyos, Jr., 7th edition, 2008)

- b. The laws governing S.A.'s are found in the "**Corporations Act (Law No. 6.404/76)**", which contains provisions defining the duties of officers and directors of Brazilian companies. They include the *Duty of Diligence (Article 150)*, the *Duty of Loyalty (Article 155)*, and the *Duty to Inform (Article 157)*. Directors must comply with the provisions contained in the statutory laws, the by-laws and regulations in force. As a general rule, directors and officers will not be held jointly liable for actions undertaken on behalf of the company, in the regular course of their duties as managers. However, under **Article 158**, officers shall be deemed individually liable to the company and to third parties when one acts: "I - ... with fault or fraud"; "II - contrary to the provisions of the law and bylaws." An officer shall be deemed personally liable for any damages resulting from false statements in the performance of one's corporate obligations, allowing plaintiffs to "pierce the corporate veil" transferring the obligations and liability of the corporation onto individuals. Generally, individual officers can be held personally liable for a broad range of matters, including labor, environmental, consumer, antitrust and tax related issues.

(Regulation of Interest to Foreign Investors, <http://www.cvm.gov.br/ingl/regu/regu.asp>.)

- c. Officers and directors of listed companies must also comply with "**The Securities Act (Law No. 6.385/76)**" and the rules and regulation issued by the **Brazilian Securities Exchange Commission (Comissão de Valores Mobiliários [CVM])**. The statute includes a provision requiring the protection of securities

holders and investors from fraud or manipulation intended to create artificial value of any securities traded, including full disclosure of all material information.

CVM's rules regulate and define the degree of securities violations, as well as the penalties applicable to each case. In addition to civil and criminal liability, the **CVM** may assess penalties against officers and directors of listed companies. The monetary penalties available to **CVM** may not exceed the higher of the following amounts: (i) R \$500,000; (ii) 50% of the value of the irregular transaction; or (iii) three times the amount of (a) the illegal advantage obtained or (b) the loss prevented by the practice of the illegal act.

(“Officers and Directors Duties in M&A Transactions in Brazil”, by Juliana Soares Porto Fonseca, [Lexuniversal](#), April 19, 2010)

- d. In 1994, Brazil enacted a new antitrust law, which empowered the **Administrative Council for Economic Defense, (Law no. 4.137/62 [CADE])** with oversight responsibility and enforcement powers, to prevent antitrust activity and abusive business practices. Daily fines may be levied for ongoing violations, and **CADE** may institute legal proceedings for damages. Managers may also be removed from office or subject to criminal liability for obstruction of the administrative process. **CADE** enforcement activity has resulted in numerous cease and desist orders. Further, certain transactions such as mergers, acquisitions or joint ventures must be submitted to **CADE** for approval if they exceed certain market share or gross annual sales criteria.

In September 2007, **CADE** found that various investment firms were guilty of acting in an anti-competitive manner in bidding on certain government contracts. **CADE** imposed fines of 20% of the companies' revenues. It also fined the individuals involved. The case is noteworthy in that **CADE** imposed penalties on both the entities and their officers, even though the administrative proceeding did not produce any evidence suggesting that the officers had been personally involved in the illegal practices. The main argument asserted by **CADE** was that a company is a legal fiction and could not have committed an illegal act except through natural persons.

(“Brazil: CADE and Executive liability For Corporate Offences”, by Barbara Rosenberg and Jose Carlos Da Matta Berardo, Barbosa, Mussnich & Aragao, Advogados, March 12, 2008)

(Legal Guide: Business in Brazil, Coordinated by Durval de Noronha Goyos, Jr., 7th edition, 2008)

e. The **Consumer Defense Code (“Código de Defesa do Consumidor [CDC] – Law No. 8.078 of September 1990)** was enacted to govern consumer protection. The CDC seeks to restrict abusive practices in the consumer market. Some of its powers include:

- i. *Disregard of legal entity* – the possibility of holding the administrators and shareholders directly responsible for abuse of rights, or illicit acts;
- ii. *A class action proceeding* – that may be brought concurrently by the Public Ministry, the Federative Union, the states, public consumer agencies and trade associations. It is a consumer based class action proceeding, similar to that of Italy;
- iii. *Steep fines and indemnities* – against suppliers that violate the terms of the **CDC**.

(“Class Actions and Collective Defendant Legal Situations”, by Freddie Didier Jr., Civil Procedure Review, June 2010)

f. The Brazilian National Tax Code (**CTN**) establishes that a company’s administrators, officers, managing-partners or representatives of both S.A. and LTDA corporate entities will be held liable for malicious and/or negligent *ultra vires* conduct, that violate statutory law, by-laws or articles of associations, resulting in unpaid taxes (**Art. 135, item III.**). Such conduct could also result in criminal liability under Brazilian law.

(“Brazil: Guilty Until Proven Innocent”, by Paulo Franco and Eduardo Fazoli, Latin Business Chronicle, April 2, 2010)

12. China

- a. In 2005, the Chinese government revised the **Company Law of the People's Republic of China (2005 PRC Company Law)** to add several statutory provisions addressing the duties and responsibilities of Chinese directors and senior managers, and resulting liabilities. They include:
 - i. **Article 113** – “The directors shall be responsible for the resolutions of the board of directors. In case a resolution...is in violation of laws, administrative regulations, articles of association or resolutions of the shareholders' meetings and causes any serious loss to the company, the directors who participated in adopting the resolution shall make compensation.”
 - ii. **Article 148** – “The directors, supervisors and senior managers shall comply with laws, administrative regulations and the articles of association. They shall bear the obligations of fidelity and diligence to the company. No director, supervisor or senior manager may take any bribe or other illegal gains by taking advantage of his authorities, or encroaching on the properties of the company.”
 - iii. **Article 150** – “Where any director, supervisor or senior manager violates laws, administrative regulations or the articles of association during the course of performing his duties, if any loss is caused to the company, he shall make compensation.”
 - iv. **Article 153**- “If any director or senior manager damages the shareholders' interests by violating any law, administrative regulation or the articles of association, the shareholder may lodge a lawsuit in the people's court.”

(“BIZCHINA/Company News: Company Law of the People's Republic of China [Revised in 2005]”, Updated 2006-04-12, [China Daily](#))

- b. **The Securities Law of The Peoples Republic of China** was enacted in 1998 and revised in 2005 (**The Securities Law**). It strengthens the accuracy and accountability of information disclosed to shareholders and provides in part:
- i. **Article 69** - “If the share prospectus, method of offer of corporate bonds, financial or accounting report, ...as well as other information disclosure materials announced by an issuer or listed company contain falsehoods, misleading statements or major omissions and thereby causes investors to sustain losses in the course of securities trading, the issuer or listed company shall be liable for damages.” The directors, supervisors, senior management and other controlling persons directly responsible for the listed company and the underwriters shall be jointly and severally liable for such damages, unless they are able to prove that they are not at fault. Where the controlling shareholders and de facto controlling persons are at fault, they shall jointly and severally bear liabilities for such damages with the listed company.

(“China’s New Securities Law: The Future for China’s Securities Market”, December, 2005, by Lin Zhong and Li Xing, Client Alert, Hao Li Wen)

- c. The securities market is regulated by the **China Securities Regulatory Commission (“CSRC”)**, which was established with **The Securities Law**. Although criminal matters are referred to the criminal prosecutor, **CSRC** relies on the following punitive measures. First, the CSRC can issue “correction orders,” which are informal administrative sanctions. Second, the **CSRC** can issue formal warnings or fines. Fines for companies range from 300,000 to 600,000 Yuan (approximately \$40,000-\$77,000) and for individuals range from 30,000 to 300,000 Yuan (\$4,000-\$40,000). Third, individuals who commit serious violations may also be barred from participation in the securities markets and from serving as a senior manager or director of a listed company.

(“Reputational Sanctions in China’s Securities market”, by Benjamin L. Lieberman and Curtis J. Milhaupt, Columbia Law Review, 2008)

- d. China's commercial criminal laws can be considered draconian. Within the last several years, individuals were sentenced to death by lethal injection for corporate fraud. The 2004 executions of four individuals convicted of white-collar crimes made world headlines. Anyone who is convicted of an economic crime can potentially be sentenced to death.

("Corporate Fraud in China Equals Death, by Brian F. LaBovick, Whistle blowers Law Blog, March 26, 2007)

- e. Examples of Chinese cases involving director and officer liability:

- i. ST Yinguangxi – is a biochemical high tech company, listed in the PRC, which overstated 745 million Yuan of profit. Following an investigation by the **CSRC**, four of the company's senior officials, including the former CEO and CFO, were sent to jail for forging documents and fraudulently misrepresenting information. The company was found liable to compensate shareholder investors.

("CSRC: Yinguangxia Fabricated 745m Yuan Profit", By Li Yan, People's Daily, September 6, 2001)

- ii. Guangdong Kelon Electrical Holdings Limited – is incorporated in the PRC, and listed on the Hong Kong Stock Exchange. It is a manufacturer of household domestic appliances. Following an investigation into the activities of the company and its directors, the **CSRC** found that the company had overstated its profits and committed accounting fraud. In September 2005, police arrested Gu Chujun the former chairman on suspicion of bribery, fraud and embezzlement. On April 9, 2009, he was sentenced to 10 years' imprisonment and, along with others, fined 6.8 million Yuan. Individual shareholders subsequently filed a lawsuit in the PRC against the company seeking civil damages.

("Bribery pervades list of wealthiest", by Wang Qian, China Daily, August 28,2009)

- iii. Zhejiang Hangxiao Steel Structure – is incorporated and listed in Shanghai. It designs, manufactures and installs steel products. A **CSRC** investigation uncovered violations of the disclosure rules concerning the timing, accuracy and completeness of information released in connection with a 31.34 billion Yuan construction deal with Angola. Hangxiao Steel's stock price soared 30% in the three days before the news was disclosed and jumped about 400% in the following 21 days. Fines were imposed on the company and five of its officers. The company's securities director was arrested and convicted of insider trading. Individual investors also commenced proceedings against the company for damages and legal costs.

("China stock market seen as insiders' playground", by Zhou Jiangong, Asia Times, Aug 30, 2007)

- iv. Rio Tinto – is a mining company that is publicly held with a dual incorporation, listed on both the London and Australian Stock Exchanges. The **Shanghai State Security Bureau** entered Rio Tinto's premises and detained four employees, including the Shanghai based General Manager, who is an Australian citizen. The four were subsequently convicted of stealing state secrets and accepting bribes during China's iron ore negotiations with foreign miners in 2009. General Manager Stern Hu admitted to receiving bribes of up to 6 million Yuan (\$960,000) and was sentenced to ten years in prison. Ge Minqiang and Liu Caikui, who were charged with receiving three million Yuan (\$480,617), admitted to accepting bribes. They face jail terms of five to 15 years. The fourth executive, Wang Yong, pleaded innocent, saying the money was only a loan.

("Rio Tinto exec Stern Hu pleads guilty in China", by Michael Sainsbury, The Daily Telegraph, March 23, 2010.)

- v. Sanlu Group – A manufacturer of dairy products, which operated as a joint venture that included a New Zealand company, was at the heart of the 2008 melamine-tainted milk scandal. The company was declared bankrupt on Feb 12, 2009, because it was incapable of paying compensation it owed to families of children sickened by melamine-tainted formula milk powder. After investigations by authorities revealed that milk powder manufactured by Sanlu had been contaminated with melamine, four Sanlu executives including Tian Wenhua, the Chairwoman/General Manager, two general managers, and the head of Sanlu’s milk division were charged with producing and selling fake or substandard products. In January 2009, Tian Wenhua, 67, was sentenced to life in prison.

(Top 10 toppled executives 2009, China Daily, January 16, 2011)

13. India

- a. The Ministry of Company Affairs in India has been working on a comprehensive rewrite of **The Companies Act, 1956**. New key elements include clear provisions for class action and derivative shareholder suits, protection of whistle-blowers, and a stronger regime of civil and criminal penalties for breaching disclosure rules. The revised Companies Bill was introduced in the lower House of the Parliament of India (*Lok Sabha*) in 2008, but lapsed due to its dissolution. It was reintroduced in 2009, but, as of this writing, revised companies legislation has not been enacted. The stock exchange listing rules, however, were amended effective January 2006 to include the new **Clause 49**, which spells out a code of conduct for D&Os and remedies. Highlights of **Clause 49** include:
 - i. Half the board of directors must be independent directors.
 - ii. The board must establish a code of conduct for all board members and senior management, and must provide for an annual affirmation.

- iii. The audit committee has oversight of the financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible.
- iv. The company must lay down procedures to inform the board about risk assessment and mitigation procedures, which shall be periodically reviewed to ensure that executive management controls are reviewed through a properly defined framework.
- v. The chief executive officer (CEO) and chief financial officer (CFO) must certify to the board that they accept responsibility for establishing and maintaining internal controls, that they have evaluated the effectiveness of the company's internal control systems, that they have disclosed to the auditors and the audit committee deficiencies in the design or operation of internal controls, and the steps they have taken or propose to take to rectify those deficiencies.

(Clause 49: An Opportunity for Indian-listed Corporations to Achieve IT Governance”, by Sree Krishna Rao, Information Systems Control Journal, 2007, Volume 1.)

- b. In India, directors can be held personally liable to creditors for fraud in the dissipation of corporate assets when a corporation is in the “zone of insolvency”. The **National Company Law Tribunal (NCLT)** is the governmental body empowered to examine the affairs of insolvent companies, and to design a plan of rehabilitation or issue a liquidation order. Indian Law confers upon the **NCLT**, a direct role in anticipating and managing insolvencies. A corporation that has been unable to pay debts for three consecutive quarters is deemed to be insolvent. When a company is insolvent, the Board of Directors may propose a plan of rehabilitation, and the **NCLT** may issue an order putting a “scheme” in place. Approval of a “scheme” requires the consent of all parties providing financial assistance. The **Companies Act** specifies that a director of a company in liquidation must cooperate with the liquidator in marshalling the assets of the company and distributing them among its creditors. Any director who fails to do

so is subject to imprisonment for a term of up to five years and a fine. The directors will be subject to imprisonment for a term of two years, or with a fine of up to 5000 rupees for any fraudulent activity that occurs in the course of the winding down of a company.

(“The Zone Of Insolvency – Perilous for Indian Directors and Officers”, by Shirley Spira and Nilam Sharma, American Bar Association, Tort Trial and Insurance Practice Section International Committee News Letter, Winter 2010)

- c. Satyam Computer Services Ltd. is the most significant example of directors’ exposure under Indian law. *Satyam* was a company engaged in Computer Services listed in India and the US and was India’s fourth-largest software-services provider, in terms of market capitalization. In January 2009, Ramalinga Raju, the Chairman of *Satyam* resigned after announcing that he had falsified earnings and overstated the company’s assets by US \$1.5 billion. His announcement prompted a collapse of the company, which led to an investigation by the **Central Bureau of Investigation**. Three directors were subsequently charged and subjected to criminal prosecution. Some of the more serious penalties that Raju and others are likely to face are from **Section 23 of the Securities Contract Regulation Act 1956** that imposes a penalty of imprisonment up to 10 years and fine. Further, under **Section 24 of the Securities and Exchange Board of India (“SEBI”) Act, 1992**, the adjudicating officer of the **SEBI** is empowered to impose a penalty on directors and management executives, of up to one year imprisonment, for making false and inaccurate disclosures in the company’s quarterly and annual results. Most recently, the Supreme Court dismissed the bail application of Mr. Raju.

(“Satyam scam case: SC refuses bail to Ramalinga Raju - The Times of India”, The Times of India, March 15, 2010)

The above list is not a scientific analysis. Rather it is based on my personal observations, handling D&O claims throughout the globe with a significant amount of research thrown in to add support to my assessments. It is noteworthy that in the article entitled *“Reputational Sanctions in China’s Securities Market”, by Benjamin L. Lieberman and Curtis J. Milhaupt,*

Columbia Law Review, 2008, the authors, on page 43, included a table identified as “Table 1” entitled: “World Rankings of Market Capitalization, Value Traded, and number of listed Domestic companies, 2005”. The countries listed on that table parallel the companies featured on my list, with the inclusion of both Spain and Switzerland. Further, I should comment that where I haven’t cited a resource, I relied upon two articles in which I was a co-author. They are: “*Global Issues Affecting Securities Claims at the Beginning of the Twenty-First Century*”, *Tort Trial & Insurance Practice Law Journal*, Fall, 2007, Volume 43, Number 1; and “*Insolvency and D&O Liability Around the World*”: *TortSource*, Vol. 12, No. 3 Spring 2010. Still, I must emphasize that my work product is not intended to be an academic exercise, nor can it be relied on as a legal analysis. Rather, I hope it will be a helpful tool for underwriters. Brokers and risk managers who are looking to get a better feel as to global D&O liability issues and the legal structures in place giving rise to such liability.

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