The Duties of Corporate Directors:

Similarities Across Jurisdictions

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Corporate directors act as a board for the good of the companies they are appointed to serve. While there are multiple theories as to the role and purpose of a corporate board—including strategic decisionmaking, monitoring executive performance, and managing the operation of the company—,[1)] whichever theory one ascribes to, the expectations for director performance remain fundamentally the same. In fact, the expectations on individual directors are surprising consistent across jurisdictions and even across legal systems.

This article examines the similarities and differences and extrapolates from them a suitable skillset for corporate directors in any jurisdiction.

The duties of a corporate director can fundamentally be placed into two broad categories: the duty of care and the duty of loyalty. Sometimes these are lumped together and referred to as the director's fiduciary duty. In some juris-

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1) See generally John Farrar and Pamela Hanrahan, *Corporate Governance*, LexisNexis Butterworths, 2017, Chapter 9.

dictions, the duties are divided into multiple subcategories to effectively result in more than just two basic duties. The discussion hereunder will examine director's duties from the perspective of the two broad categories.

In most jurisdictions the duty of care requires directors to act with the care, skill and diligence of a reasonably prudent person in similar circumstances, while the duty of loyalty requires directors to act honestly, faithfully, and always in the best interests of the company, avoiding conflicts of interest. Clearly, fulfilling these duties requires a balanced approach. Overfocussing on shareholder interests or on short-term profits can only lead to loss of perspective and some degradation of the company as a whole.

I Duty of Care

As mentioned above, directors who fail to act with care, skill and diligence are in breach of the duty of care. In the United States, one of the best known examples of this principle is *Francis v. United Jersey Bank*[2] in which Mrs. Lillian Pritchard, a bereaved widow serving as a director of her late husband's reinsurance firm, was a completely inactive director who attended no board meetings and did nothing to inform herself about any aspect of the business of the company. The New Jersey Supreme Court analyzed a broad swathe of precedents to find Mrs. Pritchard liable for losses to company customers when embezzlement occurred, saying that company directors are required to acquire and maintain a familiarity with the business of the company on whose board they serve and must pay attention to the activities of the company.[3] The court specifically noted that directors can never be "mere figureheads" but inevitably have responsibility "for managing the business and affairs of the corporation".[4]

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2) *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A. 2d 814, 1981 N.J. LEXIS 1652 (N.J. July 1, 1981)

3) Id.

More than five decades earlier, a United Kingdom court faced similar facts in *Re City Equitable Fire Insurance Co., Ltd.*[5] and similarly found inactive directors in breach of their duty of care, although ultimately those directors faced no liability due to a "loophole" in the company's constitution. Fortunately, *Re City Equitable Fire Insurance Co., Ltd.* is no longer regarded as good law, as it applied a subjective standard to the directors in question, a concept that is now generally regarded as outmoded and inappropriate. In the U.K. it has effectively been superseded by *Companies Act 2006*, Section 174:

> 174 Duty to exercise reasonable care, skill and diligence
> (1) A director of a company must exercise reasonable care, skill and diligence.
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
> (b) the general knowledge, skill and experience that the director has.

This statute introduces both an objective and subjective standard; objective in introducing a reasonable expectation of a skillset, but subjective in acknowledging the particular knowledge, skill and experience of the individual director. On the one hand the subjectivity would seem to exonerate poor performance by any director with a poor level of knowledge, skill and experience. Certainly that is how the subjective aspect of the duty was often judicially interpreted in the U.K. until the end of the twentieth century.[6] On the other hand, placing on the director the reasonable expectation of having the same "general" know-

4) Id.
5) *Re City Equitable Fire Insurance Co., Ltd.* [1925] 1 Ch 407.

ledge, skill and experience as anyone else appointed to operate as a director ensures that the director in fact is incentivized to at least be as functional as all other directors. Ignorance can no longer be bliss.

While Australia, New Zealand, and Canada also regard *Re City Equitable Fire Insurance Co., Ltd*. as the leading case for setting the standards for the duty of care, all three have leveraged and modernized those standards in their own statutory provisions.[7)]

Malaysia, too, adopted the standard of care, skill and diligence into its statute in 2007, including the objective standard of "a director having the same responsibilities", as well as imposing an additional subjective standard recognizing that the some directors may be more qualified than others.[8)] Malaysian commentators have suggested "...there is no such thing as a passive director. A director who is passive by not being involved in the company's management has breached his duty of care, skill and diligence."[9)] This statement echoes the New Jersey Supreme Court's view in *Francis v. United Jersey Bank*.

Many American states have now adopted a statutory standard, often using the subjective language of the American Bar Association-developed Model Business Corporation Act which requires that directors act with "the care of an ordinarily prudent person in a like position."[10)]

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6) For an example of the beginning of the judicial shift, see, *Re Barings Plc*. (*No.5*). (2000) 1 BCLC 523: "directors have...a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors."

7) See Australian Corporations Act 2001, s180 (1), New Zealand Companies Act 1993, s. 137, and Canada Business Corporation Act s. 122 (1) (b).

8) Malaysia Companies Act 2016, s213:

> A director of a company shall exercise reasonable care, skill and diligence with—
> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
> (b) any additional knowledge, skill and experience which the director in fact has.

9) "Company Directors' Responsibilities", p. 7; undated booklet published by Companies Commission of Malaysia, http://chartered-accountants.com.my/wp-content/uploads/2020/03/Company-Directors-Responsibilities.pdf (last accessed January 2, 2021).

Singapore continues to rely on the Common Law to impose a duty of care on directors, although in 2002 *Lim Weng Kee v. Public Prosecutor* made it very clear that the Singaporean standard for the duty of care is an objective one.[11] In the mid-1990s, prior to Australia's 2001 adoption of s180 (1), the New South Wales court had similarly—some would say presciently—shifted from subjectivity to objectivity in its interpretation of s124 (1) of the Uniform Companies Act (the statutory predecessor of s180 (1))[12] in *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson*.[13] This was one of a series of cases known collectively as the AWA cases[14] that are credited with establishing Australia's modern standards for the duty of care.

Similarly, India's 2013 modernization of its company law included clarifying various director's duties, such as requiring that a director "exercise his duties with due and reasonable care, skill and diligence..."[15] Apparently the scope of India's standard has not yet been judicially tested, although it has been suggested that "The duty of care, skill and diligence requires directors to devote the requisite time and attention to affairs of the company, pursue issues that may arise through 'red flags' and make decisions that do not expose the company to unnecessary risks."[16]

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10) Model Business Corporation Act, s. 8.30 (a) (2). It should be noted that Delaware continues to apply a Common Law standard.

11) [2002] 4 SLR 327. "...the civil standard of care and diligence expected of a director is objective, namely whether he has exercised the same degree of care and diligence as a reasonable director found in his position." at [328].

12) "A director shall at all times...use reasonable diligence in the discharge of the duties of his office."

13) (1995) 37 NSWLR 438.

14) See, *AWA Ltd v Daniels and Ors* (1992) 10 ACLC 933 (Rogers CJ (Comm D)) and *Daniels and Ors v Anderson and Ors* (1995) 16 ACSR 607; (1995) 13 ACLC 614 (New South Wales Court of Appeal).

15) India Companies Act 2013, s. 166.

16) Novo Juris, "Codification of Duties of Directors under the Companies Act 2013", April 25, 2018. https://www.mondaq.com/india/corporate-governance/695304/codification-of-duties-of-directors-under-the-companies-act-2013 (last accessed January 2, 2021).

The above survey demonstrates the consistency of Common Law jurisdictions in their definition of the duty of care, but there is also a strong consistency across the great bifurcation of Common Law and Civil Law jurisdictions with regard to the existence of a director's duty of care.

In some Civil Law jurisdictions, the statutory mandate is simple in the extreme, stating only that directors are subject to a duty of care with no elucidation of the duty.[17] Many, however, set an objective bar for performance of the duty by requiring directors to uphold a reasonable person standard or act as any similarly situated person would. This language is a close parallel to the language found in many Common Law jurisdictions.

The Companies Act of Bhutan summarizes the duty nicely, stating that directors "[s]hall exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances".[18] This reasonable person standard is mirrored in the requirements for Qatar[19] and Russia.[20]

On the other hand, Germany requires directors "to exercise the care of an ordinary and conscientious business leader."[21] Portugal similarly requires directors to display "willingness, technical competence and an understanding of the company's business that is appropriate to their role, and executing their duties with the diligence of a careful and organised manager."[22] Israel's standard is even more stringent in its expectation of business skill, requiring directors to "act at a level of competence at which a reasonable officer would have acted in

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17) See, e.g., Finland Limited Liability Companies Act, Part 1 - Section 8, "The management of the company shall act with due care and promote the interests of the company."

18) Companies Act of Bhutan 2000, s. 91

19) Board Charter Form, Art. 3 (1): "In faithfully discharging their duties, each Board Member must act in good faith and exercise the same care and diligence which an ordinary, prudent person would exercise in taking care of his own money under similar circumstances, and reasonably act in the best interests of the Company."

20) Russian Federal Law on Joint Stock Companies, Art 71 (2): "A director must... when effectuating their rights and performing duties, operate reasonably."

21) German Stock Corporation Act, AktG § 93 (1).

22) Portugal Commercial Company Act, Article 64-1 (a).

the same position and under the same circumstances, inter alia by adopting means that are reasonable under the circumstances of the case to obtain information on the profitability of the act brought to him for his decision or of the act performed by him by virtue of his position, and to obtain other information of importance for the said acts."[23] Conceptually, the standard in the People's Republic of China is similar, albeit less detailed, requiring directors to "possess adequate knowledge, skill and quality"[24] and "ensure adequate time and energy for the performance of their duties."[25]

In Japan, Civil Code agency theory is used to require directors to conduct the affairs of the company with the "care of a good manager."[26] The Taiwan Company Act imposes a similar duty, requiring directors to "exercise the due care of a good administrator in conducting the business operation of the company."[27] The Korean duty of care mirrors these, requiring directors to do their "utmost to observe the duties of prudence and faithfulness expected of a proper manager."[28]

Many of these standards include a positive obligation on directors, as part of their duty of care, to ensure they are adequately informed. This, too, is only logical; inadequately informed directors cannot be said to be acting diligently no matter what they do. A related point is that the need to be adequately informed arguably also imposes a duty on directors to monitor the actions of their fellow directors. Indeed we also see this obligation present as part of the duty of care in many Civil Law jurisdictions, and even in some Common Law jurisdictions.

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23) Israeli Companies Law, Art. 252 and 253.
24) The Company Law of PRC, s. 41.
25) Id., s. 34.
26) Civil Code of Japan, Article 644.
27) Taiwan Company Act, Art. 23.
28) Kim, J. (2019). Korea. In B. Aronson & J. Kim (Eds.), *Corporate Governance in Asia: A Comparative Approach* (pp. 297-324). Cambridge: Cambridge University Press. (2019)

Ⅱ Business Judgment Rule

To the extent that a director's decision turns out to be a bad one, what should be their liability? Many directors view a judgment that they have breached their duty of care as a failure of their own skill. The idea that such a failure could result in criminal penalties such as imprisonment or fines is extremely uncomfortable. It is, arguably, the riskiest aspect of agreeing to serve as a director.

This is in spite of the fact that in many jurisdictions, the duty of care is tempered with the "reasonable person" standard requiring that directors must act with the care, skill and diligence of a like-situated reasonably prudent person. That is to say, even a modicum of attention to the job should shield a director from any potential liability.

Although there is a growing trend toward directors undergoing formal training on legal and corporate expectations before becoming a director,[29] it has been noted that, unlike many professions with qualification standards, corporate directors can be anyone.[30] In nearly all jurisdictions there are no formal qualification standards or competency requirements. Rather, anyone selected by the shareholders will be placed in office. This fact reinforces the question of whether the duty of care should be applied subjectively or objectively. Notwithstanding the early standard set by *Re City Equitable Fire Insurance Co.*, as the above survey reveals, most jurisdictions now appear to come down on the side of objectivity.

Nonetheless, the subjective standard continues to be applied from time to time even today.[31] This is particularly apparent in the application of the busi-

29) See, e.g., *Should directors have professional qualifications to sit on a listed board?*, Australian Institute of Company Directors, 1 Mar 2019, https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/march/director-qualifications (last accessed January 2, 2021).

30) Bruce Welling "Corporate Law in Canada: The Governing Principles", p. 324–25.

ness judgment rule ("BJR"), a position originating in eighteenth century U.K.[32] but fully developed and implemented in the United States in the late twentieth century.[33] BJR is now legislated or judicially adopted in many Common Law jurisdictions and also, increasingly, in Civil Law jurisdictions as well.[34]

BJR is a presumption that business decisions involving reasonable risks made by properly informed corporate directors acting in good faith should be respected by the courts. It acknowledges that business decisions involve a certain amount of risk-taking and that neither law nor business is well served by judging those decisions with hindsight.

Notwithstanding its wide adoption, in many jurisdictions, including the United States, there remains some confusion as to the exact scope of the BJR. The American Law Institute (ALI), leveraging the legal expertise of top scholars and practitioners, has made a substantial contribution to clarifying the parameters of BJR in its *Principles of Corporate Governance* in which it states:

> A director or officer who makes a business judgment in good faith fulfils the duty under this section if the director or officer (1) is not interested in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment to the extent to which the director or officer reasonably believes to be appropriate under the circumstances; and (3) rationally believes that the business judgment is in the best interests of the corporation.[35]

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31) See, e.g., *AWA Ltd. v. Daniels and Ano*, op. cit. at Note15, in which the judge used *Re City Equitable Fire Insurance Co., Ltd.* to apply a subjective standard to non-executive directors while holding an executive director to a stricter, objective standard.

32) "Business Judgment and the Courts: End of Project Report (2018), p. 2. https://essl.leeds.ac.uk/download/downloads/id/727/concept_of_business_judgment_end_of_project_report.pdf (last accessed January 2, 2021).

33) See, e.g., *Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984).

34) Examples include: U.S., U.K., Australia, Canada, Japan, Spain, the Philippines, and South Africa.

In effect, this means that courts will not substitute their judgment for that of directors, so long as directors can show that they acted with loyalty, care and in good faith.[36] There is a lot of sense to this position. Directors who are making informed decisions on behalf of a company, effectively doing the best they can, should not be liable if, having done their best, subsequent events reveal the decision to be a poor one.

Delaware, long considered the most sophisticated corporations law jurisdiction in the United States, places the burden of proof on the plaintiff (shareholder) in cases challenging the business decisions of directors as breaches of the duty of care. Two significant Delaware cases provide further insights into the mechanics of the application of the BJR.

In *Smith v. Van Gorkom*,[37] shareholders of Trans Union Corporation sought rescission of a decision by Trans Union's board to merge Trans Union into a subsidiary of Marmon Group at a price of USD55 per share, claiming that the directors had acted too quickly and had not properly informed themselves of the true value of Trans Union so that the transaction was underpriced. The Supreme Court of Delaware upheld the plaintiff's contention, finding that the directors' rushed approval of the merger at USD55 per share on the basis of a 20 minute oral report at a two hour board meeting without thorough study of the proposal was not an informed business judgment, but rather was a grossly negligent decision.

Notwithstanding the sound legal basis for the decision, it seems to have created corporate governance turmoil, or at least substantial concern that it would have a chilling effect on attracting suitable talent to serve as corporate directors. Within one year of the decision, Delaware had amended its corporate leg-

35) American Law Institute, "Principles of Corporate Governance", Part IV, para. 4.01 (a).

36) This characterization of judicial policy has been referred to as the Business Judgment Doctrine. See, e.g., Farrar and Hanrahan, op. cit. Note 2, p. 227 and J. F. Corkery, *Companies Law* (Centre for Commercial Law, 2017), p. 394.

37) 488 A. 2d 858 (Del. 1985)

islation to provide that a company's

> certificate of incorporation may...contain... [a] provision eliminating...the personal liability of a director...for monetary damages for breach of fiduciary duty... [except]:
> (i) for any breach of the director's duty of loyalty...;
> (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;
> (iii) [for unlawful dividends]; or
> (iv) for any transaction from which the director derived an improper personal benefit.[38]

Curiously, this provision, which appears to emasculate the duty of care and expose corporate shareholders to greater risk at the hands of inattentive or careless directors, has proven highly popular, with many other states adopting similar provisions and the vast majority of corporations adding such "waivers" to their corporate charters, a change that actually requires shareholder approval.

The 2006 Walt Disney derivative litigation[39] is an example of the impact of this waiver, while simultaneously causing some to question to value of the BJR today.[40]

In the Walt Disney litigation, shareholders of Walt Disney believed that the departure package paid to failed CEO Michael Ovitz, amounting to USD130 million in cash and vested stock options, was excessive and therefore reflected poor judgment. The shareholder plaintiffs maintained that the decision to hire

38) Delaware General Corporation Law 102 (b) (7).
39) *In re Walt Disney Company Derivative Litigation* (Del. 2006), 906 A2d 27.
40) Felix I. Lessambo, "The International Corporate Governance System: Audit Roles and Board Oversight" (2014), pp. 52-54.

Ovitz under a contract that provided him with such an excessive payout if the company dismissed him without cause at any time during its five year term was essentially made by Michael Eisner and rubber-stamped by the compensation committee and the board without sufficient analysis or consideration. Alas, the Delaware Supreme Court was not persuaded, holding instead that the decisions of the compensation committee and the board were "protected business judgments."[41]

After this decision, one could be forgiven for concluding that the BJR has become effectively a "get out of jail free" card, at least in the United States.

In the U.K., too, the bench has long recognized that the Common Law duty of care is tempered by deference to the judgment of directors, so long as the directors can demonstrate that they had adequately informed themselves regarding the situation prior to making any decision.[42] There don't yet appear to be any U.K. cases with facts as extreme as those of the Walt Disney case.

Canada has similarly adopted a business judgment rule, specifically noting that it has applied the American appellation:

> "Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes

41) *In re Walt Disney Company Derivative Litigation* (Del. 2006), op. cit. Note 40, at p. 73.
42) See, e.g., "Business Judgment and the Courts: End of Project Report, op. cit. Note 33.

available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the 'business judgment rule', adopting the American name for the rule."[43)]

It should be noted, however, that the Canadian rule differs slightly from its American cousin insofar as courts consider both the process and the ultimate decision when making a finding of reasonability.

It has been suggested that in Singapore "there is no formal business judgment rule either by statute or case law. Instead, Singapore adopts a more informal version of the business judgment rule."[44)] However, judicial deference to good faith business decisions clearly implies that the BJR concept does exist in Singapore and it is only the name that is missing.[45)]

While most Common Law jurisdictions rely on judicial precedents for the scope of their BJRs, Australia and Malaysia have chosen to legislate the matter by incorporating a BJR into their statutes. For Australia, the rule is found in Corporations Act 2001, s180 (2):

> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith or a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

43) *Peoples Department Stores Inc.* (*Trustee of*) *v. Wise*, [2004] 3 S.C.R. 461 at para. 64.

44) Yaru Chia, *The Business of Judging Directors' Business Judgments in Singapore Courts*, (2016) 28 SAcLJ 428, 429.

45) See, e.g., *ECRC Land Pte Ltd v Wing On Ho Christopher* [2004] 1 SLR 105; *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162.

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interest of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Some have suggested that this was a panicked legislative response to the American *Smith v. Van Gorkom* case. Certainly it was justified by its proponents on the basis of a need "to provide more certainty for directors".[46)]

Alas, legal uncertainties were not necessarily eliminated. The New South Wales Supreme Court was soon called upon to provide interpretation of the "new" statutory language in *Australian Securities & Investments Commission v. Rich*.[47)] Austin J. spent substantial effort interpreting the statute's reference to "rational belief". Subsequent commentary has suggested that the drafters of s. 180(2) made a mistake by attempting to define "rational belief" as it resulted in confusion between reasonability and rationality as standards.[48)]

Malaysia also legislated a BJR in 2007, now at s214 of the 2016 act:

A director who makes a business judgment is deemed to meet the requirements of his duty as a director if he:

- makes the business judgment for a proper purpose and in good faith;
- does not have a material personal interest in the subject matter of the business judgment;

46) Business Regulation Advisory Group, *Corporate Law Economic Reform Program - Policy Reforms* (1998). https://treasury.gov.au/publication/clerp-policy-reforms/corporate-law-economic-reform-program-policy-reforms (last accessed January 2, 2021).

47) (2009) 75 ACSR 1; 236 FLR 1.

48) Hooper, Matthew, *"The Business Judgment Rule: ASIC v Rich and the Reasonable-Rational Divide"* [2011] BondCGeJl 1; (2011) Corporate Governance eJournal (Bond), http://www.austlii.edu.au/au/journals/ElderLRev/2011/1.html (last accessed January 2, 2021).

- is informed about the subject matter of the business judgment to the extent that he reasonably believes to be appropriate under the circumstances;
- reasonably believes that the business judgment is in the best interest of the company

The effect of this provision is that "in the absence of fraud, breach of duty or conspiracy, the Courts will rarely assess the merits of a commercial decision made by directors, even if the commercial decision did not turn out favourably for the company."[49] Malaysia's provision seems not to have created as much controversy as its Australian cousin.

On the Civil Law side of the aisle, where one would expect to find a statutory business judgment rule, instead, in Japan, the BJR is judicially-created. The rule was first applied by lower courts in the 1970s[50] and finally received Supreme Court imprimatur in 2010 in a case known as *Apamanshop*.[51] The Japanese version of the BJR, as characterized by the courts, requires a showing that a director's decision was reasonable in light of the facts and "not irrational" when considered from the perspective of a similarly-situated reasonable director.

Germany, on the other hand, is truer to type, relying on a provision of the German Stock Corporate Act for its BJR. In particular, directors will not have violated their duty of care "if, at the time of taking the entrepreneurial decision,

49) Conventus Law, *"Malaysia—Breach of Directors' Duties: What Is The Best Interest Of The Company?"* 9 June 2018. http://www.conventuslaw.com/report/malaysia-breach-of-directors-duties-what-is-the/ (last accessed January 2, 2021).

50) For a survey of the early judicial development see Vicki L. Beyer, *"Judicial Development of a Business Judgment Rule in Japan"* [1993] BondLawRw 12; (1993) 5 (2) Bond Law Review 209.

51) See Dan W. Puchniak and Masafumi Nakahigashi, *"Case No. 21: Corporate Law—Business Judgment Rule—Derivative Action—Supreme Court, 15 July 2010—'Apamanshop' with comment" in Business Law in Japan—Cases and Comments: Intellectual Property, Civil, Commercial and International Private Law: Writings in Honour of Harold Baum* (Moritz Baelz et al, eds.) (Kluwer 2012) at pp. 220–221.

they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company."[52] Unlike Delaware, the burden of proof rests with the directors to prove their actions. The reasoning behind this is that plaintiffs are less likely to have access to evidence, making it unjust to place the burden of proof on them.

When revising its Companies Law in 2014, Spain also introduced a BJR requiring directors to make their decisions on an informed basis, following a sound process, acting in good faith, and without conflicts.[53] While there is still scholarly debate over whether the new provision was intended to follow the Delaware model or the German model regarding the burden of proof, most scholars lean toward the German.[54]

The widespread adoption of a BJR implies that there is sympathy for the idea that directors can be sufficiently careful in performing their roles and still make decisions that don't work out.

Ⅲ Duty of Loyalty

The director's duty of loyalty has been summarized as a duty to "act (i) in good faith, (ii) with the conscientiousness, fairness, morality and honesty that the law requires of fiduciaries."[55] It is sometimes referred to as the fiduciary duty of directors. Fundamentally the duty requires directors to give priority to the interests of the company.

This duty is not as clearly singular as the duty of care; there are slight varia-

52) German Stock Corporation Act, AktG § 93 (1).

53) Law 31/2014, of 3 December, amending the Spanish Companies Law, Art. 226.

54) Osborne Clarke, *The business judgement rule as a mechanism to protect directors from liability when making business decisions*, 23 January 2020. https://www.osborneclarke.com/insights/business-judgement-rule-mechanism-protect-directors-liability-making-business-decisions/ (last accessed January 2, 2021).

55) Lessambo at 48.

tions across jurisdictions, making it a challenge to even label the duty clearly. It has been variously referred to as the duty of loyalty, director's fiduciary duty, duty of good faith, duty to act in the best interests of the company, duty to avoid conflicts of interest, or the duty to act for a proper purpose. Some even argue that there are overlaps with the duty of care, further blurring the lines.

In the case of Common Law jurisdictions, it could be said this is because only certain aspects of the overall duty are presented by the particular facts of any given case alleging breach of the duty. Indeed, both the statutes and case law of the Common Law jurisdictions acknowledge the various facets of the overall duty and prioritize some aspects of the duty over others.

For example, the U.S. Model Business Corporations Act requires directors to "act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation"[56] and under Delaware case law a "duty of loyalty...imposes an affirmative obligation to protect and advance the interests of the corporation and mandates that [a director] absolutely refrain from any conduct that would harm the corporation."[57]

The New Zealand statute nearly mirrors the U.S. model act: "a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company."[58] India's statute contains a similar obligation: "A director of a company shall act in good faith in order to promote the objects of the company."[59]

In Australia, on the other hand, the statutory requirement is for directors "to exercise their powers and discharge their duties: (a) in good faith in the best intecest of the corporation; and (b) for a proper purpose"[60] omitting the subjective belief of the director from the test. At the same time, the provision is

56) U.S. Model Business Corporations Act § 8.30.
57) *BelCom, Inc. v. Robb*, 1998 WL 229527 at *3 (Del. Ch. 1998).
58) New Zealand *Companies Act 1993*, s131.
59) India *Companies Act 2013*, s166 (2).
60) Australia Corporations Act 2001, s181 (1).

regarded as a mere supplement to the longstanding Common Law duty:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the singleminded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or for the benefit of a third person without the informed consent of his principal.[61)]

The United Kingdom and Canada statutes articulate a standard that appears to fall in between the standards of the U.S. and Australia. The United Kingdom requires each director to "act in way he considers, in good faith, most likely to promote the success of the company."[62)] Canada expects that directors will "act honestly and in good faith with a view to the best interests of the company."[63)] Singapore's statute also requires directors to "act honestly",[64)] which is supplemented by a Common Law duty to act in good faith and loyally in the best interests of the company.[65)]

An interpretation question raised by this focus on "the best interest of the company" is what exactly the phrase means. For example, in the U.S., "best interests of the company" has long been interpreted as "best interests of the shareholders", without substantial regard to any other interests connected to the company.[66)]

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61) Philip Lipton, Abe Herzberg, and Michelle Walsh, *Understanding Company Law*, 18th ed. (Lawbook Co. 2016), p. 354, citing *Bristol & West Building Society v. Mothew* [1998] Ch 1.

62) U.K. *Companies Act 2006*, s172.

63) Canada *Business Corporations Act*, s122 (1) (a).

64) Singapore Companies Act s157 (1).

65) See, e.g., Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters [2018] SGCA 33.

Australian courts maintain that the best interests of the company are the best interests of shareholders as a collective group—in keeping with U.K. precedent—[67] or, in the case of measures to protect against hostile takeover, the interests of present *and future* shareholders,[68] a position requiring consideration of the company's long-term prospects. These days, the U.K.'s statute takes things even further, drawing in various other stakeholders as well as mandating fairness to all shareholders.[69] Similarly, India's statute requires directors "to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."[70]

Many Civil Law jurisdictions also impose a duty of loyalty that requires directors to act in the best interest of the company. In Bhutan, the obligation is stated that simply: "shall act honestly and in good faith in the best interests of the company,"[71] remarkably similar to the Canadian requirement. The Russian duty is similarly straightforward, requiring directors to "act in the interests of the legal entity it represents honestly and wisely."[72] Vietnam requires directors to "act honestly and prudently" and to "be loyal to the interests of the enterprise."[73] China expects directors to "protect the interests of the company."[74]

In other jurisdictions, the duty of loyalty is imposed with slightly different parameters. In Germany, directors have a "duty to perform according to the

66) The seminal case for this proposition is *Dodge v. Ford Motor Company*, 170 NW 668 (Mich. 1919).
67) See, e.g., *Greenhalgh v Arderne Cinemas Ltd.* [1951] Ch 286.
68) *Darvall v. North Sydney Brick & Tile Co., Ltd.* (1987) 6 ACLC 154 at 176.
69) U.K. *Companies Act 2006*, s172 (d).
70) India Companies Act 2013, s166 (2).
71) Companies Act of Bhutan 2000, s. 91.
72) The Civil Code of the Russian Federation, art 53.
73) Vietnam *Law on Enterprises* 2014, Art. 71.
74) China: Companies Law arts 59–123.

requirements of good faith, taking customary practice into consideration."[75] The Spanish statute provides "the standard of diligence...shall be fulfilled when the director has acted in good faith..."[76] Similarly, in Korea directors are required to "perform their duties in good faith for the interest of the company."[77]

Japan, on the other hand, imposes a duty of loyalty that focuses more on fidelity to laws, regulations and company documents, requiring directors to perform their duties "in a loyal manner in compliance with laws and regulations, the articles of incorporation, and resolutions of shareholders meetings."[78]

In most jurisdictions, the fiduciary obligations of the duty of loyalty also oblige directors to avoid self-dealing or conflicts of interest. Obviously, the purpose of the prohibition is to ensure that directors do not improperly profit from serving as a director.[79] An early example in the Common Law was an 1854 U.K. case in which a railway company was permitted to void a contract with a partnership in which one of the railway company's directors had an undisclosed interest:

> It is a rule of universal application that no one having [fiduciary] duties to discharge shall be allowed to enter into arrangements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.[80]

75) German Civil Code (Bürgerliches Gesetzbuch) Sec. 242.
76) Law 31/2014, of 3 December, amending the Spanish Companies Law, Art. 226.
77) Korean Commercial Act, Art. 382-3.
78) Japan Companies Act, Art. 355.
79) See, e.g., Lipton, et al., op. cit. at p. 360.
80) *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 (Scot HL), 149 RR 32 (Scot HL) at RR 39.

Notwithstanding a long line of cases honing this principle, most Common Law jurisdictions have now chosen to codify the rule presumably to promote clarity and understanding of the principle and, in some cases, provide parameters. For example, in the U.K., s175 is titled "Duty to avoid conflicts of interest" and states:

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).[81]

India's statute has a similar prohibition: "A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company."[82]

At the same time, in most jurisdictions, the statutes do not impose a prohibition as absolute as that stated by Lord Cranworth LC in *Aberdeen Railway*, but rather oblige conflicted directors to disclose their interest, thereby allowing boards or shareholders to make informed decisions to proceed or not to proceed. For example, the U.S. Model Business Corporation Act requires directors to "disclose personal interests in related party transactions",[83] while Delaware's statute is intended as a "safe harbor" provision, overriding application of the strict Common Law rule if the conflicted director has disclosed his/her interests and the subsequent transaction is fair and made in good faith.[84] The U.K. statute contains a similar "out", allowing directors to approve a conflicting

81) U.K. *Companies Act 2006*, s175.
82) India Companies Act 2013, s166 (4).
83) U.S. Model Business Corporations Act, § 8.60ff.

transaction for which there has been full disclosure.[85)]

In Japan, rather than the directors it is the shareholders meeting that must be notified of a potential conflict of interest by a director and must consent to the transaction proceeding in spite of the conflict.[86)]

New Zealand and Canada also require directors to disclose any interests they have in potential company transactions.[87)] The New Zealand statute goes on to specifically override Lord Cranworth LC's position that the fairness of the transaction was irrelevant to the consideration: "A transaction cannot be avoided if the company receives fair value under it."[88)]

Another approach to conflicts of interest is imposing an obligation on directors not to use their position or information acquired in that position to their personal advantage. Australia has two provisions to this effect, one relating to misuse of position[89)] and the other to misuse of information[90)]. In Singapore, both the obligation not to make improper use of the position and not to make improper use of information by virtue of the position are contained in a single provision.[91)]

Ⅳ Summary

Notwithstanding minor subtle differences in director's duties, it is the similarity between director's duties across jurisdictions and even across legal systems

84) Del. Gen. Corp. L. § 144. See also discussion in Blake Rohrbacher, John Mark Zeberkiewicz, and Thomas A. Uebler, *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 Del. J. Corp. L. 719 (2008).
85) U.K. Companies Act 2006, s175 (4), (5) and (6).
86) Japan Companies Act, Art. 356.
87) New Zealand Companies Act 1993, s140; Canada Business Corporations Act, s120.
88) New Zealand Companies Act 1993, s141 (2).
89) Australia Corporations Act 2001, s182.
90) Australia Corporations Act 2001, s183.
91) Singapore Companies Act s157 (2).

that is particularly striking.

As a general matter, directors everywhere are expected to:

- Use care and whatever skill they possess
- Be well informed about the operations of the company and the matters they are asked to handle
- Act in the best interests of the company, in good faith with honesty and loyalty
- Have no conflicts of interest (or disclose any conflicts and obtain a waiver for them)

Even these criteria can be somewhat loosely interpreted, especially insofar as there are no formal qualifications in most jurisdictions for serving as a director. At the same time, for anyone contemplating agreeing to serve as a corporate director, understanding director's duties to the company means that when agreeing to accept the role, the director should do everything possible to ensure that he or she has a solid understanding of local legal requirements/duties imposed on directors, understands at least the basics of the business lines of the company the individual is agreeing to serve, can read and understand corporate financial reports, has no inherent conflicts of interest and can actively engage as a director.

Any reasonably intelligent and responsible person who meets these criteria and is willing to dedicate the necessary amount of time and energy to the task, should be able to serve on a corporate board in the manner expected by both the shareholder and the company itself.