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Mudara IOD welcomes its new members, and looks forward to working with them in advancing corporate governance and directorship in the region.

Board Members and Senior Directors are invited to apply for membership of Mudara IOD.

Mudara IOD serves the entire Middle East and Mena region.

From the CEO

Please accept our heartiest felicitations on the occasion of Eid.

With the summer months and the Ramadan now over, we look forward to a tight schedule of activities. Please visit our Web site for details on our planned activities.

Our membership drive is now on the fast track and we are adding new members.

We are moving soon to our own custom-made premises in the DIFC Village where we can offer better services to our members.

You may have noticed a small but significant addition to the title line of your Newsletter – it now carries an ISSN – making us the first in the UAE to have an ISSN according to statistics from the ISSN

International Center.

We look forward to a lasting and mutually beneficial relationship with you.

Khalid M. Al Suwaidi



The Mudara Blog

<http://www.mudaraiod.blogspot.com/>

From the press ...

In a report on the status of women in high-level jobs, the Financial Times reported in its September 4, 2008, issue that “the proportion of women directors on the boards of FTSE 100 companies was one of the few areas to show an improvement, rising from 10.4 per cent to 11 per cent”

The report said that the progress by women in attaining top jobs was slowing to a “snail’s pace” and in many cases going into reverse. The annual study of the Equality and Human Rights Commission of women’s progress in achieving positions of power and influence reported the biggest number of falls since the survey was launched five years ago.

As a result there were fewer Westminster MPs, cabinet ministers, members of the Scottish and Welsh assemblies, national newspaper editors, senior police officers and judges, health and local authority chief executives, trade union general secretaries and heads of professional bodies. However, as mentioned earlier, the percentage of women directors showed an increase.

Writing in “The Observer” dated September 28, 2008, under the title “A Shattering Moment in America’s Fall From Power”, John Gray, a professor at the prestigious London School of Economics, predicts that “the global financial crisis will see the US falter in the same way the Soviet Union did when the Berlin wall came down. The era of American dominance is over.”

Gray writes that “our gaze might be on the markets melting down, but the upheaval we are experiencing is more than a financial crisis, however large. Here is a historic geopolitical shift, in which the balance of power in the world is being shifted irrevocably. The era of American global leadership, reaching back to the Second World War, is over”.

What effect will this change have on the way corporations work remains to be seen. However, the need for better trained directors and Board members will certainly be enhanced.

Mudara is ready to face this challenge of equipping the directors with the knowledge and skills they need.

Recommended Reading for Directors

The New Corporate Governance In Theory and Practice

“Forty years ago almost all power in any given corporation was wielded by senior managers while shareholders were essentially powerless and the board of directors provided an occasional rubber stamp. The Enron scandal and the Sarbanes –Oxley Act are now emblematic of how corporate power has more recently ebbed away from management toward the competing claims of shareholders and directors.”

This is how this book is introduced on its own dust-cover. This is a very recent book – it became available only in July 2008. The author, Stephen M. Bainbridge, is the William D. Warren Professor of Law at UCLA, where he currently teaches Business Associations and Advanced Corporation Law. Previously, he has also taught Corporate Finance, Securities Regulation, Mergers and Acquisitions, and Unincorporated Business Associations. Professor Bainbridge is a prolific scholar, whose work covers a variety of subjects, but with a strong emphasis on the law and economics of public corporations. He has written over 75 law review articles, which have appeared in leading journals. Professor Bainbridge runs a blog “ProfessorBainbridge.com”.

The basic issue discussed in this book is described as “director primacy” by the author. D. Gordon Smith, the Glen L. Farr Professor of Law at the Brigham Young University, says that this issue “is both real and important. Directors now exercise control over most corporations in a way that directors did not just a few decades ago, and while this director-centered governance structure has been embedded in corporation statutes from the advent of general corporation laws in the 1800s, prior to the 1970s most corporations in the United States combined imperial managers with compliant boards of directors. Bainbridge tells the back story on this ‘transformation of corporate governance from managerialism to director primacy’, which is an important aspect of his theory because it supports the view that corporate law has evolved to an efficient state”. Smith believes that this theory “will become one of the touchstones of corporate governance debates for many years”.

Bainbridge asks if “a Unified Field Theory of Corporate Governance” is possible and then answers in the negative saying that “instead, situation-specific mini-theories often are more useful for making legal decisions than a single unified theory. I thus don’t claim that director primacy explains everything about corporate governance. The claim made herein is that director primacy has a larger domain of explanatory and justificatory power than any other theory on the market”.

“Why not Shareholder Primacy?” is another question discussed in

Did you know?

What are the “OECD Principles for Corporate Governance”?

The *OECD Principles of Corporate Governance* is a document that every Director/Board Member should be familiar with. A brief introduction of this document is therefore being presented here.

The OECD Principles of Corporate Governance were endorsed by OECD Ministers in 1999 and have since become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. They have advanced the corporate governance agenda and provided specific guidance for legislative and regulatory initiatives in both OECD and non OECD countries. The Financial Stability Forum has designated the Principles as one of the 12 key standards for sound financial systems. The Principles also provide the basis

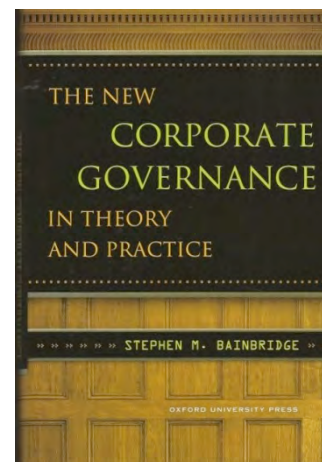
detail by Bainbridge. In his view shareholder primacy “contends not only that shareholders are the principals on whose behalf corporate governance is organized, but also that shareholders do (and should) exercise ultimate control of corporate enterprise”. He has discussed the pros and cons of shareholder primacy as against those of director primacy.

Bainbridge has also discussed “director primacy versus team production” and “incorporating shareholder wealth maximization into director primacy”.

The core of the book is in its 4th chapter – “The Shift from Managerialism to Director Primacy”. Here after discussing the evolving role of the board, the emergence of the monitoring board, the boards today and the best practices, he touches upon the judicial insistence on informed decision making and the judicial pressure for director independence and then the Sarbanes-Oxley Law.

Michael P. Dooley, the William S. Porter Professor of Law at the University of Virginia, comments that “while Bainbridge’s arguments are sophisticated, his presentation is straightforward and easy to follow. This is an important book that should command the attention of anyone interested in corporate governance, whether specialist or layperson”.

The New Corporate Governance in Theory and Practice
By Stephen M. Bainbridge
Oxford University Press
ISBN 978-0-19-533750-1
245pp.



for an extensive programme of cooperation between OECD and non-OECD countries and underpin the corporate governance component of World Bank/IMF Reports on the Observance of Standards and Codes (ROSC).

The Principles are based on the belief that there is no single model of good corporate governance. However, work carried out in both OECD and non-OECD countries and within the Organization has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist. For example, they do not advocate any particular board structure and the term “board” as used in this document is meant to embrace the different national models of board structures found in OECD and non-OECD countries. In the typical two tier system, found in some ...

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COMMENTARY: When the going gets tough, D&O claims are likely to increase

Directors' and officers' liability insurance (D&O) was created to provide protection for the personal assets of directors and officers given the significant potential personal liability they can incur in connection with the business decisions and strategies they adopt. In today's volatile markets and in the increasingly competitive world economy, the risks of failed or unprofitable business ventures continue to multiply. Alexander Blom, the Middle East and North Africa (MENA) Regional Practice Leader for Marsh's Financial and Professional (FINPRO) Practice provides an overview of the growing need for D&O insurance in MENA and information on the scope of the coverage.

Businesses are built on taking risks, but with the advancement of global standards of corporate governance, companies in the MENA region can no longer afford to take risks with the liability of their directors and officers. While the region might not have the same litigious culture as the US, the issues and dangers are no less real. It would be unwise for a company not to consider carefully the use of insurance to protect it from evolving liabilities.

The rapid growth in the MENA region has been founded on the vision and risk-taking. However, the dynamics of taking risk, or the willingness to take risk, can change dramatically when the personal assets of those responsible for making decisions are threatened.

As in many other countries, directors and officers of any corporation in the MENA region are exposed to personal financial liability arising from any claim which might be brought against them in connection with the discharge of their duties as directors and officers. These duties are numerous and may arise from statute or common law, including the laws of other countries where the directors and officers of the organisation conduct their business.

Traditionally, the Arabic business culture takes a more pragmatic approach to disputes and has proven to be much less litigious than the Anglo-Saxon/American business model. As such, many business leaders in the MENA region are still comfortable to serve on company boards and to take on director or officer duties without any indemnification arrangements from the company or any kind of insurance protection in place.

However, as local companies have, in recent years, expanded into the international business arena, implementing good corporate governance is crucial to maximising growth. The Initiative on Governance and Investment for Development led by countries in the MENA region, and supported by the OECD, illustrates the transformation the region is undergoing. This initiative promotes broad reforms to enhance the investment climate, modernise governance structures and operations, strengthen regional and international partnerships and promote sustainable economic growth. In this connection, various directives advancing corporate governance have been introduced in MENA countries, with greater accountability of directors and officers being enforced.

Corporate Governance: The relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. (source: OECD)

Directors' and Officers' Liability Insurance

Greater accountability and expanding legal standards for recourse against directors and officers in connection with company losses lead to the development of D&O insurance. The intent of a D&O policy is to protect directors and officers. Typically, companies place a high value on D&O insurance as it assists to retain and attract talented directors and officers. In addition, the policy provides protection for the companies' balance sheet for claims against the company, where it is required or permitted to indemnify directors and officers, commonly called Company Reimbursement Cover. Furthermore, a policy can be broadened to cater for shareholder claims against the company, under Securities Entity Coverage.

Some insurers even extend coverage to employment practices violations, i.e. claims made by employees alleging violations of their legal rights as employees. Possible lawsuits include claims for sexual harassment, breach of employment contract, wrongful termination, discrimination and failure to hire or promote. Generally such claims are brought against the company or against directors and officers in conjunction with the company. Separate Employment Practice Liability insurance can also be purchased to provide additional specific protection for both the company and directors and officers. MENA region companies with a large workforce in the US in particular, should consider such a policy.

One of the key drivers for companies to purchase D&O insurance is to protect the individual director or officer interests in the event of insolvency or bankruptcy problems. The policy allows directors and officers to claim directly under the policy, even if the company has gone bankrupt.

Importantly, D&O policies provide for the advancement of defence costs before the final adjudication of the claim. Since defence costs are advanced as they are incurred, this allows directors and officers to defend themselves appropriately. Claims include criminal proceedings against directors and officers as well as civil proceedings. The policies' intentional act exclusion will only operate, once there is final determination that the intent was in fact committed. Legal fees for official investigations are also part of the cover.

The policy typically provides cover for the directors and officers of the policyholder and of all its subsidiaries worldwide. Depending on the specific risk characteristics of the subject company, the scope of D&O coverage should be determined. Typical factors to consider are: jurisdictions in which the company operates; whether the company is listed on an exchange or privately owned; planned future listings; where the shareholder base is located; industry segment; financial condition; past claims experience and the risk appetite of the board. With the broad variety of technical issues to consider and the importance of D&O cover for companies and their boards, D&O is best advised and purchased through an independent insurance broker.

It is important to distinguish the liability arising out of directors' and officers' performance of their 'management activities', which is the subject of D&O insurance, from the liability of the company

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and its directors, officers and employees arising from professional services rendered to clients. Underwriters may impose a professional liability exclusion depending on the nature of the business of the policyholder. The wording of the exclusion should be carefully reviewed to make sure to limit its potential scope.

The best way to describe the difference between a D&O policy and a Professional Indemnity (PI) policy is to focus on how the wrongful act is committed: was the alleged wrongful act committed in a managerial capacity or in connection with the rendering of professional services to third parties.

For example:

- If a director is making decisions regarding the management of the company for which (s)he works, which decisions give rise to a claim from shareholders, bondholders or regulatory bodies, etc. the D&O policy would respond.
- If the same director attends a client meeting and provides a client with professional or financial advice or advice in relation to other services provided by the organisation and the client subsequently alleges that the advice was negligent and caused the client a loss, then the PI policy would respond.

Marsh spends considerable time improving and adapting the policy wordings on client programmes in order to obtain the broadest cover possible for the client. The current soft market and low claims experience in the MENA region has resulted in fierce competition amongst insurers who offer broad coverage terms and low premiums. Brokers need to understand the D&O area, however, to know how to best adapt a wording for a specific client and negotiate terms that make sense for the client in the long term.

Accordingly, pricing should by no means be the principal focus for any client. A low price with mediocre terms and conditions will not serve the client's interests in the event of a claim.

In the current market, depending on the risk factors and the scope of coverage, premiums typically range between 0.50% and 3.00% of the limit of insurance provided. This equates to \$5,000 to \$30,000 for a \$10,000,000 limit. With the low claims experience in the MENA region, it is difficult to advise the required amount of coverage. Nonetheless, as a prudent risk and insurance adviser, Marsh would generally advise its clients to consider buying the highest limit it can reasonably afford. Alternatively, many companies decide on the limit of insurance depending on benchmark details of their peers, the board's risk aversion and premium options in relation to policy limit options.

Liability trends and claims

Marsh, the world's leading insurance broker and risk adviser, is experiencing and foresees a growing demand for D&O insurance in the MENA region. This is fuelled by the following trends:

- i) MENA originated businesses investing and acquiring abroad, leading to increased exposures;
- ii) Foreign capital and foreign managers being attracted to MENA originated businesses, leading to a greater demand for protection;
- iii) Changes in legislation and regulations in the areas of corporate governance, employment law, health and safety, leading to greater accountability;
- iv) Greater willingness amongst shareholders and other stakeholders to sue in the event of substantial financial loss.

These trends and increasing demand have resulted in the presence in the region of dedicated D&O underwriters. Many of the world's leading D&O insurers have local offices, such as AIG, Ace and Liberty. Although other leading D&O insurers, such as Chubb, Zurich, Brit Insurance and Lloyd's syndicates do not have a local presence, they do write business through reinsurance arrangements with locally based insurance companies.

The greater willingness to sue amongst shareholders and other stakeholders has not (yet) led to a dramatic increase in claims across the MENA region. Based on research amongst law firms, insurers and clients, Marsh has not identified a high frequency or severity of D&O claims in relation to MENA originated businesses. This can also be explained by the overall booming economic phase the MENA region is undergoing. However, once economies tend to slow down and awareness of rights to claim against directors and officers increases. Recently a few potential D&O cases have circulated in the MENA press.

Privately-owned businesses with little international activity, are probably the least in need of a D&O policy. However, they should consider buying a policy now in preparation for bad times which might come. Relationships established in the current climate can prove valuable when harder times develop.

MENA companies that are listed and/or pursue an international expansion strategy are well advised to structure an effective D&O insurance programme. Many claims arise in connection with corporate transactions such as mergers, acquisitions, management buy outs and initial public offerings. The more frequent causes of directors' and officers' (D&O) claims activity worldwide include:

- stock price volatility
- poor financial condition
- mergers and acquisitions (M&A) activity
- insider trading
- overstating revenues/earnings, leading to financial restatements
- failure to disclose problems relating to the purchase of a subsidiary
- accounting irregularities.

In addition to shareholders, the stakeholders most likely to bring claims against directors or officers are employees, regulatory authorities, customers, suppliers, creditors and competitors.

In summary the insurance industry is well placed to cater for the growing financial and professional exposures companies face in today's complex business world. Financial lines insurances have grown to a multi-billion dollar business given the growing coverage needs of directors and officers and professionals worldwide, but also given the proven value of D&O and PI insurance in addressing liability exposures. It will be interesting to see how this business and the exposures develop in the MENA region with the further future development of the region.

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... countries, "board" as used in the Principles refers to the "supervisory board" while "key executives" refers to the "management board". In systems where the unitary board is overseen by an internal auditor's body, the principles applicable to the board are also, mutatis mutandis, applicable. The terms "corporation" and "company" are used interchangeably in the text.

The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them. Their purpose is to serve as a reference point. They can be used by policy makers as they examine and develop the legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices. The Principles are evolutionary in nature and should be reviewed in light of significant changes in circumstances. It is up to governments and market participants to decide how to apply these Principles in developing their own frameworks for corporate governance, taking into account the costs and benefits of regulation.

The Principles document is divided into two parts. The Principles presented in the first part of the document cover six areas. In the second part of the document, the Principles are supplemented by annotations that contain commentary on the Principles and are intended to help readers understand their rationale.

The six Principles are as follows.

- I. Ensuring the Basis for an Effective Corporate Governance Framework** -- The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.
- II. The Rights of Shareholders and Key Ownership Functions** -- The corporate governance framework should protect and facilitate the exercise of shareholders' rights.
- III. The Equitable Treatment of Shareholders** -- The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.
- IV. The Role of Stakeholders in Corporate Governance** -- The corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and

encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

- V. Disclosure and Transparency** -- The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.
- VI. The Responsibilities of the Board** - The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

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D&O CLAIM EXAMPLES

- Directors were accused to undervaluing a company for the purposes of sale in return for lucrative packages on the board of the new owned company. Shareholders accused the directors of breach of their duty to value the company fairly and unjust enrichment by disposing of their personal shareholding prior to the (under)valuation. Directors faced substantial joint and several liability for damages and disgorgement of profit.
- Executives employed in the international transport industry were accused of making price fixing deals with competitor companies, resulting in official investigations being launched in various jurisdictions around the world for suspected breach of competition laws. This led to substantial fines and penalties imposed against the company and exposure to criminal liability on the part of the executives.
- Two directors of a construction firm were sued for a loss that their financing bank had incurred on several loans to their company. Since violations of accounting regulations were proven, it was clear that the liability of the directors was present. The directors were found to be 60% liable and the accountants 40% liable for the loss.
- Following the bankruptcy of a subsidiary of the insured, a panel of experts was selected to check if any mismanagement faults had been committed within the company. The experts' report concluded that both the manager and a different financial subsidiary of the insured were guilty of mismanagement. The receiver sued the manager and the company before the court and requested that they be jointly condemned to reimburse over one million Euros.

Recent Events

May 19 to 20

Introduction to Board and Corporate Governance, Dubai

May 20 to 21

Practical Tools for Strategic Guidance and Managerial Oversight, Dubai

July 28 to 31

Training of Trainers – Corporate Governance Board Leadership Program, Abu Dhabi

Planned Events

November 17-18, Abu Dhabi

Introduction to Corporate Governance

November 19-20, Abu Dhabi

The Board

December 14-15, Dubai

Strategic Leadership

December 16-17, Dubai

Financial Stewardship, Accountability & Leading, Planning Improvement

For more information on Mudara please visit

<http://www.mudara.org>

For membership details, please email membership@mudara.org

For registration details on the programmes & workshops, please email profdev@mudara.org

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