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Directors' Duties Of Care, Skill and Diligence In Vietnam

Abstract

The director's duty of care in Vietnam is in its infancy. Many of the existing provisions are borrowed from other jurisdictions and require implementation and evolution to make them uniquely Vietnamese. As part of the existing duties, Vietnam currently stipulates a duty to the 'State' and this could form a cornerstone for their own model of corporate social responsibility.

Keywords

Duty of Care, Directors' Duties, Corporate Governance, Corporate Social Responsibility

DIRECTORS' DUTIES OF CARE, SKILL AND DILIGENCE IN VIETNAM

Jeremy Pearce*

The director's duty of care in Vietnam is in its infancy. Many of the existing provisions are borrowed from other jurisdictions and require implementation and evolution to make them uniquely Vietnamese. As part of the existing duties, Vietnam currently stipulates a duty to the 'State' and this could form a cornerstone for their own model of corporate social responsibility.

INTRODUCTION

The historical approach to the duty of care, at common law, was to apply a subjective test that allowed a very low standard of care. Romer J's famous judgment in *Re City Equitable* was careful to allow directors the benefit of any doubt about their competence. In other words, expect of them only what they can do, given their individual level of skill and experience.¹ This approach reflected the view that directors were chosen by shareholders and thus their choices were the shareholders' business. It was also formulated with non-executive directors in mind rather than executive directors.²

In Vietnam, Article 119(1b) of the *Law on Enterprises 2005* states:

The Board of Management, the director or general director and other managers shall ... exercise their delegated powers and perform their delegated duties honestly, diligently to their best ability in the best interests of the company and of the shareholders of the company.³

This provision is for shareholding companies. Article 56(1b) and Article 72(1b) outline similar provisions for limited liability companies with two or

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¹ *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 428-9 was the traditional starting point for the duty of care. Romer J set out the common law duties expected of directors. 'Romer J held that directors were expected to provide reasonable attention to the affairs of the company although they could delegate their duties to appropriate officers of the company; that is, to management. In addition, Romer J also held that it was not necessary for directors to attend every meeting, although that particular view has now been clearly as [sic] too lax because of cases that are more recent.' R Baxt, *Duties and Responsibilities of Directors and Officers* (18th ed, Australian Institute of Company Directors, 2005) 81. For more see D Arsalidou, 'To be Active or Inactive: Is this a "New" Question for Company Directors?' (2003) 8 *Deakin Law Review* 318.

² Romer J in *Re City Equitable*, *ibid* 489: a 'director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.'

³ National Assembly, Socialist Republic of Vietnam, *Law on Enterprises 2005*. <<http://www.dpi.hochiminhcity.gov.vn/invest/html/Laws-Policies/LawonBusiness.pdf>> at 1 May 2010.

more members and single member limited liability companies respectively. Interestingly, the wording in these Articles refers to the best (or in the case of 72(1b) 'maximum lawful') interests of the company.⁴

This provision is poorly worded and falls short of the requirements set out in other jurisdictions. The wording in Article 119(1b) suggests that a subjective test is sufficient. This may also present a conflict of interest in circumstances where shareholders' interests might not be in the best interests of the company.⁵

For shareholding companies in Vietnam, the *Model Charter* in Article 33 stipulates:

Any member of the Board of Management, the managing director or chief executive officer and any authorized manager shall be responsible to perform his/her duties including duties in the capacity of a sub-committee of the Board... in the manner which is believed to be in the best interests of the Company, and with the degree of prudence which a prudent person must have in order to fill a corresponding position in similar circumstances.⁶

Here the provision cites the manner 'believed' to be in the best interests of the company, which does not add any clarity in terms of understanding the test a Court might apply. However, the addition of the 'prudence which a prudent person ... [in] a corresponding position in similar circumstances', creates a more objective perspective to the diligence required by the director. 'Prudence' equates to care and diligence. This is the most sophisticated wording of each of the provisions set down for shareholding companies, relating to care and diligence.

Decision 12/2007/QD-BTC stipulates in Article 12 (1) that:

Members of the board of management shall be responsible to implement their duties in an honest and diligent method in the best interests of the shareholders and the company.⁷

This does not add any strength to either the *Law on Enterprises 2005* or the *Model Charter*, and continues to refer to duties to both the shareholders and the company. Rewording and consolidating these provisions would provide a clearer understanding of the requirements of directors.

⁴ Ibid.

⁵ The potential problem here is how this construction would be interpreted in the Vietnamese context. There is precedent in the US for a 'duty to shareholders'. See D G Baird and M T Henderson, 'Other People's Money (Fiduciary Duty to Shareholders)' (2008) 60(5) *Stanford Law Review* 1309.

⁶ *Decision Issuing the Model Charter Applicable to Companies Listing on the Stock Exchange/Securities Trading Centre* (No15/2007/QD/BTC) dated 19 March 2007.

⁷ *Decision Promulgating Regulations on Corporate Governance Applicable to Companies Listed on the Stock Exchange or a Securities Trading Centre* (No 12/2007/QD/BTC) dated 13 March 2007.

An intriguing complication arises when the *Law on State Owned Enterprises 2003*, Article 27, is translated to English. It refers to obligations and responsibilities of the director, stating that the director is obliged:

To perform the duties and powers assigned to him honestly and responsibly and for the benefit of the company *and the State*, to organise implementation of law at the company.⁸

What is the 'State' exactly, and what does a director do when the 'benefit' of the company conflicts with that of the State, remains unclear. Moreover, what constitutes 'benefit'? Is 'benefit' the same as 'best interests' of the company? One possible approach to this provision could be to argue that the duty to the 'State' is similar to, or will bring out the same conundrums as, the emerging doctrine of corporate social responsibility. The State's interest is equivalent to that of the other 'stakeholders' in the company; the employees, the suppliers and consumers and now, the environment. Party political objectives favouring Party officialdom, for example, could not automatically be viewed as 'State' objectives, the State being a notion of all the citizens as a corporate whole.

Although corporate social responsibility is not within the wording or parameters of their duty of care provisions, it is a useful consideration for the Vietnamese to ponder, given their current provisions and the phasing out of the *Law on State Owned Enterprises 2003*. The meaning intended for the word 'State' in the provision is almost certainly that of the 'Party State'. This narrow view might lead one to dismiss any further consideration of the provision, because the word invokes the inflexible and dictatorial State and as such may be beyond adaptation for corporate social responsibility purposes. However, if one accepts that the broader purpose of the 'State' is the betterment of the people as a whole, then the corporate social responsibility discussion may be fruitfully pursued.

Australia does not have a specific statutory requirement or duty that in terms requires directors to be socially responsible. However, the UK *Companies Act 2006*, in s 172, codifies a duty to promote the 'success' of the company.⁹ The 'success' is to be measured by looking at a range of factors, including the long term consequences of decisions and the impact of the company's operations on the community and environment.

⁸ National Assembly, Socialist Republic of Vietnam, *Law on State Owned Enterprises 2003*. [Emphasis added.]

⁹ See also Chivers D, *The Companies Act 2006: Directors Duties Guidance* (The Corporate Responsibility Coalition, 2007).

CORPORATE SOCIAL RESPONSIBILITY

Corporate social responsibility (CSR) has been a development of the stakeholder theory that is particularly pertinent for multinational corporations. The argument for CSR suggests that corporate accountability and self-regulation by companies should be dependent upon or geared towards socially responsible business behaviour.¹⁰

Sims offers one useful definition of CSR:

The continuing commitment by business to behaving ethically and contributing to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.¹¹

Lantos argues that CSR has three components – ethical, altruistic and strategic – and whereas every organisation must practise ethical (avoiding social harms) practices, for-profit publicly quoted businesses should not undertake altruistic CSR (good works at the expense of shareholders) unless these are strategically altruistic (good works which are also good for business).¹²

Carr argues differently, surmising that business works within an amoral framework whereas society operates within a more defined morality.¹³ Under this argument it is the purpose of law to regulate the excesses of business rather than for business to be self-regulating from a morality perspective. Thus, one would posit that the role of the corporation is to be as efficient as possible in maximising profits while operating under the constraints and regulations imposed by law. Here, the role of external forces, such as the law, is to function as instruments to keep companies in line with the morality of society.¹⁴ This is not the same as the corporation taking on its own self-imposed morality from the viewpoint of its corporate social responsibility.

Briggs argues that there is an inherent obligation to serve the wider community, and to fail to do this will bring about the destruction of capitalism.¹⁵ It is not clear how Briggs has come to this conclusion. Nor is it clear what Briggs defines as service to the wider community. It is simplistic to view service to the wider community as achievable only via a specific

¹⁰ R R Sims, *Ethics and Corporate Social Responsibility: Why Giants Fall* (2003) 43.

¹¹ Ibid.

¹² See J Peters, 'Social Responsibility is Free – How Good Capitalism Can Co-exist with Corporate Social Responsibility' in Crowther D, and Layman-Bacchus L (eds), *Perspectives on Corporate Social Responsibility* (2004).

¹³ See A Z Carr, 'Is Business Bluffing Ethical?' (1968) 46(1) *Harvard Business Review* 143.

¹⁴ 'In most healthy market-driven societies, you have a host of institutions whose business it is to distinguish between trustworthy and the trustworthless ... it only works if the firms that don't do a good job of separating wheat from chaff are punished'. J Surowiecki, (ed), *Best Business Crime Writing of the Year* (2002) xiii, xiv. Of course, being law abiding does not necessarily mean that a company is acting morally.

¹⁵ Ibid.

community-minded program of social responsibility. One needs only to look as far as the nearest mining town to see precisely how one company can provide for the well-being of an entire community that may well not even exist but for the operation of the mine. Surely this is service to the wider community?

Briggs' view is not well defined and fails to accept that a law-abiding corporation that is striving to be the most efficient and productive business it possibly can be is already contributing to society, regardless of CSR. Thus CSR is something more than simply contributing to the community.¹⁶ Moreover, it is a specific choice taken by the company for its own reasons and does not of itself mean that the company will be of better service to the community. For example, if we take the mining town situation, and surmise the company embarks on a large-scale CSR program that cripples its efficiency and profit thereby forcing retrenchments, which scenario is better for the community? A community buoyant with employment provided by a company that is profitable; or a community that enjoys a CSR program but has crippled morale because of increasing unemployment? This is a simplistic depiction for illustrative purposes, but it does weigh against the solemn pronouncement of the end of capitalism.

One case that is often cited in support of CSR is the Ford Motor Company – *Pinto* case of the 1960s. In this case, executives at Ford took a narrow decision against replacing the fuel tank, which was known to carry a high risk of explosion in an accident. They calculated that the amount of compensation paid to dead or burned victims of crashes involving the Pinto caused by successful negligence suits against them would be less than the cost of recall and redesign. The problem with this analysis is its assumption that the Ford executives did not take into account the potential loss of reputation for having a faulty fuel tank that could potentially kill or severely burn customers. Moreover, it fails to suggest that Ford should in fact have had no option but to recall and rectify the situation through the force of law. This then moves the debate out of the realms of CSR.

CSR remains problematic in corporate law theory and practice, because once a firm begins to go down that road it enters into a never-ending process of constantly weighing up the pros and cons of the relative economic benefits of a program against its costs. Regardless of how successful the CSR program is in terms of social or moral value, its value to the corporation will always be evaluated in terms of profit and loss, its 'profitability' or, more particularly, its impact on the stock price, if we are assessing the impact on listed public companies. Business success must remain at the core of a company's values.

¹⁶ Ibid.

As Peters says, 'CSR will not sustain unless it has a capitalist imperative – unless it is shown to make good business sense'.¹⁷ In 1970, that most articulate of free market philosophers, Milton Friedman, maintained:

There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.¹⁸

Frank supports Friedman and goes further by arguing that, 'according to the standard theory of competitive markets [firms maximising shareholder wealth] will attract more capital and eventually drive the [other] firms out of business'.¹⁹

In this context the 'other' firms are those that are engaging in some form of CSR. It is critical to separate those actions that are specifically CSR related from actions that firms might undertake that 'appear' to be CSR based but are essentially aligned to their core objectives and are motivated by profit. According to Frank, 'when material incentives favour cooperation, it is more descriptive to call the cooperating parties prudent than socially responsible'.²⁰

As a counter to this approach, consider the argument that consumers and employees might favour companies that undertake CSR. In this scenario we need to assume that the CSR is genuine and not a mechanism to generate profit. Frank outlines that Star Kist's profits increased as a result of supplying 'dolphin-safe' tuna, despite the increased costs associated with delivering this product. Frank also cites increased profits for the Body Shop, Ben and Jerry's ice cream and McDonald's, all of which engage in CSR programs of some kind.²¹

The question then arises, would these companies undertake these programs if they were not making profits? In other words, when CSR programs are aligned to core objectives and have a positive impact on profits, shareholders will accept those programs, as their interests are still being met. What happens when this is not the case? Is it unethical for directors exercising their fiduciary duty to serve the best interests of the company to continue with a CSR program despite shareholders losing profits? Or, are CSR programs the luxury of firms that can justify them only via increased profits for their shareholders? In this scenario, are CSR programs simply self-serving, even when they are legitimately beyond the core objectives of the firm?

¹⁷ Ibid 214.

¹⁸ M Friedman, 'The Social Responsibility of Business Is to Increase its Profits' *New York Times Magazine* (New York) 13 September 1970.

¹⁹ R H Frank, *What Price the Moral High Ground* (2004) 58.

²⁰ Ibid 59.

²¹ Ibid 66.

As Corkery and Welling state:

The pivotal issue is whether the company can be managed so that it recognises the interests of *stakeholders*, without jeopardising the primary function of creating profit. One view is that shareholders will get profits in the long term only if employees, customers, the environment and other 'stakeholders' are satisfied ... If one takes a long term view of profit maximisation, rarely is there incompatibility between the interests of shareholders in profit and the interests of wider stakeholders. Further, reduced reputation and loss of customers can flow from failure to respect societal concerns and prevailing ethical standards.²²

More importantly, can we equate the CSR doctrine with a duty to the 'State' in the socialist context of Vietnam? As with the CSR explanation, it would be difficult for directors to pass off a decision made in the interests of the Vietnamese 'State' (certainly from the 'narrow view' of the 'State'), that was not in the best interests of the company, as being bona fide and made in good faith or in accordance with diligence and care. The problems that the 'narrow view' of the 'State' can create are exhibited in the *Tuong An Vegetable Oil* case.

TUONG AN VEGETABLE OIL CASE

This case highlights the conflicts of interest that can exist when directors act in accordance with the State's interest rather than for the company's best interest. Directors in Tuong An Vegetable Oil secretly directed purchases away from imported materials of oil (originally supplied by Wilma), instead purchasing from Vocarimex, a major (State-owned) shareholder of Tuong An Vegetable Oil. Vocarimex appointed the directors who carried this decision. The case was never taken to Court because of the nature of the parties involved and the cumbersome processes of the Vietnamese legal system.

The lawyers representing the minor shareholders sent letters of appeal to various government organisations, including a request to the State Capital Investment Corporation, to change the directors representing Vocarimex in Tuong An Vegetable Oil. These requests were unsuccessful. Even if the requests had been granted, the same problem would remain. Having a duty to the State compromises and confuses the directors' duty of care and their primary responsibility to the best interests of the company.

Le summarises it well:

The problem is that Vocarimex, as an authorised representative of the State, has used the State's capital in order to seek its own profit, going against the State's policy on equitization... Conflict between the State's profit and that of

²² J F Corkery and B Welling, *Principles of Corporate Law* (2008 Scribblers Publishing) 205-6. The issue in the Vietnamese context is one of defining the 'State' in terms of a 'stakeholder', or in broad terms 'the people' and exploring the extent to which there is connection with the CSR discussion. This requires a separate enquiry from the purpose of this thesis.

the authorized representative of the State... is one of the reasons why public investment has never gained its effect and why many equitized enterprises are not honest and effective in their business.²³

SUBJECTIVE TEST

In Australia, the original subjective test for the duty of care has been replaced with a more objective standard, both at common law and statute. In the *AWA Case*,²⁴ the auditors of the company were held liable because they negligently failed to report on the company's improper bookkeeping and its inadequate internal controls on foreign exchange dealings. The Court reiterated and considered four major aspects of the duty of care: the nature of the duty, the ability for directors to delegate, the need for directors to keep informed about the company's business, and the standard of care for both executive and non-executive directors.²⁵

In the *AWA case*, Clarke and Sheller JJA recognised that directors can and should have diverse backgrounds. But they do not just represent their background:

There is no doubt reason for establishing a board which enjoys the varied wisdom of persons drawn from different commercial backgrounds ... a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience.²⁶

There was some contention that non-executive directors ought to be able to rely on a lower standard and one that is more subjective in nature.²⁷ This argument was rejected by the NSW Appeal Court, and an objective duty of care was held to apply to both executive and on-executive directors.

What is there in this common law development that assists Vietnamese corporate regulation? First, Vietnam might ensure that its duty of care and diligence is objectively applied and assessed. Second, that duty applies with equal force to all directors, whether State or private appointees, executive or non-executive in nature. The Vietnamese can strengthen their corporate governance by reviewing the provisions for the directors' duty of care and outlining a more objective test, especially for limited liability companies. Article 33 of the *Model Charter* takes a step in this direction for shareholding companies.

²³ Le N, '*Tuong An Vegetable Oil*: The key is the conflict between the State's profit and that of the authorised representative of the State' (unpublished paper, 2008).

²⁴ *AWA case (Daniels v Anderson)* (1995) 37 NSWLR 438.

²⁵ *Ibid.*

²⁶ *AWA case (Daniels v Anderson)* (1995) 37 NSWLR 438, 500.

²⁷ See Rogers CJ in *AWA case (Daniels v Anderson)* (1995) 37 NSWLR 438. 'The debate on whether the duties imposed by the statute was too onerous, developed after the famous *AWA case* (1991 and on appeal 1995)... this led to the introduction of the so-called statutory business judgment rule'. B Baxt, *Duties and Responsibilities of Directors and Officers* (18th ed, Institute of Company Directors, 2005) 81.

Common law jurisdictions usually set out more detail on the duty of care, although the duty of care provision is never lengthy. Usually they mention care and diligence; rarely do they add the word 'skill'. There is good reason for that, as 'director' was not seen by the law as a profession or trade with an acknowledged skill set, such as that surrounding a surgeon, architect, builder or accountant.

The Vietnamese provision refers only to diligence and does not mention care or skill. Some steps have been taken to strengthen the standard of care required by directors in shareholding companies, but these do not relate to directors in other forms of company, and still fall well short of the considerations set down in the common law jurisdictions.

ASIC V ADLER

ASIC v Adler revealed a crowded and multi-coloured array of breaches of duty. Santow J recounts:

So far as Adler is concerned, the findings indicate not only that he contravened the *Corporations Law* in many respects but also that he did so with knowledge of the impropriety of his conduct and for the purpose of advancing his own personal interests at the expense of the companies of which he was a director or officer. His conduct thus amounted to a most serious dishonesty, occurring not as an isolated act but as a pattern of conduct over a number of months. This conduct was coupled with persistent lies and deceptions designed to conceal his conduct and/or its impropriety.²⁸

This case included other breaches of duty, not least of which was the duty to act honestly. Most importantly, however, the Court found that there was a conflict or potential conflict between the director's interests and the director's duties and that the duty of care requires a standard that demonstrates some diligence.²⁹ Santow J outlined a number of considerations which form the cornerstone of the law on the directors' duty of care, in any jurisdiction, and this formulation illustrates the depth to which the Australian law goes regarding the director's duty of care. It offers key requirements for the duty of care from which Vietnam might take guidance:

- (1) A duty of care, diligence and skill;
- (2) A standard of care that is commensurate with the skill and diligence of a director in that company at that time;
- (3) The standard of care that is at worst that of the ordinary prudent person;

²⁸ *ASIC v Adler* [2002] NSWSC 483, ¶57.

²⁹ *ASIC v Adler* [2002] NSWSC 483, ¶56 (vii). Santow J cites *ASC v Donovan* (1998) 28 ASR 583, 607: 'In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.'

- (4) The standard of care that requires the director to appropriately inform him/herself of all aspects of the company's affairs that one would reasonably expect of a director in that company at that time;
- (5) Any delegation of duties should reflect all the qualities of care, skill and diligence of a director in that company at that time;
- (6) The director's care, skill and diligence reflects a rational belief of a reasonable person in that company at that time that their decisions were in the best short and long term interests of the company.

In short, the duty is both subjective (specific and contextual) and objective, rational and exhaustive,³⁰ and carries a minimum standard of care of the ordinary prudent person. A higher standard applies if the specific circumstances merit it. In borderline cases, where the appropriate standard is not clear, the onus ought to be on the director to show why a higher standard should not be applied, rather than being able to rely on the minimum standard of the ordinary prudent person.

DILIGENCE

Diligence is an alternative formulation of the duty of care. It is a synonym for care. Diligence also appears in the Vietnamese provisions. The sole reference in Vietnam to acting diligently to the best of one's ability as a director, contrasts with the extensive provisions outlining what constitutes care and diligence in the Australian statute. The Vietnamese version does not explain what constitutes diligence for directors. It may be susceptible to subjective considerations, as indeed the Australian provision has been over the years. It is unclear how it would be interpreted by the courts. Are there situations in the company circumstances that influence the standard of diligence required? Is the diligence of a small company director the same as the diligence required of a director of multinational company? How would the Vietnamese Courts adjudicate on diligence?

In Australia, s 180(1) of the *Corporations Act 2001* states:

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

³⁰ This means that each decision of the director needs to follow the same set of criteria in determining that the duty has been observed. For example, if directors claim they delegated their powers or for some reason were 'unaware' of the facts, questions follow: What measures did they take to ensure their duty of care was observed, in each of their decisions? What care, skill and diligence did they exhibit in their delegation? How does their decision to delegate their powers reflect their duty of care?

- (a) Were a director or officer of a corporation in the corporation's circumstances: and
- (b) Occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.³¹

This provision outlines an objective test for the standard of care that is determined by considering the corporation's circumstances, the office held and the responsibilities the office carries within the corporation.³² Vietnam could look at the Australian statute and case law to formulate an appropriately robust law on the duty of care.

BUSINESS JUDGMENT RULE

The Courts in Australia have taken the view that it is for directors to determine what is in the best interests of the company, and not the courts.³³ As a result Courts are reluctant to review or second guess the business decisions of directors, particularly when they are made in good faith and for a proper purpose.³⁴ This approach to the business judgment rule comes with the caveat that the decision will be subjected to scrutiny by the courts if no reasonable board would have made it.³⁵

The common law applies to directors' decisions and s 180(2) stipulates a statutory version of the business judgment rule that applies to the duty of care, skill and diligence.

The Vietnamese law must acquire an appreciation of the complexities involved in the directors' diligence requirement. The business judgment rule assists in allowing the entrepreneurial essence of the company to thrive without overly intrusive laws, while at the same time providing for essential corporate governance to protect the company from negligent or incompetent directors. Roe argues that the business judgment rule allows managers to make mistakes without consequences.³⁶ A balance has to be struck between

³¹ *Corporations Act 2001* (Cth). Note that this provision is not restricted to directors but also applies to 'officers' of the corporation.

³² 'The director may not plead personal idiosyncrasies in defence of a claim that he or she has breached the duty of due care and diligence.' See above n 28.

³³ *Smith v Fawcett* [1942] Ch 304, 306 per Lord Greene MR; *Carlen v Drury* (1812) 1 V&B 154, 35 ER 61 per Lord Eldon; *Howard Smith Ltd v Ampol Petroleum* [1974] AC 821, 832; [1974] 1 NSWLR 68.

³⁴ See *Howard Smith Ltd v Ampol Petroleum* [1974] AC 821, 832; [1974] 1 NSWLR 68; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493 per Barwick CJ, McTiernan and Kitto JJ: 'Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the Courts.'

³⁵ See *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, 671; *Shuttleworth v Cox Bros (Maidenhead Ltd)* [1927] 2 KB 9; *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62.

³⁶ 'The American business judgment rule has judges *refusing* to review and regulate managers' unconflicted acts. Managerial mistakes, disloyalty to shareholders (as long as the managers' hands

protecting entrepreneurial endeavour and ensuring proper observance by directors of their duties to the company.

The Vietnamese provisions are light on shareholder protections and remedies in general. The various provisions outlined above for Vietnamese corporate entities tend to conflate duties of care, skill and diligence with those of acting honestly and in the best interests of the company. In other jurisdictions these are separate and distinct duties. A director can act honestly and negligently at the same time.

In China, the *Company Law 2005* provides for duties of loyalty and diligence to the company.³⁷ Despite these provisions China, like Vietnam, has been criticised for having a weak accountability and governance system for company directors.³⁸ Although it is accepted that the legal systems have evolved separately and distinctly in different cultural and political contexts from the Anglo-American governance systems, there remains a considerable gap between the written provisions in China and Vietnam and tangible enforcement or any form of serious implementation of them.³⁹ If the explanation for this gap is the cultural, political and economic context of China and Vietnam, why stipulate the provisions? One could argue that the provisions are a step along the road to improved governance (from the Anglo-American perspective), as easily as one could suggest that it is merely window dressing to lure foreign investment, while maintaining scant regard for 'good' governance.

McNaughton's argument in the Chinese context is that the provisions have been borrowed and implemented to help China evolve step by step.

The terminology is similar to that of the Anglo-American provisions on which they are modelled... however the legal theories and interpretations underlying these rules are not well developed at all. This holds true for the rest of China's economic laws generally and the laws relating to directors' duties in particular. Many of the concepts therefore which underlie China's new economic laws are necessarily still 'external' to China's legal system and to those who are interpreting and applying them. In other words, conduct is prescribed or proscribed by statute, as a result of which duties and obligations will be observed; but there is not yet a recognition of the duty or

are not in the cookie jar), over-investment, under-investment, and so on, are just not subject to corporate law review.' M J Roe, *Political Determinants of Corporate Governance* (2003) 19.

³⁷ See Article 146 of the People's Republic of China *Company Law 2005*.

³⁸ 'Current Chinese company law contains insufficient provisions on directors' duties and no effective accountability system' C Shi, 'International Corporate Governance Developments: The Path for China' (2007) 7 *Asian Law* 60, 76.

³⁹ 'A major problem with adopting foreign legal ideas in the process of legal reform in China is that "quite often the Chinese legislators simply borrow the concepts and rules found in foreign laws without really understanding the meaning of the rules in these foreign laws".' A McNaughton, 'Directors' Duties Under China's Company Law: Something Borrowed, Something New' (1999) 6(1-2) *Canberra Law Review* 167.

obligation itself, which comes with the internalisation of a principle or concept.⁴⁰

This, however, assumes that the 'internalisation' process will occur and result in an understanding of the concepts that is similar to that of the Anglo-American context. Hawes adds to this discussion by stating:

far from creating a company law system that is converging with Western models, whether Anglo-American or Continental – in other words, one in which most companies are autonomous entities free from government interference – the recently amended *PRC Company Law* actually reinforces the Chinese Government's latest policy drive to regain control over the private and foreign-funded sectors of the Chinese economy. It doubtless reflects the government's concern that, with the rapid expansion of these sectors, it may soon be faced with a rich and powerful new capitalist class that could challenge its political supremacy.⁴¹

The counter to Hawes' proposition is that foreign investors and the international community, including the WTO, will expect China and Vietnam to live up to the provisions set down, as understood in the Anglo-American context. China and Vietnam will be given time to evolve an understanding, and demonstrate their best efforts to implement the provisions.

The United Kingdom has similar provisions for duties of care, skill and diligence to those of Australia. *The Companies Act 2006* (UK) provides s 174 for what was previously a subjective test for a director's duty of care and skill. Unlike the Australian law, there is no provision in Vietnam or in the UK for a business judgment shield for directors. The mechanism provided to Australian directors through the business judgment rule - that when applied, exonerates them from a breach of their duty of care and diligence - is taken up by the courts in the UK. They consider the particular circumstances and attributes of the individual directors before them.

like the Australian Courts, the Courts now appreciate that in large modern corporations, there is a distinction between oversight and management... This means that the nature and extent of the duty of skill, care and diligence will depend on such factors as the size, location and complexity of a company's business and the urgency of any decision... The formulation in s 174 takes account of the special background, qualifications and management responsibilities of a particular director.⁴²

Some commentators claim that the provisions set down for directors relating to duties of care and diligence and fiduciary duties are more comprehensive

⁴⁰ Ibid 189.

⁴¹ C Hawes, 'Interpreting the PRC Company Law Through the Lens of Chinese Political and Corporate Culture' (2007) 30(3) *UNSW Law Journal* 813, 823.

⁴² The Right Honourable Lady Justice M Arden DBE, 'The *Companies Act 2006* (UK): A New Approach to Directors' Duties' (2007) 8 *The Judicial Review* 145, 157.

in some common law countries than in Germany.⁴³ This observation sits well with the evidence provided by the 'law matters' debate. It is here that Vietnam needs to move from 'borrowing' to 'evolving' its own good governance framework. The 'law matters' evidence is comprehensive.⁴⁴ It demonstrates a strong correlation between economic growth and good governance laws, specifically laws that provide shareholder remedies. Of course, one needs to be wary of trying to dictate to or influence the Vietnamese, given their history of pugnacious and successful defence against all comers. But the challenge remains that Vietnam either accepts the 'law matters' evidence and sees the value in pursuing best practise in corporate governance theory and practice, or demonstrates why it is an exception to it.

Even in more sophisticated and elaborate corporate law frameworks, like Australia, there are spectacular corporate failures that centre on directors' incompetence, recklessness and criminality. A review of the corporate collapse of HIH demonstrates the extent of this problem. So, if corporate law does matter and mature and comprehensive corporate law frameworks fail to prevent corporate collapse, one can only wonder what the true extent of, and potential for, corporate failure might exist in the less mature corporate law environment of Vietnam.

CONCLUSION

Vietnam does not have a comprehensive duty of care, skill and diligence for its company directors. There is a duty to be diligent, but it is not well defined or supported. Vietnam is in the process of evolving its own corporate laws. It is impossible to have a strong corporate governance framework without comprehensive directors' duties. If we accept the 'law matters' evidence, then the Vietnamese need to bolster their directors' duties to make good their corporate financial success. The duty of care, skill and diligence is one of the cornerstone duties for directors. Vietnam needs to develop its approach to duty to reflect an appropriate balance between protection for shareholders on the one hand and entrepreneurial endeavour on the other.

Vietnam can also evolve its current duty to the 'State' and combine it with some of the other provisions outlined in Decree 139,⁴⁵ to formulate its framework for futuristic corporate social responsibility.

⁴³ See T Baums, 'Corporate Governance: National Report on Germany' (Paper presented at the XV International Congress of Comparative Law (*Academie Internationale de Droit Compare*), Bristol, 1998). See also *German Corporate Governance Code Gesetz*.

⁴⁴ See R La Porta, F Lopez-De-Silanes, A Shleifer and R W Vishny, 'Legal Determinants of External Finance' (1997) LII(3) *The Journal of Finance* 1131. See also G Walker and M Fox, 'Corporate Governance Reform in East Asia' (2002) 2(1) *Corporate Governance* 4, and The World Bank Group, 'Which Countries Give Investors the Best Protection' (April 1997) Note No 19 *Privatesector*.

⁴⁵ *Decree Providing Detailed Guidelines for Implementation of a Number of Articles of the Law on Enterprises* (No 139/2007/ND/CP) dated 5 September 2007.