

/ Senior executive liability

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Under the current amendment of the new Civil Code (“Amendment”) coming into force on 1 July 2016, the current liability regime pertaining to senior executives will be eased a bit.

Liability to third parties

Since 2014, a third party can make a claim directly against the senior executive. Under these provisions, if a senior executive causes harm to a third party in connection with his/her position, the senior executive and the company are jointly and severally liable towards such a third party. It was lively debated in the judicial literature which scope of application this provision is intended to have and also, who is at all eligible to claim such damages (persons with whom the company is not in any contractual relationship or even contractual partners).

As this regulation and its interpretation caused so much trouble for the companies, executives and legal practitioners as well, one of the purpose of the Amendment was to eliminate this uncertainty. From 1 July 2016, under the Amendment senior executives and the company have joint and several liability for any damage caused to third parties when acting in their capacity as a senior executive only if the damage is caused by them on purpose. Also, the Amendment extended the liability for damages to not only the non-contractual damages (tort law), but to contractual damages as well.

This clarification at least eliminates the unsettling idea that a senior executive is liable directly against all contractual partners of the company for every negligent act or omission jointly and severally with the company. An often cited example was, that the senior executive forgets to forward an e-mail with a term for supply of spare-parts and he becomes personally liable for the contractual penalty for late performance. However, as the Civil Code does not give a definition on intention, it is yet to be seen how the judicial practice will work out the details of that matter and what type of damaging conducts would qualify as intentional.

Liability towards the company

According to the new Civil Code, senior executives remain liable towards the company they represent for damage caused in the course of the performance of their duties, but the extent such liability will be significantly increased.

If a senior executive causes damage for his/her company, he/she can only be released from liability if he/she is able to demonstrate (i) that the circumstance resulting in the damage arose outside his/her scope of responsibility (e.g. as a result of force majeure or due to a change in legislation, etc.), (ii) the circumstance resulting in the damage was not foreseeable for the senior executive when accepting the appointment; and (iii) he/she could not be expected to avoid the circumstance resulting in the damage or avert such damage.

A senior executive must demonstrate all of the above circumstances together to be released from liability. We draw particular attention to the fact that a senior executive can cause damage not only through action but also by omission, for example, by failing to exercise appropriate supervision or to avert harmful events.

It is important to note that senior executives are also liable if they do not actually perform any managerial activities but merely act as ‘token’ executives registered in company registration records.

The effect of the stricter rules is some-what mitigated by the fact that under the new Civil Code, senior executives are only liable to their companies for harm or damage which the company is able to demonstrate to have been foreseeable at the time of the senior executive’s appointment. The Amendment does not change that type of liability.

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