

# Directors' Liability and Reliance on Experts

**Leopold Bauer**

Contact: L.Bauer@taylorwessing.com

Supervised by: Prof. Dr. Dr. h.c. Dr. h.c. Holger Fleischer, Dipl.-Kfm., LL.M., (Univ. of Michigan), Managing Director Max Planck Institute for Comparative and International Private Law, Hamburg

---

## Abstract

---

Those looking to explain the relationship between directors' duties and expert advice will inevitably find themselves exploring the exact nature of directors' liabilities when acting in reliance on that advice. As such, one cannot help but reflect on the role of the board itself. Section 76(1) German Stock Corporation Act (Aktiengesetz, AktG) charges the board of directors with managing the affairs of the company on its own responsibility. However, while members of the board should make decisions in the best interests of the company, they cannot possibly be expected to know or do everything on their own. In principle, business managers may and do divide their labour to allocate and delegate multiple tasks amongst themselves and to their subordinates.

The motivation and point of reference for this work comes from developments in case law over the past fifteen years. In a series of decisions, the Second Civil Senate of the Federal Court of Justice (II. Zivilsenat des Bundesgerichtshofs) specified the conditions under which members of the board of directors could claim a lack of culpability for a legal error when acting on the advice of experts. These decisions handed down by the Federal Court of Justice do more than impressively demonstrate the significance of culpability in board liability for German stock corporation scholars. They also further the understanding of the duty of corporate bodies to comply with the law and thus, in contrast, of the scope of duty imposed by the second sentence of section 93(1) AktG. Thus, a good decade subsequent to the introduction of the business judgment rule, legal practice has reached an important stage of consolidation - one that calls for a critical, and fundamental assessment of the status quo.

In three chapters, this thesis investigates the doctrinal sources of law surrounding expert advice in terms of breach of duty, culpability, and contributory negligence. The fourth chapter raises the question of whether German stock corporation scholarship is unnecessarily following a tort law paradigm by interpreting the imposition of a duty in the standard for negligence set by section 93(1) AktG. Such a paradigm may however shape how duties of the board are understood. As seen in the debate surrounding unlawful success and unlawful conduct, distinguishing between unlawfulness and culpability is often very difficult. When discussing compliance, widely understood as a duty to monitor conduct for the purposes of ensuring lawful action, we find some striking parallels. This thesis



provides a new perspective, inspired by contract law, of the board's performance (and performative) obligations. As such, it is based on the general doctrine of performance and section 315(1) German Civil Code (Bürgerliches Gesetzbuch, BGB), and consistent with the theory of final performance. This view is consistent with the case law from the Federal Supreme Court, and strict enough to account for the responsibility of the board, while also providing sufficient flexibility to accommodate the need to delegate.