

DIRECTORS AND OFFICERS
LIABILITY INSURANCE POLICY
WHAT TO LOOK FOR

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Civil Liabilities

Non-Statutory Guidelines on Director's Duties – Companies Registry

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- Duty to act in good faith for the benefit of the company as a whole
- Duty to use powers for a proper purpose for the benefit of members as a whole
- Duty not to delegate powers except with proper authorization and duty to exercise independent judgment



- Duty to exercise care, skill and diligence
- Duty to avoid conflicts between personal interests and interests of the company
- Duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law



- Duty not to gain advantage from use of position as a director
- Duty not to make unauthorised use of company's property or information
- Duty not to accept personal benefit from third parties conferred because of position as a director



- Duty to observe the company's memorandum and articles of association and resolutions
- Duty to keep proper books of account

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Criminal/Regulatory/Statutory Liabilities

(For both Listed and Non-listed Companies)

- Regulatory
- | | |
|---------------------------|--|
| 1. CO (s.168) | 7. EO (s.64B) |
| (s. 40) - Prospectus | 8. Factories and Industrial Undertaking Ord (s.14) |
| 2. SFO – MMT – PSI | 9. Competition Bill (Disqualification Order against Director) – s.99 |
| 3. IRO (s.57) | |
| 4. EOC (School Principal) | |
| 5. PDPO | |
| 6. Copy Right Ord (s.125) | |

Cost of defence, if successful.



Flow of Claims

Employee
Customer
Government } — Company — Company suffers

Pay Compensation (fine) — Shareholder suffers

Shareholder sues director



BY LIQUIDATOR

Liquidator of Wing Fai Construction Co Ltd v Yip Kwong Robert

28 March 2011

Court of First Instance

Companies (Winding-up) Proceedings No 735 of 2002

HCCW 735/2002

Liquidators sued Directors for misappropriated funds -- Directors owe duty to insolvent company – liable to compensate company for misfeasance – Directors applied to strike-out – Directors ordered to pay the legal fees



BY SFC

Securities and Futures Commission v Yeung Kui Wong

1 March 2011

Court of First Instance

Miscellaneous Proceedings No 1742 of 2009

HCMP 1742/2009

[2011] HKEC 297 English Judgment

A listed company -- directors disqualification -- failure to disclose specified matters -- appropriate periods of disqualification

Directors' misfeasance/misconduct with intent -- Withholding information from shareholders and members -- Company shares value drop -- Directors disqualified for 2-5 years



BY DIRECTOR

Director v. the Rest of the Directors

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BY CREDITOR

Creditor v. Director

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BY COMPANY

Kishimoto Ltd v. Akio

M. D. left the company

Co sue M. D. for breach of fiduciary duties



BY COMPANY

China Everbright Ltd v. Chong Pok

CEO obtained majority
shareholding in the company



BY SHAREHOLDER

Shareholder v. Director

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BY COMPETITOR

Competitor v. Director

Competition Bill



BY ANY PERSON

(who suffer pecuniary loss)

Any Person v. Director

MMT



Directors Personal Liabilities

Civil - Damages

- Legal Costs

- winning parties costs

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Directors & Officers Liability Insurance

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S165(1) Companies Ordinance

Exemption of liability of D&O or indemnity for them against liability to the company in respect of

- (a) negligence
- (b) default
- (c) breach of duty
- (d) breach of trust

are **VOID** unless the liability is for defending any proceeding (civil/ criminal) and D&O win the case or court so orders.



S165(3)

A company may purchase insurance for its D&O:-

- (a) against any liability to the company itself in respect of negligence, default, breach of duty, breach of trust (except fraud) for which D&O may be guilty in relation to the company.

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S165(3) (Con't)

(b) against any liability incurred by D&O in defending any proceeding (civil/criminal) taken against him for negligence, default, breach of duty, breach of trust (including fraud).



Things to Look Out

- Coverage
- Jurisdiction?
- US, EU, PRC
- Premium involved
- Is the Company covered?
(in addition to D & O)



Policy Coverage

- On claim made basis (usually)
(non-disclosure)
- Claim arising during the period of
insurance

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Insured Persons

Cover usually applies to:

- All Directors including non-executive (What about corporate director?)
- All Officers including managers or company secretary
- Past Directors (of old company?)
- New positions created after inception of the policy
- Outside directorship?



Limitation

- crime, fraud?
- legal expense in case of losing?
- fine/compensation?
- liability of company (in addition to D & O)?
- retention/excess
- exclude major shareholder suing director?



Exclusions

- Fines and penalties
- Compensation
- Deliberate dishonesty or fraud by any D&O,
Defence costs if case lost
- Exclude payment arising from
placement/offering exceeding certain amount



Questions

Will Insurance Company take over the conduct of litigation?



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Q & A Session



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PLEASE NOTE

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本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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