New Hong Kong Companies Ordinance: Directors’ liabilities – exemptions, indemnities and insurance

WHEN IN FORCE: 3 March 2014

COMPANIES AFFECTED: All Hong Kong incorporated companies

NEW PROVISIONS: Part 10, Division 3 of new CO: ss467-473

GENERAL POINTS:

References in this alert to a director’s liability mean liability incurred by a director whilst acting in his role of a director. Liabilities incurred by that person whilst acting in another work-related role (including merely as an employee) or whilst acting in a personal capacity are outside the scope of this alert.

This alert covers the following:

- circumstances in which a company may exempt a director from liability;
- circumstances in which a company may indemnify a director for liability;
- circumstances in which insurance purchased by a company for its directors may be void; and
- implications for practice.

The new CO uses the defined term “associated company” instead of the existing defined term “related company”. The definitions of these two terms are identical – an “associated company” or a “related company” includes each of the company’s subsidiaries or holding companies, and subsidiaries of such holding companies. The defined term “associated company” will be used throughout this alert.

1. Exemption Provisions – Exempting a director from liability under the articles or as part of the service contract

Summary of changes

Liability owed to the company or an associated company

- Under the existing legislation, a company may exempt an officer (being a director, manager or company secretary) of the company from any liability to the company or an associated company except where there has been negligence, default, breach of duty or breach of trust by the officer in relation to the company or an associated company.
• The new CO has a narrower scope. The prohibition against a company granting exemptions from liability is narrowed to a director’s liability. Exclusions from liability made in favour of managers or company secretaries are not covered by the new CO.

• The new CO permits a company to exempt a director from any liability except where there has been negligence, default, breach of duty or breach of trust by the director in relation to the company.

• It is worth noting that, in certain circumstances, a company may ratify conduct by a director involving negligence, default, breach of duty or breach of trust in relation to the company by way of shareholders’ resolution.

2. Indemnification Provisions – Indemnifying a director for liability

Summary of changes

A. Liability to the company or an associated company

• There are no changes to the indemnification position under the existing legislation in respect of liability of a director to the company or an associated company.

• Under the existing legislation and the new CO, any provision which indemnifies a director of the company or a director of an associated company for any liability attaching to the director where such liability arises as a result of any negligence, default, breach of duty or breach of trust in relation to the company or the associated company, will be void.

• Similar to the position on exemptions referred to above, however, the new CO has a narrower scope than the existing legislation and does not cover indemnities made in favour of managers and company secretaries.

• The new CO has an express provision regarding indemnities in respect of liabilities owed to other persons, which is discussed below.

B. Liability to other persons

• The existing legislation is silent on whether a company is permitted to indemnify a director for his liability to persons other than the company or an associated company.

• Under the new CO, the starting point is that a provision is void if it provides for the company to indemnify its director (or a director of an associated company) against liability attaching to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company (or an associated company). The provision applies regardless of whether the indemnity is for a director’s liability to the company, an associated company or other persons.

• There are a number of wide exclusions to the above rule in respect of liability by a director to other persons. These exclusions effectively mean that indemnities to other persons are permitted as long as the indemnities do not relate to criminal fines, penalties imposed by regulatory bodies, defence costs in criminal proceedings where the director is found guilty and defence costs of civil proceedings brought by the company or an associated company where judgment is given against a director.

• Common law rules continue to govern any potential indemnities that fall outside the statutory prohibitions and exclusions described above.
3. Purchase of director’s insurance

Summary of changes

- The existing legislation and the new CO do not prohibit a company from purchasing insurance for directors. Indeed, the new CO envisages that a company may, at the expense of the company, purchase insurance for a director of the company against:
  - Primary liability: a director’s liability to any person in connection with any negligence, default, breach of duty or breach of trust (except for fraud) in relation to the company or an associated company; and
  - Costs of proceedings: a director’s liability in defending any proceedings (civil or criminal) for any negligence, default, breach of duty or breach of trust (including fraud) in relation to the company or an associated company.

- Common law rules continue to govern the circumstances in which losses may be irrecoverable under insurance purchased by a company. For example, a court may invalidate an insurance contract on public policy grounds if it seeks to insure a director for regulatory or criminal fines made against him.

4. Implications for practice

- The new CO indemnity and insurance provisions are reflected in: (i) Articles 35 and 36 of the new Model Articles for public companies; and (ii) Articles 31 and 32 of the new Model Articles for private companies. These may be helpful, for example, in drafting contractual indemnity provisions.

- However, any exemption or indemnity provided by a company to a director should be set out expressly in the director’s service contract or terms of engagement and not merely included in the articles. This is because:
  - the articles of association of a company are a contract between the members of the company and the company (and not a contract between the company and its directors); and
  - an indemnity may not necessarily be implied in a director’s terms of engagement solely by virtue of the company’s articles of association requiring the company to indemnify a director against liability (Moulin Global Eyecare Holdings Limited (in liq) v Olivia Lee Sin Mei (HKCA CACV 109/2009)).

- Under the new CO, a company must disclose any permitted indemnity provisions which are in force in its directors’ report and a copy of such permitted indemnity provisions should be kept at the company’s registered office and be made available upon request by a member of the company.

- Given that conduct by a director resulting in liability may arise (i) from the performance by a director of his duties as a director of the company, (ii) from the performance by a director of duties whilst acting in another capacity (such as an employee, possibly as chief executive officer or chief financial officer), or (iii) in a personal capacity, it is essential for a company to determine whether the source of the conduct will have an impact on the validity of any exemption provisions, indemnity provisions or insurance provisions.

- For listed companies, paragraph A.1.8 of Appendix 14 (Corporate Governance Code and Corporate Governance Report) of the Hong Kong Listing Rules require a listed company to arrange appropriate insurance cover in respect of legal action against its directors. If the listed company does not purchase insurance for its directors, it is required to provide an explanation in its annual report as to the reasons why.
新香港《公司条例》：
董事的法律责任 - 豁免、弥偿和保险

实施日期：2014年3月3日

受影响公司：所有在香港注册成立的公司

新条文：新《公司条例》第3部分第10部;第467-473节

一般观点

本简介中提及董事的法律责任指董事担任董事职位时所产生的法律责任。该董事于担任其它与工作相关的角色时所产生的法律责任（包括仅作为雇员的法律责任）或以个人身份行事所产生的法律责任均属本简介以外的范围。

本简介的内容包括下列各项：

- 公司可豁免董事免除法律责任的情况；
- 公司可弥偿董事须承担法律责任的情况；
- 公司为其董事购买的保险时可能失效的情况；及
- 对实施的影响。

新《公司条例》使用定义词汇“有联系公司”取代现有定义词汇“关连公司”。该两项词汇的定义相同—“有联系公司”或“关连公司”包括公司各附属公司或控股公司以及这些控股公司的附属公司。定义词汇“有联系公司”将会于整份简介内使用。

1. 豁免条文 - 豁免董事在细则或作为服务合约的一部分下的法律责任

变更摘要

对公司或有关联公司的法律责任

- 根据现行法例，公司可以豁免公司高职位人员（即董事、经理或公司秘书）对该公司或具有联系公司的法律责任，惟倘若该高级职员违反有关公司或该有联系公司的疏忽、失责、失职或违反信托行为则作例外。

- 新《公司条例》的范围较为狭窄。对公司提出免除法律责任的豁免的禁止乃收窄至董事的法律责任。新《公司条例》的内容并没有包括免除经理或公司秘书的法律责任。
• 新《公司条例》准许公司豁免董事任何法律责任，惟倘若该董事违反关乎该公司或该公司有联系公司的疏忽、失责、失职或违反信托行为则作别论。

• 值得注意的是，在部份情况下，公司可以股东决议案的方式追认董事涉及疏忽、失责、失职或违反信托行为的行为。

2. 弥偿条文 — 豁免董事的法律责任

变更摘要

A. 对公司或其有联系公司的法律责任

• 现行法例下有关董事对公司或其有联系公司的法律责任的弥偿状况并没有变更。

• 根据现行法例或新《公司条例》，为附带于董事因违反关乎公司或其有联系公司的疏忽、失责、失职或违反信托行为而产生的任何法律责任而弥偿公司董事或其有联系公司董事的任何条文，将会失效。

• 不过，与上文所指的豁免的情况相似，新《公司条例》较现行法例的范围狭窄，并不包括向经理及公司秘书作出弥偿。

• 新《公司条例》就对其它人士的法律责任的弥偿有明确条文，乃于下文讨论。

B. 对其它人士的法律责任

• 现行法例并没有提及公司获准就董事对其它人士（公司或其有联系公司除外）的法律责任作出弥偿。

• 根据新《公司条例》，起始点是倘若公司就关乎公司或其有联系公司的疏忽、失责、失职或违反信托行为所附带的法律责任向其董事（或其有联系公司的董事）作出弥偿，则有关条文失效。不论有关弥偿有关董事对公司、其有联系公司或其它人士的法律责任，该条文均适用。

• 就董事对其它人士的法律责任而言有项排除在外情况。这些排除在外情况实际上指只要有关弥偿与刑事罚款，监管机构判处的罚款、在董事被裁定有罪的刑事法律程序中招致的抗辩费用，以及在有关公司或其联系公司对董事提起而董事被判败诉的民事法律程序中招致的抗辩费用无关，则准许向其它人士作出弥偿。

• 普通法规例继续规管任何超出上文所述的法定禁止和免除情况的任何潜在弥偿。

3. 购买董事保险

变更摘要

• 现行法例和新《公司条例》并不禁止公司为其董事购买保险。事实上，新《公司条例》预期公司可在自行承担支出的情况下，就以下各项为公司董事购买保险：

  – 主要法律责任：董事因在关乎公司或其有联系公司的疏忽、失责、失职或违反信托行为（欺诈行为除外）有关连的情况下对任何人承担的法律责任；及
法律程序费用：董事在关乎公司或有联系公司的疏忽、失责、失职或违反信托行为而引致的任何法律程序（民事或刑事）中承担的法律责任。

普通法例继续规管在公司所购买的保险下不可收回亏损的情况。例如，倘若该保险合约是为对董事的监管或刑事罚款投保的，法院可以因公众政策的理由使保险合约无效。

4. 对实施的影响

新《公司条例》有关赔偿和保险的条文均在以下反映：(i) 适用于公众公司的章程细则范本第35条和第36条；及(ii) 适用于私人公司的章程细则范本第31条及第32条。这些条文在如草拟合约赔偿条文方面或许有用。

不过，公司向董事提供的豁免和赔偿应明确地载于董事的服务合约或聘用条款，而不是仅仅收录于细则。这是因为：

- 公司的组织章程细则属于公司成员与公司之间的合约（并不是公司与其董事之间的合约）；及
- 赔偿不一定仅藉公司的组织章程细则要求公司就法律责任向董事作出赔偿而在董事的聘用条款内默示 [Moulin Global Eyecare Holdings Limited (in liq) v Olivia Lee Sin Mei (HKCA CACV 109 2009)]。

根据新《公司条例》，公司必需在其董事报告中披露任何实施中的获准许赔偿条文，而该获准许赔偿条文的副本应备存于公司的注册办事处，并在公司的成员要求下可供查阅。

鉴于董事引致法律责任的行为或会由以下各项产生(i) 董事担任董事职责而履行的责任；(ii) 董事担任其它身份（如作为雇员，可能作为行政总裁或首席财务总监）而履行的职责；或(iii) 以其个人身份，公司必需确定行为的来源会否对任何豁免条文、赔偿条文或保险条文的有效性将造成影响。

就上市公司而言，香港上市规则附录十四A.18段（企业管治守则和企业管治报告）规定，上市公司须就针对其董事的法律行动安排购买适当的保险。如上市公司并没有为其董事购买保险，其须要在公司年报内解释不购买保险的理由。