

PART I – THE COMPANY AND ITS BOARD

INTRODUCTION

1. Every association or organisation needs a governing body to determine its strategic objectives and policies, to appoint and control its operational management, to monitor progress towards objectives and compliance with policies and to be accountable for its activities to parties to whom an account is properly due.
2. The governing body of a company is its board of directors.
3. Many of the functions, responsibilities, liabilities and duties of directors which are described below must be discharged by the directors of any company, however incorporated and whether or not it has commercial objects. These guidelines are, however, primarily addressed to the directors of limited companies incorporated in Hong Kong under the Companies Ordinance, for business purposes.

THE COMPANY

INCORPORATION AND LIMITED LIABILITY

4. The nature of a company director's functions and responsibilities are heavily influenced by the special legal status of a company. A company is a corporation created by a legal process with a legal identity separate from the human beings associated with it. Its corporate status means that it enjoys a legal capacity to act as an entity distinct from the persons who hold the capital. This principle of incorporation offers the opportunity to the providers of capital to limit their liability for the company's debts to the amount they have agreed in advance to make available to it. The two principles of incorporation and limitation of liability apply in principle to all limited companies-public and private (including subsidiaries)-even though in the case of many small private companies it may appear difficult to disentangle the company from the proprietor and, in the case of many subsidiaries, de facto control may rest with a holding company.

DIRECTORS' LIABILITY IS UNLIMITED

5. It is only the liability of a shareholder for the company's debts that is limited. There is no limit to the damages for which a director may be held liable, as director, at the instance of the company or of a third party. There may be a provision in the company's Memorandum of Association to this effect. If so, a director should have received notice of it before agreeing to become a director.

PUBLIC AND PRIVATE COMPANIES

6. As at May 2009 there were about 740,000 companies registered in Hong Kong of which over 9,900 were registered as public limited companies (but only about 1,300 of these were companies listed on The Hong Kong Exchanges and Clearing Limited). The Articles of a private company must restrict the right of its members to transfer its shares, limit the number of its members to 50 and prohibit any invitation to the public to subscribe for any shares or debentures of the company. Any company which does not have such restrictions in its Articles is a public company.
7. Private companies are usually either subsidiaries of larger companies or companies where it is not intended that any part of the capital should be offered to the public (for example where the capital is held by a small number of individuals who for the most part play an active part in the management of the company). A small number of companies limited by guarantee and unlimited companies are also registered in Hong Kong.
8. In spite of the comparatively small number of public companies, company law in practice is primarily directed towards this type of company. On the one hand, this is appropriate because the rights of shareholders of a public company, being remote from its operations, need quite elaborate legal systems to ensure their protection. In addition, public companies and their subsidiaries dominate the economy to an extent quite disproportionate to the smallness of their number. On the other hand, the emphasis on the public company has resulted in a growing trend in corporate governance which is, in a number of respects, over elaborate for private companies.

PROFIT, SURVIVAL AND GROWTH

9. The aim of most companies is to make a profit. Profit serves three functions:
 - (i) It provides a measure of the success the company has enjoyed in satisfying its customers with the minimum overall consumption of resources;
 - (ii) It is the source of the immediate rewards for the providers of the company's equity capital – who are most exposed to the risk of irrecoverable loss;
 - (iii) It provides a source of investment for future expansion.
10. However, profit alone should not be a company's overriding aim. Companies have a wider responsibility to their employees, customers, other associated parties and the environment. Companies must also survive and grow. To achieve these aims they must both make profits and adapt to changing conditions.

THE PARTIES ASSOCIATED WITH A COMPANY

11. A number of parties will have an interest in the fortunes of a company. These include customers, suppliers, employees, lenders and other creditors whose relationship with the company is based on contract but heavily modified by statute. A company has a further and most important relationship with its shareholders and potential shareholders who enjoy, or hope to enjoy, properly rights in the company.
12. A company's obligations to its customers, suppliers and employees or its wider public obligations in respect of such issues as the protection of the environment, are not affected by its corporate status and form little part of company law. However, the mechanisms for enforcing a company's compliance with these obligations are heavily affected by its corporate status, and a great deal of the burden falls on directors personally.
13. To be successful, a company must adopt policies for its dealings with its associated parties which embrace both the economic and the legal aspects of the company's relationship with them.

CUSTOMERS

14. It is customers alone who produce revenue for companies. Every other party associated with a company through the market produces costs. Customers exercise a freedom of choice which distinguishes the free enterprise approach from the collectivist model. Nothing is more calculated to bring a business to disaster than failure to take account of its customers' requirements and interests or bring free enterprise in general into disrepute. A company must take adequate account of, or provide adequate compensation for:
 - Dangers to health or safety inherent in a particular product or service;
 - Attempts to secure unfair advantages over customers (price fixing or collusive practices);
 - Statutory safeguards for customers' economic interests.

EMPLOYEES

15. In theory, employees sell their labour to companies. In practice, a company cannot afford to treat its employees badly. Companies must take into account their employees' concerns about such factors as:
- The security of their employment;
 - The capacity of their employer to recognise and reward their individual contributions to the business;
 - The physical conditions in which they work;
 - Job satisfaction including the amount of their salary.
16. Although the Hong Kong Government has generally tended to respect freedom of contract and to minimise the extent to which legislation regulates contracts of employment, the level of protection afforded to employees in Hong Kong has gradually been extended by the addition of various rights, benefits and protections in the employment legislation (principally the Employment Ordinance). One of the surest defences against further, possibly unsuitable regulatory legislation, is for companies voluntarily to make progress in looking after their employees. A growing body of evidence suggests that harmonious employee relations and increased levels of productivity have been achieved by:
- Involving employees in decision-making (not necessarily at board level), which helps them to identify with the company (e.g. through share ownership schemes);
 - Training employees and attempting to motivate them as individuals;
 - Communicating information about the company effectively; and
 - Consulting employees before decisions are taken.

CREDITORS

17. There is a great deal of company and insolvency legislation designed to protect creditors and to compensate them for the reduction in their rights that limitation of shareholders' liability involves. The protection of depositors, who are of course creditors, is particularly important in the case of deposit-taking institutions and is the purpose behind a great deal of the specialised legislation covering such institutions as banks and insurance companies.

18. A company's liabilities to creditors may create substantial personal liabilities for its directors if the business of the company has been carried on with intent to defraud creditors and the company becomes insolvent (see paras 265 to 279 below).

GOVERNMENT AND THE COMMUNITY

19. Companies should act, and be seen to act, as "good citizens". This involves ensuring scrupulous compliance with the law of the jurisdictions in which the company does business. The problem is that a company's corporate capacity means that it can only be made subject to economic penalties if it fails in this area.
20. However, the law has never had any problem in imputing the state of mind of the individuals who can be held to be a corporation's "mind and will" to the corporation itself. The mind and will of a company is normally held to reside in its board of directors. Where questions arise concerning the criminal liability of companies, it is possible for the directors of a company to be found criminally liable on its behalf (see paras 289 to 293 below).
21. Similarly, the consciences of the members of the board of directors may be held to represent the conscience of the company where moral rather than legal issues are at stake. The Institute believes that companies should be a positive force for good in the communities in which they operate, and that companies, their directors and their employees have a great deal to contribute to the solution of many social and environmental problems, particularly in such areas as education and training, pollution, urban renewal and the stimulation and propagation of an enterprise culture.
22. A proper balance of interests must be maintained though. Directors do not have a totally free hand to act purely as their personal consciences dictate. A company may make charitable, political and other similar gifts, including ex gratia payments, if it is expressly (in its Memorandum of Association) or impliedly empowered to do so. In making such gifts or payments, directors are governed by rules similar to those which apply to any other payment made within their general power of management on behalf of the company. To be valid, the payment must be for the benefit of the company and made bona fide in the interests of the company. In the absence of an express power in its objects clause, it must also be reasonably incidental to its business. As Bowen J. said in *Hutton v. West Cork Railway* in 1883:

"The law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company."

SHAREHOLDERS

23. The role of shareholders in a company is a distinct one:
- Their relationship with the company is different from those of the other parties, being based on property rights; and
 - They play a formal part in the decision-making structure of the company and need therefore to be considered in this light also.
24. It is unhelpful and strictly speaking incorrect to regard the shareholders and the company as being identical. It is also unhelpful to describe them simply as the “owners” of the company. Even collectively they do not own the company or its assets outright. What they do own is a bundle of rights on which a monetary value can be placed. The extent and nature of these rights depend very largely on each company’s constitution as expressed in the Memorandum and Articles of Association. Shareholders’ rights will normally include the following main elements but most of them may be excluded or modified in the case of a particular company or class of shareholder:
- A financial return, normally in the form of a proportion of the company’s distributable profits (i.e. a dividend);
 - A right to transfer their interest to another person;
 - A right to vote in general meetings, enabling them to participate in decisions on the size, shape and scope of the company and in particular in decisions to:
 - dismiss and appoint the directors;
 - change the company’s constitution;
 - liquidate the company and distribute the value of the assets among themselves.
25. Many of the provisions of the Companies Ordinance are designed to protect the interests of shareholders on the assumption that their knowledge of and involvement with the company will be minimal. Shareholders’ rights to information about a company are limited to those provided for in the Ordinance. Companies and their directors must comply with these disclosure provisions.

GENERAL MEETING, BOARD AND MANAGEMENT

GENERAL MEETINGS AND RESOLUTIONS

26. Every company must hold an Annual General Meeting (AGM) each year and within 15 months of the last AGM, with the exception of a newly incorporated company which need only hold one AGM in its first two years as long as it is held within 18 months of incorporation. 21 days notice in writing, or any longer period provided for in the Articles, must be given unless all the members entitled to attend and vote at an AGM agree to a shorter period of notice.
27. Any other meeting of shareholders is an Extraordinary General Meeting (EGM) and requires 14 days notice in writing or such longer period as the Articles require. If it is proposed to pass a special resolution at an EGM (which requires a 75% majority), 21 days notice of the meeting specifying the intention to move the resolution must be given.
28. However, if a majority in number of members having the right to attend and vote at the meeting, being a majority together holding not less than 95% in nominal value of the shares giving a right to attend and vote at the meeting, agree, a shorter notice period may be given.
29. Some resolutions, such as those used to remove directors, need only a bare majority to pass them at an AGM or EGM, but special notice must be given to the company by any person intending to move such a resolution 28 days before the meeting at which it is to be moved. The company must then give notice to the members of the intention to move the resolution at least 21 days prior to the meeting.
30. Certain groups of shareholders may require the company to put forward a resolution at the next general meeting and to circulate a notice and short explanatory statement of such a resolution to those entitled to receive notice of meetings. These groups are 50 or more shareholders holding shares paid up to an average of HK\$2,000 per member of shareholders holding 2.5% or more of the total voting rights of all members having a right to vote at the meeting.
31. A more significant power given to some shareholders is the power to require the directors of a company to call an EGM. Shareholders holding 5% or more of the value of the paid up capital carrying voting rights at the date of requisition may require this of the directors. Certain notice requirements must be met by the members involved. If the directors fail to call a meeting requisitioned in this way, the members may proceed to hold it themselves at the company's expense.

WRITTEN RESOLUTION PROCEDURE

32. This is especially appropriate for many private companies where the directors and the shareholders are the same people and therefore many provisions of the Companies Ordinance, such as those relating to resolutions and meetings, are redundant. Section 116B of the Companies Ordinance provides that a resolution in writing shall be treated as a resolution (or, where relevant, a special resolution) passed at a general meeting. A written resolution must be signed by all the members entitled to attend and vote at a general meeting. The signatures need not be on a single document provided that if two or more documents are used, each document is certified in advance by the Company Secretary as containing the correct version of the proposed resolution. Thus, a resolution in writing, signed by all the members, is as good as any resolution prescribed by the Ordinance or the Articles. Such a resolution becomes valid after the last person has signed it.

RELATIONSHIP BETWEEN GENERAL MEETING, BOARD AND MANAGEMENT

33. There are three bodies with direct responsibility for shaping the company's future:
- (i) The general meeting of shareholders;
 - (ii) The board of directors;
 - (iii) The company's higher management.
34. The relationship between these three bodies is defined by the company's Memorandum and Articles of Association. Every director should, before accepting his or her appointment, get hold of these documents which, together with any resolutions of or agreements to a like effect between shareholders, constitute the company's written constitution. He should read them carefully to find out what the formal powers and duties of each body are. Each body may do only that which the current constitution of the company and the legislation permit it to do.
35. The general meeting of shareholders holds what is in effect a power of life and death over the company and over its board. It is also the guardian of the company's constitution, since it alone has power to alter the Memorandum and the Articles.
36. At the other end of the spectrum, it is the function of the higher management to deploy the resources available to it in the most economical manner in pursuit of the strategic objectives and in compliance with the policies of the company, as determined by the board.

37. Between general meeting and management stands the board of directors, the body in which rests the responsibility for governing the long-term strategic direction of the company, as contrasted with its short-term operational management.

THE FUNCTIONS OF DIRECTIONS – DEFINITION

38. In summary, the board of directors take responsibility for:
- Determining the company's strategic objectives and strategic policies;
 - Appointing the company's top management;
 - Monitoring progress towards the achievement of objectives and compliance with policies;
 - Giving an account of the company's activities to the parties to whom an account is properly due.
39. The main components of these functions are:

Strategy

- Determining the business activities in which the company should engage and those which it should by positive decision avoid.
- Ensuring that the company has adequate long-term objectives and strategies, expressed in both physical and financial terms.
- Taking a view, in carrying out its responsibilities to the company, on the necessary balance between the interests of shareholders, employees, customers, suppliers, creditors and the community and ensuring that the company has clearly understood policies in relation to these interests consistent with the achievement of its strategic objectives.
- Ensuring that the company reviews its business plans in the wider context of the current and likely local and international environment and with adequate intelligence as to the activities of its major competitors and developments in technology.
- Approving the budgets presented by the management and ensuring that they are compatible with short-term and long-term objectives.

- Determining the extent and priority of the company's investment in relation to the opportunities and threats ahead, having regard to the resources available.
- Approving specific major investment and policy proposals and deciding on dividend policy.

Appointing Top Management

- Selecting the Managing Director and determining the terms of his or her contract.
- Ensuring the adequacy of the company's management structure and resources for specific and general tasks. The planning of management motivation, development and succession.
- Approving top management remuneration and directors' expenses.

Monitoring

- Ensuring that the company's information systems are adequate to monitor performance and to provide for sound decisions by board and management.
- Identifying vulnerabilities in the company's financial position, both short term and long term, with particular reference to expected profitability, liquidity and solvency.
- Monitoring management performance against strategic objectives and compliance with strategic policies and initiating appropriate corrective action if failures are revealed.

Accountability

- Ensuring the fullest communication with shareholders and the company's recognition of their interest.
- Ensuring that the company complies with its legal obligations as to the disclosure of information and maintains an appropriate level of transparency about its business.

THE FUNCTIONS OF DIRECTION-APPLICATION TO DIFFERENT TYPES OF COMPANIES

PUBLIC COMPANIES

40. In public companies there will generally be a clear distinction between direction, management and ownership and the board's function will be directed primarily towards making strategic decisions. The directors of public companies operate under a tighter regime since public companies, especially if they are listed, are subjected to far more stringent controls than private companies. The Companies Ordinance imposes more rigorous provisions on public companies in areas such as:
- Maintenance of capital;
 - Distribution of profits;
 - Loans to directors;
 - Financial assistance for the acquisition of shares in the company;
 - The issue and purchase by the company of its own shares.
41. If the company is listed on The Stock Exchange of Hong Kong Limited ("SEHK") (either on the Main Board or on the Growth Enterprise Market (GEM)), the Companies Ordinance imposes stricter provisions in these areas, particularly in relation to the distribution of profits and financial assistance for the acquisition of shares in a company. In addition, the provisions of the SEHK's "Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited" ("MB Rules") or the "Rules governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited" ("GEM Rules") must be complied with (See Para 230 below). The Rules regulate various transactions which the company may wish to embark upon, including transactions between the company and directors themselves.
42. The Securities and Futures Ordinance (Cap. 571) also includes provisions designed solely for the regulation of listed companies and those involved with such a company.

PRIVATE COMPANIES

43. In private companies there will generally be a less clear distinction between the functions of direction, management and ownership because the same individuals are often both directors and major shareholders. The same comment in fact also applies to

a number of public companies in Hong Kong. This does not remove the need to make conscious distinctions between these functions. Every company should pay proper attention to the long-term, strategic function of direction.

44. It is suggested that even small private companies, where the equity may be owned by a single individual, should adopt a formal board system for two reasons:
- (i) It is extremely unlikely that a company can comply with its legal obligations in letter or spirit, whether imposed by the general law including the Companies Ordinance or by its own Memorandum and Articles of Association, unless certain acts are performed collectively by a board of directors;
 - (ii) The nature of the decisions directors take are based on uncertain assumptions about the future and require discussion, consultation and the exercise of judgement which is best achieved by a small, well-informed group.
45. Every board of directors should submit itself to the discipline of having a predetermined programme of meetings with a pre-prepared agenda which will help ensure that the board:
- Fulfils its legal obligations properly;
 - Prepares in advance for its discussions;
 - Concentrates on long term strategic direction rather than day to day operational management.

SUBSIDIARIES

46. Under the definitions section of the Companies Ordinance (s.2(4)), a company is deemed to be a subsidiary of another company if, with regard to the subsidiary, that other company:
- (a) Controls the composition of its board of directors; or
 - (b) Controls more than half of its voting power; or
 - (c) Holds more than half of its issued share capital (excluding preference shares).

If a company is a subsidiary of another company which is itself a subsidiary of a third company, the first company will also be a subsidiary of that third company.

47. Subject to some exceptions, a subsidiary company is prohibited from being a member (or shareholder) of its holding company (s.28A(1) of the Companies Ordinance). The aims of this are twofold:
- (i) To prevent the directors of a holding company maintaining themselves in office indefinitely with the votes of the subsidiary company;
 - (ii) To prevent the capital of the holding company being indirectly depleted by the purchase of its shares by the subsidiary.
48. The function of direction as described above must be performed for each subsidiary. However, the responsibility for performing it is normally shared between the boards of the subsidiary and the parent company. How such responsibility is split depends on a company's individual circumstances. The parent company may operate simply as owner, reserving for itself only the highest level decisions. More often, it will be more involved in making operational decisions on such issues as target rates of return, investment policies, industrial relations and product strategies. If a parent company reserves too many decisions for itself, it will subvert the subsidiary board's function of direction. It must be remembered that, despite the close economic relationship between holding companies and subsidiaries, a subsidiary is a legal entity independent of its holding company. A director of a subsidiary owes duties to the subsidiary company and the parties associated with it, not the holding company. If a person is a director of both the holding company and the subsidiary or is a director of a subsidiary who is accustomed to taking directions from the parent, he or she should take care not to breach their duty to the subsidiary and declarations of interest should be made. These problems are augmented where a director of the subsidiary is also an employee of the group; the dual responsibilities – to the subsidiary as a director and to the group as an employee – can and often do conflict.

HOW THE BOARD OPERATES

COLLECTIVE RESPONSIBILITY

49. Directors have collective responsibility for the decisions made by the board. The board should therefore attempt to reach decisions by discussion and consensus. It manages as a committee.
50. The Articles of Association of a company sometimes allow board decisions to be passed by written resolution.

NOTICE OF MEETINGS AND QUORUM

51. The Articles of Association will usually specify that every member of a board is entitled to call a meeting and to have notice of a meeting, although Articles of many companies restrict the latter entitlement to directors who are in Hong Kong. The proceedings of a meeting where all members have not had proper notice are void. The notice need not be in writing to be valid, but the period of notice must be reasonable having regard to all the circumstances, including whether notice was given early enough to enable a director to attend. Circulation of a list of prearranged dates may be taken as proof of notice (and is good practice in any event).
52. A meeting cannot proceed to business unless a quorum is present. The quorum necessary for the meetings of the board (and of shareholders) is stated in the Articles of Association which normally requires a quorum of two or a number set by the directors.

AGENDA

53. This is normally combined with the notice of a meeting but there is in fact no legal requirement to give notice of the business to be transacted when calling a board meeting. The CG Code requires generally that the agenda and board papers be sent to directors at least three days beforehand. The constructive use of an agenda, to ensure that the various functions of the board are properly performed on an appropriate cycle and that items appear in the best order, can make a considerable contribution to the efficiency of the board. Some Chairmen find it useful to hold an “agenda meeting” with the Company Secretary and Managing Director about a week before the board meeting, so as to decide what should go on the agenda and in what order, and generally to discuss how the meeting should be conducted.

MINUTES

54. Most board papers will include minutes of the previous meeting which members of the board will be asked to agree as a true record, though minutes can be prepared and signed before the meeting to which they refer breaks up. Once agreed and signed by the Chairman, they are evidence, though not conclusive evidence, of the proceedings to which they relate. Board minutes should record decisions but generally need not chart discussion. However, discussions at remuneration and audit committee meetings should be formally recorded.
55. Minutes of all proceedings at directors’ meetings must be entered in a Minute Book which must normally be kept at the company’s registered office. Failure to comply with this requirement can lead to the directors being subject to a daily fine (s.119 and s.119A of the Companies Ordinance).

INFORMATION AND DOCUMENTATION

56. Directors are entitled to any information they require in order to perform their functions. They are entitled to rely on the information supplied by management as long as they have no grounds for suspecting that it is misleading or wrong. Directors should receive complete and accurate information sufficiently in advance of a meeting to have time to study it.
57. The CG Code states that management has an obligation to ensure the board receives adequate, complete, reliable and timely information to enable it to make informed decisions. Directors should not always rely purely on what is volunteered by management and should make further enquiries if necessary. Accordingly, the board should have separate and independent access to the company's senior management.

REQUIREMENTS FOR INFORMATION

58. As a matter of good practice, it is suggested that the following information should be included with board papers for a meeting:
 - **REGULAR INFORMATION FOR MONITORING PERFORMANCE** – e.g. management accounts and statistical returns. Key statistics should not be obscured in a mass of data more suited to management's use than to the board's. Board members must have a clear picture of the expected profit and cash position of the company.
 - **INFORMATION NEEDED TO REVIEW POLICY** – e.g. plans and budgets. Boards should have adequate information about the company's future projects and planned expenditure and particularly about the sensitivity of profits and cash flow to variations in market conditions.
 - **INFORMATION SUPPORTING PROPOSALS BY MANAGEMENT FOR NEW PROJECTS** – so that the board may decide whether to commit funds to new investments or major changes in policy.

WHO INITIATES POLICY – MANAGEMENT OR BOARD?

59. This role is shared. Management is not doing its job properly if it fails to bring to the board's attention the threats and opportunities which its day-to-day familiarity with the company's business allows it to identify. At the same time, it is the duty of every board member to bring to his colleagues' attention the threats and opportunities which wider acquaintance with the business environment may reveal.

60. Although management may initiate many of the projects by which a company's strategy develops, the responsibility for accepting or rejecting them rests firmly with the board. This is a particularly important issue when internal controls are concerned, and even more so when listed companies are involved.
61. The CG Code also states that directors should conduct a review (at least annually) of the effectiveness of the internal controls of the listed group and report this in their Corporate Governance Report. The review should cover all material controls, including financial, operational and compliance controls and risk management functions.

DISAGREEMENTS ON THE BOARD AND RESIGNATION

62. A board decision, even when not unanimous, is a decision of the board as a whole and a director has a duty to stand by it, once it has been taken.
63. If a member of the board disagrees with a decision or feels that a decision is wrong commercially, his or her first duty is to have such disagreement discussed and minuted at a scheduled board meeting. If no meeting is scheduled, he or she should consult the company's Articles as to an individual director's powers to call or requisition a board meeting and exercise them, circulating his or her views in advance to the other directors. But there is no compulsion on the other directors to attend such a meeting which may therefore lack a quorum and be unable to proceed to business. As a last resort therefore, the director may consider whether it is in the interest of the company that he or she should seek the support of sufficient shareholders to requisition a general meeting of the company (see paras 26 to 31 above).
64. It is a different matter if the dissenting director feels that a board decision or policy is not merely commercially unwise, but is unethical or unlawful. A director's first duty to the company in such circumstances is to take the lead in remedying the irregularity or illegality. Directors caught up in such a situation may feel they ought to resign, but increasingly they may be expected to continue in office and take positive steps to ensure that the irregularity or illegality is eliminated.
65. In attempting this they have a number of possible allies which include:
- Professional advisers – directors should recognise that they may sometimes have to seek independent professional advice. Failure to do so in certain circumstances may leave a director open to allegations of breach of his or her director's duties;
 - The company's auditors, on issues relating to disclosure and the truth and fairness of published financial information;
 - The shareholders – shareholders have a number of rights particularly when their interests are being unfairly prejudiced (see paras 26 to 31 above and control of abuse of powers, paras 150 to 158);

- The Financial Secretary – who has wide powers to order investigations of a company's affairs;
- In the case of listed companies, the SEHK;
- In some cases, some other bodies such as the Securities and Futures Commissioner.

66. A board cannot function properly if one director is continuously at variance with other members of the board over issues of commercial policy. A director in this position may well serve the company best by resigning. Resignation is something of a "nuclear deterrent" though. The threat is more valuable than the use, and notice of resignation, whether oral or written, cannot be withdrawn once given.
67. A director may wish to make public his or her misgivings about a company. If so:
- (i) He or she must take care to avoid making a defamatory statement;
 - (ii) Once a director has resigned, he or she may find it impossible to use information acquired as a director to influence shareholders, even if the information is not defamatory, because the court may grant the company, represented by the remaining directors, an injunction to restrain the publication of information the former director received in confidence as a member of the board. A director in this position is advised to take legal advice.

DELEGATION AND COMMITTEES

68. The Articles of Association normally permit a board of directors to delegate its functions, either to committees or to management. The purpose of committees is merely to examine, in greater depth than is possible in full board meetings, certain issues. The full board still retains responsibility for those issues.
69. Three committees commonly encountered in public companies are the remuneration committee, audit committee and nomination committee.

Remuneration Committees

70. As a matter of good practice, executive directors should not be responsible for fixing their own remuneration as executives. A remuneration committee provides the opportunity for non-executive directors to assist the Chairman in the sensitive task of deciding the pay and conditions of service of their executive colleagues in a manner which is demonstrably fair to them and to the company. A director should not be present when his or her own remuneration is under discussion.

71. Listed companies are required under the CG Code to establish a remuneration committee which consists mostly of independent non-executive directors (INEDs). They would have power to approve specific remuneration packages and performance-based payments, as well as to approve termination packages. Each INED's pay should not be voted on by himself. In addition, the Listing Rules now require that remuneration of directors be disclosed on a named basis in the company's annual report.

Audit Committees

72. Audit committees exist to provide a link between board and auditor, independent of the company's management which is responsible for the accounting system (including the preparation of accounts) that is the subject of the auditor's scrutiny. The primary purpose of an audit committee is to assist the board in the proper discharge of its responsibility with regard to the validity of published financial statements. It can also provide an appropriate vehicle for:
- Reviewing prospective auditors (who in Hong Kong are appointed by and report to the shareholders);
 - Any discussions the auditors may wish to initiate on the scope of the external audit and its relationship with the internal audit;
 - Negotiating the audit fee.

Audit committees should normally be comprised mainly of non-executive directors (see paras 87-89 below).

73. The CG Code now sets out what the terms of reference of the audit committee should at least cover and states that the terms of reference should include the duty to:
- (a) Make recommendation to the board on the appointment (including terms of engagement), reappointment and removal of the external auditor;
 - (b) Review and monitor the external auditor's independence and objectivity and the effectiveness of the audit process, discuss with the auditor the nature and scope of the audit and reporting obligations;
 - (c) Implement policy on the engagement of external auditor to supply non-audit services and report to the board on necessary remedial actions;

- (d) Monitor integrity of financial statements focusing on any changes in accounting policies and practices; major judgmental areas; significant adjustments resulting from audit; compliance with accounting standards; and compliance with the Listing Rules and other legal requirements;
- (e) Review financial controls, internal control and risk management systems and ensure that management has discharged its duty to have an effective internal control system; also to review operating, financial and accounting policies and practices;
- (f) Consider findings of major investigations of internal control matters; where an internal audit function exists, to ensure co-ordination between the internal and external auditors, and to ensure that the internal audit function is adequately resourced, is effective and has appropriate standing within the company; and
- (g) Report to the board on the matters set out in CG Code provisions.

Nomination Committees

74. The CG Code recommends the establishment of a nomination committee, which consists mostly of independent non-executive directors, to perform the following duties:
- (a) review the structure, size and composition of the board on a regular basis;
 - (b) identify individuals suitably qualified to become board members;
 - (c) assess the independence of independent non-executive directors; and
 - (d) make recommendations to the board on the above and other relevant matters relating to the appointment or re-appointment of directors and succession planning for directors in particular the chairman and the chief executive officer.

DISCLOSURE AND ACCOUNTABILITY

75. Director should pay particular attention to the information which the company puts out. If they have not exercised due care to ensure that such information is accurate and not misleading, they may become personally liable to an individual who relies on the information to his detriment for business purposes. In addition, the directors may incur personal liability under various ordinances, for example, making untrue statements in a prospectus (s.40 of the Companies Ordinance). They may also incur civil liability in contract, the torts of negligence and deceit, or for misrepresentation.

76. A strong body of public opinion considers that companies and their directors should be more widely “accountable”. What is meant by this is not the strict accountability which directors already owe to the company, nor the simple discharge of their extensive duties relating to accounts and disclosure created by legislation, but a willingness to provide adequate information about the company’s affairs to any party with an interest in the company. A reasonable attitude towards voluntary disclosure of information about the company is a prerequisite for satisfactory relationships with all the parties associated with a company. If companies do not make adequate voluntary disclosure, they will undoubtedly face further ill-considered attempts to secure changes by legislation.
77. Listed companies must in addition pay attention to the general and specific disclosure requirements set out in the Main Board and GEM Listing Rules. The Rules contain a blanket disclosure requirement that a listed company must keep the Exchange, the listed company’s members and other holders of its listed securities informed as soon as reasonably practicable of any information relating to the group (including information on any major new developments in the group’s sphere of activity which is not public knowledge) which:–
- (a) Is necessary to enable them and the public to appraise the position of the group;
 - (b) Is necessary to avoid the establishment of a false market in its securities; and
 - (c) Might be reasonably expected materially to affect market activity in and the price of its securities.

In addition, the Rules have a multitude of specific disclosure obligations which pertain to a variety of matters, including: circumstances where disclosure is required when the listed group enters into transactions, specific events happening to the listed group. Also, the Rules require that some transactions be specifically disclosed and sometimes shareholders’ approval is required and the directors are responsible for ensuring that the company complies with such requirements.

Main Board and GEM listed companies are also required to post their annual reports, interim reports and financial statements on the HKEx and GEM websites for public viewing when they dispatch these corporate communications to shareholders.

THE BOARD'S MEMBERS

78. The responsibility of all directors of a company is equal, but some play a special role.

CHAIRMAN

79. The Chairman is appointed by the board to preside over the board and will normally, under provision in the company's Articles, also take the chair at general meetings of the company. In practice, however, the Chairman is not only seen as being the chairman of the board, but is also expected to act as the company's leading representative, presenting the collective views of the board to the outside world. The distinctive features of the Chairman's role are:

- To take the chair at meetings of the board; to ensure the orderly conduct of meetings, so that everyone who should have a say does have a say of an appropriate length; to allocate a proper amount of time to different items; to determine the order of the agenda; to direct discussion towards a consensus view; and to sum up decisions so that everyone understands clearly what has been agreed on policy and on action.
- As suggested above, to act as the company's leading representative in its dealings with the outside world.
- To play a leading role in determining the composition of the board and any sub-structure of committees, so as to make the board an effective team, working with a high degree of harmony.
- To take, between meetings of the board, whatever decisions are delegated to the Chairman by the board.

MANAGING DIRECTOR

80. Most companies' Articles contain a provision permitting the directors to appoint one or more Managing Directors to whom any necessary powers may be delegated, and to remunerate them for their services in that capacity. In practice, the Managing Director is the pinnacle of a management structure, including any executive directors (see para 91 below). The Managing Director has personal responsibility for the success of the company's operations within the strategy determined by the board of which he, unlike a general manager, is a member.

CHAIRMAN AND MANAGING DIRECTOR?

81. There is considerable debate about the wisdom and propriety of combining the role of Chairman and Managing Director, particularly in listed companies. This debate arises partly from issues of principle, and partly from the verbal confusion caused by the use of the words “Chief Executive” in this context.
82. On the issue of principle, it is on the one hand argued that a board cannot function to full advantage if the undoubted power of the Chairman to shape and guide board discussions and the power of the Managing Director to pressurise Executive Directors to conform with his wishes are combined in one person. It is further questioned whether non-executive directors can play their full part in the boardroom if the two roles of Managing Director and Chairman are combined. In every board there is a need for vision and imagination about the company’s future (the Chairman’s role). This should be counter-balanced by the knowledge of the realities of the company’s present (in part, the Managing Director’s role).
83. On the other hand, it is argued that there are many instances of companies which have made excellent progress where the posts are combined and, as with many aspects of company direction, a great deal depends on circumstances. While, as a matter of principle, it may be better not to combine the roles of Chairman and Managing Director in a single person, in practice in Hong Kong the Chairman/Managing Director/Chief Executive is often the founder and entrepreneurial driving force behind the growth and success of the company (often a public company). It could be counterproductive to prevent this type of growth and success in the future by insisting on the divorce of the roles of Chairman/Managing Director/Chief Executive.
84. With regard to the label of “Chief Executive”, this appears to be an American import. In the USA, the Chairman is often described as “Chairman and Chief Executive” in contrast with the “President and Chief Operating Officer”. In Hong Kong the title of “Chief Executive” floats uneasily between Chairman and Managing Director. It is most commonly and perhaps most appropriately used as a synonym for “Managing Director” where it draws attention to his or her position as the leading executive director.
85. Further confusion arises from the use of the term “Chief Executive” to describe a Chairman who exercises a significant proportion of the board’s powers through delegation. In this case the title may be “Chairman and Chief Executive” or “Executive Chairman”, especially if there is also a Managing Director or Managing Directors responsible for operations. (It should perhaps be noted in passing that in Hong Kong the term “President” is an honorary title reserved for individuals, usually former Chairmen, who have played a distinguished part in the company’s affairs in the past, but whose role in the company’s present affairs is that of a non-executive director).

86. For listed companies, the CG Code requires a clear division of the management of the board and the day-to-day management of the company's business, to ensure a balance of power and to avoid over-concentration of power in any one individual. Accordingly, the CG Code requires separation of the roles of Chairman and Chief Executive Officer. Under the Listing Rules, companies must disclose in their Corporate Governance Report the identity of the Chairman and the Chief Executive Officer and whether these two roles are segregated and the nature of any relationship (including financial, business, family or other material/relevant relationship(s)), among members of the board and in particular, between the Chairman and the Chief Executive Officer.

In fact, it is interesting to note that the CG Code's recommended practices include that the Chairman should:

- Be primarily responsible for drawing up and approving board meeting agendas (but may delegate such responsibility to a designated director or the Company Secretary);
- Take responsibility for ensuring that good corporate governance practices and procedures are established;
- Encourage all directors to make a full and active contribution to the board's affairs and take the lead to ensure that the board acts in the best interest of the company, facilitate effective contribution of non-executive directors and ensure constructive relations between executive and non-executive directors.
- Hold meetings at least annually with the non-executive directors (including independent non-executive directors) without the executive directors present.
- Ensure effective communication with shareholders and that shareholders' views are communicated to the board.

NON-EXECUTIVE DIRECTORS

87. The present legal framework in Hong Kong for appointing boards of companies permits the creation of boards composed wholly of fulltime executives. This can be a source of weakness if such boards become inbred, lacking both the wider perspectives and the stimuli to perform, which an external presence might provide. However, with effect from 31st March 2004, every company listed in Hong Kong must include at least three independent non-executive directors ("INEDs") on its board in order to comply with the Listing Rules of the HKEx. The CG Code also recommends that independent non-executive directors should make up at least one third of the board.

88. To enhance the company's sense of general responsibility, and to widen its strategic horizons, every board of a public company should, in the Institute's view, contain a proportion of suitable non-executive directors. The same considerations apply to any private company which wishes to maintain an active control over its future and not merely react passively to events. The use of suitable non-executive directors will help a board to pay proper attention to its long-term strategic function of direction. These directors should have no contractual relationship with the company and should not be under the control or influence of any other director or group of directors. The use of such directors is not new, and its extension could be regarded as a return to traditional practice. The Institute actively encourages and helps companies to appoint non-executive directors.
89. It is important to understand the contribution which can be made by non-executive directors. The overriding consideration is that they participate to the full in the board's joint deliberations. Their legal duty to act bona fide in the interests of the company as a whole is identical to that of their executive colleagues. But within this framework, their independence has three further contributions to make:
- To widen the horizons within which the board determines strategy, both by applying the fruits of a wider general experience and by bringing into board discussions any background of special skill, knowledge and experience which is relevant to strategy and which the board might otherwise lack.
 - To take responsibility for monitoring management performance and the extent to which the management of the company is achieving the results planned when strategy was determined.
 - To ensure that the board has adequate systems to safeguard the interests of the company where these may conflict with the personal interest of individual directors; to exercise a duty to the company in such areas as board appointments and remuneration; and to ensure the presentation of adequate financial information, whether or not a formal audit committee exists.
90. For listed companies, the amended Listing Rules require that at least one of the independent non-executive directors must have appropriate professional qualifications or accounting or related financial management expertise.

Furthermore, in order to assess the “independence” of the INEDs, The Hong Kong Exchanges and Clearing Limited takes into account the following, e.g. whether the director:–

- (1) Holds more than 1% of the total issued share capital of the listed company, and whether the shares were obtained as a gift from, or by means of financial assistance, from a connected person or the listed company.
- (2) Is a director, partner or principal of a professional adviser providing or having within the year prior to his appointment provided services, or is an employee of such professional adviser who is or has been involved in providing such services during the same period, to (a) the listed company, its holding company or any of their respective subsidiaries or connected persons; or (b) a controlling shareholder or chief executive or a director (other than an INED), of the listed company within the year prior to his appointment, or any of their associates.
- (3) Has a material interest in any principal business activity of or is involved in any material business dealings with the listed company or its connected persons; or is financially dependent on the listed company or its connected persons.
- (4) Is on the board specifically to protect the interests of an entity whose interests are not the same as those of the shareholders as a whole, is or was connected with a director, the chief executive or a substantial shareholder of the listed company, or is, or has been, an executive or director of the listed company or its connected persons.

EXECUTIVE DIRECTORS

91. Executive directors are members of the board who carry out executive functions in their capacity as working employees of the company, in addition to their board duties, and are remunerated separately for them. The appointment to the board of a department head is an everyday occurrence, but the reasons for these appointments are often muddled. A directorship should not be some sort of prize for long service with a company. The only criterion for appointment to the board should be recognisable capacity to contribute to the board’s proper function. This cannot be the case if an executive does not recognise that his or her responsibilities as, say, head of sales, are quite distinct from his or her responsibilities in the boardroom. The executive director is not there just to press the views of a particular side of the company, but should contribute to all policy decisions of the board and, if he or she has special skill and knowledge, present to the board this essential information in language that the other members can understand.

“QUASI DIRECTORS”

92. Directors are defined in section 2 of the Companies Ordinance as any persons occupying that position by whatever name it is called. Directors are therefore recognised by their functions and the authority and power they in fact exercise, rather than the absence or presence of any title.

Local, Special or Divisional “directors”

93. There is a tendency to describe as “directors” individuals who do not sit on company boards. Often the title is given to enhance the status of the individual concerned, either within the company or in dealings with other companies. If local or special directors are held out to the outside world with the title of “director” without qualification, there is a danger that they will become involved in arguments as to whether or not they should be able to escape the responsibilities and potential liabilities which go with that office. As regards the company, if it has held out an individual as being its “director”, it will be bound by contracts entered into by third parties with him (on behalf of the company) on the basis that he had the authority normally associated with an appointed director, even if he has no such authority.

“Shadow Directors”

94. Shadow directors are the converse of the above situation. They are people whose instructions the actual directors of the company are used to following (see paras 118 to 119).
95. The difficulties which may arise out of the above situations-and they are real difficulties-would be avoided if the use of the word “director”, with all its implications of the full responsibilities associated with that title, was reserved for those persons properly appointed to act as Directors.

ALTERNATE DIRECTORS

96. An alternate director is someone empowered to perform the duties of a director, usually only at board meetings, in the temporary absence of a director. An alternate is a director of a company within the definition of that term contained in section 2(1) of the Companies Ordinance. If the Articles are silent on the matter, an alternate director will be personally responsible for all his or her actions while acting as a director and subject to all the statutory obligations attaching to the office. (The Articles may however provide that the alternate is the agent of the appointing director, in which case the latter will be responsible for the alternate’s acts). It is therefore necessary to register the alternate as a director of the company in the books of the company and at

the Companies Registry. A director may act as an alternate for one or more of his or her colleagues on the board and, in such circumstances, would normally have an additional vote or votes to exercise on their behalf in addition to that cast in his or her personal capacity.

97. The legal authority for the appointment of alternate directors is derived from a company's Articles of Association and not from statute. The form of the governing Article is most important as the extent of alternate's powers, and the answers to such questions as to whether they are entitled to remuneration from the company (usually not) or from the director appointing them, will depend on the Article's terms. While the power of appointment or nomination of an alternate is normally vested in the appointing director, the Articles, particularly in a public company, may require that the appointment be approved by a majority of the other directors if the alternate is not already a director. Clearly the choice of an alternate requires the exercise of great care.
98. Usually a person appointed as an alternate director loses the appointment automatically when the appointing or nominating director dies or ceases to hold office. An alternate may also be removed at any time at the discretion of the appointing director.

THE COMPANY SECRETARY

99. The Company Secretary is the chief administrative officer of the company. An efficient Company Secretary can make a most important contribution to both direction and management of the company by removing from the directors' and managers' shoulders the burden of knowing how to comply with the detailed provisions of company and other legislation, and ensuring the efficient despatch of the board's business at the technical level.
100. Some companies consider it undesirable that the offices of director and Company Secretary should be combined. Company Secretaries have certain statutory duties for which they are legally responsible in their own right. A Company Secretary outside the board can give independent advice on matters for which he or she is responsible; a Company Secretary who is also a director may become bound by collective decisions which conflict with his or her statutory duties.
101. In smaller companies, however, reasons of status or even expense may dictate the decision to appoint one person as Company Secretary and director. The exercise of the dual role in no way reduces the Company Secretary's obligations under the law. It should also be borne in mind that, wherever a provision of any legislation requires something to be done or approved by both a director and the Company Secretary, a person in whom those roles are combined cannot act alone to fulfill both the director's and the Company Secretary's obligations.

THE BOARD'S RELATIONS WITH ASSOCIATED PARTIES

102. The relations between the company and the parties associated with it have already been discussed (see paras 11 to 25). We must now consider the relations between the board and these parties.
103. To discuss the relationship between directors and these parties in detail would be to write yet another textbook on business management, covering marketing and sales, purchasing and supply, industrial relations, production, financial management and public affairs. It is not the individual director's job to be an expert in all these fields. That is the role of the managing director and the operational management. It is a director's task to understand that unless each field is functioning adequately the company may fail. It is further his or her duty, if he or she possesses particular expertise in any of these fields, or in any other branch of knowledge relevant to the company, to deploy that expertise in the company's interest.
104. In formulating company policy towards associated parties, directors should take their position as the collective conscience of the company seriously. To the extent that the interests of parties are protected by law, it is likely that the company's compliance with the law will be enforced by imposing penalties on its directors. Directors should also remember that the board is the guardian of the company's reputation and that a reputation for open and honest dealing is easier to lose than it is to gain.

SHAREHOLDERS

105. As indicated below (see paras 298 to 299), under the Articles of Association it is usually shareholders who appoint the directors. In practice, in many companies the Articles give the shareholders the power to confirm appointments made by the board between annual general meetings. In relation to listed companies it is a requirement of the HKEx that a person appointed by the directors of a quoted company to fill a casual vacancy, or as an additional director, holds office only until the next annual general meeting. He or she will then be eligible for re-election. The general meeting also has an overriding power under section 157B of the Companies Ordinance to remove directors (see para 305 below). This cannot be excluded by the Articles.
106. A director's relationship with the shareholders may be terminated either by vote in general meeting or in the market place (in the case of listed companies). The normal way that the shareholders of a listed company express their dissatisfaction is not by voting out the existing board but by selling their shares, a process which, if continued long enough, may well lead to a takeover bid, a change of ownership and probably a change of directors. (It should be noted in passing that some institutional investors in other countries take an active interest in their equity holding and have been successful in removing directors). In addition, the shareholders have collectively the power to terminate the relationship by exercising their right to wind up the company.

107. Although in principle their duty is owed to the company rather than to shareholders, directors may in some circumstances become responsible to individual shareholders. This is most likely to occur in small, family companies where the directors may be shareholders and may be related to other shareholders, thus giving the directors a high degree of inside knowledge of the affairs of the shareholders. In these circumstances, and in others where there is a sufficient degree of proximity between directors and shareholders, directors may be held to owe fiduciary duties to shareholders (see paras 235 to 239 below).
108. The main justification for shareholders appointing the board is that the shareholders' relationship with the company (property rights) is different from that of other parties. Shareholders lack the leverage that other parties' contractual relationships with the company supply. Once they have subscribed the capital, they forego any detailed control over how the funds are to be used. Having control over the appointment of the company's governing body compensates them for this loss of direct control over their property. The shareholders, ranking last in priority for their income and taking the greatest risk of irrecoverable loss of their assets, are a definable group with the greatest interest in the company's success.

EMPLOYEES

109. As a general principle of Company Law, directors owe fiduciary duties to the company as a whole and, to a lesser degree, creditors. Whilst it may be technically correct to suppose that the interests of a company's employees do not therefore fall for consideration, we have already emphasised the integral role good employee relations play in a company's overall success (see paras 15 and 16 above) – directors ignore this at their own peril!
110. Despite the strict legal position, boards of directors cannot direct a company successfully unless they have regard to the interests of employees. What this means in practice is directing the company in such a manner that every individual employee perceives that he or she is getting a good bargain in terms of pay, security and general welfare at work.
111. The Institute advocates that, as a minimum requirement, boards of directors should:
- Keep under review their arrangements for determining pay and other terms and conditions (e.g. the degree of centralisation and recognition of trade unions) bearing in mind the need to link pay as closely as possible to productivity as well as the general factors affecting the labour market;

- Review the systems which exist within their companies for consultation with employees before decisions are taken, for communicating relevant decisions and general information about the company, for involving employees as necessary in the making of those decisions which will directly affect them at the work place and for enabling them to participate in the company's success (see paras 323 to 324 below), as appropriate;
- Ensure, whether or not collective bargaining arrangements exist, that clear guidelines have been set for the company's management before negotiations about pay and other terms and conditions of employment take place; and
- Review the company's health and safety policies and record, bearing in mind the provisions of the Factories and Industrial Undertakings Ordinance and any other legal requirements relevant to the company relating to the physical well-being of employees.

CREDITORS AND SUPPLIERS

112. The board of directors should be responsible for creating and monitoring compliance with the company's policy on terms of payment. It is extremely damaging to a company to get a reputation as a poor payer and attempts by larger companies to fund their working capital needs at their smaller suppliers' expenses are probably self defeating. The terms on which small companies can borrow are usually worse than those available to large companies.
113. In some circumstances, directors may owe general and specific duties to creditors. When a company is insolvent the members arguably have no remaining financial interest to consider and the directors' duties are owed solely to its creditors (see paras 265 to 276).

THE PUBLIC

114. There is no requirement in Hong Kong that board composition should comprise directors appointed specifically to represent special interest groups such as minorities, women and consumers. Although some companies in the USA adopt such a practice, the Institute believes that it is in the general public interest that corporate autonomy, including the unfettered right to select directors, be preserved wherever possible. It should be noted as a separate point that directors of listed companies have responsibility for ensuring that the company meets its substantial disclosure obligations under the HKEX's Listing Rules which were created for the benefit of the investing public.