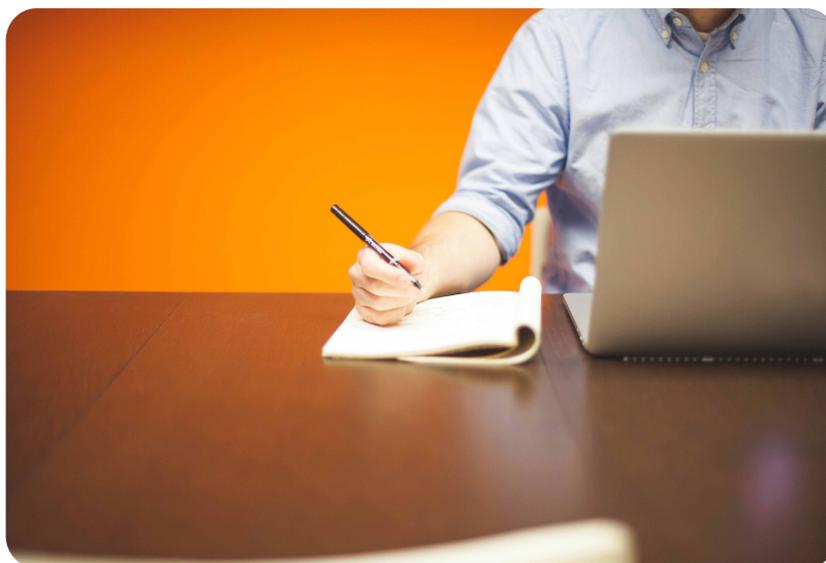


## Never delegate corporate affairs without checks and balance

### 授權處理公司事務 時須設監督制衡

Mohan Datwani 高朗



**D**irectors are agents of their listed companies, and under common law they have fiduciary duties. These include the duty to avoid conflicts of interests. Additionally, under s.465 of the Companies Ordinance they have the duty to exercise due care, skill, and diligence to the standards of a reasonable director, or a higher standard where they have special skillsets and/or experiences.

These concepts of director duties are manifested in the Listing Rules under Rule 3.08 (and GEM Board equivalent). A breach by a director of duties could give rise to HKEX's reprimand and other regulatory actions against the company and directors themselves. Listed companies must therefore be mindful and train directors, individually and collectively, to discharge their director duties. One of the best ways to learn is to learn from others' mistakes.

In an interesting case, a company

announced its interim financial results. The results were not good and the market reacted to the announcement negatively. The share price and trading volume dropped 13% and 37% respectively. Then one month later, the company issued a clarification announcement that instead of a loss at HK\$12M, it made a profit of HK\$281M. This HK\$293M swing also went to the fair value of the company's assets, which was due to an error in recognition of an investment. The share price then went up 18%, settling at 9% increase for the day. The volume was up 2.1 times. The sequence of the events naturally drew scrutiny from HKEX.

From reported information, the investment portfolio of the company was managed by an executive director/chief executive officer (CEO) of the company. He had authority to invest up to 5% of the company's assets without board approval. For such purpose, he was the sole signatory of a subsidiary used to invest the company's funds in listed shares. He was the only person who was authorised to

receive all statements and electronic access to the trading account.

For checks and balance, there was an investment committee with another executive director. This investment committee was briefed in summary manner by the CEO after investments were made. The accounting records will be posted by the CEO to the chief financial officer (CFO) who would then prepare monthly management accounts. For some six months, the CEO missed reporting the fair value changes of the investments to the CFO, which led to the reporting error.

As to the board, there was no requirement for reporting to them except for the half yearly investment reports. Apparently, the investment committee should report where there is a 40% decrease in investment value to the board. The board claimed that it took this approach because investments were only a small part of the group's business.

strata pl of STRATUM

**Strategic** / strə'ti:dʒɪk; strə'tɪdʒɪk/ adj

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**縱橫** [Zòng Héng]

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**strategy** / 'strætədʒɪ; 'strætədʒi/ n 1 [U] (art of) planning and directing an operation in a war or campaign 戰略 (術) : military strategy 軍事部署 – skilled in strategy 制定戰略. 2 [U] (skill in) planning or managing well 策略; 謀略; 計畫或管理: she negotiated a substantial pay rise 她大幅增加工資的事

The CEO claimed that he was unwell with an undisclosed sickness, while the board was not aware. Because of the CEO's condition, he forgot to keep the CFO updated with the investment account situation.

In the context of these facts, the Listing Committee found deficiencies in the internal controls of the company. Specifically, there was no effective monitoring system of investments relevant for the half-yearly reporting regime on the board level. There was inadequate checks and balance. Further, the investments were found to be in fact significant to the company which earlier announced investments as one of the company's core business.

The CEO's excuse of sickness was found unacceptable to the Listing Committee. The Listing Committee found that the CEO must exercise his duties as a reasonable director. He must take an active interest in the company's affairs. The Listing Committee referred to the Companies Registry's guidelines on director duties which states that directors need to keep accounting records with reasonable accuracy. The other director on the investment committee was under a similar breach of director duties. As to the other INEDs and audit committee members, they were also in breach for failure to monitor the integrity of the financial statements.

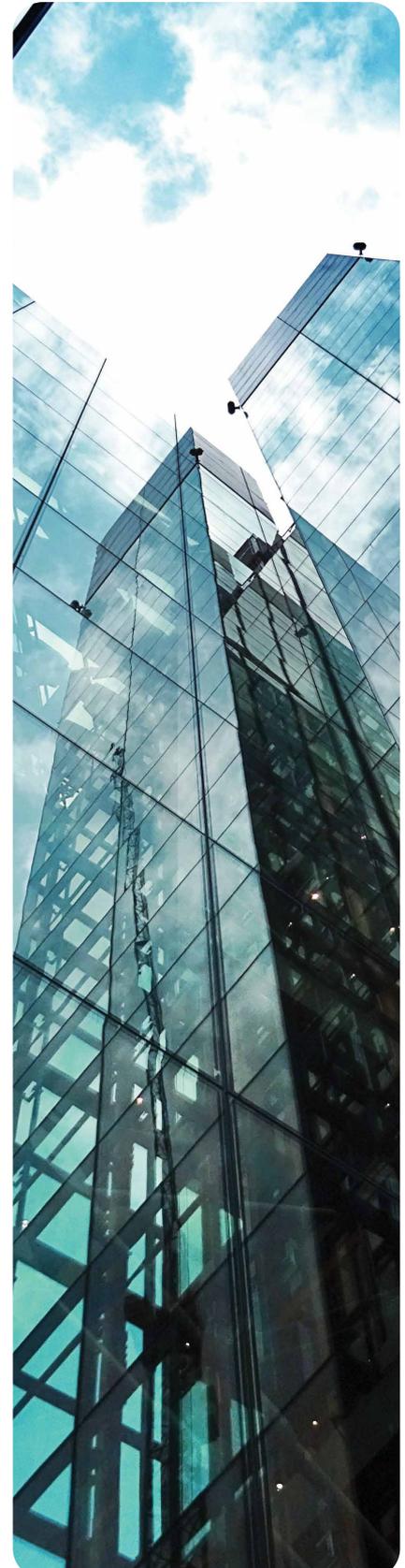
On these unique facts, the Listing Committee expressed a number of regulatory concerns. These included that shareholders should have accurate information which was not misleading. Therefore, what was done amounted to a prejudice to shareholder interests. Directors must ensure announcements were accurate and complete in all

material respects. Accordingly, no individual director could be given complete control of a part of the business without appropriate reporting procedures as checks and balance. The internal control system was therefore deficient.

In addition to the public reprimand, the company had to put in place a number of remedial steps. These included the hiring of a professional consultant for an internal control review. Also, a qualified accountant had to join the accounting team. The external auditors would assist the company to prepare future financial results and statements. The CEO and the other director on the investment committee were required to attend 24 hours of training within a specified period.

The decision showed that the HKEX/Listing Committee is taking breaches of director duties seriously. Where executive directors are parties to a breach they could expect public reprimand and regulatory actions. INEDs were also reminded that they should ensure the system of checks and balance being in place. There should never be a delegation of a part of the company's business to any individual director, which is without checks and balance. 

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**董事是所屬上市公司的代理人，根據普通法須承擔受託人責任，包括避免利益衝突。另外，根據《公司條例》第465條的規定，董事須以合理水平的謹慎、技巧及努力行事，如果董事具備特別技能及／或經驗必須達到更高的標準。**

這些有關董事職責的概念體現於《上市規則》第3.08條（創業板《上市規則》亦然）。如果董事違反規則可能會受港交所譴責，港交所亦會對公司和董事本身採取規管行動。因此，上市公司除了必須對這方面保持謹慎之外，還須培訓董事會及董事。我們亦可從市場錯誤中學習。

以下便是一宗值得借鑒的個案。某公司公佈了中期財務業績，公司業績欠佳引起市場負面反應，公司股價和成交量分別下跌13%及37%。一個月後，公司發出公告澄清公司並非虧蝕1,200萬港元而是錄得2.81億港元盈利，基於確認一項投資時出錯。這項2.93億的差異亦影響到公司資產的估值。公司的股價隨即上升18%，在當日的升幅為9%，成交量亦上升2.1倍。這一連串事件當然亦引起了香港交易所注視。

據知，公司的投資組合由公司的執行董事暨行政總裁管理，他有權無需徵求董事會批准而將公司資產的5%用作投資。因而，他是將公司資金投資於上市股票的附屬公司的唯一簽署人，亦是唯一獲授權收取所有結單和以電子方式接入交易帳戶的人。

為了制衡，公司設立了一個投資委員會，委員包括公司的另一位執行董事。行政總裁作出投資後會以撮要方式向投資委員會作簡報。行政總裁會向財務總監提交會計紀錄，財務總監會編彙每月管理帳目。六個多月以

來，行政總裁都沒有向財務總監匯報投資的估值變動，結果導致匯報出錯。

除了每半年一次提交投資報告外，並無規定要向董事會作匯報。如果投資值減少40%，投資委員會應該向董事會匯報。董事會採取此做法是因為投資只佔集團業務的一小部分。

行政總裁表示其身體有問題（並無透露病情），而董事亦不知道此事。而行政總裁亦基於身體的問題，忘記向財務總監匯報投資帳目的最新情況。

上市委員會認為公司缺乏內部管控，特別是沒有為每半年向董事會作投資匯報制定有效的監察制度，故此未能發揮充分的制衡。此外，公司較早前表示投資是公司的核心業務之一，故委員會認為投資其實對公司很重要。

上市委員會認為行政總裁託辭生病不能接受。上市委員會認為行政總裁必須合理履行董事的職責，積極處理公司事務。上市委員會引述公司註冊處發出的董事職責指引，當中註明董事必須保持帳目紀錄合理準確。投資委員會的另一位董事亦違反了董事職責。而其他獨立非執行董事及審計委員會成員，則違反了監督財務報表真實完整性的職責。

對此，上市委員會表示了多項規管關注，包括股東應該獲得不含誤導成份的準確資訊，故以上的董事行為相等於損害股東利益。董事必須確保公告在各方面準確及完整。有鑑於此，如果沒有適當的匯報程序以制衡，不得向個別董事授予全權控制業務的任何部分。

公司除了受到公開譴責，還須採取多項補救

措施，包括聘用專業顧問進行內部管控檢討及在會計團隊加入合資格會計師。外部審計師會助公司編彙日後的財務業績及財務報表。行政總裁及投資委員會的另一位董事必須在指定時限內接受為時24小時的培訓。

香港交易所／上市委員會的決定表明違反董事職責後果嚴重。如果執行董事違反職責會受到公開譴責及其他規管行動。獨立非執行董事亦必須確保公司設有制衡制度，將公司任何業務委予任何個別董事前，必須設有監督及制衡法則。🚫

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