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**Directors' Duties of Care, Skill and Diligence —
A New Standard under the Companies Ordinance 2012
董事要谨慎、技巧及努力行事的法律责任 — 2012 年公司条例下的新基准**

A. Introduction 引言

Following years of consultation and review, the new Companies Ordinance (the “**New Ordinance**”) was passed by the Legislative Council on 12 July 2012 and subsequently gazetted on 10 August 2012 in Hong Kong. As one of the measures to enhance corporate governance (企业管治), the standard on directors’ duties of care, skill and diligence (谨慎、技巧及努力行事的责任) has been modified and codified in the New Ordinance with a view to providing clear statutory guidance to directors.

B. The Present Regime – A Subjective Test 现时标准 – 主观基准

In general, directors’ duties can be classified into two broad categories, namely fiduciary duties (受信责任) and duties of care and skill. Fiduciary duties require directors to act honestly, diligently and in good faith to the company’s best interest while the duties of care and skill will require directors to exercise reasonable care and skill in performing their executive functions and exercising the powers of directors.

At present, the directors’ duties of care and skill are mainly found in case law. The leading English decision of Romer J in *Re City Equitable Fire Insurance Co Ltd* (“**City Equitable**”) laid down the superstructure of the law in this area:

- (a) in performance of his duties, a director needs not exhibit a greater degree of skill and diligence that may reasonably be expected from a person of his knowledge and experience;
- (b) he is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings and at meetings of the committee(s) of the board; and
- (c) he may, in appropriate circumstances and in the absence of grounds for suspicion, delegate his functions to some other officials.

The principles stated by City Equitable have generally been interpreted as establishing a lenient standard of care (宽松标准) on directors by providing a subjective test in determining such standard.

It follows that an incompetent person would be judged by a lower benchmark by reference to his own limited capacity in determining whether he has exercised reasonable care and skill. In other words, a director is only required to “do only as much as one might fairly expect of someone...as incompetent as the director happens to be” ①.

The decision of City Equitable has been adopted by the Hong Kong Courts. In *Law Wai Duen v Boldwin Construction Co Ltd*②, Rogers VP noted that the classic exposition of a director’s duty of care was given by Romer J in City Equitable, although he also added that such standard might well be “open to review in present day circumstances as, perhaps, being too low”.

C. The New Ordinance – A Mixed Objective/Subjective Test

新公司条例 – 混合的客观/主观基准

The New Ordinance will replace the existing common law (判例法) rules on directors’ duties of care. It states that the duties of a director to exercise reasonable care, skill and diligence refer to those care, skill and diligence that would be exercised by a reasonably diligent person with:

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions as the director of the company (the “**objective test (客观基准)**”); and
- (b) the general knowledge, skill and experience that the director has (the “**subjective test (主观基准)**”).

Unlike the existing common law regime, the New Ordinance will reform and adopt a “mixed objective/subjective test”. While any special skill and experience of a director will still be taken into account under the limb of a subjective test, the objective test of “a reasonable director (合理的董事)” will require the director to possess the skill and experience that a director in that position would be presumed to possess. This effectively raises the minimum standard of care and skill expected of directors.

In other words, the New Ordinance will demand an incompetent individual director to nevertheless meet the objective standard of care of a reasonable diligent director, whereas under the existing law, such a director is only required to exercise the degree of care and skill that might be expected of a “reasonable incompetent person” in his capacity.

D. Comments 评论

The codification of the law on the duty of care and skill will provide directors with clearer guidance regarding the more objective standard expected from them. Further, by introducing a minimum objective standard on the directors’ duties of care and skill, the accountability of directors can be enhanced for the sake of corporate governance.

However, such a new minimum objective standard may deter a person from agreeing to act as the non-executive director especially of a public company in fear of requiring him to exercise a higher degree of care, skill and diligence. There is also concern that directors will turn out to be unduly cautious in making commercial decisions to avoid being liable under the New Ordinance.

References :

- ① See RW Parsons, "The Director's Duty of Good Faith" (1967) 5 Melbourne University Law Review 395 at p.395 and P Spink and S Chan, "The Hong Kong Company Director's Duty of Skill and Care: A Standard for the 21st Century?"(2003) 33 Hong Kong Law Journal 139 at p.142-143
- ② [2001] 4 HKC 403

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