

第二环节： 企业融资及管治

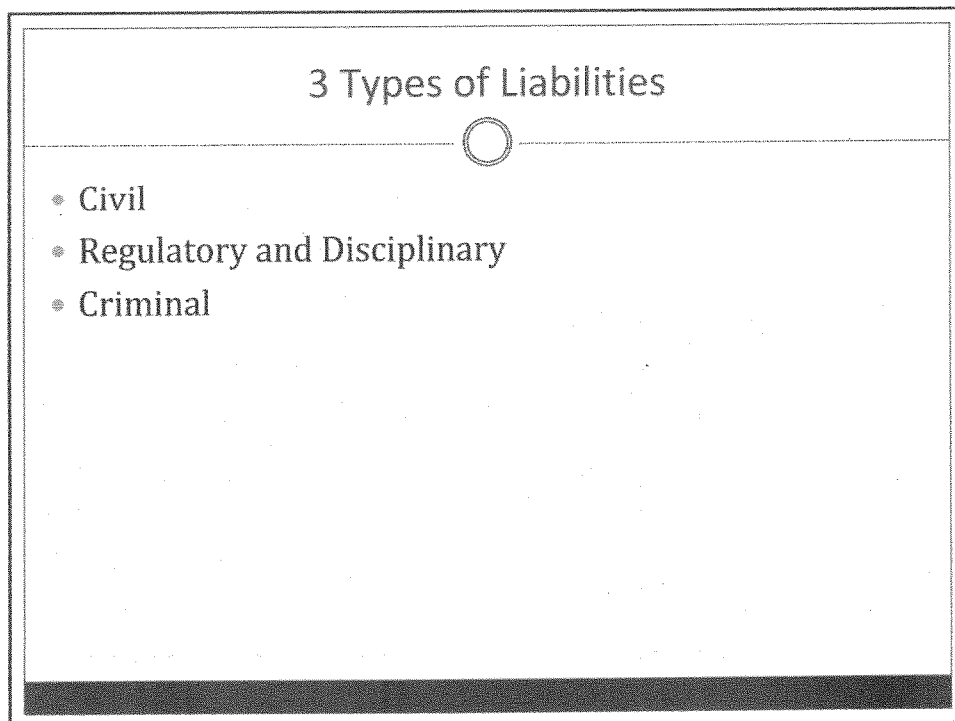
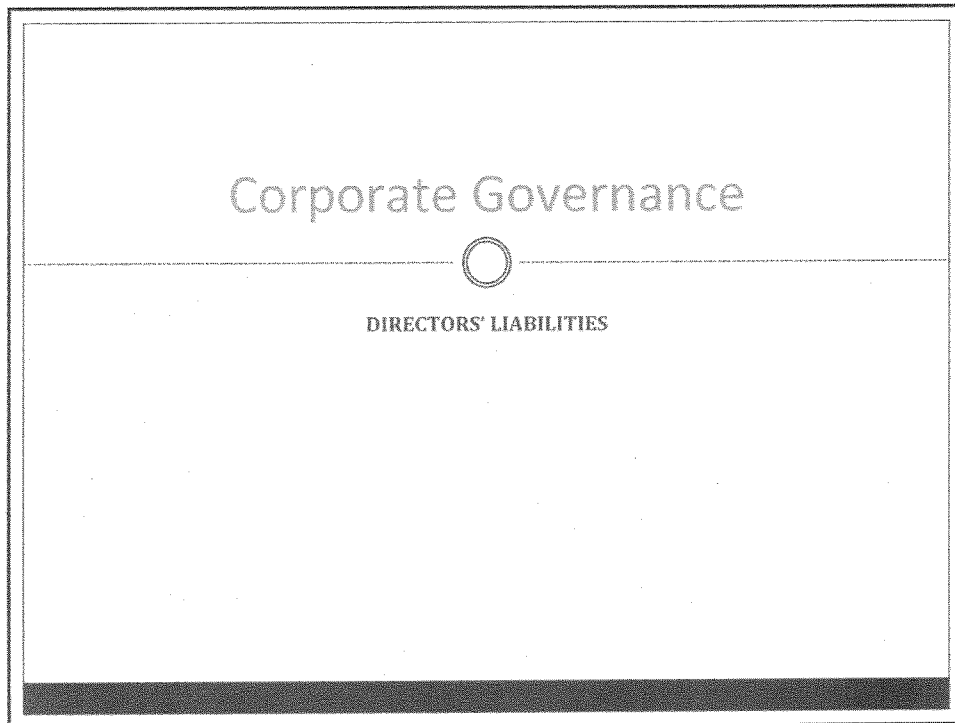
Session Two: Corporate Finance and Governance

讲题： 企业管治 - 有限公司及董事责任

Topic: Corporate Governance - Limited Companies and Directors' Liabilities

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Director's Duties at Common Law or in Equity

- The following are the main (non exhaustive list) of duties owed by a director to his company at common law or in equity
 - Duty to observe the company's memorandum and articles of association and resolutions
 - Duty to act in good faith for the benefit of the company as a whole
 - Duty to use powers for a proper purpose for the benefit of members as a whole
 - Duty not to delegate powers except with proper authorization and duty to exercise independent judgment
 - Duty to exercise care, skill and diligence
 - Duty to avoid conflicts between personal interests and interests of the company
 - Duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law
 - Duty not to gain personal profit from use of position as a director
 - Duty not to make personal use of company's property or information
 - Duty not to accept personal benefit from third parties conferred because of position as a director

Civil Liabilities for Breach of Common Law or Equitable Duties

- A director who has acted in breach of his duties at common law or in equity may be sued by the company to recover damages as compensation for the loss suffered by the company and may be held liable to account to the company for the improper profits made by him
- Assets acquired by the director from use of his position as director in breach of duties may be regarded as being held on trust for the benefit of the company
- An aggrieved shareholder may, in certain circumstances, be able to bring a direct action against the director for the benefit of the company to recover compensation or benefits improperly obtained by the director under a common law or statutory derivative action
- In addition, he may be able to obtain remedies from the court on the ground that the affairs of the company have been conducted in a manner unfairly prejudicial to his interest as a shareholder

Director's Statutory Duties and Liabilities

- Director's statutory duties are in the main governed by Companies Ordinance, which contains a host of duties to be observed or performed by a director
- The following statutory duties (non-exhaustive) are of note:
 - General prohibition against company making loans to director subject to various exceptions under sections 157H and 157HA, with civil and criminal consequences for breach under sections 157I and 157J
 - Duty to disclose interest in a contract or proposed contract with a company, with criminal consequence for breach under section 162
 - Prohibition against company making to any director or past director of the company any payment by way of compensation for loss of office, or as consideration for or in connexion with his retirement from office, without particulars with respect to the proposed payment (including the amount thereof) being disclosed to the members of the company and the proposal being approved by the company under section 163
 - Liabilities for fraudulent trading under section 275 – fraudulent trading takes place when a company carried on its business with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. During insolvency proceedings the court can impose personal liabilities on a director who is found to be knowingly involved in a fraudulent trading

Regulatory and Disciplinary Liabilities

- Disqualification
- Inspection
- Disciplinary proceedings under Listing Rules
- Insider dealings (will be discussed by another speaker)

Disqualification

• Under Part IVA of Companies Ordinance

- In the following circumstances
 - conviction of an indictable offence
 - persistent breaches of Companies Ordinance
 - in the course of winding up of a company, it appearing that a director has been guilty of fraudulent trading or of any fraud in relation to a company or of any breach of his duty as director
 - unfit director of insolvent company
- Court has power to make against the director a disqualification order, that is to say an order that he shall not, without leave of the court
 - be a director of a company;
 - be a liquidator of a company;
 - be a receiver or manager of company's property; or
 - in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company for a specified period

Disqualification

• Under section 214 of Securities and Futures Ordinance

- **Where, in relation to a corporation which is or was listed, the business or affairs of the corporation have been conducted in a manner**
 - oppressive to its members or any part of its members;
 - involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
 - resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect; or
 - unfairly prejudicial to its members or any part of its members
- **Court may order that a person wholly or partly responsible for the business or affairs of the corporation having been so conducted shall not, without the leave of the Court –**
 - be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of the corporation or any other corporation; or
 - in any way, whether directly or indirectly, be concerned, or take part, in the management of the corporation or any other corporation,for such period (not exceeding 15 years) as may be specified by the Court

Inspection

- Under section 142 of Companies Ordinance, Financial Secretary may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon
 - In the case of a company having a share capital, on the application either of not less than 100 members or of members holding not less than one-tenth of the shares issued;
 - In the case of a company not having a share capital, on the application of not less than one-tenth in number of the persons of the company's register of members
- Other circumstances in which inspection shall or may be ordered by Financial Secretary under section 143 of Companies Ordinance
 - If the court declares the company's affairs ought to be investigated
 - If the company by special resolution declares that its affairs ought to be investigated
 - If there are circumstances suggesting
 - That the business of the company has been or is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any part of its members or that it was formed for any fraudulent or unlawful purpose; or
 - That persons concerned with its formation or the management of its affairs have in connexion therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
 - That its members have not been given all the information with respect to its affairs that they might reasonably expect
- The inspector's report may be published, and may lead to subsequent prosecution, civil action or disqualification proceedings being taken against a director

Disciplinary Proceedings under Listing Rules

- Applicable only to companies listed on the Stock Exchange of Hong Kong
- The Exchange Listing Rules contain numerous detailed obligations and requirements pertaining to corporate governance matters which have to be met by listed issuers, including obligations relating to disclosure of information (under Chapter 13), notifiable transactions (under Chapter 14 and Appendix 16), connected transactions (under Chapter 16), etc
- Every director of a listed company is required to give a declaration and undertaking to the Stock Exchange of Hong Kong Limited undertaking, inter alia, that in the exercise of his powers and duties as a director, he shall comply to the best of his ability with the Exchange Listing Rules from time to time in force, and use his best endeavours to procure that the issuer shall so comply
- Where the Listing Committee of the Stock Exchange of Hong Kong Limited finds that there have been a breach by a listed company of the Exchange Listing Rules, it may impose the following sanctions against (inter alia) a director of the listed company
 - Issue a private reprimand
 - Issue a public statement which involves criticism
 - Issue a public censure
 - Report the offender to the Securities and Futures Commission or another regulatory authority (for example the Financial Secretary, the Commissioner of Banking or any professional body)
 - In the case of wilful or persistent failure by a director of a listed issuer to discharge his responsibilities under the Exchange Listing Rules, state publicly that in the Exchange's opinion the retention of office by the director is prejudicial to the interests of investors
 - In the event a director remains in office following a public statement above, suspend or cancel the listing of the issuer's securities or any class of its securities

