CHANGES TO THE DIRECTORS' INDEMNITY PROVISION IN THE COMPANIES ACT AND THE IMPLICATIONS FOR COMPANIES IN SINGAPORE

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Introduction

One amendment to the Companies Act (Cap. 50) (the "**Act**") due to come into force in the second quarter of this year that has not received much attention is the clarification to the indemnity provision for directors (i.e. Section 172 of the Act).

This particular change in the legislation was made in response to the increased recognition of directors' exposure to personal claims from third parties. To quote from the report of the Steering Committee for review of the Companies Act, "s Singapore companies become more globalised, the risk of them (directors) being exposed to liabilities to third parties, for example, arising from the frequent class actions by groups of shareholders in the US, is real and should be addressed. The Steering Committee is of the view that the Companies Act should be amended to expressly allow a company to provide indemnity to its directors for claims brought by third parties."

It is advisable that companies review their articles of association to check they reflect these particular amendments. In addition, company directors should check if the indemnity in their service agreement needs updating to safeguard their interests to the extent permitted under the revised statutory provisions.

Directors' indemnity under the revised Act

The revised Act has been amended to clarify that a company is allowed to indemnify its directors against liability incurred by the directors to third parties, subject to certain qualifications. The indemnity shall not apply where it is against (a) any liability of the officer to pay a fine in criminal proceedings or a penalty to a regulatory authority for non-compliance with any regulatory requirement, or (b) any liability incurred by the officer in defending criminal proceedings where he is convicted or in defending civil proceedings brought by the company or a related company where judgment is given against him or where an application for relief is rejected by the court.

Suggested approach

The approach which we propose is to set out in the articles and service agreements that the company shall indemnify the directors to the maximum extent permitted by law subject to any exclusion as may be determined by the directors from time to time. It bears mentioning that the exclusions/qualifications in the directors' indemnity provision under the Act sets out the minimum standard and the company has the discretion to add further exclusions/limitations to that. Adopting this approach will provide the directors with a certain level of assurance that they are protected to the extent permitted under the law and at the same time provide the company with the flexibility to protect its interests by scaling back the indemnity

provided to the directors as appropriate (discussed below).

As a matter of practice, we would recommend that the indemnity provision be included in both the articles of association of the company as well as a director's service agreement. The articles should contain the more general exclusions stipulated in the Act while the service agreement could incorporate more specific qualifications as these could be subject to negotiation between the company and an individual director.

We would also recommend that the articles provide that the company may purchase and maintain D&O insurance which would provide coverage for the directors' liability in connection with any negligence, default, breach of duty or breach of trust in relation to the company.