

Legal TAPS

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Accolades



A modern interior hallway with a textured wall and a window. The hallway is brightly lit, and the wall has a repeating geometric pattern. A window is visible on the left side, and the hallway leads to a brighter area in the distance.

Management Corporations Can Now Sue Property Developers in Malaysia – A New Class Action?

By Leonard Yeoh & Caleb Sio

There have been rapid developments in judicial determination of housing laws in Malaysia in recent years. From recent cases, the interpretation of housing laws has skewed towards increased protection for homebuyers.

In the recent High Court case of *Dua Residency Management Corporation v Edisi Utama Sdn Bhd* [2021] MLJU 140 (“Dua Residency”), the High Court was asked to decide on the issue of whether the management corporation of a condominium (“Management Corporation”) could bring an action against the developer of the condominium (“Developer”) for, amongst others, negligence predicated on defects and workmanship in several parts of the condominium.

The High Court held that the Management Corporation could sue the Developer for negligence as there was sufficient proximity between the Management Corporation and the Developer to find that the Developer owes a duty of care to the Management Corporation. The decision in *Dua Residency* raises a novel point of law. Traditionally, homebuyers would bring an action individually against developers to rectify defects or for failing to construct the condominiums with good workmanship or materials.

The High Court noted that while a contractual remedy exists for the homebuyers, this would be impractical as it would require all the homebuyers to institute a civil action. Instead, the Court accepted that from a practical point of view, the Management Corporation represents the collective homebuyers since the management and maintenance of the condominium are directly under the Management Corporation’s care.

Duty of Care

The Dua Residency decision now imposes an additional duty of care on developers to a Management Corporation of a condominium or stratified property, to ensure that the property has been constructed with good workmanship and in accordance with the agreed specification and approved plans in the sale and purchase agreements.

The decision in Dua Residency potentially raises several issues. A Management Corporation acts on a majority whereby a motion is made at a general meeting and passed with a majority vote. Should a motion be passed by the majority for the Management Corporation to commence legal action against the developer, what then would be the rights of the minority who opposed the motion? The minority would essentially be brought into a legal suit which they have no intention to commence or without their express consent.

A Class Action?

The decision in Dua Residency would be binding on all the homebuyers irrespective of whether the homebuyers are part of the majority or minority. A judgment pronounced in a representative capacity is equally binding on all the parties being represented i.e. all the homebuyers which the Management Corporation sought to represent. Whilst the decision of Dua Residency did not specifically deal with the issue of class actions, some may argue that the outcome in Dua Residency could be akin to a representative or class action claim.

Contrast this with the traditional approach whereby homebuyers would knowingly and willingly commence an action against the developer directly. The issue of the minority acquiescing or being bound by a judgement they had not sought to be a part of would not have arisen.



The decision of Dua Residency could also potentially open the floodgates to frivolous civil suits brought against developers. The majority of homebuyers could come together to compel the Management Corporation to commence frivolous suits against developers. The majority could also mean only the majority of owners that were present during the general meeting.

Whilst the prospect of a representative action against a developer may seem alluring at first glance, it may not be as sweet as it seems. As with all litigation, it is possible that homebuyers, having succeeded in their claim, would still end up with a paper judgment. The corporate entity that developed the stratified property may be insolvent. The Management Corporation, having utilised the collective fund to commence legal action, may end up being detrimental to the homebuyers instead. The minority who opposed the commencement of the civil suit would also have to bear the costs as the Management Corporation acts as a representative for all the homebuyers.

Nevertheless, how would this decision affect property developers in the future? Property developers would now have to consider not only their contractual obligations to the homebuyers but also their duty of care owed to the Management Corporation of the condominium or stratified property.



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ACCOUNTANT'S LIABILITY-

IS THERE A LIMIT FOR STATUTORY AUDIT

by Leonard Yeoh & Nurul Qarirah Md. Kahar

In recent weeks, news outlets had reported high-profile legal suits filed against a leading accounting firm in respect of the statutory audits carried out by the said firm. The legal suits were filed pursuant to alleged negligence, breach of contractual duty and breach of statutory duties. The damages claimed in these legal suits amounted to billions of dollars, which may cause concerns to all auditors. Can the opinions expressed by auditors in statutory audits expose them to civil liabilities?

Roles and Duties of Auditors

The Companies Act 2016 (CA 2016) requires all companies to appoint an auditor for each financial year, where the auditor has a duty to report to the members of the company on his opinion on the financial statements prepared by the directors of the company. Auditors are required to form an opinion on whether the financial statements give a true and fair view of the company's financial affairs, whether there is any defect or irregularity in the financial statements and whether he has obtained all the information and explanations that he required. Auditors also have a duty to report any breach of the CA 2016 or any fraud or dishonesty that are being or have been committed against the company. Failure to do so may cause the auditors to be liable to imprisonment and/or fine.

A similar duty is also provided under section 128 of the Capital Markets and Services Act 2007 (CMSA 2007). Both the CA 2016 and CMSA 2007 provide for protection for auditors against any legal suit in respect of any statement made in good faith in discharge of their duties.

Can legal claims against auditors be successfully proven?

Auditors are afforded with privilege from legal suits under the statutes, but it is pertinent to note that such statutory privilege would only apply where the statements and reports are made by the auditors in good faith. Since auditors are subject to stringent statutory requirements and duties, it would be a challenge for a party to prove that reports lodged and statements made by auditors, in the performance of their statutory duties, were made in bad faith.

A legal claim may also arise from an auditor's failure to raise certain irregularities in a company's financial affairs, if such irregularities could reasonably be detected by auditors exercising reasonable skill and care. However, it is worth highlighting that an auditor's role under the statute is not to investigate fraud, but rather to express his opinion on a company's financial statement.

Limited Liability Partnership and Liability Limitation Agreement

Accounting firms may be registered with the Companies Commission of Malaysia as a Limited Liability Partnership (LLP), which has a different structure than conventional partnerships. While the partners in a LLP are still owners and managers of the LLP, the LLP is recognized as a separate legal entity on its own and the partners enjoy limited liability. This means that unlike a conventional partnership, an innocent partner will not be personally liable for the wrongdoings of





the LLP or another partner in which he was not involved. However, a partner may still be personally liable for any of his own wrongful act or omission. Thus, a legal suit against auditors may be filed against the LLP itself or against the partners responsible for a particular matter.

It is worthy to note that in Malaysia, the statute does not make any provision for auditors to limit their liabilities in respect of any act or omission. This is in stark contrast with the position in the UK, where the UK Companies Act 2006 allows auditors to enter into Liability Limitation Agreements with companies in order to limit the amount of liability owed to a company by its auditor for one financial year.

Conclusion

It would definitely be interesting to watch how these recent legal suits will unfold and how the Malaysian courts will decide on these issues. The question of the extent of auditors' duties has not been rigorously tested in Malaysian courts since legal suits against auditors are rather rare given their statutory privilege against civil claims. In any event, auditors will have to keep in mind that as professionals, they would have certain duties and responsibilities which may also expose them to criminal and civil liabilities. Therefore, it is important to ensure that such duties are properly and professionally discharged with reasonable skill and care.



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Exclusivity of Pharmaceutical Data

by Lee Lin Li & Lim Jing Xian

Article 39.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) states:

"Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."



Although there is no explicit mention of data exclusivity (DE), Article 39.3 is commonly perceived to be the source of protection extended to pre-existing data generated from big-budget clinical trials and research by innovator companies. DE protects against any commercial use by a third party, usually a company seeking to establish bioequivalence of generic drugs or biosimilars by referencing clinical data of medicinal products to obtain marketing approvals for generics or biosimilars. Under the DE mechanism, these companies may only submit their application which relies on the clinical data generated by innovator companies after the DE period expires.

The DE mechanism is intended and thought to serve as an incentive that encourages development of new drug therapies in a heavily invested research-based industry. It delays generic and biosimilar entries into the market. This allows innovator companies to recoup their often blockbuster investment in drug research and development.

DE is a distinct form of intellectual property right which does not necessarily run concurrent with a patent protection term. Its protection stems from the same idea that another may not gain from it during the period of its exclusivity. In some cases, the DE period may even extend beyond the patent term. Notably, eligibility for DE is not subject to patentability requirements such as novelty and inventive step. Hence, DE presents an attractive and viable panacea for pharmaceuticals which cannot get across the patentability line.

DE in Malaysia

In Malaysia, DE took shape in the form of the Directive on Data Exclusivity (Directive No. 2 of 2011)¹ (DE Directive) issued by the Director of Pharmaceutical Services under Regulation 29 of the Control of Drugs and Cosmetics Regulations 1984. It came into force on 1 March 2011.

DE protection in Malaysia only extends to cover new drug products containing a new chemical entity (NCE)² and a second indication of a registered drug product³.

The DE Directive seeks to protect undisclosed, unpublished and non-public domain pharmaceutical test data, the origination of which involves considerable effort. Such test data must be submitted to the Director of Pharmaceutical Services for purposes of scientific assessment for the registration of any new drug product containing a NCE or approval of a second indication of a registered drug product.

As of 10 March 2021, DE has been granted for 88 new drug products containing a NCE⁴ and as of 7 September 2020, DE has been granted for 19 second indication of a registered drug product⁵ in Malaysia.

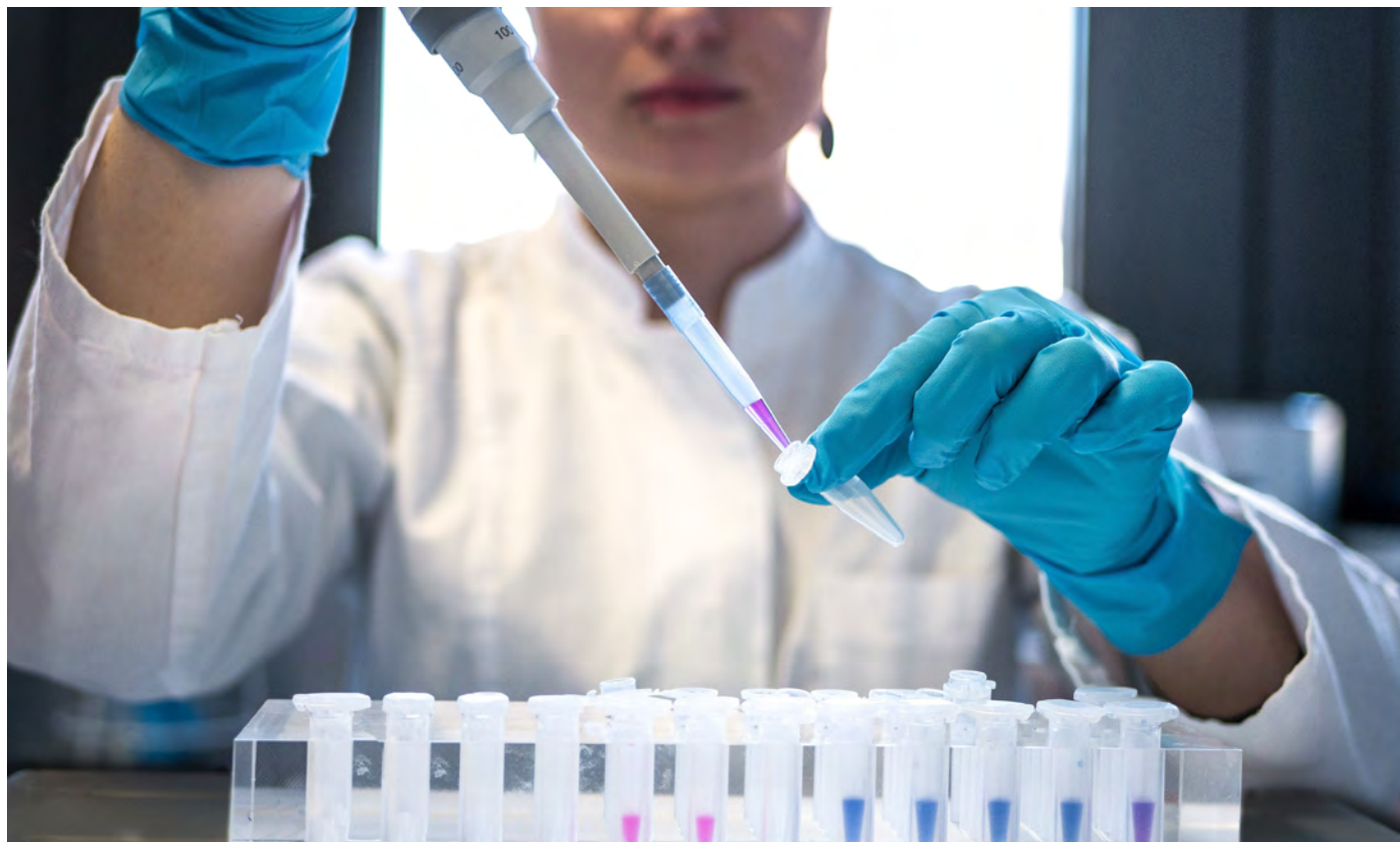
¹ Directive on Data Exclusivity (Directive No. 2 of 2011) may be retrieved from https://www.npra.gov.my/images/Circulars_Directive/Regulatory_Information/page-10/DIREKTIF_DE-1.pdf.

² Means a product that contains an active moiety that has not been registered in accordance with the provisions of the Control of Drugs and Cosmetics Regulations 1984.

³ Means a single or cluster of therapeutic indications applied subsequent to the first indication approved at the point of registration of the product.

⁴ Register of Data Exclusivity Granted in Malaysia (New Drug Product) may be retrieved from https://www.npra.gov.my/images/2019/12/NCE/DE_Table_Update_10-03-2021.pdf.

⁵ Register of Data Exclusivity Granted in Malaysia (Second Indication of Registered Drug Product) may be retrieved from https://www.npra.gov.my/images/2019/12/NCE/DE_AI_Table_Update_for_PPO_07-09-2020.pdf.



Fun Facts

	New Drug Product Containing NCE	Second Indication of Registered Drug Product
When to apply?	Within eighteen months from the date the product is first registered and granted marketing authorization and granted DE / Test Data Protection in the country of origin or in any country, recognised and deemed appropriate by the Director of Pharmaceutical Services.	Within twelve months from the date the second indication is approved and granted DE / Test Data Protection in the country of origin or in any country, recognised and deemed appropriate by the Director of Pharmaceutical Services.
How long is it valid for?	Not more than five years .	Not more than three years . <i>Note: The period of DE is for data concerning the second indication only.</i>
When does protection begin?	The date the product is first registered or granted marketing authorization and granted DE / Test Data Protection in the country of origin or in any country recognised and deemed appropriate by the Director of Pharmaceutical Services.	The date the second indication is first approved and granted DE / Test Data Protection in the country of origin or in any country recognised and deemed appropriate by the Director of Pharmaceutical Services.

Exclusive, but not so Exclusive

DE does not extend to cases where compulsory licenses have been issued, nor would it prevent the Government from taking any necessary action to protect public health or national security, or to allow non-commercial public use, or during a national emergency or public health crisis, or any other urgent circumstances as may be declared by the Government.

DE Process

DE is not automatically conferred on or made available to a product owner. An application for DE for a new drug product or a second indication of a registered drug product must be made via a letter of intent. The letter of intent is to be addressed to the Director of Pharmaceutical Services.

Any person aggrieved by the decision of the Director of Pharmaceutical Services may lodge a written appeal to the Minister within fourteen days from the date the decision is conveyed to him and any decision of the Minister made on the appeal is final.

A person making the appeal may submit any supporting data or documents to the Director of Pharmaceutical Services within 120 days for an application of a new drug product containing a NCE, or within 90 days for an application for a second indication of a registered drug product.

Postscript

Although DE protection is at least a decade old now in Malaysia, its implementation has not been uncontroversial among stakeholders. For instance, commencement of the DE period in Malaysia begins from the approval date outside Malaysia instead of the local grant date. This is perceived as insensible and limiting as the potential benefits the innovator company would stand to reap during the gap period would be lost. For efficacious DE protection, the practice in other jurisdictions such as Singapore, Australia, the United States of America and the European Union where DE protection period begins from the local grant date is food for thought.

While some advocates say that DE is crucial to the promotion of innovation in the pharmaceutical industry, others have contended that there is no evidence that stronger intellectual property protection has encouraged innovation of new drug therapies⁶.

Unlike a patent, DE is not subject to a legal challenge in court. Policy makers should be mindful that DE does not confer excessive monopolistic rights on innovator companies, particularly so as the rights conferred ought to be carefully balanced against access to affordable medicines and public healthcare.

⁶ Fifi Rahman & Fran Quigley, "The illusion of a 'golden balance': Access to medicines and the TPP", 29 September 2015, <https://www.malaymail.com/news/what-you-think/2015/09/29/the-illusion-of-a-gold-en-balance-access-to-medicines-and-the-tpp-fifi-rahma/978703#st-hash.YckPjo2Z.dpuf>.



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Regulatory Update:

Directors' Independence of Public Listed Companies

by Wong Mei Ying

Directors' independence has been a key focus of the Securities Commission Malaysia ("**SC**") and Bursa Malaysia Securities Berhad ("**Bursa**") lately as can be seen from the following amendments and proposed amendments in relation to the requirements and eligibility of independent directors of public listed companies:

Revision to Malaysian Code of Corporate Governance ("MCCG**")**

The SC issued the revised MCCG on 28 April 2021 which took effect on the same day. The revisions in relation to directors' independence include:

1. recommending that if a board of directors intends to retain an independent director after nine years, the board should provide justification and seek annual shareholders' approval via a two-tier voting process (previously required after 12 years);
2. discouraging a listed company from appointing active politicians as directors;
3. recommending that board committee meeting to be conducted separately from board meeting to enable objective and independent discussion; and
4. recommending that the Audit Committee of a listed company to have a policy that requires a former partner of the external audit firm of the listed company to observe a cooling-off period of at least three years before being appointed as an Audit Committee member. This applies to all former partners of the audit firm and affiliate firm (including those providing advisory services, tax consulting etc). Previously, the cooling-off period of at least two years applied to former key audit partner.

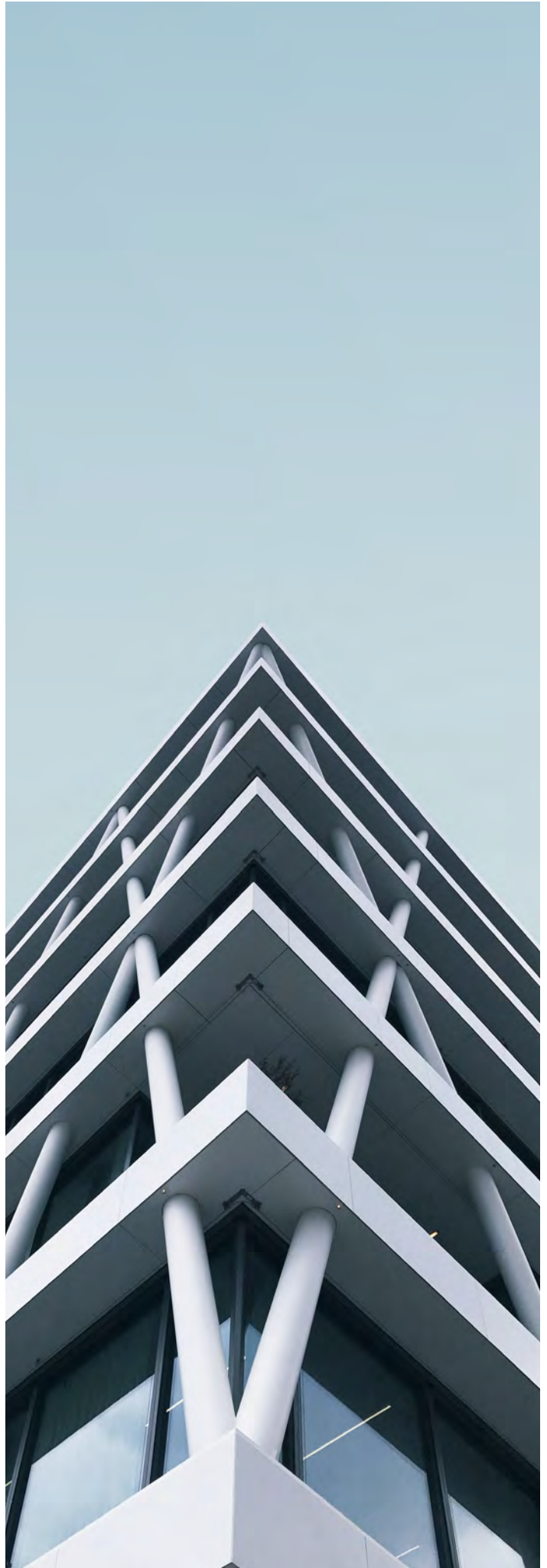
Amendments to Bursa Listing Requirements

Bursa amended the Main Market Listing Requirements and ACE Market Listing Requirements (collectively, "**Listing Requirements**") to enhance the requirements and eligibility of independent directors by:

1. lengthening the cooling-off period from two years to three years for:
 - (i) an officer;
 - (ii) an adviser; or
 - (iii) a transacting party of prescribed transactions,
of an applicant, listed issuer or any related corporation of the applicant or listed issuer; and
2. extending the three years cooling-off period to a non-independent non-executive director of an applicant, listed issuer or any related corporation of the applicant or listed issuer. Prior to the amendments to the Listing Requirements, the cooling-off period did not apply to a non-executive director (whether independent or not).

The persons stated above have to observe the minimum cooling-off period of three years before he or she may be appointed as an independent director. The appointment is subject to satisfaction of all the criteria on independence as set out in the Listing Requirements as well as shareholders' scrutiny and approval.

The amendments have been in effect since 1 October 2020.



Bursa's proposed amendments to Listing Requirements

Bursa has issued a consultation paper on 21 July 2021 ("**Consultation Paper**") to seek public feedback by 1 September 2021 on, amongst others, the following proposed amendments to the Listing Requirements in relation to independent directors:

1. amendment to the definition of "independent director" under the Listing Requirements by specifying that an independent director is one who has not served as an independent director of an applicant, listed issuer or any related corporation of the applicant or listed issuer for a cumulative period of more than 12 years from the date of his first appointment as an independent director; and
2. requiring a former independent director who has served for a cumulative period of more than 12 years from the date of his first appointment as an independent director in an applicant, listed issuer or any related corporation of the applicant or listed issuer to observe a cooling-off period of a minimum three years before he or she may be reappointed as an independent director. The appointment is still subject to satisfaction of all the criteria on independence as set out in the Listing Requirements as well as shareholders' scrutiny and approval.

It should be noted that under the proposed amendments to the Listing Requirements, the computation of the 12-year tenure includes the tenure as an independent director in a related

corporation of an applicant or listed issuer. This means that the service as an independent director on a listed subsidiary, for example, will also be taken into account when computing the tenure of 12 years.

The case for directors' independence

The issue with long-serving independent directors is explained in the MCCG. Independent directors' long tenure and familiarity with a company may erode the board's objectivity. An independent director may become too sympathetic to the interests of the board and management or too accepting of their work due to the independent director's long or close relationship with them. An independent director may also become a 'dependent' director due to prolonged insular recruitment processes and attractive remuneration packages and material benefits.

There is a strong case for ensuring independence of independent directors in public listed companies. As mentioned in the Consultation Paper, the boardroom is where strategic decisions are made, governance is exercised and risks are overseen. It is essential for independent directors to avoid entrenchment, provide more rounded consideration of issues, foster constructive challenge and guard against any biases or group think.

With the regulatory enhancement towards the requirements and eligibility of independent directors, public listed companies should assess the independence of their independent directors periodically and rigorously to ensure effective functions of their board of directors.



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