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# Liability of directors under Omani law: Part 1

The economic downturn, increasing risks, and new regulatory requirements add up to greater scrutiny of the actions of company officers and directors worldwide. The possibility that investors, regulators, and even criminal prosecutors will challenge their decisions makes it critical for officers and directors to understand the nature and scope of their duties and potential liabilities wherever they find themselves.

The trend in Oman, as elsewhere, is for laws and regulations to extend the duties and consequently the potential liabilities of company officers and directors. This column will highlight a number of key areas over the coming months.

The general obligations placed on directors of public or closed joint stock company arise from various sources including the company's statutes, the Commercial Companies Law (CCL), Commercial Law (OCL) and the Penal Code. (Many of these provisions apply equally to managers of LLCs.) Directors of public companies listed on the Muscat Securities Market face additional duties and liabilities under Oman's Code of Corporate Governance and other capital market regulations which we will discuss next month.

Under the CCL, the director's primary duty of care is to perform his duties in good faith, in the best interests of the company and with the care a prudent person in similar circumstances would use. A director may be liable to the company, shareholders and third parties for damage caused by any breach of the law or the company's statutes, fraud, negligence in the performance of his duties,

acting ultra vires, or failing reasonably. A director is assumed to have knowledge of any resolution even if he was not at the meeting where it was passed unless he can prove otherwise. Where more than one director is liable for a breach of the CCL, they may be held jointly or severally liable for all or part of the damages. Directors must be loyal towards the company and must not simultaneously manage a competing business, make a personal profit at the company's expense; or pursue an undisclosed or unapproved personal conflict of interest.

In addition to civil liability, directors may also be exposed to criminal sanctions under the CCL. These range from custodial sentences of up to three years and/or fines of up to RO500 for offences of misrepresentation including entering false or misleading information in corporate documents or an application to establish a joint stock company; distributing dividends based on falsified audited accounts; or wilfully falsifying or omitting material information from company accounts.

Potential criminal liability also exists under the Penal Code for matters such as fraud, embezzlement, disclosing confidential information for personal benefit and writing a company cheque which bounces. Insolvent trading is a major area of potential personal and criminal liability for company directors and managers to which we will return.

Consumer protection law represents a new area of potential liability for directors of trading companies. They should be mindful that they may face criminal sanctions if the company is found to be in breach of wide-ranging responsibilities and obligations under Oman's Consumer Protection Law (CPL). Breach of obligations to ensure that product are genuine, properly licensed, comply with HSE regulations and the religious values, customs and traditions of Oman and that information provided to the consumer is correct and not misleading may all expose directors to the risk of fines and custodial sentences where it is established that they had knowledge of the breach. ■

*To be continued in the next edition*

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# When things go wrong – Liability of directors under Omani law: Part 2

As discussed in Liability of directors under Omani law: Part 1, directors of public companies listed on Muscat Stock Market (MSM) are required to discharge their duties, responsibilities and obligations under Oman's Code of Corporate Governance, the Capital Market Authority Law (CMAL) and its executive regulations (in addition to the general obligations placed on directors of public and closed joint companies by the Commercial Companies Law (CCL), Commercial Law and the Penal Code).

Oman's Capital Markets Authority issued the new Code of Corporate Governance (Code) on the 22nd of July 2015. The Code is scheduled to take effect from the 22nd of July 2016 and is applicable to all public joint stock companies listed on the MSM.

Transparency, accountability, fairness, and responsibility form the basis of directors' duties as provided for by the Code. The Code requires for the directors to exercise due diligence and transparency in their dealings with the regulators, shareholders and related parties. Directors shall be accountable for their decisions to the shareholders and be open for assessment in accordance with the best practices. Shareholders, employees and related parties need to be treated fairly by directors without

any partiality or concealed interests. The standards of professional conduct provided for by the Code require directors to perform their duties towards the company professionally with honesty and integrity without any conflict of interest and in compliance with the applicable laws. Directors must at all times place the interests of the company above any personal interests. The Code obliges directors to take all reasonable measures to ensure their compliance and the company's compliance with the Code and the applicable Oman laws and regulations.

Although the Code does not elucidate penalties for the breach of its provisions, it necessitates the appointment of an independent third party consultant (at an annual general meeting of the company) for appraising the performance of the directors. The Code obligates company chairman to ensure that the directors are enrolled in training programmes for the discharge of their duties in accordance with the Code. Companies are required to highlight in their corporate governance reports any non-compliance with the Code and reasons for such non-compliance.

The CMAL and its executive regulations prohibit directors from engaging in 'insider trading' on the basis of undeclared or undisclosed information obtained by virtue of their position. Penalties may be imposed pursuant to the CMAL and the CCL on directors for intentionally submitting incorrect statements, declarations or information aiming at affecting investors' decision on whether or not to invest in the company. Such penalties may range from imprisonment for a period of not less than 3 months and/ or a fine of not less RO 10,000 and not exceeding RO 50,000.

Directors and officers should also exercise caution to ensure that the company receives timely advice and takes action with regard to solvency issues, as a insolvent company could potentially expose directors to personal liability under the CCL, the Insolvency Law and the Penal Code. ■



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# Liability of company directors and managers for insolvency

Where a company has been responsibly managed, directors will not generally face personal liability for its debts or losses. However, as discussed in our previous columns, directors who breach the law, company statutes, or are negligent or fraudulent in the performance of their duties can face personal liability for the company's debts and losses as well as criminal penalties.

A key area of potential liability for directors of a joint stock company or managers of a limited liability company (together referred to as directors in this article) is for debts incurred by the company at a time when the company itself is unable to pay those debts. This is because one of the fundamental duties of a director of any company is to ensure that it does not trade while insolvent. Where a company becomes insolvent, or is at risk of insolvency, a director's duties expand to include creditors (including employees). The Commercial Companies Law (CCL) imposes a duty on directors to prepare annual financial statements for auditing by independent auditors. This ensures that directors are familiar with the financial standing of their company in particular as to whether or not the company is solvent.

A director who becomes aware that the company

is at risk of insolvency, is required to take appropriate action to rectify the situation in order to avoid personal liability to shareholders and/or creditors. Options include filing for liquidation of the company under Article 14 of the CCL, or by restructuring, refinancing or recapitalising. If a company is unable to remain operational or, if after the lapse of one year, its share capital has not been restored and the shareholders have not placed the company in liquidation, then the directors are required to commence liquidation proceedings.

Where a company is declared bankrupt and does not have sufficient assets to pay at least 20 per cent of its debts, the Primary Commercial Court may hold all the directors jointly or severally liable to pay all or some of the insolvent company debts. Liability will arise where a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation and then failed to take the necessary actions to minimise the potential loss to the company's and or its creditors.

Arguably, in an economic downturn, directors need to be extra alert for signs of potential insolvent trading scenarios, with regard to which early accounting and legal advice increases the likelihood of the company surviving.

A serious but not well-understood risk for company directors and other officers may arise when their company refuses to implement or comply with the terms of a court judgment obtained against it. Despite the separate legal status of the company as judgment debtor, Article 418 of Oman's Civil and Commercial Procedure Code allows an enforcement judge to issue an arrest order against a person who refuses to implement or comply with the judgment. The enforcement department does not investigate whether a specific individual was involved in the decision not to comply with the judgment but takes the view that the company's failure is attributable to its directors and officers irrespective of their state of knowledge. ■