

President's Message...



Soon we will come to the close of another year. This year the SII has been livelier with regular monthly social events which we call our "SII Happy Hour" although in practice it lasts for a few hours and we sometimes have to 'shoo' people away. The credit for this goes to Tan Li Leng who so willingly has put so much energy in organising various social activities with more planned for the Christmas Season.

Where we have not progressed sufficiently however, is in the area of professional education and development. Somehow it seems difficult to get the industry enthused about this. I often hear senior members of the insurance profession lament about the fact that we are not developing enough people with sufficient expertise but as yet, I for one do not see any turn around in this area.

We have to be careful here, as the world is getting flatter by the day. Jobs will go to where the skills are readily and easily available. I work for a company that handles issues relating to Employee Benefit programmes for clients in Singapore from an operational centre in Cyberjaya outside Kuala Lumpur in Malaysia. Payroll matters for the same clients are handled in Bangalore in India. It will be quite possible to handle technical underwriting and claims handling for any insurer doing business in Singapore from either of these two locations or many others. Insurers may be forced to do this, not to save cost but because of the lack of sufficiently skilled people. I for one do not detect a sufficient sense of urgency to address these matters, either from the industry at large or the regulator.

There is only so much the SII can do. At this time the greatest impediment to the SII is its lack of a good inflow of funds to help support its activities and to enable it to play a greater role in the realm of professional development and training.

In order to be able to play a more effective role the SII needs good financial support from the industry and perhaps the regulator as well. Susan Zajac who manages our finances has been constantly reminding me that the SII cannot continue without generating more inflow of funds. I will need to address my fellow professionals and the companies on this issue. We need the industry to step up to this situation and help support the institute in its role.

The SII has some exciting events planned including an educational visit to the London Market next year. You will find more details in this issue. Sam Tan has been working very hard with the Chartered Insurance Institute to put this together for the benefit of members while working on other seminars as well.

I encourage all of you to be more active in participating in the SII activities, and also to encourage your colleagues who are not members to join the institute. And please, support your institute!

Stanley Jeremiah

ILAS/SII Seminar on 12 September 2006



(lawyer with DLA Piper) and Goh Chye Huat (Country Manager for Singapore, Jardine Lloyd Thomson Pte Ltd). The moderator was Justyn Jagger of DLA Piper.

One of the highlights of the seminar was learning more about the Defects Exclusions in a CAR policy. Through practical and lively examples, participants were given a very good idea by the speakers of how Defects Exclusions could operate in practice, and the different ways to overcome these Exclusions at the proposal and underwriting stage. The different variants of the Defects Exclusions available in the market were also discussed.

Another topic that got the speakers very engaged was the definition and meaning of simple common words in a CAR policy such as "sudden", "unforeseen" and "damage". Though such words appear simple, participants were given an idea of the numerous possible interpretations, and the problems that could arise in a claim depending on which interpretation one subscribes to.

The "hottest" topic for the day came toward the end of the seminar when the moderator asked whether some contractors abuse their CAR policies and treat their insurers as bankers. In the ensuing discussion, lawyers were not spared from being commented on! The general consensus at the end was that in a claim arising under a CAR policy, all players should abide by universal principles of fair-play, professionalism and integrity. Players should not look at one another with suspicion and distrust but should instead work together towards a win-win situation for all concerned.

The seminar ended with a call for greater clarity in the CAR policy wording and structure, and more professionalism in the claims handling process not just from the insurer's perspective but from every player involved.

The seminar proved to be highly effective in giving the participants a useful insight into the operation of a CAR policy and also facilitated a frank exchange of views amongst the various players in the insurance industry.

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The Insurance Law Association Singapore (ILAS) together with the Singapore Insurance Institute (SII) jointly organized a half-day seminar on **Insurance and the Construction Industry: A Story of CARS, Casinos, Claims and Court Cases on Tuesday, 12 September 2006** at NTUC Business Centre, Level 7.

With the increasing number of large scale construction projects in the pipeline, the seminar attracted a record number of participants from all sectors of the insurance industry and outside.

The seminar took on a more modern and casual discussion-type approach. A distinguished panel of speakers representing the usual players in a CAR policy was assembled. The speakers were posed a series of interesting questions by the moderator on which they then engaged one another with their frank and open views. It was indeed interesting to note the different perspectives of each player on what one would normally think are a simple issue.

The speakers consisted of Stuart Fairbairn (Contracts Manager of PKDBH JV), Paul J. Rabbitte (Managing Director of Crawford, Vietnam), Andianto Panduwina (Senior Engineering Underwriter, Swiss Re), Chong Sim

Directors' and Officers' Liability in a Changing Environment in Asia

Shasi Gangadharan ¹

Three years back, I co-authored an article on Directors' and Officers' (D&O) liability in Asia. The article highlighted a steady rise in the number of incidents and legal cases involving corporate managers. Many of these cases are those that were reported in the media and they included examples of action brought by regulators, creditors and a few from shareholders.

Today, three years since and on the same subject, there have been significant developments that have taken place in Asia involving D&O liability. In the vast majority of the claims reported to insurers, there is an increasing number of claims in which defence costs are incurred, which aver to the fact that there is upturn in instances where the D&O policy is engaged. This has also led to insurers being decidedly more cautious in their underwriting since the cost of funding defence can be an expensive affair. Some measures taken by insurers include cutting back on the capacity offered on a single account and exercising greater scrutiny during underwriting, particularly on companies with diversified business operations and those with sizable assets. Proposal forms are now lengthier with questions relating to corporate governance. At the same time, the awareness amongst buyers of this insurance genre has also increased which has led to the growth in the policy count. We are also observing companies with existing policies buying higher limits. The mentality in Asia that contingencies will "not happen to us" has changed to "this could happen to us" which is a reflection of the increased awareness of risk exposures.

There are several factors that contribute to this and the two key ones are: -

(1) The changing operating landscape

It is a fact that today companies are operating in an economic environment that has changed drastically over the last two years. Events such as the outbreak of terrorism, war, hike in oil prices and currency fluctuations are some of the exogenous factors that impact a company's operating environment. In some cases, these elements have caused the downfall of the company. Ask any risk manager two years before and they would have told us that none of these were

patent considerations in their minds. Today, this high level of uncertainty which continues to persist and is now inherent in the global economy, has increased the risk of doing business. However, shareholders and investors continue to demand good leadership and expect directors and officers of their company to be able to contain the risks - a feat that is challenging for them.

(2) The increasing vigilance by regulators and investors

Secondly, the number of corporate collapses, both in the US and Europe, has given rise to increasing vigilance by shareholders and regulators. The same attitude is emerging in Asia as a result of the collective reaction of shareholders and regulators to these events.

The high profile collapses are serious; not only do they have a huge bearing on the economy, they also have an impact on a broad range of people: employees, bankers and other creditors. In Asia, we are fortunate to be able to draw lessons from the widespread collapses in the US and Europe which prompted regulators to make sure that the situation here is checked. Measures undertaken by regulators involve improving transparency, increasing corporate vigilance, and empowering themselves with more authority to investigate and prosecute transgressors. A trend seen here in recent times is that companies with large government ownership or family ownership (two of the most common ownership traits) are opening up to such practices. This heralds changing times which directors are forced to reckon with. Corporate governance, which used to be paid only lip service to, is now entrusted with importance. Most authorities in Asia now require publicly listed companies to have independent directors and an audit committee in place.

An additional interesting observation is that a number of companies in Asia are racing with one another to improve their corporate governance practices especially since the media, rating agencies and institutional investors rate companies on this aspect now.

¹ The views, information and content expressed herein are those of the author's and do not necessarily represent the views of any of the insurers of the Chubb Group of Insurance companies. Chubb did not participate in and takes no position on the nature, quality or accuracy of such content. The information provided should not be relied on as legal advice or a definitive statement of the law in any jurisdiction. For such advice, an applicant, insured, listener or reader should consult their own legal counsel.

WHERE ARE THE EXPOSURES FOR DIRECTORS AND OFFICERS IN ASIA?

In light of this, there are two questions we should ask: What has changed and what are we seeing? What is so different now from before?

A bit of background on D&O markets in Asia. If we were to track the development of D&O policy in Asia, it originated with companies that had foreign listings particularly in the US. On many occasions, D&O policies were sold on the back of a foreign listing in, and exposure to, the U.S. Along the same line of thinking, some large companies purchased D&O on the basis of their concern with the shareholders and investors. However, risk managers and insurance brokers found that while shareholder suits pose a threat, this would not be clearly evident to a company operating in Asia only. The legal framework in many parts of Asia was not and is still not shareholder friendly, and this is evident by the lack of shareholder suits in Asia.

This is slowly changing with reforms undertaken, particularly in the area of securities laws where there are provisions which now recognise the shareholders' (and regulators') right to commence actions. However, the fact remains that for a company operating within the local scene, shareholder lawsuits are still not regarded a major threat. While this is the case, for the time being at least, it is disappointing to see that insurers continue to market the D&O policy as a means of shareholder protection. This mode of sale has created the expectation that the policy should be cheaply priced because of the lack of shareholder lawsuits and therefore the lack of claims. Since the opposite is the reality, D&O insurers are unable to price the risk adequately for the rising instances of claims.

SOURCES OF D&O CLAIMS

Breakdown in supervision and controls

Directors and officers are regarded as the gatekeepers of corporate governance and when things go wrong

with the company, the issue is often whether there was a breakdown in supervision and control. When this happens, the allegation against the directors and officers is simply that there was a failure to supervise. These allegations can be leveled by any party, be it the regulator, employee, creditor or shareholder. There are two common examples of this, one being fraud and the other being more specific - accounting fraud.

Fraud is an exposure that is worrying for all parties and they have increased in recent times. In many instances, the dollar amount losses are substantial and in some cases they are significant enough to bring the company down.

The peculiar problem with fraud losses is that it is often difficult to detect and because most frauds are detected by accident, it would have progressed too far into the final stages and the amounts involved highly substantial by the time of detection. While a standard D&O policy excludes fraud, innocent directors and officers may continue to get protection due to the severability feature that is built into the application of the exclusion. Furthermore, for those alleged to have committed or condoned fraud, there may still be coverage in the form of defence costs because the fraud exclusion applies only when it has been established as a fact or by some adjudication. There are a number of high profile cases in Asia. This includes a well known incident in Singapore, where a company became a victim of fraud when one of its employees was charged with defrauding four banks of a total of S\$150m. Media reports indicate that the banks are pursuing legal remedy against the company. In another case, a large conglomerate found its trading company in the midst of a US\$3.7 billion accounting fraud, which resulted in the imprisonment of a number of its top management. On December 1 2004, the Business Times carried a report about a Singapore company with Chinese parentage that incurred massive USD 550m loss arising out of unauthorised trading. The report indicate that there were breaches in the company's oil trading practices which resulted in the company not having enough financial resources to cover margin calls.

In the U.S., a number of companies were embroiled in

SII Educational Visit to London 2007

(Back by popular demand!)

The Singapore Insurance Institute (SII) once again is in collaboration with the Chartered Insurance Institute (CII) to organize an Educational Visit to the London insurance market from 28 April to 5 May 2007.

At this preliminary stage, we are pleased to provide the following details:

- Duration of trip : 8 Days 6 Nights
- Dates : 28 April to 5 May 2007 (Saturday to Saturday)
- Airline : Singapore Airline (SQ)
- Hotel : Thistle Kensington Palace (or similar) Kensington, West London
- Tour Package : S\$3,150 per person for twin sharing, daily breakfast included
S\$3,710 per person for single, daily breakfast included
(The above package pricing is indicative, subject to changes)



Overseas Trip 2004: CII hosting dinner

Twelve (12) CPD hours will be awarded to participants upon completion of Trip.

The proposed itinerary would include a visit to the CII, Swiss Re, Lloyd's London, a leading Insurance Company, a leading Insurance Broker firm, and a leading Loss Adjuster company.

We are also planning to visit the Shakespeare's birthplace on the 'free n easy' day, and to watch a show at West End theatre on one of the evenings (*tickets to the West End theatre are not included in the package, and are subject to availability*).

The SII PDE Committee is currently working with a travel agency to get favourable rates for both hotel and airfare. To facilitate our planning for the visit, we would appreciate it if you could give us an indication that you would like to join the educational visit to London.

We have limited seats – 40 maximum. Registration is on first-come-first-served basis.

This is an opportunity also for company CEOs to consider nominating their **Best Performers / Employees** for the Trip.



Overseas Trip 2004: Cheeze ... it's cold out there!



Overseas Trip 2004: Delegates wine & dine at CII

Corporate Sponsorship Package

Companies who are budgeting for the year 2007, please note that we are offering Corporate Sponsorship Packages. There are three (3) categories of sponsorship:

Gold Sponsor: S\$7,500

The package includes the following:

Two (2) nominated delegates for the trip, with air-fare and hotel accommodation

Each delegate is on twin-sharing basis, worth S\$3,150

Company logo is featured in the banner for publicity in London

Silver Sponsor: S\$5,000

The package includes the following:

One (1) nominated delegate for the trip, with air-fare and hotel accommodation

Each delegate is on twin-sharing basis, worth S\$3,150

Company logo is featured in the banner for publicity in London

Bronze Sponsor: S\$2,500

The package includes the following:

Company logo is featured in the banner for publicity in London

For those who are interested in the above programme, please inform Jacqueline, the SII Secretariat at email Jacqueline@sii.org.sg.

Regards,
Sam Tan
SII Chairman – Professional Development & Education (PDE)
Our Mission: Promoting Professionalism in Insurance and Financial Services

Upcoming Social events for SII members...

November 10 & 11, 2006 – SII Women's Day Out

Calling all women ONLY. The men don't get it!!!

SII is organising an event for women only in November at Batam View Beach Resort. Join us for 2 days of fun, games and interaction.

Our first-ever SII Women's Day Out is priced at S\$168 for SII members, S\$188 for non-members (twin-sharing). The exciting programme includes a talk on Numerology, a Professional Lingerie Workshop, optional activities such as Golf, City Tour, Massage, etc. AND, an all-girls' party with male exotic dancers!!!

December 14, 2006 – SII Year End Bash

Ready for Christmas? And for heralding in the New Year???

Join us for our special SII Year End Bash on Thursday, December 14, 2006 at the INK Club Bar at Raffles The Plaza. This event provides members an opportunity to meet each other, interact, bond, and celebrate the coming of Christmas and the year end holidays.

At an unbelievable price of \$45 for SII members, \$50 for non-members, join us for a night of fun and games, and party till early (in the morning). Enjoy the life band and the company of a hundred other members.

March 2007 – SII Golf Tournament

The ever-popular annual event that attracts 144 golfers. The primary objective of this event is to raise funds for the SII. At the same time, it is an excellent opportunity for members to play a round of golf in one of Singapore's most popular golf courses ... and have fun at the same time.

May 2007 – SII Bowling Championships

Look out for the exciting Championships coming your way in May next year!

More details on the various events will be sent to you when they are available.

We work hard, and we play hard.

Tan Li Leng
SII Chairman – Social & Recreation

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D&O Liability in a Changing Environment in Asia

accounting fraud and most recently for fraudulent stock options backdating. Asia is seeing its share of accounting fraud.

These incidents reflect directly on corporate management. When we speak to directors and officers, they acknowledge that fraud is their major concern. In a number of the incidents highlighted, it was often the case that the top management was innocent of the wrongdoing but because a management owes a duty of care to the company to ensure things do not go wrong, the liability for the loss lay with them.

Of late, we have seen top management accepting blame and resigning, often due to pressure from shareholders, which is an unprecedented phenomenon. For example, four senior directors of a large Telecom operator in the region quit due to pressure from minority shareholders, after the group company was embroiled in an accounting fraud. In another instance, the board of a debt-ridden company resigned and newspaper reports indicate that they did so after taking responsibility for management decisions that led to the company seeking a government bail out.

Employment practices claims

A standard D&O insurance provides cover for the employment practices claim for the directors and officers. Some policies go further to grant cover for the corporation - commonly referred to as the entity employment practices cover. Whether a standard or extended version, they do offer a substantial layer of cover for directors and or the company in respect of employment related claims.

There has been a steady rise of employment claims both against the individual directors and officers, and against the company. The difficult operating environment has contributed to this trend – businesses had to and are undertaking a number of costs-cutting measures, essentially cutting down excess expenditures. The sector often affected is the workforce and measures include shutting down unprofitable operations, cutting down employee

numbers and other expense reduction exercises. To compound the problem, in a number of cases, companies have lagged behind proper employment practices to handle these difficult exercises. We have also seen companies lag behind in basics such as employment handbooks and manuals outlining the company employment policies, and procedures dealing with employee termination are also not in place. Many companies with overseas subsidiaries, particularly in the U.S. and Europe where the legal environments are stricter, fail to appreciate the employment laws and it can prove a costly affair for directors to be involved in harassment suits. It is against these backgrounds that a number of employment related suits manifest in Asia.

Regulators

In recent years, regulators have become very proactive in discharging their duties. Top on their agenda is promoting rules and regulations that instill transparency and responsibility on directors and officers. In a survey conducted in late 2004 in Hong Kong by Jardine Lloyd Thompson and the University of Hong Kong uncovered the "fear of regulatory lawsuit" as the top concern of directors and officers. Similar results were produced in a recent survey published by AON Insurance Brokers. This result is no surprise given the number of prosecutions and regulatory actions seen throughout the region. While the standard D&O policy does not pay for fines and penalties, there may still be coverage of defence costs in regulatory and administrative proceedings. The most common cases seen are administrative and regulatory proceedings leveled against individual directors for the violation of securities and corporate laws.

Shareholders

It was mentioned earlier that companies in Asia with a foreign listing, especially a U.S. listing, that fear shareholder actions the most. While shareholder actions are still considered as being in its infancy, there are several reforms that have been undertaken,

aimed at allowing easier access to legal remedy for aggrieved investors. A good example is in China where there have been several shareholder actions under its new securities law, which allows investors to sue the issuers for misrepresentation and misleading statements in the offering documents. The law of shareholder derivative action is undergoing reform in certain countries to allow the expansion of rights of shareholders to commence derivative action against directors and officers. The implementation of class actions suits are being deliberated in Korea, Thailand and Singapore.

While lawsuits are not widespread, we are seeing an increasing amount of shareholder activism. Korea is a prime example of this. The civic group called PSPD has been responsible for bringing shareholder lawsuits against a number of chaebols and their directors. David Webb in Hong Kong has been successful in raising a lot of media attention in his quest to increase transparency among listed companies in Hong Kong. In Singapore, the Securities Industry Association of Singapore has established itself as the voice of the minority shareholders and, so far, has a successful track record in getting its message across to the companies. Institutional investors are also taking the lead in these shareholder movements and in some cases they have been successful in getting their message across. There are several recent examples across the region in Korea, Thailand and Singapore where shareholders have been successful in ousting the board of directors.

Foreign jurisdiction

Given that we are living very much in a global world, liability has also transcended in a similar fashion. While Asian companies are increasingly reaching out to foreign capital and conducting deals in foreign jurisdictions, they contribute to directors being exposed to liability in these foreign jurisdictions. The exposure of directors in a different legal environment can be a costly affair, especially if these jurisdictions are U.S. or U.K. Of late, there have been instances of companies offering their services or products overseas that were subjected to investigation by the foreign authorities.

This is seen particularly in the U.S. and U.K., where there are strict anti-monopoly and fair trading laws, such as in relation to price-fixing in the pharmaceutical industry in the U.K. and the semiconductor industry in the U.S., and billing charges in the telecommunications industry in the U.S..

CONCLUSION

Corporate governance is no longer a fad as we are seeing companies paying heed to calls for better governance and transparency. There are several interest groups such as the Asian Corporate Governance Association and shareholder groups that are actively championing corporate governance in Asia. The high profile collapses seen in the U.S. and elsewhere are another reason for the demand for transparency and accountability. These collapses have shown that, no matter how tough the regulator is or despite the plethora of rules or regulations, there are no guarantees of proper corporate governance practices.

Regulators are getting tougher and taking their role as gatekeepers more seriously. For example, in the U.K., the Financial Supervisory Authority stated in a recent ruling that directors are not entitled to seek recovery for any civil or criminal penalty under their D&O policy, nor are insurers allowed to grant such a cover. In these circumstances, directors are expected to fend for themselves in the event that a fine or penalty is leveled. The law relating directors duties are also undergoing major changes. This includes areas such as director duty of care, delegation of authority and the business judgment rule. For example in a recent court ruling, a Singapore court held that a managing director of company that misstated their financials may have committed a breach of duty of care to his company and is not entitled to rely business judgment rule. On the other hand the director is expected to be vigilant and make the necessary enquiries in discharging his supervisory function and therefore is liable to his company. These are changing times which directors and officers should pay heed to.