



# Professional and Management Liability in Asia

## *East Asian Actuarial Conference*

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### *Professional & Management Liability in Asia*

#### Outline of Discussion

##### DISCUSSION TOPICS

Products Overview


Brief History

Actuarial Considerations

Highlights of Current Markets by Country

- Sources of Information upon which this presentation is based:
  - AXCO Reports
  - AIG Internal Monitoring Material
  - Lexis Nexis
  - Wikipedia





# Product Overview





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## Professional Liability

### Product Overview

*Professional Liability / Indemnity*

- Protects the fiduciary **responsibility** of professionals providing advice and/or services to a 3<sup>rd</sup> party. The coverage focuses on alleged failure to perform on the part of, financial loss caused by, and error or omission in the service provided. Common claims professional liability insurance covers are **negligence, misrepresentation, violation of good faith and fair dealing, and inaccurate advice**. Coverage sometimes provides for the defense costs, including when legal action turns out to be groundless. Coverage does **not include criminal prosecution**.
- Coverage is offered to certain **professionals whose training, knowledge, and expertise are relied upon by others**. Examples of professionals that commonly purchase professional indemnity insurance include: lawyers, accountants, actuaries, architects, engineers, tradesmen & general contractors, realtors, insurance brokers, mortgage brokers, financial planners, investment managers, business consultants (e.g. recruiters, immigration consultants, etc.) and personal consultants (e.g. travel agent).
- Sold as "Indemnity" coverage – reimburse a loss incurred by the insured. The policies are not intended to pay losses on the behalf of the insured.

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## Management Liability

### Product Overview

#### Management Liability

- **Indemnification Provisions hold directors & officers harmless** for losses occurring due to their role in the company. In some jurisdictions such provisions are mandated; while in others they may be forbidden.
- Insurance reimburses the corporation (and its directors and officers) for losses or advancement of defense costs in the event an insured suffers a financial loss as a result of a legal action brought for alleged wrongful acts of directors and officers. **Coverage can extend to defense costs arising out of criminal and regulatory investigations. Intentional illegal acts and criminal fraud are not covered** due to exclusions and as a matter of public policy. Often times, both civil and criminal actions are simultaneously alleged.
- Under the "traditional" D&O policy applied to "public companies", there are three (3) insuring clauses.
  - **Side-A provides coverage to individual directors and officers when not indemnified by the corporation** as a result of state law or financial capability of the corporation; however, exclusions may apply if a corporation simply refuses to pay the legal defense/loss of a director or officer, or if a bankruptcy court issues an order preventing such indemnification.
  - **Side-B provides coverage for the corporation (organizations) when it indemnifies the directors and officers** (corporate reimbursement)
  - **Side-C provides coverage to the corporation (organizations) itself for securities claims** brought against it (e.g. Class Actions)
- More extensive coverage can be obtained for individual directors and officers under a Broad Form Side-A DIC ("Difference in Conditions") policy purchased to not only provide excess Side-A coverage but also to fill the gaps in coverage under the traditional policy, to more fully protect the personal assets of individual directors and officers.



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## Professional & Management Liability

### Product Overview

#### Similar and Complimentary Coverages

- **Third Party Coverages**
  - **Medical Malpractice** – Covers medical professionals for allegations of error in providing diagnosis and services. Unique that it carries a heavy Emotional Undertone as the responsibility affects a Person's Body / Life.
  - **Employment Practices Liability** – insurance that protects businesses from employee allegations of wrongful termination, sexual harassment, discrimination, invasion of privacy, false imprisonment, breach of contract, emotional distress, and wage and hour law violations. Employment Practices Liability is part of professional liability.
  - **Mergers and Acquisitions (Reps and Warranties)** – provides protection for unintentional breaches in the final purchase agreement. In most M&A transactions, the seller makes contractual representations and warranties to the buyer regarding key facts about the seller's business. The insurance product is available either for the buyers (a buy-side policy) and the sellers (a sell-side policy) in an M&A transaction. The majority of policies sold are buy-side which allow a buyer "to recover directly from the insurer without making a claim against the seller," which has the potential to reduce, or even eliminate, a buyer's reliance on the seller's funding; it reduces "collection risk where there are numerous sellers, foreign sellers or sellers at risk of insolvency."
- **First Party Coverages**
  - **Fidelity** – protects organizations from loss of money, securities, or inventory resulting from crime. Examples include employee dishonesty, embezzlement, forgery, robbery, safe burglary, computer fraud, wire transfer fraud, counterfeiting, and other criminal acts.
  - **Kidnap & Ransom** – cover the perils of kidnap, extortion, wrongful detention, and hijacking. The policies typically pay for Typically they cover:
    - Ransom Monies - Money paid or lost due to kidnapping
    - Fees and expenses of crisis management consultants.
    - Transit/Delivery - Loss due to destruction, disappearance, confiscation, or wrongful appropriation of ransom monies being delivered
    - Accidental Death or Dismemberment - Death or permanent physical disablement occurring during a kidnapping
    - Medical care, PR counsel, wage and salary replacement, relocation and job retraining, and other expenses related to a kidnapping incident.
  - **Cyber Protection** – Hybrid 1<sup>st</sup> and 3<sup>rd</sup> Party Coverage
    - Privacy - provide coverage for a broad range of invasion of privacy and data theft claims.
    - Intellectual property infringement except trade secret and patent.
    - Data Corruption – typically pays for the cost of recreating that data.
    - Business Interruption from Computer Disruption



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# Brief History



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## Management Liability



### Brief History

#### The Corporation

- The word "**CORPORATION**" derives from *corpus*, the Latin word for body, or a "body of people." The point was that the incorporation would survive longer than the lives of any particular member, existing in perpetuity
- Entities which carried on business and were the subjects of legal rights were found in ancient Rome, and the Maurya Empire in ancient India
- Roman Law recognized a range of corporate entities including the government, religious cult, political groups, and guilds of craftsmen or traders. Such bodies commonly had the right to make contracts, to receive gifts and legacies, to sue and be sued, and, in general, to perform legal acts through representatives.
- 17th century colonial expansion - the "chartered company" emerged sanctioned by the Dutch government. The Dutch East India Company defeated Portuguese forces and established itself in the Moluccan Islands in order to profit from the European demand for spices. Investors were issued paper certificates as proof of share ownership, and were able to trade their shares on the original Amsterdam stock exchange.
- 18th century - first treatise on corporate law defined a corporation as
  - a collection of many individuals united into one body
  - under a special denomination, having perpetual succession under an artificial form.
  - Vested by policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued
  - Enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.
- Mid - 19th Century - Government chartering began to fall out of vogue
  - Corporate law at the time was focused on protection of the public interest, and not on the interests of corporate shareholders.
  - Corporate charters were closely regulated by the states. Forming a corporation usually required an act of legislation. Investors generally had to be given an equal say in corporate governance, and corporations were required to comply with the purposes expressed in their charters.
  - Many private firms avoided the corporate model (Andrew Carnegie formed his steel operation as a limited partnership, and John D. Rockefeller set up Standard Oil as a trust).
  - Government policy on both sides of the Atlantic began to change, reflecting the growing popularity of the proposition that corporations were riding the economic wave of the future.
  - In 1844 the British Parliament passed the Joint Stock Companies Act, which allowed companies to incorporate without a royal charter or an Act of Parliament.
- With increasing pressure from newly emerging capital interests, British Parliament passed the Limited Liability Act 1855, which established the principle that any corporation could enjoy limited legal liability on both contract and tort claims simply by registering as a "limited" company with the appropriate government agency.



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## Management Liability

### Brief History

#### The Corporation

- 20th century –
  - Saw a proliferation of enabling law across the world, which helped to drive economic booms in many countries around World War I.
  - Starting in the 1980s, many countries with large state-owned corporations moved toward privatization, the selling of publicly owned (or 'nationalised') services and enterprises to corporations.
  - Deregulation (reducing the regulation of corporate activity) often accompanied privatization as part of a laissez-faire policy.
  - Another major postwar shift was toward the development of conglomerates, in which large corporations purchased smaller corporations to expand their industrial base.
  - Japanese firms developed a horizontal conglomeration model, the keiretsu, which was later duplicated in other countries as well.
- Ownership and Control
  - A corporation is, in theory, owned and controlled by its members. The articles of incorporation lay out who they may be (e.g. shareholders (JSC), purchasing members (mutual), employees (worker cooperative)).
  - The day-to-day activities of a corporation is typically controlled by individuals appointed by the members. In some cases this will be a single individual but more commonly corporations are controlled by a committee or by committees.
  - 2 Most Common Committee structures align with the 2 Most Common legal systems:
    - Single committee known as a Board of Directors is favored in most Common Law countries. Under this model the board of directors is composed of both executive and non-executive directors, the latter being meant to supervise the former's management of the company.
    - Two-tiered committee structure with a Supervisory Board of Directors and a Management Board (Executive Directors) is common in Civil Law countries.
- Future Evolution
  - The nature of the corporation continues to evolve in response to new situations as existing corporations promote new ideas and structures, the courts respond, and governments issue new regulations.
  - A Long standing moral dilemma in regards to the corporation is that of "Diffused Responsibility". As "A Body of People" when a Corporation is found liable for a terrible crime such as death of others, how should culpability and punishment for it be allocated among shareholders, directors, management and staff, and the corporation itself?



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## Management Liability

### Brief History

#### Board of Directors (BOD)

- Pre - 1900 - General Meeting of all Shareholders was the Supreme organ of the company. A BOD was merely an agent of the company subject to the control of the shareholders.
- 1906 - the English Court of Appeal in the decision of Automatic Self-Cleansing Filter Syndicate Co v Cunningham - the division of powers between the BOD and the shareholders depended on
  - the construction of the articles of association
  - if the powers of management were vested in the board, the general meeting could not interfere with their lawful exercise. The articles were held to constitute a contract by which the members had agreed that "the BOD alone shall manage."
  - Under English law, successive versions have reinforced the norm that, unless the directors are acting contrary to the law or the provisions of the Articles, the powers of conducting the management and affairs of the company are vested in them.
- 1935 - Shaw & Sons Ltd v Shaw laid out: "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of powers by the articles in the directors is by altering the articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.
- Because directors exercise control and management over the organization, but organizations are (in theory) run for the benefit of the shareholders, the law imposes strict duties on directors in relation to the exercise of their duties. The duties imposed are "fiduciary" duties, similar to those that the law imposes on those in similar positions of trust: agents and trustees.
- The duties apply to each Director separately, while the powers apply to the board jointly. Also, the duties are owed to the company itself, and not to any other entity. Under certain circumstances directors may have fiduciary relationship to individual shareholders.
- 1985 - UK Companies Act expansion, to protect for non-member stakeholders taking into account the interests of employees but which could only be enforced by the shareholders and not by the employees themselves.
- 2006 – Expansion in scope for Directors to act as Good Corporate Citizens. The UK Companies Act 2006 requires directors of companies "to promote the success of the company for the benefit of its members as a whole" and sets out the following six factors regarding a director's duty to promote success:
  - the likely consequences of any decision in the long term
  - the interests of the company's employees
  - the need to foster the company's business relationships with suppliers, customers and others
  - the impact of the company's operations on the community and the environment
  - the desirability of the company maintaining a reputation for high standards of business conduct, and
  - the need to act fairly as between members of a company



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# Management Liability

## Brief History

### Other Ancillary Changes

- **Expansion in the Variation of Shareholders**
  - *Evolution from State to Private of All Types of Industries*
    - Tax Payer - State Owned Entities ( Energy, Media, Healthcare, Education )
    - Demutualization
    - Corporations
  - Investment Pools - Pensions
  - Development of a Middle Class
  - Internet – Everyone can Trade
- **Sociocultural Changes impacting the Demand for Professional Services**
  - Education
  - Urbanization & Globalization
  - Development of a Middle Class
  - Shift from Family Owned Business to Corporations
  - Paradigm Shifts in "Rules to Live by" –
    - Historically Religion Preached = "Due Onto Others as You shall have Done On to You"
    - Business Emotional Preservation Success Strategies = Business is Business and Personal is Personal; Don't Take Business Personal
  - "Luxuries" of Trust and Forgiveness

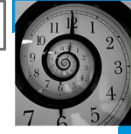
### Urbanization



# Actuarial Considerations



## Professional & Management Liability in Asia



### Product Overview – Cost of Uncertainty

#### Common Coverage Features uniquely designed to address the Cost of Uncertainty associated with Time

- **"Claims-made"** coverage trigger requires that all claims to be considered for coverage must be made against the insured and reported to the insurer during the policy period.
- **"Retro-active Date"** is the beginning of a period after which an incident/occurrence resulting in a claim being made against and reported during the policy period will be covered. If the incident is before this date, the losses associated with that incident are not covered under the policy. This reduces the uncertainty associated in pricing the coverage.
- **"Tail" or "extended reporting"** endorsements cover events that occur while the policy is in force but are reported to the carrier after the policy terminates. Purchasing tail coverage from the present carrier effectively converts the claims-made policy into an occurrence policy.
- **"Prior acts" (or "nose")** coverage transfers the retro-active date for an old policy to a new insurance carrier—eliminating the need to purchase tail coverage from the last carrier. Nose coverage is usually less expensive than purchasing tail coverage

#### Aspects of the Product designed to address the Cost of Uncertainty associated with Frequency and Severity

- **Incident Notifications** – In order to manage actions that may arise in a claim insured professionals and corporations are encouraged to report incidents to ensure proper management of the incident occurs earlier on in order to mitigate the potential for an actual claim and if such arises, the costs associated with the claim.
- **Deductibles and Retentions** – Are a common feature of the coverage. Some jurisdictions require professionals to retain a portion of the financial responsibility that may arise from their negligence or mistakes. Insurance is typically meant to cover Severity uncertainty. Deductibles incentivize risk management behaviors.
- **Policy Limits** – Limits are typically offered as per occurrence and in the aggregate. Laws on compulsory insurance may specify minimum coverage requirements.



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## Professional & Management Liability in Asia

### Actuarial Considerations

#### Some Unique Actuarial Reserving Considerations

- **Analysis of Notifications** - Frequency trends and travel time of notifications to either closure or materialization into a claim.
- **Legal Systems and Precautionary Assessments** – The "potential" magnitude of the Severity of a claim inherently increases exponentially once it moves into the court system. Understanding the uniqueness of the claim, the nature of the legal and regulatory system, and historical decisions of similar cases helps the actuary ascertain 1) the probability of a guilty outcome; and 2) if guilt is assessed, the potential amount of the award. Precautionary amounts may be assessed to understand the potential outcome of high profile cases.
- **Significant Events** – Claims may be clustered around specific turns of events in external conditions that are not anticipated to repeat themselves (e.g. changes in regulation), carry a pattern of cyclicity (e.g. shifts in the economy, periods of heightened mergers/acquisition activity), result in an increasing trend of coverage use (e.g. tort precedence). Development patterns are typically lumpy leading to the reliance on more qualitative reserving methodologies and professional judgment.
- **Cliff Nature IBNR Release** - Due to the Claim-made trigger, the very knowledge of claims (or their potential) results in an incurred development pattern that at a certain point in time may quickly converges to 100%. Typically the movement between years 2 and 5 can be quite accelerated. Depending on the claim reserving philosophy, the pattern may show the height of case estimates after a discovery period ( - year 2 ) that then revert back down. This leads to a pattern that moves above one early on then scales back to 100%. Typically by year 5 there is limited IBNR (unless set up for particular cases that remain in the court system).
- **Impact of Alternative Dispute Resolution (ADR) on Payment Patterns** – Legal systems that have an alternative avenue for conflict resolution beyond the court system will impact payment patterns. Payment patterns may vary each year depending on the a) number of Severity claims; and b) the efficiency of the legal system to resolve them (ADR and/or courts).

#### Some Unique Actuarial Risk Management Considerations

- **Accumulations** - Understanding the magnitude of loss from Significant Events and the impact such could have on its Investor Capital is important. Planning out responses to such an event helps reduce the negative short term impact it may have on the organization, and how such may be used as an opportunity in the long term agenda.
- **Conflict of Interest** - The investment portfolio of an insurance company will include its client's equities. With the Management Liability product in particular, certain inside information is required to underwrite the risk. It would be illegal to use such information for another purpose. Risk management is the gate keeper of the organization's integrity in such matters.



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## Professional & Management Liability in Asia

### Actuarial Considerations

#### Key Underlying Pricing Factors

- **Base Rate** – Key rating differentials are based on Professional practices areas (and or Industries rated by their level of exposure to:
  - Susceptibility to the occurrence of error or negligence;
  - Susceptibility of the occurrence to materially impact 3<sup>rd</sup> Party,
  - Susceptibility of the 3<sup>rd</sup> Party to seek reimbursement for damages incurred as a result of the error
  - The magnitude of the cost of these damages.
- **Deductible and Increased Limit Factors** – To capture the increase or decrease in exposure of broader / reduced coverage.
- **Step Factors** – To capture the difference between the coverage period and the retroactive date. Discounts are typically provided the first 3 years of coverage, thereafter the exposure would be deemed Mature Claims-Made
- **Discounts/Credits (examples)**
  - Size - Per scale discounts
  - Claims – Modification for historical experience
  - Geographic Spread – Load/Discount for Overseas exposure
- **Loads for Expanded Coverage Offerings** – Additional coverage may be 1<sup>st</sup> Party (e.g. Reputational Guard) or 3<sup>rd</sup> Party (e.g. Expanding the definition of Actions Causing a Loss)



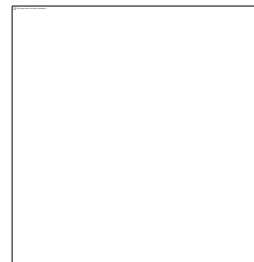
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## Professional & Management Liability in Asia

### Actuarial Considerations

#### The Rating Game – Rank the following from highest to lowest level of Hazard

- **Accountants Practice Areas** - a) Tax, b) Insolvency/Liquidation, and c) Investment Advice
- **Architects** - a) Hospitals, b) Housing, and c) Hotels
- **Engineers** - a) Civil, b) Electrical, and c) Mechanical
- **Insurance Broker** - a) Life Insurance, b) General Insurance – Personal Lines, c) General Insurance – Commercial, and d) Reinsurance
- **Media Professionals** - a) Radio, b) New Broadcaster, c) Film and d) Public Relations
- **Solicitor/Lawyer** - a) Employment Law, b) Conveyance, c) Patent Law, d) Financial Advice and e) Marriage/Divorce
- **Technology (IT) Professionals** - a) Systems Analysis, b) Data Processing, and c) Trouble Shooting
- **Insurance Broker** - a) Life Insurance, b) General Insurance – Personal Lines, c) General Insurance – Commercial, and d) Reinsurance
- **D&O**, a) Air Transportation, b) Financial Institution and c) Hospital



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# Market Overviews



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## Professional & Management Liability in Asia

### Legal & Regulatory Features



**Statute of Limitations** = A Legal System Requirement that mitigates the Uncertainty associated with Time

- **China** - per the insurance law, the policyholder's right to an indemnity lapses if they have failed to notify a claim **2 years** after the occurrence of an insured event.
- **Hong Kong** - Limitation period for **personal injury** claims is **3 years** from the date the cause of action accrued or the date the plaintiff first became aware of his or her injury. The limitation period for **other torts is 6 years**.
- **India** - The Limitation Act 1908 prescribes a limit of **2 years for tort** and **3 years for contractual cases**.
- **Japan** - The limitation period for ordinary tort actions is **3 years** from the date when the **plaintiff first became aware** of the damage and the identity of the defendant. There is a **long-stop limitation period of 20 years** from the date the damage actually occurred.
- **Malaysia** - The Limitation Act 1953 prescribes a limitation period of **6 years** for **personal injury claims**. The time limit is only relevant if pleaded as a defense. Actions in **tort and in contract** cannot be brought after the expiration of **6 years** from the **date on which the cause of action accrued**.
- **Philippines** - The right of action by virtue of a written contract must be brought within a **10 year** period unless the contract specifies any other period which cannot be less than one year. Actions arising out of an **oral contract** must be commenced within **6 years**.
- **Singapore** - The limitation period for an action for negligence is **3 years** in respect of **personal injury** and **6 years** in the case of **property damage**. The period commences from the date on which the cause of action occurred or from the earliest date on which the plaintiff acquired the knowledge necessary for bringing an action.
- **Taiwan** - There is a **2 year** time limit in respect of **actions for insurance claims**. The time limit for **civil proceedings is 15 years**.
- **Thailand** - The limitation period for bringing an action in Thai courts **varies according to the type of claim from a minimum of 6 months to a maximum of 10 years**. The limitation period for many personal injury claims is one year.



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## Professional & Management Liability in Asia

### Product Overview

#### Some Market Compulsory Insurance Requirements

- **China** - Third party liability for travel agents (national), Medical malpractice for hospitals and doctors (major cities only), Professional indemnity for lawyers, accountants and architects (some municipalities), for insolvency practitioners (national); Professional indemnity or a cash guarantee for insurance agencies and insurance brokers (national).
- **Hong Kong** - Professional indemnity for insurance brokers and trustees of mandatory provident funds. D & O for Hong Kong Stock Exchange-listed companies.
- **India** - Professional indemnity for direct and reinsurance brokers, mutual fund managers and stockbrokers
- **Indonesia** - Professional indemnity for insurance brokers.
- **Republic of Korea** - Professional indemnity for foreign insurance brokers and agencies engaged in cross-border sales, Security for insurance brokers (cash deposit, bond or professional indemnity insurance). There are an estimated 51 compulsory insurances, many industry-specific, but no definitive list exists.
- **Malaysia** - Professional indemnity for lawyers, insurance brokers and financial advisers.
- **Philippines** - Professional indemnity cover for insurance and reinsurance brokers.
- **Singapore** - Professional indemnity for individual lawyers and legal firms, architects, accountants, some fund managers, financial advisers and insurance and reinsurance brokers, Clinical trials liability is required according to the Singapore Guideline for Good Clinical Practice.
- **Taiwan** - Professional indemnity insurance for insurance brokers and accountants, Professional indemnity insurance for hospitals and clinics conducting clinical trials
- **Vietnam** - Professional indemnity for lawyers, architects, engineers, securities companies (stockbrokers), notaries, auditing firms, fund management companies, insurance brokers, contractors performing surveys for construction work and contractors supervising the execution and construction of building works.



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## China

### Summary of Legal System



Basis	Courts	Statute of Limitations	Litigiousness	ADR
Civil called General Principles Civil Law	People' s Court has 4 Divisions: District, Intermediate, High, Supreme. Judges need not have practiced law.	per the insurance law, the policyholder's right to an indemnity lapses if they have failed to notify a claim 2 years after the occurrence of an insured event	Low; Growing trend courts used in actions of Breach of Contract, Privacy Infringement, Medical Negligence, BOD misrepresentation	CIRC experimenting with Industry Based mediation committees

#### Professional Indemnity

- PI is said to be a rapidly developing class. This is partly because more companies are buying insurance on a voluntary basis, and partly because of government encouragement for quasi-compulsory insurances, which are intended to ease social tensions by making it easier for victims to obtain redress from state institutions (e.g. schools).
- No PI classes which are compulsory by law, but an increasing number of municipalities will not issue practicing certificates for lawyers, accountants or architects without evidence of professional indemnity cover. Cover for insolvency practitioners seems to be required everywhere in the country. Insurance agencies and brokers must arrange insurance or deposit a cash guarantee.

#### Management Liability

- 3 Chinese D&O markets:
  - Domestic Listings – small and almost claim free but recent activity especially in Utilities sector
  - Chinese companies listed in Hong Kong - Strict listing requirements has resulted in relatively few D&O claims, and most of these are for the defense of regulatory investigations. Lehman Brothers Mini-Bonds most relevant.
  - Chinese companies listed in New York. - Produced at least 68 class actions, many against private Chinese companies which have entered the NASDAQ market by means of a reverse takeover (RTQ) of a pre-existing NASDAQ-listed "shell". Direct exposure to US' Active Legal System with rights for every flavor of shareholder.
- Recent Laws and Tort Reform:
  - 2006 – provides Minority shareholders the right to convene a general meeting making companies more vulnerable to class action lawsuits.
  - 2007 – 1<sup>st</sup> Bankruptcy Law
  - 2008 – Employment Promotion Law prohibits job discrimination on grounds of gender, ethnicity, race, religious belief, physical disability.
  - 2010 – introduction of Joint & Several Liability, punitive damages in case of serious mental injury, increases attention on BOD misrepresentations



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## China



### Reverse Take Overs

- Some China companies were encouraged by Investment Bankers to seek the support by US investors.
- Pre-existing NASDAQ listed shell companies were reverse taken over by the China company – some of which were fraudulent. Or VIE (variable interest entities) were set up on behalf of the China company in the Cayman Islands, and then listed in NASDAQ.
- Many state the main problems stemmed from:
  - Corporate disclosure is not as mature an exercise in China and there existed a limited understanding of GAAP accounting
  - It is said that part of this is due to a corporate culture of the “understandings” that form between directors and local politicians that by there vary nature are would not be disclosed to shareholders, yet instrumental to the success of the business.
  - In the US even minor shareholders would be expected to be aware of such activity, and would hold the BOD liable for shortcomings in the communication.

### Bribery allegations – GlaxoSmithKline ( British multi-national Pharmaceuticals )

- Accusations of Funneling \$3B Yuan to travel agencies to facilitate bribes to Doctors and Officials
- Initial Response from CEO was “Not what we expect of our people; this is shameful and deeply disappointing”
- Chinese police claim evidence the Bribery was at a Company Level
  - Company set goals for annual sales targets to be 25% apparently 7% above the average growth rate for the industry
  - Head of recruitment testified that when problems were exposed the blame was pushed down in the organization to employees
- Media states the Root Cause: doctors are paid low salaries making bribes commonplace in the drug industry.



## Hong Kong



### Summary of Legal System

Basis	Courts	Statute of Limitations	Litigiousness	ADR
Common inherited from British colonial rule	5 Levels of Civil Courts: Tribunals, District, High, Court of Appeals, and Court of Final Appeals.	Limitation period for personal injury claims is 3 years from the date the cause of action accrued or the date the plaintiff first became aware of his or her injury. The limitation period for other torts is 6 years.	Highest within Asia; No punitive damages. Rainmaking “Recovery Agents” – no win no fee basis.	Complaints against insurance agents can be lodged at the IARB and ICCB for those against insurance companies.

### Professional Indemnity

- Most professional associations require PI as a condition of membership, and though mandatory indemnity limits are low, there is an active market in “top-up” policies providing excess layer coverage. Managed Pension Fund trustees are required by law to carry PI insurance, with indemnity limits depending on the value of assets under management. Most trustees are covered by a local market scheme. There are two professional associations (the Hong Kong Bar Association and the Law Society of Hong Kong) which organize a compulsory scheme for their respective members. Construction professionals are said to account for 50% of the PI market purchasing multi-year contracts for single projects.
- There have been some large claims against accountants, architects, lawyers and doctors. But most of the claiming is from western residents, not Asians. There are reported to be quite large numbers of small claims, but these are mainly for legal defense costs. Although large claims are comparatively rare, there is said to be increasing frequency of smaller losses, particularly in respect of legal defense costs.

### Management Liability

- In 2012 the HK Stock Exchange issued new governance guidelines making the purchase of D&O insurance effectively compulsory. This forced 40% of listed companies to buy insurance, but most were small family controlled enterprises. Roughly 50% of companies listed in HK are based in China (called “red chips”), RTO’s are not allowed.
- Large D&O claims are rare as it is difficult to bring class actions into the system. However, based on UK company law, BODs are sued by shareholders for breach of fiduciary duty and creditors for wrongful trading. Effective Dec 2012, at least one third of BOD must be independent Non-Exec directors who must play an active role in specified committees. There are moves to make IPO sponsors both criminally and civilly liable for misinformation in IPOs.
- Many regulators make risk landscape high: Securities & Futures commission, Monetary Authority, Independent Commission against Corruption who has been cracking down on alleged bribery & corruption within the business elite.
- 2008 – 2009 HK Banks ( along with Singapore and Taiwan) become involved in mis-selling allegations arising out of the sale of complement financial instruments. Main focus were credit default swaps on a basket of equities with Lehman Brothers as counterparty. 19 banks were involved in selling to 29,000 retail investors with little or no disclosure of the risk involved. Losses are estimated at \$6.3B HKD. This has led to continued claims for banks.



• With the exception of the banking industry, large claims have historically been rare. EPL claims are common in Malaysia and Philippines foreign subsidiaries, where HK managers may not be familiar with the strong employment protection laws and union influence in these jurisdictions.

## Singapore

### Summary of Legal System

Basis	Courts	Statute of Limitations	Litigiousness	ADR
<u>Common</u> inherited from British colonial rule	<u>2 Levels:</u> Subordinate Courts: Small Claims Tribunals, District; and Supreme Courts: High and Court of Appeals.	The limitation period for an action for negligence is <u>3 years</u> in respect of <u>personal injury</u> and <u>6 years</u> in the case of <u>property damage</u> .	<u>Growing trend:</u> Punitive damages for defamation and P&S. Litigation is expensive.	Singapore Mediation Center and arbitration alternatives commonly used. FIDReC services the FI Industry

#### Professional Indemnity

- Professional indemnity for individual lawyers and legal firms, architects, accountants, some fund managers, financial advisers and insurance and reinsurance brokers. Clinical trials liability is required according to the Singapore Guideline for Good Clinical Practice.
- Some demand is now coming IT consultants, real estate agents and property managers. Claims are not seen as a business driver, as most claims are settled behind closed doors, without the general public being aware of them.

#### Management Liability

- Increasing demand for D&O s being driven by various factors including:
  - The Singapore Stock Exchange encourages IPO's to have D&O cover and over 80% of listed companies have it to some extent.
  - The Monetary Authority encourages financial companies to take D&O cover, as it is seen as a feature of good corporate governance.
  - In the past few years a series of high-profile claims have received prominent coverage in the press. Demand from NGOs has increased following a case in 2006 involving the National Kidney Foundation.
  - A market study carried out some years ago indicated that prosecutions against directors achieved a success rate of over 70%, and many directors and officers subsequently concluded that their chances of defending themselves against accusations of malpractice were small.
  - The presence of expatriate managers and directors is said to encourage legal action against their companies.
- According to the Companies Act, liability may attach to any employee or agent of the company for wrongful acts committed in that capacity. No distinction is made between executive and non-executive directors. The policy covers members of the board of directors jointly and severally in addition to officers, including chief financial officers, chief executive officers and all others deemed to have a fiduciary duty.
- At least 90% of claims are against non-listed companies.
- Vessels and crew are regularly covered for Kidnap and Ransom, especially for voyages through the Indian Ocean and western Africa.



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## Professional & Management Liability in Asia

### India

#### Legal System

- The Indian legal system is based on the 1950 constitution, pre and post-independence statutes and ordinances, and English common law. Elements of the Portuguese Civil Code are still applicable in Goa and enclaves such as Diu and Daman administered by Portugal until 1961, and some French law is still applicable in Pondicherry and its enclaves.
- The legal system recognises both negligence and strict liability. The Environmental Pollution Act 1986 imposed liability on those that cause pollution of the air, water or land from such activities and the Public Liability Insurance Act followed in 1991.
- The Limitation Act 1908 prescribes a limit of two years for tort and three years for contractual cases.

#### Courts

- The supreme court is at the apex of the Indian judicial hierarchy, the essential features of which have been inherited from Britain. Immediately below this level there are high courts and subordinate courts in each state. Each court in the hierarchy administers the whole law of the country, whether made by parliament or the state legislature. Below the high court each state is divided into a number of districts under the jurisdiction of district judges who preside over civil courts and courts of sessions. There are a number of judicial authorities subordinate to the district civil courts. On the criminal side the high court supervises the work of magistrates of various classes.



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## Professional & Management Liability in Asia

### India

#### Legal Environment

- Court awards are lower than in some other Asian countries such as Hong Kong but higher than in other Asian countries, such as Indonesia. Recent trends in court awards demonstrate increasing generosity towards bodily injury claimants and this has been a factor in the run-off deterioration which is a feature of the motor market and also the market motor third party insurance pool (IMTPIP). An actuarial investigation of the latter carried out in 2011 established that the ultimate loss ratios for 2007-08, 2008-09 and 2009-10 are likely to be in the range, respectively, of 172.30%, 181.1% and 194.15%, compared to the pool's estimate at the time of an average of 126% for each of three years under review.
- It is not possible to cite precise levels of injury and death awards because each case in India is judged on its facts and merits (it being noted that in the small selection of cases noted above none of the plaintiffs were particularly wealthy). A system of general and special damages (identical in principle to that employed in the UK) is used to calculate bodily injury and death compensation. Heads of damages such as loss of earnings during temporary disability and loss of future earnings in respect of permanent disability depend on the degree of disability, the plaintiff's age (resulting in a multiplier adopted by the court) and declared taxable income. As a result awards can vary widely. It can, however, be very approximately estimated that death claims can currently cost up to about INR 1mn and serious injury claims even more. There is every probability that current inflationary award trends are likely to continue into the future. Punitive damages are not a feature of the Indian legal system.

#### Alternative Dispute Resolution

- The IRDA (Protection of Policyholders' Interests) Regulations 2002 require every insurer to have a proper procedure in place to deal with complaints and grievances of policyholders. In addition information in respect of the insurance ombudsman must be given to insureds in their policies. Insurance policies contain fairly standard arbitration clauses that follow the procedures contained in the Arbitration and Conciliation Act 1996.
- The 1999 act empowers the IRDA to adjudicate in the case of dispute between insurers and policyholders. The insurance ombudsman scheme has been established to deal with personal lines disputes where the amount involved is less than INR 2mn.



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## Professional & Management Liability in Asia

### India

#### Professional Indemnity

- It is understood that demand for professional liability is growing steadily, particularly amongst doctors. Private insurers look upon professional indemnity as one of a number of niche markets, which they can exploit with profit. A lack of sufficiently detailed statistics, however, means that it is difficult to gauge the amount of progress made so far.
- The provisions of the IRDA (Insurance Brokers) Regulations 2002 oblige direct and reinsurance brokers to take out professional indemnity insurance.
- According to the regulations of the Securities and Exchange Board of India (SEBI), it is obligatory for stockbrokers to have a minimum professional indemnity insurance of INR 500,000.
- In its circular of 30 September 2002 addressed to the country's mutual funds SEBI reiterated the need for mutual fund managers to arrange insurance cover against third party losses arising from financial errors and omissions.
- Medical malpractice claims continue to increase. Although individual doctors are taking out professional liability insurance, it seems that so far no cover has been arranged on an affinity group or association basis even though cover is granted in such a way and group discounts are permitted within the market agreement on premiums. Some hospitals, however, are known to have arranged insurance to embrace the potential liability of all their professional staff including doctors.
- Accountants, architects and lawyers also arrange professional liability insurance although to a much lesser extent.

#### Management Liability

- India is one of the Asian markets that is benefiting most from an increased interest in D&O insurance as the need for good corporate governance grows. Amongst other things, a number of Indian companies have made acquisitions in the US and Europe and this has led to increased D&O exposures and a growing awareness of the need to arrange adequate insurance both inside and outside India. The US Securities and Exchange Commission demands that the Indian corporations must take out D&O cover if they are quoted on US stock exchanges or raise capital in the US.
- It is currently estimated that there are between 2,000 and 2,500 D&O policies issued or renewed annually in the Indian market. D&O gross premium is estimated at USD 18mn, about 10% of the overall liability account.



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## Professional & Management Liability in Asia

### Indonesia

#### Legal System

- Indonesia's legal system is a mixture of indigenous law (which is unwritten), sharia law and Dutch law based on the Dutch civil

#### Courts

- The court system consists of three tiers: the district courts (as courts of first instance), the high court (as court of appeal) and the supreme court. Cases are presided over by a panel of three judges, who review and decide all questions of fact and law. There is no jury system and no discovery procedure: verbal arguments rarely take place and disputing parties are expected to produce their own evidence.



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## Professional & Management Liability in Asia

### Indonesia

#### Legal Environment

- Indonesians are not litigious, as is demonstrated by the low level of awards and the limited demand for liability insurance. The legal process is difficult and unpredictable, and few people choose to bring cases to court.
- Third party motor accidents rarely proceed to court. The injured party is unlikely to be able to afford to pay the legal costs and both the injured party and the insurer are usually happy to settle out of court. It is rare for death or permanent disability claims to exceed the local equivalent of USD 5,000 and many are settled for considerably less. Injury claims are usually confined to the reimbursement of medical expenses incurred.
- In principle foreign judgements are not recognised or enforceable in Indonesia. A successful foreign judgement creditor is therefore obliged to file a new action in the Indonesian courts and to re-litigate the matter on its merits within the confines of Indonesian law. Once a judgement is obtained in the Indonesian courts it can then be enforced in Indonesia.

#### Alternative Dispute Resolution

- The Indonesian Insurance Mediation Body (Badan Mediasi Asuransi Indonesia - BMAI) has been set up by life and general insurance companies, bypassing the country's judicial system and giving customers an alternative recourse for settling insurance disputes.
- A monitoring body in the form of the Supervisory Board of the Arbitration Body (BPBMAI) has also been established, headed by five association officials and four academics. The BPBMAI considers it necessary to monitor the activities of the BMAI so that it will not be counterproductive to industry growth.
- There is a general arbitration law and a national arbitration board, but arbitration is not popular as decisions reached are binding on the parties involved.
- The Federation of Indonesian Insurance Associations operates a complaints division, which handles small complaints relating to both life and non-life policies.
- Presently, there is no insurance ombudsman in Indonesia but one is set to be introduced when the OJK act becomes effective from 1 January 2013.



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## Professional & Management Liability in Asia

### Indonesia

#### Professional Indemnity

- Demand in respect of professional indemnity insurance has been historically low, however, and claims from the public are rare. This is partly because proving a loss would be difficult, with expert witnesses from the professional body involved likely to be reluctant to testify against colleagues. International companies rely on global programmes arranged by their principals offshore. This is especially so for international legal firms, engineers and architects.

#### Management Liability

- Brokers report that an increasing awareness and demand for D&O insurance has been influenced by the Companies Act 1998 and tax law amendments of 2000. Demand is also driven by the Bursa Efek Indonesia (stock exchange) and the Institute of Corporate Governance. Demand also comes from listed companies and the few remaining companies with American Depository Receipts (ADRs).
- The roles of directors and officers are becoming more onerous and there is more accountability. This is causing directors and officers to be held personally liable, not only for their actions and omissions, but also for the acts and omissions of others. Directors and officers can also be held liable not only for their actions but also for failing to act in certain circumstances.
- Usually cover follows US policy wordings as the leading insurers of this class are joint venture companies with US connections. Claims by majority shareholders are excluded, with the definition of majority shareholder being one who holds 15% or more of the company's shares. Other exclusions include creditor-related claims and acts of government. This is evidence of the caution with which this class is treated in Indonesia and the likely source of claims.



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## Professional & Management Liability in Asia

### Indonesia

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- The code of good corporate governance and best practice did not have the effect of law until late 2012. Regulation of the Minister of Finance No 152/PMK.010/2012 effective from 4 October 2012 establishes corporate governance requirements for insurance companies. This includes insurance (life and non-life) and reinsurance companies. The compliance deadline for existing licence holders is six months from the date the regulation was promulgated (4 October 2012). There is also a growing demand from the public for government and business to be more accountable for their actions.
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- Retroactive cover is given on a case by case basis, normally for a maximum of 12 months or from the date of establishment of the insured company, depending on previous insurance. Discovery periods after expiry can be granted for 12 months covering only claims arising from acts occurring prior to expiry for an additional premium of 50% of the expiring premium. Legal costs coverage is normally inclusive in the limit of liability.



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## Professional & Management Liability in Asia

### Japan

#### Legal System

- The Japanese legal system is based on a civil code. Damages in tort may be awarded for both economic and non-economic loss, but may be reduced in case of contributory negligence. Punitive damages are not available.
- Strict liability applies in the following circumstances:
  - \*third party bodily injury claims arising out of motor accidents under the terms of the Automobile Liability Security Law 1955
  - \*product liability claims under the terms of the Product Liability Law 1995
  - \*liability for clean-up of contaminated land under the terms of the Law on Geo-Environmental Protection Measures 2002.
- The limitation period for ordinary tort actions is three years from the date when the plaintiff first became aware of the damage and the identity of the defendant. There is a long-stop limitation period of 20 years from the date the damage actually occurred.

#### Courts

- There are four tiers of courts: summary courts, district courts, high courts and the supreme court. Summary courts are presided over by a single judge and have jurisdiction over civil claims in which damages do not exceed JPY 1.4mn. The majority of civil actions are heard at first instance in the district courts, which have general jurisdiction over all civil matters. District courts have either a single judge or three judges. The high courts, which are presided over by three judges, act only as courts of appeal. The supreme court is theoretically the highest court of appeal, but in practical terms the decisions of the high courts are often final.



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## Professional & Management Liability in Asia

### Japan

#### Legal Environment

- The Japanese legal environment remains unfavourable to the private litigant, despite judicial reforms intended to increase the number of lawyers and facilitate access to the courts. Although certain motivated groups, such as women employees, have shown a greater willingness to assert their rights through the courts, the average victim of negligence will still tend to blame themselves for their accident, or will be satisfied with an apology and informal compensation. There is no detectable trend in claim frequency or severity, and third party policies are still priced to reflect the low level of risk.

#### Alternative Dispute Resolution

- The Insurance Business Law was amended in June 2009 to require insurance companies to set up complaint handling procedures and appoint a designated alternative dispute resolution (ADR) organisation to deal with complaints which cannot be resolved internally. The Non-life Insurance Arbitration Committee of the General Insurance Association of Japan was authorised as a designated ADR organisation in September 2010.



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## Professional & Management Liability in Asia

### Japan

#### Professional Indemnity

- There are association schemes for all the major professions providing a low level of primary cover. These are normally coinsured for relationship reasons. Because of the cultural aversion to litigation, clients tend only to sue their professional advisers if their loss is exceptionally big. Loss experience is therefore good for all professions, including medical malpractice, which has been turned round in the last few years by a combination of higher premiums and improved risk management.

#### Management Liability

- D&O is not big business in Japan. Most listed companies have bought cover, but poor disclosure standards and a history of questionable business practices make insurers wary of offering limits much in excess of JPY 500mn. Such low-limit policies tend to be included in corporate insurance portfolios without the specialist underwriting which is normal practice in the west. Since policies are principally written as a service to major clients, rating levels are low and there is little incentive for insurers to market cover to the small to medium-sized enterprise sector.
- Although the legal framework exists for shareholder derivative suits, claims against directors are few and paid claim amounts are thought to be low. Because of an absence of claims arising out of the global financial crisis, the D&O market has been stable to slightly soft over the last five years.



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## Professional & Management Liability in Asia

### Republic of Korea

#### Legal System

- The Korean legal system is based on the Civil Code. Articles 750 to 766 of the code provide a body of law resembling the law of torts in common law jurisdictions. Damages may be awarded for pain and suffering in addition to economic loss. Punitive damages are not available. The limitation period for actions in tort is three years.
- Employers are strictly liable to their employees for industrial accident or disease under the terms of the Labor Standards Law. Employees enjoy the right to sue their employers for damages in excess of the statutory compensation available under the terms of the Industrial Accident Compensation Insurance Law, Korea's equivalent of a workers' compensation act.
- Manufacturers are strictly liable for death, injury or damage caused by defective products under the terms of the Product Liability Act, which came into effect on 1 July 2002. Class action lawsuits are allowed in respect of financial securities and defective products under the terms of the Securities-Related Class Action Act 2005 and the Consumer Protection Act 2008 respectively.

#### Courts

- Most litigation is begun in the district courts. Judgements may be appealed to the appellate court and ultimately to the supreme court.



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## Professional & Management Liability in Asia

### Republic of Korea

#### Legal Environment

- Although the Koreans are not litigious, they are far more active in asserting their legal rights than, for example, the Japanese. There is said to be an increasing number of "slip and trip" claims against shopping malls, and though these are normally settled by means of an apology and a gift voucher, they still provide evidence of the advance of consumer activism.
- Economic loss claims mainly consist of future earnings and medical expenses. Although injuries are normally treated in state hospitals, patients are required to contribute up to 50% of treatment costs, which make up a considerable part of economic loss awards. Non-economic loss awards are assessed by judges and are far lower than in the common law jurisdictions of the West.

#### Alternative Dispute Resolution

- One of the key roles of the FSS is to act as a mediator in insurance-related disputes. Conciliation services are also available from the General Insurance Association of Korea and the Consumer Protection Centre of the Korea Life Insurance Association (KLIA).



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## Professional & Management Liability in Asia

### Republic of Korea

#### Professional Indemnity

- Professional indemnity claims are still rare outside the medical field: the victims of professional negligence are normally satisfied with an apology (which causes considerable "loss of face" to the tortfeasor) and informal compensation. Accountants had an exceptionally poor loss experience in the aftermath of the 1997 financial crisis because of collusion with their chaebol clients but are now regarded as an acceptable risk. Lawyers and insurancebrokers are also said to have above-average loss ratios.
- There are no compulsory insurance requirements, though all the major professions are required to provide some sort of security against professional negligence claims. This may take the form of a cash deposit with their professional association, a bond or professional indemnity insurance. A growing number of professional associations have set up self-rating schemes for their members, and it is becoming more common for clients to ask their professional consultants for evidence of PI cover. Indemnity limits are still low, however, with most practices buying cover equal only to the amount of their largest per-contract fee. The main insurance buyers are accountants, lawyers, architects and engineers.

#### Management Liability

- D&O insurance was introduced to Korea in October 1997 and was originally rated on a highly conservative basis. Despite historically low standards of corporate governance, the account is described as virtually loss-free, and this has allowed average premiums to be cut by over 50% in the last seven years. Because there are so many highly-publicised instances of corporate malfeasance, the number of D&O policies is continuing to grow and indemnity limits for D&O are higher than for any other line of casualty business.
- In the year ending 31 March 2012 there were only 16,842 PI and D&O policies in force, generating premiums of KRW 160.56bn (USD 144.87mn). The incurred loss ratio is normally below 30%. Because of the low loss ratio, premium rates have fallen progressively since 2005, with the average premium per policy falling by 26.7% between 2010 and 2012. Partly because premiums are now so cheap, the number of policies in force grew by 36.1% over the same period.
- Korea has made considerable progress in improving its accounting and corporate governance standards since the 1997 economic crisis. There has therefore been a significant improvement in risk quality, though many listed companies are still navigating the transition from prioritising family or group interests to prioritising shareholder interests. One reason for the excellent loss experience is that disputes between shareholders, companies and financial institutions are often resolved through the informal mediation of the government or the regulatory authorities. Another reason is that stock market investment is regarded by many people as a form of gambling, which means that a fall in a company's share price might be seen as bad luck rather than a trigger for legal action.



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## Professional & Management Liability in Asia

### Philippines

#### Legal System

- *The Philippine legal system is based upon elements of Spanish practice, American and English common law, a series of pre and post independence civil and criminal codes, and a variety of legislative measures such as decrees and presidential administrative orders.*
- *The legal basis for negligence derives from the law of tort.*
- *The right of action by virtue of a written contract must be brought within a 10-year period unless the contract specifies any other period which cannot be less than one year. Actions arising out of an oral contract must be commenced within six years.*
- *Actions for bodily injury must be commenced within six months of the event giving rise to such injury, but once action has been filed the time limit is open-ended.*
- *Appeals must be made within 30 days of a judgment being delivered.*

#### Courts

- *There are 15 Supreme Court justices, including one chief justice, who are appointed by the president of the republic on the recommendation of the judicial and bar council. A panel of judges sit at hearings of the Supreme Court and court of appeal, giving judgements on a majority basis. One judge is appointed to hear cases in the lower courts.*
- *There is a four-tier court structure ranging from the lowest court (able to handle cases up to PHP 100,000 outside Manila and PHP 200,000 in Manila) up to the Supreme Court.*
- *There is no jury system. Some political interference continues to be experienced by the judiciary, but it is diminishing.*



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## Professional & Management Liability in Asia

### Philippines

#### Legal Environment

- *Litigation is rare due to a widespread ignorance of legal rights and a cultural tradition of deference towards authority.*
- *Also, potential claimants may be deterred from going to court because of high legal costs, the lengthy legal process, corruption and court inefficiency.*

#### Alternative Dispute Resolution

- *The only alternative dispute mechanism in force in relation to insurance is referral of disputes under PHP 100,000 to the insurance commissioner. It has been proposed that in the future revision of the Insurance Code this figure will be increased substantially.*



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## Professional & Management Liability in Asia

### Philippines

#### Professional Indemnity

- The market for professional indemnity is developing, with demand coming from engineers, architects and contractors driven by the requirements of their international principals and the provisions of the Civil Code.
- Insurance brokers are required to lodge a bond for PHP 500,000 and purchase two professional indemnity policies with different insurance companies for a minimum of PHP 500,000 each. The aggregate total of the two policies should be equivalent to 100% of the broking income (life and non-life) for the preceding year.
- Apart from architects, engineers and insurance brokers, demand for cover also comes from property managers, appraisal companies, surveyors and adjusters.

#### Management Liability

- Interest in directors' and officers' liability insurance (D&O) has picked up since SEC and the Central Bank introduced a code of corporate governance for banks and other financial institutions including insurance companies. Awareness is increasing but D&O cover is not compulsory, and while companies have received enquiries the take-up rate so far has been low. Even the largest companies remain in private hands, often owned by single families, and the influence of public ownership is comparatively weak.



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## Professional & Management Liability in Asia

### Malaysia

#### Legal System

- The legal system is based on English law, which is based on common law. Malaysian law is becoming more codified, however.
- The Limitation Act 1953 prescribes a limitation period of six years for personal injury claims. The time limit is only relevant if pleaded as a defence. Actions in tort and in contract cannot be brought after the expiration of six years from the date on which the cause of action accrued.

#### Courts

- There are three tiers of civil courts: the subordinate courts, the high court and the appellate courts. The high court of the Malaysian peninsula and those of Sabah and Sarawak each covers its own territorial jurisdiction. The Islamic court system, known as the sharia court, runs parallel with the civil court system and its jurisdiction is limited to family disputes, estate claims and certain offences considered criminal under Islamic laws. All parties to proceedings in the sharia court must be of the Muslim faith, and courts can generally only pass limited sentences.
- The Malaysian judiciary has also set up a dedicated high court to adjudicate cases involving Islamic banking and takaful (Islamic insurance). Any dispute, within or outside the court system, which calls into question issues concerning Islamic law is referred to the sharia advisory council for guidance and clarification. Alternatively, disputes may also be referred to the regional centre for arbitration.
- Subordinate courts consist of the magistrates' and sessions courts, with civil monetary jurisdictional limits of MYR 25,000 and MYR 250,000 respectively. Claims exceeding MYR 250,000 are heard by the high court.
- The appellate courts consist of the court of appeal and the federal court.



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## Professional & Management Liability in Asia

### Malaysia

#### Legal Environment

- Malaysia is not an inherently litigious country and liability claims tend to be relatively low. In some circumstances Islamic law applies to those who adhere to the Muslim faith. "Ambulance chasing" lawyers are, however, present and appear to act with impunity, regardless of bar council rules, encouraging claimants to sue for excessive amounts.
- The Civil Law (Amendment) Act 1984 capped awards, including a cap on loss of earnings at age 55. Interest of 8% is awarded for general damages assessed from the date of accident, and 4% interest is applied to special damages such as medical expenses, loss of use and loss of earnings.
- Measures proposed by the BNM in 2011 to reduce leakage on personal injury claims costs include a single industry call centre for claim notification, earlier engagement with injured third parties and a review of lawyers' fees. Lawyers' incentive to keep a case going so as to "earn" high interest rates on general damages from the date of injury has been reduced, by cutting these interest rates in early 2011 from 8% to 4%.

#### Alternative Dispute Resolution

- The Arbitration Act 2005 brought a long-awaited and much needed change to arbitration practice in Malaysia. The act is based on the United Nations Commission on International Trade Law (UNCITRAL) model law on international commercial arbitration. There is no compulsory requirement for parties intending to litigate to consider or submit to any prior alternative dispute resolution process.
- The Malaysian Mediation Centre is regulated by the Mediation Rules and the Mediators' Code of Conduct provided by the Bar Council. It has the objective of promoting mediation as a means of alternative dispute resolution and providing a proper avenue for successful dispute resolutions.
- The Mediation Act 2012 came into effect in August 2012. This aims to promote and encourage mediation as a method of alternative dispute resolution and to facilitate the settlement of disputes as fairly, quickly and cost-effectively as possible.



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## Professional & Management Liability in Asia

### Malaysia

#### Professional Indemnity

- Professional indemnity is compulsory for insurance brokers, financial advisers and members of the Bar Association.
- Litigation for cases involving professionals, in particular doctors, can be extremely protracted, with one recent estimate suggesting an average of around 15 years from date of injury to the conclusion of the case.
- Architects and engineers have been involved or implicated in some high-profile cases, including the following:
  - Collapse of the Highland Towers apartment building in Ulu Klang, Selangor in 1993
  - In May 2009 the collapse of the Jaya Supermarket while being torn down for redevelopment in Petaling Jaya, Selangor
  - Partial collapse of the roof of the newly built Sultan Mizan Zainal Abidin sports stadium in Gong Badak, Terengganu in June 2009.

#### Management Liability

- Prior to the 1990s, there was virtually no demand for directors' and officers' liability (D&O) insurance in Asia, but the financial crisis of 1997 changed things with a wave of company privatisations, listings on foreign stock exchanges and an influx of foreign capital. As for other liability classes, the growth of D&O has been limited by the lack of a litigious culture and shareholder activism in Asia. This has changed to some degree in Malaysia and D&O is becoming more popular because of a combination of entry level pricing, increasing exposure and claims being made in the region itself, although claims activity in Malaysia is said to have been confined largely to legal costs. The local D&O market in 2013 was said to be soft in terms of ratings, which was a further incentive to purchase cover.
- Local sources have estimated that around 50% of listed companies in Malaysia have arranged D&O coverage, which has been driven largely by the Malaysian Institute of Corporate Governance (MICG) and the Kuala Lumpur Stock Exchange (Bursa Malaysia). MICG discusses competences, but the requirements are not as yet enshrined in law. Company annual reports must report on compliance with corporate governance which is being driven by the Securities Commission and strictly enforced.
- A few Malaysian companies have decided to list in the US and are therefore potentially exposed to the US legal system via American Depositary Receipts (ADRs). Many Malaysian companies, however, are small family-owned operations and cannot see the need for D&O insurance. Local sources suggest that, even among larger private corporations, less than one-third have purchased coverage to date.



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## Professional & Management Liability in Asia

### Taiwan

#### Legal System

- *Taiwan's legal system is based on a combination of continental European civil law and traditional Chinese law. The emphasis of the legal system is placed on statutes rather than case law. The constitution guarantees the independence of the judiciary.*
- *Compulsory motor third party liability is based on "no fault" and applies to all occupants of a vehicle, excluding the driver. Strict liability for defective products was introduced by the January 1994 Consumer Protection Law.*
- *There is a two-year time limit in respect of actions for insurance claims. The time limit for civil proceedings is 15 years.*

#### Courts

- *Taiwan has a three-tiered system made up of the Supreme Court, high courts and district courts. The Supreme Court is the top tier, serving as the court of final appeal. The second tier is made up of the high courts, which are established in the provinces or special regions. The third tier is made up of district courts which are the lowest courts, located in counties or cities.*



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## Professional & Management Liability in Asia

### Taiwan

#### Legal Environment

- *The level of litigiousness is low, and many do not have a thorough grasp of their legal rights. In the case of disputes, negotiation and out-of-court settlements are preferred to taking legal action.*
- *Punitive and exemplary damages are not awarded. By statute, they may be awarded in relation to product liability cases but insurers avoid covering such cases.*

#### Alternative Dispute Resolution

- *The department of insurance deals with complaints about insurers from policyholders and other consumers. In 2002 an Insurance Disputes Tribunal was established by the Taiwan Insurance Institute. The objective of the tribunal, which operates under a committee, is to provide a neutral, fair and professional review of complaints and third party claims under the Compulsory Automobile Liability Act (CALI).*
- *The establishment of the Financial Ombudsman Institution (FOI), envisaged under the terms of the Financial Consumers Protection Act, was passed into law on 3 June 2011 and the organisation formally commenced operation on 2 January 2012. It will mediate disputes between consumers and providers of banking, insurance, securities, futures and other financial services. The rulings made by the FOI have binding force for the award of compensation up to TWD 1mn in respect of investment products and up to TWD 100,000 in respect of non-investment products.*
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## Professional & Management Liability in Asia

### Taiwan

#### Professional Indemnity

- Professional indemnity (PI) has not developed fully in Taiwan and remains a small class of business, but there is demand for cover from the medical profession and from architects and engineers. Other demand is driven by professional associations, especially those in the legal sector, which insist that their members have cover in order to maintain their licence to practise. Regulations require accountants to have PI, both individually and partnerships, but no limits of indemnity are set.

#### Management Liability

- The view expressed in the market used to be that directors' and officers' liability (D&O) business had become increasingly competitive in recent years, with rising demand and few significant losses, not enough either in number or amount to scare underwriters away. In 2010, however, the highly-publicised and expensive defence of an anti-trust suit brought in California and class actions in Taiwan resulting from insider trading and false statements made through the Stock Exchange before IPOs began to change perceptions somewhat. Thus for the 2011 renewal season rates rose by double digit percentages, sometimes by up to 50%. In the absence of further loss experience, however, the 2012 renewal season saw increases of up to just 5%, but with increased deductibles.
- At present, some 60% of Taiwan's 1,300 publicly listed companies have this cover, leaving scope for further penetration. Underwriters estimate that 80% of the total account, both in number and income, is related to hi-tech business: demand has been driven by local hi-tech companies wanting to be quoted on NASDAQ and also by a series of IPOs. Although at present there is no statutory requirement to have cover, the government insists that publicly listed companies which have such cover must publish details of it on their websites.
- The Taiwan SEC has set up a Securities and Futures Investor Protection Centre to assist shareholders in pursuing class action claims against errant directors: these would normally be in relation to false statements in accounts in preparation of IPOs and to insider dealing. There are currently 78 class actions before the courts dealing with insider trading and false accounting.



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## Professional & Management Liability in Asia

### Thailand

#### Legal System

- The legal system is a blend of Thai civil and commercial law, influenced by English common law and statutes and by continental Europe, especially Germany and Switzerland. It is a codified civil law system and the Civil and Commercial Code is the most important of the four legal codes insofar as civil matters are concerned. The legal relationship, including liability in respect of non-marine and life insurance, is governed by the provisions of the code, while marine insurance is governed by the British Marine Insurance Act 1906.
- English common law is recognised by the fact that the duty of disclosure is a general principle of Thai law, as is the concept of negligence.
- Judicial precedent as a source of law has a unique Thai definition, and lies somewhere between the English common law practice of precedent being binding and the continental civil law practice of relying only on a long line of strongly held decisions for authority.
- The limitation period for bringing an action in Thai courts varies according to the type of claim from a minimum of six months to a maximum of 10 years. The limitation period for many personal injury claims is one year, although the Consumer Case Procedure Act 2551 (2008) has established a period of three years, in the case of defective products, from learning of the injury or damage and identifying the responsible business operator, in the case of defective products, or not later than 10 years after the discovery of the injury/damage, where the business operator cannot be identified.
- Any right to claim compensation under an insurance policy is time-barred if judicial proceedings are not instituted within a two-year period from the date of loss.

#### Courts

- The Thai judiciary has a three-tier system: the court of first instance, the appeal court and the supreme court. There are also a number of special courts, for example, the labour court, the taxation court and the intellectual property and international trade courts. Thailand also operates a two-tier system under which an unsuccessful party in the first court is entitled to appeal to the supreme court direct.



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## Professional & Management Liability in Asia

### Thailand

#### Legal Environment

- *Thais are not litigious and prefer to resolve disputes by compromise, although this is said to be slowly changing. Increases in awards made by the courts have been moderate, however, and most cases continue to be settled out of court.*
- *The recent introduction of a Consumer Case Procedure Act, a Product Liability Act and the proposed introduction of a Malpractice Victim's Fund Bill are indicative of an increasing awareness of consumer rights.*
- *Trial by jury is not available, and all issues of law and fact are determined by one or more professional judges. Legal costs are subject to the discretion of the court, but in general they are borne by the party that loses the action.*
- *Awards are low. Compensation payable in respect of non-motor negligence claims involving personal injury is assessed in accordance with the provisions of the Civil and Commercial Code. Compensation may include the restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused. In the case of death, the compensation also includes funeral expenses and other necessary expenses. No awards are made for punitive damages or pain and suffering and the courts adhere to the principle of economic loss. Interest is payable on awards, typically at a rate of 7% from the date of the wrongful act. Awards are made as a lump sum.*

#### Alternative Dispute Resolution

- *Awards can be made by arbitrators as foreseen in the insurance policy or by the Office of the Insurance Commission (OIC) if the case is referred to them. Neither decision is binding on the parties, who may still go to court.*
- *The General Insurance Association (GIA) has run an arbitration office since 1994, the objective of which is to reduce the number of disputes between insurers and their clients or among insurers.*



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## Professional & Management Liability in Asia

### Thailand

#### Professional Indemnity

- *Although professional indemnity remains a small class of business in Thailand, principally due to the restrained legal climate, the sector is showing signs of growth. There are no drivers in the sense that insurance against professional indemnity is not compulsory for any profession including insurance brokers. The Thai Securities Exchange Committee does require asset management companies that undertake mutual fund and provident fund management business to have appropriate professional indemnity insurance, however.*
- *Architects and engineers are increasingly asked to provide evidence of insurance, particularly when working on major contracts.*
- *A proposed Medical Malpractice Victim Protection Bill has been shelved until government and the medical community are able to reach a closer consensus on the way forward.*
- *Although the Thai Civil and Commercial Code (CCC) does allow recovery for actual damages for injuries caused by negligence, malpractice claims in Thailand were historically very rare, but in recent years the picture has changed significantly.*

#### Management Liability

- *The main legislation governing liability of directors and officers is the Civil and Commercial Code. The recent Financial Institutions Act tightens regulations in a number of areas including disclosure standards and fraud prevention, and changes made to the constitution in 1997 allow the public to sue officials for mismanagement.*
- *Demand for directors' and officers' insurance is limited, however, as company shareholdings tend to be tightly controlled among a few shareholders and Thais are not unduly litigious. Most publicly listed companies are thought already to have contracted D&O insurance.*



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## Professional & Management Liability in Asia

### Vietnam

#### Legal System

- The 2005 Civil Code, together with the constitution, codes, decrees, laws, ordinances, decisions, circulars and directives, is the cornerstone of Vietnam's legal system.
- **Statute of limitations = three-year** period from the occurrence of the insured event as specified in the Law on Insurance Business (Article 31) applies to legal proceedings involving insurance contracts.

#### Courts – 3 Levels

- First = Each administrative district has a **District People's Court** which is the court of first instance for criminal cases and civil, labour, economic and administrative disputes. Most cases at the **first** instance are settled by a **professional judge aided by two lay assessors** all of whom are elected by and accountable to local government.
- Second = Each province has a **Provincial People's Court** which acts as a court of **appeal** for cases referred from the district courts and also as a court of first instance for serious crimes. Cases are heard by **three judges**.
- Third = The **Supreme People's Court** is the highest appellate court in the country: its **members are elected by the National Assembly for five year terms**.

#### Legal Environment

- **Awards are low** and there are no limits, caps or thresholds and no structured settlements in the market.
- Punitive and exemplary damages are not known but damages may be awarded for pure economic or financial loss.
- **Most cases are settled out of court**



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## Professional & Management Liability in Asia

### Vietnam

#### Professional Indemnity

- Low Risk Environment limits demand for coverage that is not compulsory.
- Cover is obligatory for lawyers, architects, engineers, securities companies (stockbrokers), notaries, auditors, fund management companies, insurance brokers and contractors supervising the execution of building works although implementation legislation is still pending in several cases.
- PI cover, which follows UK and US market conditions, is on a claims-made basis and a local jurisdiction clause usually applies, but foreign jurisdiction may be arranged at a higher premium.
- Local legislation does not establish any extended reporting or discovery period but it is market practice to give six to 12 months without charge.

#### Management Liability

- **Demand** for directors' and officers' (D&O) liability has been **growing since Vietnam joined the WTO and businesses have had to adapt to international standards**.
- The basic law dealing with liability is the Enterprise Law No 60/2005/QH-11 which took effect in July 2006.
- D&O liability cover is based on the UK claims made wording and comprises Side A and Side B though Side C may be added if required.
- Both entity and non-entity employment practices indemnity are included as are new acquisitions up to a limit; prospectus indemnity may be covered but it is usually necessary to add it by endorsement at an additional premium. It is usual to give a 12-month extended reporting period free of charge.
- The normal limits of indemnity are USD 1mn to USD 2mn per occurrence and in the aggregate although requests for USD 5mn to USD 10mn have been handled.



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## Professional & Management Liability in Asia

### The Rating Game – Rank the following from highest to lowest level of Hazard

- **Accountants Practice Areas**
  1. b) Insolvency/Liquidation,
  2. a) Tax – c) Investment Advice
- **Architects**
  1. a) Hospital,
  2. c) Hotels
  3. b) Housing
- **Engineers**
  1. a) Civil,
  2. c) Mechanical
  3. b) Electrical
- **Insurance Broker**
  1. d) Reinsurance,
  2. c) GI – Commercial
  3. a) Life
  4. b) GI – Personal Lines
- **Media Professionals**
  1. c) Film
  2. d) Public Relations
  3. b) News Broadcaster TV
  4. a) Radio
- **Solicitor / Lawyer**
  1. d) Financial Advice
  2. c) Patent Law
  3. b) Conveyance - Residential
  4. e) Marriage/Divorce
  5. a) Employment Practices
- **Technology (IT) Professionals**
  1. c) Trouble Shooting,
  2. b) Data Processing
  3. a) Systems Analysis
- **Management Liability**
  1. b) Financial Institution
  2. a) Air Transportation
  3. c) Hospital



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