



Sharing Session with Members of Chartered Institute of Housing Asian Pacific Branch

Risks Exposures and Insurance Protection for Building Manager

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Today's Agenda

- Overview of key risk exposures of Building Managers
- Key Insurance Programs and areas required special attention
- Statutory insurance requirements under the Building Management Ordinance and the Building Management (Third Party Risks) Regulation
- Standard cover proposed by the Hong Kong Federation of Insurers and potential gaps for Building Managers' arranged insurance programs
- Housing Management - Professional Indemnity Insurance
- Q&A

Key Insurable Risk Exposures of Building Managers

- Loss of or damage to physical properties belonging to or for which building managers are legally liable (including money)
- Legal liability incurred as a result of business activities engaged:
 - Employer's Liability (i.e. Employee Compensation)
 - Motor Third Party and/or Ship Third Party, as appropriate
 - Public Liability including those arising from professional services
- Death and illness suffered by employees (on top of employee compensation)
- Loss suffered as a result of contingency risks

Property Damage/Public Liability Insurance – Special Risks Exposures

- Maintenance/Renovation and/or other works undertaken by “Own Staff or Third Party”
 - Insurance cover for the works and legal liability arising there from
 - Impact to existing insurance program?
 - Exclusion to self-employed persons and employees of sub-contractors
 - How to arrange appropriate cover? (extensions vs separate program)
- Potential subrogation against individual owners/tenants by insurers
- Breach of policy terms and conditions by contractors; individual owners/tenants for which the building managers and/or other insured parties have no control
- Respective interests of Owners Corporation (OC) and Building Managers
- Mechanical mobile equipment used in public areas



Employee Compensation Insurance - Special Risks Exposures

- Maintenance/Renovation and/or other works undertaken by “Third Party”
 - Exposure to employees of third parties involved
 - Self employed persons involved
 - How to arrange appropriate cover?
- Potential subrogation against individual owners/tenants, building managers and OCs by EC insurer of third party
- Breach of policy terms and conditions by contractor; individual owners/tenants for which the building managers and/or other insured parties have no control
- Respective interests of Owners Corporation (OC) and Building Managers

Public Liability - Usual Causes of Action against OCs & BMs

- Law of Tort:
 - Negligence
 - Occupiers' Liability
 - Public Nuisance

Negligence

- 3 main requirements for common law liability to be established
 - Duty of Care;
 - Breach of such duty; and
 - Such breach has caused the damage suffered.

Occupiers Liability

- Occupiers Liability Ordinance (Cap.314) – Section 3
 - *“(1) An occupier of premises owes the same duty, the “common duty of care”, to all his visitors, ...”*
 - *“(2) The “common duty of care” is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”*

Public Nuisance

- a common law offense but actionable as a tort by individual;
- constituted when a state of affairs which endangers the lives, safety, health, property or comfort of the public; (“a nuisance hazard”);
- neither plaintiff nor defendant need to have interest to any land or building;
- is actionable if:
 - a. the Defendant’s act or omission has created a nuisance hazard;
 - b. the Defendant knew or ought reasonably to have known the existence of the nuisance hazard which is presenting a real risk of harm to the public; and
 - c. the Defendant is under a duty to eliminate a nuisance hazard but fails to do so.

Public Nuisance

- Negligence is not essential in order to prove liability
 - If the defendant's act or omission had caused the injury, it is no answer to the charge even if the defendant took all reasonable care to avoid causing injury;
 - However the injury must be a foreseeable one.
- Non-delegable Duty
 - the defendant will still be liable even though he had engaged an apparently competent independent contractor to remove the hazard but the hazard still caused injury to plaintiff.

Overview – Third Party Risks Insurance for Owners' Corporations in 2011

General

- Building Management (Third Party Risks Insurance) Regulation
- Mandatory as from **January 1, 2011**
- In relation to the **common parts** of the building and **the property of the corporations** on “**Prescribed Liability**”
- **Prescribed Liability** means such liability to be covered under Section 28(1) of BMO and Section 3 of the Regulation

Overview of Section 28 of BMO

- Permit certain class of people to inspect the policy and premium receipt.
- The Management Committee shall notify the **Land Registrar** details of the policy.
- Criminal offence for **every member** of the Management Committee for failing to keep in force such insurance policy. (Max. fine of up HK\$50,000)

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 3

- Insures against liability in respect of **death of or bodily injury** to any person but **exclude** liability :
 - a. covered by **Motor Vehicles (Third Party) Ordinance**;
 - b. for death or injury to any **person employed by OC** arising out of such employment;
 - c. arising out of breach of any duty imposed on any **building contravening to the Building Ordinance** ;
 - d. for **building works or street works contravening to the Building Ordinance**;
 - e. of any **contractual liability**

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 4

- Not less than HK\$10 million in respect of **the “death, or injury or both” arising out of one event** (property damage is not included)

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 5

- Issue to the OC a **Notice of Insurance** under a specific form
- Display the notice in a prominent place in the building
- Failing which **every member** of the Management Committee will be subject to maximum fine of HK\$2,000
- Insurer fails to issue the Notice is subject to maximum fine of HK\$5,000.

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 6

- The following restrictions in the policy are of **no effect**:
 - a. number of claims incurred during the policy period;
 - b. age of the building;
 - c. condition or maintenance of the building;
 - d. number of flats in the building;
 - e. use of the building;
 - f. existence of statutory instrument to the building.

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 7

- OC can not reach any agreement with any person limiting its prescribed liability

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 8

- Subject to section 9, insurers **shall** pay to the person who obtained judgment against the OC :-

in respect of liability for death or injury of the person **even if the insurance company may avoid or cancel, or has avoid or cancelled the policy.**

- Insurer can recover the amount paid from the OC

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 9

- Insurer is not required to pay under section 8:
 - a. unless before or within 7 days after the commencement of the proceedings, the Insurer has notice of the proceedings;
 - b. when the judgment is pending appeal;
 - c. if the policy was cancelled before happening of the event;
 - d. for any amount exceed the policy coverage;
 - e. if a declaration from court is obtained stating that the insurer is entitled to avoid the policy due to non-disclosure of material facts or misrepresentation of material facts by OC.

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 10

- Prescribed liability of the OC against any third party will not be affected by the winding up of the OC;
- Plaintiff can sue the insurer directly in some circumstances.

Overview of Building Management (Third Party Risks Insurance) Regulation

Section 11

- Within 10 days upon receiving request by a person.
- The OC shall disclose:
 - a. whether required insurance is in effect;
 - b. whether they would have been so insured if the policy was not avoided or cancelled by the insurance company;
 - c. all particulars as specified in the Notice of Insurance.
- **Every member** of the Management Committee is liable to a maximum fine of HK\$5,000.

Overview of Building Management (Third Party Risks Insurance) Regulation

*Form of Notice of Insurance
Building Management Ordinance (Cap. 344)
Notice of Insurance*

Policy No. :

All parties please take notice that the policy numbered above against third party risk claims has been issued by the undersigned insurance company to the owners' corporation named below covering the area as described :

1. Name and address of owners' corporation;
2. Description of the building and premises covered under the policy;
3. Amount insured;
4. Effective date of commencement of the policy for the purposes of the above Ordinance;
5. Date of expiry of the policy;

- Date of issue :

Insurance Company



How the BM TPL policy is geared to the Regulation?

- What are required to be covered by the Policy
- Amount to be covered
- Conditions & Exclusions

What is required to be covered by the Policy

To insure the **“assured corporation (IO / OC)”** in respect of any **“prescribed liability”** that may be incurred by the assured corporation in respect of **“death or bodily injury”** to any person

Basic coverage of the TPL policy

- Section 1 – Death or Bodily Injury
- Section 2 – Property Damage (**Optional**)

Indemnity Limit

- Section 1 – HKD10m Per Event (min. required by law)
- Section 2 – (Optional) A “separate” insured limit for Third Party Property Damage (TPPD), as appropriate, based on the client’s need

Indemnity Limit (2)

- **“Limit of Indemnity”:**
 - “Defense costs agreed and recovery costs” are included **within** the limit
 - Limit and govern the aggregation of a series of claims (**any one event**)
 - Accident must **occur** during the period of insurance

Special Exceptions to Notice

- Liability arising out of breach of the Buildings Ordinance – except “designated exempted works” as prescribed in the Building (Minor Works) Regulation
- Professional &/or Product liability
- Liability caused by contractor(s) of the Insured
- Contamination and pollution
- Penalty, punitive & exemplary damages
- Asbestos liability
- Pure Financial Loss

Special Conditions to Notice

- Insured Party : Owners' Corporation of the building
- Insurer's limit of liability shall not be changed even if the Ordinance changes in future
- Definition of "Event"
- Geographical Limits only limited to HK only
- Definition of Business is limited to activities associated to common parts only
- Definition of Products (goods or commodities "tested, processed or supplies" by the Insured.....)

Special Conditions to Notice

- Insurer cannot deny liability base on policy exclusions except under defined conditions
- Right of recovery against Insured on settlement made by Insurer which she would otherwise be liable
- Third Party Right against Insurer
- Other Insurance – Non Contribution except for excess
- Change in Risk
- 7 days Notice of Cancellation

Level of Coverage offered under the Standard OC Third Party Liability Insurance is very limited and is not adequate to protect the exposures of OC

Insolvency of OC

- Pursuant to Section 34 of BMO, the Owners shall be liable **both jointly and severally** to contribute according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liability.
- Insurers can pursue this as a debt against individual owners of the property and place a charge on their property for recovery.

Other issues

What is the legal position of the OC and its Insurers if a committee member is sued?

- Provided that committee member is **not** an employee of the OC, it can be regarded as a third party and can claim against OC

Liability Ins. Arranged by BM vs Mandatory 3rd Party Liability for OC

	Liability Insurance arranged by BM	Mandatory 3rd Party Liability for OC
Name of Insured	IO / OC / Building Manager	IO / OC only
Coverage	Bodily Injury (BI) and Property Damage (PD)	Death or Bodily Injury
Limit of Indemnity (any one accident / event)	Shared between BI&PD and different insured parties	HK\$10M for IC / OC only
Business Activities Covered	Activities engaged by OCs and BM (not restricted to common areas)	Restricted to OC's activities at common areas
Liability caused by contractors	Various (some without cover)	Standard exclusion

Liability Ins. Arranged by BM vs Mandatory 3rd Party Liability for OC

Liability for OC

	Liability Insurance arranged by BM	Mandatory 3 rd Party Liability for OC
Notice Of Insurance	Not issued	Required in Specific Form
Sole Proprietors and/or Self-employed Persons	Common exclusion	No such exclusion
Avoidance of Certain Terms and Right of Recovery	Uncommon	Comply with the Building Management (Third Party Risks Insurance) Regulation
Third Party Right against Insurer	Uncommon	Comply with Sections 8 and 10 of the Building Management (Third Party Risks Insurance) Regulation S8) cannot avoid / cancel policy liability S10) winding up of assured IO / OC not affect 3rd party

How to arrange cover required for OCs and BM?

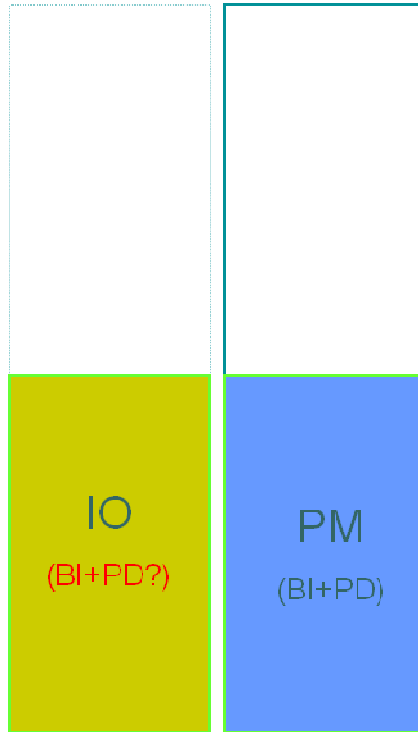
Key Objectives

- Ensure min. requirements under the Building Management (Third Party Risks Insurance) Regulation are met.
- Ensure much wide coverage are still available to protect the BM's exposure.
- Achieve good bargaining power and a cost effective program.

How cover could be arranged?

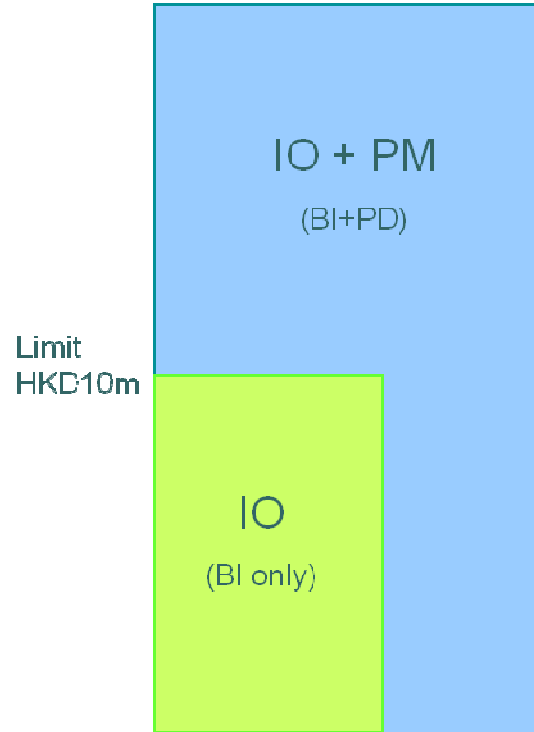
Option 1

Separate policies where insured limit more than HKD10m is optional

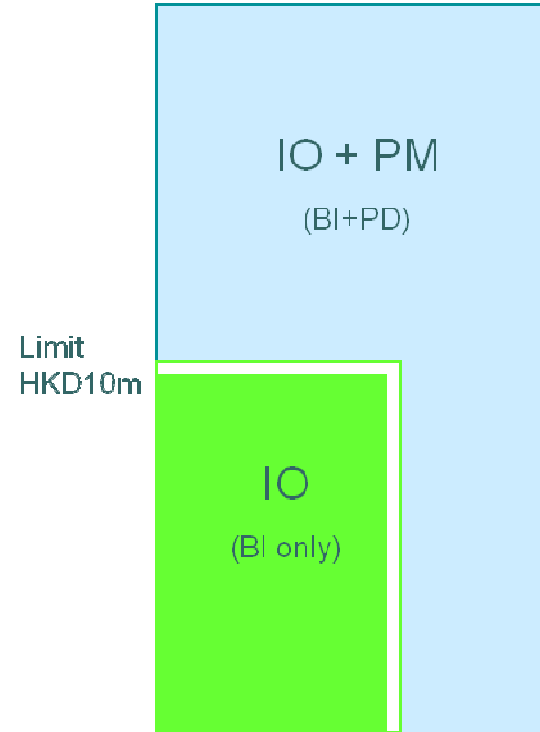


Option 2

One policy with two parts sharing a limit higher than HKD10m



Option 3



You need advice from Specialist !!

Why a OCs 3rd Party Policy is required?

- Meet Regulatory requirements
- Special conditions concerning:-
 - Avoidance of restrictions / Avoidance of Certain Terms and Right of Recovery
 - Duty of Insurer to satisfy judgments
 - Right of 3rd party directly against insurer
 - Notice of Insuranceare met
- Standard policy wordings recommended by HKFI and approved by Government

Important Note

- Both Liability policies must be placed with same insurer
- Claims make against OCs, if any, must be reported under both policies



Housing Management - Professional Indemnity Insurance

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Housing Management as a Profession

Quotes from the book titled “Professional Housing Management Practices in Hong Kong”

- Good management may be defined as the application of skill in caring for the property, its surroundings and amenities, and in developing a sound relationship between landlord and tenant, and between tenants themselves, in order that the estate, as well as the individual houses, may give the fullest value to both the landlord and tenants. From the landlord’s point of view, it is desirable that the property should be as **efficiently and economically maintained and managed** as possible; while from the tenant’s point of view, the house should provide a home, the focal point for a full and happy life for the family, set in surroundings where there are opportunities for attaining the wider goal of a happy and community life. (definition given by Macey Baker)
- Modern Housing management is a people oriented and multi-faceted professional service
- It aims at problem prevention and solving, demanding high skills in “master of all housing related trades”
- Housing manager is required to possess a wide knowledge of legislation that has direct relevance to estate management

Housing Professionals Duties/Claims Samples

- Primary Duty to Property Owners
- Secondary Duty to Tenants
- A Few Claims Samples
 - Property maintenance failure, e.g. on hygiene and safety
 - Failure to maintain insurances

Risk Management Tools

- Avoidance
- Self Retention
- Transfer via Contract
 - Back to Back
 - Hold Harmless Agreement
 - Indemnification Clause
- Transfer via Insurance

BUILDING MANAGEMENT ORDINANCE - SECT 34L

Indemnity of manager in respect of legal costs, etc.

No provision in a [deed of mutual covenant](#) or other agreement shall operate to entitle the [manager](#) of any [building](#) to be indemnified by a [corporation](#) or by the [owners](#) of the [flats](#) in that [building](#) in respect of any legal costs, charges, expenses or fees relating to any civil or criminal proceedings (whether successful or otherwise) between or in respect of that [manager](#) and that [corporation](#) or those [owners](#) and any such provision shall be void and of no effect. (Added 27 of 1993 s. 29)

建築物管理條例 - SECT 34L

管理人就訟費等而獲得 彌償的條文

公契及其他協議的條文的實施，並不使任何建築物的經理人有權就該經理人和法團或該建築物各單位的業主之間的或有關該經理人和法團或建築物各單位的業主而有的任何民事或刑事法律程序(不論勝訴與否)，獲得該法團或該等業主彌償有關的訟費、收費、開支或費用，而任何此等條文，亦屬作廢及無效。
(第VIA部由1993年第27號第29條增補)

Professional Indemnity Insurance as a Risk Transfer Tool

- **Who** - to protect the **Insured**
- **What** - LEGAL liability against **Claim** made by third-parties,
- **Why** - due to errors or omissions made or alleged to have been made by the **Insured**
- **When** - while rendering professional services (as defined in the policy in accordance to the business nature).

Professional Indemnity Insurance Basics

Insured :

- Insured Entity, Company, Partnership....
- Principals, Directors & Partners
- Employees
- Others (to be mutually agreed between the Insured & Insurer)

Claim :

- made by third party
- Monetary Demand
- Claim or Circumstance which may give rise to a claim
- Written / Verbal

Loss :

- Financial (Monetary) Loss (Court award, settlement amount)
- Legal Costs & Expenses
- Fines and Penalties normally uninsurable

Special Areas to Note

- Adequacy of Limit Protection
- **Bodily Injury & Property Damage Exclusion/Cover**
- Potential Gap/Grey Areas between PI and PL
- Retroactive Cover
- Claims Jurisdiction
- Proposal Form Disclosure

Professional Indemnity Insurance in Hong Kong

Mandatory Requirement

- Lawyers
- CPA firms if they are corporate practices
- MPF Trustees
- Insurance Brokers

Commonly adopted by Profession as Best Practices

- Medical practitioners
- Architects, Engineers, Surveyors
- Financial Institutions
- Large corporations who are rendering professional services

Contract Driven

- Construction professionals
- IT Consultants, Project Managers, Property Managers
- Mostly on project basis

Recent Development

Reply from Secretary for Home Affairs to Questions raised by Hon Chan Kin-por on 3 Nov 2010 in the Legislative Council

Q: Whether it will make it mandatory for property management companies to take out professional indemnity insurance so as to enhance protection for property owners who hire property management companies?

會否強制物業管理公司投購專業責任保險，以加強對僱用物業管理公司的業主的保障？

A: We note that there are views that property management companies should take out professional indemnity insurance. Should acts of professional negligence result in losses suffered by owners and OCs, any liability engendered shall be compensated. We will listen carefully to the views of various stakeholders during the public consultation, including whether the Government should make it mandatory by legislation for property management companies to take out professional indemnity insurance.

我們知悉有意見認為物業管理公司應投購專業責任保險，若果有涉及專業疏忽等行爲而致業主和業主立案法團蒙受損失，就因應法律責任作出賠償。我們會在諮詢公眾時細心聽取各持分者的意見，包括應否透過法例強制物業管理公司投購專業責任保險。

Q & A