

# CSj

August 2012

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The journal of The Hong Kong  
Institute of Chartered Secretaries

香港特許秘書公會會刊



**AGM**

## Shareholder spring?

2012 AGM  
season review

Peer to peer interview  
Cloud computing  
Expense reduction



CHARTERED  
SECRETARIES  
特許秘書

# A bird's eye view

Company secretaries need to be proficient in a wide range of practice areas. *CSj*, the journal of The Hong Kong Institute of Chartered Secretaries, is the only journal in Hong Kong dedicated to covering these areas, keeping readers informed of the latest developments in company secretarial practice while also providing an engaging and entertaining read. Topics covered regularly in the journal include:

- regulatory compliance
- corporate governance
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**Judith Sihombing**  
Visiting Scholar  
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## Good governance comes with membership

### About The Hong Kong Institute of Chartered Secretaries

The Hong Kong Institute of Chartered Secretaries (HKICS) is an independent professional body dedicated to the promotion of its members' role in the formulation and effective implementation of good governance policies in Hong Kong and throughout China, as well as the development of the profession of the Chartered Secretary.

The HKICS was first established in 1949 as an association of Hong Kong members of the Institute of Chartered Secretaries and Administrators (ICSA) of London. It became a branch of ICSA in 1990 before gaining local status in 1994, and today has more than 5,500 members and approximately 3,100 students.

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## August 2012

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在中国公司里，法定代表人的权力很大，地位重要，而外国投资者往往不能全面理解这个职位的意义。R&P China Lawyers董事总经理Maarten Roos探讨这些权力遭滥用时为公司带来的风险，并讨论在法人代表、公司或雇员有失当行为时，法人代表所承受的个人风险和法律责任。

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# Auditors in the dock

It is an unfortunate reality of life that society contains dishonest people. It has always been so and I have no doubt that it will always be so. The same is also true of the business sector. There are businessmen and women whose sole aim is to maximise their personal take home from a company by dishonest means.

These people care not a jot for rules, regulations, laws or indeed the general good of the company or society. They knowingly break the law for personal gain regardless of the short- or long-term consequences to the company, its investors, employees, suppliers or customers. These people are criminals. It matters not whether you steal money from the cookie jar in someone's home or the safe or bank account of a company. Theft is theft and the law states very clearly that this is a crime for which a person, if caught by the police, will be judged in a court of law according to due process and, if found guilty, sentenced according to the law of the land.

However, there is another element to corporate misdeeds – the accidental ones, the honest mistakes. These occur when people make poor or misinformed judgements. The result of these honest mistakes can be just as devastating as those perpetrated deliberately, but the person or persons who made these mistakes should not, in general, be considered criminals. Call them sloppy, foolish, misguided, misinformed or plain daft; have the relevant professional body discipline them if necessary, but let us avoid criminalising poor judgement.

The corporate world has developed a number of mechanisms to try to avoid mistakes. It is impossible to eliminate all mistakes because business is all about making decisions and judgement calls. But in terms of administration and accounting there are mechanisms and professionals such as Chartered Secretaries, lawyers and accountants who exercise their professional judgement so that most accounting and administrative errors are spotted and corrected before they do any harm or are eliminated early on in the process. For example, in an audit situation where an error is discovered either by the external auditor or by the internal accountant, it can be traced back to source and either corrected or a reason given for the discrepancy so that shareholders and other stakeholders have a clear understanding of the situation. This is what is meant when accountants state that the accounts of a company give a 'fair view' of a company's financial position.

For these reasons we support our accounting colleagues in their concerns with regard to the criminal sanction in the Companies Bill for an auditor who 'knowingly or recklessly' causes certain statements required to be contained in an auditor's report to be omitted from the report (see Part 9, Division 5, Subdivision 3, Clause 399 – please note that this clause will become section 408 of the new Companies Ordinance subject to final confirmation).

Judging whether or not an auditor has been 'reckless', as the Bill now states, is something that the legal and accounting professions will need to sort out, but it will not be easy. It seems to me that it is a very loose term which could be open

to numerous interpretations. Sometimes auditors make mistakes, sometimes they will be the victim of a deliberate deception. Auditors, like Chartered Secretaries with corporate governance issues, have to make professional judgements and sometimes, with the benefit of hindsight these may seem to have been poor decisions. That does not make the auditor a criminal and he or she should not be treated as such.

I have no doubt that the Hong Kong Institute of Certified Public Accountants will work with its members to see how they should fulfil an auditor's obligations without falling foul of Clause 399 in order to protect themselves from legal claims against them. So, should the addition of this clause really concern us? Yes it should. Hong Kong follows a principles-based regulatory philosophy because it is a better way to keep the market honest, but Clause 399 moves us a step closer to prescriptive regulation which, in the view of the Institute, might possibly be a step in the wrong direction. It will not deter those who seek to break the law for profit, the criminals, but may well deter people from becoming auditors which will weaken Hong Kong's corporate governance, not enhance it.

A handwritten signature in black ink, appearing to read 'Edith Shih', with a long horizontal flourish extending to the right.

Edith Shih FCIS FCS(PE)

# 核数师应否受审判

很 不幸，现实中的社会确有不诚实的人；过去如此，相信将来也没有两样。商界的情况也一样，有些商人唯一的目标是为自己从公司取得最大利益，甚至不惜使用不诚实的手法。

这些人丝毫不理会规则、规例、法律，亦完全漠视公司或社会的福祉。他们蓄意犯规，以追求个人得益，而不理会此等行为对公司、投资者、雇员、供应商或客户所造成的短期或长期后果。他们都是罪犯。不管是从别人家里的饼干盒子偷钱，还是从公司的夹万或银行账户偷钱，都属于偷窃，法例清楚订明这种做法是犯罪，若因此而被捕，就要按适当程序经法院审判，定罪后按当地法律判刑。

不过，企业里发生的不当行为还有另一重考虑因素：有些不当行为并非故意，而是无心之失，是人为判断错误，或作判断时掌握的资料有误所致。这些无心之失，与故意犯错所造成的后果，破坏力可以一样大，但大意犯错的人一般不应视为罪犯。我们大可视他们为鲁莽、愚蠢、受错误引导、掌握错误信息，又或把他们看作彻头彻尾的笨蛋；如有需要，可让有关专业团体施以纪律处分，但且让我们避免把错误判断的行为刑事化。

商界设有一些机制防止出错。营商就是决策的过程，需要作判断，因此不可能完全避免出错；但在行政和会计范畴，

我们设有机制，并由特许秘书、律师和会计师等专业人士作专业判断，找出会计和行政上的大部分错误，在这些错误产生不良影响前予以纠正，或在较早阶段消除这些错误。以审核为例，外聘核数师或公司内部的会计师发现错误时，可以找出错误的源头，予以纠正，或给予解释，让股东和其他利益相关者清楚了解有关情况。会计师指公司的账目「公平地反映」公司的财务状况，就是这个意思。

正因如此，我们支持会计师同事们对《公司条例草案》当中一条刑事处分条文的看法。核数师若「明知或罔顾后果地」导致本须载于核数师报告的陈述没有载于该报告内，《草案》建议给予刑事处分（见第9部第5分部第3次分部第399条 — 请注意，待《公司条例》最终落实后，条文号码应会改为408）。

如何判定核数师是否如草案所述般「罔顾后果」，是法律界和会计界须予斟酌的，但这并非易事。在我看来，这词语的意思不很明确，可以有许多不同的解释。核数师有时会出错，有时会被故意欺骗。正如特许秘书须就公司治理事宜作专业判断一样，核数师须作专业判断，而事后看来，有些判断可能并非明智的决定。这不等于有关核数师就是罪犯，核数师也不应因此而被视为罪犯。

我相信，香港会计师公会一定会和会员一起研究如何在履行核数师职责时避免

触犯第399条，以保障自己免受法律诉讼。那么，这条文真正与我们有关吗？是有关的。香港奉行以原则为基础的规管理念，这种规管方式较能让市场保持诚实；但第399条是偏向规范性的条文，公会认为这有可能是错误的方向。这条文不能阻吓故意犯法图利的罪犯，只会阻吓有志之士加入核数师行列；香港的公司治理不但不会因而加强，反而会遭到削弱。



施熙德

# Rewarding the Extraordinary



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SECRETARIES  
特許秘書

More than meets the eye.  
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## The Hong Kong Institute of Chartered Secretaries Prize 2012

### Call for Nominations

‘Company secretaries have to be prepared to get involved, to volunteer for the Institute’s committees, and in general be proactive in making themselves heard.’

Mike Scales, Former Regional Company Secretary, Asia Pacific, HSBC (Awardee of 2010 HKICS Prize)

‘Voluntary work for the Institute gives you an opportunity to work with high-level professionals who are ideal role models.’

Duffy Wong, Partner, Ho, Wong & Wong, Solicitors & Notaries (Awardee of 2011 HKICS Prize)

The nomination deadline is Saturday, 29 September 2012. Please visit [www.hkics.org.hk](http://www.hkics.org.hk) or contact the Secretariat at 28816177 for more details.



# Ask the Expert

To ask our experts a question, please contact CSj Editor Kieran Colvert: [kieran@ninehillsmedia.com](mailto:kieran@ninehillsmedia.com)

**Q:** *We are considering migrating from a paper board pack to an online board portal, what practical issues do we need to consider in selecting an online service?*

**A:** There are many considerations in addition to the more obvious security and support issues that you are bound to have already on your list. We are likely to cover these areas in detail in future columns, so we will initially look at some less immediately obvious but equally vital questions from the point of view of your company secretarial team.

- **Can I set different access rights?** You will need to set different access levels for individuals so that your portal can be used by a broad range of executives. You should ensure therefore that your service provider offers a flexible 'permission system' which will enable you to give different users different access rights to information.
- **Can I set different document action rights?** In addition to setting different access rights, you will also want to be able to determine the degree to which users can edit the board materials. You may, for example, want to give some users 'read-only' rights, while other users may need full rights to delete, amend and save documents.
- **How easy is it to distribute the board materials?** Document dissemination should be simple and immediate. A system that sits within your existing IT software with typical user commands such as 'drag and drop' will allow your company secretarial team to quickly and easily distribute documents.

When migrating to an online board portal, you should always bear in mind that the experience of your board members when

## BOARDVantage

using the system will determine the overall success of the project. Since your board members will have varying levels of computer expertise, any system must be intuitive and easy to use. Questions related to the user-friendliness of the system should include:

- **How easy is it for users to access the board materials?** Your service provider should offer a quick and easy interface with the board materials. For example, a user should not have to navigate files saved in multiple locations. As an example, the BoardVantage platform includes clickable links to all documentation on the meeting agenda – extremely easy to use for the less IT-literate board members!
- **Can users access historical data not included in the current board pack?** Past meetings will often be referred to and the ability to access this historical information quickly and simply will be crucial for your board members.
- **Can users communicate and collaborate when using the board materials?** Your system should provide a secure two-way channel for communication, the sharing of notes and consents and related board processes.

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### Your chance to ask the expert...

The challenges company secretaries face in their work tend to be much broader in scope than those faced by other professionals. Their remit goes from technical areas of corporate administration up to providing high-level corporate governance advice to the board. While this certainly adds to the variety of company secretarial work it does mean that practitioners need to be competent in a wide range of fields.

CSj's new 'Ask the Expert' column is designed with this in mind, providing you with the opportunity to ask our experts questions specific to the challenges you are facing.

This month, we are very happy to welcome the latest addition to our expert panel, BoardVantage. With a client-base encompassing over 30 percent of the Fortune 500, BoardVantage is uniquely placed to address your questions as you work towards a paperless boardroom and integration of new technology into your board processes.

*To ask a question from BoardVantage, or our other experts, simply email CSj Editor Kieran Colvert at: [kieran@ninehillsmedia.com](mailto:kieran@ninehillsmedia.com).*

*If you would like information about how your company can join our expert panel then please contact Paul Davis at: [paul@ninehillsmedia.com](mailto:paul@ninehillsmedia.com), or telephone: +852 2982 0559.*

10:30am



**Resolution**  
**2012-4-001**

**FOR**

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# Shareholder spring?

## Looking back at the 2012 AGM season

While the annual general meeting (AGM) season in Hong Kong coincides with springtime, did we see any evidence this year of the 'shareholder spring' – the backlash by shareholders on executive compensation and other corporate governance matters that has had a major impact on AGMs globally? Lucy Newcombe, Director of Corporate Communications at Computershare, reviews the 2012 AGM season, both locally and globally, and provides insight into the trends and quirks that characterise this crucial exercise in shareholder communication nationally and internationally.

With the continuing financial crisis, it has been rare in recent years that the AGM season around the globe has passed sedately and peacefully – and this year has so far proven to be no exception.

The UK media has heralded a 'shareholder spring' with unprecedented levels of 'no' votes against proposed remuneration packages; Australia has seen the introduction of the 'two strikes' rule with the board forced to stand for re-election if 25% or more of votes are cast against remuneration two years in a row; and 'say on pay' legislation was recently enacted in the US.

Closer to home, this year the Hong Kong market has seen new requirements relating to AGM procedures in the corporate governance code and associated listing rules (see 'Required reading' on page 13). What effect have these new requirements had on AGMs locally? What were the trends in this year's AGM season, both locally and around the world? Did attendance, voting and the number of questions go up or down? What issues arose? Is there

significance and value in the physical AGM in today's digital age?

### Hong Kong and mainland China

Over 1,000 AGMs take place in Hong Kong and mainland China in a relatively short window between mid-April and late June, placing pressure on venues and logistics providers during this time.

In 2012, the most popular venues in Hong Kong for larger companies were hotels in Central, Admiralty and Wanchai. Smaller

companies still typically hold their AGMs in their own premises.

In China, over 60% of AGMs were held in Beijing, with Shanghai, Shenzhen and Chongqing top amongst the other locations. 59% of companies held their AGM at their office and the remainder used a hotel.

Recent changes to the corporate governance code and associated listing rules introduced by the Hong Kong stock

### Highlights

- companies should prepare for tougher legislation on shareholders' voting rights on executive compensation (similar to the US 'say on pay' vote and the Australian 'two strikes' rule)
- in 2012 shareholder attendance at AGMs in Hong Kong and mainland China increased more than 44% compared to the previous year
- Hong Kong should consider amending its legislation to take advantage of technological advances already in use overseas, such as online attendance at the AGM and voting via smartphones

exchange now require Hong Kong-listed companies, amongst other things, to:

- avoid 'bundling' resolutions and, where they are 'bundled', explain the reasons and material implications in the notice of meeting
- get shareholders' approval at a general meeting for any proposal to re-appoint or remove auditors before the end of the term of their office, and
- ensure that external auditors attend the AGM to answer questions about the conduct of the audit, the preparation and content of the auditors' report, accounting policies and auditor independence.

Each of these amendments could have changed the face of an AGM with the potential for more questions taking extra time and requiring more preparation on behalf of the company secretary. However, analysis of this season's meetings has shown that this was not in fact the case – at the vast majority of AGMs there were no extra questions as a result

of these amendments, whilst at a few there were merely short questions about the credentials of the auditors, their background and experience. In the same vein, there was typically no increase in the number of resolutions in spite of the introduction of the code provision on bundling, though this could change in future seasons.

Interestingly, where questions are asked, they generally follow different themes in Hong Kong and mainland China. Shareholders from Hong Kong tend to ask questions regarding stock price, dividend and director's fees. Those in mainland China tend to ask questions regarding business performance, company development plans and industry situations. There are some meetings that always have a significant number of questions and those that get none at all – but the general level of questions being asked did not change dramatically in 2012.

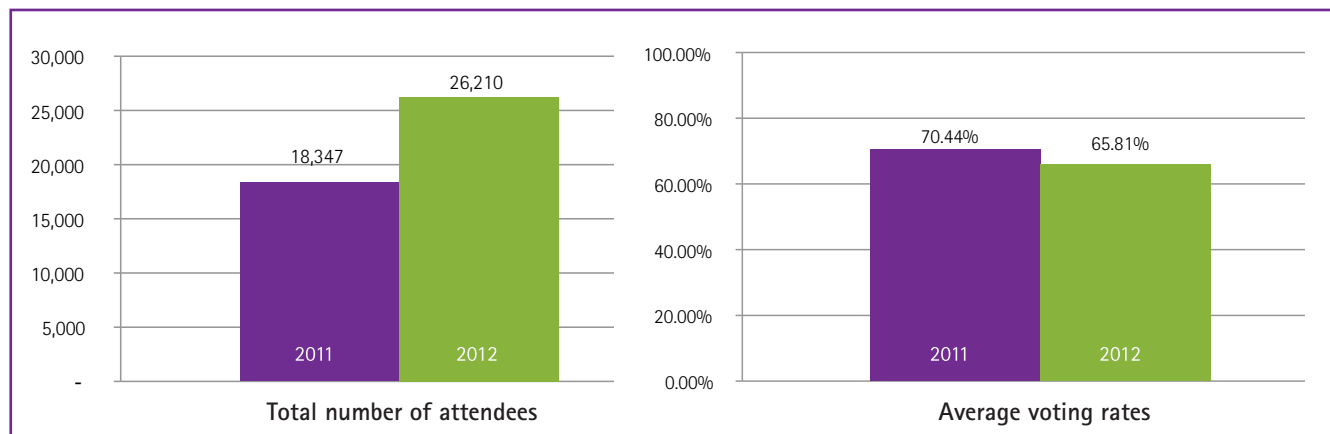
Something which did change significantly for this year's meetings was the level of attendance. Across the board, there was a more than 44% increase in shareholder

attendance, with this figure more pronounced for bigger companies – Bank of China for instance had 880 more attendees in 2012 than 2011, whilst China Construction Bank experienced a massive jump to 1,600 people, from just 13 in 2011 (held in the PRC) and 478 in 2010 (see 'Total number of attendees' below).

However, this increase in attendance did not translate into an increase in voting, with a small decline year on year in the voting figures (see 'Voting rates in large meetings' below).

To understand a potential reason for this, we need to look a few years back. It used to be common practice for companies to treat shareholders attending their AGM to lunch following the event. As shareholder numbers increased this became impractical and so companies moved to offering a buffet which could accommodate more people – which in turn became a drink and snack as numbers continued to rise over the years. Today, companies often find it easier to hand out a voucher or 'goody bag' rather than deal with the logistics of refreshments – again this is designed to

### Hong Kong and mainland China's 50 largest meetings



Source: Computershare



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“  
 some countries around the globe,  
 including the US and Germany,  
 offer the option for shareholders to  
 attend meetings online rather than  
 in person... It’s worth noting that  
 the law [in Hong Kong] does not  
 currently allow for online meetings  
 ”



enable them to cope with shareholder numbers. This shows how attendance does not necessarily correlate to an increase in voting as some shareholders see the meeting as an opportunity for interaction with the company informally via the collection of a voucher rather than formally through the necessity to vote.

The increase in attendance at Hong Kong meetings is not without other challenges, such as locating a venue which can cope with the numbers. Some countries around the globe, including the US and Germany, offer the option for shareholders to attend meetings online rather than in person – this could be something for consideration if attendance numbers carry on climbing. It’s worth noting that the law in Hong Kong does not currently allow for online meetings, so would need to be amended should it be an option companies want to pursue. Russia is just making such an amendment to its legislation, as lawmakers feel online meetings will be a good option given the size of the territory.

Although voting figures were slightly down overall, there was an increase

in the number of companies choosing to use wireless voting tools to deliver increased transparency at their meeting. Prada and Alibaba joined MTR and AIA in using wireless handsets and displaying instant voting results, with good shareholder feedback. Elsewhere in the world, 34% of the UK’s FTSE 100 companies now use wireless voting technology at their AGMs.

Another issue worthy of mention is the fact that meeting procedures are significantly different for Hong Kong-listed companies and those with a dual listing in both Hong Kong and the PRC. For instance, companies with both A- and H-shares need to comply with regulations which state that they must announce the number of shareholders attending and the associated number of shares represented, before the meeting commences. This means that they have to stop registration at a certain point and that anyone arriving late cannot be given a voting paper – a fact many shareholders are unaware of. Typically, they are used to attending the AGM of a Hong Kong-only listed entity and being able to obtain voting papers any time up until the vote starts. These

types of differences in procedure mean that shareholders can be confused when attending several meetings in quick succession. Companies can help their shareholders understand these procedures by explaining them in advance with the meeting papers and providing extra information on their websites.

#### Around the world

AGMs have not just been taking place locally – around the world companies have been undertaking the same precisely-planned exercise.

#### Australia

This year saw Australia’s first examples of voting via smartphone – from a QR code embedded in the AGM materials straight through to the online portal. This technology is now being rolled out across North America and is expected to be available in Europe for the next meeting season. Current legislation in Hong Kong does not allow for this kind of voting.

The challenges that Australian companies had to contend with this year included the introduction of the ‘two strikes’ law designed to give investors more power (as mentioned above, this requires the board

to stand for re-election if 25% or more of votes are cast against remuneration two years in a row). 106 companies (53 managed by Computershare) received a first strike in 2011. 14 of these are companies in the ASX200 and a further four are in the ASX100.

### The US

The single most important element of the US meeting season was whether a company's executive/ CEO pay is aligned with company performance and pay, and performance of the company's peers. With a 'say on pay' (SOP) vote now standard at US meetings, shareholders are becoming used to having a voice on executive performance and it is also evident that proxy advisers have a significant influence on the outcome of this vote.

As of 13 June, 1,714 US companies had held their 2012 annual meetings and associated SOP votes:

- 40 companies (2.6%) had failed SOP votes, up from 1.2% in 2011
- 74% had passed SOP votes with 90+% support, and
- 91% had passed with 70+% support.

Two general categories of companies had problems with 2012 votes:

- those which failed or had close 2011 SOP votes and, in the opinion of the proxy advisers, were not sufficiently responsive to shareholder concerns, and
- those which failed the proxy advisers' 2012 pay for performance voting policies.

## Required reading

The latest changes to Hong Kong's corporate governance code and associated listing rules, which became effective earlier this year, have revised the regulatory regime for local AGMs. While the changes do not appear to have increased the number of shareholder questions or the number of AGM resolutions in the 2012 AGM season, company secretaries need to be aware of the new compliance requirements. The more significant changes include:

- a new code provision clarifying that issuers should avoid 'bundling' resolutions and, where they are 'bundled', explain the reasons and material implications in the notice of meeting
- a new listing rule to require shareholders' approval at a general meeting for any proposal to re-appoint or remove auditors before the end of the term of their office
- a new code provision stating that the issuer's management should ensure the external auditors attend the AGM to answer questions about the conduct of the audit, the preparation and content of the auditors' report, accounting policies and auditor independence
- an amended listing rule to

allow a chairman at a general meeting to exempt certain prescribed procedural and administrative matters from a vote by poll and to clarify the disclosure requirements regarding poll results

- a new code provision, upgraded from a recommended best practice, stating that non-executive directors, including INEDs, should attend board, committee and general meetings and contribute to the issuer's strategy and policies
- a new requirement that issuers must disclose details of the attendance at general meetings of each director by name in its Corporate Governance Report, and
- a revised code provision on attendance at the AGM of the chairman of the board and the chairmen of the audit, remuneration and nomination committees to include chairmen of 'any other committees'.

*The listing rule amendments mentioned above became effective in January this year, while the code amendments became effective in April. More details can be found on the stock exchange's website ([www.hkex.com.hk](http://www.hkex.com.hk)).*



“ Shareholders from Hong Kong tend to ask questions regarding stock price, dividend and director’s fees. Those in mainland China tend to ask questions regarding business performance, company development plans and industry situations. ”

**The UK**

Post the global financial crisis and with continuing economic turmoil in Europe, the UK season had both a political and media focus on executive pay. Historically, shareholders have been supportive of remuneration packages in FTSE100 companies:

- average shareholder support for FTSE 100 remuneration reports = 90.6% (2003–2011) (Source: Manifest)
- average support for FTSE 100 remuneration reports in 2012 = 85.4%.

'No' votes in relation to remuneration reports are extremely rare in the FTSE 100 – however, the media-titled 'shareholder spring' in 2012 saw two companies – Aviva and WPP both lose this vote with many other FTSE companies finding it an extremely close run thing.

The consequence of loss or very near loss was dramatic – the CEOs of Aviva, AstraZeneca and Trinity Mirror all

stepped down as a result, events almost unprecedented in the UK AGM season.

**Continental Europe**

Voting attendance in Continental Europe is very different to that in Asia. It is normal for large companies to attract thousands of attendees and the very largest venues are hired to cope – football stadiums and concert arenas are among the most popular. In Italy, a co-operative bank, Banca Popolare Emilia Romagna, had 13,000 members participate in its AGM. In Germany, where the European rule of having to answer all shareholder questions applies, this year’s longest AGM started at 10.00am and did not conclude until 11.30pm. Another AGM went through 86 shareholder speakers with more than 400 questions between them, before voting started on the 38 resolutions. Online participation seems to be increasing in Germany, with one company having more than 100 online attendees.

**Summary**

There are clearly vast differences in AGMs around the globe – from attendance

and voting levels, to the types of resolutions that have to be raised by law – each region has its own quirks. What is common amongst all companies no matter where they reside is the feeling that the AGM remains a vitally important exercise, allowing a company to truly understand the sentiments of its shareholders and to engage with them on their views about the business. It is inevitable that legislation like the US 'say on pay' and the Australian 'two strikes' rule will make their way to other countries in the not too distant future – so using the opportunity your AGM provides to truly understand in advance how these may affect your company when introduced, is a sound idea.

**Lucy Newcombe**

*Director of Corporate Communications, Computershare*

*Lucy Newcombe is living and working in Hong Kong. You can connect with her via Linked-In or Twitter (her Twitter name is @lucyjayneN).*





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# India: interview with a company secretary specialist

Company secretaries have a lot going for them in India. The local institute of company secretaries is a statutory body and has some 25,000 members and over 230,000 students. Moreover, by law all companies with a paid up capital over approximately US\$500,000 must employ a full-time company secretary. This second article in our 'Peer to Peer' series, interviews Mahendra Shah, Group Director, Corporate Secretarial, IDFC, India, about the way company secretaries in India have become increasingly specialised in their core areas – board support and corporate governance.

***T***hank you very much for talking to us today, can we start with some background about yourself and your current work?

'Currently I am working as the Group Director, Corporate Secretarial, of the IDFC group of companies. IDFC is a financial institution set up for financing Private-sector infrastructure projects in India. Regarding my personal background, I am a Chartered Accountant, a management accountant, and a company secretary.

I have around 25 years' plus of experience. I started my career in 1985, working for various companies including the Xerox Corporation and Pfizer Pharmaceuticals of the US. I started in the finance departments and my job was purely on the accounting side. I got my degree in company secretaryship in 1983 and over the years I have built up my experience in this field. My work became increasingly focused on this role, though I have earlier worked in the fields of taxation and accounts.

For the last 11 years, I have been working as the group company secretary for IDFC:

***What are the major challenges you face as a company secretary in India?***

'We started to liberalise and reform our regulatory system in India in 1991 and it is still evolving. Before 1991, we had a controlled economy and our regulations were only for domestic entities, but after we opened up the economy a lot of foreign capital came in. So our regulatory system has been trying to adapt to the new conditions.

For example, IDFC is in the financial services sector and we have three regulators we need to work with – the Securities and Exchange Board of India (which is the capital markets regulator), the Ministry of Corporate Affairs (which regulates all companies registered in India) and the Reserve Bank of India (the money market regulator). So the first challenge is the need to deal with many regulators, each with its distinct views on what is required.

The second challenge is applying corporate governance best practice standards. As I mentioned, we started our reform drive in 1991, so awareness of corporate governance issues, including the company secretarial and the compliance functions, has been picking up over the last two decades. I am not saying companies in India were not complying with legislation before 1991, but certainly the importance of the compliance and company

secretarial functions has really become critical in the last two decades since liberalisation/ globalisation.

So, I think applying corporate governance best practice standards is a challenge for all entities in India. Of course there are differences depending on the size and type of the organisation – multinationals are usually following the best practices available across the globe while many small and medium-sized entities are more focused on business than on compliance.'

***What is the attitude to corporate governance and the company secretarial role in the companies you have worked for?***

'I don't want to boast about it, but IDFC is one of the top companies in India in terms of corporate governance standards. We are a professionally-run company with a high-profile board. In fact we have become something of a governance role model both within and beyond the company secretarial community in India.

The function of the company secretary is very well recognised. I am the secretary for the board so I attend all the board meetings and I am the gatekeeper for best practices and corporate governance for the entire group. We have prominent directors on the board, experts in their respective fields, so we have lawyers, accountants, tax experts and so on. In terms of governance practices to be followed, I provide them with all the data they need. We have also prepared a compendium of corporate governance rules for the entire group which we follow religiously.'

***How do you keep your skills and knowledge up to date?***

'I have been in this field for the last 11 years and I have been keeping a close eye on regulatory amendments and enactments, particularly in the field of corporate law. There are changes almost every week. There are two main ways to keep up to date. The first is your own personal professional development activities, such as regular visits to relevant websites including those of the professional accounting firms, regulators, ministries, etc.

The second is to attend professional training seminars and events. The Institute of Company Secretaries of India has training seminars on a quarterly basis for company secretaries. I attend these seminars and conferences to stay up to date.

We also have an internal training programme at IDFC. I have a team of around eight company secretaries working with me and



we have a bi-weekly meeting where we discuss relevant matters such as new regulations, proposed changes and we do an impact analysis for each change. One person from the team makes a presentation for about an hour on a new concept or a new change in regulation – anything affecting the organisation and our role as company secretaries.'

*Would you say that the company secretarial profession is well respected in India?*

'Yes, it is a very well respected profession. As per the Indian Companies Act, all companies with a paid up capital over about US\$500,000 must have a full-time company secretary. We have about 26 entities in the IDFC group and about 10 entities require separate qualified company secretaries.

Also, within organisations, the role of the company secretary is much better understood now. Company secretaries used to have to take on dual roles, such as a combination of company secretarial and accountancy work, but we have now become increasingly specialised in our core areas. My own career is an example of that. When I started my career I combined accounting and company secretarial duties, but now I am concentrating solely on company secretarial duties. In large companies like mine, there has also been a trend towards specialisation in different areas of the company secretarial function. Accordingly,

“  
Companies with a reputation  
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differently by the market...  
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framework of governance  
”

four years ago, for example, I handed over the responsibility for compliance to a colleague of mine.

Currently there are two aspects to my work. Firstly, the core corporate secretarial functions – attending board meetings; keeping minutes; preparing the board agenda; assisting directors; talking to shareholders; filing with regulatory authorities, and so on – and secondly, looking after the corporate governance framework of the group.

This second aspect involves looking at how the subsidiaries are governed, how their boards are reporting to the board of the main company; how the audit committees of subsidiaries are reporting to the audit committee of the main company; how the linkages are mapped; how proposals are approved; and monitoring who is responsible for doing what in terms of the delegation of authority/ responsibility.

The governance framework of companies is becoming very critical in India. There has been a lot of research which has proved that there is a direct correlation between a company's corporate governance quotient and the value the company creates for stakeholders. Everyone is focused on that now. It is widely accepted that corporate governance is the way to proceed and will improve the value of the business in the long run. I think India is ahead now in terms of its corporate governance awareness!

*It was interesting to hear you say that you have split the compliance function from the board support and corporate governance functions; do you think that is a widespread practice in India?*

'In the financial services sector, yes. Manufacturing companies

don't have to comply with such complex regulations and there you might have someone taking care of both the company secretarial and the compliance functions, but in financial services companies the compliance requirements are very complex and you have to deal with a number of different regulators such as the Securities and Exchange Board of India and the Reserve Bank of India

Now most top end companies are appointing separate people to take care of the company secretarial and compliance functions and the company secretarial side has become specialised on core company secretarial and governance duties – that's what my role is here. So if you take any bank in India, they will have a team for compliance and a team for the company secretarial function. Of course there is some overlap. There are two regulators I have to deal with – the Ministry of Corporate Affairs and the stock exchanges. I have to monitor compliance with the stock exchange's guidelines for corporate governance since our stock is listed on the local exchange here in Bombay. There is a clear line of demarcation within the company, however, and we manage the split roles quite well!

*Do you think it makes sense for the company secretary to take on a lead role in corporate governance?*

'Yes. Company secretaries are aware of the regulations, the board members and the shareholders. They are aware of how the shareholders, the board and the management are linked; how the delegation works; the company's reporting obligations; the need for shareholder approvals, and so on. This is elevating our role. Company secretaries can take care of the governance framework – I think people are now convinced of this point.'

*It seems that the role of the company secretary is well understood in the business community in India, but how well understood is it by the general public?*

'I'm not very sure about that. I think over a period of time people have become more aware of what we do. Certainly, if they have some connection with companies, if they are investors for example, then I would imagine they would be broadly aware of what we do. But I doubt that other people, particularly people in rural or semi-rural areas, would have much awareness about our role. Many people still confuse the company secretary with a personal secretary.'

*What do you think are the main corporate governance challenges and the main corporate governance successes in India?*

'Well, as I mentioned, we only started developing and re-aligning our regulations in 1991, so our corporate governance regime is still evolving. That is the main challenge. I think the main success is that many companies now recognise that good corporate governance creates value. Companies with a reputation for good governance are valued differently by the market.'

Admittedly, investors may simply not be aware of the level of the company's governance. I am not trying to say that 'A' is good and 'B' is not good, but there is value creation over a period of time with the right framework of governance. Indian companies are now known worldwide and a lot of investment has poured into India – foreign direct investment has gone up dramatically in the last two decades. Also, Indian companies are now able to make major acquisitions outside India, for example Tata Motors recently took over Jaguar.

Those kinds of acquisitions would not be possible if Indian companies did not match global corporate governance standards, but now they can go across borders and feel that they are following the same rules of the game as other companies across the world!

*The current president of the Corporate Secretaries International Association (CSIA) is a former president of the Institute of Company Secretaries of India, do you think India will play a more active part in the global profession of corporate secretaries?*

'Yes, we are planning to become a more active member of the CSIA. Actually, we have many groups of company secretaries in India, for example I am a member of the group of 15 company secretaries of the top 15 companies of India. We meet every month to exchange ideas and keep ourselves updated on areas of common concern. If a new law or regulation is coming up, we look at the practical implications and we might make a representation to the Ministry of Corporate Affairs and help them with the redrafting if there are practical difficulties. We are very aware of the need to do this at the international level!'

*Are your submissions to the Ministry of Corporate Affairs effective – do they listen to your views?*

'They do listen. This doesn't mean of course that our suggestions are always accepted. They publish draft legislation for public comments and they listen to our views, as well as the views of other stakeholders, purely on a merit basis!'

**One last question – do you enjoy your job?**

'Very much so. For the first 15 years of my life I worked as an accountant and tax expert so I was already 40 when I became a full-time company secretary, but I think I joined the profession at the right time and in the right place. It is a challenging area to be working in. The project to draft our compendium of corporate governance for example, was major and challenging task.' CSj

*Mahendra N Shah, Group Director, Corporate Secretarial, IDFC, India, was interviewed by CSj in May 2012.*

*Our 'Peer to Peer' series introduces you to your peers in the global corporate governance profession. If you have any suggestions of interest to this column, please get in touch with the CSj editor by email: [kieran@ninehillsmedia.com](mailto:kieran@ninehillsmedia.com); by phone: + (852) 2982 0559; or by post: The Editor, CSj, PO Box 9963, General Post Office, Hong Kong.*

*Comments on this column can also be posted on the Institute's weblog ([www.governancemaze.com](http://www.governancemaze.com)).*

**India: a governance profile**

**Legal system:** Hybrid, both civil and common law.

**Key legislation/ regulation:** The Companies Act and the Securities and Exchange Board of India Act. In addition to legislation, corporate governance standards in India are the subject of the Ministry of Corporate Affairs' Corporate Governance Voluntary Guidelines and the Listing Agreements of the two national stock exchanges. These Agreements include a number of governance requirements, for example 'Clause 49' in the Agreements enforced by both the Bombay and National stock exchanges includes requirements for boards to adopt a formal code of conduct and for CEO/ CFO certification of financial statements. There are also requirements concerning independent directors, audit committees, financial disclosures and regulatory compliance. While these governance standards are relatively high, non-compliance is widespread and the stock exchanges have been criticised for weak enforcement despite the fact that they have the authority to impose disciplinary measures up to and including delisting.

**Financial reporting standards:** This year India will complete its transition to international financial reporting standards (IFRS).

**Key statutory/ regulatory bodies:** The Ministry of Corporate Affairs is the primary body responsible for enforcing India's company law. The Securities and

Exchange Board of India and the Reserve Bank of India regulate financial institutions and the money markets. As noted above (see 'key legislation/ regulation') the two national stock exchanges also have a role enforcing corporate governance standards.

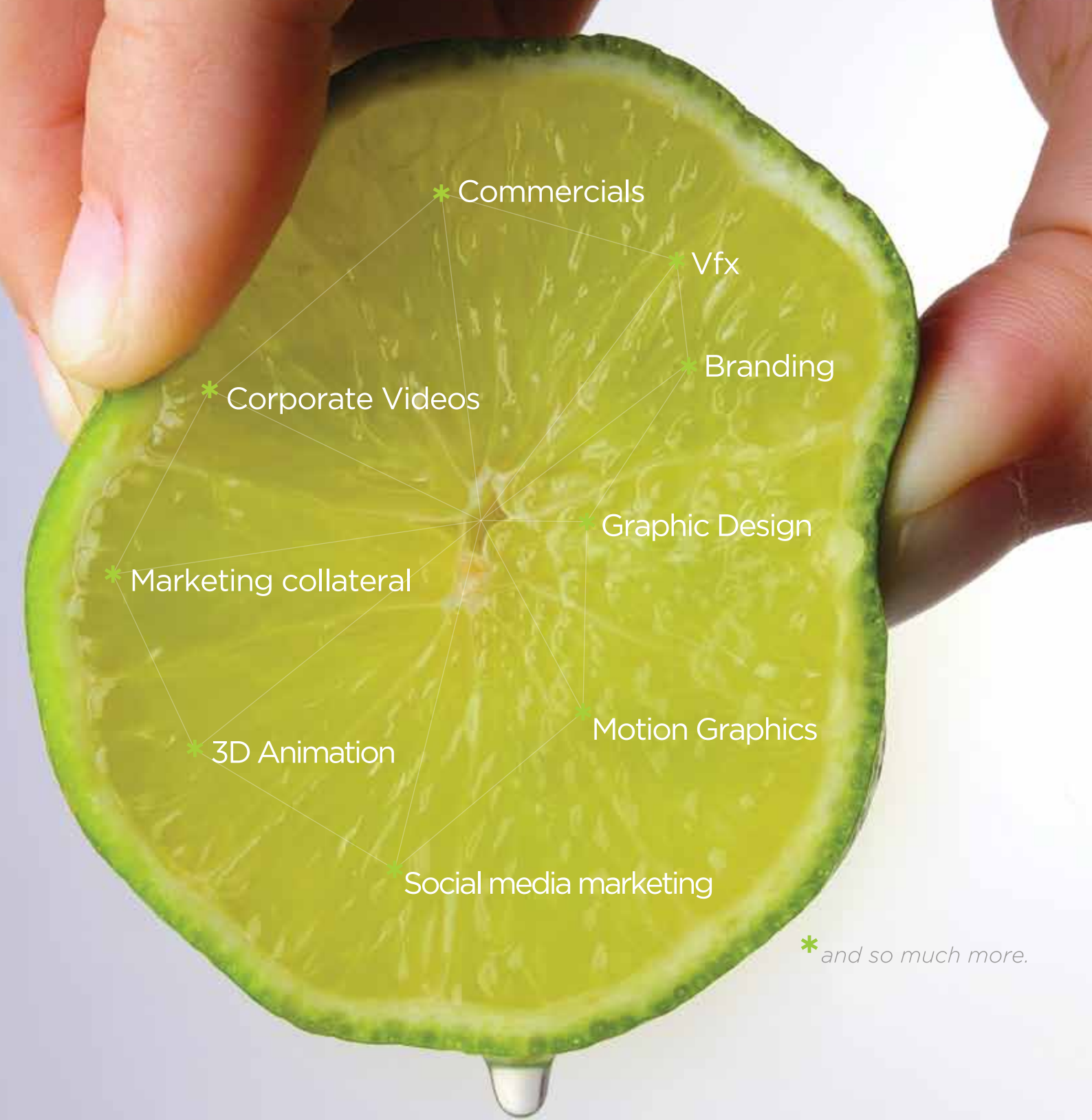
**Predominant ownership structure:** Varied.

**Board structure:** Unitary.

**Corporate secretary job title:** Company secretary.

**Corporate secretary duties:** Typical. These include the core corporate secretarial functions – attending board meetings; keeping minutes; preparing the board agenda; advising directors; liaising with shareholders and regulators, etc – and acting as the gatekeeper of corporate governance.

**Corporate secretarial community:** Formal. The Institute of Company Secretaries of India (ICSI) is a statutory body constituted under the Company Secretaries Act of 1980. ICSI is the official professional body for company secretaries in India and awards the certificate of Company Secretary (CS) to qualifying candidates. The ICSI has about 25,000 members and over 230,000 students. Pursuant to section 383A of the Companies Act, companies having a paid-up share capital of approximately US\$500,000 are statutorily required to appoint a full-time company secretary.



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# Join the cloud?

Certainly, but do your  
due diligence first





Cloud computing provides easy, scalable access to IT resources and services – it's also much cheaper than building your own IT infrastructure – but before you sign up to 'join the cloud', Zoe Chan, Programme Director, HKU SPACE, suggests some of the issues you need to consider to avoid a hard landing.

Cloud computing provides convenient, on-demand access to IT resources. Networks, servers, and storage and application services can be rapidly provisioned with minimal management effort or service provider interaction.

A cloud can be private or public. A private cloud is typically a proprietary network or a data centre set up by a single, large-scale organisation to supply hosted services to a limited number of people. The public cloud scenario is where a service provider sells services to anyone on the internet, for example Amazon Web Services is the largest public cloud provider in terms of market share.

There are also various permutations of 'hybrid' clouds where the cloud infrastructure is a composition of two or more clouds (private, community or public). When a service provider uses public cloud resources to create a private cloud, the result is called a 'virtual private cloud'.

Cloud computing can significantly reduce companies' IT costs, but despite the cost and operational advantages of these services, compliance professionals need to seriously assess the risks outlined below before opting to 'join the cloud'.

## The risks

### 1. Cybercrime

Computer-related crime (especially cybercrime) continues to increase around the globe. The 2011 Norton Cybercrime Report, estimates that the global cost

associated with cybercrime is in excess of US\$388 billion, and that 69% of all adults in the world will experience cybercrime during their lifetime. Digitisation, data sharing and the increase in the availability and access to digital technologies have all provided new opportunities for criminal activity and increasing compliance and IT risks for corporations.

Cloud computing poses additional challenges here. Corporate users should be mindful of information security when using cloud computing. Compliance professionals not only have to consider the widening scope and scale of computer-related crime, but they must also combat the growing threat of anti-digital forensics. Many new tools and techniques have been developed to undermine or frustrate digital forensics investigations and the law enforcement process.

### 2. Jurisdictional issues

Once in a cloud, computer data can be stored anywhere in the world. This

scenario may pose compliance problems if the data is stored in jurisdictions with a poor regulatory framework. Generally speaking, there is no single local or international law which governs cloud computing.

Corporations should consider the location of their service provider since there are complex jurisdictional issues involved in hosting cloud services. Storage of personal data in the cloud in practice means that it is on a server owned by the service provider. The cloud allows most computing activity to go on at remote servers instead of on your personal computer or on a server owned by an individual company. No one is certain of all the legal risks associated with enterprises storing personal data and confidential or proprietary information in the cloud.

A patchwork of conflicting laws and regulations threatens to undercut the full promise of the global cloud computing market. Many European countries have

## Highlights

- cloud services can significantly reduce IT costs, but compliance professionals need to do their due diligence before opting in
- assess the information security measures of your service provider
- ensure that all relevant assurances (including security, confidentiality, ownership and e-discovery requirements) are included in your agreements with your service provider

## Weighing the benefits and risks of cloud computing

### Benefits

- **cost effective** – reduces IT capital expenditure and maintenance costs, you pay only for what you use
- **scalable** – you can expand and contract your IT resources as and when needed

### Risks

- **cybercrime** – it is important to monitor the data security measures of your service provider
- **service provider risks** – what happens, for example, if your service provider goes into bankruptcy?
- **jurisdictional risks**
  - conflicts of laws
  - data ownership and retention problems (data is stored on a server owned by the service provider)
  - data privacy, for example, risk of breaches of local data privacy laws where data confidentiality is breached and there are restrictions on international transfers of personal data
- **e-discovery** – e-discovery can become very time consuming and expensive, particularly where data is held outside your home jurisdiction

a legal system which is a combination of different legal principles, for example English Law and Roman Dutch law. All these laws were promulgated to apply in a society where all transactions were 'offline'. Therefore many of these laws remain untested in terms of the novel situations which have arisen as a result of the development of information and communication technologies.

The only international treaty on cybercrime is the Convention on Cybercrime issued by the Council of Europe in 2001. The Convention on Cybercrime is applicable to European Union (EU) member countries as well as to four non-European signatory countries, namely the US, South Africa, Japan and Canada.

Electronic data physically hosted in the EU is controlled under EU regulations. These regulations can be extended beyond EU territory through 'safe harbour' arrangements and tailor-made service agreements. However, data can still be subject to 'local' regulations. Examples include the US Patriot Act, which was established to protect the US from acts of terrorism following the 911 attacks in 2001. In essence, this allows the US government to obtain any information stored on US territory (including those in 'safe harbours') or any other jurisdiction when managed by a US-headquartered organisation.

To capture the full economic potential of the cloud, governments need to better harmonise their policies to facilitate the flow of data across borders globally.

### 3. Data privacy

Compliance professionals should also consider the issue of data privacy. Hong Kong's data privacy rights could be at risk where personal information is

stored in the cloud. There is currently no comprehensive law to control the storage of personal data abroad where a service provider stores personal data in the cloud. Too little attention has been paid to this issue in Hong Kong and regulators should be monitoring the scale and implications of cloud computing in Hong Kong.

There is also the issue of compliance with overseas privacy and information security laws. There has been increased legislation and regulation in this newly developing area, the UK for example has brought in the Data Protection Act; the Privacy and Electronic Communications Regulations; the Official Secrets Act; and the ACPO & Computer Misuse Act.

### 4. E-discovery

Companies should also consider the need to preserve evidence stored 'in the cloud' and weigh e-discovery issues and costs in their due diligence, contract negotiations, back-up and archival routines, and performance monitoring in case of possible litigation.

The legal process to gain access to data held in a public cloud computing system (especially in a different jurisdiction) can be complex. What legal jurisdictional power and justification does local law enforcement have where the data physically exists on a foreign server outside Hong Kong? Different jurisdictions have different policies on data access in overseas investigations.

Moreover, there may be technical difficulties in accessing this data. Unless your cloud computing applications provide an audit trail, it may be difficult to extract digital evidence in an admissible form. Digital evidence is more ethereal and dynamic in a cloud environment. If



“  
no one is certain of all the legal risks  
associated with enterprises storing  
personal data and confidential or  
proprietary information in the cloud  
”

an application is accessed via a cloud computing system, for example, data traditionally written to the operating system (for example registry entries or temporary internet files) will reside or be stored within the virtual environment and so be lost when the user exits.

It may also be difficult to establish a chain of custody for the data and identify the sources of potential digital evidence particularly if the data is stored and managed outside your local jurisdiction. This can cause delays in retrieving data as evidence in investigations. Certain data may be encrypted and, where the cloud hosts many tenants, there may be 'synchronisation' problems since it is hard to segregate the relevant data in the logs. A forensic investigation should not impact upon other cloud service users who are not the target of the investigation.

#### Get it in writing

Many of the compliance risks outlined above can be mitigated via contractual agreements with your service provider. There is a growing consensus about what companies should ask cloud vendors to maintain a secure IT environment and avoid the potential legal risks associated

with it. Service agreements should be explicit, for example, in terms of access to data and metadata that may be required to prove chain of custody and ownership of data. For US corporations, the *Federal Rules of Civil Procedure* are a good starting point for compliance guidance. Although the contracts may not protect you from legal repercussions in the event of a policy breach (for example moving European customer data through an unapproved cloud), but you should at least be protected contractually from certain types of economic loss.

For IT risk mitigation and compliance purposes, the cloud computing service provider should provide assurances through a 'terms of service' or 'privacy' policy that all data stored with the provider will be kept confidential, and not used for any purposes other than serving the end user. The service provider should guarantee that:

- no personally identifiable information will be released to third parties unless required by law
- cloud-based servers will be physically secure under lock and key with controlled access

- account data will only be accessed with the specific authorisation of the account-holder to resolve a customer issue
- all data stored with the service provider is sole property of the customer with access to e-data, and
- technology standards for cloud computing service providers are in place.

Finally, companies would be well advised to phase in their reliance on cloud computing services, for example migrating non-core data and documents to the cloud first. This will allow them to assess the service and determine if it is cost effective and, most importantly, whether the service risks core business functions. For example, companies may decide to place back-office information – such as payroll and employee training data – in the cloud, before sending privileged and confidential client information.

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# Expense reduction

There are many ways to reduce corporate expenditure without having to cut staff, argues Richard Wong, Principal, Ascent Partners

As staff are generally a major corporate cost category, whenever there is a need to trim costs, the opportunity to find victims presents itself.

However, it is not easy to determine accurately how many employees can be cut without affecting the quality of service, or company efficiency, etc. In fact, there are other expense categories which, if trimmed properly, can generate comparable cost savings.

As there are costs involved in an expense-reduction project, carefully planning the scope and selecting the right overhead cost items to begin with is crucial. The 80/20 rule always helps to focus on what is important. This rule says: pick the 20% of items that constitute 80% of the total cost, to study.

Here are some common areas suitable for cost reduction:

- Printing has a high hidden cost. To keep its cost under control, a proper print management system, which standardises design, reduces variety and supports bulk purchases, is a prerequisite. Establishing a



“ many senior corporate executives tend to overlook all these overhead costs because it is not immediately obvious that savings can be made in these areas ”

good relationship with contract printers could also help to reduce unnecessary costs.

- Office supplies is a highly varied category where there can be big price differences among similar items. Opportunities exist for the rationalisation of supply types and choosing cost-effective brands.
- Record keeping expenses could be reduced by choosing cheaper storage media and means. Introducing a record retention guide could eliminate unnecessary record-keeping costs.
- Courier costs can be minimised by focusing on specialists, making best use of satchels and defining regular schedules in the contracts.
- Communication, in particular telecommunication, is a very competitive market. Always keep a lookout for what the market is offering and be prepared to change to better systems and better technology. At the same time, make very sure all available discounts from the current suppliers are received.
- An energy audit can identify inefficient and high consumption areas. Major saving opportunities include air-conditioning and compressed air efficiency

improvements, power factor correction and heat recovery from process heating. There are also energy reduction management systems that can be installed.

- Bank fees can be renegotiated as no bank wants to lose their existing good customers and there are so many other banks that want to gain new customers. On the other hand, not many companies would want to change their bankers and therefore negotiations should be mainly with your incumbent bank.
- Having the right service plans means reviewing all existing service plans and thinking twice before signing any new plan. As it is now very difficult to increase prices, many suppliers build traps in the service plan. Monitor and negotiate a price to ensure you get the best deal. It is not necessary to sign an ongoing service for a piece of very reliable equipment; on-call base maintenance is always cheaper.
- Vehicle expenses covering maintenance, fuel and insurance is always a prime area for cost cutting. If the vehicle fleet travels across states or countries frequently, arrange maintenance in the lowest cost area of their journeys. Most oil companies offer fleet discounts. Putting drivers with good driving records on new vehicles could help to reduce insurance premiums.

Changes in policies can also bring savings to cost categories:

- Travel expenses can be reduced significantly if there is a disciplined

pre-booking policy in place, especially for air travel. Making bulk purchases would also be cheaper.

- Insurance has grown more and more expensive after the September 11 terrorist attacks. It is not unusual to find a multinational company using one standard policy for a whole region. This may not be cost-effective for certain countries due to special local risks. It would be cheaper to choose policies by local insurance companies which are better suited to the local environment.
- A review of office and space standards can help to put more people in a smaller office space. Encouraging an open plan can result in flexibility for future changes to be made, thus making substantial savings on renovation bills.
- Cash can be needlessly tied up in inventory. It is important to do some demand forecast exercises so that less merchandise or stock can be kept without the danger of being unable to meet customers' demands.
- A supply and demand policy which trims unnecessary demands and aggregates purchases could reduce spending.
- Paper is expensive to buy, maintain and store. There should be a policy in place to encourage reading and storing electronic information, and restricting the number of printers.
- A recovery audit identifies errors in bills due to duplication, payment mistakes, non-compliant contract terms or price mess-ups.

Many senior corporate executives feel they have done enough in cost cutting after trimming departments and rationalising procedures and headcounts. They tend to overlook all these overhead costs, because it is not immediately obvious that savings can be made in these areas.

In fact, many overhead items are related to special trades, and they could be too complex for non-trade personnel to see cost-reduction opportunities without performing a thorough analysis of requirements and the trade tariffs. Getting help from the appropriate specialists could produce unexpected reduction results. Adding up all the reduced expenses in the overhead items can result in a significant amount of savings!

#### Richard Wong

*Principal, Ascent Partners*

*Richard is a career cost-reduction professional with 30 years' practicing experience. Prior to his consulting practice, he worked for a number of blue chip companies in the manufacturing, telecommunication and financial sectors, and was mainly responsible for introducing and monitoring effective cost-reduction and control programmes. If you have any questions on this article, Richard can be contacted at [richard@ascent-partners.com](mailto:richard@ascent-partners.com).*

*Richard recently delivered a seminar on expense reduction for the HKICS ECPD programme. Information on forthcoming ECPD seminars is available on the HKICS website [www.hkics.org.hk](http://www.hkics.org.hk).*



# Legal representatives: risks and liabilities

The legal representative occupies a powerful and important position in Chinese companies, but it is a position not always fully understood by foreign investors. Maarten Roos, Managing Director, R&P China Lawyers, looks at the risks for companies where these powers are abused, and at the personal risks and liabilities faced by legal representatives in cases of misconduct either by himself or by the company and its employees.

**T**he legal representative is the person with the broadest individual authority in a company in China. Unlike in other countries, PRC law requires that only one person – either the chairman of the board of directors, the executive director or the general manager – is appointed by the investor(s) to represent the company on its behalf. In other words, this one person has access to and control over the company's assets and capital, and in most cases the company's stamps.

For foreign companies it is therefore important to understand not only the powers that are transferred to this one position, but also the liabilities that

come with it. On the one hand, the legal representative executes great authority in the company's daily operations, as he is considered to act on behalf of the company and has the right to make decisions regarding the company's assets, to confirm transfers, and authorise legal representation of the company. The legal representative's authorities are only limited by law and – internally – corporate governance rules such as the Articles of Association (AoA). On the other hand, the legal representative faces certain responsibilities that may lead to personal risks for wrongdoings either by himself or by the company and its employees, subject to civil, administrative or even criminal liability.

## **Risks for the company**

In general, actions of the legal representative that fall within his professional assignment are considered actions of the company itself, and therefore the company will be held responsible. Even in cases where the legal representative exceeds his authority while concluding contracts and his actions do not comply with the actual intent of the company, the contract will be binding and the company will be held liable if the business partner reasonably believes that the legal representative acted on the company's behalf. Therefore, a legal representative that has not been carefully chosen can seriously damage the business.

If the company can prove to the court that it has clearly defined and recorded the limits of the legal representative's authority, it may ask a court to release it from the liability for the action.

However, civil liabilities to the company may arise when the legal representative clearly violates the laws or AoA, or if his actions constitute malpractice, gross negligence or intentional harm to the company's interests. If the company suffers any losses from the legal representative's actions, it can claim compensation.

#### Access to company chops and termination of employment

In China, business contracts are usually 'signed' with the company stamp that is registered with the Public Security Bureau. In practice, the company stamp is much more powerful than a written signature. In fact contracts are legally binding even without the signature of the company's authorised representative, as long as they are properly stamped. This can be convenient as the person in charge does not have to be physically present to conclude a binding contract. Moreover, rules on stamp use, and procedures to restrict access and monitor use – with or without the assistance of a law firm – are key parts to managing and supervising the activities of senior managers.

Firing an uncooperative legal representative can be painful if the proper precautionary measures have not been taken in advance. For a valid termination of employment, the legal representative must sign and approve his own termination documents, and a person who is confronted with accusations of exceeding his competences and harming the business may have

anything in mind but cooperating with the employer who tries to get rid of him. It is not uncommon that the company finds itself in the unfavourable situation where a legal representative keeps the company stamps 'hostage' and demands a financial settlement. A good strategy to facilitate termination is to ask the person to be appointed as legal representative, to sign and stamp an undated termination agreement.

#### Risks for the legal representative

A potential risk for the legal representative is posed by activities of other executive directors or senior managers that harm the interest of the company. Since the legal representative's actions are considered as those of the company, he can only avoid joint liability for the misconduct of others if he can show credibly that he was not aware of the harmful acts, did not participate in them, or explicitly disagreed at the board meetings.

Criminal activities of the company generally result in liability of the company itself. However, if the legal entity is charged with a crime, the persons directly in charge or the persons responsible

for the crime may also bear criminal liability. Illegal business operations that could lead to risks of criminal liability for the legal representative include, most notoriously, tax evasion, customs duties evasion, bribery, environmental crimes and manufacturing of counterfeit or substandard quality goods. As the legal representative is in charge for the company's business activities, the illegal activities may be considered within the scope of his duties and therefore he could be held directly responsible. When the melamine milk scandal was exposed in 2008, the legal representatives of various dairy companies were held responsible for manufacturing and selling substandard goods and had to face criminal prosecution.

#### Bankruptcy proceedings

Should the company file for bankruptcy, the legal representative will have to take on a heavy burden that even influences his private life. To make sure that the bankruptcy procedure runs smoothly, PRC law determines that the legal representative is responsible for preserving the company's assets, stamps, accounting books and any documents under his control, and he is

## Highlights

- a legal representative that has not been carefully chosen can seriously damage the business
- to prevent abuse of power, companies should include clear limitations on the legal representative's powers in the Articles of Association
- a good strategy to facilitate termination is to ask the person to be appointed as legal representative to sign and stamp an undated termination agreement



“when the melamine milk scandal was exposed in 2008, the legal representatives of various dairy companies were held responsible for manufacturing and selling substandard goods and had to face criminal prosecution”

obligated to cooperate with courts and the bankruptcy administrator. Unless a replacement is found to take over the responsibility for unpaid taxes and liabilities, the legal representative may be prevented from leaving his domicile without permission of the court, and may not take up senior posts in another company. While the appointed legal representative is not required to reside in China, for those who are located in China this may result in a lengthy restriction on exiting the country. A way to mitigate this restriction is to seek permission of the courts to appoint an agent (usually a law firm) to represent the (foreign) legal representative in the process.

Some companies consider illegally withdrawing their investments from China, even though this means that it will be extremely difficult to conclude any future business in the country. In this scenario, the legal representative may be jointly held responsible for the failure to complete liquidation procedures, which can even lead to criminal charges.

#### Conclusion

The legal representative occupies a powerful and important position in the company. Due to the broad scope of authority and access to the company's most valuable properties, it is important to carefully choose the right person for the

position, and even more, to make use of best practices to prevent abuse of power. This includes clear limitations of the legal representative's powers in the AoA and other internal rules, as well as stipulations on stamp use, and termination strategies.

Minimising personal risk is much more difficult. Liability insurance is generally available only for directors of listed companies and in any case does not protect against criminal liability. Best practice is for the legal representative to know what is going on, be able to show that he has done all he could to prevent unlawful practices, and if the threat of (criminal) liability does present itself, respond quickly to minimise further risks to his person.

### Meet the author

Maarten Roos worked for a Chinese law firm for eight years before founding R&P China Lawyers in 2010. He advises and represents European and American companies with business interests all over China, mainly relating to investment projects and corporate activities, commercial transactions, employment relations, intellectual property rights protection and dispute resolution. He is the author of *Chinese Commercial Law: A Practical Guide* (Kluwer Law International, September 2010). Besides his position as managing director of R&P China Lawyers, Maarten also is the Chairman of the Dutch Association in Shanghai. He has been in China since 1999 and is fluent in English, Dutch and Chinese (Mandarin).

#### Maarten Roos

*Managing Director, R&P China Lawyers*

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CHARTERED  
SECRETARIES  
特許秘書

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# 中国境外上市公司 企业规管高级研修班

本研修班是特别为内地在香港上市的企业而设计。受全球金融危机影响下，内地和香港相关法律法规不断调整，促使广大企业对扩大内地董事会秘书与各高管人员培训范围的要求提高。本研修班旨在透过一连四天的培训课程，向内地企业董事会秘书与各高级管理人员深入浅出地讲解在香港上市须注意的技术问题，并提高他们在这方面的知识及理解水平。研修班内容包括香港上市公司的监管、香港上市条例概况、上市公司的披露责任等公司治理的相关课题。

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# 法人代表： 风险与法律责任



在中国公司里，法人代表的权力很大，地位重要，而外国投资者往往不能全面理解这个职位的意义。R&P China Lawyers董事总经理Maarten Roos探讨这些权力遭滥用时为公司带来的风险，并讨论在法人代表、公司或雇员有失当行为时，法人代表所承受的个人风险和法律责任。

**法**人代表是中国公司里个人权力最大的人物。跟其他国家不同，中国内地法律规定投资者只可指定一人代表公司，该人往往是董事会主席、执行董事或总经理。换句话说，这一个人可取得和控制公司的资产和资本，许多时候也能取得和控制公司的印章。

因此外国公司不仅必须了解这个职位的权力，还须认识相应的法律责任。一方面，法人代表在公司的日常运作中行使重大的权力，代表公司行事，有权就公司的资产作出决定、确认资产转移，并授权他人作为公司的法律代表。法人

代表的权力只受法律限制，并由内部的公司治理规则（例如公司章程）管限。另一方面，法人代表的一些职责，会导致他因个人、公司或雇员的不当行为而面临个人风险，须承担民事、行政甚至刑事责任。

## 公司的风险

一般而言，法人代表在个人专业范畴内的一切行为，均视为公司的行为，公司须负上责任。即使法人代表越权订立合同，而其行为亦与公司的真正意图不符，但假如商业伙伴有合理理由相信法人代表是代表公司行事，该

合同便依然具有约束力，公司须负上责任。因此，若不小心物色法人代表，可严重损害公司业务。假如公司能向法院证明自己曾清楚界定和记录法人代表的权限，便可请求法院解除公司对该行为的法律责任。

然而，假如法人代表明显违反法律或公司章程，又或其行为属不良行为、严重疏忽或蓄意损害公司利益，则公司可能须负上民事责任。假如公司因法人代表的行为而蒙受损失，则可申索赔偿。

## 取得公司印章及终止雇用

中国公司「签订」合同时，用的是在公安局登记的公司印章。实际上，公司印章比签名更有效；即使合同上没有公司法人代表的签名，只要妥善盖上公司印章，便具有法律约束力。这其实相当方便，负责人不必亲身在场，也可订立具有约束力的合同；况且，有关使用印章的规则，以及限制取得印章和监察其使用的程序（不论是否邀请律师事务所协助制定相关规则和程序），是管理高层管理人员和监察其活动的重要一环。

## 摘要

- 若不小心物色法人代表，可严重损害公司业务
- 为防止滥用权力，公司应在公司章程中明确限制法人代表的权力
- 在指定法人代表前，先请有关人选签订没有写上日期的终止雇用协议，并在上面盖章，这不失为方便日后终止雇用的良策

假如事先没有做好妥善的预防措施，解雇不合作的法人代表可能是相当困难的事。法人代表必须签署和批核他自己的解雇文件，解雇才能生效；而在被指越权和损害公司业务的情况下，法人代表当然万分不愿意与欲除之而后快的雇主合作。法人代表「扣押」公司印章，要求达成财务和解协议，并非罕见，这会令公司处于不利地位。在指定法人代表前，先请有关人选签订没有写上日期的终止雇用协议，并在上面盖章，这不失为方便日后终止雇用的良策。

### 法人代表的风险

其他执行董事或高层管理人员如有损害公司利益的行为，法人代表便有可能承担风险。由于法人代表的行为视为公司行为，法人代表若要避免就他人的失当行为承担共同责任，便要使人相信他并不知悉那些有害的行为、没有参与其中，又或在董事会会议中明确表示不同意。

公司的犯罪行为，法律责任一般由公司本身承担；但若法律实体被控有罪，直接负责的人或负责犯罪行为的人也有可能须承担刑事责任。有可能导致法人代表负上刑事责任的非法经营行为包括逃税、规避关税、贿赂、环境罪行、制造假冒伪劣产品等。由于法人代表负责公司的商业活动，有关非法行为便可视作他的职责范围以内，他可能须直接负上责任。2008年三聚氰胺毒奶粉事件中，多家乳品公司的法人代表均须为生产和出售劣质产品负责，面对刑事起诉。

### 破产法律程序

公司申请破产时，法人代表须负起重大责任，甚至影响私人生活。为确保破产程序顺利，中国法律订明法人代表负责保存公司的资产、印章、会计簿册和他所控制的文件，并须与法院和破产管理人合作。除非找到他人承担欠税及欠债的责任，否则法人代表便可能不得在未经法院批准前离开居住地，也可能不得

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2008年三聚氰胺毒奶粉事件中，多家乳品公司的法人代表均须为生产和出售劣质产品负责，面对刑事起诉”



担任其他公司的高层职务。法人代表不必一定在中国居住，但在中国居住的法人代表，便可能因公司破产而长期不得离开中国。为减轻这项限制所带来的影响，可向法院申请许可，指定代理人（通常是律师事务所）在破产过程中代表（海外）法人代表。

有些公司会考虑把投资非法撤离中国，尽管这意味着投资者日后再难以在中国营商。在这情况下，法人代表有可能须

为未能完成清盘程序承担共同责任，甚至有可能被刑事起诉。

### 结语

法人代表在公司里的权力很大，地位重要。由于法人代表权力范围广阔，而且可取得公司最有价值的财产，公司必须小心物色适当人选出任此职；更重要的是采取最佳措施，防止滥用权力。这些措施包括在公司章程和其他内部规则中明确限制法人代表的权力，以及订明使用印章的程序，并订定终止雇用的策略。

在减低个人风险方面，则较难做到。法律责任保险通常只供上市公司董事投保，而且不会提供刑事责任方面的保障。法人代表宜清楚了解公司事务，能显示自己已竭尽所能防止不法行为；假如有可能面临（刑事）法律责任，则须迅速回应，以尽量减低个人承受的风险。

### Maarten Roos

R&P China Lawyers 董事总经理

本文原由 R&P China Lawyers 发表，现获许在此重刊。

本文旨在就法人代表的相关事项提供一般指引；读者个别情况如何处理，宜另寻求专门意见。

### 作者简介

Maarten Roos 为中国一家律师事务所工作八年后，于2010年创办 R&P China Lawyers，为在中国各地经营业务的欧美公司提供意见，担任这些公司的代表，主要涉及投资项目、企业活动、商业交易、劳资关系、知识产权保护、调解争议等事务。著有《中国商法实务指南》(Chinese Commercial Law: A Practical Guide) Kluwer Law International, 2010年9月)。除担任 R&P China Lawyers 董事总经理外，Maarten 也是上海荷兰协会的主席。自1999年起在中国生活，能操流利英语、荷兰语和汉语。

## A review of seminars: June 2012

8 June 2012



Eric Chan (Chair) and Dong Fang Gumi

From Eric Chan FCIS FCS(PE), Chief Consultant, Reachtop Consulting Ltd, and chair of the seminar delivered by Dong Fang Gumi, Director, KCS Hong Kong Ltd, on '认识中国营商环境讲座系列: 外商投资企业设立指引'

'Ms Dong Fang is very experienced in this area and she delivered a highly practical seminar which looked at the relevant laws and regulations. The audience actively participated in the Q&A session and valued every second of this seminar.'

12 June 2012



Gloria Ma (Chair) and Hauman Yueng

From Gloria Ma, FCIS FCS(PE), Director – Corporate Secretarial, KCS Hong Kong Ltd, and chair of the seminar delivered by Hauman Yueng, Director, Asset Management (Environment Focus), Ascent Partners, on 'ESG reporting.'

'Hauman Yueng is a very knowledgeable speaker on this topic. His seminar offered attendees an in-depth examination of the history and evolution of environmental, social and governance (ESG) reporting. He also discussed why companies need to engage in ESG reporting and, just as importantly, how to get it right. He emphasised the value and benefits of this exercise and shared his valuable experience with the attendees.'

13 June 2012:  
Joint seminar with HKICPA  
and the Law Society of  
Hong Kong



Parry Tam, Robin Huang, CK Low (Chair) and Gordon Walker

The Institute jointly organised a seminar on 'Insider trading – Australia, Hong Kong, mainland China and New Zealand compared' with the Hong Kong Institute of Certified Public Accountants (HKICPA) and the Law Society of Hong Kong on 13 June 2012. Professor Gordon Walker, La Trobe University, Australia; Professor Robin Huang, the Chinese University of Hong Kong; and Professor CK Low, the Chinese University of Hong Kong; were the speakers and panellists. This joint seminar, which was hosted at the United Conference Centre, attracted over 150 attendees.

From CK Low, Associate Professor in Corporate Law, the Chinese University of Hong Kong, and chair of the seminar:

'Professors Walker and Huang contributed significantly to a vibrant seminar with their lucid presentations on insider trading across Australia, China and New Zealand. Their references to cases were particularly appealing to the audience with numerous questions raised and a lively debate of the issues ensuing. The HKICS secretariat should also be commended for its highly efficient management of the packed venue despite the wet and windy conditions on the day.'

## 14 June 2012



Lila Fong (Chair) and Nelson Lam

*From Lila Fong FCIS FCS(PE), Legal Manager – Company Secretarial, MTR Corporation Ltd, and chair of the seminar delivered by Lam Chi Yuen, Nelson, FCPA, CFA, Nelson Consulting Ltd, on **'Financial reporting standards update for 2011/ 2012'**.*

'Nelson outlined the key issues of this subject professionally and in a user-friendly manner. The examples he discussed also helped enhance the attendees' understanding of the principles and the background. Nelson's presentation was well received.'

## 16 June 2012



Polly Wong (Chair) and Ho Chi Ming

*From Polly Wong FCIS FCS(PE), Company Secretary and Financial Controller, Dynamic Holdings Ltd, and chair of the seminar delivered by Ho Chi Ming, FCCA, CPA(Australia), FTIHK, CTA, Barrister at law, on **'The implications of the Li & Fung case on offshore profits tax claims'**.*

'Mr Ho Chi Ming delivered a concise seminar on the critical implications of the Li & Fung case on offshore profits tax claims in Hong Kong. He explained precisely the relevant requirements of tax law, as well as the technical issues involved. His illustration of precedent cases, together with his professional advice about tax planning, enhanced attendees' comprehension of the implications of this case for tax exemptions of offshore profits in Hong Kong.'

## 19 June 2012



Lila Fong (Chair) and Joseph Kwan

*From Lila Fong FCIS FCS(PE), Legal Manager – Company Secretarial, MTR Corporation Ltd, and chair of the seminar delivered by Joseph Kwan, Head of Litigation & Dispute Resolution Department, Deacons; and Maggie Wong, Senior Associate of Litigation & Dispute Resolution Department, Deacons; on **'Market misconduct – law and update'**.*

'The presentations by Joseph and Maggie were both impressive. They were well organised, comprehensive and quite easy to understand. It is recommended that a re-run be arranged by the Institute to enable other Chartered Secretaries and students to have a good grasp of this important subject.'



Lila Fong (Chair) and Maggie Wong

## A review of seminars: June 2012 – continued

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29 June 2012



Angie Fung (Chair) and Philip Tso

*From Angie Fung FCIS FCS, Head of Company Secretarial Services, Hongkong Land Ltd, and chair of the seminar delivered by Philip Tso, Director of Investment Services (Hong Kong), Towers Watson, on 'MPF – can it be better?'*

'This was a very comprehensive, well-structured and useful presentation. It addressed the concerns of both employers and employees and gave real-life examples of the issues involved. Philip reiterated the importance of planning for your retirement, including estimating your future savings and your future needs. The MPF has always been a complex and sometimes controversial matter, but Philip's message – that you must understand your needs before you can choose wisely a service provider that is suitable for you – is good and timely advice.'

### New no cash policy

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Starting from 1 August 2012, no cash will be accepted by the Institute's secretariat. Payment of members/ students' subscriptions and fees for the Institute's services/ products may be settled by the following methods:

- EPS
- Cheque, or
- Chartered Secretaries Amex Card.

The Institute is examining additional means of payment for the convenience of members and students which will be available in the near future. Please contact the secretariat should you have any queries.

### Mandatory CPD

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Members who qualified between 1 January 2005 and 31 July 2011 need to accumulate at least 15 mandatory continuing professional development (MCPD) or enhanced continuing professional development (ECPD) points for the current CPD year ending 31 July 2012 and every CPD year thereafter.

Members who work in the corporate secretarial (CS) sector and/ or for trust and company service providers (TCSPs) have to obtain at least three points out of the 15 required points from the Institute's own ECPD activities.

Members who do not work in CS sector and/ or for a TCSP have the discretion to select the format and areas of MCPD learning activities that best suit them. These members are not required to obtain MCPD points from the HKICS (though they are encouraged to do so), but nevertheless they must obtain 15 MCPD points from suitable providers.

#### When to submit the declaration form?

Those who have achieved the MCPD requirements of 15 CPD points during the CPD year (1 August 2011 – 31 July 2012) are required to fill out the Institute's declaration form (see 'MCPD Form I' on the Institute's website). The deadline for submitting the declaration form is **14 August 2012**.

*To learn more about MCPD please visit the Institute's website.*

## Enhanced CPD Programme

The Institute cordially invites you to take part in our Enhanced Continuing Professional Development (ECPD) Programme, a professional training programme that best suits the needs of company secretaries of Hong Kong listed issuers who will need to comply with the new mandatory requirement of 15 CPD hours every year. The Institute launched its mandatory CPD programme in August last year and, since January 2012, its requirement for Chartered Secretaries to accumulate at least 15 CPD points each year has been backed up by a similar requirement in Hong Kong's listing rules.

*More information on the new Hong Kong Exchanges and Clearing (HKEx) requirements can be found in the consultation conclusions to the 'Review of the Corporate Governance Code and Associated Listing Rules' on the HKEx website ([www.hkex.com.hk](http://www.hkex.com.hk)).*

*To learn more about Institute's ECPD programme, please visit the Institute's website ([www.hkics.org.hk](http://www.hkics.org.hk)).*

## Convocation 2012

The Institute will organise its annual Convocation on 15 August 2012 at Jardine Penthouse to celebrate the achievements of newly elected Fellows, Associates and Graduates during the financial year 2011/ 2012. We are honoured to have Anthony Rogers *FCIS FCS*, former Chairman, Standing Committee on Company Law Reform and former Vice-President, Court of Appeal, as the guest of honour. Details with photos will be included in the next issue of *CSj*.

## Newly appointed company secretaries

The Institute would like to congratulate the following members on their appointments as company secretaries of listed companies:

Company secretary	Listed company	Date of appointment
Wong Hiu Wong <i>ACIS ACS</i>	China LotSynergy Holdings Ltd (stock code: 8161)	1 June 2012
Lo Tik Man, Ophelia <i>ACIS ACS</i>	Sustainable Forest Holdings Ltd (stock code: 723)	1 June 2012
Yim Siu Hung <i>ACIS ACS</i>	China Precious Metal Resources Holdings Co Ltd (stock code: 1194)	12 June 2012
Ho Siu Pik <i>FCIS FCS(PE)</i>	Yashili International Holdings Ltd (stock code: 1230)	20 June 2012
Wong Tak Fong <i>ACIS ACS</i>	Hisense Kelon Electrical Holdings Company Ltd (stock code: 921)	26 June 2012
Chow Miu Fan <i>ACIS ACS</i>	Cypress Jade Agricultural Holdings Ltd (stock code: 875)	28 June 2012

## Fee structure 2012/ 2013

### Annual subscription

Members and Graduates will receive notification of the new fee structure and their remittance advice in August 2012 accordingly.

### Special rate for Fellowship election

Our Fellows are the leaders of our profession. They have the most influence over our profession because only Fellows can stand for election to Council. These highly qualified and respected 'role models' are crucial in maintaining the growth of the Institute. Fellows are:

1. eligible to stand for election to Council and to be appointed to committees, working groups and panels, thus giving them the opportunity to represent other Members, Graduates and Students and to participate in the development, planning and management of both the profession and the Institute's affairs
2. invited as representatives of the profession to events hosted by the Institute, regulatory or governmental bodies, etc
3. eligible to attend the special 'Fellows-only events'
4. invited to share expertise and experience at the new Fellows' Sharing events in a relaxed and informal environment
5. given priority to participate in Institute events, and
6. invited as speakers or chairpersons at our ECPD seminars (extra CPD points are awarded for these roles).

To encourage highly-qualified Associates to join our league of Fellows, the Institute will continue to offer a special rate for the Fellowship election fee at HK\$1,000 for 2012/ 2013. All applications will be considered by Membership Committee on a regular basis.

*For further details please refer to the Institute's website or contact the Membership section at 2881 6177.*

### Studentship fee structure

Effective from 1 August 2012, the following studentship fee structure applies:

Items	Amount (HK\$)
Registration fee	1,150
Re-registration fee	1,150
Renewal fee	700
Late studentship registration administrative charge <b>(note 1)</b>	450
Examination fee	1,000 per subject
Examination postponement fee	650 per subject
Examination appeal fee	1,700 per subject
Exemption fee	1,000 per subject
Exemption re-application administration charge <b>(note 2)</b>	500 per application
Transcript application	50 per copy
Examination technique workshop	400 per subject
Study outline	300 per copy
CCA late registration fee	250 per month

**Note 1:** An administration charge of HK\$450 will be applied to studentship registrations submitted within the specific periods stated below for taking corresponding examinations in June and December:

Studentship registration	Examination diet
1–15 August 2012	December 2012 examination
1–15 February 2013	June 2013 examination

**Note 2:** An administration fee of HK\$500 per exemptions re-application will be charged to students who do not settle their exemption fees as approved within the due date, effective from 1 August 2012.



## Membership application deadlines

Members and Graduates are encouraged to advance their membership status once they have obtained sufficient relevant working experience. Fellowship and Associateship applications will be approved by the Membership Committee on a regular basis. If you plan to apply, please note the following submission deadlines and the respective approval dates.

*For details, please contact the Membership section at 2881 6177.*

Submission deadlines	Approval dates
Saturday 8 September 2012	Tuesday 9 October 2012
Saturday 24 November 2012	Mid-December 2012

## CSIA presentation to the WTO

On 25 June 2012, representatives of the Corporate Secretaries International Association (CSIA) made a presentation to the Committee of Specific Commitments of the World Trade Organisation (WTO) in Geneva proposing the creation of a new 'Corporate Governance, Compliance and Secretarial Advisory Services' heading in the WTO's services sectoral classification list. The delegation consisted of CSIA representatives from Hong Kong, India and the UK. They met with various WTO country representatives prior to and following the presentation.



*(From left to right) Edith Shih, HKICS President; Nesar Ahmed, Institute of Company Secretaries of India (ICSI) President; Dr Harsha Singh, WTO Deputy Director-General; April Chan, CSIA and HKICS Immediate Past President; Phillip Baldwin, HKICS Chief Executive; Anil Murarka, CSIA President and ICSI Past President; Dale Honeck, WTO Counsellor; Ruosi Zhang, WTO Counsellor; Russell Morrice, ICSA (UK) Head of Secretariat and Clerk to the Council*

## New membership re-election policy

With effect from 1 August 2012, members applying for re-election will not be required to settle all subscriptions in arrears. As an effort to encourage lapsed members to rejoin the Institute, re-elected members will only be required to pay a total of three years' subscriptions plus the re-election fee under the new policy. The three years' subscriptions (based on current fees at the time of application) will include:

- i. subscription for the current year
- ii. subscription for the lapsed year, and
- iii. an additional year of subscription to cover the year(s) in between i) and ii) above regardless of the length of the lapsed period.

We understand that members might have reluctantly chosen not to renew their membership due to sickness, unemployment, pregnancy, etc. This new re-election policy aims to encourage lapsed members to rejoin the Institute. All applications are to be approved by the Membership Committee.

*For further details on re-election application procedures, please refer to the Institute's website or contact the Membership section at 2881 6177.*

## Membership activities

### Members' networking

The Institute's networking events aim to assist in your personal development via informal and enjoyable activities. The Institute will continue to organise networking events this year in three areas: the environment, personal development and IT. More photos taken at these events are available in the gallery section on the Institute's website.

### IT – tips to be a smart iPhone and iPad user

This event was held on 21 June 2012 at Club Lusitano with over 40 members and graduates attending. Participants learned from Derek Ngai, Chairman of MACitizen, some practical tips on being a smart iPhone and iPad user, and also got to know other HKICS members in a relaxed and convivial environment.



*Dr Eva Chan, Membership Committee Vice-Chairman, welcoming members*



*Natalia Seng FCIS FCS(PE), Council member (first from left), meeting with members*



*The speaker sharing practical tips on using the iPhone and iPad*

### Personal development – dress code and grooming for professionals

This event was held on 10 July 2012 at the United Conference Centre with over 65 members and graduates attending. Participants learned from Allan Lee *ACIS ACS(PE)*, Vice-President of the Association of Image Architects, about the magic of colour and style of clothing, as well as the different dress codes for establishing a professional demeanour.



*Susie Cheung, Council Member and Membership Committee Chairman, greeting members*



*Allan Lee explaining colour analysis*



*Members networking at the event*



*Members enjoying delicious refreshments*

### HKICS dragon boat team 2012

The Institute's dragon boat team participated at the 7th Stanley Dragon Boat Warm-up Races on 26 May 2012 and won the third runners-up in Mixed Teams Gold Bowl. They also entered the International Dragon Boat Races on 2 July 2012. The Institute would like to thank the team members who devoted their valuable time to the practice sessions in Sai Kung every Saturday for three months before the races. Our appreciation also goes to our coaches, Yale Leung ACIS ACS and Ma Siu On.

*Should you be interested in joining the team in 2013, please contact the Membership section at 2881 6177.*



*Group photo taken at International Dragon Boat Races in Tsimshatsui*



*Warm-up for the race*



*At the race*



*Group photo with HKICPA team*

### Happy Friday for Chartered Secretaries

The Institute is launching another new series of events called 'Happy Friday'. These after-work gatherings on Fridays will be designed to give members and graduates the opportunity to exchange views and share information and news on practical and interesting topics in a warm, friendly and informal environment. The Institute will hold the inaugural gathering on 24 August with chilled wine, drinks and snacks. Fellow member Dr Albert Lung, who is the representative of the HKICS serving on the Panel of Adjudicators of the Best Annual Reports Awards organised by the Hong Kong Management Association since 2008, will be there to share his insights on what constitutes

a good annual report and the latest developments in corporate governance disclosure in annual reports. So come and join us to exchange your views with Dr Lung and other members on a relaxed 'Happy Friday'.

*For details, please refer to the flyer on page 43, the Institute website or contact the Membership section at 2881 6177.*

### Fellows-only event: Picasso – masterpieces from the Musée National Picasso, Paris

Fellows are crucial in facilitating the continued development of our Institute and the Chartered Secretary profession. As part of Institute's new series of 'Fellows-only events', designed to offer

exclusive benefits to these leaders of the Institute, a visit was held on 20 July 2012 to the Picasso exhibition at the Hong Kong Heritage Museum. Four narrators, including three art students from France, were specially arranged for the Institute's tour. Details with photos will be included in the next issue of CSj.

### Members' Luncheon

A Members' Luncheon was held on 18 July 2012. Andrew Sheng, President, Fung Global Institute and Chief Adviser, China Banking Regulatory Commission, was the guest speaker presenting on the topic '**Post-crisis thinking on corporate governance**'. A review with photos will be included in the next issue of CSj.

## Examination results (June 2012)

The June 2012 examination results will be released in mid-August 2012. Candidates will receive the results slips by mail.

## IQS recommended reading

The second edition of *Corporate Governance: Principles, Policies and Practices* (Bob Tricker, Oxford University Press, 2012) is now available. HKICS students are entitled to a 15% discount (discounted price: HK\$340, original price: HK\$400). Please refer to the Institute's website for the order form

*For enquiries, please contact Amy Cheng of the Academic & Professional Book Centre (tel: 2774 3740)*

## HKU SPACE examination preparatory courses

Enrolment for the HKU SPACE examination preparatory courses (September 2012 intake) will begin from late August 2012. Please refer to the timetable and enrolment form at the Institute's website.

*For enquiries, please contact HKU SPACE at 2867 8478.*

## IQS information session

The Institute organised an IQS information session on 18 July 2012 to introduce the IQS examinations and the career prospects of the Chartered Secretary to the general public. Winnie Li ACIS ACS, Director, CWCC, shared her career development and working experience in the corporate secretarial field.



*Winnie Li ACIS ACS sharing her experience with the participants*



*Candy Wong presenting a souvenir to Winnie Li*

## IQS examination timetable (December 2012)

The December 2012 examination enrollment will begin from 1 to 30 September 2012. Students can download the examination entry form from the Institute's website in mid-August.

	Tuesday 4 December 2012	Wednesday 5 December 2012	Thursday 6 December 2012	Friday 7 December 2012
09:30–12:30	Hong Kong Financial Accounting	Hong Kong Corporate Law	Strategic and Operations Management	Corporate Financial Management
14:00–17:00	Hong Kong Taxation	Corporate Governance	Corporate Administration	Corporate Secretaryship

**New**

## Happy Friday for Chartered Secretaries



Your Institute is launching a new series of events called "Happy Friday". This aims to enhance opportunities for members and graduates to exchange views and share information and news on practical and interesting topics in a relaxed environment. In short, a warm, friendly and informal members' "after-work" gathering on Fridays.

Come and join the inaugural gathering on 24 August with chilled wine, drinks and snacks. Fellow member Dr Albert Lung, who is the representative of the HKICS serving on the Panel of Adjudicators of the Best Annual Reports Awards organised by the Hong Kong Management Association since 2008, will be there to share his insights on what constitutes a good annual report and the latest developments in corporate governance disclosure in annual report. So, come and join us to exchange your views with Dr Lung and other members on a relaxed Happy Friday.

Details	Guest speaker
<p>Date : 24 August 2012 (Friday)</p> <p>Time : 6.45 p.m. – 8.00 p.m. (Networking starts at 6.30 p.m.)</p> <p>Venue : Central/Admiralty (TBC)</p> <p>Fee : HK\$100 (wine, drinks &amp; snacks will be provided)</p> <p>Language : Cantonese</p>	<p>Dr Albert Lung FCIS FCS</p> <ul style="list-style-type: none"> <li>• HKICS external representative serving on the Panel of Adjudicators of the Best Annual Reports Awards organised by the Hong Kong Management Association since 2008</li> <li>• Ex-Company Secretary and Financial Controller of a Hong Kong Main Board listed company</li> </ul>
Programme	
<p>6.30 p.m. – 6.45 p.m. Registration and networking</p> <p>6.45 p.m. – 7.00 p.m. Sharing by Dr Lung on the latest development of annual reports on:</p> <ul style="list-style-type: none"> <li>• regulatory requirement (e.g. Corporate Governance Code and Rule Amendments)</li> <li>• structure &amp; design</li> <li>• presentation of information</li> <li>• how to showcase a good annual report</li> </ul> <p>7.00 p.m. – 7.45 p.m. Happy Hour &amp; views' sharing in small groups</p> <p>7.45 p.m. Wrap up and closing</p>	

For more information, please visit the Institute's website at [www.hkics.org.hk](http://www.hkics.org.hk) or contact the Secretariat at 2881 6177.



Scan to share with other  
HKICS members!

## Student Ambassadors Programme – list of summer interns 2012

A total of 14 summer intern vacancies were offered by the six companies. The Institute would like to thank them for their support.

Employer	Summer intern	University	Discipline
APF Partners Corporate Services	Katherine Poon	Hong Kong Shue Yan University	BBA in corporate governance
Companies Registry	Natalie Wong	The Chinese University of Hong Kong	Faculty of Law
	Sherine Yeung	Lingnan University	Philosophy
Hutchison Whampoa Ltd	Cherry Chu	Hong Kong Shue Yan University	Bachelor of Commerce in Law & Business
	Queenie Tam	Hong Kong Baptist University	BBA in Accounting
	Angela Wong	Hong Kong Shue Yan University	Bachelor of Business Administration
	Wong Shun Tsz	Hong Kong Shue Yan University	BBA in corporate governance
Reachtop Consulting Ltd	Kinki Chow	The Open University of Hong Kong	Accounting
TMF Hong Kong Ltd	Ceci Fok	The Open University of Hong Kong	Accounting
	Ester Ma	Hong Kong Shue Yan University	Bachelor of Commerce in Law & Business
	Celia Ng	Hong Kong Shue Yan University	Bachelor of Business Administration
	Jerry Tsoi	The Open University of Hong Kong	Accounting
Tricor Services Ltd	Tim Dang	Hong Kong Shue Yan University	Bachelor of Commerce in Law & Business
	Eric Ng	Hong Kong Shue Yan University	Bachelor of Business Administration

Note: company names are in alphabetical order



APF Partners Corporate Services



Hutchison Whampoa Ltd



TMF Hong Kong Ltd



Companies Registry



Reachtop Consulting Ltd



Tricor Services Ltd

## Upcoming activities

### New Students Orientation

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The Institute would like to invite students who have registered since March 2012 to attend a free New Students Orientation. This event aims to give new students up-to-date information on the Institute. It also serves as a platform for them to meet with other students.

Alberta Sie *FCIS FCS(PE)*, the Education Committee Chairman, will be invited to present certificates to the Subject Prize winners. They will also be invited to share their experience on preparing for the IQS examinations.

*Please reserve your seat either by faxing the reply slip from the Institute's website to 2881 5050, or by email to student@hkics.org.hk on or before 13 September 2012.*

<b>Date:</b>	19 September 2012 (Wednesday)
<b>Time:</b>	19:00 – 20:30
<b>Venue:</b>	Etech Centre, Room M6, 4/F, Opulent Building, 402-6 Hennessy Road, Wanchai
<b>Enrolment deadline:</b>	13 September 2012 (Thursday)

### Student Ambassadors Programme (SAP) – tea reception 2012

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The Institute is organising a tea reception for all student ambassadors and their mentors on 15 September 2012. Certificates and souvenirs will be presented to student ambassadors and HKICS mentors at the occasion.

<b>Date:</b>	15 September 2012 (Saturday)
<b>Time:</b>	15:00 – 17:00 (Registration starts at 15:00)
<b>Venue:</b>	Lily Valley Café (百合谷餐厅), Baptist Oi Kwan Social Service, Ground Floor, 36 Oi Kwan Road, Wanchai

### Recruitment of SAP mentors

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The SAP has been an effective platform to introduce the Chartered Secretarial profession to local undergraduates. Members are invited to contribute to the programme as mentors to our student ambassadors. Each mentor will be assigned up to five mentees. Mentors can share their working experience, professional knowledge and give career guidance. The Institute also organises social events for mentors and mentees.

*Members who are interested in becoming an SAP mentor, please contact the Education & Examinations section at 2881 6177, or student@hkics.org.hk.*

## New Companies Ordinance

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Hong Kong's new Companies Ordinance, revised in a major rewrite exercise launched in 2006, has been passed by the Legislative Council. The government hopes the new Ordinance will enhance corporate governance, ensure better regulation, facilitate business and provide a modernised legal framework for the incorporation and operation of companies in Hong Kong.

'This is a historic moment,' Professor KC Chan, Secretary for Financial Services and the Treasury, said as the new Ordinance was successfully passed by LegCo on 12 July, 'we are indeed opening a new chapter in the development of company law in Hong Kong.'

### What's new?

The new Companies Ordinance, which consists of more than 900 sections and 10 schedules, is one of the most complex pieces of legislation in Hong Kong. The main changes to the Ordinance include:

***Strengthening the enforcement regime.*** The new Ordinance strengthens the enforcement regime in relation to the liabilities of officers of companies for contravention of provisions in the Ordinance, including lowering the threshold for prosecuting a breach or contravention through a new definition of 'responsible person'.

***Facilitating simplified reporting.*** The new Ordinance allows companies that meet specified size criteria to prepare simplified financial statements and directors' reports. Larger private companies that do not meet the specified size criteria will also be entitled to prepare simplified financial statements and directors' reports if their sizes do not exceed a higher threshold provided that members holding 75% of the voting rights so resolve and no member objects.

***Strengthening auditors' rights.*** An auditor is empowered to require a wider

range of persons, including the officers of a company's Hong Kong subsidiary undertakings and any person holding or accountable for the accounting records of the company or its subsidiary undertakings, to provide information or explanation reasonably required for the performance of the auditor's duties. The offence for failure to provide the information or explanation is extended to cover officers of the company and the wider range of persons.

***Clarifying directors' duty of care, skill and diligence.*** With a view to providing clear guidance to directors, the standard for company directors' duty of care, skill and diligence is clarified in the new Companies Ordinance to incorporate a mixed objective and subjective test.

***Restricting corporate directorship in private companies.*** Every private company is required to have at least one director who is a natural

## New Mediation Ordinance

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Hong Kong's new Mediation Ordinance, introduced into Hong Kong's Legislative Council on 30 November 2011, was passed on 15 June 2012. The Ordinance seeks to promote and encourage mediation for the resolution of disputes in Hong Kong and to protect the confidentiality of mediation communications.

The ordinance is based on the proposals of the cross-sector Working Group on Mediation chaired by the Secretary

for Justice, Wong Yan Lung, SC. The Working Group recommended that there should be a stand-alone Mediation Ordinance to provide a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. The proposed ordinance includes provisions dealing with the rules of confidentiality and privilege, and sets out the statutory exceptions to the rules and the sanctions for breaching the rules of confidentiality and privilege.

The Ordinance does not include a statutory mechanism for enforcing mediated settlement agreements, as such settlements can be enforced by the courts as contracts where necessary.

*More information on the new Mediation Ordinance can be found on the website of the Hong Kong International Arbitration Centre ([www.hkiac.org](http://www.hkiac.org)).*



person, to enhance transparency and accountability. A grace period of six months from the commencement date of the new Ordinance will be given for companies to comply with the new requirement.

#### ***Abolishing 'par value' for shares.***

The Ordinance adopts a mandatory system of no-par for all companies with a share capital and retires the 'par value' of shares in line with international trends and to provide companies with more flexibility in structuring their share capital.

#### ***Replacing the 'headcount test'.***

The 'headcount test' for privatisations and specified schemes of arrangement is replaced by a 'not more than 10% disinterested voting' requirement. The court is given a new discretion to dispense with the 'headcount test' in cases where it is retained for members' schemes.

#### **Implementation**

The long process of revising Hong Kong's companies law is not over yet. Before the new Companies Ordinance – which has already been the subject of five rounds of public consultations – can be implemented, the government needs to enact more than 10 pieces of subsidiary legislation. The government hopes to complete this process in the next legislative session and to implement the new Companies Ordinance in 2014.

The existing Companies Ordinance (Cap 32) will remain in force after the enactment of the new Companies Ordinance. All the provisions in the existing Ordinance, except those provisions on winding-up and insolvency of companies and prospectuses, will be repealed when the new Companies Ordinance comes into operation. The existing Ordinance will be retitled 'Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)'.

*The new Companies Ordinance was introduced into the Legislative Council on 26 January 2011 and was passed on 12 July 2012. The Ordinance has been uploaded to the 'New Companies Ordinance' section of the Companies Registry's website ([www.cr.gov.hk](http://www.cr.gov.hk)), and the 'Companies Ordinance Rewrite' section of the Financial Services and the Treasury website ([www.fstb.gov.hk](http://www.fstb.gov.hk)).*

*The Institute's Professional Services Panel, chaired by Natalia Seng FCIS FCS(PE), Past President of the Institute, met last month to discuss, among other things, the implications of the new Companies Ordinance for company secretaries. Further information and discussion of this important topic will be included in future editions of CSj.*

## SFC proposes to enhance sponsors' regulatory regime

The Securities and Futures Commission (SFC) has published proposals to enhance the regulatory regime of sponsors in Hong Kong. The SFC issued a report in March 2011 highlighting many deficiencies in the work of sponsors in the listing process, and it hopes the new proposals will raise standards and encourage best practice across all sponsor firms in Hong Kong. 'Sponsors play a lead role in coordinating an IPO,' said Ashley Alder, the SFC's Chief Executive Officer, launching a consultation on the new proposals in May this year. 'They advise and guide directors

and are centrally involved in ensuring that prospectuses contain reliable and relevant information for potential investors,' he said.

Under the proposed regulatory regime sponsors will have civil and criminal liability for untrue statements (including material omissions) in a prospectus. They will need to complete the vast majority of due diligence prior to submitting a listing application and will need to publish the first draft of the prospectus on the website of Hong Kong Exchanges and Clearing Ltd.

The new proposals limit the number of independent sponsors involved in each listing application, and include tougher requirements for sponsor due diligence. Sponsors will be expected to gain thorough knowledge and understanding of listing applicants, in particular they will be expected to adopt an 'open and questioning' approach to information relevant to the listing application.

*Look out for the consultation conclusions on the SFC website ([www.sfc.hk](http://www.sfc.hk)).*

# Careers

To advertise your vacancy, contact Paul Davis:  
Tel: +852 2982 0559  
Email: paul@ninehillsmidia.com



To cope with our continuous growth, we are looking for energetic candidate(s) to join us as:

## Assistant Manager, Company Secretarial (Ref: KYI-AMC)

- Qualified professional with ICSA/HKICS membership
- At least 8 years' related experience, some of which gained from listed companies at managerial / supervisory level
- Affluent with listed and compliance rules and regulations, with in-depth knowledge of the Listing Rules, the Companies Ordinance and relevant provisions of the Securities and Futures Ordinance respecting disclosure of interests
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