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June 2023

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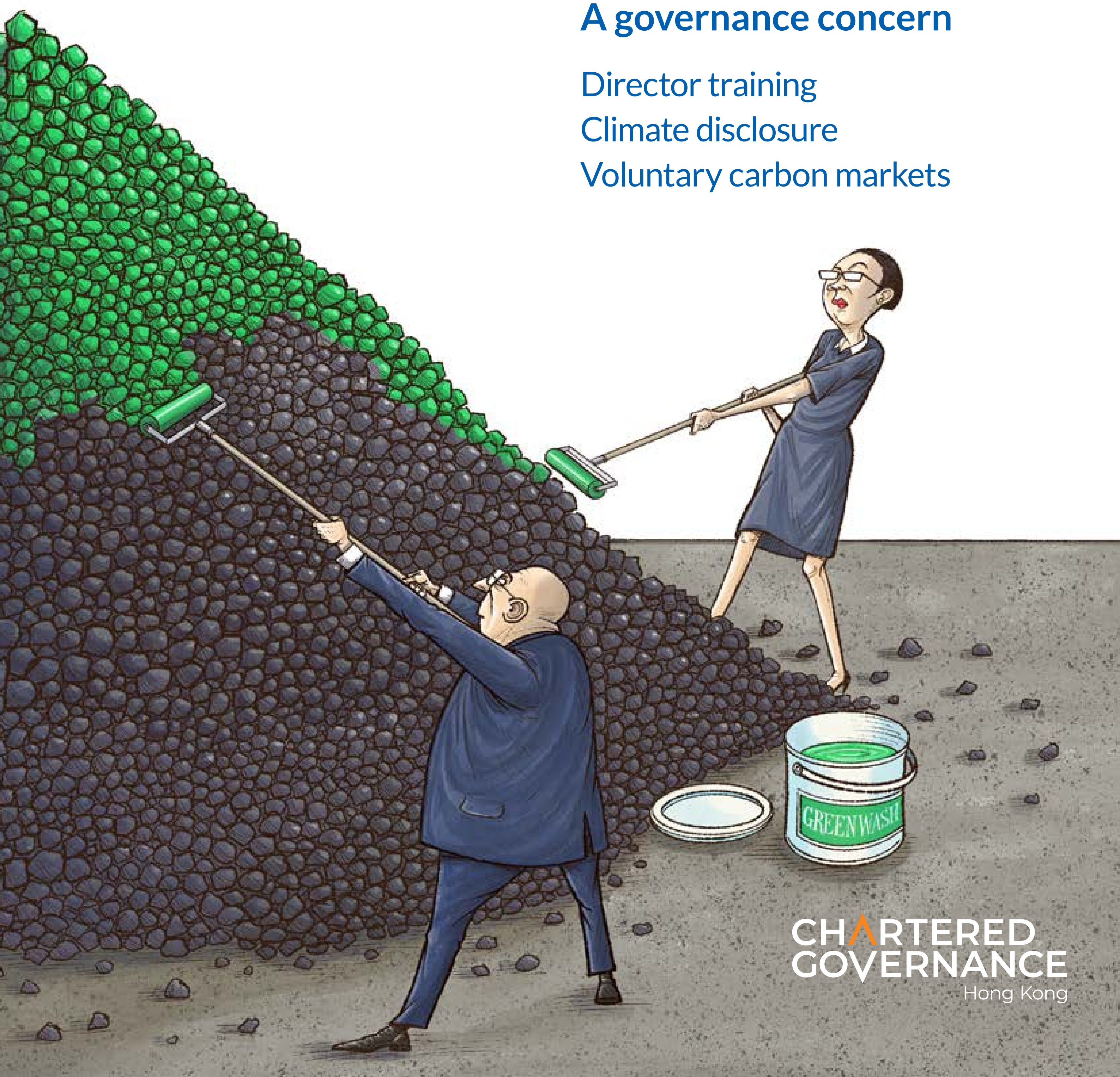
The journal of the Hong Kong Chartered Governance Institute
香港公司治理公會會刊

Greenwashing

A governance concern

Director training
Climate disclosure
Voluntary carbon markets



CHARTERED GOVERNANCE Hong Kong

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Hong Kong

Calling for Nominations of HKCGI Prize 2023

2022
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Past President and Former Chief Executive, HKCGI

2021
April Chan
FCG HKFCG
Past President and Chairman of Technical Consultation Panel, HKCGI

2020
Ada Chung
FCG HKFCG
Privacy Commissioner for Personal Data

2019
Edith Shih
FCG(CS, CGP)
HKFCG(CS, CGP)(PE)
Past International President, CGI; Past President, HKCGI; Executive Director and Company Secretary, CK Hutchison Holdings Ltd

2018
Peter Greenwood
FCG HKFCG
Former HKCGI Representative to CGI Council

2017
Natalia Seng
FCG HKFCG
Past President, HKCGI

2016
Gordon Jones
BBS FCG HKFCG
Former Registrar of Companies

2015
Anthony Rogers
GBS QC JP FCG HKFCG
Former Vice-President of the Court of Appeal of Hong Kong

2014
Neil McNamara
FCG HKFCG
Past President, HKCGI

2013
Edwin Ing
FCG HKFCG
Past President, HKCGI

2012
John Brewer
Past Chairman, The Association of the Institute of Chartered Secretaries and Administrators in Hong Kong

2011
Duffy Wong
BBS JP FCG HKFCG
Past Chairman, The Association of the Institute of Chartered Secretaries and Administrators in Hong Kong

2010
Mike Scales
FCG HKFCG
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(Prize Awardees from 2010 to 2022)

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CHARTERED GOVERNANCE Hong Kong

Good governance comes with membership

About The Hong Kong Chartered Governance Institute

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

The Institute was first established in 1949 as an association of Hong Kong members of The Chartered Governance Institute (CGI). In 1994 the Institute became CGI's Hong Kong Division and, since 2005, has been CGI's Hong Kong/China Division.

The Institute is a founder member of Corporate Secretaries International Association Ltd (CSIA), which was established in March 2010 in Geneva, Switzerland. Relocated to Hong Kong in 2017, where it operates as a company limited by guarantee, CSIA aims to give a global voice to corporate secretaries and governance professionals.

HKCGI has over 6,800 members, more than 300 graduates and around 3,000 students.

Membership and studentship statistics update

As of 30 April 2023, the statistics were as follows:
Students: 2,650 **Graduates:** 410 **Associates:** 6,253 **Fellows:** 836

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Greenwashing: a cautionary tale

This journal aims to be a reliable early warning system for how frontier topics in governance and risk management are likely to impact the roles of governance professionals. This month's *CGj* addresses one such topic – greenwashing.

Our cover story this month demonstrates that, while there is as yet no specific legislation addressing greenwashing in Hong Kong, making unsubstantiated or exaggerated claims about an organisation's environmental standards entails very serious risks. These risks fall into two broad categories – regulatory and reputational.

In relation to the regulatory risks, organisations should not assume that the absence of specific greenwashing legislation in Hong Kong will reduce the likelihood of enforcement action. Our regulators have the ability to take action against companies making misleading statements and they have made it very clear that they intend to use such tools to crack down on greenwashing.

While these regulatory risks should be a sufficient disincentive to get caught up in greenwashing allegations, the reputational risks are likely to be even more serious. Issues relevant to environmental sustainability are the ultimate test of how genuine an organisation's culture is. Lofty rhetoric about intentions to decarbonise or reduce environmental impacts is not what investors and other stakeholders are looking for – they want to see concrete actions and measurable targets. Where these are lacking, however impressive an organisation's ESG or sustainability report might sound, the message they will be taking away will be that the organisation lacks integrity, honesty and, ultimately, credibility.

Our cover story this month does not leave the issue there however. It points out that the message for members of our profession is that seeing an organisation's green credentials through a marketing lens is the wrong way to go – greenwashing is a governance issue. Avoiding the regulatory and reputational risks mentioned above will require boards to have sufficient expertise to address greenwashing issues. It will also require company secretaries to keep directors informed of developments relevant to greenwashing and to ensure that this issue is a regular item on the board's discussion agenda.

Needless to say, to be effective in this role, company secretaries will need to remain well informed both of the rapidly evolving regulatory regime locally, regionally and internationally, but also the macro economic, social and political factors that are shaping this space. Greenwashing is one of those issues that perfectly demonstrates the necessity for members of our profession to take a broader view of compliance. In today's operating environment, best practice is just as important as strict rule adherence and successful governance professionals are increasingly relied upon for strategic advice and good judgement, in addition to the technical skills in regulatory compliance that they bring to the organisations they work for.

Rest assured, this journal, along with our Institute's broader CPD, research and thought leadership initiatives, will continue to help you rise to this challenge and stay tuned to the issues that really matter.

Ernest Lee FCG HKFCG(PE)

漂绿：一个警示

本会刊旨在为治理从业者提供可靠的提醒与预警，让大家意识到治理和风险管理的一些前沿议题可能对治理专业人士所承担角色产生的影响。本月会刊就讨论了这样一个话题—漂绿。

本月的封面故事(Cover Story)指出，虽然香港目前没有针对“漂绿”的具体法例，但对一个组织的环保标准作出未经证实或夸大的声明，会带来非常严重的风险。这些风险可分为两大类——监管风险和声誉风险。

就监管风险而言，公司不应认为香港没有专门的“漂绿”法例，就会减少执法行动的可能性。香港的监管机构有能力对发表误导性声明的公司采取行动，并且已经非常明确地表示，他们打算利用这些工具来打击漂绿行为。

这些监管风险应该足以阻止企业陷入“漂绿”指控，而声誉风险可能更为严重。与环境可持续性相关的问题是检验一个组织文化是否真实的终极标准。投资者和其他利益相关者所希望看到的不是关于脱碳或减少环境影响意图的高谈阔论——他们希望看到具体的行动和可衡量的目标。无论一家组织的ESG或可持续发展报告听起来多么令人印象深刻，如果缺乏这些，它们传递出来的信息将是，该组织缺乏诚信、不诚实，最终使报告缺乏可信度。

本月的封面故事进一步指出，治理从业者需要注意的是，通过营销的视角来看待一个组织的绿色证书是错误的——“漂绿”是一个治理问题。为了避免上述监管和声誉风险，董事会需要具备足够的专业知识来解决“漂绿”问题。此外，公司秘书也需向董事通报与“漂绿”有关的事态发展，并确保这一议题成为董事会议程的常规项目。

毋庸置疑，公司秘书如要在这方面有效发挥作用，需要充分了解本地、区域和国际上快速演变的监管制度，以及对其产生影响的宏观经济、社会和政治因素。漂绿是其中一个问题，它使治理从业者更加意识到对合规事宜应采取更宽泛视角。在当今的企业运营环境中，最佳实践与严格遵守规则同样重要，对于成功的治理专业人士来说，除了为雇主提供合规方面的专业支持，他们的战略建议和良好的判断力也越来越被倚重。

本会刊及公会的涉及议题日益广泛的持续专业发展课程、研究和思想领导力倡议等工作将帮助大家迎接这些挑战，并持续保持对关键问题的关注与洞察。

李俊豪先生 FCG HKFCG(PE)

Greenwashing – your questions answered

Organisations and directors face significant reputational and liability risks if they engage in greenwashing. Sharan Gill, Associate Editor, *CGj*, answers key questions about the nature, and best practice management, of these risks.

Greenwashing allegations have been much in the news recently. On 15 February this year, climate activists voiced concerns about Lufthansa's introduction of 'Green Fare' flights – in particular questioning the suggestion that these flights' CO2 emissions were being compensated for. In October last year, HSBC suffered a blow to its green credentials when the UK advertising watchdog banned a series of misleading adverts and said any future campaigns must disclose the bank's contribution to the climate crisis.

The reputational fallout arising out of these incidents is a stark reminder to organisations of the risks associated with greenwashing. 'If a company or institution is going to make statements that project ESG commitments, it is going to have to make sure those statements are truthful, accurate and clear, and the claims that it makes are going to have to be substantiated,' says Ben McQuhae, Founder, Ben McQuhae & Co.

What is greenwashing?

There can be no doubt that greenwashing is a key concern for governance professionals, but it is not easy to pin down an exact definition, partly due to varying terminology around this space. A paper published in January this year by a consortium of ESG experts led by Dr Daniel Cash of Hong Kong law firm Ben McQuhae & Co – Joint Response to ESAs Call for Evidence on Better Understanding Greenwashing (Greenwashing Paper) – explains that the term has traditionally been defined as the intersection of two firm behaviours, namely, poor environmental performance and positive communication about environmental performance. In particular, organisations making

Highlights

- listed companies have an obligation to make sure that the statements they put out in the public domain are truthful, accurate and, crucially, that the claims they make are substantiated
- regardless of whether there are any regulations in Hong Kong specifically targeting greenwashing, directors are already exposed if they overlook greenwashing that presents a material risk to the financial performance of the company
- directors need to be mindful of potential reputational and liability risks to themselves and their companies, and they may be held to account in the future for the data they release now

commitments in the public domain – for example net zero within a specified time frame – need to ensure that these commitments are backed up by management processes, key performance indicators (KPIs), strategies and specific plans.

The Greenwashing Paper highlights key practices that can amount to greenwashing.

- Selective disclosure – where firms focus on beneficial or relatively benign performance indicators to obscure their less impressive overall performance.
- Decoupling – where symbolic actions are taken, or statements made, aimed at satisfying stakeholder expectations in terms of sustainability and to deflect attention from the real issue – the need to take concrete action.
- Executional greenwashing – much more subtle in nature, this is where no explicit claims are made, but the overall impression given is that of sustainability, or of a commitment to improving the environment, in the absence of actual measures taken to back this up.

In essence, says Pat Nie Woo, Partner and Head of ESG in Hong Kong at KPMG China, 'there is often a disconnect between the external facade and the internal reality'.

Why is greenwashing a governance issue?

One of the reasons greenwashing has become prominent so quickly, says McQuhae, (also one of the authors of the Greenwashing Paper), is that 'it is an essential tool to accelerate capital to sustainable projects'. Investors need to be able to rely on the ESG information, including the mission statements, provided by companies, but some companies may be tempted by the prospect of attracting investor capital by inflating their sustainability credentials.

Mr McQuhae points out that, as we look to integrate anti-greenwashing mechanisms into financial systems, we have to be mindful that it is a process, and should be working to educate the regulators, as much as listed companies, on why it is important to get this right. 'Sustainability is not something you do on the side,' says Mr Woo. The question to address, he emphasises, is whether a company's sustainability processes are robust.

While companies can be exhorted to make changes from within, it is also important for regulators to ensure enforcement of the rules. When companies and directors have reason to believe that the regulators are going to scrutinise their disclosures for signs of greenwashing, then the fear of reprisals, and the inevitable reputational fallout involved, will be the most effective method to encourage best practice.

What are the relevant regulatory developments?

In Hong Kong there is no legislation specifically targeting greenwashing, but some aspects of greenwashing could fall within the existing framework. Regulators already have the tools to take action against companies making misleading statements, for example, under existing laws addressing misrepresentation.

Are misrepresentation provisions an effective tool to tackle greenwashing? Mr McQuhae points out that there has to be a victim and that victim has to be willing to take action, but in most cases a victim of greenwashing is unlikely to initiate court action. He

> sustainability is not something you do on the side

Pat Nie Woo, Partner and Head of ESG in Hong Kong at KPMG China

points out that we have yet to create enough definition around these terms to create a level of certainty to be able to address greenwashing in a coherent manner similar to how other forms of misrepresentation are tackled.

Specific greenwashing regulation would be a more effective deterrent, emphasises Mr Woo, as regulators always kickstart the process of behaviour change. He believes that we need regulation to come in 'to enforce change, enforce disclosure and enforce accuracy of information'.

The international picture

Globally there has been a concerted drive for clearer and more standardised reporting standards to allow stakeholders to better monitor companies' green credentials. The International Financial Reporting Standards Foundation, for example, launched the International Sustainability Standards Board (ISSB) in November 2021 to establish a comprehensive global baseline for sustainability disclosures.

Meanwhile, the International Organization of Securities Commissions (IOSCO) has emphasised a focus on mitigating greenwashing, and recommends greater disclosure requirements.

Within the UK there have been many developments with significant implications for the fight against greenwashing.

- The Financial Conduct Authority (FCA) in its last annual letter emphasised that it would exercise more stringent supervision over ESG integration in asset management. It rolled out a consultation in 2022 to introduce regulations to help mitigate greenwashing risks.
- The Competitions and Markets Authority (CMA) has, via the Green Claims Code, provided guidance on environmental claims in goods and services.
- The Committee of Advertising Practice has published guidance on making carbon neutral and net-zero claims in UK advertising, non-broadcast and broadcast.

In the US, the Securities and Exchange Commission has proposed to amend the rules to enhance scrutiny of ESG funds. This will dictate that a fund's investment portfolio must constitute at least 80% of its stated target.

In the EU, the Green Deal approach has taken several forms which will impact the development of anti-greenwashing initiatives. The Sustainable Finance Disclosure Regulation, the EU Taxonomy (which provides a minimum standard across sustainability disclosure requirements) and the recently implemented Corporate Sustainability Reporting Directive present a unified approach to disclosure, identification and substantiation.

Hong Kong's regulatory trajectory

Mr McQuhae points out that, historically, Hong Kong regulation has been significantly guided by developments in other key markets. Shareholders demand what constitutes best practice internationally and, presently, much of the best practice with regards to greenwashing accords with standards being set in the UK.

Regulators in Hong Kong have, however, been rapidly evolving local regulatory requirements to combat greenwashing.

- Hong Kong Exchanges and Clearing Ltd (HKEX) proposes to upgrade Appendix 27 of the Main Board Listing Rules to align with the standards expected to be released this month by the ISSB.
- The Securities and Futures Commission (SFC) has highlighted greenwashing as a key threat to the development of green and sustainable finance and is focused on mitigating this risk. In its agenda for green and sustainable finance – Strategic Framework for Green Finance – the need to tackle greenwashing is stated as a key challenge for the SFC. It remains to be seen whether the SFC's approach will include new

> **greenwashing is a shorthand that we use to advocate for transparency, and proper and accurate communication**

Ben McQuhae, Founder, Ben McQuhae & Co

greenwashing-specific regulation, an ESG-enforcement taskforce, direct enforcement action, or a combination of these.

- The Hong Kong Monetary Authority has also been addressing greenwashing issues. In a research paper published in November 2022 – Greenwashing in the Corporate Green Bond Markets – it estimated that up to 30% of green bond issuers are engaged in greenwashing.

What does this mean for directors?

Under Appendix 27 of the Main Board Listing Rules, the board has overall responsibility for an issuer's ESG strategy and reporting – this of course includes greenwashing. Mr McQuhae points out that 'regardless of whether there are any regulations in Hong Kong specifically or otherwise targeting greenwashing, directors are already exposed if they overlook a greenwashing event that presents a material risk to the financial performance of the company'.

Mr Woo highlights key questions the board should be addressing.

- Is there sufficient expertise when looking at these issues?
- Is there someone responsible for this?
- Is the board setting up a sustainability committee to look at this more closely?
- Is there sufficient incentive for non-executives to review the processes involved?

Mr McQuhae emphasises that whether you are an independent non-executive director (INED), or an executive director, you cannot claim ignorance of these issues – ignorance is not a defence to the discharge of a director's duties. This is particularly true for directors who take on a role with specific responsibility for the management of ESG issues and they need to be careful to ensure that they are properly informed in order to be able to make key decisions. If such directors cannot identify a greenwashing issue, they will suffer reputational damage along with the company.

At heart, this is a transparency issue. 'Greenwashing is a shorthand that we use to advocate for transparency, and proper and accurate communication' Mr McQuhae says. He points out that increasing transparency requirements in the current market are going to inform best practice going forward. The focus will be on ensuring that listed companies have an obligation to make sure that the statements they put out in the public domain relating to the environment are truthful, accurate, and, crucially, that the claims they make are substantiated.

This needs to be very much on the risk register of INEDs and embedded in the enterprise management framework. INEDs should be asking: should internal audit be involved? Should internal audit be looking at the robustness of the ESG reporting process?

It is also important to look beyond the jurisdiction that a company may be listed in and assess greenwashing risks across all jurisdictions that are relevant to shareholders. In particular, greenwashing allegations may result when companies are not coherent with their disclosures across the different jurisdictions they operate in.

What are the implications for sustainability reports?

Preparation

The ESG space is changing rapidly with new regulations and requirements coming out every year. The regulatory developments mentioned above will likely mean that organisations will soon have to start disclosing the impact of climate on their enterprise value, and there will be a need for increasing quantitative disclosures over time. The accuracy of the numbers being disclosed will come under scrutiny exposing companies to greenwashing risks.

It will be very difficult for any organisation to keep abreast of all of these changes as soon as they come out without external assistance, but Mr Woo believes that, ideally, an organisation should gradually develop its capabilities in the preparation of sustainability reports. Though initially externally outsourced, over time internal management should be able to take on more of a role.

Assurance

Mr McQuhae stresses that listed companies need to ensure that both the qualitative aspects of their ESG reports and the data are independently assessed to ensure that disclosures are in compliance with all applicable regulations in Hong Kong and any other jurisdictions that key shareholders are subject to.

Preparation and assurance have to be looked at differently, points out Mr Woo. The consultants preparing the report should not be assuring it and vice versa. However, at present the assurance landscape globally is not sufficiently regulated. Currently there are different types of assurance, with different types of companies using different methodologies to assure ESG reports. Some are assured by well-known global accounting firms, but there are other organisations that are not under a regulatory regime. This results in differing types and quality and robustness of assurance. The assurance of ESG reports, he emphasises, needs to be aligned globally.

What is the role of environmental activist groups and the media?

One effective deterrent to greenwashing is the role of activists, NGOs and the media. The greenwashing paper mentioned above points out that, as consumers, the public and investors become more interested in environmental issues, environmental activist groups become more powerful and can exert influence and pressure on companies. The threat of public exposure stemming from the accusation of a third party is an essential element of greenwashing risk that companies need to be wary of.

McQuhae suggests that we shift focus to the UK, which has the newest and latest anti-greenwashing regulation. He points out that it is no coincidence that much of the high-profile naming and shaming has happened in the UK. This has not been necessarily through the regulator but primarily through the advertising standards agency. 'It is this public profile of naming and shaming through enforcement action that has probably done more to alert the business communities than any regulation that already exists or is in the pipeline,' he says.

What is the role of governance professionals?

Governance professionals need to be kept up to speed via CPD to ensure that they are aligned with the market and new developments. 'There is a need for both financial and ESG reporting to hold the same sway', says Mr Woo. 'It will take some time but it needs to happen, when real dollars are changing hands based on the information you put out in the public domain, accuracy becomes vital'.

He adds that financial information that a company puts out in the public domain needs to be future proof. What is acceptable now may not be acceptable in the future. Companies need to be aware of this – sustainability claims made today need to be credible and to hold up to scrutiny in the years to come.

How important are ESG ratings?

Related concerns pertain to how the ratings market has evolved, and the perceived lack of clarity and certainty over the methodologies being applied. Even those companies that have shown goodwill in reporting GHG emissions may cherry-pick their data and methodologies. The question thus arises whether there should be a level playing field, and all companies should be measured equally. However, as ESG ratings help shareholders verify the sustainability performance of a company, it is important for management to identify which methodology is relevant to the company's operations, not just which should enable it to score better. The cookie-cutter approaches of third-party ratings may not necessarily be effective to compare and contrast the relevant sustainability performance of different companies.

Sharan Gill

Associate Editor, CGj

Governance and sustainability – what's next?

In this concluding part of our interview with Dr Christine Chow, board member, International Corporate Governance Network, and Head of Active Ownership at Credit Suisse Asset Management, she talks about how the approaches to governance and sustainability are likely to evolve in the years ahead.

In the first part of this interview, published last month, we discussed how the main focus of the ESG movement has been on environmental aspects, but that there is likely to be an increased focus on social aspects in the future. What's your view of how the 'G' aspect of ESG fits into all of this?

'I don't find the ESG acronym very useful – are we talking about the need for net-zero alignment? Are we talking about working conditions, health and safety or diversity and inclusion? As my friend Professor Fabrizio Ferraro stated in his conversation with Professor Alex Edmans, who published the provocative but well regarded paper, The End of ESG, ESG does not need a specialised term, as that implies it is niche. Considering long-term factors when valuing a company is not ESG investing; it's just good practices in investing. We want great companies, not just companies that are great at ESG. Not all ESG factors improve long-term firm performance.

Similarly, the term biodiversity is very broad – are we talking about soil health, are we talking about the extinction of certain species? As my colleague, Dr Christoph Biehl, Senior Active Ownership Specialist, Credit Suisse Asset Management, has pointed out in the FAIRR Oceans and Biodiversity Impact Report, published in November 2022, "Companies with a dependency on natural capital, such as those in the food industry, should have an understanding of how this dependency may be affected by climate change. In this specific case, this could be the migration of fish due to changing sea conditions. Food producers are closely exposed to the double materiality of environmental degradation and should therefore be at the forefront of assessing and mitigating this risk". In our recently published 2022 Active Ownership report, we further discussed different aspects of biodiversity by looking at distinct companies and their individual interactions with the biosphere.

Having said that, focusing exclusively on E&S is a very bad idea. Some of the biggest scandals that have brought the biggest harm to society and the biggest harm to investment value were caused by governance failures. If we look at the UK, its governance-related reports and Stewardship Code were induced by governance scandals, from the Robert Maxwell case in 1991 that led to the Cadbury report, Walker Report and the Kay review, to the impact of the 2008 Great Financial Crisis that gave us the 2012 UK Stewardship Code. So I think the 'G' should really be the top priority. Most of the people who have been in this industry for a long time would say that governance is always the most important because without improving governance processes and their effectiveness in practice, changes in E&S cannot be implemented well.

If companies focus only on, say, being aligned with the United Nations Sustainable Development Goals they are forgetting the elephant in the room. If governance issues are not addressed, for example if board oversight is not strong and directors do not speak up because there is no safe space to challenge ideas and the status quo, this may lay grounds for problems in the future.

Also, many issues that might come under the 'E' or the 'S' headings are

Highlights

- companies that focus only on the 'E' and 'S' aspects of ESG are forgetting the elephant in the room – the need for good governance should be the top priority
- regulations are there to drive a change in outcomes and behaviour – they were never intended to drive compliance in name but not in spirit
- investors are looking for evidence that company executives are not afraid of running towards problems to address them before they become big issues, rather than sweeping them under the carpet

> some of the biggest scandals that have brought the biggest harm to society and the biggest harm to investment value were caused by governance failures

also governance issues. In the UK, the Financial Conduct Authority (FCA) often focuses on the issue of culture in its discussion papers. For example, as the late Sir Win Bishoff said, "a healthy culture both protects and generates value. It is therefore important to have a continuous focus on culture, rather than wait for a crisis". Sir Win sponsored the project on corporate culture, which led to the publication of Corporate Culture and The Role of Boards by the FCA in 2016.

Culture affects how people work together so it is an 'S' issue, but it is primarily a governance issue – culture is about having an atmosphere and processes in place where a board can challenge management when necessary, and colleagues that will speak up when they think things are not right. It is about ensuring the quality of implementation of policies and processes. Look at the Theranos example – the company had a lot of well-known people on its board, but did any of them raise the alarm about the ongoing fraud? Eventually, it was a brave whistleblower who uncovered the wrongdoings.

In fact, we should not forget about governance and what good governance really means – this is about more than tick-the-box compliance. An independent board of directors is crucial to the economic success of a company. Business strategies need adjusting more often these days in response to rapidly changing circumstances, and therefore changes to the executive board occur more frequently than in the past. Hence, ensuring the board, especially the audit and compensation committees, are independent and effective is of vital importance. Investors appreciate the opportunity to vote on compensation for the board and the executive management team. Europe is advanced in compensation governance matters, with regulatory-mandated binding votes on executive and, depending on the market, also on director remuneration. Companies in Asia can benefit from such best practices.'

Is the Theranos example also a warning to company secretaries and governance professionals who are responsible for supplying directors with the information they need to make the right decisions?

'Yes, but board members can't just rely on what is being presented to them in the boardroom. They need to have alternative channels of information if they want to do the job properly. This is particularly important for independent board directors as they do not have executive responsibilities in a company. They should conduct their own due diligence, such as shop visits, if the company is in the consumer sector, or visit a bank branch and speak to frontline staff when they can, so that they can get a real sense of the culture and workforce sentiment.

I appreciate that not all sectors provide directors with the opportunity to conduct such due diligence – many sustainability-related risks come from the value chain, for instance, in upstream suppliers and in downstream logistics. Directors may need insights from a range of venues and operations, from forests to mines and manufacturing operations. Hence, working with investor initiatives and supranational organisations that provide such access would be extremely valuable.

To give some examples, the OECD has organised mine site visits in the Democratic Republic of Congo; FAIRR, the investor collaboration initiative referenced above by my colleague Dr Biehl, has organised an aquaculture visit to the Nordics; and in April 2023, the Investor Policy Dialogue on Deforestation (IPDD) Initiative organised a delegation to Brazil to visit government representatives, companies and forests. There is no better way to understand a company and an issue than doing proper on-site due diligence, both planned and impromptu.'

In the first part of this interview you made the point that investors are looking for quality rather than quantity when it comes to corporate disclosures – could we revisit the issue of quality disclosure and materiality here?

'Companies should not lose sight of what their indicators actually mean and what story they are trying to tell. Companies often put out a lot of data and indicators relating to diversity, equity and inclusion (DE&I). Sometimes such data looks good on paper but doesn't actually represent any gain in relation to DE&I. Investors have noted the practice, for example, of changing the definition of seniority to improve a company's gender diversity indicators in the top leadership. This tactical manipulation is a waste of resources and is really an indicator of bad culture.

At Credit Suisse Asset Management, we are working with peers to come up with a list of social indicators that reflect financial materiality to a company, as well as impact on employees or the society. We are providing collaborative feedback to the European Financial Reporting Advisory Group to support the development of consistent and transparent indicators. We have leveraged our experience engaging with companies as we have developed a bespoke questionnaire that focuses on a range of relevant material factors specific to funds' characteristics.'

Would switching to an outcomes-based approach be solution to this?

'This is the direction of travel, as noted in the UK Stewardship Code 2020 and the latest Guidance for Pursuing Impact in Listed Companies published by the Global Impact Investing Network, but the definition of the desired outcomes needs to be a lot smarter. For example, how do you choose what staff training is appropriate and how do you measure the return on investment in this training? What do you expect as a change of behaviour, or as an improvement in efficiency? If you cannot measure what you are expecting in terms of change post-training, you are wasting people's time and company resources.'

Do you expect to see regulatory regimes globally take an increasingly outcomes-based approach?

'Regulations are there to drive a change in outcomes and a change in behaviour – they were never intended to encourage compliance in name but not in spirit. Any regulator or standard setter will tell you that the regulations are a form of guidance to help raise standards.

But we should also bear in mind that, while the narrative and expectation is to drive a change in behaviour, regulations and standards are building blocks. If you asked me whether the SASB indicators are enough to set a company's own indicators, I would say no because they're quite basic. So we need companies to add layers of explanation on top of the basic set of indicators – they need to tell their story based on their business model. It has always been about the story and the business model. Companies, whether public, private or start-up, are trying to sell investors their story about how to be a successful company. The indicators provide the data and information to back this up.'

Regulators in Hong Kong have made it clear that they intend to align the local regulatory regime with international standards – in particular those of the International Sustainability Standards Board (ISSB). Do you think this will result in a steep learning curve, for example for companies not yet reporting on their Scope 3 greenhouse gas (GHG) emissions?

'The ISSB announced in December 2022 that Scope 3 will be on the agenda. You can find a short video about this online as, after every board meeting, ISSB discloses the key outcomes online. This is sending out a really good message – it's not about the fact that the board had six hours of meetings, it's about the major decisions the board made during those meetings.

Coming back to Scope 3, while this will be a requirement, there will be some exemptions to the reporting requirements in the first year. The idea is to incentivise progress – no one is ever perfect and the definition of perfection keeps changing anyway.

> **investors … are looking for companies that may not be perfect today, that may never be perfect, but that just want to do better**

One of the things my horse-riding has taught me is that the pursuit of perfection reflects the growth mindset of a company.

Investors have more confidence that problems will get addressed if a company has a growth mindset. They are looking for companies that may not be perfect today, that may never be perfect, but that just want to do better. So they are looking for evidence that the executives are not afraid of running towards problems to address them before they become big issues, rather than sweeping them under the carpet.

That is why, in engagement, we often ask situational questions – how would you handle this scenario? How do you address conflicts of interest? If executives are uncomfortable talking about conflicts, that is a problem for me. If they cannot acknowledge these issues, how are they going to get their staff to escalate problematic issues to make sure they are addressed.'

What's your view of the current controversy surrounding carbon credits?

'I think we need to approach carbon credits with caution, especially the voluntary carbon market. You've probably seen the criticisms around how carbon credits are calculated. We need to be cautious about the mechanism and methodology used to certify carbon credits, but I don't think we should ignore them. They are a way of providing natural assets with a proper price in the world. Without trustworthy carbon credits it would be harder to protect natural resources because there would not be enough value being put on them.'

Lastly, can you tell us about developments in your own career – in particular your work as Convenor of the Sustainability and Climate Action Task Force set up by the Accounting and Financial Reporting Council (AFRC) here in Hong Kong?

'The task force is composed of a diverse group of people. Even though I'm from Hong Kong, I hope to bring more of a global perspective to the discussions, making sure of course that it is applicable to Hong Kong and, in a broader context, Greater China.

When the task force members were appointed, we were asked to do a blue sky study of what is needed to support Hong Kong to continue as a financial centre through the climate lens, but also looking at broader sustainability issues. This will of course be partly about the impact of the ISSB standards, which I think will be an important part of encouraging sustainability integration.

The task force had monthly meetings last year, sometimes inviting experts from Hong Kong and around the world to speak to us – including regulators, standard setters and independent industry experts. We've come up with a report and our recommendations are under review by the AFRC.'

Could you also update us on your work as a board member of ICGN?

'ICGN was established after the Cadbury review in the UK and was one of the first governance networks with a global remit. It has done a fantastic job as a platform for a global dialogue on governance. We try to make it as globally relevant as possible and we are always learning about what has worked in different jurisdictions. Our recent conference in Stockholm is a good example of that. While ICGN advocates one share one vote, one of the issues discussed at the conference was how Sweden has made dual-class shares work.

So it's very much a learning organisation with a learning culture that is open to ideas. We are making a conscious effort to encourage young sustainability and governance professionals to join us and to share their perspectives about the future of our industry. For example, in 2021, we established the Rising Star Awards to explicitly acknowledge the industry-leading work of promising young talent. I feel very privileged to be working with ICGN and will continue to contribute by bringing the Asian perspective to the global audience and the global perspective to the local audience, which is what I hope to achieve at the AFRC as well.'

Dr Christine Chow was interviewed by CGj Editor Kieran Colvert. The first part of this interview was published in the May edition of this journal and is available via the CGj website: https://cgj.hkcgi.org.hk.

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Carbon offsets: how your business can benefit

Dr Agnes KY Tai, Chief EC.ESG Investment Strategist, BlueOnion, highlights how carbon offsets can assist companies in their transition towards low-carbon operations, products and services.

Climate change is one of the most pressing issues facing the world today. The effects of rising temperatures, extreme weather events and sea level rise are already being felt around the globe. In response, governments, businesses and individuals are taking action to reduce their carbon footprint and mitigate the effects of climate change.

Hong Kong is well-positioned as the Greater Bay Area (GBA) green finance hub. President Xi Jinping's July 2022 speech, which referred to Hong Kong as a 'springboard', further emphasises the city's importance as a super connector, not only in capital markets activities but also in the global fight against climate change. The Hong Kong Climate Action 2050 plan and the Mainland's commitment to peak greenhouse gas (GHG) emissions by 2030 and achieve carbon neutrality by 2060 are significant steps towards achieving a sustainable future.

How can voluntary carbon markets help?

There are many well-known measures businesses can take in their transition towards low-carbon operations, products and services. These include: investing in renewable energy, improving energy efficiency, reducing embodied carbon in materials, use of low carbon transportation, and collaborating with suppliers and customers in emissions reduction. Businesses can also contribute to carbon neutrality efforts, however, through participation in voluntary carbon markets (VCMs). In particular, they can utilise carbon credits where carbon removal technology is not available at scale yet.

VCMs are distinct from compliance carbon markets in that they are not legally mandated but are instead driven by voluntary commitments to reduce emissions. The role of VCMs is to provide a platform for businesses to offset their hard-to-abate residual emissions by purchasing carbon credits from projects that reduce or remove GHG emissions. These credits are generated by projects such as (re) forestation, renewable energy and energy efficiency. Each carbon credit is equivalent to offsetting one tonne of GHG emissions.

The HKSAR Financial Services Development Council recently published a research report titled – Road to Carbon Neutrality: Hong Kong's Role in Capturing the Rise of Carbon Market Opportunities. The report predicts that global VCMs will grow to a value of US$17.1 billion by 2027. As a leading international financial centre with deep experience in capital markets, strong connections with international investors and proximity to the Mainland, Hong Kong is in a prime position to operate a dynamic VCM that caters to the global business and investment demands.

Key considerations for companies in Hong Kong

In October 2022, Hong Kong Exchanges and Clearing Ltd (HKEX) launched its own VCM – Core Climate. By November, 40 trades were completed by 20 participants, representing around 400,000 carbon credits (offsetting around 400,000 tonnes of GHG emissions). This trusted platform enables the registration, transaction and settlement of quality carbon credits in Hong Kong dollars and RMB on a Delivery-versus-Payment basis. The transacted credits are retired to avoid double-counting.

Carbon credit issuers in VCMs are project-based. The nature and vintage of these projects – vintage here refers to the year that the associated carbon credits were issued or the year in which the GHG emission reductions occurred – together with the jurisdictions involved and the verification standards and methodologies used, can vary significantly. This diversity allows businesses to choose projects that align with their values and goals. Businesses can benefit from VCMs by offsetting their hard-to-abate residual emissions, which are emissions that

Highlights

- a recent research report, published by the HKSAR Financial Services Development Council, predicts that global VCMs will grow to a value of US$17.1 billion by 2027
- carbon credits are particularly useful where carbon removal technology is not available at scale yet
- businesses with the desire to sell, or need to purchase, verified carbon credits can transact through Core Climate – the VCM launched by HKEX in October 2022

> **VCMs provide a platform for businesses to offset their hard-to-abate residual emissions by purchasing carbon credits from projects that reduce or remove GHG emissions**

cannot be eliminated through internal measures. The Science-Based Targets initiative (SBTi) does not allow carbon offsets to count towards GHG emissions reduction targets except for hard-to-abate residual emissions, but they can still contribute to reducing a business's carbon footprint.

It is important to note that carbon credits are not a commodity due to the different nature of projects and vintages. The quality of carbon credits is essential and attributes, such as additionality, permanence and MVR (monitoring, verification and reporting) can affect their value. To date, the most used standards are those of the Verified Carbon Standard Program operated by VERRA, and the Gold Standard – a voluntary carbon offset programme focused on progressing the United Nation's Sustainable Development Goals.

Some of the considerations in the corporate use of carbon credits include:

- the need to understand the VCM and the nature of the credits on offer
- the availability of the desired vintage
- the available budget
- the risk of being seen as not having done enough to reduce your carbon footprint, and
- the fact that SBTi does not allow carbon offsets to count towards GHG emissions reduction targets.

Building liquidity

The exchange-traded carbon credits' price discovery requires volume and liquidity, which can be challenging to achieve in VCMs. Supported by the evidence of a successful 'Stock Connect' regime, Core Climate and China Beijing Green Exchange can potentially form a 'Carbon Connect' to increase liquidity and facilitate price discovery. As the carbon market becomes more mature, carbon-themed indices and derivatives could also be developed, which would further enhance trading volume.

Going forward, a unified GBA carbon market could provide an opportunity for businesses to participate in a more extensive and more liquid market. The integration of the GBA's carbon market with Shanghai's national Emissions Trading System could also provide opportunities for businesses to participate in a more extensive and more liquid market. The GBA's carbon market could facilitate the flow of capital and technology across the region.

Businesses with projects that remove GHG emissions could potentially generate revenue by selling verified carbon credits on an exchange such as Core Climate. This would provide an opportunity for companies to not only reduce their carbon footprint but also contribute to the growth of the VCM.

The fight against climate change requires collective action, and businesses can play a significant role in decarbonising our economy and in achieving a sustainable future.

Dr Agnes K Y Tai, Chief EC.ESG Investment Strategist

BlueOnion

In addition to her work with BlueOnion, an intelligent sustainability platform that empowers responsible investing, the author is Director of her family office Great Glory Investment Corporation; Governing Board member of the Climate Governance Initiative and Founding Steering Committee member of its Hong Kong Chapter; Advisory Board member of Asia Climate Forum; Council member of the Hong Kong Institute of Directors; and an expert review panel member of MTR's sustainability reports. Agnes holds multiple globally recognised certificates in climate, sustainability and ESG investing, trains board directors in sustainability across five continents and has held senior roles in asset/risk/investment management in various jurisdictions over the past 43 years. She has a PhD from the Hong Kong University of Science and Technology and an MBA from the University of Chicago, Booth School of Business. She is an author and a frequent speaker.

Corporate Governance Paper Competition and Presentation Awards 2023

Saturday 16 September 2023
10.00am - 1.00pm

The annual Corporate Governance Paper Competition and Presentation Awards organised by the Institute aims to promote the importance of good governance among local undergraduates. This is a great opportunity for students to learn about teamwork and to research, write and present their thoughts on a selected theme. The topic this year entices applicants to evaluate the question – '**Climate change disclosures – is the world too focused on this topic?**'

Awards

- **Best Paper:** HK$11,000
  The best paper will be published in the HKCGI monthly journal
- **Best Presentation:** HK$6,000
- **Audience's Favourite Team:** HK$2,000

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Director training – a focus on INEDs

Session 3 – avoiding complacency

The third and final session of the Institute's director training series, held in collaboration with Hong Kong Exchanges and Clearing Ltd (HKEX), urged all directors, but independent non-executive directors (INEDs) in particular, to avoid the danger of complacency about their roles in upholding good governance.

The third and final session of the Institute's director training series (Director training – a focus on INEDs) was held on 17 March 2023 at the HKEX Connect Hall.

In their speaker presentations, Jon Witts, Senior Vice-President, Head of Enforcement, and Candy Au, Assistant Vice-President, Enforcement, both of the Listing Division, HKEX, clarified the standards expected of directors, in particular INEDs, in their roles as champions of governance. They pointed out that many directors who find themselves involved in HKEX enforcement investigations and disciplinary actions are well-intentioned and surprised to find themselves in the spotlight. It is often complacency and a lack of awareness regarding the roles they are supposed to be fulfilling, rather than a desire to commit fraud, that has put them there. In this context, the speakers focused on three key factors that HKEX looks at when assessing whether directors have adequately fulfilled their duties.

1. Providing independent judgement

The first factor relates to the exercise of independent judgement. 'Contributing their independent judgement on the business of the company is at the absolute core of everything INEDs do,' Mr Witts said. 'They need to have and speak their own mind.'

This includes avoiding groupthink, and INEDs must not become a puppet for the controlling shareholder who may have had a hand in their appointment. It also involves being proactive in getting the information they need to be able to provide independent judgement.

Mr Witts used the example of a director being asked to assess a complex corporate transaction that is out of his or her area of expertise. He emphasised that directors are not expected to be an expert on everything, but they are expected to act when they realise that they don't have enough information to provide independent judgement. 'This is where they need to ask questions to ensure that they are aware of what's going on in the company,' Mr Witts said.

Ms Au further clarified this issue in her presentation. She said that INEDs involved in disciplinary cases often use the defence that they, unlike the executive directors, are not responsible for the day-to-day business affairs of the company.

'We're not saying that you share the same role as executive directors,' she said. 'In fact, you may delegate and rely on others, whether they are other board members, professional advisers or other staff members, but we do expect you to play at least a continuing supervisory role. We want to see that you have an inquiring mind, and that you use your wisdom and experience to make independent decisions,' she said.

This topic came up in the panel discussion at the end of the webinar. The chair of the session, Mohan Datwani FCG HKFCG(PE), Deputy Chief Executive, The Hong Kong Chartered Governance Institute, invited the panellists to share their own insights on the topics under discussion. Panellist Ernest Lee FCG HKFCG(PE), Institute President, and Technical Partner, Deloitte China, emphasised that providing independent judgement was particularly critical where INEDs are reviewing corporate transactions.

'It is really important for INEDs to exercise independent thinking as to whether the transaction makes sense for the company and whether the transaction terms are fair and reasonable,' he said.

He added that Listing Rule 3.08 makes it clear that directors, as a group collectively and individually, are responsible for the affairs of the company. This he linked to the point made above by Ms Au about INEDs frequently relying on the defence that they cannot be expected to share the same level of culpability as the executive directors. He emphasised

Highlights

- HKEX has imposed public sanctions on about 400 directors, many of whom are INEDs, since the start of 2020, and the list is growing at a rate of about three a week
- a director's failure to ensure adequate internal controls can, in and of itself, be a breach of the Listing Rules
- HKEX wants to see that directors have an inquiring mind, and that they use their wisdom and experience to make independent decisions

that all directors are expected to exercise their duties of care, skill and diligence.

'INEDs need to recognise that they are dining with the other directors – eating the same food from the same kitchen,' Mr Lee said.

> contributing their independent judgement on the business of the company is at the absolute core of everything INEDs do

Jon Witts, Senior Vice-President, Head of Enforcement, Listing Division, HKEX

2. Providing effective oversight of internal controls

Under Hong Kong's Corporate Governance Code, boards are required to oversee the company's risk management and internal control systems on an ongoing basis. In particular, internal controls should be subject to a review at least annually. INEDs, as members of the audit committee, have a particular responsibility here. The audit committee's terms of reference are required to include an obligation to review listed companies' risk management and internal control systems and

The purpose of enforcement

When it comes to holding individuals accountable for wrongdoing, most of the focus tends to be on the adequacy of the rules. But markets with impressive-sounding regulatory regimes are not always the most honest or cleanest markets in which to do business. Effective deterrence relies on more than a good rule book – just as important is the presence of an effective enforcement regime that ensures that breaches of the rules do not go unnoticed and carry consequences for the individuals involved.

The first speaker of the training session reviewed in this article, Jon Witts, Senior Vice-President, Head of Enforcement, Listing Division, HKEX, started his presentation with a reminder of the purpose of enforcement. He pointed out that enforcement is not really about punishment in the sense of imposing retaliation or getting revenge. A better sense of the purpose of enforcement, he suggested, can be found in the words of the Duke of Wellington at the Battle of Waterloo. After winning the battle, he famously said that 'nothing except a battle lost could be half so melancholy as a battle won'.

Wellington went on to talk about the expense that had been occurred in the battle, which he described as a heavy misfortune 'but for the result to the public', and that, Mr Witts said, gets us much closer to the purpose of enforcement. Regulators are in the business of trying to ensure better market quality and higher standards of corporate governance and investor protection. This can only be achieved, however, through an effective mechanism for holding individuals accountable for their actions and decisions.

HKEX has imposed public sanctions on about 400 directors, many of whom are INEDs, since the start of 2020, and the list is growing at a rate of about three a week. Public sanctions will of course have negative consequences for the people involved, 'but it's worth it for the results to the public,' Mr Witts said.

He added that, in the wake of scandals such as the collapse of the crypto exchange FTX, there is a better awareness generally of why markets need regulators. Successful markets need effective gatekeepers and regulators are only one of the many gatekeepers that play a role in achieving good compliance and governance. Indeed, the roles of governance professionals and INEDs, he pointed out, are just as critical in imposing the internal discipline needed to achieve those goals.

INEDs have to make up a majority of the audit committee members.

Ms Au addressed this aspect of the INED role. She said that another common defence INEDs raise in disciplinary cases is that they relied on the external auditors' oversight of the internal controls. She pointed out that the role of the external auditor is to audit the company's financial statements – they will not normally conduct an internal control review as part of their regular auditing work. Certainly, auditors may flag up any control deficiencies that they find during the course of their work, but that is not the same as performing a dedicated and focused internal control review.

'So you cannot rely on audit work to satisfy your compliance with the Corporate Governance Code as an INED,' she said.

She also reminded listeners that INEDs should not take a 'passive approach' to internal control reviews. This refers to the practice of assuming that, if no concerns have been raised since the last review, the controls must still be sound. Sometimes the absence of any red flags regarding the controls may be due to the absence of a proper channel for staff to voice their concerns and bring them to the board's attention. Ms Au reiterated the need for ongoing reviews for the company's internal controls to ensure they are still fit for purpose.

This issue was further discussed in the panel discussion. Julia Charlton, Principal Partner, Charltons, sought to raise awareness among directors that a failure to ensure adequate internal controls can, in and of itself, be a breach of the Listing Rules. Moreover, in its enforcement work HKEX not only looks at what went wrong when companies breach the Listing Rules, it also looks at the control environment to assess why this failed to prevent things from going wrong.

Typically, inadequate internal controls will be an indicator of a breach of directors' duty to exercise the skill, care and diligence. It may also be deemed to be a breach of their directors' undertaking under the Listing Rules, Ms Charlton said. She added that, since listed company boards are also responsible for ensuring that adequate internal controls are in place in the company's subsidiaries, this is therefore something to consider when a company acquires a new subsidiary.

> **"INEDs need to recognise that they are dining with the other directors – eating the same food from the same kitchen"**
>
> **Ernest Lee FCG HKFCG(PE), Institute President, and Technical Partner, Deloitte China**

She also made the point that, since setting up an internal control system at the listing stage is a critical part of achieving a successful listing, it often gets the due diligence it deserves. Once the company is listed, however, directors may 'take their eyes off the ball'. 'They are not always focused enough on reviewing and evolving their internal control systems so that they remain fit for purpose both in terms of new requirements coming into place and evolving business situations and the new risks which come up,' Ms Charlton said.

She also pointed out that the fact that the audit committee takes the lead role in reviewing the company's internal

A taxonomy of director dysfunction

The final session of the Institute's director training series was fortunate to have Dr Kelvin Wong SBS JP, Chairman, Accounting and Financial Reporting Council, to give his insights on director effectiveness. Based on his experience serving on Hong Kong boards, together with his role as the past Chair of the Hong Kong Institute of Directors in Hong Kong, Dr Wong gave a very apposite description of different types of dysfunctional directors.

1. The overboarded director

The first type he described as the overboarded or busy director. According to the Listing Rules directors serving on six or more boards are deemed to be overboarded. Dr Wong pointed out that the danger here is quite obvious – such a director is unlikely to have the capacity to give every board appointment the time and attention needed.

Under the current definition, there is a total of 58 individuals who are classified as overboarded and they are serving an aggregate of 409 board seats. Dr Wong added, however, that the issue of whether the directors who are not serving six or more boards can devote sufficient time and attention to their board appointments is just as important. Depending on their levels of energy and diligence, for some directors, four board appointments might be too many. This led him to the second type of director.

2. The lazy director

In Dr Wong's view, a lazy director is even less useful than an overboarded one. And, once again, he suggested that the statistics will not always give an accurate picture.

'When you calculate their attendance, they always attended full score 100% of board meetings. Largely thanks to the Covid pandemic, they are even able to attend more than one directors' meeting at the same time. This is because they can afford to have two iPads, three iPhones and four computers in front of them. But while lazy directors attend every meeting, they don't say anything. They agree, even before the resolution has been finished, with the proposals under controls doesn't absolve the company's other directors from any responsibility in this area. They are still expected to understand and oversee the audit committee's internal control review and to take an active interest in any potential deficiencies identified and assist in implementing the necessary improvements.

3. Ensuring good record keeping practices and cooperating with HKEX

Last October, HKEX published a new guidance note on cooperation. Mr Witts urged participants, if they have not already done so, to read the guidance as it clarifies HKEX's expectations regarding the cooperation they expect from listed companies involved in enforcement actions.

He emphasised that HKEX expects timely and substantive responses to its queries and good record keeping practices will be key to being able to show HKEX the evidence of a good control environment. In other words, while good record keeping practices should be followed as a basic component of good corporate governance, they will also be beneficial if companies find themselves involved in enforcement actions.

However, the new HKEX guidance note on cooperation makes it clear that a failure to cooperate when there is a duty to do so is itself considered a serious breach of the Listing Rules, warranting the imposition of some of the most severe sanctions available, and HKEX has successfully taken enforcement action on several occasions against directors who have refused to cooperate.

The Institute would like to extend its gratitude to everyone who contributed to the director training series reviewed in this article. It attracted a cumulative audience of over 1,200 directors, governance professionals and other stakeholders over the course of the three sessions. The first two sessions were reviewed in the March and April editions of this journal. More resources relating to the issues discussed are available on the HKEX website: www.hkex.com.hk.

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discussion. This is not uncommon among listed companies in Hong Kong,' Dr Wong said.

3. The tired director

This type of director, Dr Wong pointed out, are often the victims of the situations they find themselves in. This is particularly true of INEDs since 75% of all listed companies in Hong Kong have only three INEDs serving on their boards. Dr Wong pointed out that, in addition to attending regular board meetings, these INEDs need to serve on the critical board committees where a majority of INEDs is required by the Listing Rules, namely the audit, remuneration, nomination and now ESG committees. In other words, while they may not be overboarded, they are likely to be overburdened. 'I encourage HKEX to consider raising the bar,' Dr Wong said. 'With the increasing burden and also higher public expectations of the role of INEDs, I believe it is high time to have a holistic review as to what should be the optimal number, or the optimal proportion, of INEDs on the boards of listed companies in Hong Kong.'

4. The vanishing director

Dr Wong saved the most dysfunctional type of director to the last. Vanishing directors are those who disappear as soon as they find themselves under investigation by regulators. Since more than 55% of listed companies by number, and in terms of market capitalisation more than three quarters, are either state-owned enterprises or privately owned enterprises from the Mainland, many of the directors of these companies are currently able to escape the jurisdiction of Hong Kong regulators simply by returning to the Mainland. Dr Wong recommended regulators in Hong Kong look at what can be done to ensure that their enforcement actions can reach beyond Hong Kong, in particular to the Mainland.

Climate disclosure: new regulatory proposals

A consultation paper published by Hong Kong Exchanges and Clearing Ltd (HKEX) seeks market feedback on proposals to align Hong Kong's climate-related disclosure regime with international standards.

On 14 April 2023, HKEX published a public consultation – Enhancement of Climate-related Disclosures under the Environmental, Social and Governance (ESG) Framework – proposing to create a new Part D of the Environmental, Social and Governance Reporting Guide (Appendix 27 of Hong Kong's Listing Rules), upgrading the climate-related reporting requirements for listed companies in Hong Kong.

The proposed new requirements are intended to align Hong Kong's ESG regime with global standards – in particular the global baseline for climate disclosures currently being finalised by the International Sustainability Standards Board (ISSB). The ISSB will publish its finalised climate standards by the end of the second quarter of 2023, but draft standards were published in March 2022 – in particular the S2 Climate-related Disclosures Exposure Draft (S2 Exposure Draft). HKEX has based its consultation proposals on the S2 Exposure Draft and subsequent ISSB deliberations up to April 2023.

The consultation aims to give issuers more time to get familiar with these incoming climate-related reporting requirements. HKEX will continue to monitor developments and take into account the final ISSB climate standards when finalising the Listing Rule amendments.

Key proposals

The ISSB approach to climate disclosure builds on the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), which are structured around four thematic areas:

1. governance
2. strategy
3. risk management, and
4. metrics and targets.

Highlights

Under the new proposals, listed companies would be required to disclose:

- the governance process, controls and procedures used to monitor and manage climate-related risks and opportunities
- their Scope 1, Scope 2 and, subject to interim provisions, Scope 3 GHG emissions
- the resilience of their strategy and operations to climate-related changes assessed by means of scenario analysis.

The HKEX consultation proposed changes are categorised under same four core areas.

1. Governance
Listed companies will be required to disclose the governance process, controls and procedures used to monitor and manage climate-related risks and opportunities.

2. Strategy
Climate-related risks and opportunities. Listed companies will be required to disclose their material climate-related risks and, where applicable, opportunities, and their impact on the issuer's business operations, business model and strategy.

Transition plans. Issuers will need to disclose their response to climate-related risks and opportunities identified, including any changes to their business model and strategy, adaptation and mitigation efforts, and climate-related targets set for such plans.

Climate resilience. Issuers will need to disclose the resilience of their strategy (including their business model) and operations to climate-related changes, developments or uncertainties, which shall be assessed using climate-related scenario analysis that is commensurate with the issuer's circumstances. Scenario analysis is a tool for assessing how the future might look if certain trends continue or certain conditions are met.

Financial effects of climate-related risks and opportunities. Issuers will be required to disclose the current (quantitative where material) and anticipated (qualitative) financial effects of climate-related risks, and where applicable, opportunities, on their financial position, financial performance and cash flows.

3. Risk management
Listed companies will be required to disclose the process used to identify, assess and manage climate-related risks and, where applicable, opportunities.

4. Metrics and targets
GHG emissions. Listed companies will be required to disclose their Scope 1, Scope 2 and Scope 3 GHG emissions.

Other cross-industry metrics. Issuers will need to disclose the amount and percentage of assets or business activities vulnerable to transition/physical risks, or aligned with climate-related opportunities, and the amount of capital expenditure deployed towards climate-related risks and opportunities.

Internal carbon price. Issuers will be required to disclose the internal carbon price, if they maintain one, applied in their decision-making.

Remuneration. Issuers will be required to disclose how climate-related considerations are factored into executive remuneration policy.

Industry-based metrics. Issuers should consider industry-based disclosure requirements prescribed under international ESG reporting frameworks and make disclosures as the issuer sees fit.

Other proposals

Consequential amendments to Appendix 27 are also proposed to reflect the adoption of the new Part D4. HKEX also proposes to change the name of Appendix 27, which sets out the ESG disclosure requirements listed companies need to comply with in their ESG reports. The HKEX consultation points out that the word 'guide' in the current name – The Environmental, Social and Governance Reporting Guide – may give people the impression that Appendix 27 offers only voluntary guidance.

Some of the requirements of Appendix 27 are mandatory or subject to a comply-or-explain mechanism and a failure to comply with such requirements would therefore constitute a breach of the Listing Rules. In order to clarify the nature of Appendix 27, HKEX proposes to rename it the Environmental, Social and Governance Code and to make consequential changes to relevant Listing Rules to reflect the name change.

Transition arrangements

Subject to responses received in the consultation, HKEX proposes the revised Listing Rules and Appendix 27 to become effective on 1 January 2024 (Effective Date). Not all of the proposed requirements would apply to issuers' ESG reports in respect of financial years commencing on or after the Effective Date, however. The consultation proposes to allow issuers to comply with interim measures for the requirements set out below for the first two reporting years following the Effective Date. All listed companies are expected to be in full compliance with all the new climate-related disclosures in respect of financial years commencing on or after 1 January 2026.

> our proposals aim to accelerate the building of resiliency and the sustainability journey of our issuers, further strengthening Hong Kong's position as a trusted and attractive venue for capital raising

Katherine Ng, Head of Listing, Hong Kong Exchanges and Clearing Ltd

1. Anticipated financial effects of climate-related risks and opportunities
To provide more time for issuers to comply with the requirement to disclose their assessment of the anticipated financial impact of climate-related risks and opportunities, HKEX proposes to require issuers to describe the anticipated financial effects in qualitative terms. Moreover, during the interim period, where an issuer has yet to provide disclosures on these anticipated effects, they should disclose:

- information, to the extent reasonably available, that may enable investors to understand the aspects of the financial statements that are most affected, and
- the work plan, progress and timetable for making the required disclosure.

2. Scope 3 GHG emissions
The consultation proposes to require listed companies to issuers to apply either the GHG Protocol, or the protocol prescribed by local legislation for measuring GHG emissions. Companies will need to report on their:

- Scope 1 emissions – covering direct GHG emissions that occur from sources that are controlled or owned by a company
- Scope 2 emissions – covering indirect emissions from purchased electricity, heat, steam and cooling, and
- Scope 3 emissions – covering all other indirect emissions that occur in a company's value chain such as business travel, purchased goods and services, waste disposal and employee commuting.

HKEX recognises that reporting on Scope 3 emissions will present practical difficulties for companies, particularly in the collection of data from upstream and downstream stakeholders which they have no control over. The consultation therefore proposes to give companies more time to identify significant Scope 3 activities, collect data and build appropriate calculation models.

During the interim period, issuers would be required to disclose:

- information that enables investors to understand the issuer's relevant upstream or downstream activities along the value chain, and
- their work plan, progress and timetable for full disclosure of Scope 3 GHG emissions.

3. Other cross-industry metrics
HKEX proposes to require issuers to make disclosures relating to a number of cross-industry climate-related metrics that the ISSB deems useful in informing investors and stakeholders of companies' exposure to climate-related risks, and how far companies have integrated climate-related considerations into their business strategies. These metrics include the amount of capital expenditure, financing or investment deployed

> **Hong Kong's early adoption of climate-related corporate reporting requirements will consolidate its position as a leading green and sustainable finance hub within the region and globall**
>
> ***Julia Leung, Chief Executive Officer, SFC***

towards climate-related risks and opportunities, and the amount and percentage of assets or business activities vulnerable to transition and physical risks, or aligned with climate-related opportunities.

To give issuers more time to familiarise themselves with the calculation methodologies and explore ways to address their concerns on data accuracy and credibility, during the interim period issuers will be required to:

- describe the assets or business activities vulnerable to or aligned with such risks or opportunities, or that require capital expenditure, and
- their work plan, progress and timetable for full disclosure.

Guidance

To assist issuers in understanding and complying with the new requirements, HKEX will issue implementation guidance together with the consultation conclusions to:

- set out principles, guidelines and illustrative examples for the implementation of the new Listing Rules
- refer issuers to external frameworks, tools and guidelines helpful for disclosures, and
- set out a glossary of technical terms/acronyms commonly used in international ESG reporting frameworks, such as those of the ISSB.

The significance of the consultation proposals

Mandatory climate-related disclosures aligned with the ISSB and TCFD have been coming to Hong Kong for some time. The Hong Kong Green and Sustainable Finance Cross-Agency Steering Group announced its intention to implement such a mandatory disclosure regime by 2025 for the financial sector. The latest HKEX consultation is designed to help listed companies prepare for these tougher requirements relating to climate disclosure.

The consultation should also be seen in the context of the carbon neutrality target set by the Hong Kong government. The government seeks to make Hong Kong carbon neutral by 2050 and has launched its Climate Action Plan setting out initiatives to reduce carbon emissions for a smooth transition to a low-carbon, climate-resilient economy. The upgrading of Hong Kong's climate disclosure regime will help Hong Kong meet these goals and, in doing so, maintain its competitiveness as an international financial centre.

'Our proposals aim to accelerate the building of resiliency and the sustainability journey of our issuers, further strengthening Hong Kong's position as a trusted and attractive venue for capital raising,' says Katherine Ng, Head of Listing, HKEX.

The consultation proposals are supported by the Securities and Futures Commission (SFC) as a step towards aligning Hong Kong with the ISSB global baseline for climate-related reporting standards.

'Hong Kong's early adoption of climate-related corporate reporting requirements will consolidate its position as a leading green and sustainable finance hub within the region and globally,' says Julia Leung, Chief Executive Officer, SFC.

> ***The consultation paper reviewed in this article is available at the HKEX website: www.hkex.com.hk. The consultation ends 14 July 2023.***

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Overview

The Institute is a recognised thought leader in governance reporting. Obtaining the Institute's ESG Reporting Certification means you stand apart from your peers by having a comprehensive ESG reporting understanding and competencies. This Course consists of seven 2-hour sessions with 20 ESG experts as speakers, including reporting professionals from listed companies, largest accounting firms and consultants.

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Attendees of the ESG Reporting Certification Course who successfully fulfilled attendance requirements and passed a final assessment will be accredited for two years and will also be:

- Permitted to use the post-nominal 'HKCGI Cert: ESG' during the accreditation period
- The names and post-nominals of those who have successfully obtained the certification will be listed on the Institute's designated webpage for prospective employers and public searches.

There will be a maximum of two intakes per year and a refresher course every two years for extended accreditation. The ESG Reporting Certification Course counts toward ECPD hours for Institute members.

Topics Covered

In line with Listing Rules requirements, the ESG Reporting Certification Course will cover:

- Introduction to HKEX's ESG Reporting Guide
- Directors' duties in ESG & climate reporting
- ESG and climate-related disclosures
- Setting metrics and targets
- Setting strategy, materiality assessment, and identifying risks and opportunities
- Governance structure for ESG and climate-related disclosures
- Data collection, report drafting, timeline
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Enquiries

For enquiries, please contact HKCGI's Professional Development Section by phone (2881 6177) or email (cpd@hkcgi.org.hk).

Court validates Hong Kong's No Consent Regime

Hong Kong law firm Gall reviews a recent Court of Appeal (CA) judgment regarding the lawfulness of Hong Kong's 'letters of no consent' regime.

On 14 April 2023, the Court of Appeal (CA) in *Tam Sze Leung v Commissioner of Police* [2023] HKCA 537 overturned Court of First Instance (CFI) decisions, which declared that Hong Kong's 'letters of no consent' (LNC) regime, as operated, is:

- ultra vires Sections 25 and 25A of the Organized and Serious Crimes Ordinance (OSCO)
- not prescribed by law, and
- disproportionately interferes with rights and, in particular, the right to the use of property.

The facts

The Applicants were under suspicion by the Securities and Futures Commission (SFC) for having committed breaches of the Securities and Futures Ordinance Cap 571 for 'stock market manipulation'.

The SFC referred the matter to the police for investigation and, in turn, the police informed a number of banks of the investigation and requested the banks' action. The banks then submitted 'suspicious transaction reports' (STRs) to the Joint Financial Intelligence Unit (JFIU), a unit jointly run by staff members of the Hong Kong Police Force and the Hong Kong Customs & Excise Department. LNCs were then issued and eventually the accounts were frozen by the banks.

The way the LNC regime had been operated by the police was put into question by the Applicants who challenged, by way of judicial review, the decision of the Commissioner of Police to issue and maintain LNCs in relation to their bank accounts.

The CFI decisions

Under Section 25 of OSCO, it is an offence for someone to deal with property knowing, or having reasonable grounds to believe, that any property in whole or in part, directly or indirectly, represents any person's proceeds of an indictable offence. This is subject to Section 25A of OSCO, which allows for the dealing of such property if the said person discloses his knowledge or suspicion that such proceeds may be connected to crime to an authorised officer, and he receives the consent of said officer.

Of the six grounds of challenges raised by the Applicants, the CFI, in Tam Sze Leung v Commissioner of Police [2021] HKCFI 3118, and [2022] HKCFI 772, held in favour of the Applicants on the following three grounds: ultra vires, prescribed by law and proportionality.

The CFI therefore granted a declaration in favour of the Applicants, holding that 'the Letters of No Consent and the No Consent Regime as operated by the Commissioner' was unlawful. In doing so, the CFI judge held that the CA decision in Interush Ltd v Commissioner of Police [2019] HKCA 70 did not apply. The CA decision in Interush upheld the constitutionality of the relevant sections of OSCO. The Commissioner of Police appealed to the CA.

> **"The CA judgment clarifies and reinforces the lawfulness of the use of LNCs, which will still be used proactively within the statutory regime"**

The CA judgment

No Consent Regime as operated by the Commissioner

The CA was critical of the fact that the CFI decision had not defined the phrase 'No Consent Regime as operated by the Commissioner', in both the judgment and the subsequent decision, and that the Applicants' use of this phrase was to bypass the earlier CA decision in the Interush case. To say that the 'No Consent Regime as operated by the Commissioner' is unlawful leaves one in doubt as to what

Highlights

- two Court of First Instance decisions in 2021 and 2022 declared that Hong Kong's 'letters of no consent' regime, as operated, is unlawful
- the 2023 CA decision reaffirms the legality of Hong Kong's No Consent Regime
- the CA decision clarifies the position of banks, financial institutions or other professional gatekeepers that deal with notifications of investigations and 'letters of no consent' from the police

> the CA decision will be welcomed as the early issue of an LNC often plays a vital role in what can be a race against time to preserve potential proceeds of crime

precisely is held to be unlawful and as to the continued effect of the relevant statutory provisions.

Ultra vires ground

The CFI Judge remarked that the LNCs caused the financial institutions not to deal with the relevant funds and practically and informally froze the property. Sections 25 and 25A of OSCO do not empower, expressly or by necessary implication, the Commissioner to have such secret, informal and unregulated asset freezing power. The No Consent Regime as operated was therefore ultra vires.

The CA disagreed with the above analysis. The Commissioner was only empowered under Section 25A to give consent for an act in contravention of Section 25(1) of OSCO, but has no power to require the banks to do anything. The banks made their own decision whether to deal with the property in question. The police in this case only informed the banks about their suspicion of money laundering activities and issued LNCs upon receiving the banks' STRs. Neither of the aforesaid conduct was ultra vires. The CA dismissed the ultra vires ground.

Improper purpose

The CA also dismissed the alternative argument of improper purpose. In the present case, the CA held that it was clear that the purpose of the JFIU in issuing the LNCs was to prevent dissipation of the funds in question, and was proper. The decision to not give consent is 'exercisable not only where he or she is satisfied in fact – but also where there is reasonable suspicion – that the property is derived from criminal conduct'. Given that there was 'no suggestion that the police did not have such reasonable suspicion', the improper purpose ground was not made out.

Prescribed by law

Restriction of fundamental rights must be prescribed by law. The Applicants' basis for this ground was in the statute's lack of defined scope for the power to be exercised under Section 25A, including the evidential threshold, the property over which the power may be held, factors to be considered by an authorised officer, the duration for which the power may be exercised, etc.

The CA held that although there were no specified fetters or parameters as to how the police should exercise their discretion for giving or refusing consent in Section 25A, there were sufficient constraints as discussed in the Judgment to guard against arbitrary or capricious refusal (for example, the power must be exercised bona fide, and consent not given when there was 'reasonable suspicion', though not a high evidential threshold but certainly not unfamiliar and uncertain). Section 29 of OSCO also empowers the Court to award compensation in the event that a person suffers loss in view of serious defaults on the part of any person concerned in the investigation or prosecution. The CA ruled that the prescribed by law ground was not made out.

Proportionality

The Applicants brought a fact-specific challenge on this basis, but was allowed by the CFI Judge to pursue a systemic proportionality challenge. Such challenge failed because the CA's decision in Interush held that Sections 25 and 25A of OSCO and the practice of the JFIU in issuing LNCs were not systemically unconstitutional, and Interush would be binding under the fundamental doctrine of precedent. There was no valid basis to hold that the CA's Interush decision did not apply. It was held that the CFI Judge should not have allowed the Applicants to pursue the systemic challenge especially when their originating document did not advance it.

Other grounds

The CA also rejected the other grounds raised by the Applicants, including procedural unfairness grounds, fair hearing ground and blanket freeze ground, all of which were rejected by the CFI Judge.

Conclusion

The CA judgment clarifies and reinforces the lawfulness of the use of LNCs, which will still be used proactively within the statutory regime.

LNCs practically result in the freezing of the suspicious bank accounts by the banks in most circumstances. For potential victims of cyber fraud, the CA decision will be welcomed as the early issue of an LNC often plays a vital role in what can be a race against time to preserve potential proceeds of crime. The judgment also puts an end to the ambiguity initially posed by the CFI's judgment by clarifying the position of banks, financial institutions or other professional gatekeepers that deal with notifications of investigations and LNCs from the police.

Nick Gall, Senior Partner, and Kenix Yuen, Partner
Gall

Hong Kong's CFA gives guidance on banks' Quincecare liabilities

Herbert Smith Freehills reviews a recent Hong Kong Court of Final Appeal decision that clarifies a bank's liability for transferring customer funds in breach of its Quincecare duty of care before unauthorised closure of the account.

In *PT Asuransi Tugu Pratama Indonesia TBK (formerly known as PT Tugu Pratama Indonesia) v Citibank N.A.* [2023] HKCFA 3, the Hong Kong Court of Final Appeal (CFA) gave important guidance on a bank's liability in the event it transfers funds out of a customer's account without authority and the account is subsequently closed.

The CFA considered whether the bank's liability would lie in an action for damages or in debt, which in turn determines whether it could rely on the defence of contributory negligence and at which point would such an action become time-barred.

Background

In 1990, three officers of the appellant (Tugu) had opened an account (the Account) with the Hong Kong branch of the respondent bank (the Bank). The banking mandate authorised any two of the three officers who opened the Account to operate it. From June 1994 to July 1998, funds received by the Account were paid out to four individual Tugu officers in 26 transfers totalling US$51.64 million. Each transfer was instructed by two of the Tugu officers authorised to operate the Account. After all funds in the Account were paid out, the Bank took steps to close the Account on 30 July 1998 on the instructions of the two Tugu officers given on 16 July 1998.

Tugu wrote to the Bank On 6 October 2006, alleging that all 26 of the transfers were dishonestly authorised and demanded payment of the sums transferred out of the Account in full.

Subsequently, Tugu commenced proceedings on 2 February 2007, claiming, inter alia:

The disputed debit entries resulting from the Tugu officers' instructions to pay out funds and to close the Account, which were all unauthorised, were of no effect, such that the Account remained in existence and fell to be reconstituted by reversing the disputed debit entries.

Further or alternatively, damages for breach of its Quincecare duty of care owed by the Bank either in contract or in tort not to carry out payment instructions in circumstances where the Bank knew of facts which would lead a reasonable and honest banker to consider that 'there was a serious or real possibility that... [Tugu] might be being defrauded... by the giving of that payment instruction'.

The Court of First Instance (CFI) held the transfers were fraudulent and that a reasonable and prudent banker would have been put on inquiry by the time the two Tugu officers instructed the third transaction. The Bank breached its Quincecare duty of care on the basis that it did not make any inquiries. However, the Judge held the instruction to close the Account was given with authority, such that the banking relationship terminated on 30 July 1998. It followed that Tugu's claims commenced in 2007 were out of time under the Limitation Ordnance (Cap 347), being more than six years from the termination of the contractual relationship with the Bank.

Tugu's appeal against the first instance decision was dismissed by the Court of Appeal (CA) and the CA's conclusions largely mirrored those of the CFI's. The CA upheld the CFI's finding that the Bank had been put on inquiry and found that necessary inquiries were not made. In the CA's view, the Bank should have contacted directors

Highlights

- the CFA decision gives important guidance on a bank's liability in the event it transfers funds out of a customer's account without authority and the account is subsequently closed
- the CFA's view was that the closure of the Account did not discharge the debt represented by the reconstituted balance
- for as long as the debt remained outstanding, the relationship of banker and customer subsisted

> even if an account was closed after unauthorised transfers were made, [banks] remain liable in debt to their customers to reconstitute the original balance on demand if the closure was made without authority

independent of the operators and beneficiaries of the fraud.

On closure of the Account, unlike the CFI, the CA held that was unauthorised and repudiatory, but it was nevertheless effective to bring the relationship of banker and customer to an end. A cause of action in debt arises when a customer demands for payment by the bank of the balance in its account; however, the necessity for a demand would be waived if the relationship of banker and customer is terminated by the bank's repudiation (that is a balance on a bank account is payable by the bank on the termination of the banking relationship with or without a demand). Alternatively, a cause of action may arise in tort for breach of a bank's duty of care independently of any demand. The CA held that the unauthorised closure of the Account and the repudiation by the Bank operated as a waiver of the need for a demand; it was irrelevant that the repudiation was not accepted by the customer. Therefore, Tugu's cause of action for the wrongful payments by the Bank accrued in 1998 and these claims were time-barred by 2007.

While the issue did not arise due to Tugu's claims having been brought out of time, both the CFI and the CA held that the Bank would have been entitled to rely on the defence of contributory negligence.

Tugu subsequently obtained leave to appeal to the CFA. Taking into account the broad context, Lord Sumption NPJ, who gave the leading judgment on behalf of the CFA, rephrased the issue in appeal as follows: 'Does a cause of action for sums debited without authority to the account arise upon the closure of the account, without the need for demand?'

The CFA decision

In short, the CFA's view was that the closure of the Account did not discharge the debt represented by the reconstituted balance, and for as long as that debt remained outstanding the relationship of banker and customer subsisted. This means that the running of time for limitation purposes may be indefinitely deferred by the customer, and that an account may be dormant without activity for many years without affecting the customer's right eventually to demand the balance.

Lord Sumption NPJ highlighted the two juridical sources for a bank's duty in making payments out of its customer's account. First, the bank has a duty to make payments only with the authority of the customer. Second, the bank acts as the customer's agent. This means a bank owes all the ordinary duties to be expected from an agent, including to the duty to exercise reasonable skill and care when performing its obligations. The standard of duty is the same under either head, because the duty of care is a duty in the performance of the mandate.

In the CFA's view, the instructions to close the Account was 'a pure question of authority', to which the Tugu officers had none. This has serious implications on the nature of the financial remedy available to Tugu.

If the Bank had debited funds from the Account without authority, this would be considered as a nullity, which Tugu could ignore. Any award for damages would be nominal as Tugu could not be said to have suffered any losses. Given so, Tugu's only effective financial remedy lies in an action in debt.

Considering the Account was closed without authority and a bank is never allowed to ignore its liabilities for debts owed to customers without repaying, the banking relationship between Tugu and the Bank continued to subsist. Accordingly, Tugu could seek payment of a debt corresponding to the reconstituted balance of the Account on demand. Under the circumstances, there is no question of Tugu's action being time-barred.

The CFA also confirmed that the Bank could not rely on the defence of contributory negligence, having established that Tugu was entitled to succeed in its action in debt and was not advancing a claim for damages for breach of the Bank's duty of care in the making of payments to third parties. Also, a claim in debt, as in Tugu's case, was not a claim in respect of 'damage' or for relief on account of the Bank's 'fault'

> **an account may be dormant without activity for many years without affecting the customer's right eventually to demand the balance**

in failing to make the relevant inquiries, such that Section 21(1) and 21(10) of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) – which provides a statutory basis for a contributory negligence defence – had no application.

Commentary

This decision unequivocally affirms that Hong Kong courts will not draw distinctions between different instructions given by persons who do not have authority to operate a bank account.

Following the CFA's ruling, banks should be conscious that even if an account was closed after unauthorised transfers were made, they remain liable in debt to their customers to reconstitute the original balance on demand if the closure was made without authority. In such a case, the running of time could be deferred indefinitely unless and until the customer demands for payment from the bank.

Gareth Thomas, Jojo Fan, Rachael Shek and Timothy Shaw
Herbert Smith Freehills

Professional Development

Seminars: April 2023

12 April
CSP training series: how to serve the board better (session three: roles of the company secretary in influencing the board)

Chair: *Stella Lo FCG HKFCG(PE), Institute Education Committee member and Technical Consultation Panel (TCP) – Public Governance Interest Group member, and Company Secretary, Guoco Group Ltd*

Speaker: *Patricia Hui FCG HKFCG*

13 April
Companies (Amendment) Ordinance 2023: a practical brief

Chair: *Wendy Ho FCG HKFCG(PE), Institute Council member, Professional Development Committee Chairman and Professional Services Panel member, Mainland China Technical Consultation Panel member and AML/ CFT Work Group member, and Executive Director, Corporate Services, Tricor Services Ltd*

Speakers: *Grace Siow ACG HKACG, Director of Corporate Services, and Truman Chan FCG HKFCG, Director of Investor Services, Tricor Services Ltd*

18 April
Sanctions: practical overview governance professionals should know

Chair: *Mohan Datwani FCG HKFCG(PE), Institute Deputy Chief Executive*

Speakers: *Martin Lim, Founder & CEO, and Bible Kwan, Head of Sales (Northeast Asia) – Channel & Partnership, Ingenique Solutions; Richard Ip, Founder, Richard Ip Consultancy; and Elaine Chong FCG HKFCG, General Counsel-Hong Kong, CLP Power Hong Kong Ltd*

21 April
Corporate crisis management: practical guidance for handling related governance and compliance issues

Chair: *Mohan Datwani FCG HKFCG(PE), Institute Deputy Chief Executive*

Speakers: *Wynne Mok, Partner, and Ralph Sellar, Partner, Slaughter and May*

28 April
Company secretarial practical training series: notifiable transactions – practice and application

Speaker: *Ricky Lai FCG HKFCG(PE), Company Secretary, China Renewable Energy Investment Ltd*

ECPD Videos on Demand

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ECPD forthcoming seminars

Date	Time	Topic	ECPD points
19 June 2023	4.00pm–5.30pm	Offeree board in a takeover: what you need to know and plan in advance	1.5
20 June 2023	4.30pm–6.00pm	China tax controversy: practical considerations & case studies	1.5
23 June 2023	6.45pm–8.45pm	Company secretarial practical training series: share capital, capital raising and share schemes – practice and application	2
6 July 2023	4.00pm–5.30pm	Hong Kong securities enforcement update – practical knowledge and applied practices	1.5

For details of forthcoming seminars, please visit the Professional Development section of the Institute's website: www.hkcgi.org.hk.

Membership

New Fellows

The Institute would like to congratulate the following Fellows elected in March 2023.

Chan Chi Wai FCG HKFCG

Mr Chan is the Vice President of the Secretarial Services Department of Hong Kong Exchanges and Clearing Ltd (Stock Code: 388). He holds a bachelor's degree in business administration in accounting from The Hong Kong University of Science and Technology and a postgraduate diploma in corporate administration from The Hong Kong Polytechnic University.

Chen Yuan FCG HKFCG

Ms Chen is the Vice President of the Corporate Advisory Department of Computershare Hong Kong Investor Services Ltd. She joined Computershare International Information Services (Beijing) Co Ltd in 2008, as part of the founding team, to bring shareholder identification and proxy solicitation services to companies. She relocated to the current company in 2019 and was responsible for maintaining key client relationships. Prior to joining Computershare, Ms Chen had more than 12 years of management experience in different corporations. She holds an MBA from the Beijing University of Posts and Telecommunications.

Lam Chun Yat FCG HKFCG

Mr Lam is an Associate Director of Ogier Global Hong Kong. He has more than 13 years of experience in company secretarial practice and specialises in corporate formation, administration and regulatory compliance in the Cayman Islands, British Virgin Islands and Hong Kong. Mr Lam holds a bachelor's degree in global business system management from City University of Hong Kong and a master's degree in corporate governance from The Hong Kong Polytechnic University.

Lam Kang Chi FCG HKFCG

Mr Lam has over 10 years of experience in the company secretarial industry, employed at SWCS Corporate Services Group (Hong Kong) Ltd. Mr Lam worked as a manager at V1 Group Ltd and as Compliance Manager at First Credit Financial Group Ltd. He holds a master's degree in corporate governance from Hong Kong Metropolitan University.

Lam Pik Lin FCG HKFCG

Ms Lam is an Asia Data Steward at HSBC Global Asset Management (HK) Ltd, delivering innovative data solutions to achieve responsible investing. She is now serving voluntarily as a Vice Chairman (Development) at the International Chamber of Sustainable Development (ICSD) to promote sustainability education to the public.

Membership (continued)

Yang Na FCG HKFCG
Ms Yang is the Company Secretary and the General Counsel of Guangdong Investment Ltd (Stock Code: 270). Ms Yang is an experienced solicitor and obtained her legal professional qualifications in the Mainland and New York. Ms Yang has abundant professional experience in corporate governance and legal compliance through her Company Secretary and General Counsel roles for Hong Kong listed companies. Ms Yang holds an LLB and LLM in economic law from Renmin University of China, an LLM in commercial law from Cambridge University and an LLM in corporation law from New York University.

Ho Rosenna FCG HKFCG
Company Secretary, EuroEyes International Eye Clinic Ltd (Stock Code: 1846)

New graduates

The Institute would like to congratulate our new graduates listed below.

So Siu Fong, Charlotte
Yu Wing Yan, Yanny
Zhong Wei

Forthcoming membership activities

Date	Time	Event
8 July 2023	2.00pm–5.00pm	Art jamming – acrylic paint workshop (session A)
22 July 2023	2.00pm–5.00pm	Art jamming – acrylic paint workshop (session B)

For details of forthcoming membership activities, please visit the Events section of the Institute's website: www.hkcgi.org.hk.

Membership activities: April 2023

1 April
Lawn bowls fun day

20 April
Joint professional networking drinks (coorganised with HKICPA and LSHK)

15 April
Zentangle in nature workshop

22 April
Wellness series: yoga workshop

Advocacy

Corporate Governance Week 2023 – mark your diary

The Institute is organising its sixth Corporate Governance Week (CG Week), from 16 September to 22 September 2023, as a major event providing opportunities to engage with company secretaries, governance professionals and regulators on key corporate governance issues and new perspectives. During this CG Week, a series of activities will be held, including the Corporate Governance Paper Competition and Presentation Awards, and a Governance Professionals Information Session, as well as a number of professional development seminars in Hong Kong and the Mainland.

Nominations for the HKCGI Prize 2023

Nominations are now open for The Hong Kong Chartered Governance Institute Prize 2023. This is an opportunity to recognise individuals who have made significant contributions to the Institute and to the profession of the Chartered Secretary and Chartered Governance Professional during their careers. Members are invited to submit nominations on or before the deadline of 30 September 2023.

For more information about the Prize and details of the nomination procedure, please visit the News section of the Institute's website: www.hkcgi.org.hk.

Luncheon meeting

A luncheon meeting was held on 4 May 2023 for the Liaison Office of the Central People's Government in the HKSAR and members of The Hong Kong Coalition of Professional Services. Ernest Lee FCG HKFCG(PE), Institute President and Technical Partner, Deloitte China, also attended the luncheon on behalf of the Institute.

Scholarship & Award Presentation Ceremony 2023

Institute Chief Executive Ellie Pang FCG HKFCG(PE) was delighted to attend The Hang Seng University of Hong Kong (HSUHK)'s Scholarship & Award Presentation Ceremony 2023, held on 4 May 2023.

Chartered Governance Qualifying Programme (CGQP)

June 2023 examination diet

Candidates who were unable to attend the scheduled CGQP June 2023 examinations may apply for examination postponement by submitting a relevant medical certificate and/or supporting document(s). All applications must be submitted to the Institute on or before 6 July 2023.

Key dates	Description
6 July	Closing date for examination postponement applications
Mid-August	Release of examination results
Mid-August	Release of examination papers, mark schemes and examiners' reports
Late August	Closing date for examination results review applications

Note: The Institute reserves the right to change the dates and details without prior notice.

For details about the CGQP examinations, please visit the Examinations page under the Chartered Governance Qualifying Programme subpage of the Studentship section of the Institute's website: www.hkcgi.org.hk.

For enquiries, please contact the Education and Examinations Section: (852) 2830 6010, or email: exam@hkcgi.org.hk.

Learning support

The Institute provides a variety of learning support services for students to assist them with preparing for the CGQP examinations.

HKU SPACE CGQP Examination Preparatory Programme – autumn 2023 intake

HKU SPACE has been endorsed by the Institute to organise the CGQP Examination Preparatory Programme, which helps students to prepare for the CGQP examinations. One assignment and one take-home mock examination will be provided to students. There are 36 contact hours for each module, except for Hong Kong Company Law, which has 45 contact hours. The autumn 2023 intake will commence in September 2023.

For details, please contact HKU SPACE: (852) 2867 8485, or email: hkcgi@hkuspace.hku.hk.

Video-recorded Student Gatherings

Video-recorded Student Gatherings are available in the Students Gathering page under the Learning Support subpage of the Studentship section of the Institute's website: www.hkcgi.org.hk.

Student Gathering (1st session): getting started with the CGQP examinations – from planning to success
Student Gathering (2nd session): sharing from outstanding students in the CGQP examinations
Student Gathering (3rd session): preparing for and passing professional examinations – with flying colours!
Student Gathering (4th session): preparing for and passing professional examinations – Risk Management

Examination technique online workshops and student seminars

Video-recorded examination technique online workshops and student seminars are available for subscription to assist with preparing for the CGQP examinations.

For details, please visit the Online Learning Video Subscription page under the Learning Support subpage of the Studentship section of the Institute's website: www.hkcgi.org.hk.

For enquiries, please contact the Education and Examinations Section: (852) 2830 6010, or email: exam@hkcgi.org.hk.

Studentship activities: April 2023

18 to 19 April
CIHE & CBCC Career and Education Fair 2023

25 April
Student Gathering (4th session): preparing for and passing professional examinations – Risk Management

27 April
Student Ambassadors Programme 2022/2023: a visit to Hong Kong Business Ethics Development Centre, ICAC

Notice

Featured job openings

Company name	Position
Lululemon HK Ltd	Senior Corporate Governance Specialist, APAC
MTR Corporation Ltd	Senior Company Secretarial Manager (Ref: 23000106)
The Hong Kong Chartered Governance Institute	Senior Officer/Officer, Marketing and Communications (Ref: MKT 2023-04)
Tradelink Electronic Commerce Ltd	Company Secretarial Assistant Officer/Assistant Company Secretary

For details of job openings, please visit the Job Openings for Governance Professionals section of the Institute's website: www.hkcgi.org.hk.

Securities and Futures Commission update

Regulation of virtual asset trading platforms

On 23 May 2023, the Securities and Futures Commission (SFC) released its Consultation Conclusions on the Proposed Regulatory Requirements for Virtual Asset Trading Platform Operators Licensed by the SFC. The consultation, launched in February 2023, proposed new regulatory requirements applicable to licensed virtual asset trading platform operators (VA trading platforms).

The consultation conclusions confirms that the SFC will allow licensed VA trading platforms to provide their services to retail investors. However, such platforms will need to comply with a range of robust investor protection measures covering onboarding, governance, disclosure and token due diligence and admission, before providing trading services to retail investors.

'Providing clear regulatory expectations is the key to fostering responsible development,' says Julia Leung, Chief Executive Officer, SFC. 'Hong Kong's comprehensive virtual assets regulatory framework follows the principle of "same business, same risks, same rules" and aims to provide robust investor protection and manage key risks. This will enable the industry to develop sustainably and support innovation.'

The Guidelines for Virtual Asset Trading Platform Operators became effective on 1 June 2023. The Guidelines set out, among other things, requirements relating to safe custody of assets, segregation of client assets, avoidance of conflicts of interest and cybersecurity standards. The SFC will provide additional guidance on the new regulatory requirements and implementation details, including licence application procedures, as well as more information about the transitional arrangements.

'Operators of virtual asset trading platforms who are prepared to comply with the SFC's standards are welcome to apply for a licence. Those who do not plan to do so should proceed to an orderly closure of their business in Hong Kong,' the SFC states.

The SFC will continue its efforts with the Investor and Financial Education Council to warn investors about the risks of trading on unregulated platforms. In particular, despite the commencement of the regime on 1 June 2023, the SFC has yet to approve any virtual asset trading platform to provide services to retail investors and most virtual asset trading platforms currently accessible by the public are not regulated by the SFC.

Revisions to takeovers and share buy-back rules

On 19 May 2023, The SFC launched a consultation on proposed amendments to the Codes on Takeovers and Mergers and Share Buy-backs (Codes). The proposed amendments include codification of existing practices of the Takeovers Executive (this refers to the Executive Director of the SFC's Corporate Finance Division or any delegate of the Executive Director), clarifications on the Codes and other matters. The consultation paper also introduces a number of initiatives to reduce the environmental impact associated with the documents published under the Codes.

Proposed subsidiary legislation for implementing an uncertificated securities market in Hong Kong

On 27 March 2023, the SFC launched a consultation on the proposed subsidiary legislation for implementing an uncertificated securities market (USM) in Hong Kong. The proposed subsidiary legislation includes two new sets of rules:

1. the Securities and Futures (Uncertificated Securities Market) Rules, which aim to set out the operational and technical matters and processes under a USM environment, and
2. the Securities and Futures (Approved Securities Registrar) Rules, which aim to provide for the regulation of share registrars.

The consultation also covers amendments to other subsidiary legislation.

More information is available at the SFC website: www.sfc.hk.