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January 2016

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The journal of The Hong Kong Institute of Chartered Secretaries
香港特許秘書公會會刊

Connected transactions

The compliance challenge

AML update
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CHARTERED SECRETARIES 特許秘書

Good governance comes with membership

About The Hong Kong Institute of Chartered Secretaries

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

The HKICS was first established in 1949 as an association of Hong Kong members of the Institute of Chartered Secretaries and Administrators (ICSA) of London. It became a branch of ICSA in 1990 before gaining local status in 1994, and today has over 5,800 members and 3,200 students.

Membership statistics update

As of 30 November 2015, the Institute's membership statistics were as follows:

Students: 3,207
Graduates: 457
Associates: 5,115
Fellows: 542

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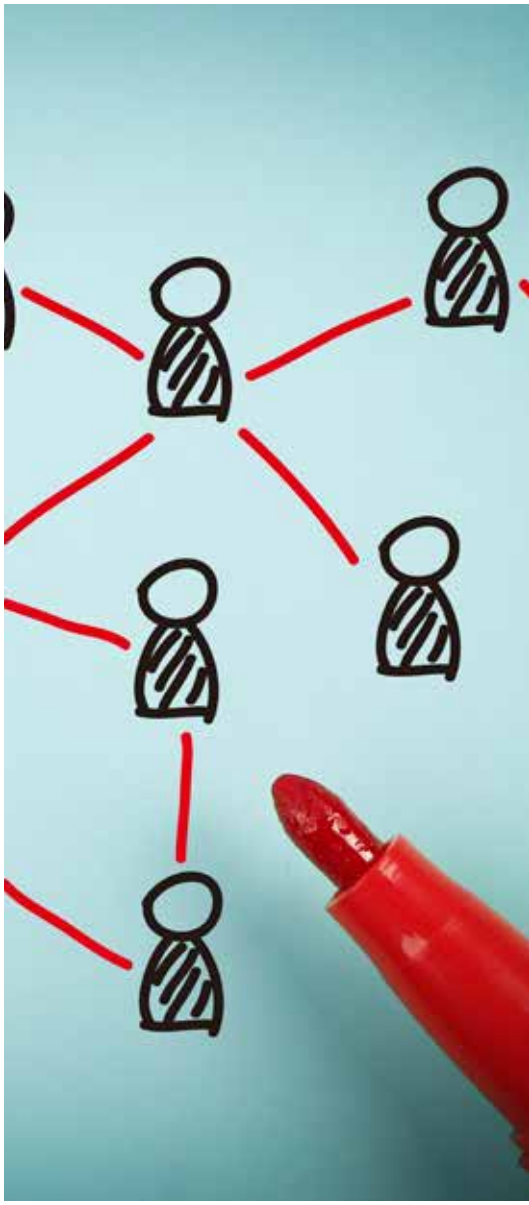


Looking ahead

I am honoured to be addressing you as president of our Institute after my election at the Council meeting following our Annual General Meeting on 15 December 2015. As I mentioned in my acceptance speech at the dinner following the AGM, I will do my best to build on the excellent work of Dr Maurice Ngai, our Immediate Past President, and all of my predecessors in this role.

Our Institute has achieved a great deal in recent years, particularly in terms of getting our message out there about the value we bring to the organisations we work for. The company secretarial role is better understood today than at any time in the past. That said, there remains a lot of work to do. As readers of this journal will be well aware, there are a number of very critical issues we need to address now and in the years ahead. I will be reporting in more detail on those issues after our Council strategy meeting in February.

Turning to something on the more immediate horizon, I would like to remind readers of our Annual Dinner 2016, which will be held on the 14th of this month at the JW Marriott Hotel. This year, under the theme 'Celebrating our Heritage', our Annual Dinner will be celebrating another milestone in the evolution of our profession. It was 125 years ago that a group of company secretaries got together in the UK to form the 'Institute of Secretaries', the body that went on to become the founding organisation of our Institute here in Hong Kong – the Institute of Chartered Secretaries and Administrators (ICSA). Our Annual Dinner always provides an excellent opportunity for Institute members and friends to get together in an informal and enjoyable setting, and this year's event is shaping up to be particularly interesting since our Guest of Honour will be Ada Chung FCIS FCS JP, Hong Kong's Registrar of Companies. I look forward to seeing you at the dinner.

This month's journal addresses one of the most critical areas of corporate governance for practitioners in Hong Kong – compliance with Hong Kong's connected transactions regime. The requirements for companies engaging in connected transactions, as set out in Chapter 14A of the Main Board Listing Rules and Chapter 20 of the GEM Rules, are arguably the most complex and technical requirements of Hong Kong's corporate governance rule book – and with good reason. Hong Kong is a relatively small place, a majority of our companies have controlling shareholders and a relatively small group of individuals control a large amount of the market capitalisation. This market profile suggests that, without robust regulatory controls in place, connected transactions could provide an opportunity for insiders to extract resources from companies through self dealing.

Our Institute, through its ECPD programme and through this journal, is focusing on helping our members understand Hong Kong's connected transaction rules, and on enhancing our advisory and compliance work in this area. As usual, there is no substitute for knowing the small print of the rules and, just this month, we will be launching a new guidance note on connected transactions. Our *Guidance Note on Connected Transactions*, which will be available in the Publications section of our website (www.hkics.org.hk) later this month, takes a very practical approach to its subject. In particular, advising on who is and who is not a connected person is not always straightforward, so our guide contains a highly useful A3-sized synthesis of the available diagrams showing the relationship connections among different individuals and entities.

In addition to knowing the letter of the rules, of course, professionals need to have a good understanding of the principles behind the rules. Our cover story this month (pages 6–11) looks at both the rationale of our connected transaction regime and at the role company secretaries can play to ensure effective compliance. So, to get started on the busy year ahead, *read on*!

Ivan Tam FCIS FCS

展望来年

2015年12月15日公会会员周年大会后所举行的理事会会议中，本人被推举并获选为公会会长，对此我深感荣幸。正如我在会员周年大会后的晚宴中致辞时所说，上任会长魏伟峰博士及历任前会长均表现卓越，我期待在他们所奠定的稳固基础上竭尽全力，继续积极发展会务。

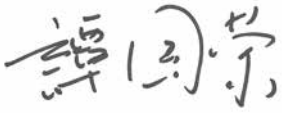
近年公会做了大量工作，特别是宣扬特许秘书为所任职机构带来的价值，成绩斐然。各界对公司秘书角色的了解较过往更为深入。与此同时，要做的工作还有很多。相信大家都知道，现在到未来数年，我们还会面对不少机遇和挑战。理事会将于2月举行策略会议，之后我会更详尽报告这些事项。

公会即将举办的大型活动是于本月14日假万豪酒店举行的2016年度周年晚宴，主题为「庆贺传承」，以纪念特许秘书专业发展的又一里程碑。125年前，一群在英国的公司秘书成立了「秘书公会」，其后发展为特许秘书及行政人员公会(ICSA)，亦即创立香港公会前身的专业机构。公会的周年晚宴一直是公会会员和友好欢聚的良机，今年更邀得香港公司注册处处长鍾丽玲FCIS FCS太平绅士担任主礼嘉宾，教人期待。希望当晚会见到大家。

本刊今期探讨同业要处理的企业管治事务中最要紧的范畴之一：遵守香港的关连交易规定。涉及关连交易的公司所须遵守的规定，载于主板上市规则第14A章和创业板上市规则第20章，可谓香港企业管治法规中最为复杂和最为技术性的要求。这实在有其原因，香港算是个小地方，大部分公司有其控股股东，由较少数人士控制大部分市值。在此市场结构下，倘若没有严谨的规管控制措施，关连交易便可能为「知情人士」提供机会透过「自行买卖」挪取公司资源。

公会透过强制持续专业发展计划和本刊，积极协助会员了解香港的关连交易规则，加强在这方面的谘询和合规工作。一如其他合规事务，我们必须熟悉有关规则条文的细节。就在本月份，我们将出版关于关连交易的刊物。《关连交易指引》将于本月中旬上载至本会网站(www.hkics.org.hk) 的「刊物」一栏，尝试从实务角度说明有关规定。实务上要判断谁是否关连人士并非一目了然；因此指引内特设A3大小的图表，说明不同个人和实体之间的关系，相当实用。

除了熟悉规则条文的细节外，专业人士当然需要充分了解规则背后的原则。今期的封面故事（第6至11页）探讨关连交易规管制度的理念，以及公司秘书确保有效遵从规定的角色。繁忙的新一年又开始了，现在就阅读今期文章吧。



谭国荣先生 FCIS FCS

Connected transactions – the compliance challenge

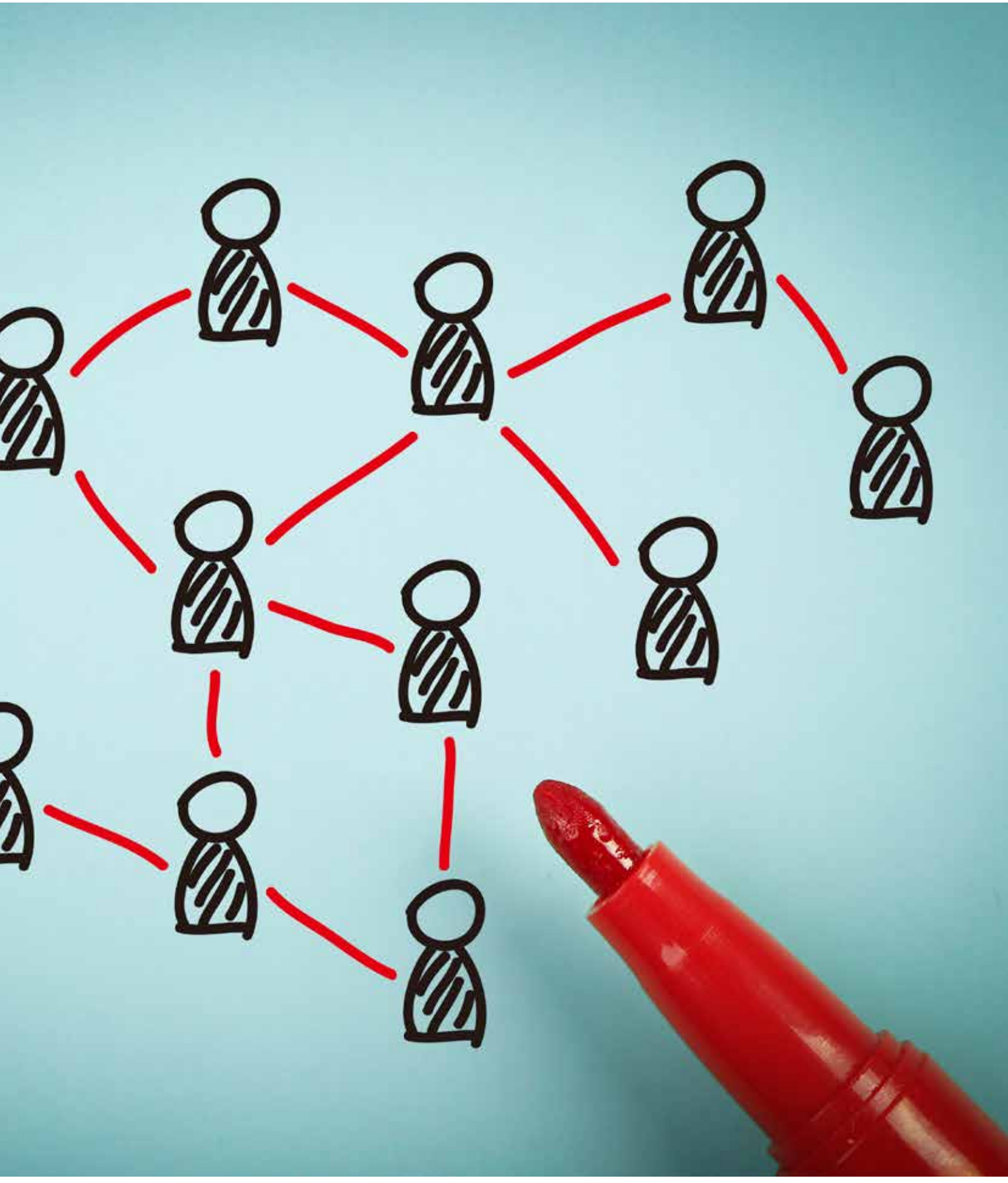
Complex though they may be, Hong Kong's connected transaction rules can be better understood if the basic principles behind the regulations are grasped. This month, *CSj* looks at the rationale behind the rules and at the role of the company secretary in ensuring compliance.

Just like water that can both float and sink a boat, connected transactions are neither good nor evil by nature, their effect depends on the motive behind them. They are considered abusive or harmful only when, for example, the price is unfair to the company by reference to the price the company would have received from an unrelated party dealing at arm's length.

Simply put, connected transactions are transactions that take place between an issuer and the persons or parties it has a relationship with. Chapter 14A of the Main Board Listing Rules (or Chapter 20 of the GEM Rules) has well-defined descriptions of who connected persons and associates are, and what conditions constitute a connected transaction.

Highlights

- the objectives of the rules on connected transactions are to ensure that companies take into account the interests of shareholders as a whole when they, or one of their subsidiaries, enter into connected transactions
- the company secretary is responsible for ensuring that the internal controls designed to safeguard against abusive connected transactions are effective
- whistleblowing is an important potential safeguard against harmful connected transactions in Hong Kong



By and large, the objectives of the rules on connected transactions are to ensure that a listed issuer takes into account the interests of shareholders as a whole when it, or one of its subsidiaries, enters into connected transactions; and to provide safeguards against directors, chief executives and substantial shareholders (or their associates) taking advantage of their positions.

This is achieved by requiring immediate disclosure and prior shareholders' approval of material connected transactions. In addition, issuers are required to disclose their connected transactions in annual reports. Continuing connected transactions are also subject to annual review by independent non-executive directors (INEDs) and auditors.

The regulatory framework

In Hong Kong a large number of companies are controlled by a dominant shareholder so connected transactions is a major area of potential concern. In this context, Grace Hui, Managing Director and Chief Operating Officer (Listing), Listing and Regulatory Affairs, Hong Kong Exchanges and Clearing Ltd (the Exchange), says a robust approach to connected transactions is critical to the corporate governance framework in Hong Kong.

'We review the connected transaction rules from time to time to ensure that they have addressed developments in the market and international best practices, and also represent acceptable standards which help ensure investor confidence. We believe that our current rules meet the purpose as intended,' she says.

She adds that scrutiny of connected transactions by independent directors provides an important means to ensure that such transactions are fair to all shareholders. 'Our current approach gives independent shareholders the right to vote against material connected transactions that they consider unfair. This is in line with the practices in a number of Asian countries and other developed markets (for example, the PRC, Singapore, the UK and Australia),' she explains. She adds that relaxing the requirements and relying only on company disclosures would undermine investor protection against connected transactions in Hong Kong.

Dr Maurice Ngai, CEO, SW Corporate Services Group Ltd, and HKICS Immediate Past President, points out that Hong Kong's connected transactions regulatory regime is among the most complicated in the world. 'Such complexity and extensive coverage of the rules cause listed companies to think twice before they engage in connected transactions. Given the technical complexity and stringent rules, I think the current regulatory regime is reasonable and acceptable.'

In addition to the board and independent directors, he points out that the audit committee and internal/external auditors are also required to play a significant role in monitoring and curbing abusive connected transactions.

'While the audit committee and internal/external auditors, as gatekeepers, should double check whether a connected transaction has taken place and provide necessary advice in hindsight, equally important is raising the awareness of the management and internal departments in the gatekeeping process before the occurrence of a connected transaction,' he says.

He adds that the company secretary also has a key role to play – in particular the company secretary is responsible for ensuring that procedural safeguards are in place and effective. As an example, Dr Ngai cites the need for listed companies seeking to carry out continuing connected transactions to establish a framework specifying the connected parties it is going to trade with, business nature, number of transactions, pricing criteria, duration, along with other terms and conditions.

Such continuing connected transactions framework has to be approved by the board and independent directors, who are presumed, *prima facie*, to exercise independent judgement; and also has to be disclosed to and ratified by the general meeting of shareholders. Moreover, each continuing connected transaction must meet the criteria and be within the limits stipulated, or else it has to be treated as a separate connected transaction, which is subject to a separate set of approval and disclosure procedures.

The company secretary, along with the company's internal departments, such as the sales and finance departments, needs to ensure that the internal control processes designed to safeguard against abusive connected transactions are effective. For example, the finance department knows key figures, such as the company's issued capital and shareholding figures, and they can validate if a deal crosses the pre-defined thresholds. Salespeople should also be aware if they are trading with connected parties, such as spouses of the company's directors.

'The company secretary is the one charting the territory including all the routes for the parties to follow. It's like a map all parties can follow to identify

> "the company secretary [provides] a map all parties can follow to identify connected persons, their associates and thresholds that would require disclosure as connected transactions"
>
> Dr Maurice Ngai, CEO, SW Corporate Services Group Ltd, and HKICS Immediate Past President

connected persons, their associates and thresholds that would require disclosure as connected transactions. The company secretary must have a clear understanding of the structure of the "private group", from the parent or holding company and associates of the holding company, down to the listed issuer,' Dr Ngai says.

Strengthening the role of independent directors

It will be clear from the foregoing that independent directors play a key role in monitoring and curbing abusive connected transactions, but are they effective in this role?

David Webb, shareholder activist and Founder of Webb-site.com, points out that, because the controlling shareholders and other directors are allowed to vote on the election of INEDs, listed companies with a high shareholding concentration can usually determine who should be "independent" of them in the board room. 'It's like having a parliamentary democracy in which the ruling party picks the members of the minority party,' he says.

INEDs, Webb argues, would need to be independent of management and controlling shareholders if they are to effectively perform their monitoring role for connected transactions. As a way to strengthen the independence of INEDs, Dr Bryane Michael, a fellow at the University of Hong Kong's Law Faculty, suggests that a voting scheme for independent directors should be introduced into the Code of Corporate Governance such that shareholders not among the top 10% shareholders can nominate at least one independent director.

Mohan Datwani, Senior Director of HKICS, makes the point that on independence of INEDs, the current rules simply focus on certain business and professional conflicts, and do not truly assess the independence of mind which is the essential challenge. 'Does this then mean that if the minority shareholders have the right to nominate that this issue is addressed? More importantly, the ramifications flowing from tangential inroads to the "one share, one vote" principle has to be considered,' he says.

The enforcement challenge

The Exchange primarily operates a 'name-and-shame' system to enforce Hong Kong's connected transactions regime. The sanctions available to the Exchange for breaches of the regime include public censure, public criticism, private reprimand and a statement that in the opinion of the Exchange, the retention of office (of a current director) is prejudicial to the interest of investors.

Grace Hui believes that this remains an effective way to police conflicts of interests arising from connected transactions. 'In our experience, directors take the possibility of sanctions very seriously,' she says. 'The Exchange may also give directions for the issuers to take remedial actions and

improve future conduct, such as requiring the issuers to appoint advisers or requiring the directors to undergo training. These actions are designed to enhance the corporate governance of the issuers that have acted in breach of the rules.'

As part of its effort to improve the regulation of issuers, Hui says the Exchange is conducting a review of the disciplinary powers and sanctions under the listing rules to make the disciplinary regime more effective and responsive to market needs and expectations.

David Webb believes that all the listing rules, including the connected transaction rules in Chapter 14A, be moved under the Securities and Futures Ordinance (SFO) to be administered by the Securities and Futures Commission (SFC). Currently, the SFC can get involved in connected transaction cases where an issuer's business or affairs have been conducted in a manner prejudicial to the interests of shareholders, such as where there has been asset misappropriation and fraud through undisclosed connected transactions.

'The Exchange should not be regulating anything and the regulating functions should be moved to the SFC,' says Mr Webb. He adds that this would enable the SFC to seek remedies from the courts under the SFO. Possible remedies include, among others, an order restraining (or requiring) the carrying out of a specific act, requiring the issuer to commence legal proceedings for recovery of damages, disqualifying a director and other orders for regulating the conduct of the company's business and affairs.

Dr Ngai, however, warns about the effect that criminal sanctions may have on business activity in Hong Kong. While the possibility of abusive connected transactions cannot be ruled out, he suggests, neither would it be practical to criminalise violations of the connected transaction rules by moving them under the SFO. He adds that the 'arm's length' standard can be exceedingly difficult to apply. Often, the pricing of transactions, including compensation arrangements, is complex and requires the exercise of judgement by directors, which regulators and courts are reluctant to second guess.

> "just like water that can both float and sink a boat, connected transactions are neither good nor evil by nature, their effect depends on the motive behind them"

Under the radar?

Respondents to this article all agree that connected transactions is an extremely complex area to police. Where such transactions are not disclosed, it could take substantial research to distinguish them from usual commercial decisions in the normal course of business – particularly if the audit trail has been deliberately obfuscated.

Dr Michael points out that Hong Kong's rules on connected transactions are very similar to other developed countries, but the problem is where companies do not disclose connected transactions. 'The connected transaction rules are okay, as long as companies actually disclose, but I think many do not. That's why the system needs better policing. In the cases where self-dealing and self-serving connected transactions are covered up, this type of malpractice constitutes fraud against shareholders,' he says.

Mohan Datwani's views on the assertion that there may be lack of disclosures by listed issuers are that this is difficult to assess in the absence of empirical evidence and understanding of the applicable exemptions which were invoked for the non-disclosure. He adds that regulators are increasingly looking at the quality of disclosures and using regulatory tools like Section 179 of the SFO.

One way to remedy this situation would be to recruit other players to monitor compliance with the connected transaction regime. Two other players which could be gatekeepers in this respect are minority shareholders and whistleblowers.

1. Minority shareholders

In the past, minority shareholder oversight of corporate governance issues has been weak in Hong Kong due to the cost of performing this role. Will the growth of institutional investors, with

their access to greater resources, change this dynamic?

Unlike in the US where the increased presence of pension funds has had a strong influence on firm-level corporate governance, pension funds and institutional investors still represent a small part of total equity investment in Hong Kong – giving them little bargaining power to militate for better corporate governance. While investment by the MPF schemes has increased over the years in local equities, such schemes still represent a very small proportion of the market and they do not, therefore, have much influence over governance.

Moreover, Dr Michael points out that the duty of trustees under Hong Kong's trust law towards their beneficiaries may not extend to using investment criteria which would potentially lower returns and incur additional costs. Within the confines of Hong Kong law and practice at present, he recommends alerting trustees to the risks of investing in companies with high shareholder concentrations. The SFC already issues regular warnings about the risks of high equity ownership concentration. Last week, MSCI Inc, a provider of securities markets indexes and analytics, announced that companies over which SFC announced a high concentration would not become MSCI index constituents.

Why the connected transactions rules matter

As the main article makes clear, there is nothing inherently wrong with connected transactions. Problems clearly do arise, however, where such transactions enable insiders to take advantage of their position to act in their own interest rather than in the interests of the company. A recent paper – *Last of the Tai-Pans: Improving the Sustainability of Long-Term Financial Flows by Improving Hong Kong's Corporate Governance* – by Dr Bryane Michael and Say Goo, Fellows of the Law Faculty at the University of Hong Kong, indicates that connected transactions tend to reduce shareholder value.

Citing statistics from previous studies in Hong Kong, the paper suggests that when connected parties engage in takeover activity, firm value decreases by about 30%. Asset sales between connected parties tend to reduce firm value by about 20%. Such transactions should have the aim of increasing firm value of course. Lack of information about connected transactions also tends to result in the destruction of firm value in Hong Kong. The paper cites statistics that indicate an average fall by about 10% in cumulative annual returns when a company provides no information about a connected transaction. When the financial adviser involved in the transaction provided no report, firm value fell in the sample they cite by about 30%.

While these figures indicate clear damage to the interests of shareholders, the paper also points out that inadequate policing of connected transactions could seriously undermine Hong Kong's reputation as an international financial centre. 'Self-dealing (either real or imagined) acts as a severe brake on domestic and foreign investment in Hong Kong's companies,' the paper states.

Dr Michael also suggests that regulators should provide constantly updated information on these kinds of risks and the rights of shareholders to the investment committee members of these schemes. This would give them a better understanding of their rights as shareholders and ways to exercise them while serving their beneficiaries' interests.

2. Whistleblowers

The first people to become aware of fraudulent practices within companies are often the officers and employees of the company. Dr Michael points out that there will often be individuals close to problematic connected transactions who wish to protect the company for which they work. He therefore sees whistleblowing as an important potential safeguard against harmful connected transactions in Hong Kong.

He recommends adopting whistleblower protection provisions in Hong Kong's Code of Corporate Governance. He points out that amending the Code would be a speedier process than going down the statutory route. It would also help prepare companies for the inevitable whistleblower protection legislation that will come. He adds that many companies operating in Hong Kong already have to comply with whistleblower protection laws in their home jurisdictions in the form of Sarbanes-Oxley and/or the Public Interest Disclosure Act.

Jimmy Chow
Journalist

> *The new HKICS guidance note on Hong Kong's connected transaction regime will be available from mid-January in the Publications section of the Institute's website: www.hkics.org.hk.*

Changes to payment regulations in Hong Kong

Gabriela Kennedy and Karen Lee, Mayer Brown JSM, outline Hong Kong's new regulatory regime for payment systems and stored value facilities.

Mobile payments, digital wallets and contactless payments are easy and efficient methods for retail payment that are continuing to grow in popularity in Hong Kong. Inevitably, such new innovative payment methods have caught the attention of regulators. Protecting consumers is a key priority, resulting in not only new regulatory guidelines and changes in the law, but also in increased enforcement actions.

Greater scrutiny of financial institutions and contactless credit card payments is now the norm against a backdrop of increasing cybersecurity threats. On 13 November 2015, the new regulatory regime for stored value facilities (SVFs) and retail payment systems (RPS) came into operation under the Payment Systems and Stored Value Facilities Ordinance (formerly the Clearing and Settlements System Ordinance). The Payment Systems and Stored Value Facilities Ordinance introduces new regulations for all non-financial institutions that issue and operate certain payment systems, which will now be under the scrutiny of the Hong Kong Monetary Authority (HKMA).

Cybersecurity – a changing landscape for financial institutions

In mid-October 2015, the HKMA ordered seven banks to recall their contactless credit cards embedded with near-field communication (NFC) chips, after identifying security issues relating to such chips. Personal data of customers, stored on the NFC chips, could be read by a mobile app. The main risk came from the fact that the contactless credit cards stored the cardholders' names, as well as the card number and its expiry date on the NFC chip, leaving the door wide open for online fraud in the event of leakage of such data. The obvious conclusion drawn as a result of this sweep was that unnecessary data, such as the name of the cardholder, should not be stored on the contactless credit card, and all data should be encrypted in order to minimise security risks.

On 13 October 2015, the Hong Kong Privacy Commissioner (PC) released a statement confirming that it was carrying out a compliance check of the possible personal data leakage involving contactless credit cards of the seven banks. Depending on the outcome of the compliance check, the PC could institute a formal investigation and issue enforcement notices.

Scrutiny regarding NFC technology, and the security of data kept by financial institutions, is not new. In fact, on 25 November 2013, the Hong Kong Association of Banks, in consultation with the HKMA, issued a guideline on the *Best Practice on NFC Mobile Payments in Hong Kong*. About a year later, on 6 October 2014, the former PC also issued a *Guidance on the Proper Handling of Customers' Personal Data for the Banking Industry*.

More recently, on 15 September 2015, the HKMA issued a circular specifically on cybersecurity risk management (the Circular). The Circular advises banks to, amongst other things, have in place a clear ownership and management structure to ensure accountability of cybersecurity risks; internal risk management measures; and regular and periodic evaluations of their internal cybersecurity controls, taking into account emerging cyber threats. If material gaps are identified, then any acceptance of risks posed by such gaps must be justified and documented. The Circular requires banks to have compliant internal measures put in place by the end of 2015, or early 2016.

Payment Systems and Stored Value Facilities Ordinance 2015

Financial institutions are subject to the oversight of the HKMA, and are required to maintain security measures over the NFC technology utilised by them, and to implement cybersecurity controls.

Highlights

- previously only financial institutions were regulated but the new regulatory regime will cover all organisations and all types of payment facilities
- under the new regime, all organisations which issue and operate payment systems will be under the scrutiny of the Hong Kong Monetary Authority
- issuers of multi-purpose stored value facilities should start the process of obtaining a licence now

What about unlicensed, non-financial institutions who issue SVFs and RPSs? What are their obligations, and how are they regulated?

Over the last few years, there has been an influx of new consumer payment tools enabling a quick and efficient way to conclude transactions. Some examples include HKT's mobile payment facility (Tap & Go) and MasterCard's PayPass. Apple Pay, which is already offered in other jurisdictions (including the US and UK), is to be introduced in Hong Kong in 2016. Until recently, these types of payment methods were generally unregulated in Hong Kong. At most, they would be subject to the Hong Kong Personal Data (Privacy) Ordinance, which imposes regulations on all data users on the use and safeguarding of personal data.

While financial institutions are clearly subject to stringent regulations on their handling of customer data and have money and security obligations, there was no control over new entrants to this market, whose main sphere of activity is non-financial, nor was there any control over the way they could conduct their payment activities. Customer information held by these companies, and money stored on their facilities, are just as vulnerable (maybe even more so) to theft and cyber attacks as is the data held by financial institutions. It no longer made sense to leave this area unregulated. As a result, a new regulatory regime has been introduced, which will effectively cover all organisations (not just financial institutions) and all types of payment facilities.

> "mobile payments, digital wallets and contactless payments are easy and efficient methods for retail payment that are continuing to grow in popularity in Hong Kong"

Background

In brief, an RPS is a payment system that handles the transfer, clearing or settlement of low-value payments for retail purchases (for example, credit cards), whilst an SVF involves the pre-payment of an amount, the value of which is stored on a payment facility used to pay for goods or services. SVFs can be categorised as either:

1. a single-purpose SVF (which can only be used to purchase goods or services from a single merchant, for example a gift card), or a multi-purpose SVF (which can be used to obtain goods or services from multiple merchants, for example the Octopus card), and

2. device based (value is stored on a physical device) or non-device based (value is stored on, say, a computer or mobile network).

Previously, only companies that issued multi-purpose device based SVFs were regulated and required a licence, whilst issuers of non-device based SVFs, single purpose SVFs and RPSs were not subject to regulatory requirements.

On 4 November 2015, the Hong Kong Legislative Council held a third reading of the Clearing and Settlement Systems (Amendment) Ordinance (Amendment Ordinance), which was passed on the same day. The Amendment Ordinance came into effect on 13 November 2015 and included a renaming of the Clearing and Settlements System Ordinance to the Payment Systems and Stored Value Facilities Ordinance (the Ordinance).

A new regulatory regime

In summary, the new regulatory regime introduced by the Ordinance:

1. requires issuers of both device and non-device based multiple purpose SVFs to obtain a licence from the HKMA – this applies to both current and future operators of such SVFs (the licensing requirement does not apply to single-purpose SVFs), and

2. gives the HKMA the power to designate RPSs that will be subject to its oversight if the RPS is operated in Hong Kong, or processes Hong Kong dollars or any other currencies prescribed by the HKMA, and the disruption of the business of such an RPS may have an adverse impact on Hong Kong's financial stability, the functioning of Hong Kong as an international financial centre, the day-to-day commercial activities in Hong Kong, or would adversely affect public confidence in Hong Kong's payment or financial systems.

The HKMA has issued an *Explanatory Note on Licensing for Stored Value Facilities* to provide organisations with guidance on the new SVF licensing regime (the Explanatory Note). The Explanatory Note summarises the main provisions of the

> “greater scrutiny of financial institutions and contactless credit card payments is now the norm against a backdrop of increasing cybersecurity threats”

Ordinance (for example, application procedure, licensing criteria, etc), and sets out the policies and approach that the HKMA intends to take in implementing the new licensing regime.

The changes brought about by the Ordinance are being implemented in two phases. The provisions concerning the application and processing of SVF licences and the designation of RPSs came into operation on 13 November 2015. However, the provisions that create offences and impose repercussions for failing to comply with the new regulatory regime will not come into force for 12 months.

This effectively gives issuers a 12-month grace period to obtain the required SVF licence. After the expiry of 12 months (that is, after 13 November 2016), it will be illegal for an organisation to carry on any SVF business without having obtained the required licence. Note that licensed banks will already be deemed to have the necessary licence to carry on an SVF business, and will not be required to obtain a separate SVF licence.

Offences and HKMA powers

After 13 November 2016, the carrying on of a multi-purpose SVF business without a licence will constitute an offence and may result in a maximum fine of HK$1,000,000 and five years imprisonment for conviction on indictment. A summary conviction attracts a maximum fine of HK$100,000 and six months imprisonment.

The HKMA will have the power to conduct investigations if it reasonably believes that an offence has been committed, and can impose sanctions, for example, issue warnings, revoke or suspend licences, or impose a penalty of no more than HK$10,000,000 or three times the amount of profit gained or avoided by the breach, whichever is higher.

Conclusion

Banks and other organisations need to start getting their ‘ducks in a row’ to ensure compliance with the Circular and the Ordinance respectively. In particular, issuers of multi-purpose SVFs should start the process of obtaining the SVF licence now – waiting too long may result in issuers having to interrupt, or stop, their business if they fail to obtain their licence by 13 November 2016. A year is not a long time, considering the volume of applications the HKMA may need to deal with.

Gabriela Kennedy, Partner, and Karen Lee, Senior Associate
Mayer Brown JSM

Risk management and corporate governance

The winning paper in the Institute's latest Corporate Governance Paper Competition argues that risk management is an essential part of a healthy corporate governance framework. In this second and final part of their article, the authors look at examples of best practice in risk management in the Hong Kong market.

Risk management has been a critical area of corporate governance since the 2008 financial crisis. The crisis demonstrated that a number of problematic financial institutions did not have effective risk management. Those financial institutions failed to monitor potential risks. Risk management, in fact, is the process of identification, assessment and prioritisation of risks by both the board and the management to monitor, minimise and control the probability and the impact of risks. Only if potential threats and opportunities are identified can a company apply good governance to cope with the evolving environment. The company's management should invest more resources in risk management and this should form an essential part of the company's strategy.

Moreover, as the consultation paper on risk management and internal control issued by Hong Kong Exchanges and Clearing Ltd (the Exchange) in June 2014 emphasised, companies' risk management systems need to be fully integrated with their internal controls. Currently, jurisdictions in other countries such as UK, Australia and Singapore have already incorporated risk management requirements in the internal control section of their corporate governance codes. All these codes require the board to maintain a sound risk management and internal control framework system. In accordance with this global trend, it is necessary for companies in Hong Kong to ensure an effective framework for risk management and internal controls and to ensure full disclosure in this area.

Rationale of the Code changes

Following its 2014 consultation paper, the Exchange amended the Corporate Governance Code to upgrade the provisions of the Code relating to risk management and internal control. These amendments took effect at the beginning of this month. The rationale for the Code changes are discussed below.

On the company side, the revised Code Provisions are intended to provide a better guideline for both board and management to monitor the procedures and evaluate the performance of internal controls. Better risk management and internal controls will help companies to reach their long-term objectives and improve the efficiency of operations. The board has a responsibility to identify potential problems in the first place. Potential risks vary in relation to the nature, size and complexity of the company, and its individual characteristics. In addition, the audit committee has the responsibility to set up risk assessment and management guidance based on the 'comply or explain' provisions of the Code and overview of the internal control performance.

On the shareholders' side, risk management disclosure can enhance transparency. With the risk management report, shareholders can be fully informed how the company's management deals with the risks they have encountered or will encounter in future. It provides reassurance to the shareholders and helps them make rational investment decisions.

Although risk management reporting is not mandatory, CLP Holdings Ltd (CLP) is a good example of best practice in this area. The company provides a risk management report to shareholders in its annual report. CLP's risk management report of 2014 (available on the company's website: www.clpgroup.com), discloses the risk governance framework and existing risks, and compares this with the past. This enables shareholders to have a better understanding of the company's strategy and operation. The MTR is another good example of a company which publically

discusses its risk management, especially its crisis management.

Examples of best practice

1. CLP Holdings

CLP is a well-known listed corporation in Hong Kong. It has adopted its own corporate governance code (the CLP Code) which exceeds many of the requirements of the Exchange's Corporate Governance Code.

In order to enhance transparency, CLP has adopted its own Code for Securities Transactions by Directors. What's more, CLP requires directors and senior management to disclose their interests and confirm compliance with the Model Code and the CLP Code for Securities Transactions. CLP has also published a set of Continuous Disclosure Obligation Procedures for other staff: this formalises the current practices in monitoring developments in its businesses for potential inside information and communicates the information to its shareholders, the media and analysts. CLP has also set up an internal control system of checks and balances on staff and managers' authority so as to avoid one party monopolising a transaction.

CLP provides guidelines for staff to voice their opinions and suggestions (and to report any malpractices) to management. This accords with the company's values, that is – 'every employee is responsible for the company's risk management'. These policies can protect the corporation

Highlights

- upgrading the need to review and disclose risk management policies and performance to 'Code Provision' status in the Corporate Governance Code has raised awareness of the importance of good risk management and internal controls
- the authors suggest, however, that introducing these new requirements on a 'comply or explain' basis may not be effective and they recommend making them mandatory
- imposing a mandatory requirement for disclosing risk management policies might create a greater compliance burden, but it would safeguard companies' assets and reputation

from making unwise decisions and from corruption.

CLP has disclosed its strategic plan for responding to risks in its Risk Management Report since 2007. In addition, its audit committee is responsible for internal controls and the financial report. Although risk management reporting is not a mandatory requirement in Hong Kong, CLP provides a risk management report covering its risk management framework and strategies to deal with crises.

Every quarter, business and functional units are required to submit the material risks identified through their risk management process to group risk management. When the risks have been identified, the group executive committee writes a quarterly group risk management report and submits it to the audit committee. A summary of the material risks are passed to board. In the case of investment proposals, CLP requires multi-disciplinary experts to evaluate the risks ahead of any investment.

2. The MTR Corporation

In 2014, the Mass Transit Railway (MTR) Corporation established a risk committee which complies with the Exchange's new requirements on risk management and internal control. The company's risk committee's work and responsibilities, as stated in the 2014 annual report, include the following:

- review the set-up and implementation of the company's ERM framework, guidelines, policy and procedures for risk assessment and risk management
- review the company's top risks and key emerging risks
- review the enterprise risk management function, and
- review the collaboration arrangements with the capital works committee and the audit committee.

Recommendations

According to good corporate governance procedures, the board and management owe a duty of care to their shareholders and the public, especially financial institutions. Rather than just tick boxes, the role of the board should be to oversee and evaluate the risks towards objectives

> "[the new Code Provisions on risk management] will enhance the transparency of listed companies as they are required to disclose to their shareholders how they have managed their risks"

> “it is not easy to assess the nature and extent of risks and it can be catastrophic for a business to wrongly assess the complexity of risks”

and establish a sound framework for risk management and internal control. Simultaneously, management has the ongoing responsibility to monitor and implement risk management and internal control. In order to perform this duty of care, it is also necessary for the board to disclose its risk management processes in its annual report for shareholders to assess the performance of investment. As a further line of defence, internal audit plays a significant role in analysing and appraising the effectiveness of risk management and internal control.

It is not easy to assess the nature and extent of risks and it can be catastrophic for a business to wrongly assess the complexity of risks. Some large companies such as Enron, even those with risk management departments, failed to successfully assess the risks which led to corporate collapse. In pursuit of business objectives, there is an urgent need for all companies to disclose their risk management details in their financial reports. In line with the assumption for the current and future risks, the board should not only identify shareholders' expectations but also balance the strategic objectives between risk taking and risk control.

According to the recent amendments to the Corporate Governance Code, the board is responsible for overseeing the risk management and internal control systems on an ongoing basis. The aim of upgrading the need to review risk management to a Code Provision is to protect shareholders' long-term interests and to manage risks. However, according to the Organisation for Economic Co-operation and Development (OECD), the existing guidance on risk management is concerned with creating a risk management framework. Management is not only responsible for monitoring and implementing risk management through internal control; the company should develop a risk-aware culture and disseminate this awareness to every individual.

The CLP risk management report mentions that every employee within CLP has responsibility for risk management. Sometimes it is hard to assess the risks or for management to identify all the risks. A good risk awareness culture and a proper risk appetite can help reduce certain risks. Education of the company's employees may help to achieve this.

Despite the fact that the need to review risk management has been upgraded, this requirement is still based on a 'comply or explain' approach. Although this provides flexibility to the board, it also challenges the ethics of the board. In contrast, the NYSE Corporate Governance Standards require all companies to develop a clear risk management report for shareholders. To better enhance transparency and accountability, we recommend further upgrading the Code Provision on risk management to a listing rule. In other words, it should be mandatory for all companies to disclose their risk management policies and performance in their annual financial report.

Conclusion

To conclude, the new Code Provisions on risk management have raised awareness of the importance of good risk management and internal controls. This will enhance the transparency of listed companies as they are required to disclose to their shareholders how they have managed their risks. However, since the Code Provisions are imposed on a 'comply or explain' basis, some companies might fail to comply with this requirement and simply provide explanations for their non-compliance in the corporate governance report. This means that shareholders in these companies may not be protected.

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The Institute's Corporate Governance Paper Competition is designed to promote awareness of good corporate governance among local undergraduates. Authors of the competing papers also enter a presentation competition. More information is available on the HKICS website: www.hkics.org.hk.

Clarifying Hong Kong's AML regime

Mohan Datwani FCIS FCS (PE) Senior Director and Head of Technical & Research, HKICS, and Certified Anti-Money Laundering Specialist, looks at the background to two cases *HKSAR v Salim Majed & Anor* and *HKSAR v Yeung Ka Sing, Carson*, scheduled to be heard by Court of Final Appeal in mid-2016 which it is hoped will clarify a number of contentious issues in the interpretation of Hong Kong's money laundering offences.

Hong Kong is a member 'country' of the Financial Action Task Force (FATF). Under the February 2012 FATF Recommendations, it is stipulated under Recommendation 3 that '[c]ountries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences'.

As to what are 'predicate offences', under the Interpretative Note to Recommendation 3 (Money Laundering Offence), this is left to individual countries, or in Hong Kong's case more accurately jurisdictions, to determine. Nevertheless, predicate offences should extend to property representing the 'proceeds of crime'. Also importantly, it is stated that, '[c]ountries should ensure that: (a) [t]he intent and knowledge required to prove the offence of money laundering may be inferred from objective factual circumstances…'

As part of the FATF member countries, dealing with property that represents the proceeds of crime should be criminalised in Hong Kong, as it has been for decades. Further, the person dealing with such proceeds of crime cannot simply assert that he or she did not know that the proceeds were those of crime, when objectively this may be inferred from the factual circumstances. But doesn't the prosecution still have to prove that, where the person claims he or she is not dealing with the proceeds of crime, that in fact the proceeds are those of crimes, as inferred from objective factual circumstances? This is a vexed question under Hong Kong law.

Currently it would appear that the reverse is true – the accused has to assert that he or she has done the necessary due diligence prior to dealing with the proceeds that the money is not the proceeds of crime. More simply put, the money is not 'dirty' or is otherwise 'clean'. This appears to be over and above the minimum requirements under the FATF Recommendations, but there is nothing preventing a FATF member country to apply a standard relating to predicate offences over and above those required under the FATF Recommendations.

Points of law

On the topic of Hong Kong's money laundering laws, The Centre for Comparative and Public Law of the University of Hong Kong hosted a conference with University College of London on 23 November 2015 at the University of Hong Kong titled 'Financial crime, risk, and the rule of law'. During the conference, The Honourable Justice Joseph Fok, Permanent Judge of the

Court of Final Appeal of Hong Kong, spoke on the 'Development of the law in Hong Kong on Money Laundering'. As practitioners knowledgeable with money laundering issues will know, the contentious matter in relation to Hong Kong's money laundering relates to the requisite knowledge required to find a conviction for a money laundering offence as alluded to in the above discussions.

Justice Fok, following an analysis, identified in detail the pertinent questions for Hong Kong's court as follows:

- Whether, on a charge of dealing with the proceeds of crime contrary to the relevant anti-money laundering (AML) legislation, it is necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of a predicate offence?
- What is the appropriate *mens rea* for the offence of money laundering and does this import a necessity for the prosecution to prove the predicate offence?
- Whether indictments containing charges of multiple instances of money laundering are duplicitous? This last ground is because dealing in proceeds is unlikely to be a one-off incident but does each dealing represent the commission of an offence, or should this be viewed as a continuous conduct.

Highlights

It is hoped that the Court of Final Appeal will clarify the following points of law:

- whether, on a charge of dealing with the proceeds of crime contrary to the relevant AML legislation, it is necessary for the prosecution to prove that the proceeds being dealt with were in fact proceeds of a predicate offence
- what is the appropriate *mens rea* (the level of knowledge and intent) required of the person to convict him or her of the offence money laundering, and
- where the accused is charged with multiple instances of money laundering, does each dealing represent the commission of an offence, or should this be viewed as a continuous conduct?

These questions cut across the offence of dealing with property known or believed to represent proceeds of an indictable offence under Section 25(1) of the Organized and Serious Crimes Ordinance (OSCO) and the Anti-Money Laundering Ordinance (AMLO) applicable generally and to financial institutions respectively. However, for company secretaries, of more relevance is Section 25(1) OSCO which states that '[s]ubject to Section 25A, a person commits an offence if, 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, he deals with the property'. Upon conviction on indictment the offence is punishable by a fine of up to HK$5million and imprisonment for up to 14 years under Section 25(3). In view of the severe consequences, in case of doubt, Section 25A, namely the filing of a suspicious transactions report (STR) should be considered.

For example, in the case involving a solicitor, Wu Wing Kit, the District Court handed down a six-year sentence on Wu. This was not because the prosecution proved that the solicitor knew the money he dealt with in the case was the proceeds of a predicate offence, or in layman terms 'dirty', but rather that the solicitor did not do sufficient to ascertain that the money was, again in layman terms 'clean', through proper due diligence. This was in the context of the size of an alleged

Grounds of Appeal

HKSAR v Salim Majed & Anor

Regarding the *HKSAR v Salim Majed & Anor FAMC 71/2015 (10 February 2015)* case, the point of law for which leave to appeal to CFA was granted was: 'In the context of the offence of money laundering under Section 25 of OSCO, how does the rule against duplicity operate? In particular, whether the offence of money laundering, capable of being committed in any of the modes of 'dealing' as included in its definition under Section 2 of the Ordinance, is or could be a continuing offence [so] that the rule against duplicity does not apply. Moreover, how do the exceptions to the rule against duplicity (namely 'one transaction' as in *DPP v Merriman [1973] AC 584*, 'general deficiency' as in *R v Tomlin [1954] 2 QB 274* and the 'continuous course of conduct' as in *Barton v DPP [2001] 165 JP 779)* appl[y] to a charge of money-laundering which alleges multiple dealings some of which [involve] money from known and different sources.' The other case under appeal (see below) raises the same question.

HKSAR v Yeung Ka Sing, Carson

The *HKSAR v Yeung Ka Sing, Carson FAMC 29/2015 (14 August 2015)* case raises several important points of law.

Re *actus reus*

Leave to appeal was granted to defendant (appellant): 'On a charge of dealing with proceeds of crime contrary to Section 25(1) of the Organised and Serious Crimes Ordinance (Cap 455) (OSCO), is it necessary for the prosecution to prove, as an element of the offence, that the proceeds being dealt with were in fact proceeds of an indictable offence? Was *Oei Hengky Wiryo (2007) 10 HKCFAR 98* wrongly decided on this issue?'

Re *mens rea*

Leave to appeal was granted to:

- ***the prosecution (respondent) –*** 'When considering whether a defendant had reasonable grounds to believe in the context of Section 25(1) of the [OSCO], how does a trial judge reconcile the formulation set out in *Seng Yuet Fong v HKSAR (1999) 2 HKC 833* and the formulation 'knew or ought to have known' set out in *HKSAR v Pang Hung Fai (2014) 17 HKCFAR 778*? Under what circumstances should the trial judge apply these two formulations?'

- ***the defendant (appellant) –*** 'In considering the *mens rea* element of a charge contrary to Section 25(1) of OSCO, to what extent does a trial judge need to make positive findings as to a defendant's belief, thoughts, intentions at the material time even though the judge rejects the defendant's testimony? In particular, where the trial judge rejects the defendant's testimony, to what extent can the judge remain oblivious to the defendant's actual reason(s) for dealing with the specified proceeds in making the finding that the defendant had reasonable grounds to believe that the proceeds he dealt with were proceeds of crime?'

> "this effectively means that, where a person charged with an offence did not conduct a reasonable level of due diligence, they will be facing a charge of criminal negligence"

preliminary deposit which Wu dealt with for a client, and lack of reasonable due diligence by the solicitor, even where there are some applicable Law Society practice directions, which while not determinative, was a fact of the case. In short, the solicitor, and any person including a company secretary, could go to jail for dealing in property without proper due diligence that the money being dealt with is not dirty, or is otherwise clean, where an STR has not been filed.

But is this the correct approach? Should the prosecution have to prove that the proceeds were those of an indictable offence? Moreover, how much needs to be done by a person, in terms of due diligence, to prove that the proceeds are not dirty, or otherwise clean, to be safe in dealing with proceeds of property for others?

Justice Fok, without referring to the Wu Wing Kit case, as this has not yet reached the Court of Appeal level, went through other more pertinent authorities. The Appeal Committee in *HKSAR v Wong Ping Shui & Another (2001) 4 HKCFAR 29*, and the Court of Final Appeal in *Oei Hengky Wiryp v HKSAR (No 2) (2007) 10 HKCFAR 98*, both held that it is unnecessary for the prosecution to prove the money was 'dirty'. This effectively means that, where a person charged with an offence did not conduct a reasonable level of due diligence, they will be facing a charge of criminal negligence. This leads to a further question about the *mens rea* (the level of knowledge and intent) required of the person to convict him or her of the offence to this criminal negligence standard?

As would be recalled, under Section 25(1) OSCO, if the person deals with knowledge that the proceeds are those of an indictable offence, he or she should be convicted. This is the first limb of Section 25(1) and indicates that the person must have actual knowledge. Where the mental state or *mens rea* is an issue is where the prosecution relies on the second limb of Section 25(1) on the ground that the person dealing with the proceeds has 'reasonable grounds to believe that the relevant property represents the proceeds of an indictable offence'. This must be less than actual knowledge, which under the FATF rules should not be the only grounds to find a conviction as the rules refer to the fact that the 'offence of money laundering may be inferred from objective factual circumstances…'

In the latest decision of *HKSAR v Pang Hung Fai (2014) 17 HKCFAR 778*, Justice Fok noted that the test in *Seng Yuet Fong v HKSAR* was applied. That is, 'to convict, the jury had to find that the accused had grounds for believing; and there was the additional requirement that the grounds must be reasonable: that is, that anyone looking at those grounds objectively would so believe'. But this approach was rejected under *HKSAR v Shing Siu Ming*. That case adopted a two-stage approach to 'having reasonable grounds to believe', that is: a subjective evaluation of what facts were known to the accused – and then an objective evaluation of whether those facts would lead a common sense, right-thinking member of the community to believe that the proceeds constituted proceeds of an indictable offence, but uninfluenced by the personal beliefs, perceptions and prejudices of the defendant.

The current state of the law could therefore at best be said to be uncertain. That is, to what extent a person has to conduct due diligence to prove that the money is not dirty or otherwise clean, so as not to be liable for dealing in proceeds of indictable offence is unclear. Further, depending on which is the applicable test regarding *mens rea*, there could be different outcomes. This lack of certainty is undesirable.

Clarifying the law

It follows that there is a need for the Court of Final Appeal to clarify the law. In fact, this will happen in mid-2016 when the decisions of *HKSAR v Salim Majed & Anor FAMC 71/2015 (10 February 2015)* and *HKSAR v Yeung Ka Sing, Carson FAMC 29/2015 (14 August 2015)* are to be heard together commencing 31 May 2016. In Justice Fok's presentation, he identified the grounds of appeal under the cases (see 'Grounds of Appeal' sidebar).

There will no doubt be keen interest relating to the determination of the Court of Final Appeal based on the current provisions of OSCO which contains similar legal issues as those under AMLO relating to financial institutions. As Justice Fok himself remarks, watch this space!

Mohan Datwani FCIS FCS(PE)
Senior Director and Head of Technical & Research, HKICS

Shareholders' rights: an update

A new Court of Final Appeal ruling casts new light on the enforcement of shareholders' rights in respect of a non-Hong Kong company which does not have a place of business in Hong Kong.

In a shareholders' dispute involving the affairs of a non-Hong Kong company, a minority shareholder may try to seek relief under Division 2 of Part 14 of the Companies Ordinance (Cap 622) (CO). The equivalent provisions used to be Section 168A of the former Companies Ordinance (Cap 32) – now the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (C(WUMP)O). Other statutory reliefs include the statutory injunctive relief and declaration under Division 3 of Part 14, inspection of the company's records by members under Division 5 of Part 14 and statutory derivative action under Division 4 of Part 14.

Alternatively, the minority shareholder may seek to wind up the company on the just and equitable ground pursuant to Section 327 of C(WUMP)O. This is the same provision as in the former Companies Ordinance and it is retained in the C(WUMP)O. Here, the petitioner's purpose in seeking a winding up order is to realise his or her investment in the company, which is different from a petition brought by a creditor for which the purpose is to obtain payment of a debt.

Unfair prejudice relief – place of business in Hong Kong?

In order to seek the statutory unfair prejudice relief against a non-Hong Kong company, the applicant needs to establish that the non-Hong Kong company establishes a place of business in Hong Kong. The same requirement shall apply to other statutory reliefs available to members under Part 14 which cover non-Hong Kong companies. 'Place of business' is defined by the CO to include a share transfer or share registration office. However, such definition only provides for a *prima facie* case as the word 'include' has the meaning that the list is not exhaustive. A company incorporated outside Hong Kong does not necessarily establish a place of business in Hong Kong by performing or carrying out business activities in Hong Kong. It is noteworthy that the test of 'business' under the Business Registration Ordinance is much wider and covers any form of commercial activity which is materially different from the definition of 'a place of business' under the CO.

Winding up proceedings on just and equitable ground – the core requirements

Section 327(3)(c) of the C(WUMP)O provides that a non-Hong Kong company may be wound up if the court thinks that it is just and equitable to wind up such company. *Re Beauty China Holdings Ltd* (2009) set out the core requirements for the court to exercise its jurisdiction to wind up a non-Hong Kong company, namely:

1. there has to be a sufficient connection with Hong Kong, but this does not necessarily have to consist in the presence of assets within the jurisdiction

2. there must be a reasonable possibility that the winding up order would benefit those applying for it, and

3. the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

The CFA's decision in the Yung Kee Case

On 11 November 2015, the Court of Final Appeal (CFA) reversed the decision of the Court of Appeal in the Yung Kee case and made an order winding up Yung Kee Holdings Ltd (Company). The CFA's decision is significant since the definition of 'place of business in Hong Kong' is reaffirmed, and more importantly, the test for the Hong Kong courts to invoke their statutory jurisdiction to wind up a non-Hong Kong company on just and equitable ground is restated. Curiously, and as the CFA noted, before the Yung Kee case there had only been a few cases in Hong Kong of a shareholder's petition to wind up a foreign company and most of these cases were concerned with purely interlocutory applications and the point on jurisdiction was not discussed. This may perhaps be understandable since the best way to achieve an exit is to obtain a buyout order from the court based on unfair prejudice petition as one could get a fair value of the shares without a discount on the minority shareholding as opposed to a share in the realisable value of assets upon liquidation.

Highlights

- the Court of Final Appeal (CFA) reversed the decision of the Court of Appeal in the Yung Kee case and made an order winding up the company
- the CFA decision sets out the criteria as to when the Hong Kong courts may exercise their statutory jurisdiction to wind up a foreign company on just and equitable ground
- the CFA decision also reaffirms the definition of 'place of business in Hong Kong' pursuant to Section 327 of C(WUMP)O

> “the Yung Kee case is an important decision which represents an example as to how a shareholder may seek remedy from the Hong Kong courts in order to enforce his or her rights in a non-Hong Kong company which involves overseas holding companies and does not have a place of business in Hong Kong”

The Yung Kee case concerns a family business which has been operating in Hong Kong for decades. The Company was incorporated in the BVI as the ultimate holding company of a group of companies (including one direct subsidiary named Long Yau and eight indirect subsidiaries) and does not carry out any investment or business. Long Yau is another BVI company which has two operating subsidiaries which are both incorporated in Hong Kong and operate the core business of the group in Hong Kong. The protagonists of the dispute are the two brothers being two shareholders of the Company. The elder brother complained that the affairs of the Company had been carried out in a manner what was unfairly prejudicial to him. The two brothers initially attempted to resolve the dispute with a proposed buy-out but failed. They subsequently resorted to litigation. The complaining brother sought remedies under both Sections 168A and 327 of the former Companies Ordinance.

In relation to the application for unfair prejudice relief under Section 168A (now sections 724 to 726), the CFA was of the view that ‘place of business’ connotes a place where or from which a company either carries on or possibly intends to carry on business, and that the fact that a company’s directors discuss its affairs and hold their board meetings in a particular place is not sufficient by itself to make that place the company’s ‘place of business’. Further, while business is not confined to commercial transactions or transactions which create legal obligations, there is no reason to suppose that it covers purely internal organisational changes in the governance of the company itself. The CFA also agreed with the lower courts that the word ‘establish’ indicates that some degree of regularity and permanence of location is required.

The CFA found that the Company did not keep a share transfer or share registration office in Hong Kong. It held no board or general meetings prior to 2009, and since then there were only eight resolutions of the Company or its directors which were all concerned with internal matters such as the payment of dividends or changes to the composition of the board. In light of the above, the CFA held that the courts of Hong Kong have no jurisdiction to make an order under Section 168A as the Company does not have a place of business in Hong Kong.

As regards the petition for a winding up order on just and equitable ground, the starting point is that there is no need to show that the Company has ever had a place of business or carried out business within the jurisdiction.

It was the CFA’s view that there are substantial overlaps between the three core requirements set out in *Re Beauty China Holdings Ltd*. The real test in the case of a creditor’s petition is whether there is a sufficient connection between the company and this jurisdiction to justify the court in ordering a company to be wound up despite the fact that it is incorporated elsewhere; and that in deciding that question the fact that there is a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding up order, whether by the distribution of its assets or otherwise, will always be necessary and will often be sufficient.

The CFA also disagreed with the lower courts that a more stringent connection

is required in the case of a shareholder's petition. Whilst the CFA recognised the difference in terms of purpose and factors relevant to establishing the connection between a creditor's petition and a shareholder's petition, it was of the view that just like a creditor's petition, the important question relating to a shareholder's petition is that whether there is a sufficient connection between the company and the jurisdiction. Indeed, given the nature of the dispute and the fact that it is a dispute between shareholders, their presence in the jurisdiction is highly relevant and will usually be the most important single factor.

The CFA held that the requirement of a sufficient connection with Hong Kong for the purpose of Section 327(3)(c) is satisfied after considering the connecting factors with Hong Kong in the present case, including that:

1. all the underlying assets indirectly owned by the Company are situated in Hong Kong
2. the business of the group is wholly carried out by the Company's indirectly held subsidiaries which are incorporated in Hong Kong, and
3. the whole of the Company's income is derived from businesses carried out exclusively in Hong Kong.

When considering whether it would be just and equitable to wind up the Company, the CFA agreed with the trial judge that there used to be a mutual understanding between the brothers that the family business should be jointly run or managed and that understanding was breached by the respondent brother. On such basis, the CFA held that it was just and equitable to wind up the Company.

Closing remarks

The Yung Kee case is an important decision which represents an example as to how a shareholder may seek remedy from the Hong Kong courts in order to enforce his or her rights in a non-Hong Kong company which involve overseas holding companies and does not have a place of business in Hong Kong. Whilst the threshold to establish a place of business in Hong Kong remains unchanged, the CFA set out the criteria as to when the Hong Kong courts may exercise their statutory jurisdiction to wind up a foreign company on just and equitable ground, and those criteria should not be as stringent as the lower courts had previously adopted or certain authorities had suggested.

Also, the CFA allowed the Company to be wound up but still ordered a stay of the winding up order for 28 days to give the parties an opportunity to agree the terms on which the petitioner's shares in the Company could be purchased by the respondent. Also, in the event that a winding up order is confirmed, the petitioner or the liquidator will be permitted to apply for an injunction order in order to make the underlying assets of the Company available to the liquidator. It appears that the court made these practical arrangements in order to provide the petitioner with other alternatives to realise his investment in the Company. Such approach is in line with the spirit of the statutory relief for a shareholder to wind up a company on just and equitable ground.

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Thoughts on poll voting

Seaman Kwok, Head, Corporate Secretarial, Boardroom Corporate Services (HK) Ltd, and Director, Boardroom Share Registrars (HK) Ltd, argues that more flexibility should be given to listed companies to use the most appropriate voting method for passing resolutions at general meetings.

The Hong Kong listing rules provide that '[a]ny vote of shareholders at a general meeting must be taken by poll'. The above rule – Rule 13.39 (4) of the Main Board Listing Rules and Rule 17.47(4) of the GEM Listing Rules – took effect as of 1 January 2009. However, the full rigour of the rule was mitigated as from 1 April 2012 with the stipulation that this was subject to the situation 'where the chairman, in good faith, decides to allow a resolution which relates purely to a procedural or administrative matter to be voted on by a show of hands'. The author lobbied in the press and through written submissions to the Hong Kong Exchanges and Clearing Ltd (the Exchange) for the 1 April 2012 amendment. The change shows that, under suitable circumstances, there could be alternative arrangements under 'one share, one vote'.

The previous practice was for voting on a show of hands on all resolutions unless a poll was demanded by the chairman of the meeting, or by a certain number of shareholders or a shareholder/shareholders having a certain percentage of the voting rights as specified by the listed company's constitutional documents such as the articles of association or bye-laws.

The author believes that there are still a number of the drawbacks with the poll voting rule and there may be a need for some lateral thinking. The suggestions below are personal to the author and only intended to start a relevant discussion of the issues raised.

1. Time-consuming and no instant voting results

Shareholders present in person, by corporate representative or by proxy and voting at a general meeting, usually do not know or will not be informed of the voting results instantly on the spot as most listed companies will close the meeting before the votes cast have been scrutinised and counted. Therefore, only those shareholders who are smartphone users/personal computer-literate and can access the respective websites of the Exchange (as long as it is a day on which the Exchange is open for the business of dealing in securities) and the listed company can read the poll results announcement after 4:15pm on the date of the meeting at the earliest.

Though not a common practice, certain listed companies may arrange for a break of the general meeting to enable the scrutineers to verify and count the votes cast and the poll results to be announced before the meeting is closed. However, the greater the number of shareholders attending and voting at the meeting, the longer the time the scrutineer will take to finalise the poll results. This is a well-known reality, and perhaps it is time for a rethink as to why shareholders are required to wait for the voting results. There must be better administrative arrangements.

2. Costly and difficult to ascertain accurate voting results

From the company's perspective, there are additional fees for retaining a scrutineer (which must be the listed company's independent auditors, share registrars or external accountants) for dealing with the votes. From experience, this could range from four to five times the fees charged by the listed company's share registrars in Hong Kong for dealing with votes by a show of hands at a general meeting.

Further, extra charges may be levied by the scrutineer if the verification and counting of votes have to be completed at the general meeting. In view of the time constraints and the possible associated human errors, accuracy of the poll results announced within a short time span on the spot cannot be fully guaranteed.

The situation could be mitigated by electronic means. However, currently, to the author's knowledge, there are only three large listed companies in Hong Kong (namely AIA, the Exchange and MTR, each having a huge number of registered shareholders and higher shareholder attendance) which use electronic voting at their annual general meetings such that the poll results for each resolution can be announced promptly after the votes. However, the relevant costs are high and this may well be the reason that so few

Highlights

- the author believes there is no evidence that voting on any proposed resolution at a general meeting has been impaired by voting on a show of hands rather than by poll
- he proposes a narrower scope for mandatory voting by poll, such as for special resolutions and resolutions where interested or majority shareholders are required to abstain from voting
- he proposes that the current listing rule requirement for poll voting should become a Code Provision of the Corporate Governance Code and be subject to 'comply or explain' rather than mandatory compliance

companies have adopted the electronic voting method.

3. No ultimate benefit

Minority shareholders will lose in the same ordinary resolutions whether a vote is by poll or a show of hands (unless they outnumber the controlling shareholders or substantial shareholders (as defined in the listing rules) or the 'relevant shareholders' (as defined below) who attend and vote at the general meeting. Also, even if the minority shareholders present outnumber the relevant shareholders, controlling shareholders or substantial shareholders at the meeting, a poll could be demanded by the latter before the declaration of the unfavourable voting results by a show of hands.

4. Burdensome

Additional administrative and other work as well as the associated costs (such as typesetting and translation costs) and time are required for preparing the poll results announcement in both Chinese and English to be published in accordance with the listing rules.

Some thoughts

In view of the matters discussed above, the author believes that further thought needs to be given to the identified issues. The author believes that more flexibility should be given to a listed company to use the most appropriate voting method for passing its resolutions at general meetings.

A review of the listing rules will show that written approval (in lieu of holding a general meeting to approve) is allowed for a major transaction from a shareholder or a closely allied group of shareholders who together hold more than 50% in the nominal value/number of the securities having the right to attend and vote at the general meeting (the relevant shareholders) if no shareholder is required to abstain from voting thereat (the absolute 50% majority rule).

> “the author believes that more flexibility should be given to a listed company to use the most appropriate voting method for passing its resolutions at general meetings”

If the relevant shareholders attend and vote on the ordinary resolutions proposed at any general meeting, each of the resolutions will be passed or will not be passed in the way they cast their votes at the meeting and the minority shareholders will not be able to reverse the voting results irrespective of whether the vote is by poll or by a show of hands. This is entirely consistent with the 'one share, one vote' principle, and the author is not aware of any severe public criticism of the absolute 50% majority rule.

Further, the author understands that the listing rules or their counterparts in the US, the UK, Mainland China, Australia and New Zealand do not require voting by poll on any resolutions at a general meeting. Nor has there been any evidence indicating that discussion or deliberation on any proposed resolution at a general meeting by the shareholders present is impaired if voting on the same is not taken by a poll (that is, by a show of hands instead). Voting by a show of hands means that each registered shareholder or proxy shall have only one vote, and under the Hong Kong Companies Ordinance, if a shareholder appoints more than one proxy, the proxies so appointed are not entitled to vote by show of hands.

In view of the above, the author's thoughts are that there should be a discussion as to whether voting by poll at a general meeting should be only applicable to:

1. any special resolutions on which the relevant shareholders are not required to abstain from voting, and

2. all other resolutions on which the relevant shareholders or shareholders having a material interest are required to abstain from voting where the reasonable safeguards set out below are in place.

- The detailed procedures for demanding a poll is (a) stated legibly and prominently in the circular accompanying the notice of the general meeting at which the relevant resolution(s) will be considered and voted; and (b) explained clearly at that general meeting and questions from the shareholders or their corporate representatives and proxies regarding the same be answered thoroughly.

- The level of proxy received by the chairman of the general meeting (including the way the votes will be voted) be disclosed before the declaration of the voting results of a resolution if it is voted by way of a show of hands.

- The chairman must demand, and any director of the listed company present must demand or procure the chairman to demand, the voting by a poll if the level of proxy received by him/them together would indicate the opposite voting results by a show of hands had the relevant resolution been voted by a poll.

- The existing listing rules requirement that all votes on the resolutions (except those relating to a purely procedural or administrative matter) at a general meeting must be taken by poll be deleted on the one hand but be included in the Corporate Governance Code as contained in the listing rules as a Code Provision (subject to the 'comply or explain' principle). Arguably, this would result in sufficient pressure from a listed company's competitors and market players to adopt a responsible approach.

Conclusion

In conclusion, as the mandatory poll voting rule has been implemented by listed companies for seven years, perhaps it is time for the Exchange to review and, if it considers it necessary, to amend or modify it.

Seaman Kwok FCIS FCS

Head, Corporate Secretarial, Boardroom Corporate Services (HK) Ltd, and Director, Boardroom Share Registrars (HK) Ltd

Professional Development

Seminars: November and December 2015

12 November
Complex money laundering typologies and red flags

Chair: Mohan Datwani FCIS FCS(PE) CAMS, Solicitor, Senior Director and Head of Technical & Research, HKICS

Speaker: Jason Wong, Principal, Risk Advisory Service, BDO Ltd

20 November
Company secretarial practical training series: how to handle corporate changes – such as company name, officer, auditor and accounting reference date

Chair: Eric Chan FCIS FCS(PE), Chief Consultant, Reachtop Consulting Ltd

Speaker: Mandy Ko ACIS ACS, Senior Manager, Corporate Services Division, Tricor Services Ltd

25 November
Understanding captives and their functions contributing to risk management

Chair: Dr Davy Lee FCIS FCS(PE), Institute Membership Committee Member, and Group Company Secretary, Lippo Group

Speaker: Sean Welsch, Head of Captive Management & Business Development, Global Corporate in Asia Pacific, Zurich Insurance Company Ltd

27 November
The new Companies Ordinance – enforcement of contract, formality and execution

Chair: Roger LC Leung FCIS FCS, LLM, MBA, FCMA, FCPA, FHKIoD, MHKIHRM, and Managing Director, Union Services & Registrars

Speaker: Paul Kwan, Partner, Deacons

3 December
ESG – what should be included under the environmental aspect?

Chair: Edmond Chiu FCIS FCS, Institute Membership Committee Member, and Director, Corporate Services, Vistra Hong Kong

Speakers: Angus Chan, Consultant, Sustainability Services, Environmental Division; Lau Yan Kin, Senior Manager, Environmental/Food & Pharmaceutical Division; and Dr Shek Ka Wing, Assistant Manager, Environmental Division; CMA Testing and Certification Laboratories

4 December
How ESG relates to business sustainability?

Chair: Grace Wong FCIS FCS(PE), Institute Professional Development Committee Member, and Company Secretary and Deputy General Manager, Investor Relations Department, China Mobile Ltd
Speaker: Woo Pat-Nie, Principal, Strategic Development, KPMG

8 December
2015 AGM season review

Chair: Polly Wong FCIS FCS(PE), the then Institute Chairman of Education Committee and Company Secretary and Financial Controller, Dynamic Holdings Ltd
Speaker: Stephanie Cheung, Vice-President, Client Relationships, Computershare Hong Kong Investor Services Ltd

10 December
Company secretarial practical training series: concise and precise – minute drafting

Chair: Edith Shih FCIS FCS(PE), Institute Past President, and Head Group General Counsel and Company Secretary, CK Hutchison Holdings Ltd
Speaker: Anthony Rogers FCIS FCS GBS QC JP, Former Vice-President, Court of Appeal & Former Chairman, Standing Committee on Company Law Reform

11 December
Company secretarial practical training series: dissolutions of companies – liquidation, de-registration and dormant of companies

Chair: Dr Eva Chan FCIS FCS(PE), Institute Council member, and Head of Investor Relations, C C Land Holdings Ltd
Speaker: Carmen So ACIS ACS(PE), Senior Manager, Corporate Services, Tricor Services Ltd

14 December
Company secretarial practical training series: annual general meeting – private and listed companies

Chair: Jerry Tong FCS FCIS, Institute Membership Committee Member, and Financial Controller and Company Secretary, Sing Lee Software (Group) Ltd
Speaker: Francis Yuen FCS FCIS, Institute Education Committee Member & Chairman of Assessment Review Panel, and Director of a consulting company

16 December
The listing rules – recent reforms on connected transactions (re-run)

Chair: Ernest Lee FCIS FCS(PE), Institute Council Member, and Partner, Assurance, Professional Practice, Ernst & Young
Speaker: Mohan Datwani FCIS FCS(PE) CAMS, Solicitor, Senior Director and Head of Technical & Research, HKICS

Professional Development (continued)

Risk management forum – looking at the new normal in Hong Kong

The 'Risk management – looking at the new normal in Hong Kong' forum was successfully held on 26 November 2015 with the support from a group of distinguished speakers: David Graham, Chief Regulatory Officer and Head of Listing, Hong Kong Exchanges and Clearing Ltd; Jyoti Vazirani, Principal, Risk Consulting, KPMG China; and Paul Stafford FCIS FCS, Institute Council Member, and Corporation Secretary and Regional Company Secretary Asia-Pacific, HSBC. The panel discussion was chaired by Edith Shih FCIS FCS(PE), Institute Past President, and Head Group General Counsel and Company Secretary, CK Hutchison Holdings Ltd. The forum was attended by more than 150 professionals.

Edith Shih, Paul Stafford, David Graham, Dr Maurice Ngai FCIS FCS(PE) (the then Institute President) and Jyoti Vazirani

At the forum

H-share Training Programme 2015

The Institute's H-share Training Programme 2015 was held in Hong Kong between 27 and 31 October 2015 and was attended by 36 board secretaries and senior executives from H-share, A+H share and red-chip companies. Speakers from the Hong Kong Securities and Futures Commission, The Hong Kong Stock Exchange (the Exchange) and the Independent Commission Against Corruption, as well as senior legal and accounting professionals and company secretaries, shared their views and hands-on experience on a range of topics including the latest regulatory developments, financial reporting standards, risk management and internal control systems. Participants also visited the Exchange, Tsz Shan Monastery and Phoenix Satellite Television.

The Institute would like to thank the speakers and participants for their great support to the Institute and Wonderful Sky Financial Group for sponsoring the event.

At the seminar

Visiting the Exchange

The 39th Affiliated Persons (AP) ECPD Seminars

The Institute's 39th Affiliated Persons (AP) ECPD Seminars were held in Zhuhai between 25 and 27 November 2015, focusing on the annual financial audit and annual report. The seminars attracted over 150 participants from H-share, A+H share, red-chip, A-share companies, as well as to-be-listed or private companies.

Ten speakers shared their knowledge and views at the seminars. On the legal front, the latest amendments to the Hong Kong listing rules, Shanghai-Hong Kong Stock Connect and the latest connected transaction regulations were discussed. On the accounting front, key issues concerning the financial report, as well as the environmental, social and governance report, and the relationship between market value management and financial management were discussed.

Two senior board secretaries shared their views on how board secretaries can discharge their duties to help manage risk, and gave practical tips on preparing the annual financial audit and annual report. The joint research report Risk Management – looking at the new normal in Hong Kong, jointly published by the Institute and KPMG China was also introduced at the seminars.

The Institute would like to thank all the speakers, participants, the event associate organiser Shinewing CPA; supporting organisations Computershare Hong Kong Investor Services Ltd, Ernst & Young Hua Ming LLP, and DLA Piper UK LLP; and the sponsor Equity Group.

Then Institute President Dr Maurice Ngai FCIS FCS(PE) with speakers

At the seminar

Professional Development (continued)

ECPD

Forthcoming seminars

Date	Time	Topic	ECPD points
15 Jan 2016	6.45pm – 8.45pm	Understanding and mitigating corruption and bribery risks	2
18 Jan 2016	4.00pm – 6.00pm	Shareholder engagement trends and practices – what role does the company secretary play?	2
20 Jan 2016	6.45pm – 8.15pm	New reporting exemption for non-public companies and other impacts of the new Companies Ordinance on financial reporting for the non-accountant (re-run)	1.5
22 Jan 2016	3.30pm – 5.30pm	Spin-off listing	2

For details of forthcoming seminars, please visit the ECPD section of the Institute's website: www.hkics.org.hk.

MCPD requirements

Members are reminded to observe the MCPD deadlines set out below. Failing to comply with the MCPD policy may constitute grounds for disciplinary action by the Institute's Disciplinary Tribunal as specified in the Article 27 of the Institute's Memorandum of Articles.

CPD year	Members who qualified between	MCPD or ECPD points required	Point accumulation deadline	Declaration deadline
2015/2016	1 January 1995 - 31 July 2015	15 (at least 3 ECPD points)	31 July 2016	31 August 2016
2016/2017	1 January 1995 - 31 July 2016	15 (at least 3 ECPD points)	31 July 2017	31 August 2017

MCPD requirement extends to graduates

Effective from 1 August 2015, all graduates who acquired graduate status before 1 August 2015 are required to comply with the Institute's MCPD requirements.

Advocacy

Issuer Forum in Johannesburg, South Africa

On 29 October 2015, Institute Chief Executive Samantha Suen FCIS FCS(PE) attended a presentation and discussion organised by the Issuer Forum in Johannesburg, South Africa, as a panellist, together with other representatives of The Corporate Secretaries International Association (CSIA). They discussed issues in shareholder engagement and activism, corporate governance, the effects of new legislation and the protection of shareholders, with over 40 participants. She also attended the Council meeting of the CSIA held in Johannesburg, South Africa, on 29 and 30 October 2015.

HKICS attends Governance Institute of Australia National Conference

Institute Chief Executive Samantha Suen FCIS FCS(PE) attended the Governance Institute of Australia (GIA) National Conference held in Melbourne between 29 November and 2 December 2015. She also met with Steven Burrell, GIA Chief Executive Officer, and his team and exchanged views on operational issues.

Advocacy (continued)

Stakeholder networking luncheon

On 3 December 2015, the Institute held a stakeholder networking luncheon with representatives of 30 major employers of our members, most of whom are also fellows of the Institute, to thank them for their support as well as to build a regular communication platform. At the event, views were exchanged relating to the recruitment, development and retention of the company secretarial talent. The feedback will be valuable for the Institute's future planning and enhancement of services to our members and the Chartered Secretarial profession at large.

At the luncheon

Annual lunch gathering with Past Chairmen and Presidents

A lunch gathering with past presidents of the Institute and past chairmen of the Institute of Chartered Secretaries and Administrators – Hong Kong branch, was hosted by the then Institute President Dr Maurice Ngai FCIS FCS(PE) on 8 December 2015. The industry's seasoned professionals and leaders shared their insights on the development of the Institute in the coming years.

From left: Terence Ng FCIS FCS, Duffy Wong FCIS FCS, Mike Scales FCIS FCS, Dr Maurice Ngai, Frank R Mullens FCIS FCS, Edith Shih FCIS FCS(PE), Natalia Seng FCIS FCS(PE) and Samantha Suen FCIS FCS(PE)

Officials visit the Beijing Representative Office

Officials from the China Securities Regulatory Commission (CSRC) and the China Association for Public Companies (CAPCO) visited the Institute's Beijing Representative Office (BRO) on 9 December 2015.

From left: Dr Gao Wei, Zheng Kai, Yang Liu, Yang Zhiying, Kenneth Jiang and Carrie Wang

Yang Liu, Deputy Director-General, and Zheng Kai, Department of International Cooperation, CSRC, together with Yang Zhiying, Deputy Secretary-General, CAPCO, met with the Institute's Vice-President Dr Gao Wei FCIS FCS(PE) and BRO Chief Representative Kenneth Jiang FCIS FCS(PE).

They discussed in what areas the Institute may provide training and other support services to Chinese companies listed overseas, in cooperation with CAPCO and under the guidance of CSRC. These trainings and services would aim to enhance the overall quality of corporate governance at Chinese companies.

Advocacy (continued)

Visit to Shenzhen

On 23 November 2015, the then President Dr Maurice Ngai FCIS FCS(PE); the then Vice-President Ivan Tam FCIS FCS; the then Treasurer Bernard Wu FCIS FCS; and Chief Executive Samantha Suen FCIS FCS(PE), visited Shenzhen. The HKICS representatives met with Zhang Haishan, Deputy Director-General, Shenzhen Regulatory Bureau, China Securities Regulatory Commission (CSRC); Liu Huiqing, Deputy-General Manager, Shenzhen Stock Exchange (SZSE); Zhu Wenbin, President, China Capital Market Institute (CCMI); and Yan Weiming, Secretary-General, Shenzhen Listed Companies Association (SLCA).

At the meetings, the Institute's delegates discussed and shared views with the officials on the latest Mainland capital market reform and corporate governance practices in Mainland China, Hong Kong and Internationally. The Institute's delegates also discussed with SZSE officials the possibilities for future cooperation in terms of corporate governance training, research and communication, as well as a proposed Memorandum of Understanding (MoU) to strengthen cooperation and better facilitate future joint programmes. At the meeting with CCMI representatives, the two parties discussed and agreed to cooperate in future in terms of corporate governance and board secretary practical training.

At the CSRC Shenzhen Regulatory Bureau

The Institute delegates also took this opportunity to meet with members and Affiliated Persons in Shenzhen at the dinner gathering after the visits on 23 November 2015.

Institute members and Affiliated Persons elected to the CAPCO Board Secretary Committee

On 28 November 2015, a number of Institute members and Affiliated Persons (APs) were elected to the Board Secretary Committee (the Committee) of the China Association for Public Companies (CAPCO) for the coming year.

Institute AP Huang Qing of China Shenhua Energy Company Ltd was elected as Chairman of the Committee, while Institute Vice-President Dr Gao Wei FCIS FCS(PE) and three other APs, namely Xie Bing of China Southern Airlines, Zheng Yong of China Life Insurance (Group) Company, Luo Binhua of Guangfa Securities Co Ltd, were elected as Vice-Chairmen of the Committee.

In addition, an Institute member and seven APs were elected as executive committee members as listed below.

- Guo Xiangdong FCIS FCS, Board Secretary, Guangshen Railway Company Ltd
- Rao Xinyu, Board Secretary, Air China Ltd
- Gui Yuchan, Board Secretary, Dalian Port Company Ltd
- Zhou Dongzhou, Board Secretary, China Coal Energy Company Ltd
- Zhou Lianqing, Board Secretary, Huadian Power International Corporation Ltd
- Jin Shaoliang, Board Secretary, Pingan Insurance (Group) Company of China Ltd
- Li Qian, Board Secretary, BYD Company Ltd
- Guo Huawei, Board Secretary, China Ocean Shipping (Group) Company

The second term board secretary committee meeting of CAPCO

This CAPCO Committee promotes the professionalisation of board secretaries and advocates the principle of self-regulation for board secretarial professionals. This is also a key area of co-operation between the Institute and CAPCO under the Memorandum of Understanding (MoU) signed in July 2015.

Membership

New graduates

Congratulations to our new graduates listed below.

Chan Ching Yi
Chan Sing Fai
Chan Yuen Mui
Ku Lai Shan
Leung Wing Man
Lo Cheuk Ming
Lo Cheuk Nam
Ma Chun Fai
Ngai Lai Han
Tong Ka Kin, Kenneth
Wong Tze Yan, Grace

New associates

Congratulations to our new associates listed below.

Au Yeung Wai Han
Chan Oi Yuk
Chan Ping
Chan Wai Kam, Caroline
Chan Wai Ki
Chan Wing Man
Chan Yuk Man, Calvin
Chan, Zenaida Teh
Chau Sze Wan
Cheng Kee See
Cheung Hoi Sze, Joyce
Cheung Yuk Tim, Venice
Cho Lai Shan
Chow Ho Yin
Chui Wai Hoi, Matthias
Fan Cheuk Lun
Ho Chi Wang
Ho Hang Yu, Helen
Ho Ming Yan, Zona
Hui Tung Ching
Hui Wing Yip
Ip Ka Ki
Jung Man Wah, Margaret
Ko Hong Ting
Ko Wing Chiu
Kwong Chi Ho, Joseph
Lai On Ki
Lam Mei Wai, Michelle
Lam Nim Chi
Lam Siu Na
Lam Yuen Yee
Lau Kim Ming
Lau Mun Chung
Lau Wing Sum
Law Hiu Mei
Law Wai Ip, Vincent
Lee Chun Wai
Lee Ming Fat
Lee Pui Shan
Lee Sze Wai
Lee Wing Yan, Gloria
Leung Ho Yee
Leung Ho Yee, Rachel
Leung Hok Yin
Li Mei Yan
Liu Kai Wing
Luk Hoi Chit
Luk On Yee, Phoebe
Mok Wai Ching, Amy
Ng Shuk Yi
Ng Tung Ching, Raphael
Ngan Bik Ching
Nie Hui Feng
Poon Fung Hing
Sin Wai Shan
Suen Mung Lam
Tam O Fei
To Chiu Wai
Tsang Chun Ling
Tsang Lai Sze
Tse Chi Wai, Charles
Tse Sau Yu
Tso Mei Yi
Tso Wai Yin
Wang Yu
Wong Ching Man
Wong Hiu Yan
Wong Ho Kin
Wong Lai Ying
Wong Wai Leung
Woo Tin Yan, Tina
Yeung Oi Ling
Yeung Pui Shan
Yeung Shun Hong
Yu Kwok Keung

Membership renewal

The membership renewal notices for the financial year 2015/2016 and the demand notes were sent in August 2015. Members and graduates are required to settle their subscription payments by 31 January 2016. Failure to pay by the deadline will constitute a ground for membership removal.

Members and graduates who have not received the renewal notice should contact the secretariat as soon as possible at: 2881 6177, or email: member@hkics.org.hk.

Support to secondary school students

Following the invitation of the Hong Kong Coalition of Professional Services, the Institute supports the idea of the Commission on Poverty and invited six students from three secondary schools to attend the Institute events, including the Annual General Meeting and thank you dinner for Council and Committee members and other stakeholders, members' networking functions and mentorship activities in December 2015. The Institute hopes that such arrangements will broaden their horizons and help them in their future careers.

Membership

New fellows

The Institute would like to congratulate the following fellows elected in November 2015.

Chan Sau Mui, Juanna FCIS FCS(PE)

Ms Chan is Group Company Secretary of the South China Group which comprises three companies listed in Hong Kong. She has been the named company secretary for more than 10 years and has extensive experience in company secretarial, compliance and corporate governance matters. She holds a Master of Business Administration from the University of Leicester and the Practitioner's Endorsement qualification issued by the Institute.

Kan Yuk Tak, Lydia FCIS FCS(PE)

Ms Kan is the Institute's Director of Professional Development. She joined the Institute in 2012 and is responsible for the development and organisation of the Institute's continuing professional development programme and engages in promoting the Chartered Secretarial profession through training and publications. Prior to joining the Institute, Ms Kan held a managerial position and had served in the educational field for over 15 years. She was involved in developing academic programmes in corporate governance, management and leadership, as well as social entrepreneurship areas. She has been an Institute member since 2009.

Leung Ho Yan, Julian FCIS FCS

Mr Leung is currently the Chief Financial Officer and Company Secretary of Yongsheng Advanced Materials Company Ltd (Stock code: 3608), and is responsible for compliance, investor relations, financial reporting and planning. He previously worked at KPMG and has over 10 years of professional auditing experience in serving Hong Kong listed and multinational technology, media and telecommunications companies. Mr Leung obtained his Bachelor of Arts in Accountancy and Master in Corporate Governance in the Hong Kong Polytechnic University. He is a fellow of the Association of Chartered Certified Accountants and the Hong Kong Institute of Certified Public Accountants.

Leung Sui Wah, Raymond FCIS FCS

Mr Leung is the Executive Director and Chief Financial Officer of China Agri-Products Exchange Ltd (CAPE), which is listed on the Hong Kong Stock Exchange (Stock Code: 149). He is responsible for supervising financial reporting, corporate finance, tax compliance and investor relations for CAPE. Mr Leung is a fellow member of the Hong Kong Institute of Certified Public Accountants and the Association of Chartered Certified Accountants. He holds a Master of Business Administration from the University of Hong Kong.

Pau Wai Yuen FCIS FCS

Mr Pau is the Deputy General Manager and Financial Controller of New World China Land Ltd, and primarily oversees projects in Guiyang in various fields including financial accounting, treasury management, human resources, administration, corporate governance monitoring and project management. Prior to joining New World China Land Ltd, he worked for an international accounting firm and several listed companies in Hong Kong. Mr Pau is a fellow member of the Association of Chartered Certified Accountants of the United Kingdom, associate member of the Hong Kong Institute of Certified Public Accountants. He has over 24 years of experience in auditing, accounting, taxation and project management. He also holds a Bachelor of Arts Degree in Accounting, Master of Business Administration and Master of Electronic Commerce.

Tso Ping Cheong, Brian FCIS FCS

Mr Tso is currently the sole proprietor of Teton CPA Company. He has over 10 years of experience in financial management, accounting, audit, assurance, taxation as well as merger and acquisition related advisory activities. In addition to managing his accounting firm, Mr Tso also serves as an independent non-executive director for several listed companies in Hong Kong.

Mr Tso holds a bachelor's degree in Accountancy and a master's degree in Corporate Governance from The Hong Kong Polytechnic University. He is also a fellow and practising member of the Hong Kong Institute of Certified Public Accountants and a fellow member of the Association of Chartered Certified Accountants.

Kwok Kam Tim FCIS FCS

Mr Kwok is the Financial Controller for Loudong General Nice Resources (China) Holdings Ltd (Stock code: 988), and Independent Non-Executive Director for Newtree Group Holdings Ltd (Stock code: 1323).

New President and Council for 2015/2016

HKICS held its Annual General Meeting (AGM) on 15 December 2015 during which the scrutineers' report regarding the election of Council members for 2015/2016 was presented and the Council members for the ensuing year were duly elected. The four candidates namely, David Fu FCIS FCS(PE), Ernest Lee FCIS FCS(PE), Ivan Tam FCIS FCS and Wendy Yung FCIS FCS were elected Council members. The tally of the votes cast for the candidates is available in the News section of the Institute's website: www.hkics.org.hk.

At the Council meeting following the AGM, the Honorary Officers for 2015/2016 were elected. Ivan Tam FCIS FCS, Deputy Managing Director of Chevalier International Holdings Ltd, was elected as President. Dr Maurice Ngai FCIS FCS(PE) will continue to serve as a Council member in the capacity as Immediate Past President.

A thank you dinner was held to express appreciation to the Council, Committee and Working Group members of the Institute, members and peers who have contributed to student and member development and professional training, as well as those who have supported the Institute by taking up external appointments in other government bodies and associations.

The Hong Kong Institute of Chartered Secretaries Council 2015/2016

Honorary Officers:

Ivan Tam FCIS FCS	President (re-elected to Council)
Dr Gao Wei FCIS FCS(PE)	Vice-President
Paul Stafford FCIS FCS	Vice-President
Dr Eva Chan FCIS FCS(PE)	Treasurer

Council Members:

Jack Chow FCIS FCS
David Fu FCIS FCS(PE) (re-elected to Council)
Ernest Lee FCIS FCS(PE) (newly elected)
Paul Moyes FCIS FCS
Douglas Oxley FCIS FCS
Bernard Wu FCIS FCS
Wendy Yung FCIS FCS (newly elected)

Ex-officio:

Dr Maurice Ngai FCIS FCS(PE)	Immediate Past President
Edith Shih FCIS FCS(PE)	Past President

Membership activities

Members' Networking – tour to Tao Heung Museum of Food Culture

Hong Kong, as a 'culinary paradise' for gourmets, has a long history of making and appreciating food. On 28 November 2015, members enjoyed a tour to the Tao Heung Museum of Food Culture to understand the interesting history of food culture across the globe. A delicious Cantonese lunch was arranged after the tour.

Members learning about the history of local cooked food stalls (or dai-pai-dong 大排档)

Membership (continued)

Members' Networking – what will the future hold? A brief on China's regulatory environment in 2016 and beyond

The Institute was honoured to have Anthony Neoh FCIS FCS SC JP deliver a seminar on the China market on 4 December 2015. Mr Neoh illustrated the macro trends emerging from the Chinese financial and securities markets, governance reforms, internationalisation of the Renminbi and explained how these forces would impact the country and world in the years ahead. Members appreciated the insights shared by Mr Neoh at the seminar which were beneficial for business strategic Planning.

At the seminar

Susie Cheung FCIS FCS(PE), Institute Membership Committee Chairman and chair of the seminar, presenting a souvenir to Anthony Neoh

Chartered Secretary Mentorship Programme 2015 – recognition gathering

Susie Cheung facilitating the sharing session

Following a number of training sessions and activities for mentors and mentees since August 2015, the Institute held a recognition gathering on 10 December 2015. In her welcoming remark, Institute Membership Committee Chairman Susie Cheung FCIS FCS(PE) gave a review of the programme, which has successfully brought together senior and young members to share experience in both professional and social aspects of life. Certificates were presented to mentors and mentees at the gathering, who also expressed their wishes on how the programme will go forward next year.

The inaugural Mentorship Programme 2015 has now ended and the Institute will announce the Mentorship Programme 2016 in the coming months.

Forthcoming membership activities

Date	Time	Topic
9 January 2016	8.45am – 12.45pm	Community Service – low carbon living workshop
30 January 2016	9.15am – 1.15pm	Fellows Only – visit to Jao Tsung-I Academy

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

International Qualifying Scheme (IQS) examinations

June 2016 diet

A. Examination timetable

	Tuesday 31 May 2016	Wednesday 1 June 2016	Thursday 2 June 2016	Friday 3 June 2016
9.30am - 12.30pm	Hong Kong Financial Accounting	Hong Kong Corporate Law	Strategic and Operations Management	Corporate Financial Management
2pm - 5pm	Hong Kong Taxation	Corporate Governance	Corporate Administration	Corporate Secretaryship

Please enrol between 1 and 31 March 2016.

B. HKICS Examinations Preparatory Programme

The HKICS Examinations Preparatory Programme conducted by HKU SPACE will commence on Sunday 21 February 2016. Please refer to the timetable and enrolment form on the Institute website: www.hkics.org.hk. For enquiries, please contact HKU SPACE at: 2867 8478, or email: hkics@hkuspace.hku.hk.

C. Recommended reading list updates

Please note that the recommended reading list for the subject 'Hong Kong Taxation' is updated. Students may refer to 'Studentship' section of the Institute website: www.hkics.org.hk for details.

IQS information session

The Institute's IQS information session provides information on the IQS examination and on the career prospects of Chartered Secretaries. At the upcoming session in January, Anna Kong ACIS ACS will share her work experience with attendees. Members and students are encouraged to recommend this session to friends or colleagues who are interested in the Chartered Secretarial profession.

Dates:	Wednesday 20 January 2016
Time:	7pm – 8.30pm
Venue:	Joint Professional Centre Unit 1, G/F, The Center, 99 Queen's Road Central, Hong Kong
Speaker:	Anna Kong ACIS ACS Assistant Company Secretary Tsit Wing Coffee Company Ltd

Studentship

HKICS professional seminars

Two professional seminars for university students were organised in November and December.

Date	Institution	Speaker	Topic
27 November 2015	Caritas Institute of Higher Education	Candy Wong	Introduction to the HKICS and IQS
3 December 2015	The Hong Kong University of Science and Technology	Estella Ng ACIS ACS	The roles of independent non-executive directors (INEDs)

During the seminar at Caritas Institute, Institute Director of Education and Examinations Candy Wong, on behalf of the Institute, presented the Chartered Secretaries Scholarship to Suen Ka Yan, a year four student under the BBA programme in Corporate Management of Caritas Institute of Higher Education. The scholarship was donated by The Chartered Secretaries Foundation Ltd.

Dr Dennis Chan (right), Associate Professor of Business Education, Department of Accounting, The Hong Kong University of Science and Technology presenting the souvenir to Estella Ng (left)

Candy Wong at the seminar

Candy Wong (right) presenting the Chartered Secretaries Scholarship to Suen Ka Yan (left)

Correction

The name of Professor Alan Au was misstated in the 'Renewal of Collaborative Course Agreements with three local universities' item of last month's Institute News (page 40, December 2015 edition, *CSj*). His correct name and title is: Professor Alan Au, Dean, Lee Shau Kee School of Business and Administration, OUHK.

Academic Advisory Panel Luncheon

The Institute's Academic Advisory Panel Luncheon was held on 9 December 2015, and was attended by representatives of local tertiary educational institutions. The luncheon was hosted by Polly Wong FCIS FCS(PE), the then Chair of the Education Committee and Ivan Tam FCIS FCS, the then Vice-President, accompanied by Candy Wong, Director of Education and Examinations. They shared updates on the Institute's recent developments and future activities with the following guests (listed by surname in alphabetical order):

Academic Advisory Panel members

- Dr Dennis Chan, Associate Professor of Business Education, Department of Accounting, The Hong Kong University of Science and Technology
- Professor Chan Koon Hung, JK Lee Chair Professor of Accountancy, Department of Accountancy, Lingnan University
- Professor David Donald, Professor, Faculty of Law, The Chinese University of Hong Kong
- Professor Ip Yiu Keung, Associate Vice-President (Academic Support & External Links), The Open University of Hong Kong
- Dr Shirley Kan, Senior Lecturer, CUHK Business School, The Chinese University of Hong Kong
- Dr Peter Lau, Associate Dean and BBA (Hons) Director, School of Business, Hong Kong Baptist University
- Tam Ching Yee, Teaching Fellow, School of Accounting and Finance, The Hong Kong Polytechnic University
- Dr Claire Wilson, Associate Head, Department of Law and Business, Hong Kong Shue Yan University
- Dr Brossa Wong, Associate Dean, School of Business, Hang Seng Management College

HKICS/HKU SPACE programme series: Corporate Governance in the PRC (new module)

The HKICS/HKU SPACE programme series in PRC corporate practices is offering a new module – 'Corporate Governance in the PRC'. Up to 18 HKICS ECPD points will be awarded to participants who attain 75% or more attendance.

Dates:	16, 17, 23 and 24 January 2016 (Saturdays and Sundays)
Time:	Saturdays: 2.00pm – 5.00pm; 6.00pm – 9.00pm Sundays: 10.00am – 1.00pm; 2.00pm – 5.00pm
Venue:	HKU SPACE Learing Centre on Hong Kong Island
Speaker:	Dr Li Yuan Research Fellow and Deputy Director, Enterprise Research Institute, Guangdong Academy of Social Sciences
Enrolment deadline:	Monday 11 January 2016

For more information, please contact HKU SPACE at: 28678481, or email: prcprogramme@hkuspace.hku.hk.

Studentship (continued)

Joint Professional Career Day 2015

The Joint Professional Career Day was organised by the Young Coalition Professional Group (YCPG) under the Hong Kong Coalition of Professional Services (HKCPS) and the Education Bureau of the Hong Kong SAR Government on 21 November 2015. Around 250 senior students from 27 secondary schools participated the event. The then HKICS President Dr Maurice Ngai FCIS FCS(PE) and Chief Executive Samantha Suen FCIS FCS(PE) attended the ceremony.

Career talks and sharing sessions from the professional bodies were arranged for the secondary school students. A total of 186 students attended the session on Chartered Secretaries. Four younger members: Eric Fung ACIS ACS, Anna Kong ACIS ACS, Rachel Ng ACIS ACS and Jerry Tong FCIS FCS, shared their experience with participants.

The Institute would also like to thank Patrick Sung FCIS FCS for representing the Institute in the taskforce of this event.

Group photo at the opening ceremony

At the sharing sessions

Jerry Tong, Anna Kong, Dr Maurice Ngai, Rachel Ng, Eric Fung and Samantha Suen

Payment reminders

Studentship renewal

Students whose studentship expired in November 2015 are reminded to settle the renewal payment by Friday 22 January 2016.

Exemption fees

Students whose exemption approved via confirmation letter on 29 October 2015 are reminded to settle the exemption fee by Friday 29 January 2016.

Exchange to strengthen ESG reporting requirements

Hong Kong Exchanges and Clearing Ltd (the Exchange) has confirmed that its proposed upgrade of its environmental, social and governance (ESG) disclosure requirements will go ahead. The Exchange's *Environmental, Social and Governance Reporting Guide* (the ESG Guide), which was incorporated into the listing rules in 2012, sets out the minimum requirements for ESG disclosure by listed issuers in Hong Kong.

The Exchange published a consultation paper in July 2015 to seek comments on proposed amendments to the ESG Guide and related listing rules. Its consultation conclusions, published in December 2015, reported 'strong support from a broad range of respondents' for the proposed upgrade of the ESG Guide. In summary, the main changes include:

- amending the listing rules to require issuers to state in their annual reports or ESG reports whether they have complied with the 'comply or explain' provisions set out in the ESG Guide for the relevant financial year; and if they have not, to give considered reasons in their ESG reports
- revising the introductory section of the ESG Guide to provide more guidance on reporting and to bring it more in line with international standards
- re-arranging the ESG Guide into two subject areas (environmental and social)
- upgrading some of the disclosure requirements under each aspect of the ESG Guide to 'comply or explain'
- revising the wording of the general disclosures (where relevant) to be consistent with the directors' report requirements under the Companies Ordinance (Cap 622) – which were incorporated into the listing rules for financial years ending on or after 31 December 2015
- upgrading the key performance indicators (KPIs), in the environmental subject area to 'comply or explain', and
- revising the wording of the voluntary provisions of the ESG Guide (that is, the recommended disclosures) to bring it more in line with international standards of ESG reporting by incorporating disclosure of gender diversity.

The amendments to the ESG Guide and related listing rules will come into effect in two phases. The listing rule amendments and the upgrade of the general disclosures in the ESG Guide from recommended to comply or explain, as well as the revised recommended disclosures, will be effective for issuers' financial years commencing on or after 1 January 2016. So, for issuers with a financial year commencing 1 January, these amendments will first affect their financial year ending on 31 December 2016. The upgrade of the KPIs in the environmental subject area of the ESG Guide from recommended to comply or explain will be effective for issuers' financial years commencing on or after 1 January 2017. So, for issuers with a financial year commencing 1 January, this amendment will first affect their financial year ending on 31 December 2017.

More information is available on the HKEx website: www.hkex.com.hk.

New client agreement requirements

The Securities and Futures Commission (SFC) will proceed with its proposal to require the incorporation of a new clause into client agreements pursuant to the new paragraph 6.2(i) under the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission. The new clause is designed to enable an investor to claim for damages under a client agreement where the regulated intermediary solicits the sale of, or recommends, a financial product which is not reasonably suitable.

All intermediaries' client agreements must comply with the new Code of Conduct requirements, including incorporation of the new clause and observance of the new paragraph 6.5 of the Code of Conduct discussed in the SFC's consultation conclusions on its *Further Consultation on the Client Agreement Requirements*, on or before 9 June 2017.

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

Careers

Company Secretarial Professionals

Our Corporate Services Division is fast growing and we are looking for company secretarial professionals to join us.

Requirements:

- Degree holder and minimum 1 year relevant experience;
- Registered students of HKICS preferred;
- Experience in handling assignments of Hong Kong-listed companies preferred but not essential;
- Self-motivated, well-organized, detail-minded, good interpersonal skills and willing to take challenges;
- Excellent command of both written and spoken English and Chinese;

Candidates who are members of HKICS with 7 years solid experience and with special focus in listed companies will be considered for an executive position.

We offer to successful candidates:

- 15-day annual leave (20-day for managers)
- 5-day work, study / examination leave
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CHARTERED SECRETARIES 特許秘書

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