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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, as well as the development of the profession of Chartered Secretary and Chartered Governance Professional in Hong Kong and throughout the mainland of China (the Mainland). HKICS was first established in 1949 as an association of Hong Kong members of The Chartered Governance Institute – formerly known as The Institute of Chartered Secretaries and Administrators (ICSA) of London. It was a branch of The Chartered Governance Institute in 1990 before gaining local status in 1994 and has also been The Chartered Governance Institute's China Division since 2005. HKICS is a founder member of Corporate Secretaries International Association Limited (CSIA), which was established in March 2010 in Geneva, Switzerland. In 2017, CSIA was relocated to Hong Kong where it operates as a company limited by guarantee. CSIA aims to give a global voice to corporate secretaries and governance professionals. HKICS has over 6,000 members and 3,200 students.

Membership statistics update

As of 31 January 2020 membership statistics were as follows:

Students: 3,443
Graduates: 470
Associates: 5,581
Fellows: 703

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In Focus this month brings you two speeches from The Hong Kong Institute of Chartered Secretaries Annual Dinner 2020.

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Correction

The cover story of the February 2020 edition of *CSj* ('ESG: a governance perspective', page 10) contained an error relating to the post-nominals of April Chan, Institute Past President and Chairman of the Technical Consultation Panel. Apologies to Ms Chan for the error. The correct post-nominals 'FCIS FCS' have been added to the e-CSj version (http://csj.hkics.org.hk).

COVID-19

In my message this month, I would like to update you on the precautionary measures our Institute has implemented to protect our members, students, Secretariat staff and community against COVID-19.

Our Institute, first and foremost, seeks to minimise the possibility of transmission while maintaining our usual services as far as possible. Accordingly we have arranged for most of the seminars scheduled in February and March to be held via webinar, and have cancelled or postponed all other events scheduled during those two months. From 29 January, we have been maintaining limited services at both the Hong Kong Secretariat Office and our Beijing Office. To provide flexibility for our members and students, we extended the deadlines for submission of membership election and student registration for the June 2020 examination diet.

In addition, we have been posting messages on our social media platforms reminding our members, Secretariat staff and stakeholders to maintain good personal health and environmental hygiene and to check updates from the website of the Centre for Health Protection of the Department of Health for the HKSAR Government. Moreover, our Council has decided to donate HK$50,000 to The Hong Kong Council of Social Service (HKCSS) to supply the needy in Hong Kong, including some 200,000 families, elderly living alone, people with disabilities and vulnerable children, with transmission prevention materials such as surgical masks and hand sanitisers.

At this stage it is impossible to know how long these precautionary measures will need to stay in place, but for the time being we will need to rely much more on our online interactions. As with many crises, COVID-19 has had its benefits – it has certainly been a reminder of just how much can be achieved via e-learning. I urge you all to stay in touch via our social media channels and our website. The latter should be your first port of call to stay up to date with professional developments here in Hong Kong as it offers not only our latest webinars, research reports and guidance notes, but also of course the online version of this journal.

Another essential online resource is the website of The Chartered Governance Institute (the Global Institute). Recent additions to the Global Institute's website of interest to our members include the latest President's Report to Members (February 2020) from International President and former Institute President here in Hong Kong, Edith Shih FCG (CS, CGP) FCS(PE). Among other things, this latest report updates us on the memorandum of understanding with The Institute of Company Secretaries of India (ICSI) and members' transition to new post-nominals.

The report also highlights the latest paper, as well as forthcoming papers, from the Thought Leadership Committee of the Global Institute. I recommend you download the paper – 'Corporate Governance: Beyond the Listed Company' – which looks at the implications for governance of the decline in the listed company sector globally. You can access the paper, written by Peter Greenwood FCIS FCS, a member of our Technical Consultation Panel and Chairman of our corporate governance conferences, along with a short video presentation by the author and a discussion thread, from the 'insights' and 'eCommunity' sections of the Global Institute's website: www.cgiglobal.org.

I would like to wish everyone good health and safety during this difficult time. COVID-19 represents a real challenge to all of us in terms of learning new ways to go about our professional and personal lives, but the crisis will pass leaving us better prepared for subsequent challenges. If nothing else, the last few months have left us a lot wiser about an important aspect of good governance – crisis management and continuity planning.

Before I go I would like to remind readers that this year's Annual Corporate and Regulatory Update (ACRU) will be held on Friday 5 June. ACRU is the most popular event in our CPD calendar so I recommend you sign up for a place early. Those registering between now and 7 April will benefit from our early bird discount.

Gillian Meller FCIS FCS

2019冠状病毒

今期的会长致辞重点报告公会采取的防疫措施，以保障会员、学员、秘书处职员及市民免受2019冠状病毒(COVID-19)感染。

公会防疫工作的首要目的，是尽量减少病毒传播的机会，同时致力维持正常服务。因此，我们安排大部分2月和3月的讲座以网上会议形式举行，而该两个月份的其他活动亦已取消或延期。由1月29日起，香港秘书处和北京办公室一直维持有限度服务。为方便会员和学员，我们延长了会籍申请和2020年6月考试的学员注册期限。

我们亦在社交平台贴文，提醒会员、秘书处职员和利益相关方保持个人健康和环境卫生，并留意香港特别行政区政府卫生署卫生防护中心网站的最新消息。此外，公会理事会已经决定向香港社会服务联会捐赠50,000港元，协助香港有需要的人士，包括约200,000个家庭、独居长者、残疾人士、弱势儿童等，为他们提供防疫用品，例如口罩、手部消毒液等。

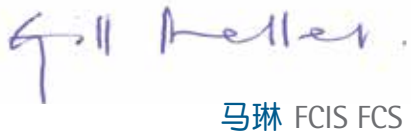
在现阶段，我们不可能预计这些措施要维持多久，目前我们仍需要多倚赖网上服务。正如许多危机一样，2019冠状病毒疫情也有正面作用，提醒我们网上学习的成效。我促请大家透过公会的社交媒体和网站了解公会动向。公会网站提供特许秘书及公司治理专业发展的最新消息，包括最新的网上讲座、研究报告和指引，以及本刊的电子版。

另一个重要的网上资源，是特许公司治理公会（国际总会）的网站。在该网站内，公会会员感兴趣的最新信息有国际会长兼公会前会长施熙德律师FCG (CS, CGP) FCS(PE) 的会长报告 (2020年2月)，当中报告与印度公司秘书公会签订合作备忘录、会员转用新称号的情况，以及国际总会的其他工作。

报告亦介绍国际总会思维领导委员会的最新和即将发表的报告。我建议大家下载「公司治理：上市公司以外」(Corporate Governance: Beyond the Listed Company)这份报告，该报告由公会技术咨询小组成员兼公司治理研讨会主席林英伟FCIS FCS撰写，探讨全球上市公司界别缩减与治理的关系。在国际总会网站(www.cgiglobal.org) 'insights' 'eCommunity' 页面，可阅览该报告，收看作者介绍文件的视频，以及参看读者的讨论。

在这段困难时期，谨祝大家身体健康，平安无恙。2019冠状病毒为我们带来挑战，我们须学习以新方法处理专业事务和个人生活；但危机终会过去，还让我们为日后的挑战做了更佳准备。过去数月的经验，起码让我们更深入认识良好治理的一个重要层面 — 危机管理和业务延续策划。

最后提醒大家，今年的公司规管最新发展研讨会(ACRU)将于6月5日星期五举行。ACRU是公会最受欢迎的持续专业发展活动，我建议大家尽早报名。由现在至4月7日期间报名，可享早鸟优惠。



马琳 FCIS FCS

Conflicts of interest: your best practice guide

CSj gets advice on how governance professionals can help companies stay on the right side of Hong Kong's legal and regulatory regime relevant to conflicts of interest.

In November 2019, Hong Kong was treated to an object lesson in how not to go about managing conflicts of interest. Court proceedings brought by the Securities and Futures Commission (SFC) against the former executive chair and three former executive directors of Minth Group Ltd (Minth) highlighted multiple breaches of Hong Kong's regulatory regime relevant to conflicts of interest.

In 2008, Minth's subsidiary, Decade (HK) Ltd (Decade), made an acquisition of two companies in a manner that seemed above board. The court proceedings revealed, however, that the sellers were relatives of the executive chair and he was also the true beneficial owner of the issued shares in the two acquired companies. These conflicts of interest and the full terms of the acquisition were not disclosed to the board and shareholders of Minth. A total of HK$99 million was paid by Decade for the acquisitions, and not RMB25.9 million as claimed in the Interim Report 2008 issued on 22 September 2008, and the bulk of the total consideration paid by Decade ended up in bank accounts controlled by the chair.

The chair had clearly acted in breach of his fiduciary duty owed to Decade. The three former executive directors of the company had failed to make further enquiries that should have revealed the conflict of interest of the chair and may have prevented Minth from making numerous misrepresentations to relevant parties. The court ordered the chair to pay a sum of RMB20.3 million in compensation to Decade. The three executive directors, together with the chair, were disqualified from being directors or being involved in the management of any corporation in Hong Kong for a period of between three and six years.

The hydra-headed beast

While breaches of Hong Kong's related-party transactions regime of the type described above in the Minth case can be fiendishly complex for governance professionals to manage, they represent one of the clearer types of conflicts of interest cases. Related party transactions are also relatively common in Hong Kong. Where a controlling shareholder of a listed company, for example, has a number of other businesses, some of which deal with the listed company, the dealings have to be transparent and approved by the independent directors. Governance professionals have to ensure that all such transactions are brought before the board for approval.

Hong Kong's regulatory regime has a lot to say about related-party transactions but the risks associated with conflicts of interest go much wider than that. 'Because conflicts of interest are so diverse,' says David Simmonds FCIS FCS, Institute Vice-President and Group General Counsel, Chief Administrative Officer and Company Secretary of the CLP Group, 'they require a conscious alertness throughout the organisation right through to the board – that is the only way that you can have any chance of uncovering them.'

The further you look into this area, the more complex it becomes. Ultimately, getting to grips with conflicts of interest best practice raises large questions about in whose interests companies should be run. The responsibility of the board is to always act in the interests of the company, but what are directors to do when the interests of different groups of stakeholders clash? This can be further complicated when directors see themselves as representatives of a particular 'interest' on the board. For example, directors may feel personal ties of loyalty to an individual, such as the chief executive, or to the majority shareholder who invited them on to the board. That could distort their decision-making.

Other common scenarios where conflicts can arise include the situation where a director has multiple directorships across competing companies, or where an individual holds multiple roles within an organisation. This type of role conflict is relatively common in Hong Kong and is becoming a much better recognised governance issue.

Role conflicts

The most common reason for non-compliance with Hong Kong's Corporate Governance Code relates to the provision

Highlights

- a relatively common conflicts of interest scenario in Hong Kong is where controlling shareholders put their own interests before those of the company and its minority shareholders
- the Securities and Futures Commission has shown that it will use its powers to seek compensation for losses to listed companies, as well as disqualification orders of up to 15 years, as a result of breaches by current and former directors
- companies need to establish a culture in which everyone knows that conflicts of interest abuses are against the company's values and will not be tolerated

> “because conflicts of interest are so diverse, they require a conscious alertness throughout the organisation right through to the board”

that one person should not perform the roles of both chair and chief executive. Many companies in Hong Kong argue that the combined role can provide strong and consistent leadership, but it also carries the risk that the board agenda can be controlled by one very powerful individual.

This possibility is not popular with investors. On 3 February this year, Legal & General Investment Management (LGIM), one of the largest asset managers in the UK, pledged to vote against all company chairs who also hold the chief executive role, which will see it take on the bosses of BlackRock, JPMorgan, Facebook and hundreds of other businesses. Sacha Sadan, LGIM's Director of Corporate Governance, points out that the job of the chair is to keep the chief executive in check for shareholders – not something likely to be possible when the same person holds both roles.

There have been suggestions that one way to mitigate this risk for companies with combined roles is to appoint a lead independent director, but does this have anything more than a palliative effect? Mr Sadan points out that many such lead directors have held their roles for a decade or more raising questions about their independence.

Mr Simmonds points out that having a combined chair/chief executive is quite common, particularly where the founder of companies takes on this dual role. Nevertheless, when these founders retire 'you would expect, with a little grace period, for the natural evolution of these companies to be to split the roles', he adds.

The combined role can also create problems for the company secretary. Typically, the company secretary has two reporting lines, one to the chief executive and one to the chair. This is a critical check and balance on the power of management and helps the company secretary ensure that the full board gets the information it needs. Sometimes it may be necessary, for example, for the chair to raise an issue that the chief executive may not want to see the light of day.

In addition to directors, professional practitioners may also find themselves subject to role conflicts. This might apply to a partner of a law firm who sits on a board while his law firm does occasional work for the company's competitors. It might also apply to company secretaries taking an executive directorship at the company they serve. Dual director/company secretaries need to be able to maintain their independent assessment of the broader governance and compliance aspects of business strategies to be effective in their board advisory role.

The role of independent directors

Independent directors are expected to take the lead where potential conflicts of interest arise. In closely held companies, however, the controlling shareholders ultimately determine the appointment of independent non-executive directors (INEDs), leading to potential conflicts of interest. Will the INEDs have the courage to speak up and potentially risk their position on the board in cases where the controlling shareholders are proposing transactions contrary to the interests of the company as a whole?

Mr Simmonds believes that the focus should be on the type of independent directors that are being appointed. He emphasises the need for genuine diversity among the INEDs, and that there should be a limit on the number of board seats they can hold. 'This would mean, firstly you are going to have a larger gene pool, and secondly you are more likely to get the type of people who are going to devote the time, energy and attention to discharging their duties fully. They would also be more likely to take on issues against the controlling shareholders if required,' he says.

He points out that it is helpful to have a critical mass of INEDs on the board, since this gives them safety in numbers and provides a deterrant to malpractice by management. 'It is one thing for an individual independent director to resign and another for a number of them to resign – that would be a massive reputational hit for an organisation and hence quite an effective deterrent,' he says.

David Webb, Hong Kong's best known investor activist and share market analyst, takes it further. He has been campaigning for over two decades to change the way independent directors are appointed in Hong Kong. To boost their independence from controlling shareholders, he would like to see minority shareholders appoint the INEDs annually by way of a shareholders' vote on nominees of their choice, and for the controlling shareholders and all directors to be prohibited from voting.

Mr Simmonds points out that there are other ways in which the effectiveness of INEDs can be boosted, for example by raising their compensation. In Hong Kong an INED's annual remuneration tends to be between HK$200,000 and HK$300,000 a year, which translates to about HK$16,000 to HK$25,000 per month. This is, in most cases, less than half the salary of a personal assistant to the chief executive.

When CLP ran a benchmarking exercise to reassess the compensation of their own INEDs, they found that they were paying at the top end for Hong Kong. They decided to broaden the exercise to look at international comparisons. Mr Simmonds points out that the low pay for INEDs in Hong Kong is a pattern that will reinforce itself in local benchmarking exercises. He adds that it would be farcical to ramp up expectations of INEDs unless you also raise their compensation.

The role of culture and internal controls

Conflicts of interest are hard to regulate against with black letter rules. The regulatory focus that has evolved globally in recent decades has therefore increasingly focused on corporate culture. Rather than looking at tightening up individual rules, regulators have focused on increasing the effectiveness of board oversight and the culture of organisations.

In addition to the right culture, however, having the right internal controls in place is vital and there has been increased reliance on governance professionals, in particular company secretaries, to help with both of these aspects. Mr Simmonds points out that the company secretary, having the ear of the chair, the chief executive and other members of the board, has an influential role to play as the guardian of the values of the organisation.

In addition, establishing and maintaining organisations' internal controls is critical. 'Taking away temptations is what internal controls are supposed to do,' Mr Simmonds says. He goes on to explain that first and foremost it is necessary to get the basic structures right, ensuring that the organisation has a set of internal controls that are thought through and tested, as well as independently audited internally and externally. Failure to do so leaves you exposed to legal preceedings as was seen recently in November when UBS AG was fined HK$400 million and reprimanded for, amongst other things, 'related serious internal control failures'.

Backing up the internal controls with training for all involved is the next step. There is always the danger that, whilst the formal procedures may be in place, the teams responsible for following them are not clear on their rationale. Everyone in the firm needs to know that conflicts of interest abuses, like any other undesirable behaviour, is against the values of the company and breaches will not be tolerated.

CLP has a 'business practice review' that provides training on business practices and expected standards of behaviour for the entire company. This includes hypothetical examples of conflicts of interest based on real-life situations and suggestions on the best ways to deal with them.

The SFC view

The SFC has been eager to highlight the need for better management of conflicts of interest in Hong Kong. 'Shareholders are highly dependent on company directors having unswerving probity when dealing with conflicts of interest,' the SFC's latest 'Regulatory Bulletin' (Issue No 4, February 2020) states.

The key issues in conflicts of interest cases the SFC has investigated include controlling shareholders putting their own interests before those of the company and its minority shareholders, and directors or senior executives deferring to a dominant company controller by relinquishing their responsibilities or accepting compromised roles. This includes situations where INEDs fail to act as a check and balance on executive directors and fail to be sceptical and diligent in discharging their duties.

The SFC may apply to the courts for a broad range of orders or injunctions under Section 213 of the Securities and Futures Ordinance (SFO). In appropriate

cases, the SFC may seek compensation or restorative orders against anyone, including a director or senior officer. Section 214 of the SFO gives the SFC the authority to take actions and obtain court orders for breaches by current and former directors which result in losses to listed companies. Under this provision, the SFC may seek disqualification orders of up to 15 years, as well as compensation from transgressors.

Recent court proceedings, including the Minth case described at the beginning of this article, demonstrate that the SFC will use its available powers to go after conflicts of interest abuses. Senior officers will also be drawn into the ambit of prosecution, as was demonstrated clearly in the prosecution of CN Capital Management Ltd in 2018, where two responsible officers were fined HK$100,000 each for failing to, amongst other things, avoid conflicts of interest.

The consequence for failing to disclose conflicts of interest can not only hurt the pocket of those who fail to disclose and those who are negligent in discovering the relevant conflicts of interest, it can also make a huge dent in their future careers.

Sharan Gill

Sharan Gill is a lawyer and writer based in Hong Kong.

Practical takeaways

- Company secretaries should ensure that the nomination committee considers any potential conflict of interest when new directors are proposed.
- It should be made clear to directors that they have an obligation to disclose fully and fairly any actual, potential or perceived conflict of interest at the earliest possible time and, in any event, prior to discussion of an issue at the board. Directors should also be aware that being negligent in ascertaining potential conflicts of interest can draw them within the ambit of prosecution, as demonstrated in the Minth case.
- Before each board meeting, directors should be required to certify that they have no potential conflicts with regard to matters being discussed at that meeting. This would prompt directors to pause and reflect whether there could be potential conflicts in the proposals tabled, as well as potential conflicts for others on the board.
- If there is likely to be a conflict of interests, the director involved should not be present at any discussions on the topic and should abstain from voting on the issue. This point was starkly illustrated when the Securities and Futures Commission commenced legal proceedings against the chair, who was also an executive director, of Perfect Optronics Ltd for failing to abstain from voting on a transaction in which he had a material interest.
- Where there is a material conflict of interest involving any board member, independent directors should meet first among themselves to discuss the matter, seek relevant information from management and, if necessary, advice from consultants (for example, on valuations for a transaction) before recommending to the board the view of the independent non-executive directors on the proposal.
- Any vote by the board on matters where there is a potential conflict of interest, including related-party transactions, should state if the vote was unanimous, or which of the directors may have abstained or voted against the proposal.
- Regular business practice reviews for the entire company should be carried out, rolling out the standards of behaviour expected, underscoring relevant codes of conduct for management and staff. This should be reinforced with training that provides hypothetical scenarios that envisage myriad conflicts of interest situations and the expected response of relevant directors, managers and staff.
- When conflicts of interest situations arise, ensure that management is seen to be dealing with it in an effective and transparent manner. It should also be apparent that actions that compromise the interests of the company will not be tolerated and those responsible will face severe consequences.
- A whistleblower policy should be introduced and widely understood by all staff, allowing anyone in the company the avenue to lodge complaints without fear of reprisal.

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Governance Professionals Career Day

Join us to explore what a career as a governance professional can offer!

Guest of Honour

Ms Ada Chung JP

Registrar of Companies, Companies Registry

Saturday 27 June 2020 | 11.00am–4.30pm

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The governance stress test

Katherine Ng, Managing Director, Head of Policy and Secretariat Services, Listing Department, Hong Kong Exchanges and Clearing Ltd (HKEX), discusses the role that good governance plays in ensuring that companies survive and thrive for the long term.

Can we start by talking about the rationale behind the latest changes to the Environmental, Social and Governance (ESG) Reporting Guide?

'The ESG Reporting Guide (the Guide) has come a long way. In 2013, we started with a voluntary guide and that was upgraded to comply or explain in 2015. HKEX monitors listed issuers' ESG reporting and assesses how helpful the information provided is to investors. Our goal is to ensure that the ESG exercise is beneficial to the market rather than dictating the reporting requirements for the sake of it.

Since the Guide was upgraded to comply or explain, all Hong Kong listed issuers have published ESG reports on an annual basis, but the key question is whether they are publishing information that is useful to investors. Issuers tend to be very good at compliance and producing data, but investors are looking for discussion about how they are managing their ESG risks, in particular the directors' views and how they are governing ESG issues.

As a result, the focus of the latest ESG consultation is very much on the governance of ESG. Have directors identified the important issues? Have they done a materiality assessment? Have they identified the potential impacts on the company? We're looking at ESG from a risk management perspective because getting this right will help ensure the long-term sustainability of the companies.'

Could we discuss the new requirements for reporting on climate risks?

'Climate change is now a much more imminent and real issue compared with a decade ago. Initially, issuers were more focused on reporting their own emissions and waste, but there has been a growing awareness that climate change could have a significant impact on the bottom line of a company. Natural disasters such as Typhoon Mangkhut in Hong Kong in 2018 and the recent catastrophic fire season in Australia have prompted companies to rethink what climate change could mean to them.

We closely monitor the recommendations from the Task Force on Climate-related Financial Disclosures (TCFD) and have added a new climate change requirement to the Guide. Every issuer must now assess whether they have significant climate-related issues which have impacted, or which may impact, them. We're not saying that every company must find climate change risk material to them, but they must consider it because it is a rising and inevitable risk to many companies.'

> "crises are a true test of the quality of your governance"

Do you think there is sufficient awareness in the market about how serious the environmental risks are – whether global warming, loss of biodiversity or degradation of the global ecosystem?

'Hong Kong issuers are quite agile. They survived the Asian Financial Crisis and Severe Acute Respiratory Syndrome (SARS). The ones with good governance structures have not only weathered the storms but capitalised on the opportunities and thrived. Crises are a true test of the quality of your governance, of how well you're guarding against future ups and downs and how seriously you are taking your sustainability.

I don't think we should be painting a doomsday picture, but directors need to be acutely aware that this is an issue with growing importance. Directors have been asked more questions on ESG, but I know this is still relatively new to many of them. Five years ago, issuers were learning about cybersecurity risks, how to manage them and how to equip themselves with the necessary expertise on their boards. Five years down the road, most directors are aware of these risks and are able to solicit help where needed to ensure that these risks are properly managed.

Highlights

- if companies are writing their environmental, social and governance reports just for the sake of complying with the listing rules they will not be of much use to themselves or to investors
- companies need to take important and material risks seriously for their survival
- previous crises, such as the Asian Financial Crisis and Severe Acute Respiratory Syndrome (SARS), have shown that companies with a good governance structure can not only survive but thrive through difficult times

We are seeing a similar pattern with ESG. Directors initially may have been sceptical and considered ESG as something technical and scientific, or had the impression you need a PhD to contribute to it. We're not expecting our directors to turn into environmental scientists overnight, nor should it be necessary for them to do so, but we expect them to uphold their fiduciary duty to ensure that a company's risks, including ESG risks, are properly managed. HKEX is very aware that this is still a relatively new area and many issuers are just beginning to take ESG seriously, so we've put a lot of effort into training directors as well as the preparers of ESG reports.

We have produced videos which give directors a high-level overview of what ESG is about, the role and responsibility of directors on ESG risk management, as well as a guidance paper on leadership and accountability of ESG issues. We have included guidance on the ESG issues which board discussion should include and the support which should be provided by management in order for the directors to have a fruitful discussion. For report preparers, we've put together a step-by-step guide to reporting on ESG. Over the years, issuers have asked us questions and we have addressed them in our FAQs for the benefit of the whole market.'

Do you think that is one of the advantages that you have at HKEX, in terms of your closeness to the market and your ability to complement enforcement with market education?

'Definitely. We want companies to do well, we want to uphold our market quality, so we are trying to support them as much as we can. We have tried to make our training materials as useful and as accessible as possible.'

Is that the side of HKEX's work that you are most interested in?

'Yes, our policy team reviews our regulatory framework, and proposes changes to our Listing Committee and for market consultation that may improve our market quality and keep up with international developments. We need to constantly ask ourselves how we can do better. Last year, for example, we brainstormed on how we could improve issues such as diversity and corporate governance. There is never a dull moment in policy work.'

You mention diversity – what is your view on how best to promote better board diversity in Hong Kong?

'I think the starting point should be to consider diversity in the widest sense. Attention is often drawn to gender diversity because it is a measurable aspect of diversity, but we should not forget the other aspects of diversity. The key point is that, if your directors share similar experiences and have similar backgrounds, the board is likely to be blinded in a groupthink trap. Your chances of successfully spotting the key risks and finding solutions is much greater if you have a group of people armed with different life experiences and perspectives.

We've done a lot of work around diversity. From 1 January last year, Hong Kong became the first jurisdiction to mandate that every company must have a diversity policy. Gender is an important aspect in diversity and since mid-last year we have also required every IPO company that wishes to list in Hong Kong but is handicapped by a single-gender board, to come up with a plan – measurable objectives and a pipeline – to move towards a more diverse path. We are pleased to see that a lot of them have committed to nominating a woman to their board in one or two years' time.'

Do you believe Hong Kong should be imposing quotas to achieve better gender diversity on boards?

'I think there needs to be a discussion amongst everybody involved on whether quotas are the way to go. This is a conversation that needs to take place at the society level, not just at the HKEX level.'

We have talked about the environmental aspects of ESG, could we also discuss the social aspects?

'When we upgraded the Guide to comply or explain, we kept the social key performance indicators (KPIs) as recommended best practices because a sizable group of listed companies were reporting on ESG issues for the first time. Social issues can be just as important, if not more important for some companies, so this time around we've upgraded all the social KPIs from voluntary to a comply or explain disclosure requirement.

If social issues are important and material risk to your company, it is only right that you should disclose to your stakeholders how you manage them. I would add that our list of social KPIs is not an exhaustive list; companies need to think about the specific social risks they face and the risks that could be unique to them. It is perfectly acceptable for companies to explain rather than comply where risks are not material to their business. We are seeing very little of that, as companies seem to find it easier to disclose issues which are not material to them rather than

> “we've always seen Chartered Secretaries as the captains of governance issues in a company”

explain non-compliance. Companies should know that there is no shame in choosing the explain route where issues are not material to them.'

Is that a worrying sign – does this mean that companies find it easier to tick the boxes rather than think through what is material to them?

'If companies are writing their ESG report just for the sake of complying with the listing rules it will be of no use to themselves or their investors. Companies need to take important and material risks seriously for their survival. This is the focus of one of our online training videos. We're asking directors to look at their risks critically and decide what's material and what's not.'

You've given us the broad sweep of how Hong Kong's ESG regulatory regime has developed over the last seven years – how do you think things will develop over the decade ahead?

'This is the beginning of the journey. Companies are now capturing the data so at least they know what they're dealing with – they have the facts. The next step will be to have the governance structure in place. There's more awareness every year, whether about climate risks or other environmental and social issues. Hopefully with our new Guide and training, directors will be focused on the governance of ESG issues going forward.

The investors' side of the ecosystem is equally important because everybody needs to mature together in this area. If investors engage the issuers on ESG topics, then the issuers will have a better sense of how ESG issues may affect their reputation as well as their valuation. This will in turn help improve their next ESG report. In this context, Hong Kong's stewardship code is important; there needs to be a two-way dialogue after all.'

What role do you think Chartered Secretaries and Chartered Governance Professionals should be playing in this area?

'We've always seen Chartered Secretaries as the captains of governance issues in a company. Chartered Secretaries play an important role helping the chair set the agenda for the board and ensure that ESG is part of the board's risk management agenda. Chartered Secretaries should recommend appropriate training to the chair and directors to help them to get up to speed with ESG. Chartered Secretaries also provide the constant force on ESG. ESG is not a one-off exercise. Chartered Secretaries can be the bridge between the directors and management to ensure the appropriate assessments are being made at the right juncture.'

Could you tell us about your own personal and professional background?

'I grew up in Hong Kong, but I went to boarding school in the UK for my secondary education. I stayed in the UK for university where I studied law. After law school, I stayed in the UK for a few more years and worked as a corporate lawyer at Linklaters before returning to Hong Kong, and then worked for an investment bank.

At that point I decided I wanted a change. I have always been interested in public policy so I decided to step out of my comfort zone and went to work for the Financial Services and the Treasury Bureau (FSTB) of the HKSAR Government. For four years, I was Political Assistant to the Secretary for Financial Services and the Treasury, KC Chan. That was an eye-opening experience and I learned a lot. Working as a transaction lawyer, you are focused on drafting and negotiating contracts and getting deals done – I enjoyed the wider scope involved in setting policy. I joined the FSTB in August 2008 – one month before the collapse of Lehman Brothers. So I spent the first couple of years addressing the fallout from the global financial crisis which followed. My work became very real and hopefully had an impact on society.

After working for the government, I knew I wanted to do something that married my legal experience and my interest in public policy, and I landed at HKEX. This, in many ways, has been my dream job. It calls on my legal skills – drafting and writing rules is easier if you have a legal background – but it also allows me to tackle issues such as ESG and diversity via the policy formation side of the role.

I love finding solutions. I was a mathematician before I studied law and that is about finding solutions to problems. I enjoy brainstorming and collaborating with people to work out how to strike a balance and find a solution that is acceptable to our society as a whole.'

Katherine Ng was interviewed by Kieran Colvert, CSj Editor.

Governance values and the value of governance

Tim Lui Tim Leung SBS JP, Chairman of the Securities and Futures Commission, focused his Guest of Honour speech at The Hong Kong Institute of Chartered Secretaries Annual Dinner 2020 on the need for companies to adopt high governance standards to improve their long-term value.

First of all, let me offer my hearty congratulations on the 70th anniversary of The Hong Kong Institute of Chartered Secretaries (the Institute). The Institute has an impressive track record of upholding high standards of secretaryship. Since its founding, it has been dedicated to the development of professionals in Hong Kong and the Mainland. It also plays a key role in promoting sound corporate governance and helping develop a robust legal and regulatory framework for Hong Kong.

This is more important than ever. Markets today are now more global and interconnected. How things have changed since the late 1970s, when I joined the London office of Coopers & Lybrand. When I returned to Hong Kong in 1984, the Mainland was just starting to open up. I was the senior tax partner for many years and worked on both the management and governance sides of my firm.

In 2018, I moved over to the regulatory side. This was the first and only career change in my life. Nowadays, many young people are amazed to hear that I only worked in one company for 40 years. My experience at the Securities and Futures Commission (SFC) has so far been both challenging and rewarding. It quickly became clear to me that regulators and accountants have many things in common: both have to make sure that listed companies stay on the straight and narrow, both have to protect the interests of minority shareholders and both have the greater goal of ensuring integrity.

Company secretaries also play an essential role in these efforts. At the end of the day, effective corporate governance depends on the values of the people who run the company.

Corporate governance values

This lesson is all too clear from the major corporate scandals we have seen over the past couple of decades. These failures shook financial markets and the repercussions were felt all over the world. One of the biggest was the collapse of Enron and its auditor Arthur Anderson, which was one of the 'Big Five' accounting firms at that time. Enron falsely inflated its revenue and its top executives went to jail for one of the biggest accounting frauds in history.

It is worth remembering that before its bankruptcy, Enron had a distinguished board of directors. Its audit committee was made up mostly of outsiders who were leaders in their respective fields, or that was how it looked on paper. In reality, Enron's corporate governance practices left a lot to be desired. That is an important lesson in what happens when corporate governance fails.

But when it succeeds, there is clear evidence good corporate governance pays off in the long term. A recent study of the Morgan Stanley Capital International World Index found that companies with good corporate governance outperformed by an average of 24 basis points per month during the 10 years up to 2018.

> "at the end of the day, effective corporate governance depends on the values of the people who run the company"

Time and again, companies with strong governance perform better and create more value. This should be a major incentive for listed companies to adopt high governance standards to improve their long-term value.

Role of company secretaries

The duties of company secretaries vary from organisation to organisation, but they really boil down to this: you play a vital role in raising governance standards and ensuring the effective functioning of the board and its committees. You are in a unique position to create the right culture for good corporate governance and to guide management and the board of directors on how best to meet their responsibilities. This is far more than just a compliance role.

Highlights

- companies with strong governance perform better and create more value; this should be a major incentive for listed companies to adopt high governance standards
- company secretaries play a vital role in raising governance standards and ensuring the effective functioning of the board and its committees
- the Securities and Futures Commission's front-loaded approach complements its enforcement actions, but does not replace them

> “there are clearly significant career development opportunities for experienced Chartered Secretaries”

Understandably, the roles and responsibilities of company secretaries in Hong Kong have become more complex as a result of calls for better corporate governance. Also, our listed market is now much larger. The number of Hong Kong listed companies was 2,449 as of December 2019. This increased 6% in just one year. So there are clearly significant career development opportunities for experienced Chartered Secretaries. Some of them will eventually go on to become chairmen, chief executives and directors of listed companies.

The SFC's front-loaded regulation

Let me say a bit here about what the SFC has been doing to promote better governance and protect the integrity of Hong Kong's markets. You might have heard about the SFC's front-loaded approach to regulation. This involves the use of earlier, more targeted intervention to tackle market irregularities. In many cases, we now directly intervene to prevent misconduct and harm to investors before it occurs. We deal directly with listing applicants at the initial stage of vetting initial public offerings and with listed companies in corporate transactions. We may object to a listing or a corporate transaction, or require the Stock Exchange to suspend a stock.

One obvious outcome has been a substantial drop in the first-day price change of newly listed GEM stocks, which on average was a staggering 874% in January 2017. It is now down to only around 10%. This shows that market behaviour has changed for the better.

I should emphasise that this front-loaded approach complements our enforcement actions, but it does not replace them. We still have the option to pursue civil and criminal proceedings, including compensation or disqualification orders against senior management for misconduct such as breaches of directors' duties. In serious cases, some have faced jail time for insider dealing or market manipulation.

Latest ESG developments in Hong Kong

Lastly, I would like to briefly mention environmental, social and governance (ESG) factors. Climate change is a real threat. It is fair to say that all companies are exposed to some measure of ESG risks. Good corporate governance requires companies to take these factors into consideration.

In December 2019, the Stock Exchange concluded a consultation on its 'Review of the ESG Reporting Guide and Related Listing Rules'. Key changes include mandatory disclosure of significant climate-related issues. The disclosure obligation of all 'social' key performance indicators was also upgraded to 'comply or explain'. We welcome these changes, which will promote quality ESG reporting.

At the SFC, we published our own 'Strategic Framework for Green Finance' in 2018. In the near term, our key focus will be on promoting better management of climate change risks in asset management. As part of this, we conducted a survey of more than 1,000 asset management firms. We asked them whether and how they integrate ESG factors and climate change related risks into their investment and risk management processes.

We found that most asset managers considered at least one ESG factor when assessing a company's investment potential. Moreover, the majority of them acknowledged that ESG factors could be a source of financial risk and may have an impact on investment portfolios.

We also surveyed asset owners to better understand what they expect from asset managers when it comes to ESG investment and climate risk management. Increasingly, ESG factors will be key to making informed investment decisions and allocating capital efficiently. The trend is clearly towards more ESG disclosures and companies that do not measure up may lose out.

Promoting market integrity

Before I finish, I want to emphasise once again that markets are now much larger, more complex and more connected than ever. But one thing has not changed: that is the SFC's commitment to protecting the integrity of Hong Kong's markets. This is a big part of our mission to deliver world-class regulation and bolster Hong Kong's status as a leading international financial centre.

When I was interviewed recently for the Institute's member publication *CSj*, I was asked whether Hong Kong needs to raise its game in terms of corporate governance. I mentioned the 'CG Watch 2018' report published by the Asian Corporate Governance Association. Hong Kong moved up to number two and was second only to Australia in the Asia Pacific region.

With corporate governance there is always room for improvement. The SFC takes this very seriously and our investigations into corporate misgovernance cases are up nearly 30% in the past three years. I firmly believe that good corporate governance helps increase investor confidence and promotes market integrity and efficiency. It also makes Hong Kong more competitive and is pivotal to its position as a leading global financial centre.

This article is based on the Guest of Honour speech by Mr Lui at The Hong Kong Institute of Chartered Secretaries Annual Dinner held on 16 January 2020 at the JW Marriott Hotel Hong Kong. See the June 2019 edition of this journal for the In Profile interview Mr Lui mentions in the article.

Governance in transition

Governance professionals are at the forefront of the many changes sweeping through the business environment globally and locally. In her speech at The Hong Kong Institute of Chartered Secretaries (the Institute) Annual Dinner 2020, Institute President Gillian Meller FCIS FCS highlighted the work of the Institute in preparing practitioners for their current and future roles.

I would like to take this opportunity to give you a quick review of where our Institute currently stands and a preview of where I hope we will be heading in the year, and years, ahead.

Where we stand

First of all, I am pleased to report that our Institute is in good financial health. This is clearly a prerequisite for everything we hope to achieve. In addition, our membership continues to grow. We currently have over 6,200 members and this number has been growing at a steady pace.

To these vital statistics, I would like to add that we have also built up a healthy reputation as a thought leader in company secretarial practice and corporate governance. The work we do in training future Chartered Secretaries and Chartered Governance Professionals – in our continuing professional development (CPD) and membership events; our guidance and research; as well as our publications and consultation submissions – has made us a leading stakeholder in the promotion of good corporate governance in Hong Kong and the Mainland, regionally and internationally.

The rising number, and increasing diversity, of people coming to our CPD events in Hong Kong and the Mainland is a good indicator of this. Last year we had a record-breaking attendance at our 20th Annual Corporate and Regulatory Update (ACRU 2019), with over 2,000 participants. This year's ACRU will be held on 5 June and early bird registration will start soon.

Where we are heading

Turning to our future prospects. The political crisis we have experienced, and continue to experience, here in Hong Kong has posed huge challenges for all of us, as have many of the issues taking place on the wider global stage. As governance professionals, we have been at the forefront of many of those challenges and I believe that there has never been a more important time for good, stakeholder-led, governance. This includes the need for all organisations (not just companies) to engage with and understand the views of their stakeholders, the need for effective risk management and internal control frameworks, and the need for transparent communication and disclosure.

This was a sentiment echoed recently by the Business Roundtable, an association of CEOs of leading US companies. In August 2019, it published its vision of a modern standard for corporate responsibility, containing a fundamental commitment to all stakeholders – customers, employees, suppliers, communities, the environment and, of course, shareholders.

This modern vision of governance has also been embraced by the Institute. Since September 2018, the majority of our members in Hong Kong and the Mainland have been awarded the new Chartered Governance Professional designation in addition to the long-established Chartered Secretary designation. On 16 September 2019, our international body adopted its new name – The Chartered Governance Institute. Many of its divisions around the world, including Australia, Canada, Malaysia, New Zealand and the UK, have already included the term 'governance' in their local institute names and we will be consulting members on a similar name change in the coming months.

Highlights

- governance professionals can play an important role helping all organisations (not just companies) to engage with and understand the views of their stakeholders
- the work of governance professionals will also be key in terms of building effective risk management and internal control frameworks
- the Institute, particularly via its new qualifying and enhanced continuing professional development programmes, will continue to focus its resources on helping members to stay up to date with the changing governance landscape

> “the political crisis we have experienced, and continue to experience, here in Hong Kong has posed huge challenges for all of us, as have many of the issues taking place on the wider global stage”

Training for the future

As many of you will know, we passed a major educational milestone earlier this month. On 1 January 2020, our Institute's qualifying programme was upgraded to better reflect the knowledge and skill set that our members will require in their expanded role as governance professionals. The new Chartered Governance Qualifying Programme reflects these changes – the Corporate Governance paper has been upgraded, an entirely new Risk Management paper has been added and a Boardroom Dynamics paper is offered as an elective.

Going forward, we will also be upgrading our Enhanced CPD programme to ensure that it offers training relevant to the current and future roles of our members.

Staying ahead of the curve will also require us to further build our research and advocacy work. We will be working to ensure that our research reports, guidance notes and consultation submissions, together with our monthly journal, help us and the wider community stay up to date with frontier topics in governance and the latest technical areas of practice.

This year will also see the return of our biennial Corporate Governance Conference (CGC). Our CGC 2020 will be held on 25 September with the theme 'Building the Modern Board: a 2020 Vision'. At the conference, we will be addressing the many different aspects relevant to enhancing effective decision-making by a board – a topic of core relevance to all governance professionals. I hope to see many of you there.

A word of thanks

Finally, I would like to take this opportunity to thank, on behalf of the Institute, the many people who have contributed to our work. Thanks are due to the government representatives and regulators who have supported our seminars and conferences, and worked with us on policy formation and legislative reform via public and soft consultations.

I would also like to thank those who have contributed their expertise and time to the work of our committees, panels, working groups and advisory boards. This includes colleagues from fellow professional firms and institutes, as well as from academia, who have worked with us for many years to further our educational, CPD and research initiatives.

Thanks are also due to our past chairmen and presidents, Council and committee members, members, graduates and students, here in Hong Kong and the Mainland. I would also like to thank the staff of our Secretariat and, of course, our Chief Executive Samantha Suen FCIS FCS(PE).

I hope the Year of the Rat brings health, happiness, prosperity and harmony to Hong Kong and to us all.

This article is based on the speech by Institute President Gillian Meller at The Hong Kong Institute of Chartered Secretaries Annual Dinner held on 16 January 2020 at the JW Marriott Hotel Hong Kong.

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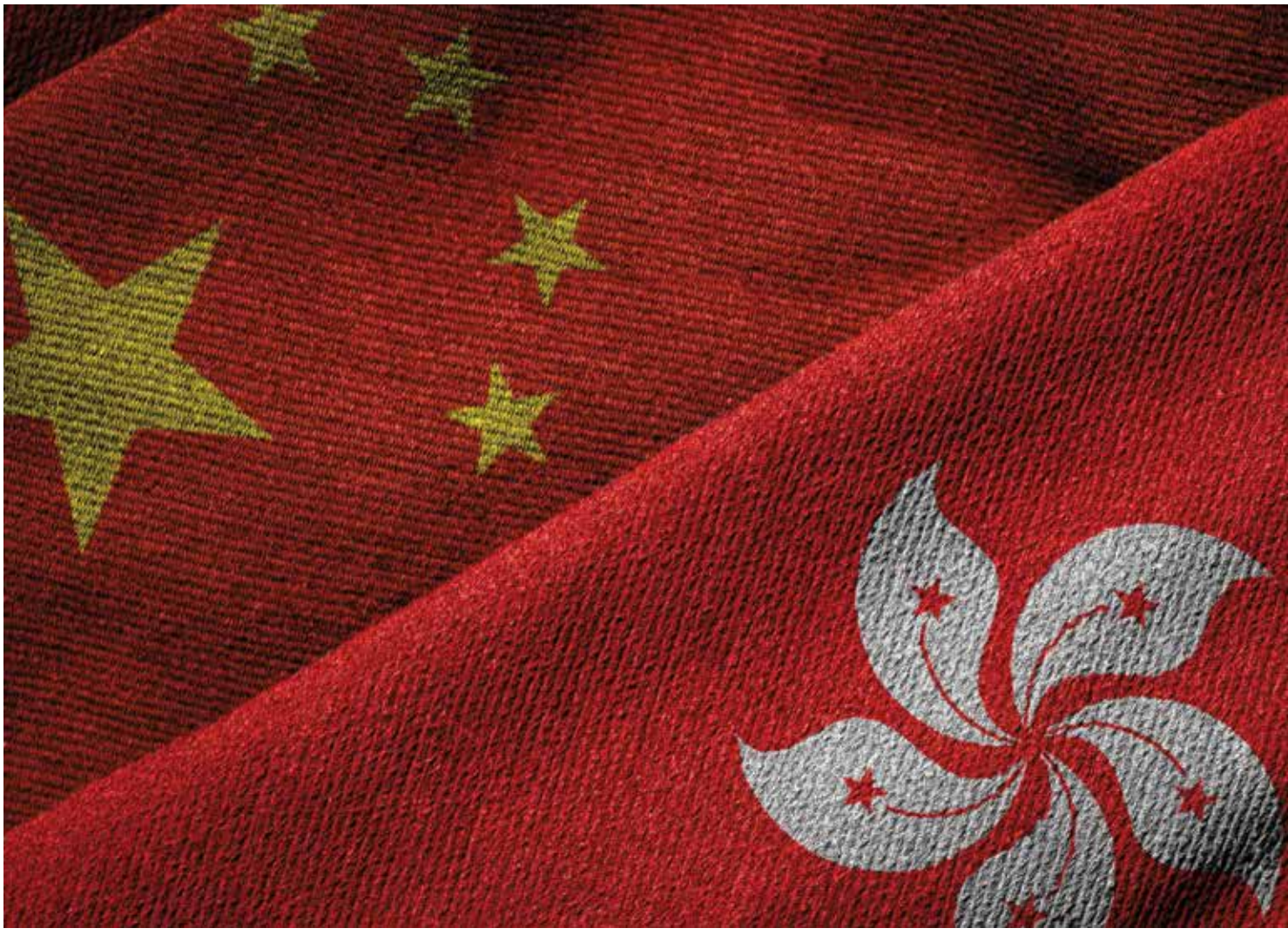
Inside information disclosure in Hong Kong and the Mainland

A comparison of the A+H share information disclosure requirements



PH Chik, Solicitor and Legal Adviser to the Mainland China Technical Consultation Panel of The Hong Kong Institute of Chartered Secretaries (the Institute), launches a two-part article in *CSj* looking at the major similarities and differences between the inside information and material information disclosure law and regulations in Hong Kong and the Mainland.

It has been more than seven years since disclosure of inside information under Part XIVA of the Securities and Futures Ordinance (SFO) became a statutory obligation for companies listed in Hong Kong in 2013. As in Hong Kong, information disclosure obligation of listed issuers in the Mainland has statutory backing under the People's Republic of China (PRC) Securities Law. Companies with a dual listing in Hong Kong and the Mainland (A+H listed companies) have to comply with both the Hong Kong and the Mainland statutory disclosure requirements and the applicable rules of the relevant stock exchanges (referred to as the 'Hong Kong rules' and 'the Mainland rules', respectively). This article gives an updated comparison of the major similarities and differences between the Hong Kong rules and the Mainland rules and discusses some practical issues that A+H listed companies may encounter on information disclosure.

References to the PRC Securities Law in this article are to the revised PRC Securities Law as revised and approved by the Standing Committee of the National People's Congress on 28 December 2019, which became effective on 1 March 2020.

1. Major events and inside information

Inside information (Hong Kong)

Under the SFO, 'inside information', in relation to a listed corporation, means specific information that is about:

- a corporation
- a shareholder or officer of the corporation, and/or
- the listed securities of the corporation or their derivatives.

This information is not generally known to the persons who are accustomed, or would be likely, to deal in the listed securities of the corporation, but would if generally known to them be likely to materially affect the price of the listed securities (Section 307A, SFO).

Examples of possible inside information have been provided by the Securities and Futures Commission (SFC) for guidance in paragraph 35 of the SFC's Guidelines on Disclosure of Inside Information (SFC's Disclosure Guidelines), but there are no defined 'major events' as in the Mainland rules (see the section below, 'Major events and inside information (the Mainland)'.

There are several distinctive Hong Kong elements.

- ***Specific information:*** a transaction which is only contemplated or under negotiation can be 'specific' information and, subject to the safe harbour provisions, may become discloseable. 'Specific' information means information which is capable of being identified, defined and unequivocally expressed, although all particulars or details are not known. For example, information relating to a decision to conduct a private placement of shares is specific information without deciding on precise information such as the placing price, number of shares to be placed etc.
- ***Not generally known to the market***: the Hong Kong rules require that the information is not generally known to those who are accustomed or would be likely to deal in the listed securities. The rules recognise that the same type of information may have different impacts on companies

Highlights

- companies with a dual listing in Hong Kong and the Mainland have to comply with both the Hong Kong and the Mainland statutory disclosure requirements and the applicable rules of the relevant stock exchanges
- the 'materiality' test under the Mainland rules is different from that of the Hong Kong rules
- both the Hong Kong and Mainland rules require inside information be disclosed by way of announcement through the websites of the relevant stock exchanges

with different types of investors (for example, speculative investors as opposed to long-term investors) and therefore does not define knowledge with reference to knowledge of ordinary or general investors (Paragraph 18, SFC's Disclosure Guidelines and pages 237-8, Insider Dealing Report of Public International Investments Ltd).

- ***Material effect on the price***: materiality is to be judged objectively by considering whether the information would influence an investor (that is, a person who is accustomed or would be likely to deal in the company's securities) in deciding whether or not to buy or sell the securities of the issuer (Paragraph 26, SFC's Disclosure Guidelines). The test is a hypothetical one to be applied at the time when the company, through its officers, has knowledge of the inside information (Paragraph 27, SFC's Disclosure Guidelines). No fixed thresholds of price movements or quantitative criteria have been provided under the Hong Kong rules (Paragraph 28, SFC's Disclosure Guidelines).

- ***Determination of inside information***: this is determined by considering whether a reasonable person, acting as an officer of the listed issuer, would consider the information as inside information based on his/her knowledge of all relevant facts and circumstances at the time (Section 307B(2)(b), SFO and Paragraph 52, SFC's Disclosure Guidelines). In this regard, good faith belief of the directors, which is not based on an objective and reasonable assessment of all relevant matters, that the information is not inside information is not an excuse for non-disclosure or delayed disclosure (Paragraph 74, Consultation Conclusions on the Proposed Statutory Codification of Certain Requirements to Disclose Price Sensitive Information by Listed Corporations, by the Financial Services and the Treasury Bureau).

- ***Guidance on materiality***: in determining whether a material effect is likely to occur, the SFC has provided the following guidance.

  The actual magnitude of price movement once the information is made public is by no means a conclusive indication of its materiality (Paragraph 29, SFC's Disclosure Guidelines).

  The following factors should be considered in determining 'materiality', including:

  - the anticipated magnitude of the event in the context of the totality of the listed issuer's activity
  - the relevance of the information to the price of the listed securities
  - the reliability of the source of information, and
  - market variables affecting the price of the securities, such as prices, liquidity, volatilities and so on (Paragraph 28, SFC's Disclosure Guidelines).

Major events and inside information (the Mainland)

The revised PRC Securities Law specifies 'major events' for the purpose of information disclosure (Article 80, revised PRC Securities Law) and 'inside information' for the purpose of insider dealing (Article 52, revised PRC Securities Law). It specifies a list of 12 major events on the trading price of the listed issuer's equity securities (Article 80, revised PRC Securities Law) and another 11 major events on the trading price of debt securities (Article 81, revised PRC Securities Law). At the same time, it also expressly provides that all major events are inside information (Article 52, revised PRC Securities Law) and does not provide a separate list of events as 'inside information'.

A 'major event' (重大事件) is defined as an event which may have a significant effect (较大影响) on the trading price of the listed issuer's equity securities or debt securities and has not become known to the investors (Articles 80 and 81, revised PRC Securities Law). Upon occurrence of a 'major event', the listed issuer shall immediately disclose such information.

'Inside information' is defined as unpublished information which either:

- relates to the business or financial position of the listed issuer, or
- may have a material effect (重大影响) on the trading price of the listed company's securities (Article 52, revised PRC Securities Law).

No insiders shall deal in the securities of the listed issuer before disclosure of the inside information.

> “in practice, when the Mainland rules and Hong Kong rules have different disclosure requirements, an A+H company has to comply with the rule that has a higher disclosure standard”

The principal difference between a 'major event' and information which is 'inside information' is that a 'major event' may have a 'significant effect' on the trading price of the listed issuer's equity or debt securities whereas 'inside information' may have a 'material effect' on the trading price of the equity securities or debt securities. Thus, it seems that a major event, which may have more than a 'significant effect' on the trading price, will be a 'major event' for information disclosure as well as insider dealing purposes.

Formation of inside information (the Mainland) vs specific information (Hong Kong)

The PRC Supreme People's Court has interpreted the time of 'occurrence' of a 'major event' as the time of formation of 'inside information', thereby effectively applying 'inside information' as the formation test for the purpose of information disclosure. Further, the PRC Supreme People's Court interpreted a piece of 'inside information' as having been formed upon its being 'motioned', 'planned' or 'decided' by the chairman, general manager or actual controller of the listed company and its formation is not restricted to the formal approval of a plan or proposal (Article 5, Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in the Handling of Criminal Cases of Engaging in Insider Trading and Leaking Insider Information (最高人民法院、 最高人民检察院关于办理内幕交易、泄露内幕信刑事案件具体应用法律若干问题的解释), issued in March 2012).

In this regard, although there is no similar 'specific information' requirement in the Mainland as there is in Hong Kong, the interpretation of the Supreme People's Court on the time of formation of a 'major event' may mean that a 'major event' should be disclosed much earlier than is otherwise provided in the Mainland rules and as interpreted by the market (see section 2 below, 'When to disclose').

Material effect on price and fixed disclosure thresholds (the Mainland and Hong Kong)

The 'materiality' test under the Mainland rules is different from that of the Hong Kong rules. While in the Hong Kong, materiality is based on whether an investor (a person who is accustomed or would be likely to deal in the company's securities) will make an investment decision upon the inside information having been generally known to the market, the Mainland test of disclosure is based on:

- 'Material effect on price', as a matter of principle, means material deviation from the market price index or major transaction price index (Article 9, the China Securities Regulatory Commission's (CSRC) Guidance on Determination of Insider Trading in Securities Market (for Trial Implementation) (证券市场内幕交易行为认定指引(试行)).

- The Mainland rules provide several quantitative thresholds for disclosure. For example, a profit alert announcement should be issued where it is estimated that the net profits of the listed issuer will increase or decrease by 50% or more as compared with that of last year (Rule 11.3.1(2), Rules Governing the Listing of Stocks on Shanghai Stock Exchange) (the Shanghai Listing Rules). Further, 'material litigation' in the Mainland rules means any litigation involving an amount in dispute of over RMB10 million and where such dispute accounts for more than 10% of the audited net assets value of the listed issuer (Rule 11.1.1, Shanghai Listing Rules).

However, there are indications that the Mainland rules are moving towards an objective standard of materiality, in addition to providing fixed disclosure thresholds. For example, the Listing Rules of the Shanghai Stock Exchange Science and Technology Innovation Board (SSE

Star Board) recognise the objective test based on investment decision and require listed issuers to disclose 'major events or matters' which may have a significant effect on investment decisions or those which may have a significant effect on trading price of the listed company's securities (Rule 5.1.1, the Listing Rules of the SSE Star Board (上海证券交易所科创板股票上市规则)).

Disclosure obligations of controlling shareholders, actual controllers, substantial shareholders and their respective parties acting in concert (the Mainland)

There are specific obligations on the part of controlling shareholders, actual controllers and substantial shareholders holding 5% or more of the listed securities and their respective parties acting in concert to disclose certain information, including:

- major changes in its shareholding or controlled companies in the listed issuer
- court judgments imposing a freeze order, order for sale or entrustment order, and so on
- proposed major assets or business reorganisation of the listed issuer, and/or
- other circumstances specified by the CSRC (Article 46, Administrative Measures for the Disclosure of Information of Listed Companies (上市公司信息披露管理办法) (Disclosure Administrative Measures)).

Under the revised PRC Securities Law, a controlling shareholder or actual controller who has a significant influence on a major event shall inform the listed issuer in writing in a timely manner about relevant matters within their knowledge and cooperate with the listed issuer in the performance of its disclosure obligation (Article 80, revised PRC Securities Law).

Commentary

The Hong Kong rules, which provide an objective and reasonable test, appear to conflict with the Mainland rules which have defined 'major events' and 'inside information' for the purpose of information disclosure, with rules providing for quantitative disclosure thresholds on several matters (for example, a plus or minus 50% change in net profits). In practice, when the Mainland rules and Hong Kong rules have different disclosure requirements, an A+H company has to comply with the rule that has a higher disclosure standard, which as a result has resolved many conflicts arising from the different rule requirements. Take the profit alert requirement as an example. An A+H company, when faced with a less than 50% change in net profits (for example, a 30% increase in net profits), may well have to issue a profit alert in Hong Kong as the 30% increase may likely be inside information under the Hong Kong rules, although the disclosure threshold of plus or minus 50% change in net profits under the Mainland rules has not been reached.

Although there could be conceptual differences between a transaction becoming 'specific' under the Hong Kong rules and a 'major event' under the Mainland rules, the Mainland judicial interpretation has moved the time of formation of a 'major event' or 'inside information' forward to a much earlier stage (see section 2 below, 'When to disclose').

Further, it seems that the Mainland rules (for example those of the SSE Star Board) are moving towards an objective materiality standard based on the effects of the information on investment decisions.

Substantial shareholders in an A+H listed company should note their obligations under the Mainland rules to disclose to the listed company their own information that may have a material effect on the listed company's share price. In practice, it seems that such information could be disclosed to the listed issuer on a confidential and temporary non-disclosure basis, if the information complies with the conditions for temporary non-disclosure (the issue of 'safe harbours' will be covered in the second part of this article).

2. When to disclose

Disclose as soon as reasonably practicable after knowledge of inside information (Hong Kong)

Under the Hong Kong rules, a listed company has to disclose 'as soon as reasonably practicable' after any inside information has come to the knowledge of the listed company (Section 307B(1), SFO). A listed company has knowledge of inside information if:

- its officer has, or ought reasonably to have, come to know of the information in the course of performing functions as an officer of the listed company, and
- a reasonable person would consider such information as inside information of the listed company (Section 307B(2)(a) and (b), SFO).

'Officer' means a director, manager or secretary of, or any other person involved in the management of, the listed issuer (Part 1, Schedule 1, SFO) (the meaning of 'officer' under the Hong Kong rules will be further discussed in the next part of this article).

Timely disclosure after certain events (the Mainland)

Under the Mainland rules, a listed company must disclose in a timely manner any 'major event' after the earliest of the following:

- any director, supervisor or senior management comes to know, or ought to know, the major event
- the board or supervisory committee resolves to go ahead with the major event, or
- the relevant parties sign a letter of intent or agreement relating to the major event (Article 31, Disclosure Administrative Measures; Rule 7.3, Shanghai Listing Rules).

'Timely' is defined as within two trading days from the point of time for disclosure (Article 71(2), Disclosure Administrative Measures), but in practice this normally means 'as soon as possible' without referring to the two trading-day requirement.

Under the Mainland rules, the knowledge of any director, supervisor or senior management of a major event will be deemed as the knowledge of the listed company. 'Senior management' under the Mainland rules includes the general manager, deputy general manager, board secretary, chief financial officer and other persons specified by the articles of association of the listed company (Article 217(1), PRC Company Law, and Rule 18.1(5), Shanghai Listing Rules).

Commentary

PRC judicial interpretation has interpreted the formation of a 'major event' or 'inside information' as being 'motioned', 'planned' or 'decided' by the chairman, general manager or actual controller of the listed company. Together with the requirement that such information should be disclosed in a timely manner when the director, supervisor or senior management has knowledge or ought to have knowledge of a 'major event', the point of time for disclosure in the Mainland could also be quite early and there could be no material differences between the Hong Kong and the Mainland requirements in terms of the point of time for disclosure.

As 'major events' are defined events under the Mainland rules, there is no 'reasonable person' test under the Mainland rules as in the Hong Kong rules on whether a reasonable person will determine the information as 'inside information'.

3. How to disclose

Both the Hong Kong and Mainland rules require that inside information be disclosed by way of announcement through the websites of the relevant stock exchanges (Section 307C(2), SFO; Article 86, revised PRC Securities Law). However, it is interesting to note that the Listing Rules of the SSE Star Board provide for disclosure through other media or disclosure methods, such as through news conference, media interview, the company's own website or web media, provided that such disclosure is conducted only after the close of trading hours and provided further that such information is disclosed by way of announcement through the stock exchange

> "it seems that the Mainland rules... are moving towards an objective materiality standard based on the effects of the information on investment decisions"

before commencement of trading hours of the next trading day (Rule 5.4.3, the Listing Rules of the SSE Star Board). How this rule is implemented in the Mainland remains to be seen, but there is no indication by the regulators in Hong Kong that the rule in this respect will be relaxed in the near future.

PH Chik

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The Institute's 'Guidelines on Practices of Inside Information Disclosure of A+H Companies' (the second edition of which was published in September 2019) is available in the Publications section of the Institute's website: www.hkics.org.hk. Last year the author gave a series of enhanced continuing professional development seminars on the major similarities and differences between the inside information/ material information disclosure laws and regulations of Hong Kong and the Mainland.

Transfer pricing and the arm's length principle

Complying with the new transfer pricing requirements in Hong Kong and the associated penalty for any non-compliance

EY tax and transfer pricing specialists Wilson Cheng, Martin Richter, Kenny Wei and Flora Chan précis the recent regulations on transfer pricing in Hong Kong, explain the required documentation and related exemption criteria, and suggest good practices to ensure compliance and to mitigate administrative penalties.

Transfer pricing – which refers to the rules and methodologies for pricing transactions between related parties – has been one of the most-discussed topics in the tax world globally over the last decade. The core foundation of transfer pricing is the arm's length principle, which means that the amount charged by one related party to another for a transaction must be the same as if the parties were not related.

The United States led the development of detailed, comprehensive transfer pricing rules in the 1980s. To date, over 120 jurisdictions have included transfer pricing rules in their tax legislations.

On 13 July 2018, the HKSAR Government gazetted Inland Revenue (Amendment) (No 6) Ordinance 2018 (the Amendment Bill). The main objectives of the Amendment Bill were to codify certain transfer pricing principles into the Inland Revenue Ordinance (Cap 112) (the IRO) and to implement the minimum standards outlined by the Organisation for Economic Co-operation and Development (OECD).

The Hong Kong transfer pricing framework is largely based on the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (OECD Guidelines). The main transfer pricing matters covered in the Amendment Bill are:

- the transfer pricing regulatory regime, and
- transfer pricing documentation.

In additional to the Amendment Bill, in July 2019 the Inland Revenue Department of the HKSAR Government (IRD) issued the following Departmental Interpretation and Practice Notes (DIPN) to provide detailed guidance on the newly enacted transfer pricing rules:

- DIPN No 58 – Transfer Pricing Documentation and Country-by-Country Reports
- DIPN No 59 – Transfer Pricing between Associated Persons, and
- DIPN No 60 – Attribution of Profits to Permanent Establishments in Hong Kong

Transfer pricing regulatory regime

The Amendment Bill codifies the arm's length principle into the IRO by introducing the fundamental transfer pricing rule, which allows for an adjustment of the profits or losses of an enterprise where the actual transaction made between two associated persons departs from the provision that would have been made between independent persons and which has created a tax advantage.

Associated parties are defined based on tests of participation in the management, control and capital of an enterprise, or of common participation by a third party.

The fundamental rule applies to the years of assessment beginning on or after 1 April 2018 and to both cross-border and domestic transactions. In practice, the IRD will consider the overall Hong Kong tax position of the transactions involved in the application of the transfer pricing rules. Specifically, insofar as domestic transactions between associated persons do not give rise to actual tax differences in

Highlights

- Hong Kong has stepped up its regulations on transfer pricing in line with international standards and has codified the arm's length principle into the Inland Revenue Ordinance
- the new documentation and filing requirements represent a significant change in the tax environment in Hong Kong, although exemptions are provided in certain circumstances
- taxpayers – in particular multinational corporations or any enterprise with cross-border activities – should review their existing operating and tax/transfer pricing structures to ensure their compliance with the new regulations

> “the core foundation of transfer pricing is the arm’s length principle”

Hong Kong, the relevant persons will not be obliged to compute the income or loss arising from these transactions on the arm's length principle.

Transfer pricing documentation

The Amendment Bill adopts the OECD's recommended three-tiered documentation structure, comprising a master file, local file and country-by-country reporting (CbCR).

Master and local files

From the fiscal year starting on or after 1 April 2018, Hong Kong taxpayers are required to prepare master file and local file documentation. The master file provides a high-level overview of the group's global operations and policies, while the local file provides detailed transactional transfer pricing information specific to a constituent entity in each jurisdiction. The information in the local file supplements the master file and helps to meet the objective of assuring that the entity has complied with the arm's length principle in the relevant jurisdiction.

To balance the need of meeting international tax standards with that of reducing the compliance burden on the business sector as far as practicable, the IRD provides exemptions from preparing master and local files based on the size of business and the amount of transactions.

Specifically, enterprises engaging in transactions with associated enterprises will not be required to prepare a master file and/or a local file if they meet one of the following exemption criteria:

1. ***Exemption based on size of business.*** Taxpayers meeting any two of the following three conditions are not required to prepare either the master file or the local file:
    i. total amount of revenue is not more than HK$400 million
    ii. total value of assets are not more than HK$300 million, and
    iii. average number of employees is not more than 100.
2. ***Exemption based on amount of transaction***. If the amount of a category of related party transactions (excluding domestic transactions) for the relevant accounting period is below the prescribed threshold, the taxpayer will not be required to prepare a local file for that particular category of transactions:
    i. transfer of properties (other than financial assets and intangibles) does not exceed HK$220 million
    ii. transactions in respect of financial assets are not over HK$110 million
    iii. transfer of intangibles is not more than HK$110 million, and
    iv. any other transaction (for example, service income and royalty income) does not exceed HK$44 million.
3. ***Exemption in respect of domestic transactions.*** Neither master nor local files are required to be prepared for domestic transactions between associated persons.

If a taxpayer is fully exempted from preparing a local file, it will also not be required to prepare a master file.

Frequency of update and retention period

The international standard is to review and update the master file and local file annually. However, the IRD recognises that some business descriptions, functional analyses and descriptions of comparables may not change significantly from year to year. In order not to impose an undue compliance burden on a Hong Kong entity, the IRD will allow certain information (for example, benchmarking studies and the descriptions of comparables of the relevant transactions) in the local file to be rolled forward for a maximum of three years if the relevant conditions of the controlled transactions or operations of the entity remain consistent across the years.

Where arrangements continue in force for more than one accounting period (such as a distribution agreement lasting for several years), there is no need to prepare new documentation for a subsequent accounting period, provided that the original documentation is sufficient to demonstrate that the Hong Kong entity has made a complete and correct return for the later period. Nevertheless, any significant change in the nature or terms of the transaction or transactions in question should be recorded.

> “the introduction of the transfer pricing rules demonstrates the IRD's commitment to combating cross-border tax avoidance and is a significant development in preserving its reputation as an international financial and business centre”

In line with the prevailing retention requirement for business records under Section 51C of the IRO, a Hong Kong entity must retain the master and local files for a period of not less than seven years after the end of the accounting period concerned.

CbCR

CbCR is designed to provide tax authorities with a high-level snapshot of the global position of profit and tax for a multinational group operating in various jurisdictions. This will enable tax authorities to make a more informed assessment of where risks lie.

Hong Kong has adopted the OECD model for CbCR and the CbCR filing threshold is set in accordance with the OECD recommendation, such that if the multinational group's aggregated turnover for a fiscal year exceeds EUR750 million (approximately HK$6.8 billion), the group will be considered a 'reportable group' and will have a CbCR filing obligation.

The primary obligation of filing a CbCR falls on the ultimate parent entity (UPE). If the UPE of a multinational group is a tax resident in Hong Kong, the UPE will be required to file a CbCR with the IRD. In addition to UPEs, the IRD also implements the 'secondary' and 'surrogate' filing mechanisms for Hong Kong entities of multinational groups with CbCR filing obligations. For example, if the UPE of a reportable group is a tax resident in the Mainland but is not required to file a CbCR in the Mainland, the Hong Kong entity of the reportable group will have a secondary filing obligation in Hong Kong.

A CbCR has to be prepared for each accounting period beginning on or after 1 January 2018. A Hong Kong filing entity will be required to file a notification to the IRD in relation to its CbCR obligation within three months after the end of the relevant accounting period. The actual country-by-country return is then required to be filed within 12 months after the end of the accounting period.

Permanent establishment

The new transfer pricing rules apply not only to transactions between associated parties but also to dealings between different parts of an enterprise. As a result, dealings between a foreign head office of an enterprise and its permanent establishment (PE) in Hong Kong need to adhere to the separate enterprises principle when attributing profits to the PE.

DIPN No 60 provides the IRD's view on the application of the new rules defining PE creation and the attribution of profits to PEs under the IRO and, in particular, the application of the Authorised OECD Approach (AOA) in the context of the IRO.

The AOA is a working hypothesis and consists of a two-step approach to attributing profits, which consists of:

1. using functional and factual analysis to hypothesise the PE as a distinct and separate enterprise, and

2. applying the arm's length principle to the hypothetical enterprise.

While DIPN No 60 indicates that the accounts and books of the PE in Hong Kong are a practical starting point for the attribution of profits to the PE, in the end a functional and factual analysis of the PE (cross-checked with transfer pricing documentation) should be the basis for determining the attribution.

Penalties

The Amendment Bill introduces an administrative penalty relating to transfer pricing. However, given that transfer pricing is not an exact science, the penalties have been set at a level lower than those for other incidents of non-compliance under Section 82A of the IRO.

Specifically, penalties will be imposed where a tax return was made with incorrect information on transfer pricing without a reasonable rationale or with the intent to evade tax. Taxpayers will be liable to an administrative penalty by way of additional tax not exceeding the amount of tax undercharged (vis-à-vis an amount trebling the tax undercharged, as currently imposed for incorrect return and other matters under Section 82A of the IRO).

That said, the IRD has not ruled out the possibility of imposing more stringent penalties or initiating criminal prosecutions on blatant cases in accordance with relevant provisions of the IRO. The availability of transfer pricing documentation alone will not qualify for an exemption from penalties, but will be considered in determining whether individual taxpayers have a 'reasonable excuse' to be exempt from the penalties.

With the burden of proof on taxpayers and more stringent penalties anticipated, it is crucial for taxpayers to put proper transfer pricing documentation in place within the set timeframe of nine months after the financial year-end to demonstrate that the arm's length principle has been applied in all related party dealings. Proper transfer pricing documentation includes a local fact-finding and robust functional analysis detailing the functions performed, assets used and risks assumed by Hong Kong entities.

In respect of the transfer pricing documentation requirements, taxpayers who fail to prepare master file and local file documentation without a reasonable excuse are liable to a level 5 fine (HK$50,000) and may be ordered by the court to prepare such documentation within a specified time. Failure to comply with that order carries a level 6 fine (HK$100,000) on conviction.

In relation to CbCR, penalties will apply if a taxpayer fails to file reports or notifications, provides misleading, false or inaccurate information, or omits information in the CbCR. Penalties are as outlined below:

- on summary conviction: a fine at level 3 (HK$10,000) and imprisonment for six months, or
- on conviction after indictment: a fine at level 5 (HK$50,000) and imprisonment for three years.

Penalty and offence provisions will also apply to the service providers engaged by the reporting entity.

Recommendations

The introduction of the transfer pricing rules demonstrates the IRD's commitment to combating cross-border tax avoidance and is a significant development in preserving its reputation as an international financial and business centre. Adopting the OECD minimum standards will also enable Hong Kong to avoid being listed as a 'non-cooperative' tax jurisdiction.

Whilst the IRD has sought to limit the impact of the transfer pricing requirements on the regulatory burden and compliance costs for businesses, the new documentation and filing requirements represent a significant change in the tax environment in Hong Kong. They are highly complex and have wide-ranging consequences for taxpayers in Hong Kong.

Accordingly, taxpayers – in particular multinational corporations or any enterprise with cross-border activities – should review their existing operating and tax/transfer pricing structures to ensure their compliance with the new transfer pricing regulations and seek professional advice where necessary.

Even though an entity may be exempt from the preparation of the master and local files, the availability of robust transfer pricing documentation can be a mitigating factor in any tax review or tax audit situation that might result in a penalty.

Further, tax audit cases in Hong Kong cover at least six years of assessment and it is common to involve transfer pricing issues. Robust transfer pricing documentation can help ease the difficulties in justifying an entity's related party transactions during a tax audit and can prevent loss of knowledge when there is a change of personnel in the entity.

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A bird's eye view

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CHARTERED SECRETARIES 特許秘書

Reasonable grounds to believe

Peter So, Partner, and Connie Ma, Associate, Deacons, look at a landmark Court of Final Appeal judgment that casts new light on the 'reasonable grounds to believe' test for money laundering offences.

In the two important Court of Final Appeal (CFA) cases of *HKSAR v Pang Hung Fai* (2014) 17 HKCFAR 778 and *HKSAR v Yeung Ka Sing Carson* (2016) 19 HKCFAR 279, in relation to the money laundering offence under Section 25(1) of the Organized and Serious Crimes Ordinance (Cap 455) (OSCO), the CFA laid down important principles for construing the meaning of 'reasonable grounds to believe' in that section of OSCO.

Subsequent to the above two decisions, on 5 December 2019, the CFA handed down another landmark judgment in *HKSAR v Harjani Haresh Murlidhar* (FACC 17/2018) (Judgment) which further clarified and reformulated the test for determining if a person has 'reasonable grounds to believe' the property represents proceeds of an indictable offence. In addition, the CFA elaborated on the relationship between Section 159A of the Crimes Ordinance (Cap 200) (CO), the conspiracy offence, and Section 25(1) of OSCO, the substantive money laundering offence.

There have been quite a number of occasions in recent years, of which the present case is one, in which the CFA has seen fit to comment on the ambit of Section 25 of OSCO, demonstrating the growing importance of these provisions and the difficulties of setting a clear scope for them.

In summary, the test, as reformulated now by the CFA, for determining the 'reasonable grounds to believe' is as follows:

1. What facts or circumstances, including those personal to the defendant, were known to the defendant that may have affected his/her belief as to whether the property was the proceeds of crime ('tainted')?
2. Would any reasonable person who shared the defendant's knowledge be bound to believe that the property was tainted?
3. If the answer to question (2) is 'yes', the defendant is guilty. If 'no', the defendant is not guilty.

It is now decided by the CFA that a defendant can still be convicted despite a genuinely held belief that the subject proceeds are not tainted, if that belief is proved to be unreasonable by objective standards with reference to the defendant's knowledge of the facts and circumstances.

Background

The event related to an email fraud. Fraudsters hacked into emails concerning a contract to supply fertiliser which required the buyer to pay the seller 5% of the contract price as a deposit. The fraudsters tricked the buyer into paying the deposit instead to a bank account held by the defendant's company. The defendant was arrested when he made withdrawals from his company account in Hong Kong and was charged with the offence of conspiracy to deal with property known or believed to represent the proceeds of an indictable offence, or commonly known as conspiracy to commit money laundering, contrary to Sections 159A and 159C of CO and Section 25(1) and (3) of OSCO.

At trial, the defendant did not dispute that there was an email fraud. The thrust of his defence was that he was a legitimate businessman and, when dealing with the fraudster, he believed that the latter was an agent acting bona fide on behalf of the principals in the fertiliser deal with the funds in question deriving form a genuine commercial transaction.

The trial judge relied upon the CFA judgment in *Pang Hung Fai*, interpreting the effect of it as requiring a substantial objective element when deciding whether a person had 'reasonable grounds to believe' that the property represented the proceeds of an indictable offence. He found that although the defendant did not know that the property represented the proceeds of an offence, he turned a blind eye to the facts and had reasonable grounds to believe that the money was tainted. He held that such level of culpability sufficed to found the defendant's guilt of the conspiracy offence. The defendant was ultimately sentenced to prison for three years and nine months.

Highlights

- the CFA judgment means that a defendant's actual belief is not determinative of guilt under the reasonable grounds limb of the money laundering offence
- a defendant can still be convicted despite a genuinely held belief that the subject proceeds were not tainted if that belief is proved to be unreasonable by objective standards with reference to the defendant's knowledge of the facts and circumstances
- the judgment departs from the *mens rea* principle of criminal law – which requires proof of a defendant's subjective belief as the basis for determining culpability

On appeal, the Court of Appeal (CA) applied the CFA judgment in *Yeung Ka Sing Carson* and held that a genuinely held belief that the money was not tainted would secure an acquittal even if the belief was unreasonable by objective standards. The CA nonetheless upheld the conviction on the basis of the judge's finding that the defendant's belief was not only unreasonable but was simply untrue.

Questions of law for determination

The defendant appealed against his conviction to the CFA. The CFA dismissed the appeal and determined several questions of law in relation to the offence.

1. What is the meaning of a defendant 'having reasonable grounds to believe that the property is tainted'? What is the relevance of the defendant's actual belief in determining whether the test is satisfied?

2. To what extent is wilful blindless relevant in determining whether the test is satisifed?

3. Regarding the relationship between the conspiracy offence and the (reasonable grounds limb) of the money laundering offence:

    a. given the statutory requirements of Section 159A(2) of CO, can there be an offence of conspiracy to commit the reasonable grounds limb of the money laundering offence, and

    b. given the statutory requirements of Section 159A(1) of CO, where defendants have reasonable grounds to believe that property is tainted, will they be guilty of conspiracy if they agree to deal with the property notwithstanding that those grounds may not exist at the time of dealing?

The test for determining 'having reasonable grounds to believe that the property is tainted'

The CFA reaffirmed the correctness of the test propounded in *Seng Yuet Fong v HKSAR* [1999] 2 HKC 833 (which had been endorsed in both CFA decisions of *Pang Hung Fai* and *Yeung Ka Sing Carson*) in determining whether a defendant has reasonable grounds to believe that the money in question is tainted for the purposes of the (reasonable grounds limb) of the money laundering offence in Section 25(1) of OSCO.

It will be recalled that the test in *Seng Yuet Fong* laid down by the CFA was that: 'To convict, the jury had to find 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'.

The proper interpretation is that the test has a subjective and an objective limb. In the interests of clarity, the CFA reformulated the test as follows:

1. What facts or circumstances including those personal to the defendant were known to him that may have affected his belief as to whether the money was tainted (the subjective limb)?

2. Would any reasonable person who shared the defendant's knowledge be bound to believe that the money was tainted (the objective limb)?

3. If the answer to (2) is 'yes', the defendant is guilty. If 'no', the defendant is not guilty.

In other words, unlike other criminal offences requiring proof of a defendant's subjective belief or *mens rea* as the basis for determining his culpability, a defendant's actual belief is not determinative of the question of guilt under the reasonable grounds limb of the money laundering offence. The CFA made it clear that where the defendants puts forward a defence that they believe that the money in question is clean, it is the facts and circumstances that the defendants claim to have led them to that belief that are significant, rather than the belief itself. If a reasonable person who shared the defendant's knowledge of the relevant facts and circumstances would be bound to believe that the money is so tainted, the offence is still made out even though the defendant may have subjectively believed otherwise (that is, believed that the money was clean). Hence, the CFA took the view that the CA fell into error in giving too much weight to the defendant's subjective belief as being capable of an acquittal.

The CFA said that the aforesaid scenario would be a rare case and is only likely to arise in circumstances where it is apparent that the defendant lacks the reasoning abilities of a normal person. In such case, the defendant's actual subjective belief is only relevant to mitigation (Para 33 of the Judgment).

Relevance of 'wilful blindness' in the test

'Wilful blindness' essentially means that a defendant is treated as having the required knowledge if he suspects the likely truth but deliberately avoids making the enquiries that would have given him the knowledge of the truth.

> “it is the facts and circumstances that the defendants claim to have led them to that belief that are significant, rather than the belief itself”

The CFA found that this concept is not very relevant in determining whether the test is met since 'having reasonable grounds to believe' is the statutory alternative to having knowledge for the purposes of the Section 25 offence. The CFA therefore found it not necessary or helpful to apply the concept to prove the offence.

Relationship between Section 159A of CO and Section 25 of OSCO

The CFA concluded that a person can be guilty of conspiracy to commit an offence under Section 25 when he/she agrees and intends with others to deal with a property and, at the time of the conspiratorial agreement, he/she knew or had reasonable grounds to believe that that property in whole or in part represents, or will represent, the proceeds of an indictable offence, even if it does not actually materialise in the end.

Commentary

It is unclear whether the current test, as now reformulated by the CFA, will be the final one. The difficulties in setting a clear scope for the reasonable grounds limb of Section 25 of OSCO is apparent. New sets of facts will continue to arise such that the CFA may find it necessary to opine on the scope of the offence.

In *Pang Hung Fai*, Spigelman NPJ (with whom all members of the CFA agreed) stated that the simple test in *Seng Yuet Fong* on most occasions will be all that is required (Para 55 of *Pang*) and that test retains the statutory word 'grounds', avoids the 'subjective' terminology and any contrast with 'objective' terminology and focuses attention on the accused (Para 53 of *Pang*).

It appears that the CFA in *Harjani* has gone back to the subjective terminology and contrasted it with the objective terminology.

While the CFA said it is a rare case (Para 33 of the Judgment) that a court would conclude that a reasonable person would have believed that the property was tainted but nonetheless accepts that the defendant did not have this belief and this kind of case is only likely to arise when such defendant lacks the reasoning abilities of a normal person, the CFA maintained that such defendant (who lacks the reasoning abilities of a normal person) should still be convicted, but his actual belief could be a mitigating factor at sentencing. One may question if this approach is casting a net that is too wide and inconsistent with the fundamental principles of criminal law that criminal liability is only attached when the defendant has the requisite mental element of the offence (*mens rea*). Spigelman NPJ in *Pang Hung Fai* stated that 'by the imposition of the same penalty, the mental element of the "reasonable grounds" alternative is regarded as being at the same level of moral obloquy as actual knowledge'. (Para 77 of *Pang*). If a person indeed lacks the reasoning abilities of a normal person and genuinely believes that the money was not tainted, why should he be convicted and subject to, potentially, the same level of penalty as actual knowledge? Stock VP in the Court of Appeal of *Pang Hung Fai* was concerned that a morally blameless person may find himself convicted of an offence (Para 211 of *Pang* in CA). Spigelman NPJ responded that there is a significant *mens rea* in the second limb of the offence and there is a strong element of moral blame (Para 57 of *Pang*).

The reformulated test in *Harjani* refers to a reasonable person who shared the defendant's 'knowledge'. However, it is unclear if the defendant's 'knowledge' is also meant to encapsulate the defendant's reasoning abilities, belief, perception and prejudices. Should the hypothetical reasonable person also share the defendant's reasoning abilities, belief, perception and prejudices when assessing the defendant's guilt?

It remains to be seen if the reformulated test for the reasonable grounds limb of the money laundering offence in Section 25(1) of OSCO will provide a workable formulation that helps the jury and lower courts decide the verdict going forward. Perhaps simplicity is the key and the test in *Seng Yuet Fong* is all that is required: 'To convict, the jury had to find 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'.

Peter So, Partner, and Connie Ma, Associate

Deacons

Professional Development

Seminars: January 2020

6 January

The role of Hong Kong notaries public in helping business and citizens

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

Speaker: *Samuel Li, Solicitor & Notary Public, Samuel Li & Co*

8 January

HKEX's revised listing rules and the ESG Reporting Guide – updates and insights

Chair: *YT Soon FCIS FCS, Director of a corporate advisory service provider*

Speakers: *Dr Lindsay Mai, Senior Sustainability Consultant; and Bonnie Yip, Principal Sustainability Consultant; Carbon Care Asia*

9 January

Women on boards: value all around

Chair: *Edith Shih FCG (CS, CGP) FCS(PE), International President, The Chartered Governance Institute and Institute Past President, and Executive Director and Company Secretary, CK Hutchison Holdings Ltd*

Speakers: *Dr William Fung SBS OBE JP, Member of Asia Global Institute's Advisory Board, Group Chairman of Li & Fung Ltd and Chairman of Global Brands Group Holding Ltd; Amar Gill, Managing Director and APAC Head of Investment Stewardship, BlackRock; and Teresa Ko BBS JP, Partner and China Chairman, Freshfields Bruckhaus Deringer LLP*

14 January

Redefining growth: integrating ESG into your business

Chair: *Edith Shih FCG (CS, CGP) FCS(PE), International President, The Chartered Governance Institute and Institute Past President, and Executive Director and Company Secretary, CK Hutchison Holdings Ltd*

Speakers: *Katherine Ng, Managing Director, Head of Policy and Secretariat Services, Listing Department, HKEX; Dr Niven Huang, Regional Leader of KPMG Sustainability Services in Asia Pacific, KPMG; Pat-Nie Woo, Head of Sustainable Finance, KPMG China; David Simmonds FCIS FCS, Institute Vice-President and Group General Counsel, Chief Administrative Officer and Company Secretary, CLP Holdings Ltd; and Amar Gill, Managing Director and APAC Head of Investment Stewardship, BlackRock*

17 January

Practical company secretarial workshops: Part 4 – what you can do more? Module 10 – building ethical cultures (re-run)

Speaker: *April Chan FCIS FCS, Institute Past President and Chairman of Technical Consultation Panel, and Inaugural President, CSIA*

ECPD forthcoming seminars

Date	Time	Topic	ECPD points
17 March 2020	6.45pm–8.15pm	Updates to Cayman SIBL and economic substance (webinar)	1.5
18 March 2020	6.45pm–8.15pm	Directors' duties on corporate transactions and intervention by the SFC (webinar)	1.5
24 March 2020	6.45pm–8.15pm	2020 Regulatory Trends (Over the Next 12 months) (webinar)	1.5
26 March 2020	6.45pm–8.15pm	China's Foreign Investment Law 3.0 – the new world and its opportunities (webinar)	1.5
30 March 2020	6.45pm–8.45pm	Tax Planning and Marketing Opportunities in the Greater Bay Area (webinar)	2.0
31 March 2020	6.45pm–8.45pm	AML/CFT Best Practices Series: The AML/CFT Landscapes, Controls and Challenges – Practical Knowledge Sharing (webinar)	2.0

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

Online CPD seminars

For details, please visit the CPD section of the Institute's website: www.hkics.org.hk. For enquiries, please contact the Institute's Professional Development Section: 2830 6011, or email: cpd@hkics.org.hk.

Seminar review

Hybrid AGMs – the next logical step?

For the last two months, the seminars in the Institute's ECPD programme have been held as webinars as a result of the COVID-19 outbreak. This context gave added interest to the Institute's ECPD seminar on 'Hybrid AGMs' held on 20 February. The seminar was held in the very format – a hybrid of in-room and remote attendance – that is used in hybrid AGMs.

The Institute has been at the forefront of promoting hybrid meetings for a number of years. Mohan Datwani FCIS FCS(PE), Institute Senior Director and Head of Techincal & Research, referred to the July 2018 paper – '21st Century AGM' – published by The Chartered Governance Institute (the Global Institute). In the context of declining attendance and voting at AGMs globally, the paper promotes use of the hybrid format to enhance shareholder participation in AGMs, promote long-term shareholder retention and streamline administration.

The 'Hybrid AGMs' seminar was enabled by the technology provided by Lumi, and the company's CEO, Richard Taylor, spoke at the seminar about the drivers of the trend towards greater use of hybrid meetings globally. The primary driver, he said, was the wider shareholder participation offered by the hybrid format. Both virtual-only and in-room only meetings restrict the options open to would-be participants, while the hybrid format permits those unable to make the physical meeting, and also those who prefer the in-room experience, to attend.

In addition, he pointed out that the current COVID-19 outbreak has certainly focused minds on the advantages of a

Professional Development (continued)

format which enables shareholders to continue to attend AGMs when large gatherings of people are not possible for health reasons. A further driver, however, is the desire by early adopters of this format to embrace, and to be seen to embrace, digitalisation.

The seminar was itself a demonstration of what companies thinking of using this format can expect from hybrid meetings.

It re-enacted the 2019 AGM of the Institute to give participants the experience of attending the AGM via live broadcast, e-voting and questioning side-by-side with the physical meeting.

Edith Shih FCG (CS, CGP) FCS(PE), International President, The Chartered Governance Institute, and Institute Past President, chaired the mock AGM. Samantha Suen FCIS FCS(PE), Institute Chief Executive, joined the panel to answer questions from 'members'.

The mock AGM was followed by a presentation by Michael Ling, Deputy Company Secretary, CLP Holdings Ltd. CLP Holdings became the first Hong Kong company to adopt this format when it ran its latest AGM using the hybrid format.

That meeting attracted about 1,700 people with only a small number participating online. Mr Ling believes, however, that online participation will rise as the market gets used to the hybrid format.

The main driver for CLP to embrace this format was to enable the company to broaden the accessibility of its AGM, Mr Ling said. Currently the majority of in-room participants are retirees. He pointed out that, since the CLP AGMs are generally held on a weekday, enabling online participation will permit a younger demographic to attend. He emphasised that the adoption of the format is also part of the company's strategy to embrace digitalisation. 'Our AGM should represent us well as a utility of the future,' he said.

Mr Ling also shared some practical tips with attendees. He pointed out that, for Hong Kong–incorporated companies, Section 584 of the Companies Ordinance permits companies to have online participation at their AGMs, but companies may need to amend their articles of association to ensure that they permit shareholders who are not physically present to fully participate in the meeting.

He also recommended that companies should be explicit about the distinction between 'registered' and 'non-registered' shareholders. This has important implications for AGM participants since shareholders who hold their shares via the Central Clearing and Settlement System (CCASS) in Hong Kong are 'non-registered' shareholders and will not be able to participate in the online polling.

Mr Ling also emphasised the benefits of good preparation – thinking through the 'what if' scenarios, having back-up plans in place and doing dry runs – to ensure that the transition to the hybrid format works well. He recommended that companies give a clear warning to those wishing to attend online that they will need a good internet connection – 40% replied to an e-poll at the seminar on this issue that they experienced connection issues.

The Institute's ECPD seminar on 'Hybrid AGMs' was held on 20 February 2020. The seminar attracted 293 participants, the vast majority (289) of whom attended the seminar remotely. The '21st Century AGM' paper can be downloaded from the 'Insights' section of The Chartered Governance Institute's website: www.cgiglobal.org.

Membership

New graduates

Congratulations to our new graduates listed below.

Chan Hiu Tung
Chan Wai Tsz
Cheng Lai Kei
Cheng Tsz Yan
Cheung Ka Man
Cheung Ka Yin
Cheung Wing Sze
Ching Man Kit
Chiu Yi Sum, Esther
Chung Wing Yan
Deng Xiaoren
Ho Sze Wai
Ho Wing Chee
Lai Hiu Tsing
Lai Man Wa, Eva
Lam Man Yee
Lee Tsz Fung
Leung Ka Ki
Lo Pui Ying, Janice
Lo Wai Yin
Mak Kai Fung
Ng Ching Man, Joey
Ng Wai Ki, Otto
Pang Oi Fung
Qi Mengchu
To Wing Yee
Tse Pik Shan
Wong Kin Hang
Wong Wing Shun
Wong Wing Ying
Yu Chenye
Yu Chi Ying
Zhang Bingjie

Maintaining professional standards

Member, graduate and student discipline

The Institute requires its members, graduates and students to comply with the requisite standards of professional ethics and conduct, and the Institute's regulations. The Investigation Group, Disciplinary Tribunal and Appeal Tribunal are the Institute's disciplinary bodies, as stipulated in the Byelaws of The Chartered Governance Institute and the Articles of Association of the Institute.

Notice of Disciplinary Tribunal decision

The Institute reprimands one member for professional misconduct:

- Chow Chi Wa

For details of member, graduate and student discipline, please visit 'Discipline' in the Membership section of the Institute's website: www.hkics.org.hk.

Advocacy

The Chartered Governance Institute – new thought leadership report

The Chartered Governance Institute published a new thought leadership report, 'Corporate Governance - Beyond the Listed Company' authored by its Thought Leadership Committee Chairman Peter Greenwood FCIS FCS. This report discusses key questions around the governance of private and listed companies.

To discover more information on 'Corporate Governance – Beyond the Listed Company', please visit The Chartered Governance Institute's website: www.cgiglobal.org.

HKICS continues to receive the Caring Organisation Logo Award

The Institute has been awarded the 2019/2020 Caring Organisation Logo by The Hong Kong Council of Social Service. The award is in recognition of the Institute's corporate social responsibility efforts in caring for the community, its employees and the environment. The Institute will continue to support and embark on projects that will bring long-term sustainable growth to its members and students, its employees and other stakeholders, as well as the community and the environment at large.

Advocacy (continued)

Institute's measures in response to the outbreak of COVID-19

On 28 January 2020, the Institute posted a message on its social media platforms to support efforts to prevent the spread of COVID-19 in the community. The message reminded members, graduates, students and Secretariat staff to maintain good personal health and environmental hygiene at all times and to check the website of the Centre for Health Protection of the Department of Health for the HKSAR Government for updates.

Subsequently, due to continuing outbreaks, the Institute started to maintain limited services at both the Hong Kong Secretariat and Beijing offices. To provide flexibility for our members and students, the submission deadlines have been extended for (i) election to membership, and (ii) student registration for the June 2020 examination diet, to 3 February 2020.

To facilitate the continuing professional development of our members, graduates and students during this challenging time, most of the seminars scheduled for February and March 2020 are being held via webinar instead of requiring physical attendance. In the interests of safety, all other events scheduled for February and March have been rescheduled or cancelled.

As a caring organisation, the Institute's Council has decided to donate HK$50,000 to The Hong Kong Council of Social Service (HKCSS). This donation will assist in procuring appropriate preventive materials such as surgical masks and hand sanitisers for the needy, including some 200,000 families and individuals who are elderly people living alone, those living with disabilities or vulnerable children.

Institute President Gillian Meller FCIS FCS, Treasurer Ernest Lee FCIS FCS(PE) and Chief Executive Samantha Suen FCIS FCS(PE) presented the donation cheque on behalf of the Institute to Chua Hoi-Wai, Chief Executive of HKCSS, on 4 March 2020. They also presented a greeting card thanking all staff at HKCSS and its member organisations for looking after the needy especially in this challenging time.

The Institute calls upon its members, graduates and students to work together during this challenging time to help the needy in our community. To stay updated with further developments, please visit the COVID-19 section of the Institute's website: www.hkics.org.hk.

Earth Hour 2020

The WWF Earth Hour 2020 will take place at 8.30pm on Saturday 28 March 2020. The Institute will continue to support this initiative in environmental protection and caring for our planet. As pledged, both the Institute's Hong Kong Secretariat and Beijing offices will switch off all lights for the designated hour. Members, graduates and students are invited to join the Institute in support of this meaningful cause.

For more details, please visit: www.earthhour.org.

International Qualifying Scheme (IQS)

Examination results – December 2019 diet

Results of the December 2019 examination diet were released on 14 February 2020. Students can now access their examination results from their own login account on the Institute's website. From now onwards, all examination results will be made available in each candidate's own login account only and will no longer be sent by mail.

IQS examination pass rates (December 2019)

Subject	Pass rate
Part I	
Strategic and Operations Management	33%
Hong Kong Corporate Law	47%
Hong Kong Taxation	50%
Hong Kong Financial Accounting	74%
Part II	
Corporate Governance	53%
Corporate Administration	30%
Corporate Secretaryship	28%
Corporate Financial Management	11%

Subject Prize and Merit Certificate awardees

Institute students who pass a module of the Institute's qualifying programme with a Distinction will be awarded a Subject Prize; while those passing with Merit will be awarded a Merit Certificate.

The Institute is pleased to announce the following awardees of Subject Prizes and Merit Certificates for the December 2019 examination. The Subject Prizes are sponsored by The Hong Kong Institute of Chartered Secretaries Foundation Ltd. Congratulations to all awardees!

Subject	Subject Prize awardees
Hong Kong Corporate Law	Chan Ka Lee So Sze Man Tse Siu Ho Yeung Lok Yan
Hong Kong Financial Accounting	Wei Fan
Corporate Governance	Lam Tsz Kit Lo Cheuk Wai Ng Chi Fung Sham Wing Yin Yuen Wing Ki

Subject	Merit Certificate awardees
Hong Kong Corporate Law	Chan Ngar Wai Chan Shu Kan Ching Kim Fung Ding Bo Lian Weimin Lu Chanyuan Ng Mei Ha Ren Fang Sze Tong Tang Lai Fong Tin Yin
Hong Kong Financial Accounting	Lung Yi Ye Jiahong Zheng Chan Chan Ka Ning Wong Ching Wa
Corporate Governance	Au Siu Kit Chu Pik Man Ko Tsz Shan Kwok Wai Ming Lee Shuk Ling Mak Wing Mui Tam Wang Ngai Wong Lok Hang Wu Jiali
Corporate Secretaryship	Cheng Kwan Yuen

Chartered Governance Qualifying Programme (CGQP)

June 2020 examination diet timetable

Date	AM Session Reading time: 9.15–9.30 Examination time: 9.30–12.30	PM Session Reading time: 1.30–1.45 Examination time: 1.45–4.45
Tuesday 2 June 2020	Corporate Governance	Hong Kong Taxation
Wednesday 3 June 2020	Interpreting Financial and Accounting Information	Risk Management
Thursday 4 June 2020	Hong Kong Company Law	Strategic Management
Friday 5 June 2020	Corporate Secretaryship and Compliance	Boardroom Dynamics

The examination enrolment period runs from 18 February 2020 to 31 March 2020. Please download the examination entry form from the Forms tab under the Studentship section of the Institute's website: www.hkics.org.hk. All students are advised to submit their examination entry forms by email: exam@hkics.org.hk or by post on or before 31 March 2020.

For further information, please contact the Education and Examinations Section: 2881 6177, or email: student@hkics.org.hk.

June 2020 examination diet - key dates

Key dates	Description
14 Feb 2020	Release of December 2019 examination papers, suggested answers and examiners' reports
18 Feb–31 Mar 2020	Enrolment for June 2020 examination diet
2 Mar 2020	Closing date for the HKU SPACE Examinations Preparatory Programme enrolment
2 Mar–1 Apr 2020	Enrolment for CGQP examination technique online seminars
31 Mar 2020	Closing date for CGQP June 2020 examination enrolment
On or about 20 Apr 2020	Pre-released case for CGQP June 2020 examinations
15 May 2020	Release of admission slips
2-5 Jun 2020	Examination period for June 2020 examination diet
26 Jun 2020	Closing date for June 2020 examination postponement application
14 Aug 2020	Release of June 2020 examination results

CGQP pilot papers and online materials

CGQP pilot papers and online study materials are available now from the Institute's website login area and PrimeLaw online platform.

For further questions regarding the pilot papers, please contact the Education and Examinations Section: 2881 6177, or email: student@hkics.org.hk. For technical questions regarding the PrimeLaw account, please contact Wolters Kluwer Hong Kong's customer service: HK-Prime@wolterskluwer.com.

CGQP examination technique online seminars

To reduce the risk of the COVID-19 in the community, the CGQP examination technique seminars will be conducted via webinar in April 2020.

For further details, please refer to the Events section of the Institute's website: www.hkics.org.hk.

HKICS Examinations Preparatory Programme

The HKICS Examinations Preparatory Programme conducted by HKU SPACE will commence on Monday 2 March 2020. Please note that due to the COVID-19 situation, the HKICS Examinations Preparatory Programme will be a mix of online and face-to-face sessions. For enrolment details, please refer to the Studentship section of the Institute's website: www.hkics.org.hk.

For enquiries, please contact HKU SPACE: 2867 8317, or email: hkics@hkuspace.hku.hk.

Forthcoming activities in March 2020

Date	Event
5 March 2020	Student Gathering: Session 1 - How to use PrimeLaw online platform to study for HKICS CGQP examinations (webinar)
9 March 2020	Student Gathering: Session 2 - Updates on CGQP examinations (Management/Accounting/Finance modules) (webinar)
10 March 2020	Student Gathering: Session 3 - Updates on CGQP examinations (Law modules) (webinar)
17 March 2020	Governance Professionals Information Session (webinar)
27 June 2020 (rescheduled)	HKICS Governance Professionals Career Day 2020

Student Ambassadors Programme

Summer Internship – call for vacancies

The Institute invites companies and organisations to offer summer internship positions to local undergraduates under its Student Ambassadors Programme with the aim of promoting the Chartered Secretary and Chartered Governance Professional qualification to the younger generation in Hong Kong. The internship period is usually from June to August 2020 for a maximum period of eight weeks.

Members who are interested in offering summer internship positions this year, please visit the Events section of the Institute's website: www.hkics.org.hk. For details, please contact Louisa Lau: 2881 6177 or email: student@hkics.org.hk.

Notice:

Policy – payment reminder

Studentship renewal

Students whose studentship expired in January 2020 are reminded to settle the renewal payment by Monday 23 March 2020.

Exemption fees

Students who received an exemption confirmation notice issued in December 2019 are reminded to settle the exemption fees before the payment deadline set out in the exemption confirmation email. The exemption granted will be forfeited in the event that an applicant fails to settle the fees by the due date.

Featured job openings

Company name	Position
Hong Kong Exchanges & Clearing Ltd	Vice-President
Shenzhen International Holdings Ltd	Manager – Company Secretarial Department/Senior Company Secretarial Officer

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

Court dismisses challenge to SFC's investigative powers

Last month the Court of First Instance dismissed judicial review applications against the Securities and Futures Commission (SFC) in connection with a search operation it conducted for ongoing investigations into suspected breaches of the Securities and Futures Ordinance (SFO). The judicial review applications sought to challenge search warrants issued by two magistrates in July 2018 on the basis that they were unlawful or invalid for want of specificity.

They also alleged that seizures of digital devices pursuant to the search warrants, the SFC's continued retention of the devices and notices issued by the SFC under the SFO for the production of emails or passwords for the devices or email accounts were unlawful, and interfered with their right to privacy under the Basic Law and the Hong Kong Bill of Rights.

The court rejected the applications and held that the search warrants plainly authorised digital devices to be seized by the SFC. The words 'document' or 'record' in the SFO should not be narrowly construed, having regard to the manner in which information and data are nowadays being created, transmitted and stored in digital devices.

Moreover, the SFC is empowered, under the SFO, to require access to email accounts and digital devices which contain, or are likely to contain, information relevant to its investigations, even though the email accounts and digital devices would likely also contain other personal or private materials which are not relevant to the SFC's investigations.

The applicants were ordered to pay the SFC's legal costs. The investigations are ongoing.

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

Companies Registry resumes normal services

To align with the announcement by the HKSAR Government on 27 February 2020 that government departments should resume services in a safe and orderly manner, starting from 2 March 2020, all of the Companies Registry's services will resume as normal. To achieve social distancing with a view to reducing the risk of the spread of the COVID-19 virus in the community, the Registry advises customers to continue to deliver documents electronically or by post. Customers should avoid visiting the Registry's office premises unless they require urgent service. As the services of the Registry have been scaled down since 3 February 2020, the Registry also requires longer processing time for documents submitted in hard copy form.

The Registry's services on registration of documents and public search services will continue to be provided electronically through the e-Registry (www.eregistry.gov.hk), Cyber Search Centre (www.icris.cr.gov.hk) and the website of the Registry for Trust and Company Service Providers (www.tcsp.cr.gov.hk).

More information is available on the Companies Registry website: www.cr.gov.hk.

The Exchange updates guidance materials

The Stock Exchange of Hong Kong Ltd (the Exchange), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Ltd (HKEX), has further updated its guidance materials. The Exchange began a review of its guidance materials in early 2018 as part of its continuous effort to streamline its guidance and related materials. The first three sets of updates were published in July 2018, March 2019 and April 2019, respectively.

The latest changes update three Guidance Letters – HKEXGL89-16 (Guidance on issues related to 'controlling shareholder' and related listing rules implications); HKEX-GL52-13 (Guidance for mineral companies); and HKEX-GL36-12 (Guidance on due diligence to be conducted by the sponsor and disclosure in the listing document relating to a distributorship business model). In addition, eight sets of FAQs have been updated and 15 sets of guidance materials have been withdrawn.

The updated guidance materials can be found on the HKEX website: www.hkex.com.hk.

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