

The Company Secretary, His Involvement in IPO Projects and His Role in Corporate Governance

Every company incorporated in Hong Kong must have a company secretary (s.474(1)). The person named as company secretary in the incorporation form filed with the Registrar of Companies becomes the first company secretary of the company with effect from the date of its incorporation (s.474(2)).

Historically, the company secretary was regarded as a “mere servant”¹, doing what he was told, with no authority to represent anything, and a “limited ... humble character”². However, his position has changed a great deal in the last century. First recognised in 1971 as the chief administrative officer with extensive authority to bind the company concerning contracts connected with the administrative side of the company’s affairs³, the company secretary is now regarded as a member of senior management who has a duty to, amongst other tasks, advise the Board, through the chairman / CE, on corporate governance matters.

The company secretary is an officer of the company (s. 2 of the Cos. Ord. and s. 2(1) of the S&F Ord.) and is liable to fines and, in certain cases, imprisonment if he fails or omits to carry out his duties as imposed by the applicable ordinances, codes, rules and regulations. As part of the senior management team and at the centre of the Board’s decision-making process, the company secretary having good communication skills and knowledge of the company’s business, operations and specific circumstances is influential to promote good corporate governance. Indeed, he can assist the directors in their legitimate pursuit of growth and profit with integrity, independence, dedication and professionalism and use reasonable endeavours to seek to protect the interests of the company and its stakeholders, including the following:



¹ *Barnett, Hoares & Co. v South London Tramsway Co.* (1887).

² *George Whitechurch Ltd. v Cavanagh* (1902).

³ *Panorama Developments (Guildford) Ltd. v Fidelis Furnishing Fabrics Ltd.* (1971).

Involvement in IPO Projects

When a company offers its securities to the public for the first time, the process is referred to as an initial public offering (IPO) and the company is said to ‘go public’. Should there be no experienced in-house company secretary, the company may retain, amongst other professionals such as legal advisers and reporting accountants for the IPO, a professional corporate services firm (like Boardroom) which can provide a qualified individual company secretary to deal with the following matters (subject to the nature and scope of work having been mutually agreed) before the listing of the company’s securities on the Exchange and cope with the continuing statutory and regulatory compliance after the listing:

Review of the corporate structure and the constitutional documents of the company in preparation for listing;

Conversion of a private company into a public company;

Discussion with the company and other relevant parties about the company’s corporate secretarial, compliance and corporate governance matters;

Review of the policies and practices relating to corporate governance matters and the relevant documents (e.g. the terms of reference of the audit, remuneration, nomination and corporate governance committees, directors’ service contracts, directors’ declarations and undertakings relating to the non-competition with the group’s business activities; share option schemes, code of conduct regarding securities transactions by directors and employees, shareholders’ communication policy, Board diversity policy and policy for the disclosure of inside information, etc.);

Attendance at the Board meetings approving the matters relating to the application for listing and associated matters and review of the relevant Board minutes and attendance at the directors’ training session;

Review of the listing application form (Form A1) together with the accompanying documents, underwriting agreement, placing letter (if any), prospectus, forms of application for securities, press announcements regarding the new issue and its results and basis of allocation and share certificates;

Review and signing of a power of attorney authorizing any director to sign on the company’s secretary’s behalf any documents in connection with the listing;

Review of the consent letter in respect of the named company secretary and authorized representative and the forms in respect of the named company secretary and authorized representative, etc. for submission to the HKCR and the Exchange;

Provision of documents in relation to the particulars of the named company secretary disclosed in the prospectus, completion of the due diligence questionnaire and attendance at the interview conducted by the sponsors and the latter's solicitors for verification purpose;

Attendance at the office of the Company's solicitors at around 8:00 a.m. on the date the prospectus is filed with the HKCR for registration, to sign the prospectus cover in the capacity of the company secretary; and

Review and signing of the company secretary's closing certificate as a closing document under the underwriting agreements, if required.

General Roles and Routine Duties

Depending on the size and nature of the company and the contractual arrangements made with him, the company secretary may perform a variety of duties (e.g. company secretarial, administrative, management, etc.). No doubt, the role of the company secretary will be dictated by his initiative, experience, knowledge and capability as well as the culture, tradition and practice of the company for which he is working.

As regards the company secretarial duties, the company secretary will arrange for and attend all meetings of the members, directors and Board committees of the company and prepare proper minutes of the proceedings. Under the direction of the Board, he will issue all notices to members and other persons who are entitled to receive them. The company secretary may countersign every document to which the common seal of the company is affixed, and the company secretarial department headed by him will deal with share and debenture transfers, keep and update the statutory books and records of the company, including the registers of directors, company secretaries, members, transfers and charges, and prepare and file resolutions and other documents including the prescribed forms usually signed by him (e.g. the annual return, return of allotments, notices of change of company secretaries/directors and their particulars and address of registered office, notices of particulars of mortgages or charges for registration as well as, for listed companies only, the monthly returns on movements in securities) to the regulators such as the HKCR and the Exchange.

Essential Corporate Governance Responsibilities

Section F of the Code provides that the company secretary of a listed company:

- (a) plays an important role in supporting the Board by ensuring good information flow within the Board and that the Board policy and procedures are followed; and
- (b) is responsible for advising the Board through the chairman and/or the CE on governance matters and should also facilitate induction and professional developments of directors.

It also provides that he should be an employee of the company and where an external service provider is engaged as the company secretary, the identity of a person with sufficient authority (e.g. chief legal counsel or chief financial officer) at the company whom the external provider can contact must be disclosed by it. Further, the company secretary should report to the chairman of the Board and/or the CE (it appears that the above provision seeks to preserve the independence of the company secretary and help the company secretary earn the credibility and trust from the Board and management); and all directors should have access to the advice and services of the company secretary to ensure that Board procedures as well as all applicable laws, rules and regulations are followed.

In addition, rule 3.05 of the Listing Rules and rule 5.24 of the GEM Rules require that every listed company appoints two authorised representatives who:

- (a) will act at all times (particularly before the commencement of trading in the morning of a business day) as the principal channel of communication between the Exchange and the listed company; and
- (b) must be either two directors or a director or the company secretary unless the Exchange, in exceptional cases, agrees otherwise.

As such, the company secretary is usually appointed as one of such representatives.

To actively promote good corporate governance, company secretaries can consider the following responsibilities*:

- 1) Supporting the chairman positively and establishing an effective working relationship with the chairman and the CE, with accountability to the Board (through the chairman) for all matters relating to directors' duties as an officer of the company;
- 2) Ensuring the smooth running of the activities of the Board and Board committees (such as the audit, remuneration, nomination, corporate governance and other committees) by helping the Board chairman and each of the Board committee chairmen set agendas and preparing and presenting papers to the Board and Board committees, advising on Board and Board committee procedures and ensuring that they are followed, regularly reviewed and, if appropriate, amended;
- 3) Keeping under close review all legislative, regulatory and corporate governance

developments as well as compliance issues that may affect the company's business and operations, and ensuring that the Board is timely and fully briefed on these and takes them into account when making decisions;

- 4) Ensuring that the concept of stakeholders is in the Board's mind when important matters are being considered and decisions are being made;

**Based on the suggestions made by The Hong Kong Institute of Chartered Secretaries (HKICS) to its members in the guide entitled "The Essential Company Secretary" published by it on 30th October 2013, which have been substantially modified, elaborated and supplemented by the writer herein.*

- 5) Advising the Board on the need to "comply with or explain" any deviation from the Code, including provisions relating to the adoption of various governance policies and periodic reporting of measurable objectives for implementing such policies, and updating progress thereon in the corporate governance report to be contained in the company's annual report;
- 6) Advising the Board on potentially enhancing existing governance practices which suit the company's needs and adopting some or all of the recommended best practices under the Code;
- 7) Keeping abreast of the sustainability issues as well as the environmental, social and governance (ESG) policies and practices and reporting thereon;
- 8) Acting as a confidential sounding board to the chairman, executive directors and non-executive directors (including the INEDs) on matters that may concern them, and taking a lead role in managing any difficult inter-personal issues on the Board;
- 9) Acting as a primary point of contact and source of advice and guidance for directors, and in particular non-executive directors since they are generally not as close to the company's business as their executive peers, as regards the company and its principal activities in order to support the decision-making process;
- 10) Acting as an additional enquiring voice in relation to the Board decisions which particularly affect the company, drawing on his expertise, experience and knowledge of the practical aspects of management including law, accounting, tax and business finance to act as the "conscience of the company";
- 11) Ensuring, where applicable, that the standards and/or disclosures required by the relevant laws, codes, rules and regulations (e.g. the Listing Rules, the Cos. Ord. and the S&F Ord.) and the applicable financial reporting standards are observed and, where required, reflected in the quarterly, interim and annual reports. The company secretary usually takes the lead overseeing role in the preparation of such reports (and in the case of the annual report, in particular the directors' report (which will include information on environmental and employee matters in the business review section for the company's financial year commencing on or after 3rd March, 2014, the effective date of the Co. Ord., and the subsequent financial years), the corporate governance report and,

as from 2015 if the listed company elects to make, the ESG report), and obtaining consensus on these from the Board and the Board committees;

- 12) Complying strictly with the company's constitution and codes of practice and the continuing obligations of the relevant laws, codes, rules and regulations, including:
 - (i) seeking shareholders' approval at general meetings in respect of major and very substantial transactions regarding the acquisition or disposal of assets or business and independent shareholders' approval for connected transactions, and
 - (ii) publication and distribution to the shareholders of the following documents within the periods specified by the Listing Rules and the Cos. Ord.:
 - a) annual reports which contain, amongst others, the audited financial statements;
 - b) interim and quarterly reports which contain, amongst others, unaudited condensed financial statements; and
 - c) circulars which contain, amongst others, particulars of the securities issues or corporate actions; and
 - (iii) disseminating announcements to the market timely and ensuring proper disclosure of inside information;
- 13) Managing relations with investors with regard to corporate governance issues and the Board's practices in relation to corporate governance;
- 14) Induction of new directors and CEs into the business, explaining their roles and responsibilities (including timely notification of their interests, short positions and dealings in securities) and facilitating their continuing professional development and maintaining the relevant record of directors' training;
- 15) Ensuring that the Board is fully aware of its responsibility to avoid engaging in any market misconduct practices, including not disseminating or allowing the release of inaccurate, deceptive or misleading information, or engaging in a course of conduct which could amount to market misconduct;
- 16) Ensuring compliance with all statutory document preparation, record maintenance and filing requirements and regulatory disclosure;
- 17) Arranging and managing AGMs and any other general meetings and putting forward, with the Board's agreement, the items to be considered at such meetings, including resolutions dealing with governance matters;
- 18) Providing an interface between the Board and senior management and acting as the key liaison between non-executive directors and senior management, thereby ensuring good information flow;
- 19) Ensuring that the directors' dissenting views or concerns about the running of the company or a proposed action which cannot be resolved, if any, are contained in the minutes of the relevant Board or Board committee meetings; and

- 20) Where possible, in the case of larger companies, separating the roles of the company secretary and the finance director/controller (and the like) and in the case of smaller companies with limited resources, recognising the potential for conflicts of interest and building “firewalls” between such roles by ensuring that the information received in one capacity is not used for any other purposes.

Qualifications

The company secretary of a company may be one of its directors pursuant to the Cos. Ord. (s.475(1)), and a company may appoint two or more persons to act as joint company secretaries (s.474(3)). However, the sole director of a private company cannot be appointed also as the company secretary of the company (s.475(2)). Further, a private company having only one director may not appoint as company secretary a body corporate whose sole director is the only director of that private company (s.475(3)). While the individual company secretary must ordinarily reside in Hong Kong (s.474(a)), a body corporate having its registered office or a place of business in Hong Kong (s.474(b)), e.g. a firm, that provides professional company secretarial services, can be appointed as secretary. Where a partnership firm is appointed, then all the partners of the firm act as joint company secretaries of the company (ss. 474(3) and 650). On the other hand, the company secretary of a listed company must be an individual (rule 3.28 of the Listing Rules and rule 5.14 of the GEM Rules).

As in the case of directors, the Cos. Ord. does not specify any qualifications needed for holding the office of company secretary. Nonetheless, the company secretary of a listed company must by virtue of his academic or professional qualifications or relevant experience, in the opinion of the Exchange, be capable of discharging the functions of a company secretary (rule 3.28 of the Listing Rules and rule 5.14 of the GEM Rules).

In fact, the following academic or professional qualifications will be acceptable by the Exchange:

- (a) a member of The Hong Kong Institute of Chartered Secretaries;
- (b) a solicitor or barrister (as defined in the LP Ord.); and
- (c) a certified public accountant (as defined in the PA Ord.)

As regards the relevant experience, the individual will be assessed by the Exchange on the following aspects:

- (a) his length of employment with, and the role he plays/played in, the listed company and other listed companies;
- (b) his familiarity with the Listing Rules/GEM Rules and other relevant laws and regulations (including the S&F Ord., the Cos. Ord. and the Code on Takeovers and Mergers administered by

the SFC);

- (c) the relevant training he has taken/will take in addition to at least 15 hours of relevant professional training in each financial year of the listed company, commencing on or after 1 January 2012 subject to the specified dates on which the company secretary was so appointed and served in the same and other listed companies previously (rule. 3.29 of the Listing Rules and rule 5.15 of the GEM Rules)**; and
- (d) his professional qualifications in other jurisdictions.

*** In this regard, the writer is delighted to disclose that he was first appointed the company secretary of a Hang Seng Index Constituent stock company in February 1991 and has been serving the same and other reputable listed companies in the above capacity for most substantial times since then. Therefore, he is not required to take such training until 2017.*

Attached to this article for the readers' reference is the Appendix which contains a table showing the qualifications and experience of the company secretary prescribed by the Companies Ordinance/Act and the listing rules of Hong Kong, Singapore and Malaysia.

Dual Capacity

It is common for the company secretary to act in a dual capacity (e.g. secretary-cum-financial controller, legal counsel or human resource director). However, where a provision of the Cos. Ord. requires or authorises anything to be done by or to a director and the company secretary, the same person cannot act in a dual capacity as both director and company secretary (s. 479(1)). For example, if the company's Articles provide that a share certificate must be signed by a director and the company secretary jointly, any individual or body corporate appointed as both a director and the company secretary of the company cannot sign the certificate in both capacities.

If the office of the company secretary is vacant, the directors may authorise an assistant, a deputy or an officer to act, specifically or generally, as company secretary (s474). This also applies in the event of the company secretary's incapability.

Appointment and Vacation of Office

The appointment and removal of a company secretary must be made in accordance with the company's Articles. The model articles of the Cos. Ord. give the directors of a company the power to appoint the company secretary for a term, at a remuneration and on the conditions they think fit (art.33(1) of the Model Articles (private companies) and art.37(1) of the Model Articles (public

companies)). Also, Table A of the Predecessor Cos. Ord. contains the same provision (art. 112). The company secretary may vacate his office by resignation, death, expiration of the length of employment specified in the subject contract or as otherwise provided in the company's Articles. Though the Cos. Ord. does not expressly confer on the directors a power to remove a company secretary, the company secretary who is appointed by the directors may be removed by them (art.33(2) of the Model Articles (private companies) and art.37(2) of the Model Articles (public companies) and art. 112 of Table A of the Predecessor Cos. Ord.). In addition, the Articles of a company may contain a provision that the company secretary may be removed by the directors on justifiable grounds and a new company secretary may be appointed. Pursuant to the Cos. Ord., a company secretary may resign subject to the same restrictions as directors (s.477).

However, if there are no directors by reason of the company's failure to hold AGMs pursuant to ss. 576, 610 and 612 of the Cos. Ord., the alleged appointment of a company secretary is void and of no effect⁴.

As regards listed companies, the selection, appointment or dismissal of the company secretary should be approved by the Board which must deal with such matters at a physical meeting rather than by a written resolution (section F of the Code).

Exclusion from Liability

When acting on behalf of the company, the company secretary is the company's agent. Irrespective thereof, he owes the company the following, which are similar to those owed by the directors:

- 1) Statutory duties;
- 2) Contract duty of performance;
- 3) Common law duty of care and skill (though incorporated in the Cos. Ord. in effect since 3rd March, 2014); and
- 4) Equitable duty as a fiduciary, e.g. the duty to act in good faith for the benefit of the company as a whole.

Certainly, the company secretary (being an officer of the company) is bound to perform all the duties and responsibilities imposed on all officers of a company. He, as provided in the Cos. Ord., cannot by virtue of any provision, whether contained in the Articles or in any contract with the company or otherwise, be exempt from, or indemnified with respect to, any liability for negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, and any such provision is void (ss. 468(1) and (2)). However, a company may take out and maintain for any officer of the company insurance against any liability incurred by him (s 468(4)).

⁴ *Ong Kim Yim v Sheecon Trading Co. Ltd.* (1996).

Conclusion

The company secretary occupies an unusual position in the corporate structure. He sits on the Board but is not, unless being a director of course, a Board member. He works with senior management but may not be part of the line management structure. The breadth and importance of the company secretary have increased noticeably over the last decade and the company secretarial role will, certainly, continue to broaden in scope and evolve towards a greater responsibility for corporate governance. However, not until the recent years following the amendments to certain regulations, and in particular the Listing Rules, has the company secretary had to perform such a crucial role as an independent in-house “gatekeeper”. To me, it may be apt to add “chief governance officer” or “corporate governance advisor” to the company secretary’s job title. Whilst endeavouring to enable the company to abide by all relevant legal principles in form and in substance, the company secretary is tasked with assisting the company to satisfy the reasonable ethical expectations of its stakeholders in respect of transparency and accountability and ensuring that all plans and activities of the company meet good corporate governance standards. Above all, he needs to adopt an impartial mind and a neutral stance and must be bold and confident enough to speak out and not to compromise his professional integrity, being loyal to his employer when his professional obligations conflict with the decisions taken by the Board or senior management. It is important for the individual company secretary to bear in mind that he is an employee of the company and not the chairman or the Board as a whole and plays a pivotal role in preserving and enhancing the long-term interests of the company.

Glossary

In this article, unless the context requires otherwise, words importing one gender include any other genders and the following abbreviations and terms will have the following respective meanings:

“AGM”	annual general meeting;
“Articles”	articles of association, bye-laws or other equivalent constitutional documents of a company;
“Board”	board of directors;
“business day”	any day on which the Exchange is open for the business of dealing in securities;
“CE”	chief executive;
“CG Code”	Corporate Governance Code contained in both Appendix 14 to the Listing Rules and Appendix 15 to the GEM Rules;
“Cos. Ord.”	Companies Ordinance, Chapter 622 of the laws of Hong Kong;

“e.g.”	for example;
“Exchange”	The Stock Exchange of Hong Kong Limited;
“GEM Rules”	Rules Governing the Listing of Securities on the Growth Enterprise Market of the Exchange;
“HKCR”	Hong Kong Companies Registry;
“INEDs”	independent non-executive directors;
“Listing Rules”	Rules Governing the Listing of Securities on the Exchange;
“LP Ord.”	Legal Practitioners Ordinance, Chapter 159 of the laws of Hong Kong;
“PA Ord.”	Professional Accountants Ordinance, Chapter 50 of the laws of Hong Kong;
“Predecessor Cos. Ord.”	Companies Ordinance, Chapter 32 of the laws of Hong Kong in force before 3 rd March 2014;
“SFC”	Securities and Futures Commission of Hong Kong; and
“S&F Ord.”	Securities and Futures Ordinance, Chapter 571 of the laws of Hong Kong.

Appendix

Prescribed Qualifications and Experience for the Companies Secretaries of Listed Companies in Hong Kong, Singapore and Malaysia

Jurisdiction	Under the Companies Ordinance / Act			Under the Listing Rules		
	No	Yes	Section Number(s) and Particulars	No	Yes	Rule Number(s) and Particulars
Hong Kong	✓				✓	<p><i>Rule 3.28 of the Listing Rules / Rule 5.14 of the GEM Rules</i></p> <p>The issuer must appoint as its company secretary an individual who, by virtue of his academic or professional qualifications or relevant experience, is, in the opinion of the Exchange, capable of discharging the functions of company secretary.</p> <p>Notes</p> <ol style="list-style-type: none"> The Exchange considers the following academic or professional qualifications to be acceptable: <ol style="list-style-type: none"> a member of The Hong Kong Institute of Chartered Secretaries; a solicitor or barrister as defined in the LP Ord.; and a certified public accountant as defined in the PA Ord. In assessing “relevant experience”, the Exchange will consider the individual’s: <ol style="list-style-type: none"> length of employment with the issuer and other issuers and the roles he played; familiarity with the Listing Rules / GEM Rules and other relevant laws and regulations including the S&F Ord., the Cos. Ord. and the Code on Takeovers and Mergers administered by the SFC; relevant training taken / to be taken in addition to the minimum requirement under rule. 3.29 of the Listing Rules / rule 5.15 of the GEM Rules; and professional qualifications in other jurisdictions. <p><i>Rule 3.29 of the Listing Rules and Rule 5.15 of the GEM Rules (“Training Rules”)</i></p> <p>In each financial year, an issuer’s company secretary must take no less than 15 hours of relevant professional training.</p> <p>Note:</p>

						<p>A person who was a company secretary of an issuer:</p> <ol style="list-style-type: none"> (1) on or after 1 January 2005 must comply with the Training Rule for the financial year commencing on or after 1 January 2012; (2) between 1 January 2000 to 31 December 2004 must comply with the Training Rule for the financial year commencing on or after 1 January 2013; (3) between 1 January 1995 to 31 December 1999 must comply with the Training Rule for the financial year commencing on or after 1 January 2015; and (4) on or before 31 December 1994 must comply with the Training Rule for the financial year commencing on or after 1 January 2017.
Singapore	✓	<p><i>Section 171 of the Companies Act - extracted with slight adaptation</i></p> <p>The company secretary shall be:</p> <ol style="list-style-type: none"> (1) a natural person who has his principal or only place of residence in Singapore; (2) a person who appears to the directors of the company to have the requisite knowledge and experience to discharge the functions of secretary of the company; and (3) a person who — <ol style="list-style-type: none"> (a) on 15th May, 1987 held the office of secretary in the listed company and continued to hold that office on 15th May, 2003; (b) for at least 3 years in the period of 5 years immediately preceding his appointment as secretary, held the office of secretary of a company; (c) is a qualified person under the Legal Profession Act (Cap. 161), a public accountant, a member of the Singapore Association of the Institute of Chartered Secretaries and Administrators, or a member of such other professional association as may be prescribed; or (d) is, by virtue of such academic or professional 	✓			

			<p>qualifications as may be prescribed, capable of discharging the functions of secretary of the company.</p>		
Malaysia	✓	<p><i>Section 139A of the Companies Act</i></p> <p>No person shall act as a secretary of a company unless-</p> <p>(a) he is a member of a professional body, or any other body, which has for the time being been prescribed by the Minister of Ministry of Domestic Trade and Consumer Affairs of Malaysia (the “Minister”) by notification published in the gazette; or</p> <p>(b) he is licensed by the Registrar of Companies Commission of Malaysia (“Commission) for that purpose.</p> <p>Provided that a person who is a secretary of the company before the coming into operation of s.139A and who is not a member of a professional or other body as prescribed by the Minister may continue to act as the secretary for that company for a period of not more 12 months after the coming into operation of the above section unless he has obtained a license pursuant to paragraph (b).</p> <p>For the purpose of (a) above, the prescribed bodies are the Malaysian Institute of Chartered Secretaries and Administrators, Malaysian Institute of Accountants, Malaysian Institute of Certified Public Accountants, the Bar Council of Malaysia, Sabah Law Association, Advocates Association of Sarawak and the Malaysian Association of Company Secretaries.</p> <p>For the purpose of (b) above, Licensed Secretary is those licensed by the Commission to be company secretary. The licensing process of company secretaries by the Commission includes evaluating that the</p>	✓		

		<p>applicant is fit and proper to act as company secretary. The applicant's background, work experience, academic qualifications and knowledge of company law will be assessed by the Commission. Such company secretaries must continuously undergo courses and training under the Continuing Professional Education requirement to enhance their standard of professionalism.</p>			
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