Chapter 8
The Company Secretary and His Role in Corporate Governance

Every company incorporated in Hong Kong must have a secretary (s 154 of the Cos. Ord.).

Historically, the 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 affairs,³ the secretary is now regarded as a member of senior management who has a duty to, amongst other tasks, advise the Board, through the chairman and/or the CE, on corporate governance matters.

The 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, rules and regulations. As part of the senior management team and at the centre of the Board’s decision-making process, the 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 his reasonable endeavours to seek to protect the interests of the company and its stakeholders (including shareholders, employees, suppliers, customers, independent auditors, regulators, government and the investing public).

General Roles and Routine Duties

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

As regards the company secretarial duties, the secretary will be present at 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 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,

² George Whitechurch Ltd. v Cavanagh (1902).
³ Panorama Developments (Guildford) Ltd. v Fidelis Furnishing Fabrics Ltd. (1971).
keep the statutory books and records of the company, including the registers of directors, secretaries, members 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 regarding directors, company secretaries, registered office and particulars of mortgages and charges for registration as well as monthly return on movements in securities) to the regulators such as the Hong Kong Companies Registry and the Exchange.

**Essential Corporate Governance Responsibilities**

Section F of the Code provides that the secretary of a listed company 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 secretary, the identity of a person with sufficient authority (e.g. chief legal counsel or chief financial officer) of the company whom the external provider can contact must be disclosed by it. Further, the 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 secretary and help the secretary earn the credibility and trust from the Board and management); and all directors should have access to the advice and services of the secretary to ensure that Board procedures as well as all applicable laws, rules and regulations are followed.

In addition, every listed company must appoint two authorised representatives who: (a) will act at all times 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 secretary (r 3.05 of the Listing Rules and r 5.24 of the GEM Rules). As such, the secretary is usually appointed as one of such representatives.

To actively promote good corporate governance, secretaries can, as suggested 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 has been substantially modified, elaborated and supplemented by me, 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 and corporate governance committees) by helping the Board chairman and by helping on 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 and regularly reviewed;
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;
5) Advising the Board on the need to comply with or explain any deviation from the code provisions of 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 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 sustainability issues as well as 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 on matters that may concern them, and taking a lead role in managing any difficult interpersonal 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, 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 Board decisions which particularly affect the company, drawing on his 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, 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. He usually takes the lead oversight 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 thereof after the coming into effect of the new Companies Ordinance on 3rd March, 2014), the corporate governance report and, as from March 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, rules and regulations, including publication and distribution of the following documents within the periods specified by the Listing Rules:
   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 transactions or corporate actions and 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 notification of their and their respective associates’ interests 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 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 secretary and the finance director (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 information received in one capacity is not used for other purposes.

Qualifications

The secretary of a company may be one of its directors pursuant to the Cos. Ord. (s154(1)), and there may be joint secretaries. However, the sole director of a private company cannot be appointed also as the secretary of the company. Further, a private company having only one director may not appoint as secretary a body corporate whose sole director is the only director of the private company. The secretary must be a Hong Kong resident or a body corporate having its registered office or place of business in Hong Kong (s 154(2)). On the other hand, the secretary of a listed company must be an individual (r 3.28 of the Listing Rules and r 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 secretary. Nonetheless, the secretary of a listed company must, by virtue of his academic or professional qualifications or relevant experience, be, in the opinion of the Exchange, capable of discharging the functions of a secretary (r 3.28 of the Listing Rules and r 5.14 of the GEM Rules).

Therefore, the secretary:

1) may be a member of The Hong Kong Institute of Chartered Secretaries, a lawyer (i.e. solicitor or barrister) or a certified public accountant;

2) may have served the listed company or other listed companies in a certain role before;

3) must be familiar with the Listing Rules and other relevant laws and regulations (including the S&F Ordinance, the Cos. Ord. and the Code on Takeovers and Mergers administered by the Securities and Futures Commission of Hong Kong); and

4) should have gone through the relevant training and have at least 15 hours of relevant professional training in each financial year of the listed company commencing on or after 1st January, 2012 if he commenced his role on or after 1st January, 2005 in the same and other listed companies. For secretaries who commenced their role at an earlier date (e.g. the writer was appointed secretary of a Hang Seng
Index Constituent stock company in 1991), later commencement dates apply (r 3.29 of the Listing Rules and r 5.15 of the GEM Rules).

**Dual Capacity**

It is common for the secretary to act in a dual capacity (e.g. secretary-cum-financial controller, legal counsel or human resource manager). However, where a provision of the Cos. Ord. requires or authorises anything to be done by (or to) a director and the secretary, the same person cannot act in a dual capacity as both director and secretary (s154B). For example, if the company’s Articles provide that a share certificate must be signed by a director and the secretary jointly, any individual or body corporate who/which has been appointed both a director and the secretary of the company cannot sign the certificate in both capacities.

If the office of the secretary is vacant, the directors may authorise an assistant, a deputy or an officer to act, specifically or generally, as secretary (s154(3)). This should apply in the event of the secretary’s incapacity.

**Appointment and Vacation of Office**

The appointment of a secretary must be made in accordance with the company’s Articles. Table A provides that the secretary will be appointed by the directors for such term, at such remuneration and upon such conditions as they think fit (art 112). The 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 secretary, the secretary who is appointed by the directors may be removed by them (art 112 of Table A). In addition, the Articles of a company may contain a provision that the secretary may be removed by the directors on justifiable grounds.

Pursuant to the Cos. Ord., a secretary may resign subject to the same restrictions as directors (s157D).

However, if there are no directors by reason of the company’s failure to hold AGMs pursuant to s 111 of the Cos. Ord., the alleged appointment of a secretary is void and of no effect.4

As regards listed companies, the selection, appointment or dismissal of the 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 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; 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.

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Certainly, the secretary (being an officer of the company) is bound to perform all the duties 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 (s 165). However, a company may purchase and maintain for any officer of the company insurance against any liability incurred by him (s 165(2)).

**Conclusion**

The 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 may work with senior management but is not part of the line management structure. The breadth and importance of the 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 been required 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 secretary’s job title. Whilst endeavouring to enable the company to abide by all relevant legal principles in form and in substance, the 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 must be bold enough to speak out and not compromise his professional integrity, being loyal to his employer when his professional obligations conflict with the decisions taken by the Board or management. It is important for the individual 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 looking after 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 document of a company;
- “associate” has the same meaning ascribed to it by the Listing Rules;
- “Board” board of directors;
- “CE” chief executive;
- “Code” Corporate Governance Code contained in both Appendix14 to the Listing Rules and Appendix 15 to the GEM Rules;
- “Cos. Ord.” Companies Ordinance, Chapter 32 of the laws of Hong Kong (Please see remarks below);
- “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;
- “Listing Rules” Rules Governing the Listing of Securities on the Exchange;
- “S&F Ord.” Securities and Futures Ordinance, Chapter 571 of the laws of Hong Kong; and
- “secretary” company secretary.
Remarks:

1) The Cos. Ord. will be renamed as “Companies (Winding Up and Miscellaneous Provisions) Ordinance as the core provisions affecting the operation of companies will be repealed and only the provisions relating to winding-up and insolvency of companies and prospectuses will be retained.

2) A new Companies Ordinance, Chapter 622 of the laws of Hong Kong will come into operation on 3rd March, 2014.

3) Therefore, the section numbers of the Cos. Ord. referred to in this article will have to be replaced by the relevant section numbers of the new Companies Ordinance, where applicable.

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