第二环节：企业融资及管治

讲题：　　企业管治 － 公司上市及内幕交易

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企业管治 — 公司上市及内幕交易
（讲者：杨家雄资深大律师）

欢迎来到这个论坛。今天会和各位谈谈内幕交易，它是什么，香港法律对相关行为的监管，以及预防的方法。

良好的企业管治与「内幕消息」的处理

如何处理股价敏感信息（下称「PSI」）是良好企业管治一个非常重要的环节。今年初，为进一步改善香港的上市平台，香港政府就法例迫使上市公司披露 PSI 的建议向公众展开谘询。今年 6 月 4 日，在香港董事学会午餐演讲会时，财经事务及库务局局长陈家强教授就今次展开公众谘询有以下解说：－

> *「市场和广大市民理解法定 PSI 披露制度的好处。这种制度将使调查违规更有效，及令有意义的制裁得以施加。再者，列明一个上市公司何时会被容许推迟或不予披露 PSI，即在法例中列出的安全港，也可以促进法律得以遵从。[法例]最终的目标是促进上市公司持续披露文化，提高市场透明度，改善市场质量，促进企业管治，从而吸引更多投资者。」*

是次公众谘询的结果我们拭目以待。但有一点我们现在就知道：不妥善处理 PSI 会导致许多严重的问题。这些问题之一正是我今天将集中讨论的—内幕交易。

问题所在

让我开宗明义讲清楚 — 内幕交易属股票市场失当行为的一种，是违反香港法律的（见香港法例第 571 章证券及期货条例（下称「SFO」）第 270 和 291 条）。如香港终审法院所言，内幕交易是一种非常严重和不诚实的失当行为。它扰乱香港股票市场的公平和运作。市场失当行为的其他类型为(1)虚假交易，(2)操控价格，(3)披露关于受禁交易的资料，(4)披露虚假或具误导性的资料以诱使进行交易及(5)操纵证券市场。

内幕交易在本质上关乎内幕人士在法律规定的某些特定情况下不当使用未经公布的 PSI。人们进行内幕交易的目的通常是获取利润（在价格因公布利好消息而上涨前买入）或避免损失（在价格因公布坏消息而下降前沽售）。诱惑确实存在。这一问题往往与上市公司的董事及大股东有着尤为紧密的关系。从定义来看（随后我将进一步解释），他们属于内幕人士。他们亦凭借职位优势最有机会掌握 PSI。其他雇员及专业人士亦可因其职位或所知的被视为内幕人士。以风险资本家为例，如其为上市公司的大股东，其

将被视为内幕人士；即使其并非上市公司的董事或股东，但如果其从该公司的相关人员（如董事）处获悉一则其知道属于 PSI 的消息，并因而买卖该公司的上市股票，其行为亦可构成内幕交易。我们有守法的责任。我们不愿因对法律不熟悉而违法。我们需了解法律。

「内幕消息」／「股价敏感消息」／「有关消息」

我们将首先探讨「*内幕消息*」的含义。但应指出，SFO 所使用的术语并非「*内幕消息*」，而是「*有关消息*」。定义见 SFO 第 245 或 285 条[1]。在非法律术语中，该词是关于某法团，其股东或高级人员，或其上市证券或该等证券的衍生工具的具体及未经公布的股价敏感信息。

让我举一些例子：公司财务业绩较佳（或不佳）、与其他知名公司开展可盈利的业务合作（甚或只是就这些合作的谈判）、以高溢价作私有化，以高溢价被收购等 — 这类消息若未经公布，均极有可能被视作「*有关消息*」。如有疑问，且为惯例，当有人被指控参与内幕交易，「控方」将聘请金融专家证明所涉及的消息确实为 SFO 定义的「*有关消息*」。

「内幕人士」／「与法团有关连的人」

接下来将讨论「*内幕人士*」的含义。与「*内幕消息*」的情况类同，SFO 所使用的术语并非「*内幕人士*」，而是「*与法团有关连的人*」，主要定义请参阅 SFO 第 247 或 287 条，其核心内容已在本文脚注中列出[2]。简要来说，就某法团而言，其董事、雇员及大

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[1] *""有关消息" (relevant information) 就某法团而言，指关于—*

(a) 该法团的；

(b) 该法团的股东或高级人员的；或

(c) 该法团的上市证券的或该等证券的衍生工具的，

而并非普遍为惯常(或相当可能会)进行该法团上市证券交易的人所知的具体消息或资料，但该等消息或资料如普遍为他们所知，则相当可能会对该等证券的价格造成重大影响；"

[2] *"任何个人如符合以下说明，即属与某法团有关连的人—*

(a) 他是该法团或其有连系法团的董事或雇员；

(b) 他是该法团或其有连系法团的大股东；

(c) 他身居某职位，而因以下理由可合理预期该职位给予他接触关于该法团的有关消息的途径—

(i) 在—

(A) 他本人、他的雇主、他担任董事的法团，或他属合伙人的商号；与

(B) 该法团、该法团的有连系法团，或该法团或有连系法团的任何高级人员或大股东，

之间存在专业或业务关系；或

(ii) 他是该法团或其有连系法团的大股东的董事、雇员或合伙人；

(d) 他有途径接触关于该法团的有关消息，而—

(i) 他有该途径是因他身居某职位，而凭借(a)、(b)或(c)段，该职位令他会被视为与另一法团有关连；及

(ii) 该有关消息关乎涉及上述两个法团的交易(实际进行的或意图进行的)，或涉及该两个法团的其中一个与其余一个

股东（持有5%或以上相关股本）即为「*有关连*」，或属通用语言中的「*内幕人士*」。该法团有连系法团的董事、雇员及大股东亦属于「*有关连*」或「*内幕人士*」。但必须注意「*有关连*」这一概念所涵盖的范围并不止步于此。除此以外，未与某法团有直接连系的人士可能由于其或其雇主与该法团的专业或业务关系而变成有关连的人。举例来说，一名负责处理某法团私有化项目并由此掌握该法团「*有关消息*」的第三方律师或财务顾问，即使并非该法团的雇员或董事，亦可能属于「*有关连*」。类似地，即使一名风险资本家自身并非某法团的大股东且未实际加入该法团的管理层，其亦可能因为其或其公司与该上市公司的专业或业务关系而成为「*有关连*」。

内幕交易

我们现在较能理解何时会发生内幕交易。与之有关的条款为SFO第270及291条。这两条规定十分冗长复杂，因此不便在此赘述。下面我将总结一下主要及典型的内幕交易行为（但必须声明其并不全面）：-

a. 任何与某上市法团「*有关连的人*」，掌握了他知道属关于该法团的「*有关消息*」的消息，并进行该法团(或该法团的有连系法团)的上市股份或其衍生工具的交易，则属内幕交易；
b. 尤应指出，一名正意图或曾意图提出收购某上市法团人如果为收购以外的目的交易该法团的上市证券，亦可能构成内幕交易；
c. 即使上述「*有关连的人*」或收购者并未亲自交易任何上述股份，如其在知道或有合理理由相信另一人会进行该等股份的交易的情况下，怂使或促致该另一人进行该等交易，亦可能构成内幕交易；
d. 该等「*有关连的人*」或收购者在知道或有合理理由相信另一人会利用「*有关消息*」进行交易的情况下，只需向该另一人披露该「*有关消息*」，亦可构成内幕交易；
e. 此外，如「*有关消息*」的接受者在掌握该等消息的情况下进行该法团的上市股份的交易，则其亦可能触犯内幕交易罪—即如该接受者(1)知道其所接收的消息为「*有关消息*」，(2)知道向其披露该消息的人士为「*有关连的人*」，且(3)知道或有合理理由相信其「内幕消息提供者」因与该法团有关连而掌握该消息。

下面我将举例解释上述内容：-

- A先生是某上市公司「B」的董事。他查看了年报草稿，并获悉B公司去年的财务业绩不佳。他知道这属于PSI，并在掌握这一消息的情况下，于该等财务业绩公开发布前一天沽售了其在B公司的股份来避免损失。他的行为构成内幕交易罪；

的上市证券或其衍生工具的交易(实际进行的或意图进行的)，或关乎已打消进行上述交易的意图；或

(e) 在与该法团有关的违例事件发生之前6个月内的任何时间，凭借(a)、(b)、(c)或(d)段他会被视为与该法团有关连的人。"

- A 先生的一位朋友 C 先生亦持有 B 公司的股份。A 先生（其认为）为尽到朋友的义务，在知道或有合理理由相信 C 先生将会采纳其意见的情况下建议 C 先生沽售该等股份。虽然 A 先生并未向 C 先生透露有关 B 公司财务业绩不佳的有关消息，A 先生的行为亦可构成内幕交易罪；
- 如果 A 先生确实向 C 先生披露该等信息，将出现什么结果？在这一情况下，如果 A 先生知道或有合理理由相信 C 先生将因此出售 B 公司股份，则 A 先生披露有关消息的行为可构成内幕交易罪；
- C 先生如在下述的情况下沽售 B 公司股份，则其亦可能触犯法律，即(1)知道 B 公司财务业绩不佳这一消息属于未经公布的 PSI，(2)知道 A 先生为 B 公司董事，及(3)知道或有合理理由相信 A 先生是因担任 B 公司的董事而掌握 B 公司财务业绩不佳这一消息。

参与内幕交易的后果

在香港，内幕交易可被判为刑事罪行[3]或被有关部门循民事追究[4]（但有关部门不可民刑双重追究[5]）。两者后果不同:-

a. 如被刑事法庭循公诉程序定罪，内幕人士将面临最高 10 年的监禁及 10,000,000 港元的罚款[6]。
b. 如被有关部门从民事追究，并被市场失当行为审裁处识辨出须负法律责任，则内幕人士或会面临多项不同的命令[7]。举例而言，审裁处可命令其在不超过 5 年的期间内，不得担任上市法团的董事或加入上市法团的管理层，并进一步命令其在不超过 5 年的期间内不得直接或间接取得、处置或以其他方式处理任何证券。其亦可能被命令向香港政府缴付一笔款项，金额不超逾该人因其内幕交易而获取的利润或避免的损失的金额。

另外，任何因其内幕交易而蒙受金钱损失的人士亦可向他循民事追讨，要求赔偿[8]。

[3] SFO 第 XIV 部
[4] SFO 第 XIII 部
[5] SFO 第 283 及 307 条
[6] SFO 第303条
[7] SFO 第257条
[8] SFO 第281及305条

防止内幕交易的职责

毋庸置疑，上市法团的管理层有责任防止发生内幕交易。以下条文能够说明这一点：

- SFO 第 279 条列明「*任何法团的每一名高级人员，均须不时采取一切合理措施，以确保有妥善的预防措施，防止该法团以导致它作出构成市场失当行为的行为的方式行事。*」
- 香港交易所制定的《香港联合交易所有限公司证券上市规则》（通常称为《上市规则》）附录十[9]列载董事于买卖其所属上市发行人的证券时用以衡量其本身操守的所需标准。附录十第 13 段进一步载明上市公司的董事须以董事会及个人身份，尽量确保其公司的任何雇员、或附属公司的任何董事或雇员，不会利用他们因在该公司或该附属公司的职务或工作而可能拥有与任何上市发行人证券有关的未经公布的股价敏感资料，在该守则禁止董事买卖证券之期间买卖该等证券。

上市公司可通过施行有效的行为守则、指引及政策将内幕交易风险降至最低。就此作出以下建议：-

- 对所有董事及雇员进行教育及入职培训，以令其更为了解规管内幕交易的法律及规则；
- 发布道德及行为准则，针对如何处理 PSI 及规管有潜在问题的证券交易；
- 特别须制定清晰的指南及惯例以预防及调查 PSI 泄露。以收购的协商为例：
  - PSI 仅可在须知的基础上被共享；
  - 项目及所有参与方均须以代号指称；
  - 所有文件及通信均需储存在指定的电脑服务器或硬盘中并须加密保护；
  - 需对服务器及硬盘的各次访问进行记录；
  - 任何时候均不得公开讨论潜在 PSI（例如在与其他无关连雇员共用的公司餐饮室或打印室内），仅可私下及在受控制的环境中讨论；
- 制定明确的强制执行政策，确保道德及行为准则得到遵守。

由于时间所限，我无法在此进行更详细的解说。但今天我要为香港做点小小的宣传，那就是香港有许多经验丰富的专业人士（例如律师及特许公司秘书），他们将会十分乐意为诸位及诸位的公司提供有关企业管治各方面的帮助。

结语

感谢各位。希望以上内容对各位有所帮助。

[9] 即「上市发行人董事进行证券交易的标准守则」

Session Two: Corporate Finance and Governance
Topic: Corporate Governance – Listing of Companies and Insider Dealings
Speaker: Mr Keith Yeung, SC Vice-Chairman, Hong Kong Bar Association

Corporate Governance - Listing of Companies and Insider Dealings (By Keith Yeung SC)

Welcome to this Forum. I am going to talk to you about insider dealing, what it means and how it is regulated under the laws of Hong Kong, and how it can be prevented.

Good corporate governance and the handling of "inside information"

How price sensitive information ("PSI") should be handled is a very important aspect of good corporate governance. Earlier this year, the Hong Kong Government, in an effort to further improve the listing platform in Hong Kong, launched a public consultation on the proposal to statutorily oblige listed corporations to disclose PSI. During an address to the Hong Kong Institute of Directors on 4th June 2010, the Secretary for Financial Services and the Treasury, Prof. K.C. Chan, had this to say on the consultation:-

> *"The market and the general public appreciate the benefits of having a statutory regime on PSI disclosure. Such a regime would enable effective investigation and imposition of meaningful sanctions. In addition, spelling out when a listed corporation would be permitted to delay or withhold disclosure of PSI, that is, setting out the safe harbours in the statute, would also facilitate compliance. The ultimate objective is to promote a continuous disclosure culture among listed corporations, which would enhance market transparency, improve market quality, promote corporate governance and in turn attract investors to come to our market."*

What the results of that consultation are we have to wait and see. But there is one thing which we now know: failure to properly handle PSI can cause many serious problems. One of such problems is the one I will focus upon today - insider dealing.

The problem

I make this clear at the outset - insider dealing is a type of stock market misconduct and is against the law in Hong Kong (see ss.270 and 291 of the Securities and Futures Ordinance, Cap. 571, Laws of Hong Kong ("SFO")). It has been described by the Court of Final Appeal in Hong Kong as being a very serious and dishonest misconduct. It upsets the fairness and operation of our stock market. Other types of market misconduct are (1) false trading, (2) price rigging, (3) disclosure of information about prohibited transactions, (4) disclosure of false or misleading information inducing transactions and (5) stock market manipulation.

In essence insider dealing concerns the mis-use by insiders of non-public PSI in certain specific circumstances as prescribed by the law. People normally do that for gain (buy early before prices rise after good news becomes public) or to avoid loss (sell early before prices dip after announcement of bad news). The temptation is there. It is a problem which concerns in particular directors and substantial shareholders of listed corporations. They are by definition (and I will explain this further later) insiders. They are also by virtue of their positions most likely to be privy to PSI. Other employees and professionals, depending upon their positions and what they know, can also be regarded as insiders. For example a venture capitalist - if he is a substantial shareholder of a listed company, he will be regarded as an insider; even though he is neither a director nor shareholder of a listed company, but if he has been told of a piece of PSI by for example a director of that company which the venture capitalist knows is PSI, he may equally be regarded as engaging in insider trading if he subsequently deals in the company's listed shares. We ought not break the law. Nor do we want to unknowingly break the law. We need to know what the law is.

Inside information / Price sensitive information / Relevant information

The starting point of our discussion must be the meaning of "*inside information*". The term which the SFO uses is however not "*inside information*", but "*relevant information*". Its definition is at ss.245 or 285 of the SFO[10]. In non-legal

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[10] " *"relevant information" (有關消息), in relation to a corporation, means specific information about-*

(a) the corporation;

(b) a shareholder or officer of the corporation; or

(c) the listed securities of the corporation or their derivatives,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the

terms, it means specific, non-public and price sensitive information about the corporation concerned, its shareholder or officer, or its listed securities or their derivatives.

I can give you some examples: good (or bad) financial results of a company, profitable business co-operation with another well-know company (or even negotiation therefor), privatization at high premium, being the subject of a take-over bid at high premium, etc - these types of information, if not yet been made public, are most likely to be regarded as "*relevant information*". In case of doubt, and as a matter of practice when a person is accused of having engaged in insider dealing, the "prosecution" will call a financial expert to prove that the information concerned is in fact "*relevant information*" as defined by the SFO.

Insiders / Persons connected with a corporation

The next question is the meaning of an "*insider*". Again, the term used by the SFO is not "*insider*", but "*person connected with a corporation*". Its main definition is at ss. 247 or 287 of the SFO, the core part of which is reproduced in the footnote below[11]. In gist, in respect of a corporation, a director, employee, and substantial

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listed securities."

[11] "*a person shall be regarded as connected with a corporation if, being an individual-*

(a) he is a director or employee of the corporation or a related corporation of the corporation;

(b) he is a substantial shareholder of the corporation or a related corporation of the corporation;

(c) he occupies a position which may reasonably be expected to give him access to relevant information in relation to the corporation by reason of-

(i) a professional or business relationship existing between-

(A) himself, or his employer, or a corporation of which he is a director, or a firm of which he is a partner; and

(B) the corporation, a related corporation of the corporation, or an officer or substantial shareholder of either corporation; or

(ii) his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation of the corporation;

(d) he has access to relevant information in relation to the corporation and-

(i) he has such access by reason of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraph (a), (b) or (c); and

(ii) the relevant information relates to a transaction (actual or contemplated) involving both those corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that the transaction is no longer contemplated; or

(e) he was, at any time within the 6 months preceding any insider dealing in relation to the corporation, a person who would be regarded as connected with the corporation by virtue of paragraph (a), (b), (c) or (d)."

shareholder (holding 5% or more of the relevant share capital) of the corporation will be regarded as "*connected*", or "*insiders*" in common language. The directors, employees, and substantial shareholders of a related corporation of the corporation will also be so regarded. But it is very important to note that the concept of "*connected*" is much wider than that. A person who otherwise has no connection with a corporation may be regarded as connected by virtue of the professional or business relationship he or his own employer has with the corporation. I give you an example: a third party lawyer or financial consultant who handles the privatization project of a corporation and as a result becomes privy to "*relevant information*" about it can be regarded as "*connected*", even though he is neither an employee nor a director of the corporation concerned. Similarly, a venture capitalist may by virtue of his or his company's professional or business relationship with a listed company become "*connected*", even though he is himself not a substantial shareholder, and has taken no actual part in the management of the corporation.

Insider dealings

We are now in a better position to understand when insider dealings take place. The relevant sections are ss.270 and 291 of the SFO. Those two sections are far too long and complicated to be reproduced here. I can summarize to you the main and typical acts of insider dealing (but I emphasize that they are not all):-

a. A "*connected person*" having "*relevant information*" which he knows is "*relevant information*" in relation to the listed corporation with which he is connected commits insider dealing if he deals in the listed securities of that corporation or its derivatives (or the listed securities of a related corporation of the corporation or their derivatives);
b. Specifically, a person who is contemplating or has contemplated making a take-over offer for a listed corporation may commit insider dealing if he, otherwise than for the purpose of the take-over, deals in the listed securities of the corporation;
c. Even though such a "*connected person*" or take-over bidder does not deal in any such shares himself, he may equally commit insider dealing if he counsels or procures another person to do so, knowing or having reasonable cause to believe that the other person will deal in them;
d. Such a "*connected person*" or take-over bidder may also commit insider dealing by simply disclosing the "*relevant information*" to another in the knowledge or reasonable belief that the other will use the information to deal;

e. Further, a recipient of "*relevant information*" may also be guilty of insider dealing if he deals in the listed shares of the corporation with knowledge of such information. That can be so if that recipient deals with such shares (1) knowing that the information he has received is "*relevant information*", (2) knowing that the person from whom he received the information is a "*connected person*", and (3) knowing or believing based on reasonable cause that his "tipper" held the information as a result of being connected with the corporation.

Let me give you some examples to illustrate the points:-

- Mr. A is a director of listed company "B". He looks at the draft annual statement and becomes aware that the financial results of Company B last year were bad. He knows that that is a piece of PSI. With that knowledge he sells his shares in Company B to avoid loss the day before the public announcement of those financial results. He has by doing so engaged in insider dealing;
- Mr. A has a friend Mr. C who also holds shares in Company B. As a favour (he thinks) to his friend, Mr. A counsels Mr. C to sell, knowing or believing that Mr. C will follow his advice. This can also be insider dealing by Mr. A, even though he has not revealed to Mr. C the relevant information about the poor financial results of Company B;
- What if Mr. A has in fact disclosed that information to Mr. C? In such a case, the mere act of such disclosure can be insider dealing by Mr. A if he knows or has reasonable cause to believe that Mr. C will as a result sell;
- Mr. C himself may also get into trouble if he sells (1) knowing that the poor financial results of Company B is a piece of non-public PSI, (2) knowing that Mr. A is a director of Company B, and (3) knowing or believing based on reasonable cause that Mr. A knew about the poor financial results of Company B as a result of him being one of its directors.

<u>Consequences of having been found to have engaged in insider dealing</u>

In Hong Kong, insider dealing can either be prosecuted as a criminal offence[12] or pursued by the authorities as a civil wrong[13] (but not both[14]). The consequences are different:-

[12] Part XIV of the SFO
[13] Part XIII of the SFO
[14] sections 283 and 307 of the SFO

a. If convicted by the criminal court on indictment, the insider dealer can face maximum imprisonment for 10 years and a fine up to HK$10,000,000[15];
b. If pursued via the civil route, and if found liable by the Market Misconduct Tribunal, the insider dealer can face a number of different orders[16]. For examples, the Tribunal may order that, for a period up to 5 years, he cannot be a director or take part in the management of a listed corporation. He may further be prohibited for up to the same period from directly or indirectly acquiring, disposing of or otherwise dealing in any securities. He may also be ordered to pay to the Hong Kong Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of his insider dealing.

Separately, an insider dealer may also be sued and held liable to pay compensation to any persons who have suffered pecuniary loss as a result of his insider dealing[17].

Duties to prevent insider dealing

The duties of the management of a listed corporation to prevent insider dealing are clear. I refer you for example to the following provisions:-

- section 279 of the SFO, which says that "*Every officer of a corporation shall take all reasonable measures from time to time to ensure that proper safeguards exist to prevent the corporation from acting in a way which would result in the corporation perpetrating any conduct which constitutes market misconduct.*"
- Appendix 10[18] of The Rules Governing the Listing of Securities on the Hong Kong Stock Exchange (commonly called the Listing Rules) laid down by the Hong Kong Exchange sets a required standard against which directors must measure their conduct regarding transactions in securities of their listed issuers. Paragraph 13 of that Appendix further says that the directors of a listed company must as a board and individually endeavour to ensure that any employee of the company or director or employee of a subsidiary company who, because of his office or employment in the company or a subsidiary, is likely to be in possession of unpublished price-sensitive information does not deal in

[15] section 303 of the SFO
[16] section 257 of the SFO
[17] sections 281 and 305 of the SFO
[18] namely "the Model Code for Securities Transactions by Directors of Listed Issuers"

those securities at a time when he would be prohibited from dealing by the Code if he were a director.

The risk of insider dealing can be minimized by a listed company putting in place effective codes of conduct, guidance and policies. Some suggestions are:-

- education and induction programmes to all directors and employees so as to give them better understanding of the law and regulations governing insider dealing;
- promulgating a code of conduct and ethics addressing how PSI should be handled and potentially problematic securities transactions be regulated;
- specifically there should be clear guidelines and practices to prevent and trace leakage of PSI. For example, and using the negotiation of a take-over bid as an illustration:-
    - PSI should only be shared on a need-to-know basis;
    - the project and all parties involved be given code names;
    - all documents and correspondence be stored in a designated computer server or hard drive and password protected;
    - all access to the server and hard drive be logged;
    - potential PSI should never be discussed openly (for example inside a company pantry or printing room shared by other unrelated employees) but only in private and controlled environment;
- a clear enforcement policy to ensure compliance of the code of conduct and ethics.

Due to the shortage of time I cannot go into much further details. But may I do a bit of advertisement for Hong Kong, that there will be in Hong Kong a lot of experienced professions like lawyers and chartered company secretaries who will be very happy to assist you and your companies on this and other aspects of corporate governance.

Conclusion

Thank you very much for your attention. I hope you will find the above useful.