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CONTACT US

43/F., The Lee Gardens,
33 Hysan Avenue,
Causeway Bay,
Hong Kong.
T. (852) 3909 8900
F. (852) 3583 8581
W. www.shinewing.hk

Email Us:
sasmarketing@shinewing.hk

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e-Discovery - the new Practice Direction

The new Practice Direction for discovery of electronic documents will come into effect on 1 September 2014, which set out pre-requisites, processes and tools available for e-Discovery. This article explores the guidelines set out in the new Practice Direction and ways to manage the requirements of the pilot scheme when discovering electronically stored documents.

Directors' liability risks in corporate financial distress and the proposed insolvent trading provisions

The Hong Kong Government announced recently that draft bill for corporate rescue, and also the relevant insolvent trading provisions, will likely be tabled to the LegCo in 2014/2015. This article discusses the recent development of this far-reaching new bill and addresses on the potential liability risks that would alert directors trading whilst insolvent.

China & Hong Kong M&As Review and Outlook - First half 2014

M&As started strong in first half 2014 worldwide and in Asia. China and Hong Kong sustained the momentum of 2013 and hit a 7-year high in first half 2014. It is expected that deal activity will remain flourish in the second half of the year.

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e-Discovery - the new Practice Direction

By Matthew Chu, Senior Manager and Kenneth Lam, Assistant Manager

Introduction

With the advance in technology and rapid growth in ecommerce over the past 20 years, companies have digitalised most of its business transactions / processes if not all from traditional means like typewriters, faxes and letters to word processing, spreadsheets and emails. While these changes have brought benefits to the business environment, they also created masses of electronic documents which are stored for years and many of them don't ever get printed.

To handle these massive electronic documents that may be relevant to legal actions, a new Practice Direction Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List ("Pilot Scheme") was launched by the Hong Kong Judiciary, and will become effective on 1 September 2014. This article will share our experience in handling electronically stored documents and discuss how the new Pilot Scheme can help companies retrieve and gather both hard copy documents and electronically stored documents to facilitate the discovery process.

Objective of the Pilot Scheme

The objective of the Pilot Scheme is to assist parties in legal actions

to reach an agreement on how to discover electronically stored documents in a cost effective manner by introducing a framework together with prerequisites before an e-Discovery application is applied.

Prerequisites of the Pilot Scheme

The Pilot Scheme is applicable to commercial litigations when a claim or counterclaim exceeds HK\$8 million and that there are at least 10,000 documents to be searched for the purpose of discovery, or if both parties agree to, or if the court directs to. It is important to note that once litigation is contemplated, all discoverable documents relevant to the case, including electronic documents which might otherwise be deleted in ordinary course of business, need to be preserved.

Understanding from the beginning

It is always important to set an objective prior to starting any discovery process. Below are a few important steps to consider when performing e-Discovery:

- Identify the custodians and/or creators of electronic documents, period (or date range) relevant to the case and also location where the documents are electronically stored;
- Identify what types of electronically stored documents being used during the relevant period of the case;
- Interview the custodians and/or creators of electronic documents and find out their involvement e.g. their role and responsibilities;
- Understand and identify the IT infrastructure that may potentially create problems to search and access relevant electronically stored documents e.g. privileged, private, confidential documents, location of where they are stored;
- Understand and obtain copies of policies and procedures of the IT infrastructure such as backup policies, data retention policies, security policies etc.



Once there is a reasonable understanding of what information is relevant to and required in the case, the next step is to preserve the electronically stored documents for review and discovery.

Finding relevant electronically stored documents

Based on the new Pilot Scheme, parties to the legal action or their legal representatives have to attend a Case Management Conference (“CMC”) to discuss and agree on the scope, tools and techniques to be used to identify and locate relevant documents, basis of costs and other issues in relation to the e-Discovery. Other technical details include steps for preservation of evidence, data exchange format and unique filters to be used to help filter non-relevant documents are also discussed during the CMC.

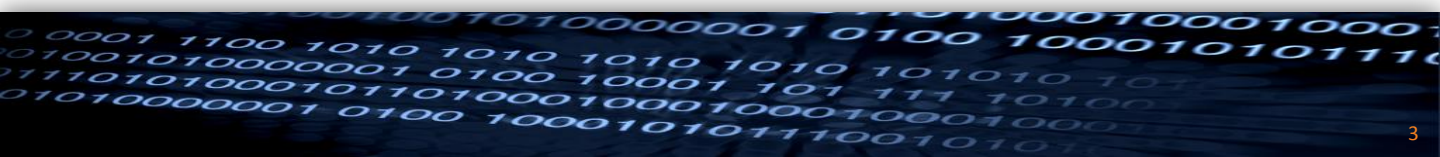
The CMC conference is conducted based on the Electronic Documents Discovery Questionnaire (“EDDQ”) that outlines the relevant period, custodians and creators, nature of potential relevant electronic documents which will include the mode of communication such as emails and/or instant messaging, estimated number of documents, size of data, backup and retention

policies and other information that may influence the e-Discovery plan.

The scope of review discussed during the CMC can cover hundreds of thousands of electronic documents and the Pilot Scheme recognises the fact that a full review of each and every electronic document can be unnecessary, and may not be appropriate, in many cases. To help minimise the overall cost for e-Discovery, the Pilot Scheme encourages the use of filters and various techniques to find relevant documents to the case. Suggested techniques include:

- **Keywords/Keyphrases:** Keywords are words that are relevant to the subject matter, while keyphrases are series of keywords in specific order which are required to appear consecutively as typed. With the use of relevant keywords and/or keyphrases, it is possible to identify electronically stored documents that are relevant to the action. This process can be extended to scanned documents after undergoing a process called optical character recognition (OCR) which enables the scanned document to be searchable by keywords and/or keyphrases similar to native documents.

- **Date and time:** A number of timestamps exist on almost every electronic file, which includes the file creation date, last modify date, last accessed date, as well as the date and time an email is sent or received. When the relevant period (or date range) of the subject matter can be identified, any documents that are not within the relevant period can be filtered out and excluded from the review process.
- **De-duplication:** It is common that multiple copies of a single document exist in a business environment as it is shared and/or forwarded from creators to co-creators and amongst co-workers. Multiple copies also exist in backups / archives, and/or when the document is distributed over email or by other means (e.g. messaging applications like Skype). The use of de-duplication technique is to filter out duplicated copies of a single document and it is no need to read the same document twice, or over and over again. With advances in technology, it is also possible to identify similar files with slight differences e.g. mark-ups done by various co-creators, known as “near-duplicates”.



- Metadata:** Electronic documents contain metadata, which is “data about data”. The details could include the author / creator of a document, total time spent creating the document and when the document was printed, etc. The use of metadata to perform searches is particularly useful when parties know something about the document, such as the creator and co-creators, project names/codes and specific details of the confidential information.

facilitate the production and disclosure of these documents at a later stage of the proceedings.

Production of electronically stored documents

The Pilot Scheme requires electronic documents to be produced in their native format or in a searchable PDF format, which must contain any pertinent information such as “track changes”, “comments and mark-up” and the metadata relevant to the case. The requirements set out a standard/benchmark for the format of electronic documents to be presented which allows for the relevant documents to be produced in a way similar to that of traditional document discovery such as bates numbering and optional redaction of contents. Searchable PDF can also be easily accessible with generic software packages yet produce consistent layout across different platforms and eliminate the need to

install, and possibly difficult to obtain, proprietary software that may require additional license and costs.

Conclusion

The Pilot Scheme sets a standard framework and clarifies the requirements, scope, timing, costs and the technological aspects for discovery of electronic documents. It also provides guidelines similar to those computer forensic practices in the US, UK and Singapore; and facilitates parties in legal action the process of applying e-Discovery, in addition to other traditional discovery process, to obtain a better/overall discovery when involved in commercial litigation.

To illustrate, during an investigation into a shareholder dispute, it was revealed that around 300,000 electronic documents were discovered from relevant sources e.g. computers previously used by shareholders and employees, accounting system and file server. With the use of a combination of the abovementioned filters, it was possible to reduce the relevant unique electronic documents to some 500 to 600. To help reviewing these identified 500 to 600 electronic documents, a review platform with functions to tag the relevant documents can

matthew.chu@shinewing.hk
 kenneth.lam@shinewing.hk
 Forensic & Investigation Services



Directors' liability risks in corporate financial distress and the proposed insolvent trading provisions

By Terry Kan, Partner of Specialist Advisory Services

Introduction

Corporate rescue bills¹, the long awaited new statutory procedures, are intended to rescue corporations with viable business but faced with short-term financial problems. The Hong Kong Government announced recently that draft bills will likely be tabled to the LegCo in 2014/2015. Coupled with the corporate rescue bills are the new insolvent trading provisions, aiming to encourage directors to act on insolvency situations earlier, failing which directors may be personally liable on company losses in the event of liquidation. This article discusses the recent development of the far-reaching new bills and addresses on the potential liability risks that would alert directors trading whilst insolvent.

Circumstances may give risk to personal liability

With reference to the Consultation paper on Corporate Rescue Procedure ("CRP")² which consultation was resumed in October 2009 and concluded in early 2010, any responsible person

who "knew or ought reasonably to have known that the company was insolvent" or "knew or ought reasonably to have known that there was no reasonable prospect that the company could avoid becoming insolvent" but "failed to prevent the insolvent trading", would run the risks of being sued by liquidator of a failed company. Responsible person would include director and shadow director. Section 2 of the New Companies Ordinance (Cap.622) defines director as any person occupying the position of director by whatever name they are called. Shadow director is a person in accordance with whose directions or instructions of the director, or a majority of the directors, of the body corporate are accustomed to act.

Latest framework for insolvent trading provisions

In second quarter of 2014, the Hong Kong Government has rolled out the framework for insolvent trading provisions and invited feedback and comments among insolvency practitioners, legal profession, banking institutions, professional

bodies and stakeholders of different commercial associations, in particular directors both in listed company or private sector. Key focuses of the framework are:

- New bills apply only when company goes into insolvent liquidation
- Liquidator would only bring civil claims to declare director to be personally liable to compensate the company which suffered losses
- Test of insolvency would likely be a hybrid of cash flow and balance sheet tests
- The codified statutory duty of care, skill and diligence of director shall be examined (Section 465 of Cap.622)
- No retrospective effect before the new law on insolvency trading is enacted



¹Two bills were introduced to the LegCo in 2000 and 2001, based on the recommendations of the Law Reform Commission in 1996.

²Consultation paper on Review of Corporate Rescue Procedure Legislative Proposals – October 2009

The proposed framework follows the results of the CRP consultation that if the option adopted by directors provides a safe and sound solution to bring the debt-ridden company back on track, no insolvent trading provisions would be invoked and thereby directors are encouraging to act on earlier rather than later. However, it remains to be seen if concerns of directors in the commercial world that the new bills may discourage them from taking risks to endeavour restructuring options could be addressed and to what extent directors are comfortable with the safeguards, for example, directors can be relieved of personal liability for claims of negligence or breach of duties if they acted honestly and reasonably (Sections 902-904 of Cap.622).

Practical issues faced by directors in financial difficulties

Practically speaking, for a director who is faced with the burden of saving a financially troubled company from falling down the cliff, actions that could be taken may include cost-cutting measures, acceleration of cash collections, withholding capital expenditures, delay of payments to suppliers or lenders, seeking financial support

from shareholders or new investors, or even drastic assets disposal.

Only with the benefit of hindsight, director though acting honestly and with reasonable care to endeavour different restructuring options, may face with problems to anticipate the outcome with certainty. To what extent that the director should attempt to rescue the falling corporate and when to act would be regarded as “early enough” to adopt the CRP or seek advice from corporate rescue experts, would be subjective. Likewise, in what circumstances that directors should know or ought reasonably to have known that the company was insolvent or becoming insolvent demand the judgment call on management skills and experience of director which might not be a common skill set through textbook or classroom learning.

Tests of insolvency seem to be straight-forward but in fact they attract heated debate at court. From a recent court case of Hong Kong , the liquidators of a failed listed company have mounted various claims of over HK\$1 billion against a non-executive director for the breach of director’s duties in stopping / taking action to avoid the company continued trading and made repayments to lenders whilst

insolvent. The defendant argued that the company has suffered no loss because of making early payments to two lenders for the purpose of

discharging genuine corporate debts and this argument was initially accepted by the Court of First Instance, and hence the claim was struck out. Appeal of the court decisions went all the way to the Court of Final Appeal which eventually overturned the decisions of lower courts, in which it held that the issue of whether or not director owes a duty not to prejudicial to the interest of creditors in insolvency and to preserve assets where possible for the equitable distributions among all creditors should be well argued and determined at trial. Whether or not the liquidator would pursue further on a new law suit would remain to be seen.

Conclusion

Risks of insolvent trading seem not to be on top of risk management issues in the current economic environment. From the issues we discussed, there are certainly more complicated matters directors might face with in the sudden and unprepared economic downturn. Apart from keeping alert of the development of the new insolvent trading provisions in the coming years, directors should stay alert to core business performance and act on earlier in seeking professional advice in the unfortunate event of non-performing business.



China & Hong Kong M&As Review and Outlook – First half 2014

By Yan Chiu, Vice President

Overview

M&As started strong in the first half of 2014 worldwide and in Asia. China and Hong Kong sustained the momentum of 2013 and hit a 7-year high in first half of 2014. It is expected that deal activity will continue to flourish in the second half of the year.

According to Mergermarket, the value of global M&As valued at US\$1.57 trillion in the first half of 2014, up 56% compared to a year ago and reached the highest half year value since 2007 (US\$2.09 trillion). It was mainly driven by the United States, where US\$694.6 billion was announced and recorded 98% increase year-on-year.

Asia is getting more important in global M&A market. M&As in Asia (excluding Japan) were very active and have surged to US\$286.7 billion in first half of 2014, representing 18% of the global M&A activities, and increased by 57% from US\$182.9 billion in first half of 2013. The strong performance in Asia for first half of 2014 was the highest 6-month total on Mergermarket record since 2001.

Meanwhile, M&As in China and Hong Kong recorded a 7-year high of US\$154.1 billion in first half of 2014, up 85% year-on-year. China and Hong Kong, which accounted for 54% of the total value in the Asia (excluding Japan), was the most targeted region for M&A

activities in first half of 2014. Market expects this trend will continue in second half of 2014 encouraged by various factors including relaxation of government regulation, continued development in consumption market in China, etc.

Inbound transactions rose 62% to US\$18.2 billion year-on-year. Temasek's acquisition of 24.95% stake in A.S. Watson & Co. for US\$5.7 billion, which is one of the key inbound transactions in first half of 2014, accounted for 31% of total inbound transactions. Outbound deals dropped 8% in value to US\$36.8 billion but rose 12% in volume year-on-year, which indicates outbound activities remained strong but with smaller capital investments. During first half of 2014, there were 5 mega deals (US\$5 billion-plus deals) totaled at US\$63.7 billion in China and Hong Kong. It was over 6 times the US\$9.8 billion for mega deals during the full year 2013. Citic Pacific's acquisition of Citic Limited from its parent Citic Group for US\$36.5 billion accounted for over half of the total value.

There were encouraging signs for M&As in second half of 2014 year-to-date. In July and August, there were announcements about Cheung Kong's US\$2.2 billion acquisition of Australian gas distributor Envestra, and Wanda's planned acquisition of one to two large international entertainment companies and investment in 2 five-star hotel projects in major international cities.



It is hopeful that 2014 will be a productive year for M&As.

Industry

(A) Technology, Media and Telecommunications (TMT)

The TMT market in China and Hong Kong was the hottest sector in first half of 2014, with a deal value of US\$23.8 billion and accounted for 15.4% of M&A total. China is the second most targeted nation behind the United States for technology targeted M&As.

E-commerce companies Tencent and Alibaba were among the most active acquirers in the sector. The largest deal relates to Tencent's acquisition of 20% stake in China's No. 2 online retailer JD.com for US\$3.4 billion. The partnership aimed at further strengthening their e-commerce business and platform against its major competitor Alibaba.

Besides, it is worth to note that Lenovo Group contributed to 2 significant cross-border deals during the period. It splurged over US\$5 billion on deals with Google Inc's for Motorola Mobility and International Business Machines (IBM) Corp for its low-end server business.

It is expected that the technology sector will remain robust in the coming future, especially when well-capitalized internet companies, like Tencent, Alibaba and Baidu, are vying for China's ever-growing web users to monetize their businesses and pursuing expansions through acquisitions.

(B) Real Estate

The real estate sector is the second largest sector for M&As in China and Hong Kong. China and Hong Kong follows the United States being the second most targeted country for real estate transactions with deal value US\$18.3 billion, over four times of first half of 2013's US\$4.3 billion.

The landmark transaction in this sector relates to Greenland Holdings' US\$10.6 billion backdoor listing through asset swap with Shanghai Jinfeng's (600606.SH). Greenland aimed to strengthen its competitiveness and profitability through this

transaction when government efforts to control property prices in China were high, and financing were difficult.

Driven by the tightening of domestic credit market and downward revision of property prices, it will likely lead to more opportunities for M&As in the near future.

(C) Energy, Mining and Utilities

Energy, mining and utilities is the third largest sector for M&As in China and Hong Kong, accounting for 9.5% of total activities based on statistics from Mergermarket.

Positive momentum is likely to continue in the second half of 2014 evidenced by some announced big deals in July and August - the US\$7 billion acquisition of the Las Bambas project in Peru by a Chinese consortium led by China Minmetals Corporation, China Oil and Gas's US\$216 million

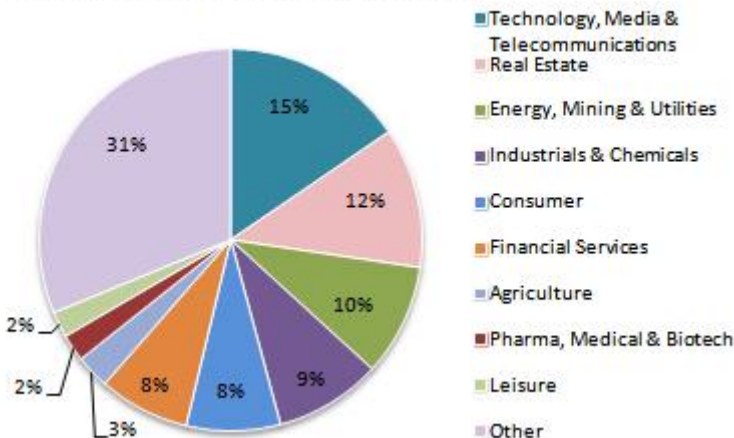
acquisition of Baccalieu Energy Incorporation in Canada and Fosun's US\$441 million acquisition of Australia's Roc Oil.

Looking ahead

We expect China will remain busy with M&As in the second half of 2014 and continue to 2015 driven by the following factors.

- Market and business development in China, including industry consolidation, market liberalisation, business diversification, etc., will carry the market forward strongly to the near future and continue to boost the domestic M&A activities.
- As Chinese corporate have become more sophisticated about going out and desire to gain foreign market access, outbound M&As are unlikely to slow for the rest of the year.

China & HK M&As: Industry Analysis 1H 2014



Source: Mergermarket

- Chinese corporate's appetite towards food and agricultural industry appears to grow in recent years. Recent transactions included COFCO Corporation's US\$2.8 billion acquisition of 51% equity in a Dutch grain trader Nidera BV in March this year and WH Group's (formerly known as Shuanghui) acquisition of Smithfield, a US pork processor for US\$6.9 billion in 2013. As food security and supply continues to be a concern in China, together with the desire to expand global footprint and demand by burgeoning middle class, outbound M&As in this industry will likely to increase.
- As the China's middle class becomes richer and tastes broaden, consumer demand for brands and luxury products grows in recent years. This motivates Chinese corporate to go out and look for global brands with Chinese potential. Recently, Chow Tai Fook announced to buy US luxury diamond company Hearts on Fire for US\$150m to expand its catalog for high-end customers. Fosun also invested in a German fashion and lifestyle brand Tom Tailor in July this year.
- Recent policies launched by government, for example, introduction of simplified review procedures for non-controversial deals and reforms in the state-owned enterprises, are supportive and will encourage both inbound and outbound M&As.
- Confidence has returned to overseas market, especially Europe and US, who are keen to tap the booming Chinese consumer market which is considered to be one of the greatest business potential worldwide. Inbound deal value in first half of 2014 has grown by 77% increase from second half of 2013 and 62% from first half of 2013.

Table: Selected top deals in China and Hong Kong

Announcement Date	Bidder Company	Target Company	Stake	Target Sector	Deal Value (US\$m)
16/4/2014	CITIC Pacific Ltd	CITIC Ltd	100%	Other	36,501
18/3/2014	Shanghai Jinfeng Investment Company Ltd	Shanghai Greenland (Group) Company Ltd	100%	Real Estate	10,572
21/3/2014	Temasek Holdings (Private) Ltd	A.S. Watson & Company Ltd	24.95%	Consumer	5,666
1/4/2014	Oversea Chinese Banking Corporation Ltd	Wing Hang Bank Ltd	100%	Finance	4,953
24/3/2014	COFCO Corporation	Nidera BV	51%	Agriculture	2,847

Source: Mergermarket

News

Hong Kong Institute of Chartered Secretaries (HKICS)

Terry Kan, partners of SAS was invited by HKICS to speak on topics relating to ***Practical Solution In Resolving Shareholders' Disputes*** in June 2014. There were over 100 participants joining the seminar and Terry's talk covered different aspects of the topic:

- Different stands of majority and minority shareholders
- Commercial solutions
- Drastic commercial weapons to be cautious
- Other options to resolve shareholders' deadlock
- Practical tips for Directors and Company Secretary

The Association of Hong Kong Accountants (AHKA)

Terry was also invited by AHKA to talk in a seminar on ***"The Road Less Travelled" - Walk Through The Multi-dimensions Of Insolvency Work And The Role Of Accountant*** in July 2014. During the seminar, Terry shared with the participants the multi-dimensional professional work as an Insolvency Practitioner, the knowledge and skills required when dealing the opportunities and challenges now faced by practitioners. Terry is also a Member of AHKA Insolvency and Forensics Working Committee.

ACCA Hong Kong

Anita Hou, partner of SAS, was invited by ACCA Hong Kong as one of the speakers in its Future Business Leadership Programme 2014, in July 2014. The Programme was an incentive award scheme for ACCA's students in mainland China who are either the national top paper winners in ACCA Exams or top students shortlisted from ACCA bounded undergraduate programmes. Anita shared with the students her knowledge and experience in working as an forensic accountant.

Hong Kong Institute of Certified Public Accountants (HKICPA)

Anita was invited to speak on topics relating to insolvency administrations in Hong Kong for the insolvency courses organised by the HKICPA in July 2014.

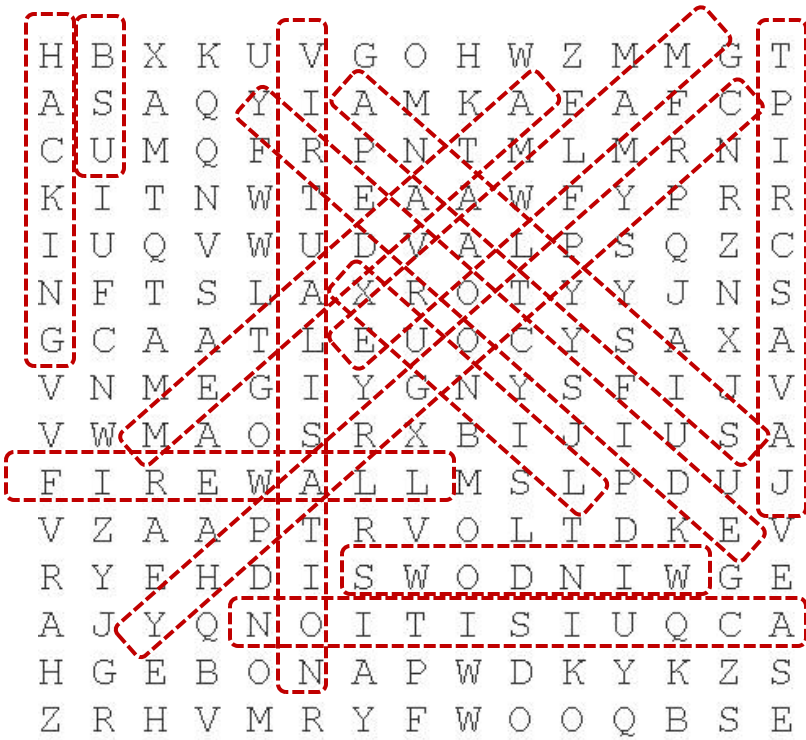
Alan Tang, Head of SAS was invited by the Restructuring and Insolvency Faculty (RIF) to have ***An Update on the Developments in PRC Bankruptcy Law*** in August 2014, topics cover:

- An update on PRC bankruptcy cases and A-share reorganisation cases
- Judicial interpretations of the Enterprise Bankruptcy Law
- Recognition of and assistance given to foreign insolvency proceedings by PRC courts
- Cross-border issues in major PRC reorganisation cases
- Receivers and trustees-in-bankruptcy in the PRC

For those of you who are interested to explore our seminars such as liquidation and restructuring, forensics and digital investigations, as well as mergers and acquisitions, please do not hesitate to contact us at sasmarketing@shinewing.hk to arrange for a tailored session.

Puzzle Answers

Our answers to our computer literacy puzzle. Let us know how you did!!!



Find these words:

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CONTACT US

43/F., The Lee Gardens,
 33 Hysan Avenue,
 Causeway Bay, Hong Kong
 T. (852) 3909 8900
 F. (852) 3583 8581
 W. www.shinewing.hk

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Email Us:
sasmarketing@shinewing.hk