

THE
SECURITIES
LITIGATION
REVIEW

THIRD EDITION

Editor
William Savitt

THE LAWREVIEWS

THE SECURITIES LITIGATION REVIEW

The Securities Litigation Review

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PREFACE

This third edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world’s most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class-action principles and generous fee incentives for plaintiffs’ lawyers. At the other extreme lie jurisdictions like China, where private securities litigation is complex, expensive, seldom remunerative and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Canada’s highly decentralised system of provincial regulation contrasts with Brazil’s Securities Commission, a powerful centralised regulator that is primarily responsible for creating and enforcing Brazil’s securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now challenged by the imminent departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world’s securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing investment

rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction has reported an across-the-board uptick in securities litigation activity. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as the 2008 crisis has given rise to a new normal in the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Law Review*: to annually reflect where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both divergence and convergence and divergence, continuity and change – with divergence and change particularly predominant this year, following political upheaval in the United States and Britain that could herald a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work

with one another in the field of securities regulation will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this third edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt

Wachtell, Lipton, Rosen & Katz

New York

June 2017

HONG KONG

*Thomas So and Wilson Fung*¹

I OVERVIEW

i Sources of law

Ordinances

- a* Securities and Futures Ordinance (Cap. 571) (SFO);
- b* Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (CWUMPO); and
- c* Companies Ordinance (Cap. 622) (CO).

Regulations

Subsidiary legislation under the SFO, in particular:

- a* Securities and Futures (Stock Market Listing) Rules (Cap. 571V);
- b* Securities and Futures (Disclosure of Interest – Securities Borrowing and Lending) Rules (Cap. 571X);
- c* Securities and Futures (Short Position Reporting) Rules (Cap. 571AJ); and
- d* Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules (Cap. 571AL).

Codes and guidelines

- a* The Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the Listing Rules).
- b* Codes and guidelines issued by the Securities and Futures Commission, in particular:
 - Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission;
 - Code on Real Estate Investment Trusts;
 - Codes on Takeovers and Mergers and Share Buy-backs;
 - Code on Unit Trusts and Mutual Funds;
 - The Guidance Note on Short Selling Reporting and Stock Lending Record Keeping Requirements; and
 - Guidelines on Disclosure of Inside Information.

¹ Thomas So is a partner and Wilson Fung is a senior associate at Mayer Brown JSM.

ii Regulatory authorities

- a* The Securities and Futures Commission (SFC): regulates and supervises Hong Kong's securities and futures markets (including the Hong Kong Exchanges and Clearing Limited).
- b* The Hong Kong Monetary Authority (HKMA): regulates and supervises banking business and the business of taking deposits in Hong Kong.
- c* Hong Kong Exchanges and Clearing Limited: regulates and supervises listed issuers and administers listing, trading and clearing rules; provides service, primarily at the wholesale level, to participants and users of its exchanges and clearing houses.

iii Common securities claims

Common market misconduct claims include:

- a* insider dealing;
- b* false trading;
- c* price rigging;
- d* disclosure of information about prohibited transactions;
- e* disclosure of false or misleading information inducing transactions;
- f* stock market manipulation; and
- g* offences involving fraudulent or deceptive devices in transactions in securities, futures contracts or leveraged foreign exchange trading.

Sponsors are licensed by the SFC and therefore are subject to the provisions of the SFO and the various rules, codes and guidelines issued by the SFC, including the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission, the Additional Fit and Proper Guidelines for Corporations and Authorised Financial Institutions applying or continuing to act as Sponsors and Compliance Advisers, the Corporate Finance Adviser Code of Conduct, the Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission, as well as the Listing Rules.

While the codes and guidelines issued by the SFC do not have the force of law and any breach will not render a sponsor liable to any judicial or other proceedings, the SFC may take disciplinary actions against the sponsor and may impose appropriate sanctions (e.g., revocation of the sponsor's licence).

Further, under Sections 40 and 40A of the CWUMPO, any person who authorises the issue of a prospectus that includes untrue statements shall be liable to pay compensation to the victims, imprisonment and a fine, unless he or she proves either that the statement was not material or that he or she had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the statement was true.

Insofar as offences of market misconduct are concerned, the general legal principles applicable to accessory liability also apply.

For both disciplinary action and civil proceedings, the parties will need to prove their case on the balance of probabilities. For criminal prosecutions, the prosecution will need to prove beyond reasonable doubt the elements of the relevant offence. Therefore, it is in general more likely that a person may be disciplined or ordered by the court to make compensation in civil proceedings.

II PRIVATE ENFORCEMENT

i Forms of action

Class actions are not available in Hong Kong. However, under Part 14 Division 4 of the CO, a shareholder may, with the leave of the court, bring a derivative action in the name of the company in respect of the misconduct committed against the company, or intervene in the proceedings before the court for the purpose of continuing, discontinuing or defending those proceedings on behalf of the company.

For the purpose of seeking the court's leave to bring a derivative action in the name of the company or intervene in proceedings, under Section 733 of the CO, a member needs to show that:

- a* it appears to be in the company's interests that leave be granted to the member;
- b* in the case of an application for leave to bring proceedings, there is a serious question to be tried and the company has not itself brought the proceedings; and
- c* in the case of an application for leave to intervene in proceedings, the company has not diligently continued, discontinued or defended the proceedings.

Under Section 108 of the SFO, if a person makes any fraudulent, reckless or negligent misrepresentation that induces another person to enter into or offer to enter into an agreement to acquire, dispose of, subscribe for or underwrite securities, the person who makes the misrepresentation shall be liable to pay compensation to the person who suffers pecuniary loss as a result of the misrepresentation.

Further, under Sections 281 and 305 of the SFO, if a person has engaged in or committed a market misconduct, he or she shall be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other person as a result of the market misconduct.

ii Procedure

The right to bring statutory derivative actions applies to both companies incorporated in Hong Kong and companies incorporated outside Hong Kong that have established a place of business in Hong Kong. Before a statutory derivative action can be brought, a member needs to first make an application to the court by issuing an originating summons to obtain leave. Once the court grants leave, the proceedings may be brought or continued in a manner similar to other civil proceedings.

To commence a civil action (including actions based on Sections 108, 281 and 305 of the SFO), the plaintiff needs to file with the court a writ of summons (if there are disputes as to facts) or an originating summons (if the facts are not in dispute).

For actions commenced by writs of summons, the parties will file pleadings in which the parties will need to state all the relevant facts and give necessary particulars.

After pleadings are closed, the parties will need to make discovery of relevant documents and prepare witness statements and expert reports (if necessary) before proceeding to trial.

For proceedings commenced by originating summons, the parties will adduce evidence by affidavits and the court will determine the matter based on that evidence. There is no automatic discovery in proceedings commenced by originating summons.

In an action before the court (whether commenced by writ of summons or originating summons), the parties may seek discovery of specific documents. A party who seeks specific discovery needs to show the existence of the document; that the party from whom discovery

is sought has in his or her possession, custody or power the relevant document; that the document relates to one or more of the matters in question in the action; and that discovery of the document is necessary.

iii Settlements

Derivative actions may only be discontinued or settled with the leave of the court.²

Other proceedings, such as proceedings based on contract or tort, can be settled by the parties' agreement and the agreement is not subject to review or approval by third parties. The parties are free to agree on how matters related to the action are to be disposed of, including the costs of the action.

iv Damages and remedies

In general, damages are assessed to compensate the plaintiff in the action. For an action based on breach of contract, damages are payable to the plaintiff to place the plaintiff in the position as if the contract had been properly performed. For an action based on tort, damages are payable to the plaintiff to place the plaintiff in the position that the plaintiff would have been in had the tort not occurred.

In addition to payment of damages, the court may also grant other equitable reliefs, which include:

- a* specific performance – an order requiring the defendant to fulfil his or her contractual obligation;
- b* injunction – an order prohibiting the defendant from doing a certain act or requiring him or her to perform a certain act that he or she has failed to do; and
- c* declaration – the court declaring certain rights and obligations of the parties; for example, that the defendant has contravened a certain provision of the SFO.

III PUBLIC ENFORCEMENT

i Forms of action

- a* Market Misconduct Tribunal (MMT) proceedings;
- b* criminal prosecutions;
- c* SFC disciplinary proceedings; and
- d* High Court proceedings (which are remedial in nature; for example, winding up, injunction and disqualification).³

Under Sections 252, 283 and 307 of the SFO, MMT proceedings, which deal with market misconduct and are civil in nature, and criminal prosecution for market misconduct are mutually exclusive. In appropriate cases, the SFC would apply to the Court for an injunction to freeze the assets of a person who contravenes the provisions of the SFO before the MMT proceedings or criminal prosecution. This is to ensure that the relevant parties can be compensated in future.

² CO Section 735.

³ SFO Sections 212 to 214.

ii Procedure

Before enforcement action is taken, the SFC (and the HKMA – if the party being investigated is a bank) will first conduct an investigation into the matter. This involves obtaining relevant records and interviewing witnesses. If the investigation shows that there has been a contravention of the relevant legislation or any code published by the SFC, further action may be taken.

MMT proceedings

The SFC may institute proceedings in the MMT concerning market misconduct by giving a written notice containing a statement.⁴ However, the consent of the Secretary of Justice must be obtained before the institution of the MMT proceedings.⁵

The MMT will determine whether any market misconduct has taken place, the identity of any person who has engaged in the market misconduct and the amount of any profit gained or loss avoided as a result of the market misconduct.⁶ The MMT may determine whether a person has engaged in market misconduct even if that person is not within the jurisdiction.⁷

*Criminal proceedings*⁸

Criminal prosecutions for contravention of the provisions under the SFO are similar to prosecutions of other criminal offences. The defendant will first be asked to tell the court whether he or she pleads guilty or not. If he or she pleads guilty, the court will usually pass sentence the same day. If the defendant pleads not guilty, the matter has to proceed to trial.

The prosecution has the duty to provide all used and unused materials to the defendant and a person can only be prosecuted if he or she is within the jurisdiction or is extradited from other jurisdictions.

If the defendant is not satisfied with the decision of the court, he or she may apply to review or appeal against the decision, as the case may be.

*SFC disciplinary proceedings*⁹

After the SFC has completed its investigation against a person licensed with the SFC, it will decide whether to initiate the disciplinary proceeding.

If the SFC decides to bring disciplinary proceedings against a licensed person, it will issue a notice of proposed disciplinary action, which states its preliminary views on the misconduct, sanctions that the SFC is going to impose and a list of supporting documents. The regulated person will also be invited to make an explanation.

The licensed person will then have 30 days from the date of the receipt of the notice to make written representation.

Afterwards, the SFC will make its decision, which will be set out in its decision notice. The decision notice will also set out the reasoning of the decision, the effective date, the

4 SFO Section 252.

5 SFO Section 252A.

6 SFO Section 252(3).

7 *Securities and Futures Commission v. C, D, E and F* (HCMP 727/2008).

8 www.judiciary.gov.hk/en/crt_services/pphl/html/mag.htm#2.

9 SFC, 'Disciplinary Proceedings at a Glance' (September 2011) (www.sfc.hk/web/EN/files/ENF/PDF/Disciplinary%20Proceedings%20at%20a%20Glance_Sept.2011.pdf).

duration and the terms of any revocation, suspension or prohibition to be imposed, the terms of any reprimand under the decision and the amount of any fine that may be imposed, as well as the date by which it must be paid.

The licensed person may appeal against the SFC's decision to the Securities and Futures Appeals Tribunal within 21 days after a decision notice is served or given, otherwise the decision becomes effective after the expiry date.

For disciplinary proceedings, the licensed person who is proposed to be disciplined does not have the right to seek discovery from the SFC of documents other than those referred to in the notice of proposed disciplinary action.¹⁰

High Court proceedings

Although MMT proceedings and criminal proceedings are mutually exclusive, the SFC may commence proceedings for winding up, injunction and disqualification under Sections 212, 213 and 214 of the SFO in addition to such proceedings. Proceedings under Sections 212, 213 and 214 are free-standing and not contingent or conditional on there being other substantive proceedings in parallel, including proceedings in the MMT or criminal proceedings before the court.¹¹

iii Settlements

MMT proceedings

A person who is subject to MMT proceedings may approach the SFC to seek the SFC's agreement on the facts related to the enquiry by the MMT. If both sides can reach an agreement, a statement of agreed and admitted facts will be signed, which will be provided to the MMT and the MMT will make findings based on that statement.¹²

Criminal proceedings

The defendant may contact the SFC (or the Department of Justice, in cases where the prosecution is conducted by the Department of Justice in the District Court or the High Court) to make a plea bargain. For example, the defendant may offer to plead guilty to particular charges in exchange for the prosecution offering no evidence in relation to other charges.

Disciplinary proceedings

The regulated person may make a resolution proposal to the SFC and the latter has power to determine whether to accept the proposal after considering the interest of the investing public or the public interest.¹³

10 *X v. Securities and Futures Commission* [2012] 4 HKLRD 296.

11 www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=09PR74.

12 For example, see 'The Report of the Market Misconduct Tribunal into dealings in the shares of Bank of China Limited and China Construction Bank Corporation on and between 19 December 2008 to 13 January 2009', dated 7 October 2014.

13 SFO Section 201(3).

High court proceedings

As in other civil proceedings, the defendant may contact the SFC to discuss whether the matter can be settled. For proceedings to disqualify a director, the defendant may seek to agree with the SFC on the relevant facts. If an agreement can be reached, a statement of agreed facts will be submitted to the court for the court to decide on the length of disqualification.

iv Sentencing and liability

MMT proceedings¹⁴

The MMT may order the wrongdoer to pay to the government of the Hong Kong Special Administrative Region an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question.

The MMT may also order that the person shall not, without leave of the Court of First Instance, be a director, liquidator, or receiver or manager of a corporation or acquire, dispose of or deal in any securities, etc.

Cease-and-desist and ‘cold shoulder’ orders can also be issued as civil sanctions by the MMT.

Criminal proceedings

If a defendant is guilty of an offence relating to dealing in securities and future contracts under Part XIV of the SFO, he or she shall be liable:

- a* on conviction on indictment to a fine of HK\$10 million and to imprisonment for 10 years; or
- b* on summary conviction to a fine of HK\$1 million and to imprisonment for three years.

In addition, the court may also order:

- a* the defendant shall not, without leave of the court, be a director, liquidator, or receiver or manager of the property or business, of a listed corporation or any other specified corporation, or acquire, dispose of or deal in any securities;
- b* any body that may take disciplinary action against the defendant as one of its members be recommended to take disciplinary action against the defendant; and
- c* the defendant pays to the government an amount not exceeding the amount of any profit gained or loss avoided by the defendant as a result of the commission of the offence in question.

Disciplinary proceedings¹⁵

The SFC is empowered to impose one or more of the following sanctions:

- a* revocation or partial revocation of licence or registration;
- b* suspension or partial suspension of licence or registration;
- c* revocation of approval to be a responsible officer;
- d* suspension of approval to be a responsible officer;
- e* prohibition of application for licence or registration;

14 SFO Section 257.

15 SFC, ‘Disciplinary Proceedings at a Glance’ (September 2011), ‘Disciplinary measures available to the SFC’, p. 3.

- f* prohibition of application to become a responsible officer, executive officer or relevant individual;
- g* fine (up to the maximum of HK\$10 million or three times the profit gained or loss avoided, whichever is higher); and
- h* reprimand (private or public).

High Court proceedings

Under Section 212 of the SFO, the SFC may present a petition for winding-up orders and bankruptcy orders if it appears to the SFC that it is in the public interest to do so.

Under Section 213 of the SFO, the SFC may apply to the Court of First Instance for injunctions and orders requiring the person to take such steps as the Court directs to restore the parties to any transaction to the position in which they were before the transaction was entered into.

Under Section 214 of the SFO, the SFC may apply to the Court of First Instance for an order against a person who is wholly or partly responsible for the business or affairs of a listed corporation to be disqualified and not to take part in the management of the corporation or any other corporation for a period not exceeding 15 years. The period of disqualification depends on the seriousness of the misconduct.

IV CROSS-BORDER ISSUES

A number of companies listed in Hong Kong have businesses based in the People's Republic of China (PRC) or have their directors located in the PRC, or both.

Further, under the cross-border investment channels that are known as the 'Shanghai-Hong Kong Stock Connect' and the 'Shenzhen-Hong Kong Stock Connect', investors in the PRC and Hong Kong may trade shares listed on the other market.

The above can present difficulties to the SFC when conducting investigations against directors and other persons who may have committed wrongdoings.

In this connection, the SFC and the China Securities Regulatory Commission (CSRC) have signed memoranda of understanding to assist each other with their investigations,¹⁶ as well as a memorandum of understanding on the regulatory and enforcement cooperation under the stock connects.¹⁷

As mentioned above, there are difficulties in prosecuting a person who is not within the jurisdiction of Hong Kong. In such a case, the SFC may consider instituting MMT proceedings if appropriate.

V YEAR IN REVIEW

i Regulatory development

The Financial Institutions (Resolution) Ordinance was passed by the Hong Kong Legislative Council on 22 June 2016 and gazetted on 30 June of the same year. It establishes a regime in Hong Kong for the orderly resolution of financial institutions with a view to avoiding

16 See www.sfc.hk/web/EN/about-the-sfc/collaboration/mainland/investigatory-assistance-and-exchange-of-information.html.

17 See www.sfc.hk/web/EN/files/ER/MOU/ENF_MOU_Eng_2016.pdf.

or mitigating the risks otherwise posed by their non-viability to the stability and effective working of the financial system of Hong Kong.¹⁸ It will commence operation on a date to be appointed by the Secretary for Financial Services and the Treasury after the related subsidiary legislation has been passed. Under the Financial Institutions (Resolution) Ordinance, the HKMA, the Insurance Authority and the SFC are designated as resolution authorities. They are vested with a range of necessary powers to effect orderly resolution of a failed systemically important financial institution, which means maintaining continuity of access to the essential financial services it provides by imposing losses on creditors, while minimising the risks posed to public funds.¹⁹

Trading under the newly introduced Shenzhen-Hong Kong Stock Connect began on 5 December 2016. As such, the SFC and the CSRC also entered into a new memorandum of understanding on strengthening cross-boundary regulatory and enforcement cooperation, which will supersede the previous memorandum of understanding applicable to Shanghai-Hong Kong Stock Connect,²⁰ which commenced trading earlier in 2014.²¹

ii SFC enforcement actions

According to the latest quarterly report published by the SFC,²² the Enforcement Division of the SFC has undertaken the following activities for the period from April to December 2016:

Enforcement activities	
Item	Number
Production of records and documents inquiries commenced under Section 179 of the SFO	18
Trading inquiries commenced under Section 181 of the SFO	207
SFO offences and other misconduct investigation directions issued under Section 182 of the SFO	313
Investigations started	317
Investigations completed	457
Investigations completed within seven months (percentage)	221 (48%)
Individuals or corporations charged in criminal proceedings	4
Criminal charges laid	15
Notices of proposed disciplinary action issued*	42
Notices of decision issued**	39
Individuals or corporations subject to ongoing civil proceedings	109
Compliance advice letters issued	409
Cases with search warrants executed	24

* A notice issued by the SFC, to regulated persons, that it proposes to exercise its disciplinary powers on grounds that they appear to be guilty of misconduct or not fit and proper.

** A decision notice sets out the SFC's decision and its reasons for taking disciplinary action against regulated persons.

18 Financial Institutions (Resolution) Ordinance Section 4(1).

19 www.info.gov.hk/gia/general/201606/30/P201606300349.htm.

20 <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR127>.

21 www.hkexnews.hk/listedco/listconews/sehk/2014/1110/LTN20141110037.pdf.

22 SFC, 'SFC Quarterly Report October–December 2016' (www.sfc.hk/web/EN/files/ER/Reports/QR/201610-12/Eng/00_full.pdf), p. 12.

iii Significant decisions

Citron Research

On 26 August 2016, the MMT found that Mr Andrew Left of Citron Research disclosed false or misleading information inducing transactions and so engaged in market misconduct under the SFO following proceedings brought by the SFC.

The SFC alleged that, on 21 June 2012, Mr Left published a report on Citron Research's website that contained false or misleading information about Evergrande Real Estate Group Limited (Evergrande). The report stated that Evergrande was insolvent and had consistently presented fraudulent information to the investing public. The MMT found that these allegations were false and misleading and likely to alarm ordinary investors. Mr Left had made these allegations recklessly or negligently with no understanding of the Hong Kong accounting standards that applied and without checking them with an accounting expert or seeking comment from Evergrande.²³

As a result, the MMT ordered that Mr Left be banned from trading securities in Hong Kong for the maximum period of five years without the leave of the court. The MMT also issued a cease-and-desist order against Mr Left ordering that he shall not again perpetrate the market misconduct specified in the order issued by the MMT.²⁴

Mr Left applied for leave to appeal against the MMT's determination, but the application was dismissed by the Court of Appeal.²⁵

AcrossAsia Limited

On 7 November 2016, the MMT found that AcrossAsia Limited (AcrossAsia), its former chairman and chief executive officer failed to disclose inside information as soon as reasonably practicable as required under part XIVA of the SFO.

AcrossAsia Limited and its former senior executives admitted that they had been late in disclosing inside information about a petition filed by AcrossAsia's subsidiary and major creditor against AcrossAsia and a related summons. The senior executives also admitted that they had been negligent and this negligence resulted in AcrossAsia's breach of the disclosure requirement.²⁶ The gap from when the making of an announcement became reasonably practicable to the actual making of that announcement was just over a week.²⁷

The SFC alleged that the failure of AcrossAsia and its former senior executives to ensure timely disclosure of these court documents had resulted in the investing public not knowing about the possible insolvency of AcrossAsia and the possible loss of control over its major asset, and consequentially, the material increase in financial risks faced by AcrossAsia at the time.

23 https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR84;www.mmt.gov.hk/eng/reports/Evergrande_Report.pdf.

24 <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR107>.

25 www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=17PR5.

26 www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=16PR114.

27 Paragraph 199 of the MMT report, dated 29 November 2016 (www.mmt.gov.hk/eng/reports/AcrossAsia_Limited_Report_e.pdf).

It was the first concluded case in relation to late disclosure of inside information under the SFO in the MMT.²⁸ The MMT fined AcrossAsia and the chief executive officer HK\$600,000 each, and the former chairman HK\$800,000. The MMT also imposed an order that the former chairman and the chief executive officer each undergo a training programme approved by the SFC on compliance with Part XIVA of the SFO (disclosure of inside information), directors' duties and corporate governance.²⁹

Greencool Technology Holdings Limited

On 29 December 2016, the MMT found that the former chairman of Greencool Technology Holdings (Greencool) and four former senior executives (including its former financial controller) disclosed false or misleading information inducing transactions and so engaged in market misconduct under the SFO following proceedings brought by the SFC.

The SFC alleged that the chairman and former senior executives of Greencool were involved in grossly overstating the company's net asset value in its annual reports and results announcements released between 2001 and 2005 as a result of the overstatement of bank deposits and the non-disclosure of bank loans. The MMT found that the senior executives had perpetrated a massive, systemic fraud and the fraud was known to several employees at Mainland subsidiaries, who were ordered to participate in it.

The qualified accountant and company secretary was also found culpable of market misconduct by providing materially false or misleading information to the public in circumstances in which he was negligent as to whether the information was false or misleading. He was negligent in performing his professional duties as a qualified accountant by failing to supervise the implementation of a sound internal control and financial reporting system, thereby enabling the former senior executives to provide false and misleading annual results of Greencool from 2001 to 2005 to defraud the investing public.

The SFC also commenced proceedings under Section 213 of the SFO against the chairman in the Court of First Instance in parallel with the MMT proceedings. On 18 July 2014, the SFC successfully obtained an injunction to freeze a total of 107,290,000 shares in Hisense Kelon Electrical Holdings Limited up to a value of HK\$1.2 billion. The SFC believes these shares are held by several people and overseas companies for the benefit of the chairman of Greencool.³⁰

VI OUTLOOK AND CONCLUSIONS

i Regulatory proposals

On 17 June 2016, the SFC and the Hong Kong Exchanges and Clearing Limited published a joint consultation on proposed enhancements to the Stock Exchange of Hong Kong Limited (SEHK) decision-making and governance structure for listing regulations.³¹

28 www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=16PR114.

29 Paragraph 208 of the MMT report, dated 29 November 2016 (www.mmt.gov.hk/eng/reports/AcrossAsia_Limited_Report_e.pdf).

30 www.mmt.gov.hk/eng/reports/Greencool_Technology_Holdings_Limited_Report_e.pdf; www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR148.

31 <https://www.hkex.com.hk/eng/newsconsul/mktconsul/Documents/cp201606.pdf>.

Under the proposals, two new SEHK committees, on which the SFC and SEHK are equally represented, will be established to decide listing policy and policy-related listing matters.

The consultation sparked a great deal of interest, with a wide range of views being expressed in response to the publication paper, and the deadline for responses was extended for two months until 18 November 2016.³² The regulators are currently analysing the market responses.

ii Conclusion

The Hong Kong's securities litigation scene had an eventful year in 2016, with important MMT rulings such as *Citron Research*, *AcrossAsia* and *Greencool Technology* together with regulatory developments such as the introduction of the Financial Institutions (Resolution) Ordinance. While market developments such as the commencement of the Shenzhen-Hong Kong Stock Connect have increased the difficulty for the regulators to investigate cross-border market misconduct, it is expected that the SFC, the frontline regulator of Hong Kong's securities industry, will continue its firm and ever-stronger stance in upholding the integrity of the securities and futures markets in Hong Kong.

32 <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR90>.

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