Explaining the complexities of Hong Kong's financial securities regulations to enhance trust among small investors through individual case reports as stories

Thesis submitted

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The views expressed in this research project are those of the author and do not necessarily reflect the views of the supervisory team, Middlesex University, or the examiners of this work.

Abstract

This research project set out with the purpose of contributing to trusting financial securities regulation in Hong Kong for small investors when the system is highly complex. The aim of this particular project, to contribute to that purpose, was to explore sets of cases reported on by the regulators and by the media. The cases were selected on the basis of their variety; that variety being what it is that frightens people about investing which includes being cheated; not understanding the rules; worried about safeguards against contraventions such as money laundering, corruption, insider dealing and more negative images. It is a boundaried study, focusing on financial regulation and practices in Hong Kong. However it surfaces commonalties or learnings for other financial centers. The research was motivated by a need for small investors to understand how the system works, its safeguards and its rate of response to addressing anomalies so that they can invest with more confidence. This document is to contribute to communicating a complex system to the ordinary investor and young trainees or young legal practitioners charged with helping small investors who may have a grievance. It uses legal cases as a form of storytelling or more precisely 'parabling' – the good and the bad, the David and Goliath, which serve to illustrate the anomalies in a way that helps people not only to have more understanding of the systems but also to quickly identify with what can go wrong even for the big players.

This research was carried out in part during Hong Kong's social unrest and before China's changes to Basic Law (2020) and before the global pandemic of 2020. With these events this research has become historical in a short space of time although nothing significant had changed in financial securities regulation at the time of writing.

The document is in three parts to support navigation and cross-reference: Part 1 is the main context, literature and cases studies. Part 2 contains all the bodies involved in the different cases relating to financial securities and Part 3 contains the Appendices.

Glossary: Key Acronyms

CA	Court of Appeal
CFA	Court of Final Appeal
DOJ	Department of Justice
FDRC	Financial Dispute Resolution Centre
FRC	Financial Reporting Council
HC	The High Court
HKMA	The Hong Kong Monetary Authority
HKP	Hong Kong Police
HKSAR	Hong Kong Special Administrative Region
ICAC	Independent Commission Against Corruption
IPO	Initial Public Offering
JFIU	Joint Financial Intelligence Unit
MMT	Market Misconduct Tribunal
PRC	People's Republic of China
SEHK	The Hong Kong Stock Exchange
SEC	The US Securities and Exchange Commission
SFC	The Securities and Futures Commission

Navigation of the Document

Part 1	Context, Knowledge Landscape, Research Influences, design and Cases with Comments, References
Part 2	Details of the Hong Kong Regulatory and Enforcement Bodies for reference
Part 3	Details of Key Cases explored in Part 1

Part 1

Context Knowledge Landscape Methodology Case Studies

Chapter 1

Motivation, Context and Rationale for this research

Positioning myself as part of the Context

The overall purpose of the research is to contribute to elucidating the workings of the legal and financial sectors for the public in relation to the current overall securities enforcement in Hong Kong. The aim of this particular focus is to describe and explain through case studies any anomalies which may arise and be confusing to the public. This chapter explains why I have focused on this area of research and who I am in the context and why I am a suitable person to write this piece of work.

I am a solicitor, admitted in 1992 in both Hong Kong and in the United Kingdom. Previously I was a barrister in Hong Kong. I was a Police Chief inspector when I was professionally qualified and seconded to the Attorney General's Chambers, present Department of Justice (DOJ) as an Assistant Crown Counsel. I was Senior Crown Counsel on 21 September l992 when I resigned and joined the Law Society of Hong Kong as Assistant Director supervising Hong Kong solicitors and foreign lawyers practicing in Hong Kong. I also worked with the Office for the Supervision of Solicitors in the United Kingdom supervising solicitors of England and Wales. Throughout my career, compliance with all the legislation enforceable in Hong Kong and the United Kingdom had been my major area of practice.

I have lived and worked all my life in Hong Kong. Hong Kong has been a major international and regional commercial and financial hub for several decades. For such a small geographical area it is home to one of the largest concentrations of billionaires and high net worth individuals in the world according to The World Fact book (2018)[1] but it also has large pockets of low income families and foreign workers who service

[1] The World Factbook is a guide to comparative information on countries produced by the US Central Intelligence Agency https://www.cia.gov/library/publications/the-world-factbook/

the bustling financial and commercial sectors.

Its legal and financial sector history has relevance in terms of context for this research. Hong Kong Island became a colony of the British Empire in 1842 and this was expanded in 1860 to include Kowloon and twenty eight years later the New Territories were included. Britain established its legal and financial institutions as well as its educational structure and direction. Cantonese is the local language but under the British system Hong Kong people are for the most part bi-lingual and in many cases tri lingual – Cantonese, Putunghua and English. This gave Hong Kong significant commercial advantage. However in 1997 Britain 'handed back' Hong Kong to the People's Republic of China and it became HKSAR, in full, Hong Kong Special Administrative Region of the People's Republic of China. (PRC) From 1997 till recently this arrangement of 'one country two systems' in which the Basic Law of Hong Kong is a regional constitution, Hong Kong with its economic and governing autonomy has been very stable. The regional governing system is the Executive. It has a CEO and Executive Council members who are responsible for enforcing regional law and proposing bills among other roles while the Legislative Council enacts regional law, approves budgets and has the power to impeach the CEO[2]. The Judiciary is in the form of the Court of Final appeal and lower courts and it interprets the laws and overturns inconsistencies with the Basic Law. The CEO appoints the judges. I go into the legislative and judiciary dimensions in more detail later on. This research was carried out between 2014 and 2017. The Hong Kong Stock Exchange and its safeguarding as a major international player through financial regulation and oversight is a priority for the people of Hong Kong, for the Executive and for China. Since the creation of Hong Kong SAR, nothing has substantially changed in its safeguarding practices. The whole area of financial securities regulations is important to me professionally and personally. If Hong Kong is financially healthy, that will benefit the Hong Kong communities and financial regulations are the gatekeepers of safety and trust. I found myself wanting to test the boundaries of that trust to make sure all was well.

[2] Hong Kong Legislative Council (Legco) update 2020 Congressional Research Service https://fas.org/sgp/crs/row/IF10500.pdf

Motivation for the research

My professional curiosity was stimulated by something which happened while I was undertaking a Doctor of Business Administration Programme run by the Universite Nice Sophia Antipolis in 2012. "An Overview of Securities Enforcement in Hong Kong" by Professor Howell E Jackson of Harvard Law School in a seminar on Financial Regulation relating to Hong Kong 2008 (Professor Howell E Jackson's Briefing Paper)[3] came to my notice.
Professor Howell E Jackson's Briefing Paper (pg.11) gave the following –

"*I. Description of Regulatory Agencies and Private Bodies*

A. Generally

The Hong Kong securities regulatory regime is highly fragmented—regulatory authority is widely dispersed among various public and private bodies both vertically and horizontally.

Vertically, the securities regulation regime can be conceived as a three-tiered system: 1) policy is set by the Financial Services Branch of the Financial Services and Treasury Bureau and the Legislative Council which is responsible for considering legislative proposals; 2) market regulation and oversight is carried out by the Securities and Futures Commission (SFC); and 3) "front-line regulation," primarily the setting of listing requirements and exchange oversight, is carried out by Hong Kong Exchanges and Clearing Ltd. (HKEx), the self-regulating stock exchange.

The "horizontal fragmentation" vests regulatory responsibility in multiple bodies as follows:

Accounting and Auditing. Regulation of auditing and accounting practices is carried out by the Hong Kong Institute of CPAs (HKICPA), the statutory licensing and regulatory body for the accounting profession, and Financial Reporting Council

[3] Jackson, H. (2008) *An Overview of Securities enforcement in Hong Kong* http://www.law.harvard.edu information in site accessed 2012

(FRC), which investigates suspected irregularities of auditors and listed entities and inquires into suspected non-compliance of financial reports.

Bank Inspections. The Hong Kong Monetary Authority (HKMA) is responsible for daily inspection of banks' securities departments.

Corruption. The Independent Commission Against Corruption (ICAC) and Hong Kong Police Department are responsible for regulating corruption.

Criminal Prosecution. The Commercial Crimes Unit of the Department of Justice (CCU) is responsible for criminal investigation and enforcement of commercial crimes and fraud.

Money Laundering. The Joint Financial Intelligence Unit (JFIU), an entity jointly run by the Hong Kong Police Force and the Hong Kong Customs & Excise Department, is responsible for the regulation of money laundering.

Private Action. A statutory derivative action which enables suit against Hong Kong- and non-Hong Kong-registered companies for fraud, negligence, failure to comply with the law or a breach of duty is available for private enforcement".

In my professional role and opinion, there were some things which did not ring true in this paper and which set me off trying to either corroborate Professor Howell E Jackson's Briefing Paper or confirm my initial response as to its accuracy. This was to lead me to a much wider area of interest which this document charts.

For decades in my professional roles in or associated with the Hong Kong Government, I have been deeply involved in securities legislation enforcement in Hong Kong. On the criminal aspect, my experience in commercial fraud and deception covered securities enforcement in criminal proceedings-

(a) criminal investigation whilst working with the Hong Kong Police; I also dealt with money laundering cases without the element of corruption.

(b) criminal prosecutions – from giving advice, prosecuting trials and appeals in commercial fraud and deception cases whilst working with Prosecutions Division of the Department of Justice (DOJ) -

(1) I gave advice to ICAC (Independent Commission Against Corruption) in corruption cases and cases connected with it or directly or indirectly caused by it

as well as other specified offences e.g. theft, false accounting and commercial fraud. I also gave advice to Police Force upon investigations solely money laundering without corruption.

(2) Since the Police and the ICAC have no right of audience. Legal advice sought upon investigations. I prosecuted serious or complicated offences to suppress commercial crimes and to punish commercial criminals.

Drawing on this experience, I considered that there were some opinions which were inaccurate in the Professor Howell E Jackson's Briefing Paper regarding the securities enforcement in Hong Kong

- It is wrong to describe ICAC and Police as regulatory bodies. They are not like the Monetary Authority or the Institute of CPA. A Regulatory Body can only discipline its members, but not to enforce laws as such.
- Commercial Crimes Unit (CCU)/Department of Justice is different from Commercial Crime Bureau (CCB)/Police. Accordingly, CCU/DOJ is not responsible for investigation of commercial crimes and fraud. Investigation done by CCB/Police with advice from CCU/DOJ. DOJ is responsible for prosecuting in Courts.
- ICAC is responsible for regulating corruption and enforcing the Prevention of Bribery Ordinance (Cap. 201). The police do not investigate corruption.
- Money Laundering – Investigation by the Financial Investigation Division, Narcotics Bureau with Intelligence given by The Joint Financial Intelligence Unit based in Police Headquarters run by the Police Force and the Customs & Excise Department to protect Hong Kong from the illicit activities of money laundering and terrorist financing. The investigation of a crime, which does not necessarily committed in connection with securities or by listed companies.
- The Proceeds of Crime carries its literal meaning and applies to all aspects of crimes. Often they are moneys confiscated by law enforcement authorities by applying for restraint orders and confiscation orders. Although moneys confiscated are mostly in money laundering cases yet not necessarily connected with stock and shares nor listed companies or banks.

In June 2014, I presented my research proposal to Middlesex University's Approval Panel and the following title was approved: ***The complexity of securities enforcement in Hong Kong Special Administrative Region (HKSAR): a question of transparency*** which was modified as my research progressed**.**

As the research progressed, I became focused on exploring the robustness of financial securities enforcement through case studies. I considered what it must be like for existing and potential small investors not knowing their way through this system of securities regulations and not being able to identify inaccuracies or weaknesses when they were wanting to invest when I myself, as a professional, was double checking my own understanding triggered by Professor Howell E Jackson's Briefing Paper.

Rationale for the area identified being a worthwhile focus of research

My interactions with the university's approval panel sum up the main points of my research being worthwhile. There was an understanding that helping the public understand the complexities of financial systems and regulations would be of benefit. (Smith et al, 2011) in Studying Fraud as White Collar Crime and other notable commentators refer to the increasing complexity of sectors such as fraud and the challenges which the current jury system may not be able to meet appropriately due to having little understanding of regulations and applications. As a former professional practitioner in this area and as someone who invests in stocks and shares I believe both these perspectives can be in dialogue with each other to give some guidance to the public. It is for this reason, which is discussed in more detail in the Methods chapters, that I have chosen both desk research and analysis of reported legal cases to highlight the goals and identify the learning that can emerge from such exploration. This is a common approach to legal research and legal training: through case studies and precedents.

Regulatory compliance is so complex that it can be difficult to understand some of the legal concepts behind the process. Case studies and precedents are more helpful in my opinion for the public to know more about the grey areas where most fraud happens and to avoid having to go through dozens of policy documents and try to translate the very specific legalese. Case studies that help the potential small investor and the current small investor can give them more confidence in decision making.

When a legislation has been breached it surfaces not only the grey areas but also which bodies deal with which cases and likely outcomes. For example, fines or prison sentences, compensation of no compensation.

The aim of this research became to make transparent the workings of the complex system through case studies and any anomalies that may arise confusing the public. Case studies, of the legal type, are important and enjoyable vehicles of learning and of practical use.

A brief overview of the HKSAR

With a view to making the project worthwhile, exciting and updated to meet not only the expectations of the professionals in the field who read this but also to the public at large I decided to carry out legal research in a way appropriate to my field but paying attention to my own position, motivations and potential impact. The context of legal research consists of laws, regulations, statutes, proceedings and the application of law and contraventions. Accordingly, a large part of this work is on clarifying and reporting on the context, which is complex and diverse, and the interconnectedness of the parts. This would have been the only way to verify or not the statements made in Professor Howell E Jackson's Briefing Paper. My motivations are both professional and as a private citizen who has come to understand through investing in the stock market how obscure the systems are for ordinary people and how challenging it is for people to navigate them using information from people/institutions who are supposed to know, and therefore trust in the skills of the navigator is key. I wanted to see if I could clarify the systems for the public so that they would have a better basis for deciding on action through a more informed view that would enable them to ask more informed questions to check if the trust is well placed. My focus therefore is on clarification of the context and verification of perception relating to the robustness of the HK legal system.

I also look into the enforcement powers of the Securities & Futures Commission (SFC) in –

- H shares and red chip. 2013 is the 20th anniversary of the listing of H shares. On 17 June 1993, Hong Kong Stock Exchange announced amendments to the Listing Rules for listing of H shares in Hong Kong. The Chinese Initial Public Offer (IPO) has boomed since late 2005. This research project is

concerned primarily with how the SFC adapts to the increasing dominance of the Chinese issuers – at present making up over 50% of the market

- Insider Trading, Money Laundering and Corruption with a view to make recommendations to enhance the securities enforcement in the Hong Kong SAR. I wanted to research these areas to see if there was something Hong Kong could learn from the USA to improve our situation here.

Insider Trading, Money Laundering and Corruption I chose to carry out this practitioner doctorate in the style of my profession. My ontology derives from my early familial influences of family members being in the police and living in Government quarters. These were not highly paid positions. Investing in the stock market was a way to increase the money in the savings account to put down a deposit for a property of our own. It was also the need to survive in the highly competitive environment of Hong Kong. Such an upbringing influenced both my career path and my overall trust in the stock market. Justice and fairness are the key values I bring from my childhood. Ordinary people's hard-earned money deserves to be protected when they try to supplement their income through investments. I am fundamentally a pragmatist.

Pragmatism, on the other hand, asks its usual question.

> "Grant an idea or belief to be true," it says, "what concrete difference will its being true make in anyone's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms?"

The moment pragmatism asks this question, it sees the answer:

> "True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those that we cannot. That is the practical difference it makes to us to have true ideas; that, therefore, is the meaning of truth, for it is all that truth is known-as." (Slater on William James, 2009 p190)

Hong Kong has always been thought of as a commercial transit between East and West, a British colonial bastion from which emerged hugely successful banking and trading practices. With the handing over of the sovereignty of Hong Kong to the People's Republic of China (PRC) in 1997, it is still growing as a free port hub of commercial activity but with changing practices and approaches. I would state here

that the changeover has not detrimentally influenced the robustness of the financial security sector.

I am quite positivistic in my approach to reality being much more comfortable with how facts and figures interrelate than how human interact and the merits of different ideologies.. There are other types of specialists who research this side of the human behavior spectrum. I see the intention of laws is to help human relations in terms of keeping people from harming each other through legal regulation and enforcement: common law; statute law; secondary legislation; European law; the European Convention on Human Rights; tribunals and courts; the role of statutory agencies; statutory codes of practice as well as redress. The most important thing I can offer is rigour regarding the facts and accuracy I am presenting them.

Some principles which underpin civilization are ethics; human rights; fairness; reasonableness; equal treatment; harmonization; natural justice; consent and freedom. I see myself as disposed to these features of civilization in terms of what information we need to all remain safe, as civilization is a construct for safety, rather than changing mindsets and dwelling on the relational or lack of relational qualities in people.

I am an authentic pragmatist. I believe I do not have the capability to reflect on my own behaviour but I do have the ability to reflect on the value of information. I would say that I am more an 'informed person' than a 'knowledgeable' person and that I have learned from both content and professional experience which has always been about the application of rules and regulations rather than the creation of something innovative. To me fairness and accountability of systems such as the law are two pillars of society and compliance keeps us civilized. For the average citizen I like to see such things as transport systems running smoothly, trade running economically, utilities to be functioning for business to run smoothly so that I as a citizen have access to what I need. I want people to do their jobs well because systems become unsafe when they do not. I understand that trust here in systems is an important concept and I include some explorations of this in my knowledge landscape. According to Bowden (2016)[4]

[4] Bowden B (2016) "Civilization and its consequences" in *Oxford Handbooks on line*, Feb 2016online, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-30

"Civilization refers to both a process and a destination. It describes the process of a social collective becoming civilized, or progressing from a state of nature, savagery, or barbarism to a state of civilization. It describes a state of human society marked by significant urbanization, social and professional stratification, the luxury of leisure time, and corresponding advancements in the arts and sciences. The capacity for reasonably complex sociopolitical organization and self-government according to prevailing standards has long been thought as a central requirement of civilization."

Research and the implementation Challenge

For me all research has to be useful. My professional roles have all been focused on usefulness. Research is only useful if it is championed and acted on. I have the relevant experience to persuade implementation of any recommendations based on sound research to SFC through legislation. My experience with the Law Drafting Division where I spent the later part of my career with the Department of Justice is valuable. I was responsible for drafting all legislation in English and Chinese including amendments to Companies Ordinance regarding listed companies limited by shares. Depending on how this research progresses and what it reveals, I could approach the SFC on preparation of a Bill in English and Chinese to be placed before the Executive Council and would be available at any stage for drafting amendments and other stages needed for tabling and being put to the vote in the Legislative Council. My experience in the Law Drafting Division supplemented by my attendance of a Legislative Drafting course in London has helped me to develop the skill and technique in the interpretation of laws when comparison has to be made between the SFC's system and any other system and these skills would be at their disposal.

Since 1997, Hong Kong has become Special Administrative Region of the People's Republic of China. During the past 20 years after the handover, the following occurred –

- Six years after the handover, a broad restructuring and reform of the Securities & Futures Commission (SFC) was implemented in 2003. It is now over 10 years when the comprehensive Securities and Futures Ordinance (Cap. 571) and its subsidiary legislation has been in operation;

- Ten years after the handover, in 2008, there was the global financial crisis. At the onset, it was a United States (US) subprime mortgage problem by the Lehman Brothers Holdings Inc. Prior to 2008, the US was the leading issuer of Initial Public Offering (IPO) in terms of total value. Since that time, however, China including Hong Kong has been the leading issuer.

Hong Kong Stock Exchange (SEHK) is the gateway linking PRC and the international markets. Over 50% of the market composed of PRC companies. Among the 50 blue chips are the Hang Seng Index constituents, one-fifth being H-shares which are shares of companies incorporated in mainland China that are traded in Hong Kong.

The devil is in the detail

Attribution of this proverb is unclear but it was thought to come from a previous saying: God is in the detail. Both would apply to any complex law enforcement system as law can be interpreted for advantage or disadvantage and any gaps can provide that opportunity in addition to high level knowledge of the system. For the purposes of this document it is important to have an overview of all the systems and how they operate in order to identify and understand the anomalies and the implications of them: how they managed to happen and what has been done to address those which have already happened. Part of the task I gave myself was making the system transparent to the small and medium investor. For this reason I have put all the detailed information in Part 2 as it can be used independently of this document for small investors as well as facilitating navigation of the cases studies in this Part 2 for other readerships. This system that is presented in Part 2 has not gone under any particular changes since the beginning of HKSAR each with background as to when and why it was set up till 30 June 2017.

Summary

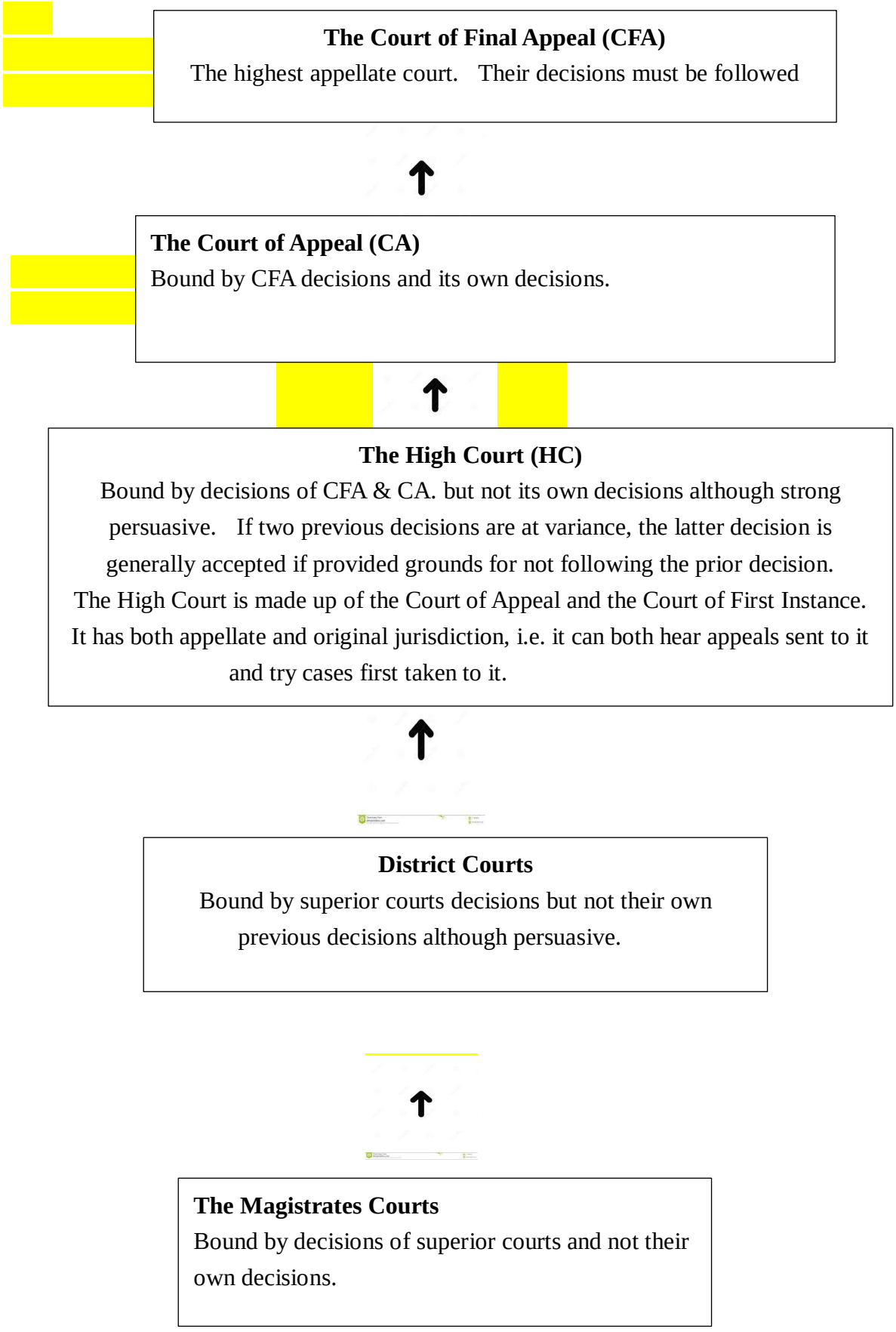
I have set out my motivations and desired outcomes in the particular context of Hong Kong in which the research has taken place and where its focus lies. I have also presented both my personal and professional interest in this area and my way of engaging with learning and which offers some explanation as my choice of research design. I have presented how financial regulation is challenging to navigate for the small investors as like all the most robust financial securities systems in the world, Hong Kong's law enforcement system is complex even for those involved

professionally in these bodies. It is recognized that the small investor or the public in general have to put their trust in the systems and those professionals as the complexities are beyond most people's understanding. The public shock comes when those systems collapse through human error or greed or over complexity and then it is the public who suffers the greatest fall out. It is in the national interest and in that of global economic health to keep these systems up to date and this is usually through system disruption as is the case of fraud of some kind. It is not unlike car theft. The manufacturers keep updating their designs to prevent theft of cars. Meanwhile those in the business of stealing cars develop new systems to hack or overcome the prevention measures with new ideas and techniques. From this perspective one might consider that crime plays a role in progress especially technological.

I include the following Figure 1 as an overview of The Court system to assist the reader through the rest of the document in how a case of fraud or neglect in relation to financial securities can find itself heading in different directions depending on each individual case. While examining a case or a complaint, decisions are made as to which route through the system is appropriate. During a more thorough examination of a case, previously unknown information may surface requiring another direction, or for example it may be revealed that individuals may have not only contravened regulations but conducted criminal acts and that would inform which bodies need to be involved and at what stage. This is why it is important to have the information in this Figure 1 and the details in Part 2 for quick access to remits and jurisdictions when testing the robustness of the system in the cases presented further on in this work. This is then followed by presenting relevant readings for this research which I found useful in different ways.

Figure 1

Chart of Hierarchy of courts in Hong Kong



Chapter 2

Knowledge Landscape

Rationale for the choice of literature

In research, the use of the term literature review is widely accepted as one which refers to journal articles and texts on academic discourses and discipline knowledge. What is contained in legal research is primarily statutes, legislation, regulation, case law, reports, evaluations which have to be contextualized as even in a global world there are multiple jurisdictions to be negotiated. This type of source has become more commonly referred to as grey literature (Auger 1998). I use the term knowledge landscape because this captures a whole range of sources including print and social media. My review comprises mainly legislation and case research. They are mentioned here and throughout the work rather than in a discrete and separated literature review. The knowledge I needed for this project resides also in cases studies reported in the public media. Reference is also made to the role of practitioner approaches to contributing to knowledge.

In order to clarify the roles of the different bodies and their powers, I refer to media and open reports when things go wrong the processes that come into play; by which body and the outcomes which close any loopholes. The outcomes of much of this desk research are presented as information, navigation and context in Parts 2 and 3 of this document. The methods I chose for this research is Case Studies (Part 1) so reference is made to the value of Case studies in this Chapter. Desk research and case studies into legal cases, and the outcomes when legislation was breached were carried out including which body was most involved and with what kind of cases. This is supported through annual reports and regulatory publications, Company reports and codes of practice, Hong Kong Law Journals, the Hong Kong Lawyer, financial newspapers & Securities & Futures Commission HK news and announcements for the latest court decisions.

At this stage it is important to focus on the systems and regulations in which decisions are made and communicated to the public relating to financial activities. Unusually for a doctoral level review I am also drawing on traditional sayings, proverbs and

little wisdoms as these are like mantras, lucky charms, compensatory retrospective reflections on lady luck, good or bad, which pervade any activity relating to chance and dreams of wealth and health as these give some insight into the cultural environment in which Hong Kong people invest. Those seeking happiness through wealth, those who just like to gamble, those who enjoy a small amount of risk, have their favourites. In the Hong Kong context many of these derive from Confucius[5] and several are now common in other parts of the world

Hong Kong cannot hide the fact that it has seen a great increase in gambling among the young and among the less privileged population. I have therefore included some commentaries on the difference between investing and gambling and I would suggest at this point that while there is an element of gambling in investing there is no investment in gambling.

Section 1: Legislation and case research

Legislation

This is comprised of Hong Kong Law up to 30 June 2017 on overall securities enforcement in Hong Kong. I have covered this extensively in Section 2, Appendices and throughout.

Case research (see methodology section) : I have included some sources here and others in the Methodology section

Online resources

These are key compliance resources and are updated through an official process. Such legal publications, regulations and statutory obligations are for the most part available on line for quick access by legal practitioners, the police and the public. They are fact checked and updated regularly by legal bodies and have to be accurate to the law. They can therefore be trusted.

Bilingual Laws Information System is maintained by the Department of Justice of Hong Kong SAR with official up-to-date information on all Hong Kong legislation[6]

[5] Confucius (479 -221 BCE) *The Analects* http://www.acmuller.net/con-dao/analects.html

[6] www.legislation.gov.hk

Hong Kong Legal Information Institute by the Hong Kong University Department of Computer Science and the Faculty of Law on Hong Kong case law[7]

Section 2: a practitioner approach

I have been a practitioner in the police and in law. I have been drawn to professions with strong regulatory dimensions because that is my neural diversity. I find safety in facts and confusion in reflections. However I have come to appreciate some of the thinking behind how critical reflection on what one does can help one improve and transfer experience to others. My way of improving my practice is by more technical knowledge and developing a mastery of facts. My transferring of knowledge to other people is the same, a process of transmission. Transmission teaching was the core teaching method of Chinese informed education for my generation. According to Xie *et al* (2018 p.1)

> "The *transmission instructional model* is a teacher-centered teaching and learning model in which the teacher's role is to design lessons aimed at predetermined goals and to present knowledge and skills in a predetermined order, and students' tasks are to passively acquire teacher-specified knowledge and skills (Guzzetti, 2002; Arends, 2012; Slavin, 2012) The model requires a fairly structured learning environment".

This model suited me as a child. I believe people need to know the facts. Facts may not be everything but they are to me.

I can say that while Schon's The Reflective Practitioner (1983, 2013) is possibly one of the best known books on reflective practice for professionals, I could not derive benefit from it as I found it confusing perhaps because I could not find its relevance to me and to my work in the law and regulatory professions. It makes multiple references to discourses I have never heard of in my professional environment. Trying to read it was for me like becoming tangled in webs of words and ideas and not knowing where it was going, like getting lost in a city without a map. His section

[7] http://www.hklii.org

entitled Emerging Awareness of the Limits of Technical Rationality (p.37-49) exploring why, in a complex age technical rationality it is not enough. , is something I can understand through observation and that there are limits to my own rationality, but then I find myself falling back to the safety of logic – fact and compliance keep us all safe and functioning because we know what to do and what is right and wrong. I trust my map. Reflection is something I can understand cognitively but cannot do. I respect other people can find it useful but I do not know of what benefit it can have for me. However I did find the introductory chapter on Nicolini's work on practice theory (2013) less confusing particularly his four reasons as to why practitioner research and theorising are important. I have selected the ones below as having a logic I get but again cannot do. Perhaps because compliance is the known and I have no idea how to navigate the unknown. The first reason Nicolini gives (p.6) for why practitioner research is important, is something I can relate to because it is about order (the bullet points are how they are presented in his work).

A practice based view of social and human phenomena is distinctive in that it:

- Emphasizes that behind all the apparently durable features of our world – from queues to formal organisations- there is some type of productive and reproductive work. In so doing it transforms the way in which we conceive of social order and conceptualise the apparent stability of the social world …

I have a great appreciation of order and of the necessity to maintain it. I have worked in law and order, statutory and regulatory bodies, applying the rules and regulations that maintain law and order and underpin our civilising institutions. I conceptualise that stability is held in place by laws that need to be followed. Where the laws come from have not been my professional concern, only their accuracy and the transmission of that accuracy and sanctions against contravening them. The fourth reason of Nicolini I can also relate to is this:

- Reaffirms the centrality of interests and power in everything we do

I would rather be more impactful as a facts person than lost in ways of thinking which could lead to disorder and chaos. Government bodies in a democracy are elected to keep everything functioning and everyone safe from disorder and chaos. Government bodies in more autocratic systems do the same. Perhaps the difference in systems of control lie in the variety of notions on individual freedom and rights and the balance

between the common good and the individual good.

The following item is the only one I can relate to in Nicolini's list of seven reasons for the importance of practice-based approaches to knowledge. It is the first on the list and I recognize something in it of value to my profession and my neural/cognitive diversity.

- A practice-based approach suggests that the basic units of analysis for understanding organizational phenomena are practices, not practitioners (p.7).

He goes on to qualify that statement with examples of what he means

> …the object of inquiry should be managerial and entrepreneurial practices, not managers and entrepreneurs; strategy making and sales practices, not strategists and sales persons; leadership practices, not leaders.

I believe those practitioners who work mostly with grey literature (reports, regulations, evaluations, policy guides etc.) are like archivists who are immersed in and guard the word of the laws which helps other kinds of practitioners and the public to have reliable information that is less mutable over time. This does not, in my opinion, require critical reflection. Other types of practitioners in this sector may benefit from practitioner approaches such as those who interpret the law like lawyers and barristers.
However, what I do appreciate, culturally and intellectually, is the value of cases as stories which can be effective as forms of communications of quite complex ideas. They convey information in black and white but at the same time use the context of everyday life as a lesson about the small and the big, the powerful and the less powerful, the good dragons who protect and the bad dragons who destroy and that the bad will not go unpunished and the good will be rewarded. This thinking is prevalent in all societies and is true for our traditions in Hong Kong. The next section look as some of those traditions.

Section 3: concepts fundamental to my research:

motivations for investing, the value of money, gambling and trust in a

cultural context

Motivations as to why people invest in the stock market and the amounts they invest in psychology from stocks and share being a form of gambling to it being more likened to a game of great skill like chess or Mahjong. I start this section on exploring the perception that those who invest have spare cash. Money invested in the stock market results in gains or losses. In the following, I have identified and contextualize the motivations of people who invest and consequently the impact which losses and gains may have on them and how the law may not be of much interest. Sometimes a person/an investor' state of mind or beliefs can make them less cautious or over cautious. This would impact whether they have paid enough attention to the prospectus of companies or securities guidelines. The less cautious are often those who fall into the category of small investor where they may believe in luck more than skill.

Money as a Symbolic Medium

Money, as a symbolic medium, is without value (Ganssman 1988 p.308, Ingham 2004 p.59) and is neutral. There are a number of sayings about money which, I suggest, we have all heard in some similar version or another: *Money is a good servant but a bad master. Money should be used according to our will. Money is a great servant if under your control.* There is also a universal understanding that taking control represents freedom of choice and that the choice to increase your wealth, if you succeed is an increase in the freedoms you can have. For the purpose of this thesis, I am interested in the choice to invest and why and what gives confidence to the investor and mitigates the chance of losses. If a right choice is made, it is either luck, sudden changes in the market in your favour or you are smart and informed about investment. When choice is involved then opportunity costs comes into play. Economists use the term *opportunity cost* to indicate what must be given up to obtain something that is desired. A fundamental principle of *Microeconomics* is that every choice has an opportunity cost and it can alter personal behavior. To play safe, investors do not put all their eggs in one basket as the old proverb warns.

Money and Hong Kong

Hong Kong is a huge commercial entity at the crossroads of trade in the Asia Pacific region with a highly respected stock exchange not least due to the legislation that

underpins the financial sectors practices. It attracts a considerable amount of local and international investors. Investors with money in HK$(HKD) can choose where to invest. They can choose to put their money in the stock market to beat inflation and get dividends higher than interest given by the banks. Shares are attractive because of liquidity, i.e. they can be bought and sold easily and cashed in quickly. My mother who was a keen investor always reminded me "never fall in love with or get married to shares". This advice is better than anything I have read in the literature. It comes out of experience.

Learn From Others' Mistakes

Chinese culture infused with Confucian principles and many of his teachings have passed from generation to generation as cultural memes of the wisdom of moderation in all things and duty as a route to happiness. The Analects of Confucius (ibid) state

子曰："三人行，必有我師焉。擇其善者而從之，其不善者而改之。"

If three are walking together, at least one can be my teacher.
Confucius continued "select the good qualities and follow, the bad qualities change [not follow]"

One cannot avoid all adversity. Adversity will happen in investment at some point. It is guaranteed. There are many advices giving types of guideline booklets and internet blogs on turning adversity into a learning opportunity. Learn from your own mistakes or experience - practical contact with and observation of facts or events. Learn by observation as stated by Confucius. Seeing is believing. My motto is to learn from others' mistakes/experience whenever possible. Life is short.

This project demonstrates how I learned from the mistakes in "An Overview of Securities Enforcement in Hong Kong" by Professor Howell E Jackson of Harvard Law School in a seminar on Financial Regulation relating to Hong Kong 2008 (Professor Howell E Jackson's Briefing Paper). It motivated me to address his errors.

This gave me some satisfaction as again from the Analects of Confucius (ibid) I found that Confucius' words of wisdom "溫故而知新" i.e. "gaining new insights through revising old material" worked for me. I did research not only to prove the misconceptions but also to revise and to update Professor Howell E Jackson's Briefing Paper.

Let Investors Beware

Caveat emptor Latin for "Let the buyer beware" is the contract law principle that controls the sale of goods. It is the customer's responsibility to act with due diligence and be cautious. The onus is on the investors to ensure that they are satisfied with the condition of the enterprises as stated in the annual reports when buying shares already listed in the SEHK. Similarly, the onus is on the investors to ensure that they are satisfied with the condition of the enterprises as stated in the prospectus of the IPO when subscribing to new shares. It is so easy to say that "buy at the lowest and sell at the highest" and strike while the iron is hot i.e. do something while the situation or conditions are right. It is also true to take precautions before it is too late and save for a rainy day

In the present world, many unpredictable key/global events that could affect the overall risk. The advice is to act promptly, before the share certificates become the "wall paper" in your house. Is there a way to guard against the unpredicted risk? This is probably the most frequently asked question and ways of guarding against such risk have ranged from the informed or wise to magical thinking. The following are more Chinese sayings that permeate our culture on which is it wise to adopt or a reminder of what happens when we do not; many deriving from Confucius:

:壯士斷臂 When the Warrior's wrist was bitten by a snake, it was cut off immediately to avoid spreading the body i.e. one must act decisively and can't hesitate. Throwing good money after bad is universally accepted as the fool's road but it does not stop it happening as investing in the stock market is a risk activity and for those addicted to risk who see investing as a form of gambling will not pay attention to old wisdoms.
In Sun Tze's Art of War (孫子兵法),[8] the strategy is speed (兵貴神速).
Accordingly, it is advisable to sell at any cost [to cut the Gordian knot. (快刀斬亂麻)] even at a loss.
The Hong Kong Stock Exchange is a major global player. It has 2,538 listed companies with a combined market capitalization of HK$47 trillion (HKEX Monthly Market Highlights January 2021). In the next section I look at its global position.

Choice of Stock Exchange in the Hong Kong context

8 Sun Tze's Art of War (孫子兵法), https://zh-classical.wikipedia.org

Why choose the Hong Kong Stock Exchange

The big three global stock exchanges are the Hong Kong Stock Exchange (SEHK), the US Stock Exchange and the London Stock Exchange. The Hong Kong Monetary Affair guarantees to exchange USD into HKD, or vice versa. . The UK Stock Exchange while it is considered reliable the risk is in the exchange rate. The dividend received and profit may sometimes not be enough to cover the loss after converting back into HKD.

Another consideration in favor of investing in Hong Kong is the political climate. Although in some areas the return of Hong Kong to China (in 1997) has been problematic, for the stock exchange it has been stable with a guarantee of fifty years unchanged until 2047. Hong Kong has a legal system based on English common law.

Investors often choose HK over the US Stock Exchange because they have more choice from the Main Board (established issuers that satisfy the SEHK's financial and track record) and/or from the Growth Enterprise Market (GEM) with lower listing eligibility criteria for small and mid-sized issuers. These, of course, include shares of Mainland enterprises listed in the SEHK. At the end of July 2016, among the 1,924 companies listed in the SEHK, 980 (51%) were Mainland enterprises comprising of Red chips (152) H share (233), Non-H shares (595).

Since November 2014, after the collaboration between the Hong Kong, Shanghai and Shenzhen Stock Exchanges, investors can make cross-boundary investment through Stock Connect and have the choice of buying shares listed in the Shanghai and Shenzhen Stock Exchanges. Every investor wants “transparency”, that is to be fully informed before making any investment decision. Hong Kong Lawyers in November 2014 on Hong Kong’s Regulatory Climate[9] states

> "Hong Kong has a robust system of financial regulations that was built on a firm British legal framework... particularly to retail customers or investors, be required to make good for that situation.”

[9] Hong Kong Lawyers Journal (2014) *Hong Kong’s Regulatory Climate* November 2014 http://www.sweetandmaxwell.com.hk/BookStore/showProduct.asp?countrycode=HK&id=2253&ptab=1&bookstore=0&g=x43t&ec=QSNBGDKTJJVZRUJQFVYJZAETCEGLPOCFIZCQJNVZCOYLXAZX

Therefore, on the whole, investors choose with confidence long/short term investments as well as subscribing their money for new shares listed on the SEHK (initial public offering IPO). Hong Kong has consistently and over time proved itself to have a reliable securities enforcement system. In an interview with the International Financial Law Review in September 2014[10], Mr. Steward [the then SFC Executive Director, Enforcement] stated

> "investors will have more confidence in financial markets, like Hong Kong's, that are effective not only in detecting and taking action against wrongdoers, but also in remediating misconduct."

The investors can rely on the prospectus and/or annual reports before making any investment decision. Case Studies show that the Securities & Futures Commission (SFC) has delisted practically all the "fraudsters" from the SEHK and has enough "weapons" or "tools" to help the investors to get the money back.

Equality or fairness in investing

Equality is often a term that is used synonymously with fairness. Mark Sheskin (2018) in "The Inequality Delusion" *New Scientist* (p.28-31) reports on his own experiments at Yale university and other similar research which indicate that humans are quite disposed to and accepting of inequalities if the inequalities are positive.

> "What makes inequalities not positive is unfairness. For example, if someone gets more money than me for doing more work which makes a greater contribution, I do not mind if I have a lower income for contributing less. What does matter is if that person gets a higher income for doing less and being incompetent."

In the financial market place, it is not about some people gaining more than others. It is about fairness in the process and the safeguarding against things like insider trading. Bodies like the SEHK ensure fairness in the system not equality. Case studies demonstrate that SEHK is an orderly informed and fair market to the issuers of whatever origin. There has been no preferential treatment given to the Chinese

[10] International Financial Law Review in September 2014 www.https://www.iflr.com

Enterprises. More established issuers that satisfy the SEHK's financial and track record, can apply to be listed on the Main Board. Small and mid-sized issuers can apply to be listed on the Growth Enterprise Market (GEM).

At the end of July 2016, the SEHK was the eighth largest in the world with 1,924 listed companies. Hong Kong had been shortlisted by Saudi Arabia's Aramco, state oil company. In Business News January 11, 2018 / Reuter it was reported:

> "Hong Kong, London, New York shortlisted for Aramco IPO: sources DUBAI/LONDON (Reuters) - Saudi Arabia has shortlisted New York, London and Hong Kong - singly or in a combination of two or even all three - for the international portion of the listing of national oil company Aramco. The shortlist means Tokyo, Singapore and Toronto are no longer in the running for what is likely to be the world's biggest IPO."

The Alibaba case demonstrates that no preferential treatment was given to the *e-commerce giant* IPO –an example of strict compliance of Listing Rules by SEHK. In the Headline Daily March 16, 2014, it was reported:

> "Alibaba, the China's e-commerce giant, decided to have its HK$100 billion offering in New York after Hong Kong turned down its request to change the listing rules to allow its founder and certain senior executives to nominate a majority of the board even though they hold only a minority of shares."

External influences

The Hong Kong Stock Market is affected by events which are non-Hong Kong predictable and unpredictable. The two most recent unpredictable events were Brexit (UK) and the election of Donald Trump as US President in November 2016 (USA).

UK BREXIT:

In the Hong Kong Economy of the South China Morning Post (Friday, 24 June, 2016, 6:07 am) with heading: **It's Brexit: Hang Seng Index plummets as Britain votes to leave EU in stunning referendum result.**

> "The verdict, which triggered a freefall of the British pound and turmoil on world markets, is a shocking turnaround after most polls had suggested Britons wanted to say in the EU"

This caused different but destabilizing messages through the financial sectors from waves of caution to panic buying or selling responses.

The US Presidency of Donald Trump In the Stock Talk of the South China Morning Post (Friday, 23 March 2018 9:08 am) with heading: **Markets plunge in China, Hong Kong as first salvoes fired in Sino-US trade war.**

> "Stock markets plunged in Hong Kong, Shanghai and Shenzhen as the two largest economies in the world fired the first salvoes of their trade war, putting the stability of global commerce at peril."

Such headlines and actions between two superpowers is unsettling for local and world finance and can create opportunity for manipulating the system by individuals for personal gain.

Section 4: Context of the law since 1997 and Trust

National Law

Several national laws of the People's Republic of China apply in Hong Kong by virtue of Article 18 of the Basic Law.

The Basic Law

The Basic Law of the HKSAR enacted by the National People's Congress in accordance with the Constitution of the People's Republic of China. It is akin to a mini-constitution for the HKSAR.

Statute Law is superior to common law.

The common law's most distinguishing hallmark is reliance on a system of case precedent/case law from all jurisdictions throughout the common law world. Article 84 of the Basic Law provides that the courts of the HKSAR may refer to the

precedents of other common law jurisdictions. In addition, the Court of Final Appeal and the Judiciary of the HKSAR have power to invite judges from other common law jurisdictions to participate in the judicial processes.
It is essentially judge-made law and is to found primarily in the judgments of the courts of the HKSAR and other common law jurisdictions. While it is flexible and adaptable, the doctrine of precedent often makes it difficult for judges to change well-established legal doctrines. If significant, rather than incremental, changes need to be made to the law, it is usually necessary to achieve these by way of legislation.

Engendering Trust

According to Krawinkler (2013 p.26)
"Establishing trust relations is a complex process. There are two layers to be taken into account: trustworthiness and trust. The first refers to morals (intentions and perceptions) and the latter to social interaction. Torsello (2008:p.98) notes that trustworthiness' relationality is less unlimited than the one of trust. According to him trust is the assessment of other people's trustworthiness."

Proper and robust regulations to prevent fraud and application of sanctions against fraud and fraudsters engender trust in investors. The law has to be seen to be done or trust is eroded and confidence undermined. Below is how the Securities Enforcement System by SEHK and SFC prevent initial public offering fraud and possibly sponsor failures from listing in Hong Kong Stock Market.

All issuers applying to be listed in Hong Kong are subject to the Hong Kong legislation, Listing Rules and Non-statutory Codes. There are two sets of Listing Rules: the Main Board is for established issuers that satisfy the SEHK's financial and tracked record and the Growth Enterprise Market for small and mid-size issuers. The most important part is the continuing obligations after having listed in SEHK. Both have similar continuing obligations.

Issuers must file application and disclosure materials with SFC via SEHK
SEHK is the front line regulator of listed companies. SFC pass its comments in writing to SEHK for it to raise with the applicant and its advisers without direct communication. Equal treatment irrespective of origin e.g. the description of red chip, H-share, or Non-H share is for statistic purpose not for SFC enforcement. Alibaba case (ante) is an example of Strict Compliance of Listing Rules by SEHK despite its size.

SFC as guardian of trust after listing

I am conscious that I have been writing in very positive terms about the SEHK, SFC and the legislation which supports trust in its practices. However. I am also cautious about how trust is maintained by SFC especially after listing. The observation by "*Positioning Hong Kong as an International IPO Centre of Choice*". 18 June 2014, paragraph 4.4.3, page 44 Financial Services Development Council[11] that the SFC has "repeatedly broken new ground by conducting 'surrogate' actions" on behalf of investors using its powers under sections 212 to 214 of the Securities and Futures Ordinance (SFO)",

This shows that SFC is seeking damages on behalf of the aggrieved investors. Indeed, during the interview by Hong Kong Lawyer Journal dated November 2014[12], the then Executive Director, Enforcement, Mr. Mark Steward talked about the SFC's Prescription -
"*We know that to have a confident, informed market with integrity, people who suffer loss or damage need to know that a remedy is available. SFC actively pursue civil sanctions to tackle not only the wrongdoing, but also the consequences of the wrongdoing*".

In order to do that, SFC has a wide area to cover namely
"to identify wrongdoers, to chase down assets and proceeds wherever they may be, to identify the nature and quantify the extent of damages or loss, to identify victims, to secure remedial outcomes as well as to ensure those who perpetrate and assist in fraud and misconduct, including those who help to hide it from detection, are made to pay for the costs of rectification."

Financial securities need to be in constant vigilance not only for events which arise in the moment but to anticipate ahead by looking at global political trends then trying to calculate what policies need enacting in the present or ready for future rapid response . The economic collapse in 2008/2009 resulted in many such global policies

11 Financial Services Development Council (2014) *Positioning Hong Kong as an International IPO Centre of Choice*", 18 June 2014 http://www.fsdc.org.hk

12 Hong Kong Lawyers (2014) *Interview with Mark Steward, Executive Director,* November 2014 www.hk-lawyer.org

and practices but the trust of the small investor was seriously challenged. Financial Securities deal with such multiple variables everyday not least individuals relationship with money, wealth and well-being.

Section 5: Methodology literature on why case studies and the value of them in research

Case studies are understood in different ways in different disciplines. In social science research case study can refer to the exploration of one individual, one group, one organization motivated by finding out more about the specifics such as the practices specific to that person or grouping which may surface generalities but the aim is to focus on the specifics. For example I am exploring factors of financial securities in Hong Kong which are likely to be specific to Hong Kong but this does not mean that in the course of the research common factors might arise relevant to other countries although that is not the intention. My whole research is a boundaried case study and within it I use 'case studies' to refer to legal case studies (see below).

According to Robson (2009 p.181-182)
"Whatever kind of case study is involved …there is always the need, as in any kind of research, to follow a framework of research design…The degree of flexibility will vary from one study to another…If, however, the purpose is confirmatory…then there is a place for some degree of pre-structure. There is an obvious trade-off between *looseness* and *selectivity.* "

Case Studies in legal research

To achieve the purpose and aims of my project as stated in the Introduction to the Context and Rationale, case studies can provide useful starting points for studying legal and regulatory matters.[13]

Legal case studies are really examples of how the law works in practice (its application) whereas the purpose of a case study mentioned in the previous paragraph

[13] https://rankingdigitalrights.org/wp-content/uploads/2015/02/RDR-Case-studies.pdf

explores the practices of a specific boundaried group for improvement. Both types of case study are narratives of real-life events. The Stanford Law School describes it as "an exciting innovation in law school teaching."[14]

Case Studies and Annual Reports are past records of events. Reading financial newspapers is the best way to get the latest court decisions and reports. This project cites the latest court decisions with special emphasis on the decision of the Court of Final Appeal, which are acted upon by subsequent courts. The decision of the highest court is binding on all courts as case precedents. This way one can understand the process and application of the law in practice.

Qualitative research on current cases from newspapers, the reported court case and case review/case commentaries is useful for illustration, demonstration and/or explanation of overall securities enforcement. It requires skilled interpretation using legal expertise which I provide. For this project, apart from reported court cases, cases related to Hong Kong listed companies reported in the newspapers were identified for analysis. The cases include mainly local cases because the project is about securities enforcement in Hong Kong. Overseas cases that have involved Hong Kong offenders or victims are also included for comparison. Newspaper searches enabled me to include not only major cases but also cases not caught in the criminal justice system e.g. Apex Horizon where Cheung Kong listed in the SEHK, controlled by billionaire Li Ka-shing, cancelled HK$1.4 billion sale of hotel after being notified by the SFC that the sales constitute an unauthorized "collective investment scheme". Since the SFC has not started legal proceedings to unwind the sale and the agreement, Cheung Kong avoids court action. The significance of SFC's action in this case is that SFC's proactive action gave time to the government to extend curbs to non-residential properties on 22 Feb. 2013.

Learning from Case Studies

I learned from the footnotes of Professor Jackson Briefing Paper as to how and why the misconceptions arose. I found that there were no case studies to refer to, to substantiate the claims being made.

One can say that this is how one can learn more about the investor's rights and how

[14] The Stanford Law School describes it as "an exciting innovation in law school teaching

http/law.stanford.edu/environmental and natural resources law policy program enrip/case studies

the overall securities enforcement in Hong Kong works by reading the relevant legislation. Case studies can make sense of the legislation as they are the legislation in practice/in action. However without case studies to illustrate and enhance understanding of the law in practice, many writings are descriptive or opinion pieces or regurgitating of the laws or regulations. The following are such examples

- Economic crime: A threat to business globally (2014) by PricewaterhouseCoopers LLP which is purely an Economic Crime Survey.[15]
- Supreme Court Regulation on Corporate Crimes dated 9 February 2017 by Baker McKenzie which is an explanation of a particular regulation.[16]

This is in contrast to Global Compliance News with significant case law concerning corporate Liability in Hong Kong. A corporate can understand better as to how to comply with the legislation by such case studies. They are essential learning devices for legal students and researchers as well as practitioners. In English law, the doctrine of precedent in common law is a legal case that establishes a principle/rule which is then used to inform decisions in future cases.

This is one of my key motivations for doing this research, to demonstrate how people can learn from other people's mistakes. Instead of waiting for adversity to hit them they can mitigate it. Investors can derive benefits from the reported court cases by reading the facts and avoid the traps previous investors have fallen into (the painful experience of these victims) and to know to what extent investors' rights are being protected in the stock market as well as how the overall securities enforcement in Hong Kong works to protect them and help them.

That is the advantage of going to law school. It has stood me in good stead. You can learn financial and commercial law through the legislation which helps to understand the complexities of finance and its regulation. I find case studies bring life to legislation which is why I enjoy doing this research project. Not everyone has the time, money or inclination to study law. Case Studies are about reading and learning from the facts of each case. They are good stories. Some of them actually amount to cautionary tales or moral conundrums. They are important and enjoyable vehicles of learning and of practical use. These cases are true stories that actually happened in

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[15] PricewaterhouseCoopers LLP (2014) *Economic crime: A threat to business globally: an Economic Crime Survey*. www.pwc.com

[16] Baker McKenzie (2017) *Supreme Court Regulation on Corporate Crimes 9 February 2017* www.bakermckenzie.com

real life. They are news reported in the media. These are not just stories or explanation but facts of life like gravity discovered by Isaac Newton. These can be used as direct supporting evidence. They are the Truth. They demonstrate how the court interprets the legislation. Moreover, in law, a case can be distinguished i.e. a court decides the legal reasoning of a precedent case will not wholly apply due to materially different facts between the two cases.

One of the most important legal cases in the West is by William Shakespeare, *The Merchant of Venice* in 1605, over 500 years ago. To demonstrate the gulf that can exist between the law and the practice of the law, Shakespeare created a drama to show how complex it is for the law to take into consideration the multiple variables and motivations in human behaviour and how the application of the letter of the law is about justice for the Merchant, the borrower. More informed readings in the 20th century of this play, highlight that it was not in fact justice for the lender either.

The borrower had taken a risk, a serious risk and borrowed money. The borrower seemed not to have invested wisely but the lender ended up the loser when he pursued what was owing to him. The character Portia's famous words (Act 4, Scene 1) capture something for everyone to think.

"The quality of mercy is not strained
It droppeth as the gentle rain from the heaven upon the place beneath
It is twice blessed
It blesseth him that gives and him that takes"

There is never much sympathy expressed for investors who are often seen as those who have money to play with or other people's money to play with, so not much has changed there really in 500 years, but if people are going to play then it is in everyone's interests that risk is mitigated through laws and regulation. If things go wrong not only does the investor lose: the investor's family, the reputation of the regulators; the reputation of the investment companies; trust in the market and so on.

The internet is full of market 'wisdoms' on investments from those who have been successful and most say the same things in different ways such as coming up with notions like the 10 commandments of investing. I have selected these from the Dividend Education website which gathers wisdoms from key financial players[17]

[17] https://www.dividend.com/dividend-education/the-ten-commandments-of-dividend-investing/

which resonate with me with regards to the investor's responsibility in the transaction.

These are from Peter Lynch who is estimated to be worth over $350 million dollars. He authors, books and runs a flourishing investment company.
"If you're prepared to invest in a company, then you ought to be able to explain why in simple language that a fifth grader could understand, and quickly enough so the fifth grader won't get bored."
"Behind every stock is a company. Find out what it's doing."
"Twenty years in this business convinces me that any normal person using the customary three percent of the brain can pick stocks just as well, if not better, than the average Wall Street expert."
"Know what you own, and know why you own it."
"If you don't study any companies, you have the same success buying stocks as you do in a poker game if you bet without looking at your cards."
"In the long run, it's not just how much money you make that will determine your future prosperity. It's how much of that money you put to work by saving it and investing it."
"Although it's easy to forget sometimes, a share is not a lottery ticket… it's part-ownership of a business."

Case Studies as stories/parables

Most people like stories and storytelling, from the parables of the Christian figure Jesus to the fairy stories of the Brothers Grimm to modern stories told in soap operas and film, to newspaper or magazine reports on scandals including legal ones. Such stories are enjoyed in part because they are about good and bad, overcoming the odds, the small person against the giant, human resilience and universal themes like love, suffering and justice (Gladwell 2014). We learn something from them. They make complex things simple. They are a means to share knowledge with everyone, not just the elite. Of course cases studies are the stories of the legal profession and in this case my selection of cases is based more on what is known as the parable. Parables are instructive. They are often moral tales illustrating dilemmas and right and wrong choices. They are often about justice and injustice hence why they are linked to religious figures. These case studies I have selected are instructive and are

https://www.dividend.com/dividend-education/41-inspiring-and-intelligent-investing-quotes/

about justice and injustice, about cheating or wrong doing and how justice comes about. At the moment the average member of the public sees that there is some large and complex guardian figure at work but does not know where its power comes from or how to summon it for help. I propose that case studies are not only used for establishing precedents in law but can also be considered as parables and used as instructive tales for ordinary people either to sustain confidence in investing or give guidance on how to summon help or both.

Summary

Looking through all these previous sections of the Knowledge Landscape I have had a dialogue with myself as a practitioner and an interested party about not only the internal and external variables at work for the financial securities sector but about human motivations for gambling and investing and mitigating disaster which is a combination of a robust safeguarding system on the one hand and people taking responsibility for their choices and accepting the risk that accompanies investing which is, some might say, a safer form of gambling. Cautionary tales or parables are one way to help communicate such ideas to the public in the hope that this will help to address individual responsibility when one invests and this can depend to a certain extent on an individual's relationship to control. Does it reside in external forces like God, Luck and Systems or in oneself?
This knowledge landscape acts as a contextual framework for the case studies starting in Chapter 3 which presents a more focused rationale for the choice of Case Studies, the sources used and the first set of cases.

Chapter 3

Methodology

Research Design and Implementation

This project is to provide an analysis on the current enforcement mechanism in detail. Accordingly, I have strived constantly to seek the latest materials through various

methods. In my discussion at the end 1 update the laws and changes since I first submitted this work for examination. In law, learning derives from knowing the law, experience and getting it wrong. As stated, cases studies are the most useful form of learning because they contain these three elements. Keeping up to date can often come from sources not within law. I have learned through media e.g. radio, TV, the internet, the press. It was a government TV commercial that alerted me to the setting up of the Financial Dispute Resolution Center when it stressed the advantage of the advantage of "Mediation First, Arbitration Next". The Financial Dispute Resolution Center is now together with Consumer Council under the heading of The Hong Kong Statutory Bodies. I learned of the securities enforcement of the Consumer Council whilst google-searching the Lehman Brothers. I sent emails to SEHK and SFC and I made telephone calls to Consumer Council and Legal Aid

The approach to gathering of literature that is relevant and traditionally called a literature review was expanded to embrace more than a traditional literature review. Some of what I accessed I have not dialogued with because they contain factual information and it is factual information that helps me to understand and highlight the different cases and check them against which body or legislation is being drawn on to pursue the case and arrive at fair decision. I am not an interpreter of case studies but a connector between the law and the practice of the law and someone who is able to select the cases of most value for the learning of the public and the investor.

The methodological approach I have taken is mainly Legal Research not to elicit subjective opinions but to explore legal documents, e.g. statutory laws, regulations and cases research. Subjective opinions do not play a role in research relating to this sector of law. What is of value are case outcomes of cases which have been brought and what they reveal about the laws that have been used to make judgments. Complaints by those who have brought cases also reveal where weaknesses and strengths might lie in the current legislature and also in the mindset of the investor. It was not my intention to statistically quantify cases and incidents, successes and failures but to look for the gap between the law and how it is understood by the public and what can be done to address the gap. However I hope that someone who has a different neural diversity to mine can take these cases studies and write fictionalized stories that can spread the learning to the public and small investor. This Chapter focuses on cases in Hong Kong and Chapter 4 focuses on cases involving mainly the USA and China.

Influences on arriving at a research design (rationale) including Ethics

I considered a number of influences on my choice of research design. These included ethical considerations, the nature of the sector, the aims of the work and intended impact, my own professional experience and view of what matters to me, my perspectives (my ontology), feasibility, accessibility and reliability.

The legal sector is rules based. It purports to apply the rule of law and separate truth from untruth. It monitors transactional trust and identifies, addresses and punishes transgressions. It is not an exact science but relies on a form of interpretation in relation to application in practice rather than the wider frames used in the social sciences and precedents when balancing evidence and action. I wanted to find a way to explore not the law itself or the public response to the law but what happens in the translation process between knowledge of the law and accessibility of people to the functions of the law and how it impacts on their life and rights. In my professional experience the public are confused by the law as it often appears that the law is not the same as justice. An important aspect of legal research is cases studies, statutes and regulations. I needed to check these areas in order to identify the gaps in communication and application. I believed that if I increased my knowledge in the law pertaining to stock markets I could then become a better translator for the public.

I also reflected on my own beliefs about knowledge. I am certainly influenced by my formative years and by my professional career to appreciate objective truth but experience has also taught me that there are many truths depending on context and interpretation even in the law. Often it is a matter of weighting, that is assessing mitigating circumstances and adjusting the regulations or legislation when new issues arise for example from the mass use of high level technologies where everyone has access to information but still do not have knowledge. The law has to be accessible to all but what is harder to access is how it actually works in application without researching case studies.

From an ethical perspective I believe there is a responsibility on the part of legislators to ensure the legislation can be understood both in word and in application. From a researcher perspective, I chose not to interview people but to collect my data from accessing publicly available documents.

In view of my background and experience, I did not feel it appropriate to be

questioning members of enforcement agencies, preventive teams, experienced practitioners and policy-makers for their views regarding securities enforcement in Hong Kong. Moreover, in their position, they would have been restricted in answering any questions and would have consistently referred me to the legal and regulatory documentation available for answers. Such documents are the distilled outcome of extensive and closely argued discussion informed by research which only become legislation through consensus of experts from a range of disciplines. As I was seeking for anomalies in the system and not compliance or interpretation, there is nothing I believed could be addressed by interviews. Since the statistics and data as well as court cases are public documents, there is no statutory restriction in their exposure. Therefore while interviewing people such as legislators and lawyers was likely to give me accounts either boundaried by the laws themselves and by confidentiality in terms of discussing any cases, interviewing members of the public would most likely give me cases personal to them and interpreted through their own lens and that lens likely to be obscured as to the actual law and what happens when it is applied. I also considered the following which I had highlighted in my original proposal to the university's ethics committee:

Conflict of interest

I do not have any connection with any securities enforcement agencies in Hong Kong or the United States. I am totally independent (Priscilla Sit 2014, Middlesex University Research records see below).

> "It is submitted that there is no conflict of interest in my case in order to achieve the aims and purpose of the project because * although I have worked with the Hong Kong Police and subsequently the Department of Justice yet I left the Department of Justice and the Hong Kong Government in 1992
> * although I have worked with the Hong Kong Law Society, a Hong Kong Regulatory Authority, I have never worked with the Securities and Futures Commission. * Moreover, I left Hong Kong and joined the Office for the Supervision of Solicitors in the United Kingdom in 1999."

Sensitivity of the research area

"A wide range of government information is already available through GovHK. More detailed information of individual departments can be found in their respective home pages. It is submitted that the research area is not at all sensitive.

The gathering of information, statistics and data is governed by the Code on Access to Information introduced in March 1995 to serve as a formal framework for the provision of information held by government bureaux/departments. In December 1996, the Code applies to all government bureaux/departments.
Among the Public Bodies in the Code, those applicable to this Project are Consumer Council, Financial Reporting Council, Legislative Council Secretariat, Privacy Commissioner for Personal Data, and Securities and Futures Commission. The Code does not apply to the Hong Kong Stock Exchange which is a listed company in the Hong Kong Stock Exchange.
The Code sets out what information must be made available to the public routinely and lays down rules for dealing with requests for access to other government information. It is supplemented by Guidelines on Interpretation and Application to help departments comply with the Code.
Requests for access to information held by departments should be made to the Access to Information Officer of the relevant department. The Code website provides hyperlinks to other websites.

Information contained therein may be re-disseminated or reproduced, provided such is for non-commercial use. Prior written approval from Constitutional and Mainland Affairs Bureau is required for commercial use."

The information provided is for reference only. There is no express or implied warranty as to the accuracy of the Government's information. Users are responsible for making their own assessments of all information contained in or in connection with the Code website. Accordingly, it is advisable to verify the information and seek independent advice before acting on it. Furthermore, the Ombudsman Alan Lai Nin found that the Government Records Service is not transparent enough in its operations and there is a lack of measures to ensure that important records are not destroyed." (Priscilla Sit 2014 Middlesex University Research records).

Copyright of material and confidentiality

As to the issue of copyright, the Copyright Ordinance, Cap. 528 has been duly observed. Under the Personal Data (Privacy) Ordinance Cap. 486, it is statutorily obliged that all the data collected is strictly confidential and will only be used for research purpose. All data will be destroyed after the Viva.

There was also the consideration of the literature review or knowledge landscape that I would access. As stated earlier my literature goes up to 2013 namely because of its significance as the tenth year when a comprehensive Securities and Futures Ordinance (Cap. 571) and its subsidiary legislation commenced operation and the 20th anniversary of the listing of H shares. As there was also a break in my studies I have updated to 2017 the literature where appropriate in my conclusions chapter.

My final consideration was my own professional experience. I am from Hong Kong and I have spent many years working with cases and documentations both in the legal profession and law enforcement. Like many citizens of Hong Kong, I am interested in stocks and shares which was not my legal specialization. I could use my interest as part of my motivation and my professional skills and boundaries to explore complex regulation and its application in order to translate it to the public of which I am a member.

After all these considerations, I decided in the end to remain with researching the legislation, its application and case studies in the public domain.

Research Activities

Note: the following cases presented in this Chapter and Chapters 4 are in summary form. More details are contained in Part 3 of the document. Part 2 of the document presents details of all the regulatory bodies and their roles

Case Studies: See Part 2 for guidance on court functions and jurisdictions

Clarification of the bodies involved and impacts on practice or development of processes emerging from each case

The approach was to draw on case studies from a variety of sources and to explain their relevance to the aim of my project, that is, to assess the robustness of the regulation in practice. This did not require me to thematically analyse cases and stories but to point out the law/regulation being tested and what the outcome demonstrated in terms of the strengths or weaknesses in the processes. I begin by listing the range of sources from which the cases were drawn.

Sources

The following are the sources from which the legal data were drawn:

Hong Kong Laws

Generally, they are composed of the Basic Law, Statute Law and Common Law.

The Basic Law ensures that the legal system in the HKSAR will continue to give effect to the rule of law by providing that the laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any subsequent amendment by the HKSAR Legislature.

Statute law is written ordinances passed by the legislative procedure in the Legislative Council of the HKSAR and become the Laws of Hong Kong (details of each can be found in the Bilingual Laws Information System)

Common law and the rules of equity found in the judgments of the superior courts in Hong Kong and other common law jurisdictions since at least the 15th century, established in detail the legal principles regulating the relationship between state and citizen, and between citizen and citizen. There are now some hundreds of thousands of reported cases in common law jurisdictions. These have now been underpinned by provisions in the Basic Law.

Statute-giving power

Non-quantifiable information is accessed such as statute-giving power because working with the Hong Kong Law Society made me understand that all regulatory bodies, such as the Securities & Futures Commission (SFC) of this project, their power is limited by SFO. Their power is derived from law as expressed in legislation and the judicial decisions made by independent courts.

The Doctrine of Precedent/Doctrine of Stare Decisis

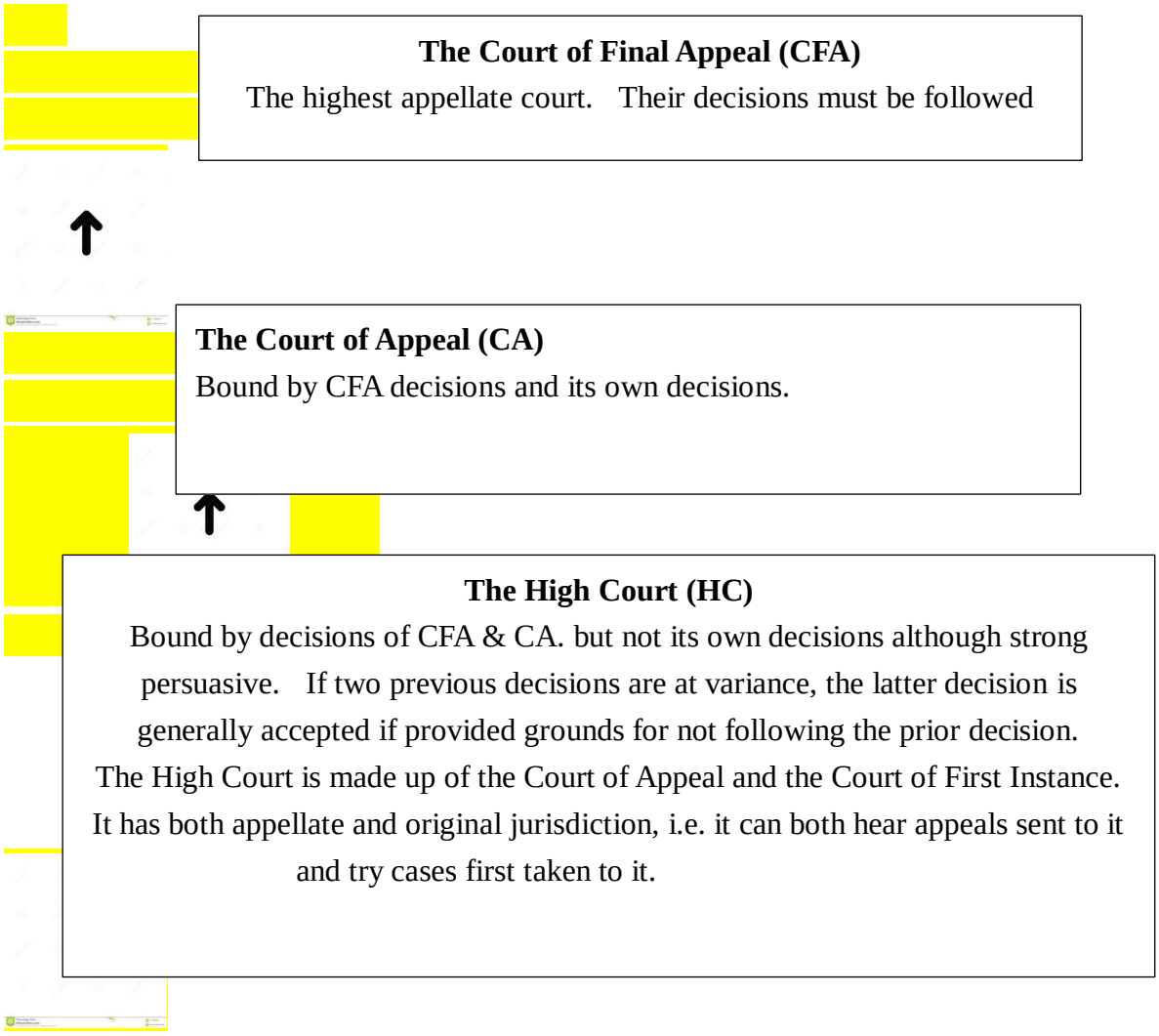
The most distinguishing feature of common law is the reliance on the doctrine of precedent when making court judgments. It is not restricted to judicial decision generated within Hong Kong but case law from all jurisdiction throughout the common law world (Article 84 of the Basic Law). Its basis is that decisions of a higher court is binding on a court below it. This is a fundamental feature in the Hong Kong legal system – the policy of legal certainty.

Hierarchy of courts in Hong Kong See Part 2 for full guide.

Figure 1 at the end of Chapter 1 reproduce here for ease of reference -

Figure 1

Chart of Hierarchy of courts in Hong Kong



They are the Court of Final Appeal, the Court of Appeal and the Court of First Instance, the District Court, the Magistrates' Courts governed by Hong Kong Court of Final Appeal Ordinance (Cap 484), High Court Ordinance (Cap. 4), District Court Ordinance (Cap.336) and Magistrates Ordinance (Cap. 227) respectively.

Hereunder are the Tribunals affecting this project
Small Claims Tribunal under the Small Claims Tribunal Ordinance Cap.388 hears minor monetary claims involving amounts not exceeding $50,000.
Market Misconduct Tribunal (MMT) conducts civil proceedings under Part XIII or XIV of SFO where no criminal prosecution is recommended by the Department of Justice. SFC has direct access after obtaining the consent of Secretary for Justice. A finding or determination of the MMT may appeal to the Court of Appeal.
Securities and Futures Appeals Tribunal under the Securities and Futures Ordinance (Cap 571) chaired by a High Court Judge dealing with appeals against SFC's disciplinary action decision. Its decision can be appealed against in the Court of Appeal.

Doctrine of Stare decisis **[to stand by things decided]**

Court of Final Appeal (CFA)
Vertically = the highest appellate court. Their decisions must be followed.
Horizontally = in *A Solicitor v Law Society of Hong Kong* [2008] 2 HKC 1, the Court of Final Appeal confirmed that the common law continued to apply in Hong Kong after the resumption of Chinese sovereignty. CFA can choose not to follow Privy Council's decision and to branch out after carefully examining developments in fraternal common law jurisdictions and made a decision what considered to be the best for Hong Kong jurisdiction.

Court of Appeal (CA)
Vertically – Bound by the decisions from CFA.
Horizontally - Decisions are binding on all other courts and by its own previous decisions unless it appeared right to do so.

The High Court (HC)
Vertically – Bound by decisions of CFA & CA.
Horizontally – Not bound by decisions of HC although have a strong persuasive authority. If two previous decisions are at variance, the latter decision is generally accepted if it provided grounds for not following the prior decision.
The High Court is made up of the Court of Appeal and the Court of First Instance. It has both appellate and original jurisdiction, i.e. it can both hear appeals sent to it and try cases first taken to it.

District Courts

Vertically – Bound by decisions from superior courts.

Horizontally - Not bound by their own previous decisions although persuasive.

Magistrates courts

Vertically – Bound by decisions from superior courts.

Horizontally - are not bound by their own decisions

The ratio decidendi/reason for deciding'

The ratio is the important part of a judgement as far as case law is concerned. This is the part that is binding on subsequent cases where the material facts are the same. Any part of the judgement that does not from part of the ratio is called obiter dictum or ‘a statement by the way' and does not form part of the binding precedent.

The cases selected for learning opportunities for the public

Research on current cases from newspapers together with opinions and views, the reported court case, legal research and case review are useful for illustration, demonstration and/or explanation of securities enforcement. It requires informed evaluation using legal expertise which I provide. For this project, apart from reported court cases, cases related to Hong Kong listed companies reported in the newspapers were identified for comments.

The cases are presented and as close as possible to the following system

Selection
Who is involved
The sequence and lines of responsibility
The impact
Comment

I concentrated on newspaper searches up to 2013. The cases include mainly local cases because the project is securities enforcement in Hong Kong. Overseas cases that involved Hong Kong offenders or victims were also included for comparison. Newspaper searches enabled me to include not only major cases but also cases not caught in criminal justice system e.g. Apex Horizon where Cheung Kong (SEHK001), controlled by billionaire Li Ka-shing, cancelled HK$1.4 billion sale of hotel after being notified by the SFC that the sale constitutes an unauthorized “collective investment scheme”. Since the SFC has not started legal proceedings to unwind the

sale and the agreement, Cheung Kong avoids court action. The significance of SFC's action in this case is that SFC's proactive action gave time to the government to extend curbs to non-residential properties on 22 Feb. 2013 (South China Morning Post 13 May 2013).

The Case Studies Hong Kong

The following cases highlight for the public the **responses made in Hong Kong to international cases that affect or affected shareholders in Hong Kong** which put in place steps to ensure investors are protected from future weaknesses.

Corporate Fraud vs Making Bad Investment Decision

Case 1

Lehman Brothers

Lehman Brothers Holdings Inc**.** listed in the New York Stock Exchange was the fourth-largest investment bank in the United States with 25,000 employees worldwide and had been operational for 158 years. On September 15, 2008, the firm filed a bankruptcy protection. Lehman was the largest victim of the U.S. subprime mortgage

Investment Decision

In 2003 and 2004, with the U.S. housing boom well under way, Lehman acquired five mortgage lenders. Lehman reported record profits every year from 2005 to 2007. In February 2007, the stock reached a record giving Lehman a market capitalization of close to $60 billion. Lehman's bankruptcy led to more than $46 billion of its market value being wiped out and induced global financial crisis in 2008.
The creditors but not the shareholders were protected.

How did the Securities Enforcement system help the Hong Kong investors who bought the Lehman-Brothers-related products?

Active Players

POLICE

There were District Court cases investigated by Police and prosecuted by the Department of Justice found in the Annual Reports of Department of Justice - HKSAR v Chu Lai Sze HCMA 527/2010

HKSAR v Cheung Kwai DCCC526/2010 and HKSAR v. Tai Ching DCCC527/2010'

CONSUMER COUNCIL

Consumers may also apply to the Fund directly for assistance. The Fund granted assistance to four Lehman Brothers related applications. (Excerpted from Consumer Council Annual Report 2012-13)

HKMA & SFC: IMPACT & RESPONSE

The SFC press release 22 July 2009 revealed that "SFC, HKMA and 16 banks reach agreement on minibonds"

The banks repurchased from investors the Lehman minibonds which had become worthless.

The SFC and HKMA decided not to take any disciplinary action.

Post-crisis financial product conduct reforms -

The Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance was gazetted and came into operation on 13 May 2011 whereby **documents offering structured products (such as the Lehman minibonds) to the public must be authorised by the SFC unless the offer is made to "professional investors".**

The purpose behind is "Investors must be fully informed".

Comment: This was an important and rapid response to keep the trust of investors and the public in the system of safeguarding and a call for organizations and investment companies to commit to fully informing the public on risk. What emerged was a call for increased accountability and transparency which has been put in place to avoid any repeat of a financial collapse although as has been seen very recently with the COVID 19 pandemic, safeguards can only go so far and can only be as good as their anticipation and preparedness of a country for global disasters. Keeping one's ship afloat often depends on keeping the other ships in the fleet afloat. .

Case Studies after the legislation

Case 2

APEX

SFC news and announcement of SFC dated 13 May 2013 available at news and announcement of SFC website re "Pearl Wisdom Limited agrees with SFC to unwind sale of The Apex Horizon hotel units".

Cheung Kong (Holdings) Limited listed in the SEHK, Pearl Wisdom Limited and others (Cheung Kong) recently **entered into an agreement with the SFC to unwind the sale of hotel room units after SFC alleged that the offer to purchase the hotel rooms was an invitation to acquire an interest in or participate in a Collective Investment Scheme in which case purchasers of the hotel room units were not provided with the necessary information.**
Cheung Kong disagreed but agreed to unwind the sale of the hotel room units after SFC informed the Cheung Kong that it intended to commence proceedings under section 213 seeking orders to unwind the sale and return all deposit moneys and part payments to purchasers.

Although "Lawyers Call for SFC to explore criminal probe into Apex deal by South China Morning Post dated 19 May, 2013 stating -

"A spokeswoman for the department [Department of Justice] confirmed that it had not been informed of the matter, while reasserting its authority."

The SFC "*declined to say if it would pursue a criminal investigation*."
Yet as the case was never placed before the Court, there was no court decision as to whether or not the sale constituted collective investment scheme as alleged by SFC.

Comment: here the SFC acted on its new policy post the crash through stopping any further investment by unwinding the sale preventing financial losses for investors. However it did not proceed in this case to criminal charges. In this case we can see that the response to the Lehman brothers issue was constituted in a policy which was enacted. It was yet to be seen if such cases could be liable to criminal charges being brought. The stopping of the sale may have been sufficient in this case. An outcome of the SFC policy post Lehman brothers with regards to minibonds is now highlighted by 16 banks collaborating on repurchase schemes which was for many commentators impressive.The then Executive Director, Enforcement, Securities and Futures Commission, Mr. Mark Steward when interviewed by Hong Kong Lawyers in November 2014 revealed that it was made as a result of SFC's 'threat'
"to remove the securities licences of any bank that refused to sit down and hammer out a deal. This facilitated the 2009 negotiations, which resulted in bankers repaying

retail investors most of the money they had put into minibonds, structured products linked to Lehman Brothers."

Case 3

BITCOIN

Since the middle of 2010, Bitcoin has undergone rapid growth to become a significant currency both on and offline, some businesses on a global scale began accepting bitcoins in addition to fiat currencies.

SFC response:

On 11 December 2017, SFC issued a reminder on bitcoin futures and other cryptocurrency-related products in circulation.
Bitcoin Futures are regarded as "futures contracts" under the SFO. Futures which are targeted at Hong Kong investors without SFC licence or authorization may constitute a criminal offence under the SFO irrespective of whether the service provider is located in or outside Hong Kong.

Comment: At the time of doing this research. Bitcoins were a fragile market and beyond some of the legislation and expectations in place for standard banking and financial institutions' practices and compliance. SFC responded by bringing the Bitcoin Futures in line with compliance. This was a significant step towards confidence building in the new arrival that did not use traditional monetary exchange but which needed to abide by the rules and safeguards. For many small investors it was to be avoided due to its instability but for a younger entrepreneurial generation it holds some appeal and is better understood as they are a generation 'plugged into' virtual worlds where virtual currency makes sense.

Recently, a variety of startups have used the Bitcoin ledger or Bitcoin-like technology as a platform to provide a variety of services, such as settlement of securities. (NASDAQ is working on such an application [UKG, 2015]) or inter-bank settlement of fiat currency (Ripple currency exchange net reports that 10 of the top 50 banks have an active integration for payments and settlement (Athey et al, 2016p.3)[18]

[18] Athey, S., Ivo,P., Sarukkai,V. and Xia,Jing (2016) *Bitcoin Pricing, Adoption and Usage: Theory and Evidence,* SIEPR Stanford Institute of Economic Policy https://siepr.stanford.edu/sites/default/files/publications/17-033_1.pdf

The authors go on to remark that "Bitcoin transaction volume is associated with one-time users" (2016 p.23) Update: bitcoin has started to become more accountable to the safeguards of national and international financial securities with global legislation likely in 2021.

The System

One of the major concerns of the compliance system of the Hong Kong stock market is ensure every investor is fully and properly informed before making any investment decision. In order to achieve that, all market conducts must be properly regulated with serious sanctions for breaches, and this must be seen by the general public, from which the confidence of the public in making long term or short term investments could be built. Whenever a misconduct is found and harm is done to the investors, their major concern must be how to get the money back. Prevention is better than cure [as the idiom says]

SFC has proved to be a guardian of trust after listing by court cases showing that section 213 of the Securities & Futures Ordinance (SFO), is a very strong "weapon" available to the SFC to sanction the misconduct and to remedy the loss of the investors under two categories.

The first category is False and Misleading Information in or Untrue Initial public offering (IPO) prospectus

Case 4

Hontex International Holdings Company Limited (Hontex)

During the interview by Hong Kong Lawyer in November 2014, Mr. Steward talked about Bringing Home the Actual Cost of Misconduct in Hontex.
The SFC
"has pursued remedial measures that require perpetrators and victims to come together to resolve what has occurred…It brings home to the community the actual cost of misconduct. It also holds wrongdoers accountable for their misdeeds in a way that criminal prosecutions do not. Paying a record fine to the government is not a good way of recognising the moral culpability of misconduct. In fact, it's a way of hiding or obscuring the moral culpability of wrongdoing."

Mr. Steward said
"In effect, the company and its victims had to come together to resolve what had occurred. Of course, the company is no longer listed in Hong Kong but nonetheless for the majority shareholders and for the directors of the company, it must have been a salutary experience to convene a meeting that was constituted by the victims."

Apart from Hontex, its IPO sponsor was disciplined
"Mega Capital (Asia) Company Limited, for inadequate and sub-standard due diligence work on the Hontex IPO and fined it HK$42 million" quoted from SFC News and announcements dated 22 Apr 2012.

Comment: This is a demonstration of the constant vigilance of the SFC regarding Hong Kong and any country's systems which want to attract investment. The SFC demonstrated that it was prepared to intervene to enforce compliance regardless emphasizing this through disciplining IPOs and their sponsors and forcing them to carry out due diligence before engaging in sponsorship. Untrustworthy companies sponsored by those with good reputations destabilize trust in the market. Claiming ignorance is not a defence that will stand up.

Case 5

Qunxing Paper Holdings for Misleading Prospectus Disclosure (Qunxing)

SFC news and announcement dated 7 February 2018 stated that "*Court orders Qunxing and former directors to compensate investors over disclosure for false or misleading information. About 27,000 shareholders were entitled to compensation.*"

The second category is Insider Trading

No one can make a profit by using undisclosed **price-sensitive information (PSI)**
Insider trading is one of the six types of market misconduct which SFC may either bring the case before **the Market Misconduct Tribunal or court**.
Insider dealers are required to pay to the counterparties the difference between the value of the shares on the day of the transaction and the actual transaction price.

Comment: This is an aspect of the investment world which can be more challenging

to monitor. However the penalties are high professionally and financially if caught. Insider trading cases going to court seem to be rare as the SFC sanctions may be sufficient in some cases and not others - see next case. Another view might be that they are handled internally and not transparently in some cases. Strict monitoring has to be put in place as corporates become liable for not having them in place. This reduces the chance of internal resolutions being attempted which in turn increases transparency and trust in the system.

Case 6

Managing Director of Morgan Stanley Asia Limited

HKSAR v Du Jun (DCCC 787/2008)
Du Jin, was ordered, after conviction, to restore the investors to the position they had before the insider information was known to the market. There is no class action in Hong Kong. Du Jin's fraudulent act affected multiple investors and this can result in multiple actions. SFC's application helps to avoid the multiple actions. SFC's powers to seek compensation for investors by Charlton's Law[19]'

"**Order for former Morgan Stanley MD to pay HK$23.9 million to Investors affected by his Insider Dealing"**

This is the first restoration order under section 213 made by the Hong Kong courts in insider dealing case

"where the unwinding of a transaction is not possible or desirable, wrongdoers to compensate their victims financially" "to pay to the 297 investors the difference between the actual price at the investors sold the shares to Du and the price at which the investors could have sold the shares had the price sensitive information been made known to the market at the time" (Re-examination of Section 213 of the Securities and Futures Ordinance[20])

Comment: Compensation rules have to be clearly defined and in this case it was understood that investors would be compensated without loss. The challenge would lie if bankruptcy were declared. Class action is how many countries increase pressure to be compensated and it shares the legal fees which can be crippling.

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[19] Charltons Law Firm SFC's powers to seek compensation for investors https://www.charltonslaw.com/

[20] Re-examination of Section 213 of the Securities and Futures Ordinance athttps://www.lexology.com/library/detail.aspx?g=56934251-bfdc

Case 7

New York-based asset management company with no physical presence or employees in Hong Kong

SFC alleged that Tiger Asia made use of PSI in relation to placement of shares in December 2008 and January 2009, and made a profit of HK$38.5 million in its dealings in those shares.
On 30 April 2013, **the Court of Final Appeal (the highest court in Hong Kong**), made a landmark ruling, upholding the **SFC's right to seek compensation**, under section 213 against Tiger Asia, **without first having to prove the guilt of insider dealing or other malpractices**
On 20 December 2013, court orders under section 213 –
Compensation of HK$45,266,610 to 1,800 investors in Hong Kong and overseas being the difference between the actual price of the shares sold by Tiger Asia and the value of those shares, taking into account the inside information known to Tiger Asia, as assessed by expert evidence.

Case 8

Lawyers

Solicitors, Mr Eric Lee Kwok Wa and Ms Betty Young Bik Fung case. D**etails** in APPENDIX ONE quoted from **SFC Press Release 15 Jan 2016**
The decision of the Court of First Instance was considered as "Landmark Decision expands insider dealing regime" to "insider dealing in securities listed overseas" (Mark Johnson re Young Bik Fung(2016)[21]

Overall Comment**:**

I see these cases above as parables which represent the regulatory bodies being alert and responding, on behalf of the little investors as well as the big investors, to those who would do harm to people, systems and reputation. Like religious parables, they send out warnings of straying from the right path; they demonstrate the way to reward is compliance to the rules and help people no to be cheated. Often when the small investor reads the case in a newspaper, for example, they are often not aware of the complexities behind the case nor what it means to them as investors. The cases show

[21] Mark Johnson re Young Bik Fung (2016) (HCMP No 2575 of 2010) on 15 January 2016.

to the small investor that the system does not tolerate weaknesses and uses such cases to attend to where the system is vulnerable, much like finding leaks after pipes have been frozen. They are sometimes in the walls or under the flooring.

Moving on to Chapter 4, I look at case studies relating to Chinese enterprises and to those of the USA. The people of Hong Kong and their institutions are still transitioning to the return of Hong Kong to China which involves long periods of negotiation and adjustment. Chapter 4 looks at action taken which inspires confidence in Hong Kong investors that Chinese companies come under the same strict rules without exception. This in the context of residual anxiety in some people that China will interfere with the smooth running and existing compliance of Hong Kong as an independent, thriving, respected global financial hub. or will be treated as a special case because it is so powerful but as the following cases demonstrate Hong Kong regulations' audit and enforcement respond with equal robustness no matter how big or powerful the investor. This can be seen with later cases relating to the United States. These global players are presented into a separate chapter (chapter 4) for ease of access as the cases are longer and more detailed.

Chapter 4

Handling of Powerful Global Players

Hong Kong is a small but thriving centre of financial activity which is now part of a far greater entity, China. The Hong Kong Stock Exchange is trusted worldwide for its attention to financial regulation and enforcement. I believed it would be of interest to investors, particularly small investors, to see that Chinese companies, like any other powerful players, have to abide by the same regulations and undergo the same enforcement if found to be contravening the regulations.

1. Chinese Enterprises: Evaluation of the complex position in Mainland enterprises citing cases

Description

Historically – 2 models for People's Republic of China (PRC) companies to list on the Hong Kong Stock Exchange (SEHK):

• Directly via an H share listing
• Indirectly via a red chip listing

For the purpose of quoting statistics, since 1 January 2012 the Mainland enterprises listed in SEHK are classified into three categories:

Red chips enterprises – shares of enterprises incorporated outside of mainland China and are controlled by Chinese entities.

H-share enterprises - shares of enterprises incorporated in mainland China and approved by the China Securities Regulatory Commission for listing in Hong Kong

Non-H share enterprises – shares of enterprises incorporated outside mainland China and are controlled by mainland private individuals.

2013 was the 20th anniversary of the listing of H shares, the Hong Kong-listed mainland Chinese enterprises. The following is information regarding the listing of H-shares

General background

On 17 June 1993, SEHK announced amendments to the Listing Rules for the listing for H shares in Hong Kong.

On 19 June 1993, the China Securities Regulatory Commission (CSRC), Shanghai Stock Exchange, Shenzhen Stock Exchange, Hong Kong's Securities and Futures Commission (SFC) and SEHK signed a memorandum of understanding on Sino-Hong Kong regulatory cooperation in the Great Hall of the People in Beijing. The purpose was to increase investor protection, ensure compliance with stock market-related rules and promote mutual exchanges of information and cooperation. In short, the door was formally opened for the listing of Mainland firms in Hong Kong.

Nine state enterprises were approved to list in Hong Kong on 6 October 1992. Tsingtao Brewery was the first to list in 1993. The second batch was in 1994 mainly from heavy industries such as energy, transport and raw materials.

SEHK had no involvement in the picking of the companies. SEHK understood the selection at that time took into account the readiness of the enterprises in terms of their quality and structure, their business prospects and the location of the company. After that the regulator felt the intermediaries and the market had developed a set of criteria to identify the more mature candidates for listings in Hong Kong and hence the selection process was gradually handed over to the market. At that time, no other exchange outside the Mainland had thought of attracting Mainland enterprises because the Mainland had no company or securities law at the time. **The Mainland**

enterprises have to comply fully with Hong Kong listing requirements, just as any other Hong Kong-listed company.

Why was SEHK interested in starting H-share listings?

SEHK was interested in starting H-share listings because of the opening up of the Mainland economy (the Open Door policy began in 1978) held the promise of a new stream of listing candidates, and the Mainland side was interested too.

During the 1980s, Hong Kong manufacturer listing applicants had been investing in Mainland operations, some Mainland enterprises had set up in Hong Kong, and there had been the first Red Chip listings (under foreign holding companies). Eventually, the idea emerged to list Mainland state-owned enterprises (SOEs) directly. The first thought was that because of the rudimentary state of Mainland corporate regulation, there was no way such enterprises could comply with Hong Kong listing and prospectus requirements, and therefore they should be listed on some kind of lower-quality caveat-emptor type of board.

However, Zhu Rongji, the then vice premier, insisted on parity for Mainland companies, i.e. Main Board listing. A key Mainland objective, in addition to pure capital raising, was to upgrade SOE's management and corporate governance standards by exposure to international practices – which obviously meant high standards and practices required for listing on the Main Board in the 90's in the last century. Accordingly, the H-share regime – which supplemented Mainland domestic regulations with additional provisions (regarding audit and accounts and investor protection and recourse to arbitration) – was born.

Why the name "H-share"

The name "H-shares" because H represents Hong Kong. There were already B shares (internationally-owned shares) and A shares (domestically-owned shares) in the Mainland market, so it was natural to use another letter.

What are the benefits for Mainland companies to list in Hong Kong?

The Hong Kong market has an obvious function for Mainland enterprises of being able to raise capital in a freely convertible currency, on the Hong Kong market, for their business development. Through flotation, businesses can accelerate their pace of reform and increase their ability to follow international practices and transform themselves into international entities.

What are the benefits for the Hong Kong market?

From the Hong Kong perspective, the listing of Mainland businesses is also beneficial. Instead of being a securities market dominated by property and finance counters, Hong Kong is now a marketplace with a great diversity of securities and other products. Hong Kong-listed Mainland companies have improved the Hong Kong securities market in width and depth and increased its influence and

attractiveness.

Hong Kong-listed Mainland businesses have greatly expanded the Hong Kong securities market. The effects of an enlarged market are seen in the number of listed companies, market capitalisation and turnover. A greater advantage is that the listing of Mainland businesses in Hong Kong has led to the convergence of a large number of international financial securities institutions and professionals in Hong Kong, including investment banks, accountants, lawyers, valuers, analysts, fund managers and institutional investors.

Six Milestones of H-share listing

Mid-1991 Exploration of the listing of H-shares began

17 June 1993 Listing Rules to permit the listing of H-shares announced

19 June 1993 Memorandum of regulatory cooperation that paved the way of H-share listing signed by CSRC, Shanghai and Shenzhen stock exchanges, SFC and SEHK

15 July 1993 First H-share company Tsingtao Brewery listed

27 Oct 2005 First fully convertible H-share company China Construction Bank listed; also first mega-sized H-share listing through a single IPO in Hong Kong

27 Oct 2006 First simultaneous listing of H- and A-share company Industrial and Commercial Bank listed

The Enforcement of Securities and Futures Commission (SFC)

All issuers (Mainland enterprises, Hong Kong and overseas incorporated issuers) listing in Hong Kong are subject to the Hong Kong legislation, Listing Rules and Non-statutory Codes.

Accordingly, it is immaterial whether or not the issuer is Mainland enterprise and/or the dominance of Mainland enterprises in the Stock Exchange of Hong Kong (SEHK). Their description i.e. red chip, H-share, red chip or Non-H share is for statistic purpose not for SFC enforcement.

Two Boards: The **Main Board** and the **Growth Enterprise Market (Gem).**

There are 2 sets of Listing Rules -

For the Main Board for more established issuers that satisfy the SEHK's financial and track record; and

For the Gem i.e. with lower listing eligibility criteria for small and mid-sized issuers.

Chapter 9A of the Listing Rules relates its transfer of listing to Main Board.

In respect of enforcement, the issuers in Gem have similar continuing obligations compared to the Main Board.

A Sponsor

Every company applying to list on the SEHK must appoint a sponsor who will assess its suitability for listing and likely interest of the investors. It is required to appoint a sponsor at least 2 months before submission of an Initial Public Offer (IPO)

application and to notify SEHK in writing within five business days of its appointment. Actions taken by SFC to enhance the sponsor's role in the IPO process are in **ANNEX B of APPENDIX TWO.**

Directors' liabilities re untrue statement contained in, or any material omission from, IPO prospectus-

Civil Liability

Section 108(1): for Inducing Others to Invest Money in Certain Cases
Section 213: SFC Application to Court of for Orders or Injunctions
Section 277: Disclosure of False or Misleading Information Inducing Transactions
Section 281: Civil Market Misconduct in Hong Kong
Section 391: False or Misleading Public Communications concerning Securities

Criminal Liability

Section 107: Offence to Fraudulently or Recklessly Induce others to Invest Money
Section 298: Offence of False or Misleading Information Inducing Transactions
Section 305: Civil Liability for Criminal Market Misconduct
Section 384 SFO: Provision of False or Misleading Information
Section 300: Offence Involving Fraudulent or Deceptive Devices
Section 390 SFO: Liability of Officers for Offences by Corporations

Actions taken by SFC to enhance the sponsor's role in the IPO process are in **ANNEX B of APPENDIX TWO.**

Dual Filing arrangement

This has been in effect since 1 April 2003 before the boom of the Chinese IPO. Under dual filing, issuers must file applications and disclosure materials with the SFC via SEHK. The SFC is the statutory supervisor and regulator of SEHK, the operator of the stock market.

The SFC has a Dual Filing Advisory Group established under section 8 of the Securities and Futures Ordinance (SFO). Advice to be rendered by the Advisory Group will include views on any application that, after analysis and due enquiry made of the applicant, the SFC believes should be rejected, and the overall direction and other policy matters relating to operation of the Dual Filing regime. Membership of the Advisory Group (nine members) comprises investors as well as market practitioners, including fund managers, corporate finance advisors, legal advisers and accountants. Each member will normally hold office for one year or otherwise at the discretion of the SFC (section 8 of SFO).

SFC issues report on SEHK's performance yearly. So far, SFC considers that SEHK is able to discharge its statutory obligations to maintain an orderly, informed and fair market.

Case 1

Alibaba case

An example of **Strict Compliance of Listing Rules by SEHK**
March 16, 2014 Alibaba, the China's e-commerce giant, decided to have its HK$100 billion offering in New York after Hong Kong turned down its request to change the listing rules to allow its founder and certain senior executives to nominate a majority of the board even though they hold only a minority of shares. (Headline Daily March 16, 2014)

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The continuing obligations for Main Board and Gem are the same
In brief, the continuing obligations are -

(1) Statutory obligation to disclosure of Inside Information under Part XIVA of the SFO with four exceptions.

Insider dealing offences are in Parts XIII and XIV SFO.
The "SFC Guidelines" provide guidance as to how these terms have been interpreted by the Market Misconduct Tribunal in the past.

(2) Obligation to Respond to Exchange Enquiry is found in Main Board Rule 13.10 (GEM Rule 17.11)
(3) Announcements

Inside information.
Notifiable transactions within Chapter 14 of the Main Board Rules (chapter 19 of the GEM Rules).
Connected transactions
Board meeting for approval of results
Annual, half-year and quarterly results
Change in auditor or financial year end
Memorandum and Articles of Association
Change in directors and supervisors
Notice of general meetings
Issues of securities
Public float
Share Repurchases

(4) Disclosure of Financial Information with auditors' requisite qualifications and audit standards as well as annual, half-yearly and quarterly reports and accounts
(5) Notifiable Transactions as set in Chapter 14 of the Main Board Listing Rules (Chapter 19 of the GEM Rules).
(6) Connected Transactions with Exemptions
(7) The Corporate Governance Code
(8) The Model Code for Securities Transactions by Directors and Supervisors of Listed Companies
(9) The Environmental, Social and Governance Reporting Guide

Comment: The SEHK listing rules were applied even at the cost of losing such a big player as China in the financial markets. This will now be under the responsibility of London and New York compliance; it demonstrates that no company, including Chinese companies, regardless of wealth and reputation can flex the rules of the Hong Kong stock exchange. This is a significant message to the public in the political context of Hong Kong, China and the Asia Pacific region.

Untrue statement contained in, or any material omission from, an IPO prospectus (Facts of the cases are in ANNEX A of APPENDIX TWO).

Action Taken by SFC under section 213

Case 2

Qunxing Paper Holdings Company Limited [SEHK:3868]

This company was listed in Hong Kong on 2 October 2007 for false or misleading information in its initial public offer and its annual reports thereafter. Qunxing's business undertaking is based in the Mainland. On 20 December 2013, SFC news and announcement reported that "Court continues interim injunction to freeze assets of Qunxing" and revealed that

"Under sub-rule 8(1) of the Listing Rules, the SFC has directed SEHK to suspend trading in shares of Qunxing in 30 March 2011"
Its billion assets frozen and an interim receivers appointed to take over Qunxing on the basis of its breach of continuing obligations for disclosing false or misleading

information in its initial public offer in 2007 and the announcements of its annual results for 2007 to 2011. On 28 March 2014, the court ordered the appointment of interim receivers and managers of Qunxing. It was announced in the SFC's press release on 31 March 2014.

"Following an application to appoint interim receivers and managers over Qunxing Paper Holdings Company Limited, we made an application to the CFI to seek orders against its former Chairman and Vice-Chairman to compel them to provide information about its main operating company's bankruptcy proceedings in China. The court also dismissed the application of Qunxing and its subsidiary to discharge the injunction obtained by us in December 2013 freezing approximately $2 billion in assets" quoted from the SFC 2014-2015 Annual Report

SFC news and announcement dated 4 April 2014 stated

"SFC seeks court orders to compel disclosure by Qunxing Paper's chairman and vice-chairman"

"to provide information to Qunxing about the bankruptcy proceedings in the PRC of Qunxing's main operating company, Shandong Qunxing Paper Limited (Shandong Qunxing)."

South China Morning Post dated 6 October 2017 reported that HKEX commences proceedings to delist Qunxing Paper Holdings. SFC news and announcement dated 7 February 2018 reported that about 27,000 shareholders were entitled to compensation.

Comment: While the SFC acted quickly this is an example of how long such a complex case can take before compensation can be applied for and impacting on how even longer it will take to reach the investor. However some cases are so complex that compliance and legal proceedings can be held back over points of law and compliance of which there are many and can be a goldmine for lawyers. While trust may have been undermined in the accuracy of a prospectus, it demonstrates to the investors that the SFC is vigilant and will prosecute a case vigorously demonstrating to the public that those responsible for the prospectus of a company must pay careful attention to its accuracy and transparency

Case 3

Hontex International Holdings Co. Ltd

The Securities & Futures Commission (SFC) alleged that Hontex, a Chinese sports fabric maker, made materially false and misleading statements in its December 2009 prospectus, including an overstatement of its profits. After 12 days of trial in the **Court of First Instance,** the SFC and Hontex signed an agreed statement of facts.

Hontex did not agree with the amounts alleged by the SFC. It was on the basis of the agreed statement that the Court made **the order under section 213.**
The Listing Committee of the Hong Kong Stock Exchange decided to cancel its listing. **The Listing (Review) Committee and Listing Appeals Committee** decided to uphold the Listing Committee's decision. The company was delisted on 23 September 2013.
SFC Enforcement news dated 20 Jun 2012 reported that **"Hontex Ordered to make HK$1.03 billion Buy-back Offer for Untrue IPO Prospectus"** about the company's true financial position, which enabled it to raise a billion dollars from the investing public

During the interview by Hong Kong Lawyer in November 2014, Mr. Steward, the then Executive Director of Enforcement Hong Kong Lawyer talked about Bringing Home the Actual Cost of Misconduct in Hontex the SFC

"has pursued remedial measures that require perpetrators and victims to come together to resolve what has occurred.
"It brings home to the community the actual cost of misconduct. It also holds wrongdoers accountable for their misdeeds in a way that criminal prosecutions do not. Paying a record fine to the government is not a good way of recognising the moral culpability of misconduct. In fact, it's a way of hiding or obscuring the moral culpability of wrongdoing."

Mr. Steward says

"In effect, the company and its victims had to come together to resolve what had occurred. Of course, the company is no longer listed in Hong Kong but nonetheless for the majority shareholders and for the directors of the company, it must have been a salutary experience to convene a meeting that was constituted by the victims." (Hong Kong Lawyer November 2014).

This case is the first of this kind where the investing public was restored to its original position.
Unprecedented order by the Court against Hontex International Holdings Company Ltd for a HK$1.03 billion buy-back offer for false and misleading information in prospectus by Deacon dated 22 June 2012

"This is an unprecedented order under section 213 of the SFO,…....enable the SFC to

use the money or "damages" to compensate the investors.
The Order was made on the basis of an admission of a contravention of section 298. In agreeing to the order, neither Hontex nor its directors or other defendants admitted to any criminal offence. However, since the SFC has expressly reserved the right to bring criminal proceedings arising from Hontex's IPO prospectus, the market will wait and see if the Department of Justice and the SFC will bring a criminal prosecution after settlement of this civil case."

Hontex's IPO sponsor

SFC News and announcements 22 Apr 2012 revealed –
In separate disciplinary proceedings, the **SFC revoked the licence** of Hontex's IPO sponsor, Mega Capital (Asia) Company Limited, for inadequate and sub-standard due diligence work on the Hontex IPO and fined it HK$42 million.
Asia Disputes: Herbert Smith Freehills, (30 April 2012) writes
"SFC imposed first revocation IPO Sponsor's licence to advise on corporate finance for due diligence failings"
Hong Kong Regulator Fines and revokes IPO Sponsor's License by CFO Innovation Asia Staff [Monday, April 23, 2012]

Comment: This was a noted case which saw the SFC and related bodies take several actions to restore and maintain public trust in its safeguards and those actions were against a number of players not just the company. It included its IPO and its sponsors. This demonstrates to the public that the bodies which have been set up to safeguard investors have teeth in that they will not only reprimand but take action at various levels to prevent others following unethical practices even down to individuals. The message is clear that no longer can individuals hide behind the company, individuals in decision-making roles regardless of what status they are will be accountable and pursued.

Case 4

China Metal Recycling (SEHK: 773)

Action taken by SFC under **section 212 for winding up order**
SFC news and announcements dated 26 February 2015
"This is the first time that the SFC obtained a court order to wind up a Hong Kong-listed company under section 212 of the Securities and Futures Ordinance for the

purpose of protecting the **company's minority shareholders, creditors and the investing public.**

On 22 June 2009, its shares were listed on the Main Board of the **SEHK.** About HK$1,685 million, net of listing expenses, were raised by the initial public offering of the company.

Trading in shares of China Metal Recycling has been suspended since 28 January 2013. On 26 July 2013, the SFC presented a petition to the **Court of First Instance** to wind up China Metal Recycling under section 212 of the **Securities and Futures Ordinance (SFO**) and obtained an order to appoint Cosimo Borrelli and Jocelyn Chi Lai Man, both of Borrelli Walsh Limited, as joint and several provisional liquidators for China Metal Recycling."

Hong Kong watchdog wins landmark case against China Metal Recycling
By **Michelle Price** of Reuter dated 26 February 2013 stated -

"Hong Kong's securities regulator has won a two-year battle to wind up Hong Kong-listed China Metal Recycling Holdings Ltd (CMR), in a victory that bolsters its authority to sanction overseas companies it suspects of wrongdoing. SFC said CMR overstated its financial position in the prospectus for its 2009 initial public offering. It also said around 38 percent, 64 percent and 90 percent of gross profits for 2007, 2008 and 2009, respectively, were fictitious."

When being interviewed by Reuter, Mr. Steward, the then Executive Director of Enforcement, said
"This is an audacious and dishonest scheme to deceive Hong Kong investors and creditors" "Liquidators will be able to conduct an independent assessment of the company's real position."

CANCELLATION OF LISTING notice was issued on 2 February 2016

"The **Hong Kong Police** charged a board member and a staff member of China Metal Recycling with one count of conspiracy to defraud" (SFC Enforcement Report dated May 2, 2017).

Overall Comment

Have I selected cases that throw a positive light on the SFC? This is an important

question. My selection criteria was based not only on SFC reporting but reporting from other sources with their perspectives eg. the press. I selected cases that would capture the interconnection of different bodies and their roles better illustrated by real cases and those which demonstrated what small investors need to know about what it is that makes them feel uncertain about investing and what it is they fear, for example, not so much losing which is fair game but being cheated which is not fair game . If the big companies can be brought to book then small companies and small investors can have trust in the system but also see that the system is rigorous in preventing fraud and encouraging informed investment. This also includes a demonstration that Hong Kong is not swayed by company global might or political power. All HK listed companies have to abide by the rules, so that all companies can have confidence in its listings. If the HK financial sector is strong then the people and institutions of HK will benefit socially and financially.

2. The USA and the SFC

It is not my intention to do a comparison of the US system and its powers with that of Hong Kong because of the differences in culture and mandate not to mention the differences in their sizes and the expenditures would not be helpful. The overall purpose is to give examples of how Hong Kong manages dealings with large American institutions and safety for investors - both Americans investing in HK and HK and Chinese investing in the USA. This breakdown of what happens in terms of regulation and safeguarding will in itself help small investors to understand larger markets. The contribution to my own thinking on this, stimulated by an American professor writing about Hong Kong practices, is whether our safeguarding systems can learn from each other.

The aim of this section is to examine the SFC's existing statutory powers to combat Insider Trading with a view to see whether or not SEC's settlement power without an admission as in Sir David Li Kwok-po of the Bank of East case should be introduced to enhance SFC's enforcement;

Money Laundering with a view to see whether or not SEC's settlement power should be introduced where a bank instead of an individual is involved as in HSBC of the US when a plea of negligence is given.

Corruption: whether similar Foreign Corrupt Practices Act of US should be introduced in Hong Kong to suppress payment to foreign government officials to assist in obtaining or retaining business.

The US Securities and Exchange Commission (SEC)

The SEC is an independent agency of the United States federal government enforcing the federal securities laws. The SEC created by Congress in 1934 under the Securities Exchange Act as an independent, non-partisan, quasi-judicial regulatory government agency with responsibility for administering the federal securities laws that protect investors.

The SEC also ensures that securities markets are fair and honest and, if necessary, enforces securities laws through the appropriate sanctions and its staff is divided into divisions

The following are the major laws that the SEC is responsible for administering:
The Securities Act of 1933
The Securities Exchange Act of 1934
The SEC also administers the Public Utility Holding Company Act of 1935.
The Trust Indenture Act of 1939
The Investment Company Act of 1940.
The Investment Advisers Act of 1940
The Sarbanes-Oxley Act 2002
Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
Jumpstart Our Business Startups Act of 2012

The SEC is given also some responsibility connected with corporate bankruptcy reorganizations, commonly referred to as Chapter 11 proceedings (Excerpted from SEC website).

How Investigations Work
The Enforcement Division is the largest SEC division. It assists the Commission in executing its law enforcement function by recommending the commencement of investigations of securities law violations, by recommending that the Commission bring civil actions in Federal district court or administrative proceedings before an administrative law judge, and by prosecuting these cases on behalf of the Commission. As an adjunct to the SEC's civil enforcement authority, the Division works closely with law enforcement agencies in the U.S. and around the world to bring criminal cases when appropriate.

The Division obtains evidence of possible violations of the securities laws from many

sources, including market surveillance activities, investor tips and complaints, other Divisions and Offices of the SEC, the self-regulatory organizations and other securities industry sources, and media reports.

All SEC investigations are conducted privately. Facts are developed to the fullest extent possible through informal inquiry, interviewing witnesses, examining brokerage records, reviewing trading data, and other methods. With a formal order of investigation, the Division's staff may compel witnesses by subpoena to testify and produce books, records, and other relevant documents. Following an investigation, SEC present their findings to the Commission for its review. The Commission can authorize the staff to file a case in federal court or bring an administrative action. In many cases, the Commission and the party charged decide to settle a matter without trial.

Whether the Commission decides to bring a case in federal court or within the SEC before an administrative law judge may depend upon various factors. Often, when the misconduct warrants it, the Commission will bring both proceedings.
Civil action: The Commission files a complaint with a U.S. District Court and asks the court for a sanction or remedy. Often the Commission asks for a court order, called an injunction, that prohibits any further acts or practices that violate the law or Commission rules. An injunction can also require audits, accounting for frauds, or special supervisory arrangements. In addition, the SEC can seek civil monetary penalties, or the return of illegal profits (called disgorgement). The court may also bar or suspend an individual from serving as a corporate officer or director. A person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment.
Administrative action: The Commission can seek a variety of sanctions through the administrative proceeding process. Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge (ALJ), who is independent of the Commission. The administrative law judge presides over a hearing and considers the evidence presented by the Division staff, as well as any evidence submitted by the subject of the proceeding. Following the hearing the ALJ issues an initial decision that includes findings of fact and legal conclusions. The initial decision also contains a recommended sanction. Both the Division staff and the defendant may appeal all or any portion of the initial decision to the Commission. The Commission may affirm the decision of the ALJ, reverse the decision, or remand it for additional hearings. Administrative sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations,

censures, bars from association with the securities industry, civil monetary penalties, and disgorgement (Excerpted from SEC website).

The Office of the Whistleblower

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the SEC. Through their knowledge of the circumstances and individuals involved, whistleblowers can help the Commission identify possible fraud and other violations much earlier than might otherwise have been possible. That allows the Commission to minimize the harm to investors, better preserve the integrity of the US's capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

The Commission is authorized by Congress to provide monetary awards to eligible individuals who come forward with high-quality original information that leads to a Commission enforcement action in which over $1,000,000 in sanctions is ordered. The range for awards is between 10% and 30% of the money collected.

The Office of the Whistleblower was established to administer the SEC's whistleblower program. (Excerpted from SEC website)

Insider Trading

Case 1

Sir David Li Kwok-po of the Bank of East Asia case

The following Hong Kong news prompted this research area –

The Securities and Exchange Commission announced settling insider trading charges against **four Hong Kong residents for illegal tipping and trading in the securities of Dow Jones & Company, Inc**. in the weeks before the public disclosure on 1 May 2007 of an unsolicited $60 per share acquisition offer for Dow Jones by News Corporation. The alleged tip originated with Li who served on the Dow Jones board of directors. At the end of January 2008, a settlement was reached where Li was ordered to pay US$8.1 million civil penalty. **Li neither admitted nor denied any wrongdoing**.

Position in the USA

U.S. SECURITIES AND EXCHANGE COMMISSION

Litigation Release No. 20447 / February 5, 2008

***Securities and Exchange Commission v. Kan King Wong, Charlotte Ka On Wong Leung, Michael Leung Kai Hung and David Li Kwok Po*, 07 Civ. 3628 (SAS) (S.D.N.Y. filed May 8, 2007)**

SEC Settles $24 million Insider Trading Case Against Four Hong Kong Residents

Including David Li Kwok Po, a Former Board Member of Dow Jones

The Securities and Exchange Commission today announced settled insider trading charges against four Hong Kong residents for illegal tipping and trading in the securities of Dow Jones & Company, Inc. ("Dow Jones") in the weeks before the public disclosure on May 1, 2007 of an unsolicited $60 per share acquisition offer for Dow Jones (the "Offer") by News Corporation. The alleged tip originated with David Li Kwok Po ("David Li"), who served on the Dow Jones board of directors. David Li is the Chairman and Chief Executive Officer of the Bank of East Asia and a member of Hong Kong's Legislative Counsel and Executive Committee.

On May 8, 2007, the Commission filed an emergency action in the United States District Court for the Southern District of New York against Kan King Wong ("K.K. Wong") and Charlotte Ka On Wong Leung ("Charlotte Wong"), alleging that the husband-wife couple traded Dow Jones securities based on inside information. Specifically, the Wongs purchased approximately $15 million worth of Dow Jones securities in their account at Merrill Lynch and, after the Offer became public, made approximately $8.1 million in trading profits. The court entered a Temporary Restraining Order freezing those assets and imposing other relief. See LR-20106 (May 8, 2007). Today the Commission filed an amended complaint alleging that Dow Jones board member David Li tipped his close friend, Michael Leung Kai Hung ("Michael Leung"), before the Offer's public disclosure, and Michael Leung, with the Wongs' assistance, traded Dow Jones stock in their Merrill Lynch account. The Commission further alleged that K.K. Wong bought 2,000 Dow Jones shares in his TD-Ameritrade account and made approximately $40,000 in profits. Charlotte Wong is Michael Leung's daughter, and K.K. Wong is his son-in-law.

Without admitting or denying the Commission's allegations, David Li, Michael Leung, K.K. Wong and Charlotte Wong consented to the entry of court orders enjoining them from violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and ordering David Li to pay an $8.1 million civil penalty, Michael Leung to pay $8.1 million in disgorgement plus prejudgment interest and an $8.1 million penalty, and K.K. Wong to pay $40 thousand in disgorgement plus

prejudgment interest and a $40 thousand civil penalty.[22]
The Commission acknowledges the assistance of **Merrill Lynch & Co. and the Hong Kong Securities and Futures Commission.**

Comment: The selection of this case was to examine the existing SFC's statutory powers to combat Insider Trading and the importance of cooperation using the example of the USA's settlement power without an admission. It also demonstrates the cooperation between the US and HK to bring perpetrators to justice whether HK residents or USA residents. This gives confidence that national jurisdictions can be second to international considerations relating to the interconnectedness of markets. Lack of confidence in one country's security system such as national protection of unethical practices can be counterbalanced by global considerations which come into force. In other words it is in everyone's interest to play by the book and those who do not can destabilize their own interests due to the amount of checks and balances in the system at national and global levels. If one of those is weak or vulnerable to malpractices the other will redress the balance.

Case 2

former Dow Jones & Company board member and three other Hong Kong residents: insider trading

The Commission obtained a $24 million settlement with a former Dow Jones & Company board member and three other Hong Kong residents accused of illegal tipping and insider trading ahead of news of an unsolicited buyout offer from News Corporation that sent Dow Jones shares soaring in the spring of 2007. In addition to settling the action, the Commission kept the defendants from making approximately $8 million in illicit profits by obtaining an emergency court order within days of the News Corporation offer, freezing the account."[23]

Comment: In August 2000, the **Securities and Exchange Commission** (SEC) had adopted new rules regarding insider trading (made effective in October of the same year) and has since updated them. There is every indication of on -going vigilance although it is often challenging to identify and prove beyond doubt. This remains a vulnerability for all markets and countries have found different ways to mitigate that

[22] http://www.sec.gov/litigation/litreleases/2008/lr20447.htm

[23] p.112 of SEC 2008 Annual Report @ www.sec.gov/reportspubs/annual-reports/aboutsecpar2008shtml.html

vulnerability. In Hong Kong's case under **Rule 10b5-1**, the SEC defines insider trading as any securities transaction made when the person behind the trade is aware of nonpublic material information, and is hence violating his or her duty to maintain confidentiality of such knowledge.
Information is defined as being material if its release could affect the company's stock price.

In a further effort to limit the possibility of insider trading, the SEC has also stated in **Regulation Fair Disclosure (Reg FD),** which was released at the same time as Rule 10b5-1, that companies can no longer be selective as to how they release information. This means that analysts or institutional clients cannot be privy to information ahead of retail clients or the general public. Everyone who is not a part of the company is to receive information at the same time.

Who Is an Insider?

In the second part of **Rule 10b5-2**, the SEC has outlined three non exclusive instances that call for a duty of trust or confidentiality:
When a person expresses his or her agreement to maintain confidentiality
When history, pattern and/or practice show that a relationship has mutual confidentiality
When a person hears information from a spouse, parent, child or sibling (unless it can be proven that such a relationship has not and does not give rise to confidentiality).
The Ins**i**der trading case against hedge fund firm CR Intrinsic and an insider trading case against Tiger Asia Management t resulted in a $44 million settlement under Section 17(a) Securities Exchange Act of 1934 which broadly prohibist fraudulent activities of any kind in connection with the offer, purchase, or sale of securities. These provisions are the basis for many types of disciplinary actions, including actions against fraudulent insider trading. Insider trading is illegal when a person trades a security while in possession of material nonpublic information in violation of a duty to withhold the information or refrain from trading.

Case 3

Hwang, Tiger Asia Management, and Tiger Asia Partners

The following is the case of **Tiger Asia Management** (**Securities and Exchange Commission** press release, December 12, 2012, Washington, D.C)

"The Securities and Exchange Commission today charged the manager of two New York-based hedge funds with conducting a pair of trading schemes involving Chinese bank stocks and making $16.7 million in illicit profits. He and his firms have agreed to pay $44 million to settle the SEC's charges.
The SEC's complaint charges Hwang, his firms, and Park with violations of **Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 as well as Section 17(a) of the Securities Act of 1933.** Hwang and his firms also are charged with violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8, and Park is charged with aiding and abetting those violations.

The settlements, which are subject to court approval, require Hwang, Tiger Asia Management, and Tiger Asia Partners to pay $19,048,787 in disgorgement and prejudgment interest — including $16,257,918 that Tiger Asia Management will pay directly to criminal authorities. Each of them has agreed to pay a penalty of $8,294,348 for a grand total of $44 million. Park agreed to pay $39,819 in disgorgement and prejudgment interest, and a penalty of $34,897. With the exception of Tiger Asia Management, the defendants neither admit nor deny the charges.

The **SEC's investigation** was conducted by Thomas P. Smith, Jr., Sandeep Satwalekar, and Amelia A. Cottrell of the SEC's Market Abuse Unit in New York, and Frank Milewski of the New York Regional Office. The SEC appreciates the assistance of the U.S. Attorney's Office for the District of New Jersey, the Federal Bureau of Investigation, the Internal Revenue Service, the Japanese Securities and Exchange Surveillance Commission, and the Hong Kong Securities and Futures Commission".

Overall Comment

Unlike the USA, SFC has no power to settle cases.
Before doing research and after reading the Sir David Li Kwok-po of the Bank of East Asia case settled by SEC in the US, I was in favor of a similar USA settlement power being introduced in Hong Kong to enhance SFC's enforcement because it is speedy. Settlement saves the trial time in Court and the appeal time from either side.
However, after doing the research, I am of view now that the SFC does not need such a power is because of the development of section 213 of the Securities and Futures Ordinance (Cap 571 Section 213) on Injunctions and Orders after the conviction of Du Jin. (Details in **APPENDIX ONE).**

Position in Hong Kong**:**

Summary of who's who and their role in safeguarding against <u>insider trading</u>

This is SFC's enforcement after listing to help clarify roles with regards to regulation and policy enforcement.

Securities and Futures Ordinance (SFO) gives **SFC** wide criminal, civil and regulatory sanctions including –

The Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission
Failure to comply with does not render the person liable to any judicial or other proceedings. However, the Code is admissible in evidence in SFO court proceedings.

(2) **SFO**
Insider trading is one of the six types of market misconduct which, since 2003, under Parts XIII and XIV.
The **SFC** can conduct an investigation if it has reasonable ground to believe that market misconduct has taken place. After investigation, **SFC** refers all market misconduct cases to **DOJ** for advice on sufficiency of evidence and venue.
Memorandum of Understanding dated 4 March, 2016 between **SFC and DOJ** :
Paragraph 5 deals with Referral of cases by the **SFC to the DOJ**
Paragraph 9 deals with Market Misconduct Proceedings and **Consent of the Secretary for Justice**

Criminal
Sections 270 and 291 of the SFO list out various situations in which insider dealing occurs with territorial limitation i.e. in relation to securities listed on the Hong Kong Stock Exchange. The defence is sections 271 and 292

Under the criminal provisions ((Part XIV)), an insider dealer could be subject to a maximum fine of HK$10 million and 10 years' imprisonment upon conviction.
In addition, the court may make disqualification, cold shoulder and disciplinary referral orders. Failure to comply with a disqualification or cold shoulder order is an offence liable to a maximum fine of $1 million and up to 2 years' imprisonment
Civil
Part XIII sets out insider dealing is subject to the civil regime.
Consent of the Secretary for Justice is required before SFC's starting proceedings in

the Market Misconduct Tribunal **(MMT).**

The **MMT** is empowered to impose a financial penalty not exceeding the amount which is the greater of HK$10 million or three times the amount of the profit gained or loss avoided by the insider dealer.
The **SFC** can seek civil sanctions that include:
Payment of restitution.
Disqualification as a director, liquidator, receiver or manager of a corporation.
A "cold shoulder order"
A cease and desist order
A disgorgement order
Government costs order
SFC costs order and
disciplinary referral order

Sections 283 and 307 expressly provides that there will not be double jeopardy.
SFC Powers
The SFC has no power of arrest and/or power to grant bail. SFC can issue notice against companies to compel production of documents and issue a notice for interview. During the interview, an interviewee has no right to silence.
Failure to answer questions is a criminal offence. However, if the interviewee believes that what he or she states during the interview may incriminate him or her in the future, he/she can make a declaration under section 187. After the declaration, the answer cannot be admitted as evidence in any criminal proceedings against the interviewee unless e.g. if the interviewee commits perjury or intentionally provides false and misleading answers to the SFC.

Under section 191, the SFC can apply to the magistrates' court for search warrant.

Internal control systems
• Section 279 of the SFO imposes a duty on every officer of a corporation to put in place reasonable measures to prevent the firm from engaging in insider dealing. Failure to do so may give rise to civil sanctions under s 258 of the SFO including disqualification as a director and prohibition from dealing in securities for a period not exceeding five years (Securities & Futures Ordinance Cap. 571).
• The Rules Governing the Listing of Securities on the Hong Kong Stock Exchange protect investors against improper use of confidential information by insiders (Securities & Futures (Stock Market Listing) Rules Cap. 571V).

• The Code of Conduct module of the Supervisory Policy Manual issued by the Hong Kong Monetary Authority (HKMA) prohibits staff members from dealing in the shares or securities of any listed company when in possession of privileged or price-sensitive information not generally known to the public (details can be found in the Supervisory Policy Manual in the HKMA website).
• The Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission imposes an obligation on the persons licensed by or registered with the SFC to ensure compliance with the relevant law, rules, regulations and codes administered or issued by the SFC, the Hong Kong Stock Exchange and any other regulatory authority that apply to a licensed or registered person (details can be found in Securities & Futures Commission Rules & Standards http://en-rules.sfc.hk/).

Prevention of insider training

A compliance system establishing a Code of Conduct would be the best defence against insider dealing.

Case 1

Apart from the Code of Conduct, the importance of educating employees on how to handle inside information is illustrated in the case of

HKSAR v Lam Kar Fai, Allen (DCCC 919, 921 and 922/2008)

where convictions were obtained against an investment banker and a fund manager. Both were sentenced to imprisonment and were fined a sum equivalent to profits. The investment banker was convicted for feeding information on takeover rumors about a listed company to a fund manager through coded emails. The investment banker was convicted even though he knew about the deal by overhearing his colleagues' conversations. The fund manager was convicted because he purchased the shares on behalf of a fund managed by his company and for himself, and made a profit after the acquisition was announced. The investment banker did not personally profit from the information, but his wife made an indirect profit as a result of her interest in the fund. The SFC revoked the licence of the fund manager and banned him from re-entering the industry for life. Although both pleaded guilty, the court felt that the seriousness of the case warranted imprisonment (HKSAR v Lam Kar Fai, Allen (DCCC 919, 921 and 922/2008).

Case 2

Apart from maintaining a system, the system must be complied with. Permission from a relevant compliance unit to deal in shares would not absolve a person's liability for insider dealing if such compliance has been obtained dishonestly and fraudulently as in

HKSAR v Du Jun (DCCC 787/2008)

To date, fines have been imposed on corporations not company officer or director in failing to implement an effective compliance system that contributed to market misconduct.

In addition to the above, the compliance to the following statutory provisions is required -
Since 18 June 2012, market participants are required to report short positions to the SFC so that unusual or abnormal trading can be detected (Securities and Futures (Short Position Reporting) Rules Cap. 571 AJ)

Disclosure of Inside Information
With effect from 1 January 2013, Part XIVA of the SFO gives statutory backing to the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited imposing a general obligation of disclosure of price sensitive, or "inside" information by listed corporations ("corporations"). Guidelines are published by the SFC under section 399 to assist corporations
(Securities and Futures Ordinance (Cap. 571).

The Inside Information Provisions and the relevant amendments to the Listing Rules
The Inside Information Provisions impose statutory obligations on issuers and directors to disclose inside information as soon as reasonably practicable after the information has come to issuers' knowledge (Rule 13.09(2)(a) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited and Inside Information Provisions under Part XIVA of the Securities and Futures Ordinance Cap. 571).

SFC administers the Inside Information Provisions and has issued Guidelines on Disclosure of Inside Information as well as FAQs
Guidance

1. Profit alerts and warnings
2. Trading updates
3. Handling of media
4. Material information about acquisitions
5. Trading halt
6. Overseas Regulatory Announcement

Exchange monitors existence of potential or actual false market by:
1. monitoring press and share price/ trading volume fluctuation;
2. making enquiries with issuers;
3. requesting issuers to publish announcements or halt trading.

What is a false market?
A situation where there is material misinformation or materially incomplete information in the market which compromises proper price discovery.
Examples:
1. False/ misleading announcement published
2. False/ misleading information (including rumors) circulating in market
3. Failure to announce inside information as required under the Inside Information Provisions
4. Uneven dissemination of inside information
5. Media/ analyst reports contain information from a credible source and:
there is material share price/ trading volume movement which might be referable to such information; or
it is likely to have a material effect on share price/ trading volume if the market starts trading with such information

On *10/07/2014*
The SFC urged companies to state specific figures in issuing profit alerts and warnings, saying a trend of not doing so has made proper evaluation difficult for investors.
In the corporate regulation newsletter, the SFC reports that the number of inside information announcements rose by 52 percent to 4,883 as of end-2013 from a year ago. That came after listed firms became statutorily required to announce information with material effect on share prices since January last year.
Profit alerts and warnings increased by 16 percent, of which about 14 percent resulted in share price movements, compared with 12 percent in 2012 However, SFC was concerned about the lack of clarity in the disclosures e.g. Modern Beauty

Salon (0919) rose 7.3 percent after a positive profit alert in April 2012. But when it was revealed in June that net profit actually fell by 7.9 percent, the stock slid 23.4 percent (Securities & Futures Commission 10/07/2014 Newsletter).

Comment: Insider trading is when insiders possess inside information and use it to their advantage often disrupting the stability of and trust in the market and causing unfair advantage at the expense of investors who suffer losses . If the timely disclosure of inside information is strictly enforced, the opportunities for insider trading will greatly diminish. My exploration recognizes the very strict enforcement procedures when insider trading has been uncovered but more can be done to prevent contraventions in the first place. The challenge is not the regulation or enforcement it is gathering the evidence to bring a case.

Insider trading is an insidious crime especially when the burden of proof is beyond reasonable doubt in respect of *mens rea*. Non-disclosure is different. Once knowledge of insider information inferred from the situation is proved, the liability is strict; the burden is on the corporation officers to show certain defined defenses.

SFC can focus resources on ensuring that disclosure obligations are conscientiously met. As such contraventions can easily be detected and be proved, regular enforcement can achieve a deterrent effect. This is more effective than prosecution in view of the difficulties in the burden of proof, especially when tippees are used. SFC can use this as a preventive measure and will not diminish the regulatory effectiveness of the SFC in any way.

Summary

We have seen the existing wide statutory powers, in particular, the section 213 commented on above, the SFC has against those who have allegedly committed the Insider Trading.

Since 2007, the SFC has been using section 213 to obtain orders in aid of its investigation e.g. SFC was successful in Hontex case in obtaining compensation for investors for financial misstatements in a company's prospectus.
It is clear from Tiger Asia case that the SFC is not afraid to use the section 213 mechanism – and possibly other powers - to obtain remedies which the industry has not seen in the past. The SFC has been steadily getting more creative in the use of its powers. The decision of the Court of Final Appeal in the Tiger Asia case has made

section 213 a valuable tool to protect the investing public when there is no determination by the Market Misconduct Tribunal or a criminal court.

Comment: I consider that the SFC's enforcement power in the area of Insider Trading is adequate because the investing public is protected by getting back all the damages. I recommend no US's settlement power be introduced to SFC. Here we have a tough SFC with the courts' increasing willingness to grant section 213 applications and protect the investing public.

Money Laundering

Money Laundering is a challenge to financial institutions and financial markets across the world. Some countries with less rigid financial regulations and enforcement cannot prevent the growing scale of money laundering. However even countries with tight regulations are having challenges with crime in this area which is facilitated by the increasingly sophisticated technologies and therefore increasing availability for various non state actors.

Update: Pol (2020) has this to say about the problem of anti- money laundering approaches generally

"The scale of the problem not addressed by "solutions" repeatedly "fixing" the same perceived issues suggest that blaming banks for not "properly" implementing anti-money laundering laws is a convenient fiction. Fundamental problems may lie instead with the design of the core policy prescription itself. With an important policymaking function o[24]perating largely as an independent silo of specialist knowledge" (Abstract 2020)

However in 2012 when undertaking this research the following Hong Kong news in 2012 prompted me to explore this area of any differences in governance and enforcement between Hong Kong and the USA relevant to small investors "HSBC agreed to pay a record US$1.92 billion in fines to settle a money laundering

[24] Pol, R.F. (2020) "Anti-money laundering: The world's least effective policy experiment? Together, we can fix it." *Policy Design and Practice,* Vol.3 Issue 1, Taylor Francis on line https://doi.org/10.1080/25741292.2020.1725366

and terrorist financing investigation by US Securities and Exchange Commission (SEC) – SEC and HSBC, have, without going to court, "settled" the case of money laundering."
According to the news, HSBC had to put aside a sum of money for settlement and another sum for paying the tax.
The issue was for me to examine the SFC's existing statutory powers to combat Money Laundering with a view to see whether or not SEC's settlement power should be introduced where a bank is involved as in HSBC of the US when a plea of negligence is given.

Position in the USA

The following is the Deferred Prosecution Agreement signed end of 2012
Cr. No. 12-763
EX-10.1 2 d453978dex101.htm EX-10.1
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Against
HSBC BANK USA, N.A. and
HSBC HOLDINGS PLC,

Deferred Prosecution Agreement
"Defendant HSBC Bank USA, N.A., a federally chartered banking institution and subsidiary of HSBC North America Holdings, Inc., and defendant HSBC Holdings plc, a financial institution holding company organized under the laws of England and Wales (collectively, "the HSBC Parties"), by their undersigned representatives, pursuant to authority granted by the HSBC Parties' Boards of Directors, and the United States Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, the United States Attorney's Office for the Eastern District of New York, and the United States Attorney's Office for the Northern District of West Virginia (collectively, the "Department"), enter into this deferred prosecution agreement (the "Agreement"). For full terms and conditions of this Agreement see footnote[25]
Comment:
Although the deferred prosecution agreement is available on the SEC website, there is no evidence that the SEC was involved.
(1) The parties signing the deferred prosecution agreement

[25] www.sec.gov/Archives/edgar/data/83246/000119312512499980/d453978dex101.htm

The Defendant was the HSBC Bank USA, N.A. The other parties were the United States Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, the United States Attorney's Office for the Eastern District of New York, and the United States Attorney's Office for the Northern District of West Virginia (collectively, the "Department")

(2) Criminal Information and Acceptance of Responsibility

The Department filed four-count criminal Information in the United States District Court for the Eastern District of New York ("the Court") charging the HSBC Parties with 2 failures with intent and 2 violations with intent. The Defendant waived their right to indictment on this charge, as well as all rights to a speedy trial.

Breach of the Agreement

Liable to prosecution and there is no time limitation.

Position in Hong Kong

Money Laundering by Bank and Financial Institutions before the Securities and Futures (Amendment) Ordinance 2014 by SFC

On April 1, 2012 when the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO) came into operation.

Under the ordinance, all banks and financial institutions, brokers, insurance companies and money changers have a statutory duty to check suspicious cash transactions. In breach of this statutory duty, the penalties include a public reprimand, a fine of up to HK$10 million or, in serious cases, criminal prosecution resulting in a maximum prison sentence of seven years. The law requires all financial firms to carry out checks on customers' background, keep records and to report suspicious cases to police.

Action taken by SFC

Prevention of Money Laundering and Terrorist Financing Guideline for Associated Entities 2012 to assist licensed corporations to design and implement their own policies, procedures and controls to comply with the AMLO. (SFC Guideline).

Broadly speaking, there are three major types of financial institutions:

Depositary Institutions : **Deposit**-taking institutions that accept and manage deposits and make **loans**, including **banks, building societies, credit unions**, **trust companies**, and **mortgage loan** companies

Contractual Institutions : **Insurance companies** and **pension funds**; and

Investment Institutes: **Investment Banks, underwriters, brokerage firms**.

The Securities and Futures Commission has issued practical guidelines for financial institutions to implement this statutory requirement. Fund managers are subject to rigorous anti-money-laundering requirements. (SFC Guidelines)

The SFC has kept statistics in respect of non-compliance with anti-money laundering guidelines during on-site inspections when the AMLO was introduced in 2012 (102 cases); in 2013 (13 cases) (Securities & Futures Commission 2010-2013 Annual Report).

Legislation

Prevention of Money Laundering - under Section 139 and section 14 of Schedule 11 the power of companies to issue share warrants to bearer is removed. Under the old law it is possible for legal title to shares to be transferred merely by physical delivery of the warrant.

"Share warrants to bearer" are different from "warrants" listed on the stock exchange. "Share warrants to bearer" are documents evidencing the ownership of shares. "Warrants" listed on the stock exchange are instruments giving an investor the right to buy or sell the shares. Moreover, "share warrants to bearer" enable the shares specified in it to be transferred by delivery of the warrant. "Warrants" listed on the stock exchange may be traded, but their transfer simply gives the transferee a right to buy or sell the shares and does not make him or her a member until the option is exercised.

Share warrants are undesirable from the perspective of anti-money laundering because of the lack of transparency in the recording of their ownership and the manner by which they are transferred.

Section 139 repeals a company's power to issue "share warrants to bearer". Those issued prior to the repeal, the bearer's name will be registered in the company's register of members upon surrender.

Money Laundering by Bank and Financial Institutions after the Securities and Futures (Amendment) Ordinance 2014

An anti-money-laundering and financial crime risk division in Hong Kong Monetary

Authority (HKMA) was set up giving investigative and disciplinary powers as those of the SFC in relation to the contravention of the reporting obligation, clearing obligation, trading obligation or record keeping obligation.

After the amendment of SFO in 2014, there are two sets of guidelines

(SFC Guideline) administered by the SFC and
Guideline on Anti-Money Laundering and Counter- Terrorist Financing (For Authorized Institutions) Revised March 2015 (HKMA Guidelines) administered by the HKMA Guidelines do not have the force of law. Failure to comply with may result in the offender being declared not fit and proper by SFC or HKMA, and is likely to be followed by disciplinary actions by these authorities.

Financial record keeping

Under the SFC Guidelines and the HKMA Guidelines, financial institutions should keep all documents and records relating to customer identity and transactions for at least six years or longer by SFC's written notice.

The following information must be kept, to provide evidence of criminal activity to the investigating authorities:
the beneficial owner of the customer;
a customer's beneficiary,
persons acting on behalf of the customer;
other parties connected with the customer.

Additional information obtained for enhanced client due diligence or ongoing monitoring.

Documents and records of the purpose and intended nature of the business relationship and of the customer's account and business correspondence.
Identity of the parties to a transaction and its nature and date.
Type and amount of currency.
The origin of the funds in which form they were offered or withdrawn e.g. cash and cheques.
The identity of the person undertaking the transaction.
The destination of the funds;
The form of instruction and authority.
The type and identifying number of any account involved in the transaction.

Failure to comply with the requirements may lead to :
Publicly reprimand the financial institution.

Order the financial institution to take any specified action to remedy the contravention.
Order the financial institution to pay a pecuniary penalty not exceeding the amount that is the greater of HK$10 million or three times the amount of the profit gained, or costs avoided, by the financial institution as a result of the contravention.

Failure to make a suspicious transaction report is a crime carrying a maximum penalty of three months' imprisonment.

Due diligence

The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance provides a detailed due diligence procedure in relation to anti-money laundering. One method is the "SAFE" approach.

Disciplinary Action for non-compliance

SFC reprimands and fines Zhongtai International Securities Limited $2.6 million for non-compliance with anti-money laundering regulatory requirements on 14 Mar 2017

SFC reprimands and fines Guoyuan Securities Brokerage on Apr 5, 2017

SFC reprimands and fines Guangdong Securities Limited $3 million for breach of anti-money laundering guidelines on 6 Mar 2017

HKMA reprimands and fines for contraventions of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance

1/Coutts & Co AG, Hong Kong Branch on 11 Apr 2017

2/ State Bank of India, Hong Kong Branch on 31 Jul 2015

The Economist Intelligence Unit, Country Finance Hong Kong dated September 15th 2016) [26]commented that

"Securities regulator takes tough line

On September 14th the Securities and Futures Commission (SFC, a market regulator) announced that it was fining a UK-headquartered bank, HSBC, HK$2.5m (US$321,000) for regulatory breaches and failing to maintain internal controls over position limits.

This is the third time in a matter of weeks that the SFC has announced a fine for one

[26] The Economist Intelligence Unit, Country Finance Hong Kong (2016) https://country.eiu.com/hong-kong September 15

of the territory's major financial firms. BNP Paribas (France) was fined HK$4m on August 31st for overcharging clients between 2011 and 2013, and Morgan Stanley Hong Kong Securities Limited was fined HK$18.5m on August 24th for internal control failures."

Comment: The above show the attitude of SFC in enforcing its Guidelines and the multiple actors involved. The average investor would not know if a company was money laundering and has to rely completely on the vigilance of the SFC. It is very costly to bring a case involving so many different actors and operations over so many national boundaries but the non-pursuance of such cases would be even more costly to Hong Kong and undermine trust in its financial sector.

Position in the USA

The offences of failure with intent and violation with intent against the HSBC Bank USA, N.A. were dealt with by the United States Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, the United States Attorney's Office for the Eastern District of New York, and the United States Attorney's Office for the Northern District of West Virginia.

There is no evidence that SEC was involved.

US Securities & Exchange Commission 2011-14 Agency Financial Reports Appendix B checked. There is no record in the Major Enforcement cases.

Position in Hong Kong -

Regulatory breaches and failing to maintain internal controls over position limits against HSBC a UK-headquartered bank by SFC on September 14, 2016

The Defendant was fined HK$2.5m (US$321,000).

Under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, all financial firms have to carry out checks on customers' background, keep records and to report suspicious cases to police. All crimes are investigated by police. Like the US, the Department of Justice is involved.

Summary

In view of the above, there is no recommendation needed to enhance the SFC's enforcement. The SFC and HKMA have sufficient guidelines for financial institutions to implement this statutory requirement. The US and HK systems have been shown to be able to work with each and in my view there is no need to learn/borrow from each other's practices. It is a matter of mutual understanding and cooperation rather than imposing practices on each other.

Corruption

Payments to foreign government officials to assist in obtaining or retaining business

JP Morgan probed for bribery

JP Morgan hired the son of China Everbright Group chairman Tang Shuangning allegedly to secure deals from the state-owned firm. New York Times cited a confidential US government document stating that the Securities and Exchange Commission's anti-bribery unit had requested from JP Morgan in May a battery of records about Tang Xiaoning – son of Tang Shuangning, Chairman of China Everbright Group. Tang Shuangning – former vice chairman of the China Banking Regulatory Commission – currently chairs state-owned financial conglomerate China Everbright, which controls locally listed subsidiaries China Everbright Limited (0165) and China Everbright International (0257). "After Tang's son came on board JP Morgan secured multiple coveted assignments from the Chinese conglomerate, including advising a subsidiary of the company on a stock offering" the report said. The bank has not been accused of any wrongdoing, according to the report. China Everbright Bank has been seeking an initial public offering in Hong Kong since 2011. The middle-sized lender is expected to raise up to HK$31 billion next month.
SEC also inquired about JP Morgan's hiring of Zhang Xixi at its Hong Kong office. She is the daughter of Zhang Shuguang, the former top engineer at the Railway Ministry. JP Morgan was one of the underwriters of the HK&19.2 billion initial public offering of China Railway Group (0390) in 2007. (Reuters on 19 August 2013)

Position in the USA

The Foreign Corrupt Practices Act in the United States (US) issued by the US Department of Justice -

An Overview

The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in

his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.

Further researches show that the Foreign Corrupt Practices Act (FCPA) Unit of the Securities and Exchange Commission (SEC) and the U.S. Department of Justice's (DOJ) Fraud Section are both responsible for enforcing the FCPA.

The sanctions are to be paid by the companies under the SEC settlements and enter into a deferred prosecution agreement (excerpted from SEC website).

Research reveals the following notable cases of the application of FCPA -

From the Major Enforcement Cases of the 2011 Agency Financial Report -

The SEC alleged that subsidiaries of J & J paid bribes to public doctors in Greece who selected J&J surgical implants, public doctors and hospital administrators in Poland who awarded contracts to J&J, and public doctors in Romania to prescribe J&J pharmaceutical products. The complaint also alleged that J&J subsidiaries paid kickbacks to Iraq to obtain 19 contracts under the United Nations Oil for Food Program. J&J agreed to settle the SEC's charges by paying more than $48.6 million in disgorgement and prejudgment interest in the SEC action, and a $21.4 million fine to settle parallel criminal charges by DOJ. [42 SEC v. Johnson & Johnson, Exchange Act Rel. No. 34-21922 (April 8, 2011) http://www.sec.gov/litigation/litre]

The rationale behind the Foreign Corrupt Practices Act (FCPA)

"It is important that investors have faith that the economic performance of public companies reflects lawful considerations of markets, price, and product rather than a mirage resulting from bribery and corruption."

"In 2013, the Division of Enforcement released joint guidance with the Department of Justice to assist enterprises of all sizes in analyzing issues related to Foreign Corrupt

Practices Act (FCPA)" (US Securities & Exchange Commission 2013 Agency Financial Report Appendix B: Major Enforcement cases Actions Relating to the Foreign Corrupt Practices Act)

Case 1

SEC v. Eli Lilly and Company, Press Rel. 2012-273 (December 20, 2012)

is selected for this project because China was involved.
In December, the SEC charged Eli Lilly and Company with violations of the FCPA for improper payments its subsidiaries made to foreign government officials to win millions of dollars of business in Russia, Brazil, China, and Poland. The SEC charged that Eli Lilly subsidiaries in Brazil, China, and Poland also made improper payments to government officials or third-party entities associated with government officials. Eli Lilly agreed to pay more than $29 million to settle the SEC's charges.

Case 2

Ralph Lauren Non-Prosecution Agreement, Press Rel. 2013-65 (April 22, 2013)

is included because this was the first that the SEC has entered non-prosecution agreement (NPA) involving FCPA misconduct.
In April, the SEC announced a NPA with Ralph Lauren Corporation, in which the company agreed to disgorge more than $700,000 in illicit profits and interest obtained in connection with bribes paid by a subsidiary to government officials in Argentina. The improper payments were made to secure the importation of Ralph Lauren products into Argentina without the necessary paperwork, to avoid inspection of prohibited products, and to avoid inspections by customs officials. The payments, bribes, and gifts, totaling more than $593,000, were discovered by Ralph Lauren during the implementation of an FCPA compliance training program in Argentina. The SEC determined not to charge Ralph Lauren with violations of the FCPA due to the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation. Ralph Lauren Corporation's cooperation saved the agency substantial time and resources ordinarily consumed in investigations of comparable conduct (US Securities & Exchange Commission 2011 Agency Financial Report Appendix B)

Position in Hong Kong

In Hong Kong there is no Foreign Corrupt Practices Act. All corruption offences are investigated by the Independent Commission Against Corruption and prosecuted by the Department of Justice.

Does SFC need similar US statutory power re payments to foreign government officials to assist in obtaining or retaining business?

Payment to Foreign officials to assist in obtaining or retaining business
The following cases in Hong Kong involved offering a bribe to **former Macau government official Ao Man-long –**

Case 3

CEO of Chinese Estates Holdings (SEHK:0127)

On 16 March 2014, Joseph Lau stepped down as chairman and **CEO of Chinese Estates Holdings (SEHK: 0127)** is a major Chinese investment holding company based in Hong Kong, after he was found guilty in Macau on 14 March of bribery and money laundering. Lau was replaced as chairman by his son, Ming-wai, who was also named acting CEO, effective March 14. Lau was found guilty of offering a bribe of over HK$20 million to former Macau public works chief Ao Man-long in a money-for-land deal. Ao was jailed for 29 years in May 2012.
Lau was sentenced to five years and three months in prison. Lau neither attend the trial nor in court for the verdict. The conviction will be suspended until there is a final ruling of the appeal court.
Trade in Chinese Estates shares was suspended at the Hong Kong Stock Exchange on 14 March afternoon. The company's stock had gained more than 80% in the past year. Hong Kong and Macau, two former European colonies that are now special administrative regions of China separated by a one-hour ferry ride, **have been discussing a mutual legal assistance agreement including surrender of fugitives**. (Bloomberg March 16, 2014)

Case 4

HKSAR v Lionel John Krieger (D1) and Tam Ping Cheong, James (D2) DCCC 316/2010

Defendants were convicted of offering bribes to the ex-Secretary for Transport and Public Works of Macau for contracts in Macau.

On appeal against conviction, the Court of Final Appeal (FAMC 1/2014) found that the Cap. 201 applies where the advantage is offered in Hong Kong, even if the offeree is a foreign public official residing outside Hong Kong, and the conduct relates to their activities in a foreign jurisdiction: it is directed against offers made in Hong Kong and targets the offer or only.

Comment: The Court of Final Appeal, the highest court in Hong Kong, puts limits on the ICAC's power in investigating bribery involving foreign officials. Since the decision of the highest court is binding on all courts, the lower courts will now view corruption outside Hong Kong in the same light. This is very reassuring to investors to know the reach of the SFC is across borders and can imagine the amount of high level negotiation this takes to pursue and prevent.

Payment to Hong Kong government officials to assist in obtaining or retaining business

Case 5

Thomas and Raymond Kwok, co-chairmen of Sun Hung Kai Properties Ltd. (SEHK0016)

Co-chairmen being investigated by ICAC for giving bribes in exchange for information on land sales between 2005 and 2007.
Rafael Hui, formerly Hong Kong's second highest ranking government official, has also been charged. The ICAC alleges that, between 2000 and 2009, Hui took more than HK$34 million in bribes, and the rent-free use of a flat in Happy Valley in return for favors.
Trading in shares of Sun Hung Kai was suspended shortly after the markets opened in Hong Kong on 8 March 2013. Fixed Date for trial in May 2014.
Sun Hung Kai appointed Mike Wong and Victor Lui, who are Sun Hung Kai executive directors, to the additional posts of deputy managing directors to assist Thomas Kwok and Raymond Kwok.
On 23 December 2014 one of Hong Kong's richest property developers, Thomas Kwok, was jailed for five years for bribing the territory's former chief secretary for administration, Rafael Hui. Hui was sentenced to seven and a half years in prison. Kwok was convicted of paying Hui, then the top-ranking civil servant in the government, millions of Hong Kong dollars for using his influence to help Kwok's property firm, Sun Hung Kai. The jury had rejected Hui's claims that the source was from a mainland-Chinese government. Two other senior executives at Sun Hung Kai

were also convicted and jailed.

The following was the Analysis of the Economist Intelligence Unit, Country Finance Hong Kong December 23rd 2014 titled "Jail sentences handed down in landmark bribery case" -
"There are a number of other ongoing investigations into the behaviour of senior officials and executives. These cases have served to undermine public trust in the government and business leaders. The perception that the territory's wealth has increasingly been channeled to a politically favored elite has also served to boost support for the local pro-democracy movement. The success in prosecution will highlight the territory's strong rule-of-law credentials".

In Transparency International's annual Corruption Perceptions Index, Hong Kong slipped from 12th (out of 183 countries) in 2011 to 17th (out of 175 countries) in 2014, but it remains among the least corrupt territories in the world.

The Court of Final Appeal's decision on bribery offences

In HKSAR v Luk Kin Peter Joseph & Yu Oi Kee (unreported, FACC Nos. 6, 7 and 8 of 2016).
Breach of Listing Rules by Directors e.g. HKSAR v Luk Kin Peter Joseph & Yu Oi Kee (unreported, FACC Nos. 6, 7 and 8 of 2016) where two directors signed board minutes authorising an acquisition which involved connected transaction. Under the Listing Rules, the transaction required disclosures and was subject to voting restrictions. However, the board minutes failed to disclose these issues. Relying on this erroneous document, the parent company executed the transaction without making disclosures. The two directors were charged as agents who deceived or misled their principal (namely, the parent company) with false document under section 9(3) of Prevention of Bribery Ordinance.
Comment: Investigation of all corruption offences is carried out by the **ICAC** even a breach of Listing Rules. **There is no need for the recommendation to enhance the SFC enforcement**.

Brief Summary of the Research Activities**:**

Chapters 3 and 4 have presented a set of case studies, reports and media coverage of key cases highlighting what a small investor might fear and what steps are in place to mitigate risk which can dispel the fear. There is significant evidence that financial

securities in Hong Kong are robust internally and across borders. Chapter 5 now looks at how this research has shifted my thinking and my intentions in this sector. I started out with attention to the public interest and how different cases and different kinds of reporting on cases make more transparent the workings of these complex systems and how they can enhance or not trust in these systems.

Chapter 5 Discussion

Impact on my professional understanding

I have professional experience over many years in this sector and as a keen investor I felt I had an above average understanding of the complexities of Hong Kong securities and could therefore offer both perspectives.

Since 2007, the SFC has been using section 213 to obtain orders in aid of its investigations e.g. Du Jin case (see Case 6 Chapter 3) and its development after Du Jin's conviction in APPENDIX ONE.

Section 213 is an application to the Court of First Instance for an order. It is not a jury trial. It is civil in nature where the SFC issues its writ of summons under s. 213 of the Securities and Futures Ordinance seeking injunctive and/or restorative orders. Civil proceedings cure the problems of criminal proceedings e.g. defendants not Hong Kong based and the requirement of a higher standard of proof when MMT proceedings are not generally known for their speed.

SFC was successful in Hontex case in obtaining compensation for investors in respect of financial misstatements in a company's prospectus. It is clear from Tiger Asia case that the SFC is not afraid to use the section 213 mechanism – and possibly other powers - to obtain remedies which the industry has not seen in the past. The SFC has been steadily getting more creative in the use of its powers. The decision of the Court of Final Appeal in the Tiger Asia case has made section 213 a valuable tool to protect the investing public when there is no determination by the Market Misconduct Tribunal (MMT) or a criminal court.

Accordingly, what I did not know before, but I know now because of this research

How section 213 addresses the problem of "Jurisdiction"

Tiger Asia

MMT/criminal court ruling not required
"The Court of Final Appeal in Tiger Asia made it clear that section 213 does confer jurisdiction on the court to decide whether market misconduct had taken place, and to

make final orders under that section, without the need that there be a ruling in the MMT or criminal court. The Tiger Asia. The highest appellate court in Hong Kong and is binding on all lower courts" (Re-examination of Section 213 of the Securities and Futures Ordinance by Baker McKenzie dated January 6 2014)

Route by SFC to pursue overseas defendants and their assets

"The Court of Final Appeal's decision paved the way for the SFC to seek remedial orders under section 213 where persons and their assets are overseas as in the Tiger Asia Parties. Given the difficulties in prosecuting persons who are outside Hong Kong through criminal or MMT proceedings, it now seems that seeking injunctions and orders under section 213 will become an enforcement route favored by the SFC to pursue potential defendants and their assets overseas"

(Section 213: the SFC has it and will use it (Norton Rose Fulbright June 2013).

Hong Kong's lack of a class action regime and contingency fees are cured by Surrogate actions

"Court of Final Appeal's landmark ruling in Tiger Asia remedies for investors under sections 212 to 214 are separate from, and where appropriate, in addition to, proceedings in the criminal court or before the MMT.

The use of these sections has faced some criticism as creating a "third way" which allows the bringing of criminal and civil proceedings against a party in respect of the same conduct it is not possible for both civil and criminal market misconduct proceedings under Parts XIII and XIV SFO to be brought in respect of the same conduct. The SFC's ability to obtain remedies for investors cures some of the problems created by Hong Kong's lack of a class action regime and contingency fees which makes it prohibitively expensive for minority shareholders to seek redress for corporate misconduct. Surrogate actions brought by the SFC also enable Hong Kong to avoid some of the disadvantages of a class action regime, such as higher incidences of speculative litigation."

Representative claims

"Court of Final Appeal decision endorses representative securities claims brought by the SFC to compensate aggrieved investors

In the meantime, the Securities and Futures Commission are embracing a significantly more active civil enforcement strategy based on section 213 of the Securities and Futures Ordinance. Section 213 is a broadly worded provision allowing the SFC to obtain a range of protective and restorative orders against any person who has breached the Securities and Futures Ordinance or related legislation.

The jurisdictional challenge brought by Tiger Asia), a New York-based asset management company that specializes in equity investments in Asia, against the Securities and Futures Commission's reliance on section 213 was determined on April

30, 2013. endorsed the propriety of the SFC proceeding for the benefit of investors and, in the context of market misconduct, confirmed that relief under section 213 is free-standing and not contingent or conditional on there being proceedings before the Market Misconduct Tribunal or the criminal courts."
(Civil Enforcement of Securities Violations in Hong Kong Section 213 of the Securities and Futures Ordinance dated 6 April 2013)

Insider Trading case committed by solicitors

The broader significance of Section 213 and its emergence as a central component of the SFC's enforcement strategy is also found in the Solicitors, Mr Eric Lee Kwok Wa and Ms Betty Young Bik Fung case - where a piece of insider information is about a bank not listed in Hong Kong - the problem of jurisdiction
However, since the Court of Appeal granted leave to take the case to the Court of Final Appeal, we have to wait for the decision of the Court of Final Appeal, the highest court in Hong Kong before we can say that insider information also include information about a bank not listed in Hong Kong.

Case studies reveal that SFC has given precedence to protect investors by compensating losses from market fraud and misconduct. The success of SFC remediation efforts over the years under research highlighted this function. In its judgment (Tiger Asia case), the Court of Final Appeal specifically referred to SFC's responsibility to maintain the trust of investors and bringing appropriate action against market misconduct. Court of Final Appeal is the highest court in Hong Kong, the decision of which is binding on all courts.
Case research reveals that the SFC has stopped existing misconduct through injunctions and other quick remedies during investigation -
(i) as soon as SFC is aware of the commission of the market misconduct the SFC immediately freeze the assets by interim injunction to prevent the wrong-doers transmit money into China as in the case of Qunxing Paper Holdings Company Limited whose business undertaking is based in the Mainland;
(ii) before taking Court action as in Hontex when $832,244,497 was frozen under interim orders obtained by the SFC and before the conclusion of action in Court, Hontex signed an admission that there were overstatements in the prospectus due to its recklessness without admission of any criminal behaviour. The Court made the order under section 213 requiring Hontex to pay $197,755,503 into Court within 28 days. The Court also required Hontex to convene a shareholders' meeting to approve the repurchase of shares of around 7,770 public shareholders of the company. The Company returned over $1 billion to minority shareholders;

(iii) immediately based on SFC's investigation even where there was no criminal conviction nor had the case been heard by the Market Misconduct Tribunal as in Tiger Asia - where the SFC sought orders under section 213, including orders freezing Tiger Asia's assets, prohibiting Tiger Asia from trading in listed securities and derivatives in Hong Kong in similar circumstances, and unwinding the relevant transactions.

Comment: In addition to section 213, I am impressed with the willingness of the Court to rule in favor of SFC's application in obtaining documents for investigation.

Court's willingness to grant SFC's application in obtaining documents for investigation

Ernst & Young Hong Kong - PRC laws/state secrets is not a valid claim

In August 2012, EY claimed that the relevant records were held by its joint venture partner in mainland China, and that the documents could not be produced to the SFC because of various restrictions under PRC laws and regulations including auditors' duty of confidentiality and the law concerning state secrets. Nevertheless, on May 23 2014 Court order granted on SFC application ordering EY to produce accounting records which EY claimed they could not produce because of restrictions under PRC.

Liquidator - legal privilege is not a valid claim in Lehman Brothers

The SFC issued a notice to Lehman Brothers on 31 October 2008 requiring production of specified documents. The liquidators for Lehman Brothers objected to the production and claimed legal professional privilege because a member of the New Product Review Committee was an in-house lawyer at Lehman Brothers.
On 21 Aug 2009 The High Court ruled that Lehman Brothers Asia Ltd (in liquidation) must disclose records in connection with SFC's investigation of the offer and marketing of Minibonds.

Comment: I am impressed, from the enforcement point of view, with how the ICAC expands its boundaries.

One may recall the case of Lionel Kriegar v James Tam (FAMC 1/2014). The Court of Final Appeal, the highest court in Hong Kong, puts limits on the scope of law regarding criminalizing the bribery of foreign officials the ICAC can investigate and enforce.

The ICAC has recently been able to expand its territory to investigate into

areas previously investigated by

Hong Kong Police

Fraud/Deception e.g HKSAR v Lily Chiang and 2 others DCCC 265
Defendants were charged with conspiracy to defraud and making false statements concerning share options and untrue statement in prospectus.
Money laundering e.g. Cheung Choi-hing, in November 2012, the Standard Chartered Bank Manager was charged by the ICAC

SFC

Breach of Listing Rules by Directors e.g. HKSAR v Luk Kin Peter Joseph & Yu Oi Kee (unreported, FACC Nos. 6, 7 and 8 of 2016) The above examples are what I learned from carrying out this research and I would have considered myself fairly knowledgeable about the sector and its practices. I hope that by continuing to keep communications simple and illustrative the small investor will be able to keep up to date with what is going on and how to make better investments and importantly to realise through cases what preventative measures can be taken and who to turn to in the case of suspicions practices. But does the SFC really care about the small investor.

Comment: My research has demonstrated that the SFC does keep the small investor in mind because confidence in the sector rises and falls on trust. If trust is lost among the small investors this can pervade the big markets with distrust. The following clarifies with examples the SFC's considerations.

Protection for the small investor

Is there such a thing as a Safe Bet?

Risk vs Gambling

It is generally accepted that gambling is a form of risk-taking. Gambling involves an element of risk, typically a high probability of loss against a smaller probability of large gain. Investors and gamblers have one thing in common. They want to put more money in their pockets. Gamblers hope for a quick win. Investors want to build wealth over time.

Gambling vs Investment

The former involves luck and may result in total loss. The odds are always in favor of the house. The latter involves allocation of money in the expectation of some benefit in the future. In **finance,** the benefit from investment is called a **return.** The return may consist of **capital gains** or **dividends** or a combination of both over a period of time. Investing money in shares by regularly monitoring and contributing can make it grow over time. Investing involves a certain amount of risk. However, by building a more diversified portfolio with shares and holdings from multiple sectors (technology, energy, blue chips) helps to balancing out the risk. In other words, not putting all the eggs in one basket. Many financial advisors apply the Modern Portfolio Theory. Nobel Prize winning economist Dr. Harry Markowitz conceived the idea for this Theory (1952) which formed the foundation for portfolio management by balancing risk and return. He is just one of many commentators on how to invest.
Investment in shares is a safe bet because investors can control risk and invest according to goals and timelines e.g. conservative, moderate or aggressive. Moreover, the case studies under “The System” prove the following – the system is trustworthy.

Class action

Many small investors or those aggrieved in some way by negligence of large organisations cannot afford to bring a case against such wealthy opponents so they can share or spread the costs in what is called a class action. For example if an

investor knows that there was insider trading he/she would not be able to afford the cost of going up against a big company to prove it.

In Hong Kong there is no class action where a group (a class) sues another party, originated in the US. Accordingly, in Hong Kong each aggrieved investor has to bring civil action in Court for losses or compensation.

Further in Hong Kong there is no contingent fee as in the US i.e. fee is payable only if there is a *favourable* result. An aggrieved investor has to pay the legal cost first before taking private action unless he passes the means test in order to be eligible for legal aid. This covers monetary claims in derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation or deception is involved in respect of the sale for civil proceedings in the District Court and above.

Since the legal profession is not fused in Hong Kong, an aggrieved investor has to pay the Counsel/barrister fee in addition to the solicitor fee because a solicitor has no right to appear as an advocate in open proceedings in the High Court, Court of Appeal and in the Court of Final Appeal. This is a left over from the British system

We have seen the wide range of orders which could be made under section 213 and the persons caught by the section. This allow SFC with great flexibility to draft the orders it seeks to address the reality of a particular situation.

Since the SFC's action under section 213 on behalf of investors aggrieved by market misconduct is an equivalent to a class action that Hong Kong does not have, SFC claim under section 213 for aggrieved investors which eliminates the worries or for them to get legal advice and more importantly to take legal actions.

Loss suffered at an individual level is very small

The SFC can make claims under section 213 on behalf of investors aggrieved by market misconduct even if the damage suffered at an individual level is small.

claim (less than $50,000) to the Small Claims Tribunal although hearing is informal and no legal representation is allowed or
claim (more than $50,000) to
seek conciliation first through the Consumer Council and then with the aid of its fund

take private action in civil courts
Mediation First then Court through Financial Dispute Resolution Center provided the financial institution is in Hong Kong, its member and the sum involved is less than HK$500,000.
Where the amount is more than HK$500,000, arbitration which needs consent for both parties.
In Hong Kong, the SFC can force the defendant to pay investors' loss by making application to the High Court under section 213 of the SFO even in Insider Trading The insider trader was sent to prison as in Du Jin case and the investors get their damages without the need to take civil action individually.

In addition, the individual investor has the Civil Right to sue for damages for loss - When the wrong-doer is convicted =
The criminal court can make compensation orders a victim when passing a sentence.
Under the doctrine of res judicata [a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties], the aggrieved person of crimes may sue the convicted person civilly by using the determination of the criminal court.
When the wrong-doer is brought before MMT, the victim may sue the wrongdoers civilly by using its determination as evidence.

Finally, civil suit can be taken by victim-investor even when the wrong-doer is not charged or acquitted because the standard of proof in civil cases is lower than in criminal cases. This should allay any fears for the small investor. A synopsis till 30 June 2017 the operations of the SFC, its relationships with the Department of Justice, and the regulatory bodies is in ANNEX C of APPENDIX THREE.

Findings Summary

1. I have provided an update till 2020 on the financial securities systems in Hong Kong. This work was submitted before a number of changes have taken place locally and globally.
2. I have provided an update on the issues that concerned me on Professor Jackson's paper in relation to my findings. I am grateful to Professor Jackson's paper for stimulating me to check and find out more about the issues he raised to see their context and accuracy.

3. My update is from 30 June 2017 to 2020.

4, I have provided the knowledge I need to be accurate in my connections between the law and the practice of the law resides in all up-to-date written materials relevant to the research and practice area, as well as legislation and policies as amended up to 30 June 2017. I have included financial reports e.g. Economist Intelligence Unit, Country Finance Hong Kong which were checked up to 30 June 2017

5. Research on Chinese newspapers in July 2017 and posted on the SFC website highlighted surfaced a speech by Mr. Ashley Alder, Chief Executive Officer on 13 July 2017 at the HKSI Institute Roundtable 2017 Luncheon Series entitled *Front-loaded, transparent and direct: A new approach to regulation*.[27]

6. Alder's speech revealed that despite success in obtaining compensation for investors for financial misstatements in a company's prospectus, the failure of the convention vetting system to filter initial public offering fraud and sponsor failures pushes the SFC to change. The change from the convention dual filing system under SEHK's non-statutory Listing Rules to Early Targeted intervention for decision-making in listing matter under The Securities and Futures (Stock Market Listing) Rules (SMLR) in order to improve the quality of disclosure in prospectuses.

7. The SMLR enable the SFC to object to an IPO based on a set of specific legal grounds. These include indications of serious disclosure failures as well as the public interest. They also allow us to object on the same grounds to some capital raising proposals by companies already listed. On top of this, they allow us to suspend trading in a company's shares in order to protect the wider investing public. In some circumstances, they enable us to direct the Exchange to delist a company after a suspension. These rules play a role in the dual filing system, which has been in place for many years. Many public responses to the joint consultation expressed a view that, instead of – 'or' it should be 'as well'.

8. Poorly managed placing-only IPOs had long been a breeding ground for extreme share-price volatility or worse. We decided to issue new guidance on the obligations of sponsors, underwriters and placing agents when managing this type of IPO. We also issued a related joint statement with the Exchange targeting company directors on the same issue. The basic message was – "if you ignore this guidance, the SFC may well intervene and object to your IPO under the SMLR, and if it becomes clear afterwards that a mismanaged placing has led to a disorderly market, expect a suspension of trading, and possible SFO sanctions to follow. Importantly we then

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27 Alder A. (2017) *Front-loaded, transparent and direct: A new approach to regulation*. Chief Executive Officer on 13 July 2017 at the HKSI Institute Roundtable 2017 Luncheon Series https://www.sfc.hk/web/EN/files/ER/PDF/Speeches/CEO

followed up by applying these guidelines in specific cases.

9. The Chinese press summarized parts of this very important speech on the relationship between SFC, IPO and SMLR

10. SFC is at the front line when making decisions under the SMLR. Applicants and their advisers are to communicate directly with SFC.

11. SFC needs to explain decisions to the market, interact directly with affected companies that can appeal against its final decisions.

12. A year before the Economist Intelligence Unit, Country Finance Hong Kong dated 15 September 2016 commented that SMLR vetting would strengthen the reputation of the territory's stock-market. It was described as "strong, as the current listing regulations are weakly enforced and have given rise to some notably poor listings, resulting in scandals."13. Alder's speech has taken a proactive approach instead of just prioritizing mentioned in the May 2015 speech of Thomas Atkinson, the executive Director of Enforcement Division titled "Enforcement trends in Hong Kong Setting the scene: SFC recalibrating enforcement priorities"[28].

14. I have checked the Financial Reports, the Hong Kong Law Journals, the official journal of the Law Society of Hong Kong.

15. The Hong Kong Lawyers[38] published the interview as Mark Steward, Executive Director, Enforcement, Securities and Futures Commission dated November 2014

16. Section 213 of the Securities and Futures Ordinance was re-examined by Baker McKenzie on January 6 2014[29]

Summary

I started off thinking about the small investor of which I am one but one with knowledge of the complexities of the financial securities systems. My question was around how such complexity could be translated to small investors to enhance their trust in the markets. This experience has convinced me more than ever that cases and reports of cases in the media can act as both the transmission of information and attend to the fears that people have about investing. As will be seen in the next

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28 Atkinson, T (2015) *Enforcement trends in Hong Kong Setting the scene: SFC recalibrating enforcement priorities* May 2015 speech @ www. Lexology.

29 Baker McKenzie (2014) *Re-examination of Section 213 of the Securities and Futures Ordinance January 6 2014* @. Lexology

chapter I have modified my claims to provide something for practitioners as well as small investors. I have come to the conclusion that the sector needs some help in this particular dimension of investment. My recommendation(s) are therefore focused on this audience and on early career lawyers in the financial sector.

Chapter 6

Findings & Recommendations

Overall the findings show

1. Consistency and adaptation to events through action and policy by the Hong Kong bodies tasked with safeguarding the confidence of the investment sector
2. The different bodies tasked with different aspects involved in ensuring and enhancing confidence not only through regulation but through significant actions taken against unethical practices have demonstrated that they work successfully together as one cohesive whole with roles clearly delineated
3. While safeguarding bodies can do a great deal to mitigate corruption and poor practice through regulation and sanctions, the investor must do their share of checking the reliability of companies in which they wish to invest
4. IPOs can be held to account as much as the company.
5. China which is the very powerful neighbor of Hong Kong with a strong influence on the socioeconomic and political health of the country has many companies listed in Hong Kong and is subject to the same regulations and sanctions as any other investor and that China, in the cases cited respects, the rigor of the safeguarding.
6. The importance is not which countries have best practices but whether best outcomes can be negotiated as demonstrated in the exploration of US/HK cases in which nationals/residents were in senior roles of US or HK listed companies which did not prevent justice being reached to the satisfaction of both parties.
7. The laws and regulations are complex and go through several iterations as practice and audit surface more issues and loopholes and unethical practices. It is evident that since starting on this research project more access and clarification has become available on line and the SFC's own website is highly informative.

8. Application to practice through cases whether on the SFC website or reported in the press/media are still the best illustration of the system in practice
   The SFC protects and acts for the small investor in claims for unethical practice by companies

Recommendations

As mentioned at the end of the last chapter, I started off as someone with a background in law enforcement and subsequently in law. I am also a small investor. I was motivated to carry out research that would help to clarify the complexities for myself and for others of the safeguards in place to protect investors. I had doubts, I was worried, I wondered if Hong Kong could do better, could learn from the USA and do better at helping to explain the systems and how they work. What I discovered is that Hong Kong regulators and regulations administered through a range of bodies are robust and active. This gives me a deep level of satisfaction. However I think there is still more we can do to help the small investor understand the machinations of the system and also help young people and young trainee lawyers in the financial sector to get a handle on not only the different components which can be learned but how they are used in practice and for me this is through legal cases as stories. This is not a new method, it is quite ancient but it regularly needs refreshing not least as technology has over the last 25 years pushed us into complexities far greater and at a much faster pace than any previous age.

I am proposing practical outcomes from this research project. My intended outcomes are

- an on line Guide for the general public who are always potential investors and for current small investors which provides illustrative cases from regulatory reports and from the media – a troubleshooting What happens if….
- a handy illustrative on line guide for young legal trainees on pertinent precedents
- a quick on line guide to Hong Kong financial bodies and their roles for young international lawyers
- this thesis to be available to help an enterprising novelist/program maker to write short stories, a form of parables and cautionary tales for the wider public based on facts

Reflections

I am not an academic. My background is very modest and like my parents I have worked all my life. Investing became for my mother and later for myself a better option than gambling when we were in so much need of money. This over time worked for us and we also had some losses but we learned from our mistakes. I think of how challenging the problem of gambling is in Hong Kong and how much better it would be if people inclined to gamble switched to investing. It does not provide quick gratification but it does not cause depression either. I believe that one learns nothing from gambling but investing broadens your thinking, it is like a good crossword puzzle or a game that requires intelligence and strategy. These are collateral benefits. People can be lone investors or invest with small groups. What is in place now, which was not when I was young, are more protections against unethical practices which have very much reduced the risk of loss.

I think I have carried out the research in a way that suits my neural makeup. It has not required me to engage in conversations and explore the entangled areas of relating. This is not who I am. It does not mean I do not care for the health of society, I do very much because I live in a society that needs to work for everyone. The poorer large sections of the population become, the less stable it is for others. I am invested in encouraging investing by the less affluent members of our society and perhaps with my training I can support in demystifying this sector and demonstrating the protections which are in place. I am sure young people too will find great appeal in learning complex law through stories which is a tried and tested method in other parts of law. I was stimulated by my own work to revisit Confucius. As children when we are taught Confucius, we are too young to understand. I came across this in the Asia Times on line July 24, 2003. It has explained better what I wrote earlier in my introduction to this work about my own predisposition and immutable characteristics.

The Confucian Code of Rites *(Liji)* is expected to be the controlling document on civilized behavior, not law. In the Confucian world view, rule of law is applied only to those who have fallen beyond the bounds of civilized behavior. Civilized people are expected to observe proper rites. Only social outcasts are expected to have their actions controlled by law. Thus the rule of law is considered a state of barbaric primitiveness, prior to achieving the civilized state of voluntary observation of proper rites. What is legal is not necessarily moral or just.

I see this mirrored in a robust Financial Securities system which is devised to prevent those inclined to be 'uncivilised.' A truly civilised society is one which does not need constant vigilance and the availability of punishments so that all are safe. It is a dream but in the meanwhile we need institutions to give us time to become the civilised ideal of Confucius.

Part 2 of this work follows after the References which lists bodies and regulatory roles in more detail followed by Part 3 which does the same for the cases cited.

Chart of Hierarchy of courts in Hong Kong

The Court of Final Appeal (CFA)

The highest appellate court. Their decisions must be followed

↑

The Court of Appeal (CA)

Bound by CFA decisions and its own decisions.

↑

The High Court (HC)

Bound by decisions of CFA & CA. but not its own decisions although strong persuasive. If two previous decisions are at variance, the latter decision is generally accepted if provided grounds for not following the prior decision. The High Court is made up of the Court of Appeal and the Court of First Instance. It has both appellate and original jurisdiction, i.e. it can both hear appeals sent to it and try cases first taken to it.

District Courts

Bound by superior courts decisions but not their own previous decisions although persuasive.

↑

The Magistrates Courts

Bound by decisions of superior courts and not their own decisions.

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Part 2

Details of structures, bodies and processes of HKSAR Financial Securities System

Description of the overall securities enforcement in HKSAR

I have put this Part 2 together as a guide to both the reader of the whole document and to stand alone as a navigation for small investors.

Like all the most robust financial securities systems in the world, Hong Kong's law enforcement system is complex even for those involved professionally in these bodies. It is recognized that the small investor or the public in general have to put their trust in the systems and those professionals as the complexities are beyond most people' understanding. The public shock comes when those systems collapse by human error or greed or over complexity and then it is the public who suffers the greatest fall out. It is in the national interest and in global economic health to keep these systems up to date. Think of it as not unlike car theft. The manufacturers keep updating their designs to prevent theft of cars. Meanwhile those in the business of stealing cars develop new systems to hack or overcome the prevention measures with new ideas. With this perspective one might consider that crime plays a role in progress especially technological.

The following are details regarding all the bodies that would be involved with the range of cases related to financial securities. The bodies involved depend on the nature of the case and the players involved and for what reasons, for example and how a case of fraud or neglect in relation to financial securities can find itself heading in different directions depending on each individual case. While examining a case or a complaint, decisions made as to which route through the system is appropriate. During a more thorough examination of a case, previously unknown information may surface requiring another direction, or for example it may be revealed that individuals may have not only contravened regulations but conducted criminal acts and that would inform which bodies need to be involved and at what stage. This is why it is important to have the information in the table for quick access to remits and jurisdictions when testing the robustness of the system in the cases presented further on in this work.

Figure 1

Table 1

Securities Enforcement in HKSAR is divided into three groups

(A) LAW ENFORCEMENT AUTHORITIES		Acronym
	The first tier is investigation of offences against wrongdoers by	
1	Hong Kong Police	HKP
2	Independent Commission Against Corruption	ICAC
	The Hong Kong Securities & Futures Commission	SFC
	The second Tier	
	Prosecutions Division of Department of Justice	DOJ
(B) HONG KONG STATUTORY BODIES	to which the aggrieved investors can approach for help	
1	Consumer Council	
2	The Financial Dispute Resolution Center Limited	FDRC
(C) THE HONG KONG REGULATORY AUTHORITIES	Regulate their own members and refer to Group A matters of interest	
1	Hong Kong Stock Exchange (with investigating and disciplinary powers against the listed companies	SEHK
2	The Hong Kong Monetary Authority with investigating and disciplinary powers against banks	HKMA
3	The Financial Reporting Council investigates financial reports of auditors and listed entities and	FRC

	refers non-compliance to Hong Kong Institute of Certified Public Accountants for discipline	HKICPA

Group A

LAW ENFORCEMENT AUTHORITIES

First Tier

1. HKP (Hong Kong Police) - the Commissioner of Police reports to Secretary for Security

The Hong Kong Police was formed in 1844 under the Police Force Ordinance Cap. 232 dealing with an extremely broad-based role including bribery since 1898. Apart from the present police service, its services included fire-fighting, prisons and immigration.

It is the largest disciplined service under the Security Bureau of Hong Kong. It is the world's second, and Asia's first, police agency to operate with a modern policing system. As the nature of Hong Kong society changed, the police force become a service orientated modern force engaging in crime prevention. The police force remains open and accountable for its actions.

The Force is headed by the Commissioner of Police, assisted by two deputies – "Operations" which supervises all operational matters, and "Management" which is responsible for the force management including personnel, training, and management services.
The Force is organised into six regions:

- Hong Kong Island
- Kowloon East
- Kowloon West
- New Territories North
- New Territories South
- Marine Region

Their crime formations investigate minor commercial deception cases.

Table 2 Force Headquarters

Force Headquarters	
'A' Department (Operations & Support) **Operations Wing**	Crime Formation investigates serious and inter-district crimes. In addition, it collects, collates and evaluates intelligence on criminals and criminal activity within the Region.
'B' Department (Crime & Security)	Crime & Security Department is responsible for the force policy regarding the investigation of crimes and matters of a security nature. Crime Wing consists of a number of operational bureau and specialised units. The operational bureau deal with specific areas of criminal activity whereas the specialised units provide support services to operational units in the force and deal with policy matters on various issues including witness protection. Security Wing provides VIP protection and security co-ordination, including counter-terrorism.
Crime Wing	1 Organised Crime and Triad Bureau 2 Criminal Intelligence Bureau 3 Narcotics Bureau 4 Criminal Intelligence Bureau the Force's central coordinating body for intelligence on crime and criminality. It cultivates information in relation to criminal activities, societies, organised and serious crime. It conducts research on such activities and mounts intelligence-based operations against the syndicates involved, enabling strategic and tactical intelligence to be produced after analysis and assessment for crime investigation and enforcement action mainly by the Organized Crime and Triad Bureau and regional crime formations in tackling triad and organized crime syndicates 5 Support Group is made up of units which provide a technical and professional service to support criminal investigation, including Criminal Records Bureau, Identification Bureau.

Table 3 Offences

Offences	
Crimes Ordinance (Cap. 200) and the Theft Ordinance (Cap. 210)	▪ Regional crime formations investigate minor commercial deception cases ▪ Commercial Crime Bureau investigates inter alia serious and complex commercial and business fraud; computer crime, the forgery of monetary instruments. It liaises closely with international law enforcement agencies on exchange of intelligence and in entertaining investigation requests from other jurisdictions alleging criminal commercial transactions.
Money Laundering **F**ailing to report suspicious transaction to FJIU by practitioners in financial markets, remittance agents, money changers, money lenders, estate agents, trust and company service providers, jewelers, accountants, lawyers i.e. sectors with greater risk of coming across crime proceeds or terrorist property It is money laundering if one deals with property knowing or having reasonable grounds to believe that the property is crime proceeds	▪ Organized Crime and Triad Bureau tackles sophisticated and syndicated criminal activities including money laundering. The assets of criminals involved in non-narcotic related crimes are also identified, restrained and confiscated. It liaises with law enforcement agencies all around the world to exchange intelligence for the prevention of illegal activities. ▪ Narcotics Bureau - its Financial Investigations Division investigates activities arising out of the Drug Trafficking (Recovery of Proceeds) Ordinance, Organised and Serious Crimes Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance. The Bureau, through the Joint Financial Intelligence Unit (JFIU), receives reports about suspicious financial activity made under the above-mentioned Ordinances. Since the enactment of the United Nations (Anti-Terrorism Measures) Ordinance in 2002, JFIU also receives suspicious transaction reports relating to terrorist property. In July 2013, a team was established in the Narcotics Bureau to conduct risk assessment on money laundering and terrorist financing.

Money laundering

Money laundering is regarded as the cleaning of dirty money from criminal activity. However, it has developed to recent cases which only involved stand-alone money launderers e.g. **Carson Yeung Ka Sing** who was president of English football club Birmingham City F.C. Yeung was arrested and convicted for dealing with property known or believed to represent proceeds of an indictable offence and sentenced to six years' imprisonment. Mr. Carson Yeung was convicted without evidence of a crime and subject to appeal. The case was investigated by the Financial Investigations Division of Narcotics Bureau (South China Morning Post 7 May 2014).
Details of Money Laundering by individuals can be found in **ANNEX B of APPENDIX THREE**.

Joint Financial Intelligence Unit (JFIU)

The Joint Financial Intelligence Unit (JFIU) was set up in 1989, run by the Hong Kong Police Force and the Hong Kong Customs & Excise Department based in Police Headquarters to protect Hong Kong from money laundering and terrorist financing. It is responsible for receiving, analyzing, and storing suspicious transactions reports and then passed on to the Narcotics Bureau, the Organized Crime & Triad Bureau of the Police Force, or the Customs Drug Investigation Bureau of the Customs & Excise Department.

HKP (Hong Kong Police) - the Commissioner of Police reports to Secretary for Security

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Kowloon West
New Territories North
New Territories South
Marine Region

Their crime formations investigate minor commercial deception cases.

The ICAC (Independent Commission Against Corruption)

Table 4

Independent	The Commissioner of ICAC reports directly to the Chief Executive
Wide investigative power	to search - bank accounts after requiring suspects to declare their assets to search suspect's home and place of work to take statement on oath to restrain properties suspected to be derived from corruption to hold suspects' travel documents to mount surveillance and telephone intercept on the suspects. In Hong Kong telephone intercept cannot be used as evidence in courts to arrange undercover operation to infiltrate into a corruption syndicate. to deploy a co-operative party to set up a meeting to trap the suspects.
Investigative Support	Intelligence Section to collect, collate, analyze and disseminate all intelligence and investigation data Surveillance Section of over 120 surveillance agents Technical Services Section to support surveillance and operations Information Technology Section - to break into computers seized during searches and examine the stored data. Financial Investigation Section - qualified accountants to investigate money trail of corruption involving off-shore companies and accounts as well as funds and to give expert evidence in court. Witness Protection Section - including 24 hours arms protection, safe housing, new identity and overseas relocation.

The ICAC

Established in 15 February 1974 with the enactment of the Independent Commission Against Corruption Ordinance Cap 204 and enforces the Prevention of Bribery Ordinance (POBO) (Cap. 201). ICAC is independent of the civil service. The Commissioner of the ICAC reports directly to the Chief Executive Hong Kong SAR.

The ICAC is responsible for investigating corruption. However, there are -
cases when investigation is not only corruption but very sophisticated organized crime e.g. the money laundering - Cheung Choi-hing, in November 2012, the Standard Chartered Bank Manager was charged by the ICAC of conspiracy to deal with property known or believed to represent proceeds of an indictable offence contrary to section 25(1) of the Organised and Serious Crimes Ordinance and section 159A of the Crimes Ordinance. Over $174 million was involved between July 2011 and October 2012 in Malaysian tax evasion. They were brought to Eastern Magistracy for mention. No plea was taken pending further enquiries by the ICAC (South China Morning Post 17 November 2012)
cases of listed companies arose from a corruption complaint but ended in offences other than corruption e.g. HKSAR v Lily Chiang and 2 others DCCC 265 and 266/2009, involving conspiracy to defraud and making false statements concerning share options. Details in **ANNEX A of APPENDIX THREE.**

Update

ICAC investigated and was successful in bring prosecution and conviction in the Court of Final Appeal, the highest court in Hong Kong against Directors of listed companies for Breach of listing rules.
The Mission of the ICAC Operations Department is *to make corruption a high risk crime*.

Setting a precedent and learning from it

The ICAC's first important task was to extradite Peter Godber from England to stand trial in Hong Kong for a conspiracy offence and one of accepting bribes. Godber was sentenced to four years' imprisonment.
In June 1973, a Chief Police Superintendent, Godber, fled Hong Kong whilst under investigation by the Anti-Corruption Office of the Police Force and during the week given to him by the then Attorney General to explain the source of his assets.
Following Godber's escape on June 8, 1973, a Commission of Inquiry was formed. In response to the finding of the Commission of Inquiry, the ICAC was established on February 15, 1974.

Since its inception in 1974, the ICAC has three-pronged approach of law enforcement namely prevention, community education and fight corruption. The ICAC comprises three functional departments: Operations, Corruption Prevention and Community Relations.

As at the end of 2013, the Commission had an establishment of 1415 posts.

Operational Script

The work of the ICAC is closely scrutinised by four independent committees comprising leading citizens as members and non-officials as chairmen namely –
The Advisory Committee;
The Operations Review Committee;
The Corruption Prevention Advisory Committee and
The Citizens Advisory Committee on Community Relations.

An independent ICAC Complaints Committee examines complaints against the ICAC or its staff.

The Operations Department is headed by a Deputy Commissioner. The department is responsible for receiving, considering and investigating reports of alleged offences under the Prevention of Bribery Ordinance**,** the Independent Commission Against Corruption Ordinance and the Elections (Corrupt and Illegal Conduct) Ordinance.

Under the Prevention of Bribery Ordinance and the Elections (Corrupt and Illegal Conduct) Ordinance, ICAC officers can make arrests for associated offences uncovered in corruption investigations, including certain offences under the Theft Ordinance, the Criminal Procedure Ordinance, and offences connected with perverting or obstructing the course of public justice.
The Department of Justice examines evidence and advises on prosecutions. The consent of the Secretary for Justice is necessary before any prosecution for an offence under Part II of the Prevention of Bribery Ordinance can be instituted.

The ICAC receives complaints through 24-hour hotline and its Regional Offices. In recent years, over 70 per cent of the complainants who reported corruption were willing to reveal their identities.
In 2012, there were 3,932 complaints (excluding elections), of which 63% concerned the private sector, 30% concerned government departments and 7% concerned public

bodies. Reports that are found to relate to crimes outside the purview of the ICAC are referred to the Police or other law enforcement agencies. Reports that are found not to involve criminality, but disclose inappropriate conduct or systems may be referred to the relevant government department for consideration of disciplinary or administrative action or to other relevant organisation for follow-up action with complainant's consent.

ICAC Resource

In the total establishment of over 1,300 staff members, over 900 of them work in the Operations Department, responsible for investigating corruption.

In the annual budget amounting to US$90M, about US$15 per capita. This is intensive. However, it is a small "premium" for a clean society - 0.3% of the entire Government budget or 0.05% of the Gross Domestic Product.

Investigating corruption can be very time-consuming and difficult. There is often no scene of crime. It can involve just two parties without witnesses. Even if there are witnesses, they are often parties to the corruption and their credibility is doubtful. The offenders can be professional and know how to cover up all trails of evidence. The offenders can intimidate the related persons to keep quiet. The offenders can make full advantage of the cross jurisdictions loopholes and employ professionals to money-laundering the corrupt proceeds.

Corruption is often a tool to facilitate organized crimes e.g. bank managers to cover up money laundering. In these cases, not only corruption is investigated, but also the sophisticated organized crime syndicates. Accordingly, ICAC is empowered to investigate all corruption offences and all crimes connected with it

Table 5

Securities and Futures Commission (SFC)

SFC	
Operational Divisions	The Corporate Finance Division - administers the disclosure-based regulatory regime The Intermediaries and Investment Products Division – licensing The Enforcement Division regulates illegal and improper activities

Supporting Divisions	The Supervision of Markets Division monitors activities on the exchanges and clearing houses. The Legal Services Division conducts prosecutions in the Hong Kong Magistrates' Court and handling civil litigation matters involving the SFC, including appeals before the Securities and Futures Appeals Panel The Corporate Affairs Division handles the external affairs. The Policy, China and Investment Products Division handles international and China affairs.

Set Up

Records of securities trading in Hong Kong date back to 1866. In 1891 Hong Kong had its first formal stock market after the establishment of the Association of Stockbrokers in Hong Kong. By 1972, Hong Kong had four stock exchanges in operation. In response to the calls, unification started on 2 April 1986. The 1986 market crash called for a complete reform of the Hong Kong securities industry. In 1989 the SFC was set up as the single statutory securities market regulator under the Securities and Futures Commission Ordinance (SFCO) with "The three-tier" structure. The front line responsibility for regulating listed companies was delegated to the Stock Exchange of Hong Kong Limited (SEHK). The SFC approved the Listing Rules and acted as statutory "watchdog", overseeing and auditing the performance of SEHK's listing functions.

A comprehensive Securities and Futures Ordinance (SFO) Cap. 571 consolidating the SFCO and nine other securities and futures related ordinances commenced operation on 1 April 2003 when the SFC's regulatory functions and powers were expanded including the introduction of "dual filing" system where all listing applications, prospectuses, and announcements by listed companies are filed both with the SEHK and the SFC. The SFC has the power to reject SEHK listing decisions.

Structure

The SFC is an independent statutory body operating outside civil service and not from public funding. It is funded by levies on transactions conducted on The Stock Exchange of Hong Kong (SEHK) and The Hong Kong Futures Exchange (HKFE) as well as fees paid by the licensees. Despite financial independence, the SFC reports and furnishes information to the Secretary for Financial Services and the Treasury

Bureau on important regulatory or market issues, and is required to consult with the Financial Secretary before exercising certain powers.

The SFC is made up of a board headed by the Chairman, all appointed by the Chief Executive of Hong Kong for a fixed term. An executive committee led by a chief executive officer reports to the board and its chairman and for daily administration.

Investor Education Center - a SFC subsidiary to enhance public understanding of different forms of financial products and services in the financial markets.

Formal Enforcement Activities

The Securities and Futures Ordinance (SFO) (Cap. 571) grants the SFC power of prosecution and disciplinary action to combat misconduct in the securities and futures markets in the Hong Kong.

Under section 169 of the SFO, the SFC has specific power to publish codes of conduct to give guidance relating to the practices and standards with which intermediaries and their representatives are expected to comply i.e. to help them to comply with the laws. Breach of a code of conduct provisions may lead to disciplinary action.

Under section 399 of the SFO, the SFC has a general power to issue codes and guidelines. These are not subsidiary legislation. They seek to assist intermediaries to comply with applicable regulatory requirements so that they are fit and proper to remain licensed or registered.

The SFC is an independent body which regulates market participants such as listed companies, brokers, investment advisers and public investors in Hong Kong.

Breach of a code of conduct provisions made by SFC under section 169 of SFO may lead to disciplinary action under Part IX of the SFO.

The SFC may initiate an investigation on the basis of information from any source.

After investigation, SFC refers all market misconduct offences under Part XIII of SFO or Part XIV of SFO namely insider trading, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions and stock market manipulation to the DOJ to consider the suitability and venue of prosecution (Article 63 of the Basic Law).

It is only when no criminal prosecution is recommended, the case will be dealt with by the Market Misconduct Tribunal (MMT) under the SFO amended in May 2012 after obtaining the consent of the Secretary for Justice under section 252A of the SFO. Accordingly, there is no double jeopardy to an offender.

The SFC will provide:

a notice specifying (a) provision(s) of the SFO the person appears to have committed a market misconduct; and (b) his/her identity and (c) brief particulars of the market

misconduct; and
whether this market misconduct has been referred to e.g. police or ICAC.

The SFC will be given the reasons of refusal (section 252A(2) of the SFO) if consent is refused.

Court –
to be done summarily under section 388 of the SFO in SFC's name and handle subsequent appeals
or
to be done on indictment by the DOJ in District Court or above.

MMT -
an independent body established under the SFO, chaired by a judge or former judge of the High Court who sits with two members who are prominent members of Hong Kong's business and professional community appointed by the Financial Secretary under the authority delegated by the Chief Executive. It can jurisdiction to hear and determine anything arising out of or in connection with the SFO proceedings.
Every sitting of the MMT must be held in public unless the MMT considers, in the interests of justice, that a sitting (or any part of it) should be held in private.

Proceedings before MMT is under Part XIII of the SFO.

The following cases demonstrate how the SFC run their cases in these 2 arms namely, the MMT arm and the criminal arm.
The Sino Katalytics Investment Corporation (then known as Capital VC Limited) 2011 in the Market Misconduct Tribunal and
HKSAR v Fan Kwong Hung 2013 in the Eastern Magistracy.
There is no double jeopardy for an offender.
SFC vs CITIC demonstrates how the SFC used the 2 arms in respect of the same matter but different offenders. Details in **ANNEX A of APPENDIX THREE**
The following are examples in MMT -
Mayer Holdings Limited
Between April and August 2012, Mayer auditors repeatedly informed Mayer's management that certain identified issues were not resolved. It was in January 2013 after Mayer auditors resignation in December that Mayer disclosed this fact together with brief details of the outstanding audit issues. Mayer's shares have been suspended from trading since 9 January 2012. The SFC commenced proceedings in MMT in March 2016 alleging that the auditors' resignation, the outstanding audit issues,

together with the potential qualified audit report, were price sensitive information which should have been fully disclosed to the public. The SFC considers that the information would have been viewed negatively by investors, and was of sufficient gravity to affect the share price.

Yorkey Optical International

The SFC alleges that contrary to the published expectations of Yorkey's management of significant growth and increasing profitability, Yorkey had in fact sustained material losses in the second half of 2012, and its financial performance had deteriorated significantly. Although Yorkey and its management are said to have known about such information around December 2012 and January 2013, the SFC says that Yorkey failed to disclose the information to the public until March 2013, when the 2012 annual results were published.

In the Corporate Regulation Newsletter published in March 2016, the SFC reminded listed companies to disclose inside information in an accurate, clear, and balanced manner, and to ensure equal, timely, and effective access by the public. (ii) The SFC's actions against Mayer and Yorkey reflect a recent drive to enhance the quality of disclosures by listed companies in Hong Kong. See more details in http://www.elexica.com/en/legal-topics/dispute-resolution-financial-markets/10-hong-kong-regulatory-enforcement-update-2016-q1

Applications can be made to the High Court –
under Sections 302 and 205 for issuing restriction notice;
under sections 213 and 214 of the SFO when there are contravention of the SFO or Companies Ordinance for an injunction and other order including
Repurchase of shares
Disqualification of listed company directors
Freezing the proceeds of insider dealing.

Sections 204 to 210 of the SFO empower SFC to prohibit or require any licensed corporation to restrict the way the firm conducts its business or deals with its property. Such powers are exercised through on-site reviews and off-site monitoring.

SFC communicates minor non-compliance to the licensed corporation for actions.
For major breaches, SFC may investigate and take disciplinary actions.
Compliance advice letters issued in 2013 and 2012 are 330 and 240 respectively.

Disciplinary process

The SFC may initiate an investigation on information from any source.

The SFC Complaints Control Committee conducts preliminary assessment of complaints. No investigation or no further action is taken if there is no evidence to support misconduct.
After a breach has been identified, the SFC will begin its investigation process.
Application can be made to the Court of First Instance under Section 185 of SFO against a person's non-compliance.
SFC is restrained by law from disclosing information obtained during the investigation. However, details of the complaint will be disclosed to the regulated person or another authority to obtain further information. If the information provided related to law enforcement and regulation, details of the complaint can be disclosed without the complainant's consent.

Notice of proposed disciplinary action (NPDA) **to be sent to the regulated person setting out SFC's preliminary views and the sanctions.**
The regulated person is invited, within 30 days, to give a written explanation and to state why the proposed sanctions are not appropriate to the person signing the NPDA.
After the deadline stated in the NPDA, the SFC will make a final decision on the sanctions based on the evidence before it.
Disciplinary proceedings are normally determined on the basis of written submissions. However, the regulated person may make written application for an oral explanation. A meeting will be held if SFC considers fair in the circumstances. In the course of disciplinary proceedings, the SFC may invite the regulated person to attend a meeting even without application.
After reviewing all information, the SFC will send a written decision notice to the regulated person setting out its decision and reasons, the sanction and the right to appeal to the Securities and Futures Appeals Tribunal.
Under section 20 of the SFO, the SFC will consider resolution proposals made by a regulated person after receiving written representations. The SFC will agree if it is in the interest of the investing public or in the public interest. All discussions about resolution proposals will be treated as "without prejudice", unless agreed otherwise.
In deciding on the final sanctions, the SFC may reduce the sanction on the degree of co-operation.
If aggrieved by the decision in SFC decision notice, the regulated person may appeal by written notice to the Tribunal within 21 days or such time extended by applying to the Tribunal. The notice to the Tribunal must set out clearly the grounds for the appeal and delivered to Tribunal Secretary.
Effective date of a decision

If no appeal, the SFC's decision will take effect when the 21 days expires.
If, within the 21 days appeal period, the regulated person informs the SFC, in writing or orally, that they will not appeal, the decision will take effect at the time the SFC receives the notification.
If, within the 21 days appeal period, the regulated person appeals, the decision will not take effect until the Tribunal makes a final decision. However, if the regulated person withdraws his appeal, the SFC's decision will take immediate effect.
Appeal to the Court of Appeal
The regulated person must appeal within 28 days from the date on which the Tribunal makes a final decision, only on a point of law and not on whether the Tribunal decision was right or whether the Tribunal misinterpreted the facts.

Disciplinary proceedings under Part IX of the SFO
If the SFC finds that a regulated person's conduct suggests it is guilty of misconduct or not fit and proper, the SFC may impose sanctions selected from a range set out in the SFO.
All sanctions except private reprimands, can be found in SFC monthly enforcement reports.
In conjunction with the courts or upon referral to the Market Misconduct Tribunal, the SFC can seek criminal penalties such as imprisonment, community service, and fines, and civil remedies such as fines, restitution, disgorgement, cold shoulder orders (denying access to market facilities), cease and desist orders, referral to professional bodies for disciplinary actions.

Under the SFO, the victims of market misconduct may also sue the wrongdoers civilly by using the determination of the tribunal as evidence.
During investigation the SFO gives the following powers to SFC:
S179 - to compel production of documents from persons related to a listed company in relation to misconduct
S181 - to require information from intermediaries about trading transactions.
S182 - to investigate offences under the SFO.
Rule 8 of the Securities and Futures (Stock Market Listing) Rules directing SEHK to suspend share trading of a listed company which cannot give a satisfactory explanation to SFC's show cause letter.
The Investor Compensation Fund
Under the Securities & Futures Ordinance, the Fund was established on 1 April 2003, to pay compensation to investors of any nationality who suffer pecuniary losses as a

result of default of a licensed intermediary or authorized financial institution in relation exchange-traded products in Hong Kong. Defaults cover insolvency, bankruptcy or winding up, breach of trust, defalcation, fraud or misfeasance.

Ten years after the handover, in 2008, there was the global financial crisis initiated by the Collapse of Lehman
SFC, HKMA and 16 banks reach agreement on Minibonds dated 22 Jul 2009. Details of which are ANNEX A of APPENDIX THREE

Second Tier

Department of Justice (DOJ)

DOJ was formerly known as The Legal Department, formed in 1840, headed by the Attorney General, was responsible for the laws of Hong Kong until 1997, when Hong Kong ceased to be a British crown colony. Since 1997 it has been renamed as the Department of Justice headed by the Secretary for Justice.

The DOJ is headed by the Secretary for Justice, who is a member of the Executive Council and is the Government's chief legal adviser.

The DOJ plays a significant role in our legal system. The DOJ gives legal advice to other bureaux and departments of the Government, represents the Government in legal proceedings, drafts government bills, makes prosecution decisions, and promotes the rule of law.

There are five professional divisions in the Department responsible for legal work. One of which is the Criminal Prosecutions: The Secretary for Justice, who heads the Department of Justice, is responsible for all prosecutions in HKSAR. It is for him to decide whether or not prosecutions should be instituted in any particular case or class of case, and it is his responsibility to conduct and control prosecutions.

The Secretary for Justice plays no part in the investigation of criminal offences. Investigation is the responsibility of the law enforcement agencies. At the end of the investigations, all papers are sent up the Prosecutions Division and it is for the Secretary for Justice to decide whether or not there is sufficient evidence for any person to be charged. In making prosecution decisions, the Secretary for Justice acts as an independent officer, independent of the Government of which he is a member

and of the courts before which he prosecutes. The function which he exercises in this area is part of his function as guardian of the public interest (Article 63 of the Basic Law) free from any interference.

Prosecutions are handled in accordance with the established policy guidelines, namely "the Statement of the Prosecution Policy and Practice". Only cases with a reasonable prospect of success of conviction are placed before the court. Further, cases will only be proceeded with if it is in public interest.

The lawyers of the Prosecution Division before 1997 were titled “Crown Counsel”. After 1997, they were renamed “Government Counsel”. Since 2007, to highlight their constitutional independence, an alternative title of “Public Prosecutor” has been used. Prosecutions on routine matters heard before magistrates are dealt with by law enforcement agencies under settled guidelines issued under the authority of the Secretary for Justice. There is no need for individual reference to the Prosecutions Division. Nevertheless, the Secretary for Justice supervises prosecutions generally. His consent is required for sensitive cases. A fortiori, all cases where the law provides that prosecutions may not be brought without his consent.

The role of the Prosecutions Division is to prosecute and to provide advice and assistance to government bureaus and departments on criminal law.
In practice, simple cases investigated by the Police or ICAC are prosecuted in the Magistrates’ Courts by officers (not counsel or solicitor) appointed by the Secretary for Justice under section 13 of the Magistrates Ordinance (Cap 227).
The Prosecutions Division is the largest in the DOJ, with approximately 125 public prosecutors or qualified lawyers and about 115 lay or court prosecutors.
The lay or court prosecutors in Hong Kong present around 180,000 cases of low level crime every year at Hong Kong's seven Magistrates' Courts on behalf of the government, most of whom have law degrees or tertiary qualifications although they are not legally qualified lawyers.

The work of the Magistrates Court was getting more demanding and complicated, and difficult cases in the Magistrates' Courts are, when necessary, briefed out to barristers and solicitors.
Counsel of the Prosecutions Division (public prosecutors) conduct most criminal appeals up to and including the Court of Final Appeal. They also conduct the majority of cases in the Court of First Instance and the District Court. Counsel from the private bar and solicitors in private practice are regularly retained for highly complex

commercial cases tried in the District Court or the Court of the First Instance. Before a case goes to trial, the public prosecutors evaluate the evidence and carrying out legal research to prepare cases for trial in either the District Court or the High Court .
In February 2010, pursuant to the recommendations made by Sir Ken Macdonald, QC (now Lord Macdonald), the former Director of Public Prosecutions of England and Wales, by Sir Ken, a number of reforms and new initiatives have been put in place. An Office of the Director of Public Prosecutions (ODPP) was created headed by the Chief of Staff, responsible for management and policy.
The operation is conducted by four sub-divisions:
Sub-division I Advisory -advises and prepares for trial in the Court of First Instance, District Court and Magistrates Court;
Sub-division II Advocacy - does all advocacy work;
Sub-division III Appeals - advises and conducts appeals including Basic Law, Bills of Rights and Judicial Review; and
Sub-division IV Commercial Crime - commercial fraud, bribery, dutiable commodities, technology crimes, securities and revenue fraud and breach of copyright and trade descriptions.
Proceeds of Crime Section under the head of Sub-division - advises law enforcement agencies on the application for restraint orders and confiscation orders. The section gives lectures and workshops to local and overseas law enforcers. Some of the section members are qualified assessors of the Asia/Pacific Group on Money Laundering.
When the HKP or ICAC has completed its investigation into a complaint, it will seek legal advice from DOJ. The Director of Public Prosecutor (DPP) on behalf of the Secretary for Justice (SJ) will make decision whether prosecution will be instituted against the persons involved and if so, the venue.
Sometimes DPP will seek advices from outside senior counsel who specializes in criminal law to ensure the community will feel confident that the examining and evaluating of the matter have been done properly without any interference and without any political consideration e.g. **Franklin Lam Fan-keung (**a former non-official member of the Executive Council of Hong Kong) where DPP said the case had been "properly considered" and all evidence was "carefully evaluated". The DPP said that he had come to the same conclusion as independent senior counsel who concluded Lam should not be prosecuted (South China Morning Post 2 August 2013).

In the case of ICAC, the result of DPP's decision will be reported to the Independent Operations Review Committee for endorsement if no further investigative action needed to be taken.

Venue of Trial

In Chiang Lily v Secretary for Justice, Court of Final Appeal (FAMC Nos. 64 & 65 of 2009 (26 March 2010))

The CFA took the view that choice of the venue for a prosecution was clearly a matter covered by Basic Law 63 which gave control of prosecutions to the SJ without any external interference.

The question of venue is a prosecutorial choice with the transfer following on a mandatory basis. (Department of Justice 2009 Statement of Prosecution Policy and Practice). Details in **ANEX A of APPENDIX THREE**

Magistracy

Cases warrant a sentence within the jurisdiction of a magistrate are referred to the Magistrates' Courts Advisory Section.

District Court

Counsel has to formulate charge sheets and the preparation of transfer papers for cases that warrant the transfer to the District Court. District Court Judge sitting alone can give a maximum sentencing jurisdiction of seven years' imprisonment.

Court of First Instance

Cases are referred to the Advisory Section after counsel has determined that the gravity of the offences required a Court of First Instance prosecution e.g. HKSAR v Chu Chien Tung and 4 others HCCC 320/2010 in which five defendants were tried before a jury at the Court of First Instance on multiple counts of fraud. Details in **ANNEX A of APPENDIX THREE**

The DOJ provides legal advice on cases investigated by the Securities and Futures Commission (SFC).

DOJ prosecutes all trials in District Court and above as well as appeals.

SFC may prosecute offences in its own name before the Magistracy (section 388(1) of the SFO).

In accordance with Article 63 of the Basic Law, the SFC refers all market misconduct cases to the Prosecutions Division. Depending on the circumstances of the case, the

Division may advise the SFC to conduct summary prosecutions in the Magistrates' Courts and to handle subsequent appeals. If no criminal prosecution is recommended, as on 4 May 2012, the SFC is empowered to have direct access to MMT, after having obtained the consent of the Secretary for Justice (sections 252 and 252A of the SFO). In 2008, there was the global financial crisis initiated by the Collapse of Lehman. Hereunder are some of the criminal proceedings stemming from the billions of dollar losses suffered by retails investors in Hong Kong following Lehman's demise - HKSAR v Cheung Kwai DCCC526/2010 and HKSAR v. Tai Ching DCCC527/2010 Two Bank of China employees were charged, in the Hong Kong District Court over the sale of structured products linked to Lehman Brothers that turned sour when the US investment bank collapsed in 2008. The two were separately charged with violating a securities law that prohibits fraudulent or reckless misrepresentation to induce others to invest money on various occasions to purchase structured products between 2005 and 2008". The total amount involved was estimated to be HK$3.5m.

BoC, listed in Hong Kong and majority-owned by the Chinese government, accounted for about half of all sales of Lehman minibonds.

The Bank of China Hong Kong (Holdings) Ltd. manager was found not guilty of fraudulently or recklessly inducing her retail banking customers to buy structured products linked to Lehman Brothers Holdings Inc. because Cheung warned customers that they risked losing their investments in the custom-made securities, which lost their value after Lehman's bankruptcy in 2008.
In HKSAR v Chu Lai Sze HCMA 527/2010,
Details in **ANNEX A of APPENDIX THREE**
More cases of successful corporate crime prosecutions launched in the District Court by DOJ in ANNEX A of APPENDIX THREE

Group B

THE HONG KONG STATUTORY BODIES where the aggrieved investor-can approach for help before taking private action

Consumer Council

mediates consumer complaints about services by Banks and/or financial service

providers. Before 2013, complaints relating to on-line securities and futures trading were made to Consumer Council. From the SFC annual report 2014, SFC conducted 88 on-site inspections during investigation of breach of regulation of on-line trading.

Although the main financial source of the Council is in the form of an annual Government subvention, the Council enjoys total independence in formulating and implementing its own policy. The difference in the conciliation work done by the Consumer Council and the Financial Dispute Resolution Centre is that the former deals with complaints outside the purview of the Financial Dispute Resolution Scheme relating to sales practice and service quality which are not monetary disputes and/or by financial service providers nor regulated by the Hong Kong Monetary Authority or the SFC.

The Consumer Council was established in April 1974 at a time of inflationary prices and widespread public concern about profiteering. The Consumer Council Ordinance (Cap. 216) came into force on 15 July 1977 to provide for the incorporation of the Consumer Council and to protect Council Members and employees from personal liability for the bona fide acts and omissions of the Council and Committees.

The 8 Consumer Rights

The right to satisfaction of basic needs
The right to safety
The right to be informed
The right to choose
The right to be heard
The right to redress
The right to consumer education
The right to a healthy and sustainable environment. (Consumer Council website)

Benefits derived from complaints handling

resolving disputes between consumers and traders by mutually acceptable resolutions;

empowering consumers through dissemination of information concerning goods and services;

alerting the public of the trend of complaints relating to malpractices in the marketplace and formulating strategies to tackle them;

improving trade practices by co-operation and coordination with law-enforcement authorities and trade associations to strengthen consumer

protection; and
enhancing consumers awareness of their rights, (Excerpted from Consumer Council website)

Mediating Consumer Complaints

A team of Complaints Officers is responsible for handling consumer complaints and mediating the disputes between the consumers and the traders in order to resolve the complaints to consumers' satisfaction. (Excerpted from Consumer Council website)

The Consumer Legal Action Fund

The Consumer Council is the Trustee of the Consumer Legal Action Fund through a Declaration of Trust executed on 30 November 1994. The Fund was established with a Government grant. The Fund aims to give easier consumer access to legal remedies by providing financial support and legal assistance for the benefit of consumers, particularly, groups with similar grievances in cases involving significant public interest and injustice. Through supporting justifiable cases, the Fund also aims to deter business malpractices and enhance public awareness of their consumer rights. It is a long-standing practice of the Consumer Council to help consumers resolve their complaints vis-a-vis traders concerned. The Council may, if it considers appropriate or if the complainants so request, refer cases of complaints to the Fund for consideration. Consumers may also apply to the Fund directly for assistance (Excerpted from Consumer Council Annual Report 2012-13).

The Fund granted assistance to four Lehman Brothers related applications.

Financial Dispute Resolution Centre (FDRC)

set up in November 2011 as a non-profit making company limited by guarantee. It is an independent and impartial organisation administering the Financial Dispute Resolution Scheme (FDRS) which requires financial institutions who are its members to resolve monetary disputes with their customers through mediation and arbitration

Financial Dispute Resolution Scheme provides consumers with an additional channel to resolve monetary dispute relating to financial products and services provided by its members involving a claim of HK$500,000 or less (or foreign currency equivalent). "Mediation First, Arbitration Next". It is funded by the Securities and Futures

Commission."

Purview of the FDRC

FDRC only handles Eligible Disputes filed by Eligible Claimants.

An Eligible Dispute is a dispute which

involves a financial institution who is a member of the FDRS

arises out of a contract between the Eligible Claimant and the financial institution entered into or arisen in Hong Kong or any services provided by the financial institution as an agent

is of a monetary nature

involves a claim of HK$500,000 or less (or foreign currency equivalent)

must have been dealt with by the relevant financial institution in the first place

An Eligible Claimant is

an individual or a sole-proprietor having or had a customer relationship with a member of the FDRS or had been provided with a financial service by the member.

A consumer having a dispute with a financial institution involving monetary loss may lodge a complaint with the relevant financial institution or report the case to the regulators such as the Hong Kong Monetary Authority (HKMA) or the Securities and Futures Commission (SFC). While the regulators may examine the conduct and practices of the financial institution, they do not adjudicate on any financial remedy for the individual. Hence, the customer may have to take the monetary claim through the court system.

Example of the work of FDRC

From 1 January 2013 to 31 December 2013, FDRC received 31 applications for mediation services under the FDRS.

Among the 31 applications, 29 were accepted for mediation, 1 was rejected as not within the Intake Criteria of the ToR and 1 was under vetting.

Among the 29 cases accepted for mediation, 25 went through the mediation process and 4 were in the mediation process.

Among the 25 cases that went through the mediation process, 24 were completed and closed, 1 proceeded to arbitration and an Arbitral Award has been rendered.

Among the 24 completed and closed cases, 18 were settled at different stages of the mediation process and 6 were not settled in mediation (these cases were closed as the claimants did not proceed to arbitration).

On 31 December 2013, out of 24 closed cases, 18 applications reached settlement.

The success rate of resolving disputes under the FDRS is 75%.

Out of 2,192 enquires received during the year of 2013, 1,182 were related to complaints about financial products and services.

Out of the 1,182 enquiries related to financial products and services, 526 were about Investment namely bond, commodity, derivative, unlisted structured product and FX/leveraged FX, share/equity/stock, and unit trust/mutual fund/managed fund. 164 were on Liability which includes credit card, loan facility and mortgage. 345 were related to Insurance. 65 were about Asset which includes integrated account, cheque, safe deposit box, savings and deposit, and stored value card provided by financial institutions and 69 were on others e.g. Mandatory Provident Fund, Occupational Retirement Schemes Ordinance, payment and cash management, and other investment products (Excerpted from FDRC website).

Group C

The Hong Kong Regulatory Authorities regulate their own members**.**

The Hong Kong Stock Exchange (SEHK)

has the duty, under section 21 of SFO, to ensure, as far as reasonably practicable, an orderly, informed and fair market for the trading of securities that are traded on it or through its facilities. Under section 23 of SFO, the SEHK made the Listing Rules conferring upon the Listing Committee disciplinary powers and imposing sanctions. The process, under the disciplinary procedures made by the Listing Committee, is informal and primarily on the papers. Parties are required to file written submissions addressing all relevant issues in respect of the Listing Rules breaches. Whilst parties may be permitted to supplement their written submissions orally at hearings, oral submissions must be kept to a minimum and be limited to matters not dealt with by way of the written submissions. Disciplinary process established under the Listing Rules is potentially a multi-stage process involving: (a) hearing before the Disciplinary Committee; (b) hearing before the Review Committee; and (c) final hearing before the Listing Appeals Committee.
Each stage will be a re-hearing on the merits. All parties are given a reasonable

opportunity to be heard before any final determination is made.

The Hong Kong Monetary Authority (HKMA)

Established on 1 April 1993 by merging the Office of the Exchange Fund with the Office of the Commissioner of Banking. 2013, apart from marking the 20th anniversary of its establishment, also marked the 30th anniversary of the Linked Exchange Rate system.

Its main functions and responsibilities are governed by the Exchange Fund Ordinance and the Banking Ordinance and it reports to the Financial Secretary.
The HKMA is an integral part of the HK SAR Government responsible for:
maintaining currency stability within the framework of the Linked Exchange Rate system
promoting the stability and integrity of the financial system, including the banking system
helping to maintain Hong Kong's status as an international financial center, including the maintenance and development of Hong Kong's financial infrastructure
managing the Exchange Fund.
The Hong Kong's central bank is financed by the Exchange Fund.
New Investigative and Disciplinary Powers are given to HKMA under the Securities and Futures (Amendment) Ordinance 2014 (to come into operation on a date to be appointed by the Secretary for Financial Services)
The HKMA will regulate OTC derivative activities of authorized institutions ("AIs") and approved money brokers ("AMBs"), while the SFC will regulate OTC derivative activities of licensed corporations ("LCs") and other prescribed persons.
Under the amendment ordinance, the HKMA is given substantially similar, if not the same, investigative and disciplinary powers as those of the SFC in relation to contravention of the reporting obligation, clearing obligation, trading obligation or record keeping obligation (collectively "Mandatory Obligations") by AIs and AMBs for their OTC derivative activities. The new investigatory and disciplinary powers for the HKMA are modelled on similar powers given to the SFC under the existing provisions of the SFO.
In other words, if the HKMA has reasonable cause to believe that an AI or AMB may have contravened the Mandatory Obligations, the HKMA (and the person directed or appointed to investigate the matter, called the "MA investigator") can investigate the matter, request the AI and AMB (or any other persons whom the MA investigator has reasonable cause to believe to be in possession of relevant records or documents) to

produce records and documents and require the AI or AMB (or any other person whom the MA investigator has reasonable cause to believe to be in possession of relevant information) to attend an interview by the MA investigator. The HKMA's new investigative powers are mainly contained in the amended section 178, new sections 184A to 184E and 186A of the SFO.
The existing section 187 (use of incriminating evidence in proceedings) has been amended to extend the right to claim privilege against self-incrimination to persons who are subject to HKMA's OTC investigations. HKMA's OTC investigations are also subject to a similar secrecy obligation (new sections 381A to 381F of the SFO).
The HKMA has also been given disciplinary powers, similar to those available to the SFC, to take disciplinary actions against AIs and AMBs for breaches of the Mandatory Obligations (mainly through new sections 203A to 203F of the SFO). Such disciplinary actions include, public or private reprimand, prohibition against the person from carrying on the business of OTC derivative transactions, fine of not exceeding the greater of HK$10 million or 3 times of the profit gained or loss avoided. The SFC's investigative and disciplinary powers have been expanded to cover: 1/. breaches of the Mandatory Obligations by LCs or other prescribed persons (not AIs or AMBs) (new section 182(da) of the SFO); and 2/. non-compliance by registered systematically important participants ("SIP") with the specified acts required by the SFC to take pursuant to the new section 101X of the SFO (new section 182(db) of the SFO), such acts may include to require the registered SIP:
(a) to refrain from increasing or to reduce the registered SIP's exposure arising from its positions;
(b) to collect collateral or to increase the amount of collateral posted; or
(c) to restrict the use of collateral or type of collateral collected or posted.
Two other amendments made to the SFO, namely the criminal court has been given a power to make a disgorgement order as a result of commission of market misconduct (amended section 303 of the SFO); and market misconduct offences are now subject to the confiscation regime under the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO") (amended Schedule 2 to the OSCO).

Financial Reporting Council (FRC) -

The FRC was established in 2007 under the Financial Reporting Council Ordinance. It investigates into possible auditing irregularities and non-compliances of financial reporting requirements.
Auditing irregularities are the irregularities of auditors or reporting accountants in relation to the audit 3.or financial reporting of listed entities, including falsifying

documents, making untrue statements, being professionally negligent.
Non-compliances exist if listed entities do not comply with financial reporting requirements in their financial reports under the Companies Ordinance, financial reporting standards and Listing Rules. In this way, investors will find the financial reports of listed entities reliable and confident to make investment decision. The FRC can only investigate and does not have the power to discipline or prosecute.
When the FRC initiates an investigation upon receipt of complaints or on its own initiative, no information can be disclosed under its Ordinance. Confidentiality must be maintained.
If a Financial Reporting Review Committee (the "Review Committee") finds there is a non-compliance with financial reporting requirements, the Review Committee may request the listed entity concerned to remove the non-compliance identified. If the listed entity fails to comply with such a request,
in some circumstances, an application may be made to the Court for an order to remove the non-compliance or
referral to The Stock Exchange of Hong Kong Limited and/or the Securities and Futures Commission for follow-up action.
If any accountants involved in the non-compliance are found not to have complied with professional standards in the preparation of financial statements, the case will be referred to the Hong Kong Institute of Certified Public Accountants for follow-up action. Any findings with criminal element will be referred to Police, ICAC, or other enforcement agencies.
The FRC is funded by the Companies Registry Trading Fund, the Securities and Futures Commission, the Hong Kong Exchanges and Clearing Limited and the Hong Kong Institute of Certified Public Accountants. These four parties have signed a Memorandum of Understanding under which they have agreed to contribute:- HK$5 million each (a one-off total of HK$20 million) to establish a Reserve Fund; HK$4 million each (a total of HK$16 million) for the recurring expenses of the FRC in 2010; and Contributions for the recurring expenses will be adjusted for inflation from 2011 to 2014 (Excerpted from FRC website).

Part 3

Appendices

APPENDIX ONE

INSIDER TRADING

Du Jun (Du) after conviction

Du , the former Managing Director of Morgan Stanley Asia Limited was convicted in September 2009. Apart from imprisonment, the financial penalties was K$23 million. Du appealed to the CA which upheld the conviction but reduced the term of imprisonment to six years and reduced the fine to enable Du to pay his legal fees. *HKSAR v Du Jun* (DCCC 787/2008)

In *Du Jin*, the High Court, on 13 December 2013 granted SFC's application under section 213 of the SFO ordering Du, after conviction, to restore the investors to the position had the insider information known to the market.

Literature - SFC's powers to seek compensation for investors by Charltons https://www.charltonslaw.com/

"*Order for former Morgan Stanley MD to pay HK$23.9 million to Investors affected by his Insider Dealing***"**

Literature

SFC news and announcement dated 12 Dec 2013

"*Court orders insider dealer Du Jun to pay $23.9 million to investors***"**

"*The Honourable Mr Justice Ng in the Court of First Instance today ordered Mr Du Jun, a former managing director of Morgan Stanley Asia Limited, to pay $23.9 million to 297 investors as a result of his insider dealing in shares of CITIC Resources Holdings Limited (CITIC Resources) between 15 February and 30 April 2007.*

These restoration orders – the first made by the court in a case of insider dealing – complete the civil proceedings commenced by the Securities and Futures Commission (SFC) against Du in July 2007 under section 213 of the Securities and Futures Ordinance (SFO) (Note 1).

The civil proceedings were delayed pending the completion of parallel criminal proceedings against Du which ended when Du withdrew an application seeking to appeal his convictions and sentence for insider dealing in the Court of Final Appeal (Note 2).

The SFC's Executive Director of Enforcement, Mr Mark Steward, said: "The effect of today's orders will be to restore investors who transacted with Du to their pre-transaction positions, resolving issues first raised by the SFC in July 2007. The 297 investors had no means to detect they were dealing with Du, who was engaged in illegal insider dealing. If they had known, they would not have sold their shares to him and certainly not at the same price."

"Above all, this case sends a clear message that the consequences of wrongdoing, including the costs of restoration or remediation, should be met by wrongdoers and not be borne by innocent investors or the market," he added.

Under the restoration orders made by the court today, the SFC will notify CITIC Resources, Morgan Stanley Asia Limited and all 297 investors of the orders and unless there is any valid objection, Du will be required to pay the investors a total amount of $23,964,440 which will be administered by a court appointed administrator, Mr John Lees of JLA Asia.

The payment to be made by Du under the restoration orders represents the difference between the actual price at which the affected investors sold the CITIC Resources shares to Du and the price at which the investors could have sold the shares had the price sensitive information concerning CITIC Resources been made known to the market at the time (as assessed by expert evidence) (Note 3).

Du will also pay the SFC's legal costs and the fees of the court appointed administrators.

End

Notes:

The SFC commenced these proceedings under section 213 of the SFO on 27 July 2007 and obtained interim orders freezing the profits of Du's insider dealing. Please see the SFC's press releases dated 18 December 2007 and 5 October 2012.

On 18 September 2009, Du was jailed for seven years and fined $23,324,117 after being convicted on ten counts of insider dealing following a trial in the District Court. Du appealed both his convictions and the sentence to the Court of Appeal.

On 20 September 2012, the Court of Appeal upheld all insider dealing convictions against Du but reduced his term of imprisonment from seven years to six years and lowered the fine to $1.688 million. In reducing the fine, the Court of Appeal held that the effect of the fine was to deprive Du's trading counterparties of the amounts which might be available to them in the proceedings under section 213 of the SFO and thus to defeat the "laudable objectives" of those proceedings.

Please see the SFC's press releases dated 10 September 2009, 18 September 2009, 20 September 2012and 2 January 2013.

Given the counterparties would not have sold the shares if they knew their sell orders might be matched with an illegal insider, they are entitled to be restored to their pre-transaction positions under section 213(2)(b) of the SFO. As Du has already sold the CITIC Resources shares, he is unable to return them to his trading counterparties. However, Du is able to restore the trading counterparties to their pre-transaction positions through monetary payment equivalent to the difference between the value of the CITIC Resources shares on the day of the transaction, taking into account all relevant information, including Du's inside information, and the price of the transactions. The total amount of the payment to the affected investors is $23,964,440."

SFC v Tiger Asia Management LLC (Tiger Asia) and others where there has been no ruling by either the Court or the Market Misconduct Tribunal

The Tiger Asia case dealt with criminals stealing Hong Kong Markets are offshore. Tiger Asia Management LLC is a New York-based asset management company with no physical presence or employees in Hong Kong. The SFC alleged that Tiger Asia made use of confidential and price sensitive information in relation to placement of shares in December 2008 and January 2009, and made a profit of HK$38.5 million in its dealings in those shares.

The SFC sought orders under section 213, including orders freezing Tiger Asia's assets, prohibiting Tiger Asia from trading in listed securities and derivatives in Hong Kong.

The orders were sought on the basis of alleged insider dealing and market manipulation, in contravention of the SFO, in circumstances where there was no criminal conviction against Tiger Asia, nor had the case been heard by the MMT. The orders were sought merely on the basis of the SFC's investigation that the Defendants had contravened the criminal provision under section 291 and section 295 of the SFO. Tiger Asia challenged the SFC action on the grounds that the court had no jurisdiction to make the orders sought without a criminal conviction or a determination by the MMT.
The Court of Appeal ruled in favour of the SFC, holding that section 213 was a free-standing remedy and "provides valuable tools to the SFC to protect the investing public.
Tiger Asia filed an appeal with the Court of Final Appeal. On 30 April 2013, the Court of Final Appeal, made a landmark ruling, upholding the SFC's right to seek compensation, under section 213, without first having to prove guilt of insider dealing or other malpractices.
The decision of the Court of Final Appeal (the highest court in Hong Kong) in the Tiger Asia case has made section 213 a valuable tool to protect the investing public when there is no determination by the Market Misconduct Tribunal or a criminal court.

In the meantime, the SFC commenced proceedings in the Market Misconduct Tribunal ("MMT") that during 2008 and 2009, the Defendants had engaged in market misconduct, contrary to sections 270 (insider dealing) and 274 (False Trading) of SFO. This is the first time that that the SFC has commenced proceedings in the MMT directly under section 252A of the SFO, introduced in 2012.

On 20 December 2013, the Court of First Instance ordered Tiger Asia Management LLC ("Tiger Asia"), a New York based asset management company, and two of its senior officers, Bill Sung Kook Hwang and Raymond Park ("the Tiger Asia Parties"), to pay HK$45,266,610 to investors affected by their insider dealing involving two Hong Kong-listed banking stocks. The court orders were made following admissions by the Tiger Asia Parties in the proceedings brought by the SFC under section 213. The Tiger Asia Parties have made the same admissions of insider dealing and market manipulation in the SFC's proceedings against them in the Market Misconduct Tribunal where the SFC can seek a cease and desist order as well as an order prohibiting the Tiger Asia Parties from dealing in Hong Kong without leave of the court for up to five years.

The court orders made by consent on 20 December 2013, under section 213(2)(b) of the SFO, returned a total of HK$45,266,610 to around 1,800 investors in Hong Kong and overseas who traded with Tiger Asia in the relevant transactions. The Tiger Asia Parties have already paid the HK$45,266,610 into court.

The restoration amount is the difference between the actual price of shares sold by Tiger Asia and the value of those shares, taking into account the inside information known to Tiger Asia, as assessed by expert evidence.

Tiger Asia admits insider dealing and ordered to pay investors $45 million

20 Dec 2013

"*The Court of First Instance today ordered Tiger Asia Management LLC (Tiger Asia) and two of its senior officers, Mr Bill Sung Kook Hwang and Mr Raymond Park (collectively the Tiger Asia parties), to pay $45,266,610 to investors affected by their insider dealing involving two Hong Kong-listed banking stocks (Note 1).*

The court orders followed admissions by the Tiger Asia parties in a statement of agreed and admitted facts filed in the Court of First Instance by the Securities and Futures Commission (SFC) in its proceedings under section 213 of the Securities and Futures Ordinance (SFO) that they contravened Hong Kong's laws prohibiting insider dealing when dealing in the shares of Bank of China Limited (BOC) and of China Construction Bank Corporation (CCB) in December 2008 and January 2009 and manipulated the price of CCB shares in January 2009 (Notes 2 & 3).

The Tiger Asia parties have also made the same admissions of insider dealing and manipulation in proceedings commenced by the SFC in the Market Misconduct Tribunal (MMT). The SFC has indicated to the MMT that it will be seeking a cease and desist order as well as an order prohibiting the Tiger Asia parties from dealing in Hong Kong without leave of the court for up to five years (Note 4).

The SFC's Executive Director of Enforcement, Mr Mark Steward, said: "Tiger Asia's admissions of insider dealing and manipulation vindicate the SFC's allegations made at the outset of these

proceedings. Investors are unable to detect, or avoid transacting with, wrongdoers in the market and so they are highly vulnerable to this kind of misconduct. It is right and fair that these transactions should be rescinded so that the 1,800 innocent investors may be put back, as closely as possible, to the positions they were in before the transactions took place."

Today's court orders, which were made by consent by the Honourable Mr Justice Harris under section 213(2)(b) of the SFO, will return a total of $45,266,610 (the restoration amount) to around 1,800 investors in Hong Kong and overseas who traded with Tiger Asia in the insider dealing transactions. To facilitate the return of money to the affected investors, the Tiger Asia parties have already paid $45,266,610 into court.

The restoration amount represents the difference between the actual price of BOC and CCB shares sold by Tiger Asia and the value of those shares taking into account the inside information known to Tiger Asia (as assessed by expert evidence) (Note 5).

The orders include the appointment of Mr John Robert Lees and Mr Kok Wing Chong of JLA Asia as independent administrators to take charge of the distribution of the restoration amount to the counterparties to Tiger Asia's insider dealing.

At a directions hearing held yesterday, the MMT fixed three days starting on 7 May 2014 to hear submissions as to what orders, if any, ought to be made against the Tiger Asia parties.

"The SFC looks forward to making further submissions to the MMT on appropriate orders to deter misconduct and to protect the integrity of Hong Kong's market," Mr Steward added.

The SFC appreciates the assistance of the UK Financial Conduct Authority and the US Securities and Exchange Commission in this case.

End

Notes:

Tiger Asia was founded in 2001 and is a New York-based asset management company that specialises in equity investments in China, Japan and Korea. All of its employees are located in New York. Tiger Asia has no physical presence in Hong Kong.

The SFC accepts that Mr William Tomita, one of the defendants in the proceedings under section 213 of the Securities and Futures Ordinance and in the Market Misconduct Tribunal, was a junior member of staff responsible for supporting Tiger Asia's trading activities, consistently acting on the instructions of Hwang and Park and not knowingly involved in the insider dealing and manipulation.

The admissions made by the Tiger Asia parties cover all the allegations made by the SFC when it commenced these proceedings in 2009, other than the allegations made against Tomita. In respect of trading in BOC shares, the SFC alleged and the Tiger Asia parties admit that: (a) Tiger Asia was given advance notice and was invited to participate in two placements of BOC shares by UBS AG and Royal Bank of Scotland Group PLC on 31 December 2008 and 13 January 2009 respectively; (b) Tiger Asia was provided with details of both placements after being told the information was confidential and price sensitive; (c) Tiger Asia agreed not to deal in BOC shares after receiving the information; (d) Tiger Asia short sold 104 million BOC shares before the placement by UBS AG on

31 December 2008 making a notional profit of around $9 million; and (e) Tiger Asia short sold 256 million BOC shares before the placement by Royal Bank of Scotland Group PLC on 13 January 2009 making a notional loss of around $10 million.

In respect of trading in CCB shares, the SFC alleged and the Tiger Asia parties admit that: (a) on 6 January 2009, before the market opened, a placing agent in Hong Kong invited Tiger Asia to participate in a proposed placement of CCB shares in Hong Kong by the Bank of America Corporation; (b) the placing agent told Tiger Asia about the size and the discount range of the proposed placement; (c) this information was confidential and price sensitive and the Tiger Asia parties knew this; (d) Tiger Asia then short sold 93 million CCB shares on 6 January 2009 before the news of the CCB placement was made public making a notional profit of around $32 million; (e) Tiger Asia covered its short sales with the placement shares that it bought on 7 January 2009 at a discount to the prevailing market price; and (f) the SFC also alleged and the Tiger Asia parties admit manipulation of the CCB share price by Tiger Asia during the closing auction session on 6 January 2009.

Please see the SFC's press releases dated 20 August 2009, 26 April 2010, 21 June 2011, 14 July 2011, 9 September 2011, 23 February 2012, 18 April 2012, 30 April 2013 and 10 May 2013.

In those proceedings, if the MMT finds there has been market misconduct, it is empowered to make a range of orders, including orders prohibiting a person from acquiring or disposing of or otherwise dealing in securities, futures contracts or leveraged foreign exchange contracts in Hong Kong without leave of the court for a period of up to five years. Please also see the SFC's press releases dated 15 July 2013 and 6 September 2013.

Under section 213(2)(b) of the SFO, where a person has contravened a provision of the SFO, the court is able to make orders requiring a person to take steps as directed by the court, including steps to restore the parties to a transaction to the position they were in before the transaction was entered into. In this case, it is impossible to return the counterparties to the exact position they were in. However, they can be restored to a substantially similar position by being paid the difference between the actual price of the transactions and the value of the shares, taking into account the inside information possessed by Tiger Asia, at the time."

Page last updated : 20 Dec 2013

Literature

SFC v Tiger Asia – "Round 2" quoted from Hong Kong Lawyer dated August 2013

On 15 July 2013 the Securities and Futures Commission ("SFC") announced it had commenced Market Misconduct Tribunal ("MMT") proceedings against Tiger Asia Management LLC and three of its principal officers ("Tiger Asia").

The announcement comes soon after the Court of Final Appeal's judgment in Tiger Asia LLC & Ors v SFC [2013] HKEC 703. That judgment confirms that the High Court's jurisdiction to grant final "remedial orders", pursuant to section 213 of the Securities and Futures Ordinance, is not dependent on a prior finding of market misconduct by either the MMT or a criminal court.

Following Tiger Asia's long fought, but unsuccessful, jurisdictional challenge to the SFC's use of

section 213, the SFC is expected to pursue its civil case at first instance through to trial or earlier settlement. The SFC's press announcement states that its section 213 proceedings against Tiger Asia "are continuing".

MMT proceedings and criminal proceedings for cases of alleged market misconduct are mutually exclusive. However, MMT proceedings can be commenced in tandem with section 213 proceedings which have been touted as "the third way". The SFC's commencement of MMT proceedings is of interest for a number of reasons.

First, this is the first instance of the SFC directly initiating MMT proceedings itself. Up until 2012, this was the sole preserve of the Financial Secretary.

Second, Tiger Asia no longer faces the prospect of related criminal proceedings in Hong Kong.

Third, in any event, criminal proceedings in Hong Kong would have been problematic. They may have fallen foul of the "double jeopardy" rule given that there have been related criminal proceedings in the US. Further, given that Tiger Asia and its principal officers are based in New York, criminal proceedings were probably impractical.

"Round 2" in the SFC's pursuit of Tiger Asia appears to be a clear indication that it has no intention of backing-off, even if MMT proceedings are not known for their speed.

SFC v Tiger - "Round 3" quoted from Hong Kong Lawyer dated January 2014

Christmas may have come a little early for a number of investors in 2013, following the SFC's press release on 20 December confirming that Tiger Asia Management LLC ("Tiger Asia") and two of its senior management have been ordered to "reimburse" a substantial number of investors, following admissions of insider dealing.

The amount of the "restoration" is stated to be HK$45 million; this sum having already been paid into court by Tiger Asia, as a result of the SFC's court proceedings pursuant to Section 213 of the Securities and Futures Ordinance.

The restoration orders are stated to follow admissions by Tiger Asia that it and two of its principal officers contravened insider dealing laws when (among other things) allegedly "shorting" the shares of two Hong Kong-listed companies in 2008-9.

Readers may recall that in "Round 1" of the proceedings between the SFC and Tiger Asia, the SFC won a landmark decision in the Court of Final Appeal on 30 April 2013.

That decision confirms that the High Court has jurisdiction to grant "final remedial" orders pursuant to Section 213 civil proceedings, without there first needing to be a finding of market misconduct in either a criminal court or the Market Misconduct Tribunal ("MMT").

"Round 2" was announced on 15 July 2013, when the SFC confirmed it had initiated MMT proceedings against Tiger Asia. The SFC's 20 December 2013 press release states that Tiger Asia's admissions also relate to the MMT proceedings, due to be heard on 7 May 2014.

It is anticipated that in the MMT proceedings the SFC will seek orders that (among other things) Tiger Asia and the two principal officers be prohibited from "dealing in Hong Kong" for up to five years, other than with permission of the court.

As for the recent announcement regarding "Round 3", the restoration orders apparently seek to compensate counterparties for the difference between the value of the shares sold and their value accounting for the "inside information". Quite how the amount is calculated and the "mental gymnastics" involved is clearly not simple.

However, what is clearer is that the outcome represents a long fought and successful battle for the SFC (not to mention, perhaps, something of a welcome surprise for the investors said to have lost out).

Market Misconduct Tribunal bans Tiger Asia and Bill Hwang from trading securities in Hong Kong

quoted from SFC press release dated 9 Oct 2014

The Market Misconduct Tribunal (MMT) has determined that Tiger Asia Management LLC (Tiger Asia) and two of its senior officers, Mr Bill Sung Kook Hwang and Mr Raymond Park engaged in market misconduct in Hong Kong (Notes 1 & 2).

The MMT has ordered that Tiger Asia and Hwang be banned from trading securities in Hong Kong for a period of four years (the maximum period is five years) without leave of the court. The MMT has also issued cease and desist orders against both Tiger Asia and Hwang (Note 3).

This was the first case directly presented to the MMT by the Securities and Futures Commission (SFC) (Note 4).

Tiger Asia and Hwang had argued no orders should be made against them by the MMT.

Tiger Asia, Hwang and Park admitted they contravened Hong Kong's laws prohibiting insider dealing when dealing in the shares of Bank of China Limited (BOC) and of China Construction Bank Corporation (CCB) in December 2008 and January 2009 and manipulated the price of CCB shares in January 2009 (Note 5).

In its decision, the MMT found that Hwang's conduct constituted "serious misconduct" and show that "little trust can be placed in Bill Hwang's integrity".

In determining a banning period of four years, the MMT warned that "this heralds a sterner approach in respect of protective measures provided under our law. We are, however, unanimously of the view that the protection of our market is a matter of such public importance, and cold shoulder orders so central to providing that protection, that market operators who, by their actions, show they cannot be trusted must from now on expect orders that exclude them from the market for more lengthy periods of time." (Note 6)

The SFC's Executive Director of Enforcement, Mr Mark Steward, said: "Tiger Asia and Hwang abused the trust of the Hong Kong market, flouted Hong Kong's laws and damaged the financial interests of thousands of investors who had no means of protecting themselves from such misconduct. They were wrong if they thought this could be done with impunity because they were situated beyond Hong Kong."

"The SFC will track down and take action against wrongdoers wherever in the world they may lurk. In

this case, we have recovered their illegal profits (around $45 million) for the benefit of the victims; the wrongdoers have been dealt with under US law and the MMT has rightly banned them from Hong Kong's markets for four years," Mr Steward added (Note 7).

Although the MMT found that Park had engaged in market misconduct, they decided to make no order in relation to him given the evidence that he has suffered an incurable and seriously debilitating brain injury and is in no position to pose any threat to the integrity of the Hong Kong market.

End

Notes:

The Market Misconduct Tribunal was chaired by The Honourable Mr Justice Michael Hartmann with two members namely, Ms Florence YS Chan and Mr Gary KL Cheung.

Tiger Asia was founded in 2001 and is a New York-based asset management company that specialises in equity investments in China, Japan and Korea. All of its employees are located in New York. Tiger Asia has no physical presence in Hong Kong. Since August 2012, Tiger Asia has become a "family office" of Hwang and renamed as "Archegos Capital Management LLC" serving as the investment manager for Archegos Fund LP and Archegos Fund Ltd in Hwang's family office. The SFC accepts that Mr William Tomita, one of the specified persons in the proceedings in the MMT, was a junior member of staff responsible for supporting Tiger Asia's trading activities, consistently acting on the instructions of Hwang and Park and not knowingly involved in the market misconduct.

Under section 257 (1)(b) of the Securities and Futures Ordinance (SFO), a cold shoulder order is an order that the person shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for the period (not exceeding five years) specified in the order.

Under section 257(1)(c) of the SFO, a cease and desist order is an order that the person shall not again perpetrate any conduct which constitutes such market misconduct.

Under section 252A of the SFO, which was introduced in 2012, the SFC was given direct access to the MMT. Formerly only the Financial Secretary could initiate proceedings in the MMT.

The admissions made by Tiger Asia, Hwang and Park cover all the allegations made against them by the SFC when it commenced these proceedings in 2009. In respect of trading in BOC shares, the SFC alleged and Tiger Asia, Hwang and Park admitted that: (a) Tiger Asia was given advance notice and was invited to participate in two placements of BOC shares by UBS AG and Royal Bank of Scotland Group PLC on 31 December 2008 and 13 January 2009 respectively; (b) Tiger Asia was provided with details of both placements after being told and agreeing the information was confidential and price sensitive; (c) Tiger Asia also agreed not to deal in BOC shares after receiving the information; (d) Tiger Asia short sold 104 million BOC shares before the placement by UBS AG on 31 December 2008 making a notional profit of around $9 million; and (e) Tiger Asia short sold 256 million BOC shares before the placement by Royal Bank of Scotland Group PLC on 13 January 2009 making a notional loss of around $10 million.

In respect of trading in CCB shares, the SFC alleged and Tiger Asia, Hwang and Park admitted that: (a) on 6 January 2009, before the market opened, a placing agent in Hong Kong invited Tiger Asia to participate in a proposed placement of CCB shares in Hong Kong by the Bank of America Corporation; (b) the placing agent told Tiger Asia about the size and the discount range of the proposed placement; (c) this information was confidential and price sensitive and the Tiger Asia parties knew this; (d) Tiger Asia then short sold 93 million CCB shares on 6 January 2009 before the news of the CCB placement was made public making a notional profit of around $32 million; (e) Tiger Asia covered its short sales with the placement shares that it bought on 7 January 2009 at a discount to the prevailing market price; and (f) the SFC also alleged and the Tiger Asia parties admit manipulation of the CCB share price by Tiger Asia during the closing auction session on 6 January 2009.

Please see paragraph 130-131 of MMT's decision, which will be available on the MMT website after 5:00 pm on 10 October 2014 (www.mmt.gov.hk).

As at 7 October 2014, around $43.3 million, equivalent to 96% of the $45 million illegal profits, have been paid to the affected investors.

Please see the SFC's press releases dated 20 August 2009, 26 April 2010, 21 June 2011, 14 July 2011, 9 September 2011, 23 February 2012, 18 April 2012, 30 April 2013, 10 May 2013, 15 July 2013, 6 September 2013 and 20 December 2013.

Page last updated : 9 Oct 2014

Tiger Asia Parties had been prosecuted in relation to the same conduct in the United States in criminal proceedings.

Literature

US Securities and Exchange Commission (SEC)

The following quoted from Annual report of SEC

"in December 2008 and January 2009, New York-based hedge fund Tiger Asia managed by Bill Hwang Sung-kook and Raymond Park, "entered into wall-crossing agreements for three private placements of Chinese bank stocks, subsequently violated the wall-crossing agreements by short selling the Chinese Bank stocks and then covered these short positions with private placement shares purchased at a discount". 'Wall crossing' is industry jargon that meant Park and Huang agreed not to do exactly what they did – trade on the confidential information the Chinese banks' investment bankers gave them and got the illegal profits of US$16.2 million.

In December 2012, Tiger Asia Management pleaded guilty to criminal wire fraud in US federal court.
Tiger Asia had pleaded guilty to criminal offences under US law and the two officers in question had been charged with civil offences by the United States Securities and Exchange Commission.

It also, along with Tiger Asia Partners, Huang and Park, entered civil consent judgment with the SEC and paid some US$60 million in disgorgement and penalties. The SEC's complaint details a long list of bad behaviors, including multiple attempts to manipulate Hong Kong's market to show inflated month-end figures so they could overcharge their investors for their good performance."

Solicitors, Mr Eric Lee Kwok Wa and Ms Betty Young Bik Fung case
SFC Press Release 15 Jan 2016

Court finds two solicitors engaged in insider dealing and fraud or deception
"The Court of First Instance today found that two solicitors, Mr Eric Lee Kwok Wa and Ms Betty Young Bik Fung, and Eric Lee's sister, Ms Patsy Lee Siu Ying, contravened SFO by insider dealing in the shares of Asia Satellite Telecommunications Holdings Ltd (Asia Satellite) and engaged in fraud or deception in transactions involving securities of Hsinchu International Bank Company Ltd (Hsinchu Bank).

The court's decision is a landmark ruling on the interpretation of section 300 of the SFO which prohibits the use of fraudulent or deceptive schemes in transactions involving securities.

The Securities and Futures Commission (SFC) started civil proceedings in the court against Eric Lee, Betty Young, Patsy Lee and Ms Stella Lee, both sisters of Eric Lee, in December 2010 under section 213 of the SFO and alleged the defendants made a total profit of $2.9 million in these transactions.

The court found that these allegations were proven against Betty Young, Eric Lee and Patsy Lee. The court ruled that there was not enough evidence to prove the allegations against Stella Lee. Nevertheless, the court may exercise its power under section 213 of the SFO against her to remove the illicit profit from her and restore the victims in the transactions. The court may make orders under section 213 against people who are knowingly or otherwise involved in a contravention of the SFO.

The SFC and the defendants are directed to jointly work out the precise terms of the final orders in view of the judgment.

The court also directed that a copy of the judgement be sent to the Law Society of Hong Kong because Eric Lee and Betty Young are both member of the Law Society.

Notes:
Hsinchu Bank was a listed company on the Stock Exchange of Taiwan in September 2006 and Asia Satellite was a listed company on the Stock Exchange of Hong Kong in February 2007."

APPENDIX TWO

ANNEX A

Cases

Action Taken by SFC under section 213

(1) against Qunxing Paper Holdings Company Limited [SEHK:3868] listed in Hong Kong on 2 October 2007 for false or misleading information in its initial public offer and its annual reports thereafter. Qunxing's business undertaking is based in the Mainland.

The Securities and Futures Commission (SFC), on 12 December 2013, obtained an interim injunction to freeze up to approximately $1.97 billion in assets of Qunxing and its subsidiary for allegedly disclosing false or misleading information in its prospectus for its initial public offer in 2007 and the announcements of its annual results for 2007 to 2011. The SFC sought orders to restore existing Qunxing public shareholders and warrant holders to the positions they were in before the transactions.

The order was granted on the same day freezing assets of up to $1,968,000,000. The SFC obtained the interim injunction to stop the dissipation of assets pending the end of its investigation. Qunxing made an application for a variation of the interim injunction order for withdrawing money to pay their operational expenses and legal costs and was permitted by The Court of First Instance.

On 31 March 2014, the SFC has obtained an order from the Court of First Instance to appoint interim receivers to take over Qunxing after its major subsidiary secretly started a bankruptcy proceeding on the mainland on 21 February 2015. Shandong Qunxing Paper is the wholly owned subsidiary of Qunxing. The interim receivers could suspend the company's board to effectively take over its management and to investigate Qunxing's affairs.

Commencement of bankruptcy proceedings on the mainland by Shandong Qunxing was price-sensitive information but the company did not make the disclosure even after SFC's requests. The SFC considered the Qunxing's continual failure to inform the investing public of these matters raised grave concerns that the interests of Qunxing's public shareholders are in jeopardy, hence the need for an urgent application to appoint receivers and managers for Qunxing. Shandong Qunxing is the sole operational arm of Qunxing and held most of Qunxing's 3.27 billion yuan

(HK$4.1 billion) in assets.

SFC, revealed on 31 March 2014, that it could only locate HK$150 million of assets the company had deposited in Hong Kong that could be placed under a freeze order. Its other assets were mainly on the mainland.

Trading in its shares has been suspended since March 2011 after KPMG said it found inconsistent information during an audit in 2010.

(**2) Hontex International Holdings Co. Ltd**

The Securities & Futures Commission (SFC) alleged that Hontex, a Chinese sports fabric maker, made materially false and misleading statements in its December 2009 prospectus, including an overstatement of its profits.

After 12 days of trial in the Court of First Instance, the SFC and Hontex signed an agreed statement of facts, in which Hontex admitted there were overstatements in the prospectus, but did not agree with the amounts alleged by the SFC. Hontex acknowledged in the statement that it was reckless in allowing false and misleading information in the prospects in contravention of section 298(1) of the SFO. The agreed statement did not amount to an admission of any criminal behaviour on behalf of Hontex or its directors.

Hontex did not agree with the amounts alleged by the SFC. It was on the basis of the agreed statement that the Court made the order under section 213. The order requires Hontex to pay $197,755,503 into Court within 28 days, which will add to the $832,244,497 that was frozen under interim orders obtained by the SFC. It also requires Hontex to convene a shareholders' meeting to approve the repurchase of shares of around 7,770 public shareholders of the company. The Company admitted to the SFC false turnover and cash figures in its prospectus and returned over $1 billion to minority shareholders.

The Listing Committee of the Hong Kong Stock Exchange decided to cancel its listing. Hontex appealed to the Listing (Review) Committee and Listing Appeals Committee. Both decided to uphold the Listing Committee’s decision to delist the company after the completion of a share repurchase offer accepted by most minority shareholders, taking into account the disclosure of false information in its prospectus (as acknowledged by the company). The Committees considered that the issue giving rise to the delisting decision could not be addressed by way of a business acquisition

proposed by the company in its submissions for the appeals. The company was delisted on 23 September 2013.

Hontex's IPO sponsor

Literature

- SFC News and announcements 22 Apr 2012 - In separate disciplinary proceedings, the SFC revoked the licence of Hontex's IPO sponsor, Mega Capital (Asia) Company Limited, for inadequate and sub-standard due diligence work on the Hontex IPO and fined it HK$42 million.

- Asia Disputes Notes Herbert Smith Freehills dated 30 April 2012 on

"*SFC imposed first revocation IPO Sponsor's licence to advise on corporate finance for due diligence failings*"

- Hong Kong Regulator Fines and revokes IPO Sponsor's License by CFO Innovation Asia Staff [Monday, April 23, 2012]

Action taken by SFC under section 212 for winding up order

China Metal Recycling (SEHK: 773)

In China Metal Recycling (Holdings) Limited (China Metal) case, the fraud was reported in 2013 by American short-seller Glaucus Research Group, 4 years after its initial public offering. Its sponsor was criticized.

China Metal (SEHK: 773) is the largest recycler of scrap metal in Mainland China by revenue. Based in Guangdong, it is mainly engaged in collecting scrap steel, scrap copper and other scrap metals and processing them using equipment to produce recycled scrap metals for its customers. Its recycling facilities are located in Guangdong, Jiangsu and Hong Kong.

The company was established in 2000. The company was listed on the Hong Kong Stock Exchange in June 2009 with the IPO price of HK$5.15 per share. Its stock price was closed at HK$6.44 at the first trading day, 24% higher than its IPO price. On 17 November 2009, its price suddenly plunged 24%, the most since listing, as its Chief Financial Officer, Wong Hok-leung, resigned after saying he was denied information.

Trading in the shares of the Company on the Stock Exchange suspended on 28 January 2013 until further notice.

The Securities and Futures Commission (SFC) presented a petition to the Court of First Instance to wind up China Metal Recycling on 26 July 2013 for allegedly overstating its financial position in its 2009 initial public offering prospectus and annual report. This is the first time the SFC has applied to the court under section 212 of the Securities and Futures Ordinance (SFO) to wind up a Hong Kong-listed company to protect the interests of the company's shareholders and creditors, and the investing public. The SFC obtained orders from the court to appoint provisional liquidators for China Metal Recycling.

The SFC alleged that an overwhelming majority of the subsidiary's purported purchases from its three major suppliers for the financial years ended 31 December 2007, 2008 and 2009 were fictitious by escalating amounts in each successive year. The SFC's investigation also found evidence showing that the suspected exaggeration of China Metal Recycling's financial situation remains a current issue that would affect its 2012 financial results, which to date remain unissued.

The Court of First Instance granted the provisional liquidators wide powers to investigate and manage China Metal's affairs. The immediate effect of the appointment of the provisional liquidators and the presentation of the winding-up

petition is to:

* suspend the powers of the current board of directors over the management of the company's affairs;

* place administrative control over the company in the hands of the provisional liquidators; and

* make void any disposition of the company's property, and any transfer of shares or alteration in the status of the members of the company, unless the court otherwise orders.

Since SFC order obtained was on an ex parte basis, the matter returned to court on 2 August 2013. After the China Metal had an opportunity to address the SFC's allegations and the order made against it, the Court, nevertheless, granted an order for the continuation of the appointment of the provisional liquidators. On 21 October 2013, the Court granted leave to Chun Chi Wai, the chairman of China Metal and Wellrun Limited, a substantial shareholder of China Metal controlled by Chun, to be joined as additional respondents to oppose the SFC's winding-up petition application . On 13 Mar 2014, Court sets trial dates for China Metal. The trial will be heard from

2 to 17 February, and from 24 February to 6 March 2015.

Trading in China Metal shares was voluntarily suspended on 28 January 2013. On 28 March 2013, the company announced that the Stock Exchange of Hong Kong Ltd (SEHK) had imposed the conditions for the resumption of trading in the company's shares. Those conditions have not yet been satisfied and the trading in the company's shares remains suspended. The conditions that must be satisfied before the SEHK allows trading in the company's shares to resume are: (i) to publish a clarification announcement addressing the allegations in the two reports issued on 28 January and 27 February 2013 by Glaucus Research Group; (ii) to provide third party assurance on the disclosure in the clarification announcement such as the publication of the audited financial statements for the year ended 31 December 2012 with an unqualified audit opinion; and (iii) to engage a forensic specialist to conduct a forensic review.

Chun was arrested by Commercial Crime Bureau/Police in August 2013 for alleged false accounting Chun is the chairman and chief executive officer of China Metal Recycling he holding approximately 53% of the shares of China Metal Recycling via Wellrun Limited. There were evidence the company inflated the size of the business and the amount of revenue generated by its major subsidiary. This would definitely affect investors' interest and decision making.

SFC news and announcements dated 26 February 2015

"*This is the first time that the SFC obtained a court order to wind up a Hong Kong-listed company under section 212 of the Securities and Futures Ordinance for the purpose of protecting the company's minority shareholders, creditors and the investing public.*

On 22 June 2009, its shares were listed on the Main Board of the SEHK. About HK$1,685 million, net of listing expenses, were raised by the initial public offering of the company.

Trading in shares of China Metal Recycling has been suspended since 28 January 2013. On 26 July 2013, the SFC presented a petition to the Court of First Instance to wind up China Metal Recycling under section 212 of the Securities and Futures Ordinance (SFO) and obtained an order to appoint Cosimo Borrelli and Jocelyn Chi Lai Man, both of Borrelli Walsh Limited, as joint and several provisional liquidators for China Metal Recycling."

Literature
Hong Kong watchdog wins landmark case against China Metal Recycling
By Michelle Price of Reuter dated 26 February 2013 -

"*Hong Kong's securities regulator has won a two-year battle to wind up Hong Kong-listed China Metal Recycling Holdings Ltd (CMR), in a victory that bolsters its authority to sanction overseas companies it suspects of wrongdoing. SFC said CMR overstated its financial position in the prospectus for its 2009 initial public offering. It also said around 38 percent, 64 percent and 90 percent of gross profits for 2007, 2008 and 2009, respectively, were fictitious*."

When being interviewed by Reuter, Mr. Steward, the then Executive Director of Enforcement, said
"*This is an audacious and dishonest scheme to deceive Hong Kong investors and creditors" "Liquidators will be able to conduct an independent assessment of the company's real position.*"

CANCELLATION OF LISTING notice was issued on 2 February 2016

"*The Hong Kong Police charged a board member and a staff member of China Metal Recycling with one count of conspiracy to defraud*" quoted from the SFC Enforcement Report dated May 2, 2017.

Ernest & Young (EY)

Standard Water Limited owns and operates sewage and waste water treatment plants in China. Standard Water applied for listing to the Stock Exchange of Hong Kong (SEHK) on 9 November 2009. In March 2010, EY suddenly informed the SEHK of its resignation as reporting accountants and auditors of Standard Water upon discovery of certain inconsistencies in documentation provided by the company. Shortly afterwards, Standard Water also withdrew its listing application.

The Securities and Futures Commission (SFC) brought proceedings against EY in 2012 under s 185 of SFO to compel the production of these documents after EY failed to provide them as part of an SFC investigation under s 183 of SFO into the proposed listing of Standard Water.

EY claimed that the relevant records were held by its joint venture partner in

mainland China, and that the documents could not be produced to the SFC because of various restrictions under Chinese laws and regulations including auditors' duty of confidentiality and the law concerning state secrets.

The Court of First Instance rejected these arguments and ordered EY to produce the required material to the SFC finding that EY had "deliberately withheld from SFC information in its knowledge"

On May 23 2014 the Court ordered EY to produce accounting records relating to its work as the reporting accountant and auditor for Standard Water Limited to the SFC. The Hon Mr Justice Ng also said the objection by EY to produce the audit working papers based on state secrets is "a complete red herring". The court also ordered EY to pay the SFC's costs on an indemnity basis.

This case is primarily about the obligations of an accounting firm in Hong Kong to comply with requirements under Hong Kong law. The case is not about PRC law. Auditors should not withhold information that is in their possession and sought by the SFC in connection with suspected misconduct in Hong Kong's markets.

The result provides important clarification to listed companies and accounting firms in Hong Kong concerning their obligations.

Ernst & Young produces audit working papers in Hong Kong and appeals order over Mainland papers. No date has been set for the hearing of EY's appeal quoted from SFC's press releases 23 Jun 2014

Ernst & Young Discontinues Appeal over Producing Chinese Audit Working Papers to SFC by Charltons dated August 2015
https://www.charltonslaw.com/ernst-young-discontinues-appeal-over-producing-chinese-audit-working-papers-to-sfc/

"Background
As reported in our February 2014 newsletter, EY had resigned as SW's auditor, citing inconsistencies in SW's documentation, meaning that it could no longer act as its auditor and EY informed the Stock Exchange of its resignation. SW subsequently withdrew its listing application and the SFC requested EY to provide documents and information relevant to its assessment of whether there was any implication of false accounting in SW's listing application.
Whilst it was EY who had contracted with SW to be their reporting accountant and independent auditor for the purpose of the intended listing, EY had used its affiliate, Ernst & Young Hua Ming LLP ("Hua Ming"), a PRC entity, subject to PRC laws, to conduct the field work for the audit. Quoted from Newsletter by Deacons heading "Ernst & Young ordered to produce accounting records and audit papers to the SFC" dated 16 September 2014

ANNEX B

Initial Public Offer (IPO) sponsor

Every company applying to list on the SEHK must appoint a sponsor to advise the company through the IPO process, preparing the listing documents, ensure sufficient disclosure in the prospectus for investors to form a valid and justifiable opinion of the company's financial condition and addressing the matters raised by regulators. The sponsor will assess its suitability for listing and likely interest of the investors in the IPO.

China Metal Recycling (Holdings) Limited (China Metal)

The fraud was reported in 2013, 4 years after its initial public offering. Its sponsor, the investment bank UBS, was criticized

It was revealed that of the 12 newly listed private mainland companies suspended for financial irregularities, four had UBS as a sponsor. The four are as follows -

	IPO	Suspension
China Metal Recycling	June 2009	Jan 2013
China Forestry Holdings	Sept. 2009	Jan.2011
Company said former management falsified logging		
Boshiwa International	Sept.2010	Mar. 2012
Auditor resigned on concern about the existence of 392 million yuan in prepayment		
Foo Woo Group	Mar. 2010	Nov. 2011
Forensic review found fabricated documents on a 100 million yuan and a 157 million yuan acquisition in 2011		

Among the twelve listed private mainland companies mentioned is Hontex International. IPO in Dec. 2009 and suspension in Mar. 2010. Its Sponsor was Mega Capital.

Actions taken by SFC to enhance the sponsor's role in the IPO process –

- On 1 October 2013, Hong Kong Sponsor Due Diligence guidelines in English and Chinese came into effect. It is a comprehensive handbook for companies considering listing in Hong Kong and for sponsors, lawyers, accountants involved.

The Guidelines contain 3 main sections:
1. Standards – these are statements of sponsors' due diligence obligations under Hong Kong's regulatory regime;
2. Guidance – guidance as to the market's interpretation of the Standards; and
3. Recommended Steps – these set out practical steps which would generally be expected to meet the Standards in a typical case.

On 22 August 2014, SFC issued the Supplemental Consultation Conclusions on the Regulation of IPO Sponsors – the SFC has confirmed its original position that no amendments are necessary - sponsors are already among the broader category of persons who have potential criminal and civil liability for untrue statements (including material omissions) under sections 40(1)(d), 40A(1) and 342F(1) of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*. As a prerequisite to being authorised for registration under the Ordinance, sponsors must discharge additional obligations in respect of IPO prospectuses under the Hong Kong Listing Rules, including providing a declaration to SEHK that the information in the prospectus is true, accurate and complete in all material respects. It is a criminal liability in the Ordinance for sponsor issuing prospectuses containing untrue statement/s and/or material omission.

- **Amendments to the Listing Rules** to ensure before making a listing application IPO sponsors thoroughly understand any company aspiring to access Hong Kong's securities markets. The Code of Conduct for Persons Licensed by or Registered with SFC encourages sponsors to take a responsible, proactive and constructive role when leading IPOs. All listing applications submitted on or after 1 October 2013 needs to have a properly drafted prospectus (Securities & Futures (Stock Market Listing) Rules Cap. 571V).

- **Amendments to the Companies Ordinance** clarifies that civil and criminal prospectus liability provisions apply to sponsors (Companies Ordinance Cap.622)

- **Hong Kong Securities and Investment Institute**

  New regulatory examinations and refresher course for individuals seeking to act as Sponsor Principals or to engage in sponsor work. SFC also published frequently asked questions on their website to help market participants understand the new eligibility requirements for sponsors (Securities & Futures Commission 2013-2014 Annual Report).

- **Disciplinary Action**

  In January 2014, The Securities and Futures Appeals Tribunal affirmed the SFC's decision to reprimand Sun Hung Kai International Limited, fine it $12 million and suspend its licence to provide corporate finance advisory services for one year (Securities & Futures Commission 2014 News from website).

  6 Lessons for IPO sponsors in conducting due diligence and record-keeping - 1. Apply the same standards of due diligence in GEM and Main Board listings. 2. Make a reasonably detailed enquiry to address concerns raised by a "red flag". 3. Bear in mind the dual obligations of a sponsor; an obligation not only to the client but, equally importantly, to the integrity of the market. 4. Blind reliance on an expert's advice is not regarded as reasonable due diligence. 5. Critically assess statements and representations made by the company and be alert to information that contradicts or questions their reliability. 6. Keep adequate records of due diligence work, especially in respect of matters that may be contentious or material.

- **The Securities and Futures** (Short Position Reporting) Rules came to effect in June 2012. In addition, as from September 2012, weekly publication of reported short positions in shares on the SFC website. This enables the SFC to better monitor our markets and gives participants useful information. (The Securities and Futures (Short Position Reporting) Rules Cap. 571AJ)

- **Investor Protection Bill**

  The Bill covers legal liability of IPO sponsors, supervisory co-operation agreements with overseas regulators and enhancing the regulatory regime for non-corporate entities listed on SEHK to ensure a level playing field (Securities & Futures Commission 2014 Annual Report).

- **Proposed Amendments to Parts XIII - XV of the Securities and Futures Ordinance**

  amendments to extend the market misconduct and disclosure of interest

requirements in to cover all listed entities whether companies or other types of business organisations (Securities & Futures Commission 2014 Annual Report).

ANNEX C

Developments till 30 June 2017

(I) **The SFC enforcement has expanded to embrace "A" Share not listed in Hong Kong leading to supervisory cooperation between SFC and the China Securities Regulatory Commission (CSRC)**

A-shares are shares of the Renminbi currency that are purchased and traded on the Shanghai and Shenzhen stock exchanges. These A shares are now available for trading through Shanghai and Shenzhen Stock Connect.

1/ Shanghai-Hong Kong Stock Connect was launched on 17 November 2014.
Joint Announcement of China Securities Regulatory Commission (CSRC) and SFC 10 Nov 2014 about the official launch by the Shanghai Stock Exchange (SSE), the Stock Exchange of Hong Kong Limited (SEHK), China Securities Depository and Clearing Corporation Limited (ChinaClear) and Hong Kong Securities Clearing Company Limited (HKSCC) of the pilot programme to provide mutual trading access between the Shanghai and Hong Kong stock markets (Shanghai-Hong Kong Stock Connect).
Memorandum of Understanding signed on 17 October 2014 between the CSRC and the SFC on Strengthening of Regulatory and Enforcement Cooperation under Shanghai-Hong Kong Stock Connect for investor protection and facilitating the sound development and effective operations of both stock markets and the SFC press release about the MoU 17 Oct 2014
2/ Shenzhen-Hong Kong Stock Connect was launched on 5 December 2016
Joint Announcement of the CSRC and SFC dated 25 Nov 2016
Under these programs, investors in each market are able to trade shares on the other market using their local brokers and clearing houses. CSRC and SFC approved the official launch by the Shenzhen Stock Exchange, The Stock Exchange of Hong Kong Limited, China Securities Depository and Clearing Corporation Limited and Hong Kong Securities Clearing Company Limited of mutual trading access between the Shenzhen and Hong Kong stock markets (Shenzhen-Hong Kong Stock Connect).

The following is SFC response re enforcement
Comprehensive enforcement and supervisory cooperation between the SFC and the China Securities Regulatory Commission because investors in each of our markets are increasingly exposed to risks in the other market and those intent on misconduct can

operate from the other jurisdiction. (A speech entitled "Front Loaded, Transparent and Direct: A New Approach to Regulation for Changing Markets" delivered by Mr. Ashley Alder on 13 July 2017 available on the SFC website.

Literature
Financial articles regarding the Share Connects are in Annex C

3/ MSCI's adding A-share to key emerging markets beginning 2018.
The MSCI is a New York-based index provider designed to measure the performance of the large and mid. cap segments in the stock market. It will add 222 A-shares on a gradual basis beginning 2018 to its benchmark emerging markets index.
The impact of the inclusion will shift the A-share trading upwards in the SEHK through Shanghai and Shenzhen Stock Connect.

(II) **Change of the convention dual filing system under SEHK's non-statutory Listing Rules to Early Targeted intervention for decision-making in listing matter under The Securities and Futures (Stock Market Listing) Rules (SMLR)**

Under the convention dual filing system, SEHK is the front line regulator of listed companies and single point of contact in all listing matters. SFC pass its comments in writing to SEHK for it to raise with the applicant and its advisers without direct communication.
The speech of Mr. Ashley Alder, Chief Executive Officer on 13 June 2017 @ HKSI Institute Roundtable Luncheon Series Titled Front-loaded, transparent and direct: A new approach to regulation for changing markets (hereinafter referred to as Ashley speech) that

> "*inquiries into corporate governance or disclosure issues, insider dealing and market manipulation have more than doubled since 2011, and the number of formal disciplinary and other proceedings have increased by more than 50%*".

On top of which was the June 27 "crash" when small-cap stocks plunged up to 90 per cent involving multi-billion dollars loss in one day, is still under investigation.

Ashley speech revealed the setting of special operational team (ICF) in 2016 under SMLR.
ICF uses powers in SMLR under the dual filing system without changing the SEHK's Listing Rules. ICF is at the front line when making decisions under the SMLR. It needs to explain those decisions to the market, interact directly with affected companies that can appeal against its final decisions.

Using SFC's powers in SMLR under the dual filing system

- without changing the SEHK's Listing Rules
- with no increase in the annual cost in adopting the "expedited procedures" to improve the current vetting mechanism.

Intake filter and prioritization
ICF has been formed with a view to reduce the complaints significantly by improving the enforcement system i.e. to reduce overall caseload through culling low-priority cases and filtering out new cases which are not within SFC's concern and re-aligned priorities by focusing on e.g. Corporate Fraud after the June 27 crash.

SMLR vetting does not bypass the SEHK but it shortens the procedures by direct communication of the SFC concern instead of via SEHK.

Literature
SFC's Statement on recent GEM listing applicants dated 13 Mar 2017 @ www.sfc.hk/.../news...statements.../statement-on-recent-gem-listing-appl
with data in paragraphs 2 and 3 explaining why Guidance was given in early 2017.

Ashley speech revealed
New Guidance Gem IPO, in early 2017, on the obligations of sponsors, underwriters and placing agents making it plain that directors and independent financial advisers have a clear responsibility to make sure that professional *valuers* engaged by listed companies cannot be allowed to use unrealistic valuation assumptions to justify acquisitions or disposals at unsupportable prices. The failure by a director is a serious breach of duty leading to disqualification or compensation orders. The SFC may object to the IPO if it becomes clear afterwards that a mismanaged placing has led to a disorderly market, expect a suspension of trading and possible SFO sanctions to follow.

At this juncture, I have to explain that suspension is an early protective action during an investigation when SFC may require a listed corporation and other persons to produce any books and records under section 179(1) of the SFO.

Response from the market – Some companies delay sub-standard listing plans, and others to include a public offer to achieve a wider spread of genuine shareholders.

Action up to 30 June 2017
- SFC objected to a GEM IPO because of an exceptionally high shareholding concentration;
- SFC objected under SMLR to three listings;
- SFC suspended trading in seven stocks for investor protection because the share issues could not be in the interests of public shareholders;
- an existing listed company's proposal to issue shares to a small group of subscribers at a price very significantly lower than the market price.

Literature

- Economist Intelligence Unit, Country Finance Hong Kong dated 15 September 2016 commented that SMLR Vetting would strengthen the reputation of the territory's stock-market. It was described as "strong, as the current listing regulations are weakly enforced and have given rise to some notably poor listings, resulting in scandals."
- The secretary for financial services and the Treasury, Chan Ka-keung, has sounded positive on the proposed changes, stating that he does not believe that they will lead to over-regulation.
- However, legislators representing the financial sector's functional constituencies in the Legislative Council have opposed the reforms.

Early Targeted intervention under SMLR by ICF

(I) Vetting of IPO

First, assessment of listing applications: The SMLR are concerned with the more serious disclosure and public interest issues. ICF will no longer relay its comments on listing applications via SEHK.

Second, when there is a prima facie case to raise an objection to a listing, a formal "letter of mindedness" with detailed reasons given to enable the applicant to respond properly. If the matter cannot be resolved, then a final decision notice will be issued. The applicant has a statutory right of appeal to the independent Securities and Futures Appeals Tribunal.

Third, Applicants and their advisers are to communicate directly with ICF.

SEHK's role remain unchanged =

- even a letter of mindedness to object under the SMLR, the SEHK still has the discretion to continue or suspend its own listing process.
- the "suitability" for listing will continue to be decided on by the SEHK's Listing Rules, and not in the SMLR: it is open to the SEHK to reject an IPO as being unsuitable even if the SFC has not identified grounds for objection under the SMLR.
- SFC continues to supervise the regulation of these listing applications through an enhanced, published audit or review of the SEHK's listing regulation work with a view that the audit or review is thorough, fair and constructive.

(I) Post-IPO under the SMLR

(a) Objection to equity offerings by listed companies

If the SFC intends to object, it will normally issue a letter of mindedness with details of its concern. ICF will then make themselves available for discussion with the company and its advisers. The listed company has the opportunity to respond before any final decision is made. The final decision will be appealable.

(b) Direction to suspend trading

SFC will issue a "show case letter" to the listed company detailing the concerns behind its mindedness to suspend trading and giving the listed company an opportunity to respond. The company can appeal for a resumption for trading.

(III) **Belt & Road Initiative with potential IPOs from 65 Asian, African and European countries with China-centered trading network may lead to a change of market composition**

Hong Kong's attractiveness to act as the major fund-raising centre by

(1) being the "super-connector" between China, the 65 Belt and Road countries, and investors and businesses worldwide.
(2) being a leading international financial centre and the gateway for the two-way flow of investment funds between China and the rest of the world,
(3) playing a key role in the development of infrastructure, trade and economic cooperation through large parts of Asia, Africa and Europe with a legal system based on English common law and offers access to experts in the fields of finance, infrastructure development, project management, accounting and legal services.

Ashley speech reveals that "*a statement in April about potential IPOs by Belt and Road infrastructure companies..We wanted to explain how we would take a sustainable and measured approach to the question of country risk, and at the same time provide a clear pathway for these companies to list from a market development angle"*.

(IV) **Alibaba case**

SEHK is exploring the idea to attract new-economy companies to list allowing a dual class share structure, and secondary listing for those already publicly –traded in the mainland and the US. The latter means that Alibaba which gave up on Hong Kong and listed in New York in 2013 due to restrictions on a dual-class share structure to return to Hong Kong for secondary listing. The consultation is still underway.

Ashley speech gave "a few high-level observations" regarding the New Board available at ww.sfc.hk/web/EN/files/ER/PDF/Speeches/CEO%20speech%20at%20HKSI%20final_13%20Jul.pdf.

This can lead to a change in Listing Rules.

Literature

Reports on others work inter alia The Economist Intelligence Unit, Country Finance Hong Kong (2016). Three cross-border platform for trading by overseas institutional investors. All have positive impact in Hong Kong's financial services sector & its economic growth -

(A) Shares Connects

1/ Shanghai-Hong Kong Stock Connect launched on 17 November 2014

l Literature – The launch of the Stock Connect scheme marks another important step in opening China's capital account By Economist Intelligence Unit, Country Finance Hong Kong Updates ng/ArticleList/Updates

Analysis

through Stock Connect global investors have gained direct access to China's capital markets.

China's decision to waive capital gains tax on foreign investors in its capital markets for an unspecified period

exempt southbound investors from capital gains tax for three years. The share link has already had a significant impact on share values in Hong Kong by removing the premium that dual-listed shares had previously exchanged hands for in the territory.

Impact on the forecast

positive impact on activity in Hong Kong's financial services sector

2/ Shenzhen-Hong Kong stock connect launches on 5 December 2016

· Literature: The scheme has not fallen foul of mainland policymakers' mounting concerns about capital outflows by Economist.

Analysis

offers mainland investors another channel through which to buy foreign-currency denominated assets.

It improves investor access to the Shenzhen market, which has a greater share of private-sector firms than the Shanghai stock exchange.

strengthen Hong Kong's role as a global financial hub, confirming its status as a gateway to the mainland's financial markets.

Impact on the forecast

Hong Kong's economic growth incorporate the marginally positive effects stemming from the scheme's launch.

APPENDIX THREE

ANNEX A

Case Study: The Collapse of Lehman

Lehman Brothers Holdings Inc. (former NYSE ticker symbol **LEH**)
was a global financial services firm.
Before declaring bankruptcy in 2008, Lehman was the fourth-largest investment bank in the United States
Lehman was operational for 158 years from its founding in 1850 until 2008.
On September 15, 2008, the firm filed for Chapter 11 bankruptcy protection
largely sparked by Lehman's involvement in the subprime mortgage crisis
i.e. mortgages targeted at borrowers with less-than-perfect credit and less-than-adequate savings.
An increase in subprime borrowing began in 1999 when there was a concerted effort to make home loans more accessible to those with lower credit and savings than lenders typically required. The idea was to help everyone attain the American dream of home ownership. Since these borrowers were considered high-risk, their mortgages had unconventional terms that reflected that risk, such as higher interest rates and variable payments.

The out-of-control mortgage market was a threat to the U.S. economy as the whole industry was dependent on ever-increasing property values.

In the up-trending market that existed from 1999 through 2005, these mortgages were virtually risk-free. A borrower, having positive equity despite the low mortgage payments since his home had increased in value since the purchase date, could just sell the home for a profit in the event he could not afford the future higher payments.

However, these creative mortgages were a disaster waiting to happen in the event of a housing market downturn, which would put owners in a negative equity situation and make it impossible to sell.

On September 15, 2008, Lehman Brothers filed for bankruptcy. Lehman's bankruptcy filing was the largest in history. was the fourth-largest U.S. investment bank at the time of its collapse, with 25,000 employees worldwide.

Lehman was the largest victim of the U.S. subprime mortgage. It induced financial

crisis that swept through global financial markets in 2008.

The market collapse gave support to the "Too Big To Fail" doctrine. After filing for bankruptcy, global markets immediately plummeted.

Investment Decision
In 2003 and 2004, with the U.S. housing boom well under way, Lehman acquired five mortgage lenders, record revenues from Lehman's real estate businesses enabled revenues in the capital markets unit to surge 56% from 2004 to 2006.
The firm securitized $146 billion of mortgages in 2006, a 10% increase from 2005. Lehman reported record profits every year from 2005 to 2007. In 2007, the firm reported net income of a record $4.2 billion on revenues of $19.3 billion. In February 2007, the stock reached a record $86.18, giving Lehman a market capitalization of close to $60 billion.

However, by the first quarter of 2007, cracks in the U.S. housing market were already becoming apparent as defaults on subprime mortgages rose to a seven-year high. On March 14, 2007, a day after the stock had its biggest one-day drop in five years on concerns that rising defaults would affect Lehman's profitability, the firm reported record revenues and profit for its fiscal first quarter.

Lehman's collapse roiled global financial markets, given the size of the company and its status as a major player in the U.S. and internationally. Lehman's bankruptcy led to more than $46 billion of its market value being wiped out. The creditors but not the shareholders were protected.

SFC, HKMA and 16 banks reach agreement on Minibonds
22 Jul 2009

The Securities and Futures Commission (SFC), the Hong Kong Monetary Authority (HKMA) and 16 distributing banks (the Banks) (Note 1) today jointly announce that they have reached an agreement in relation to the repurchase of Lehman Brothers Minibonds from eligible customers (Note 2).

The Banks have agreed with the SFC and the HKMA without admission of liability : Inter alia

People who have previously reached settlement with the Banks in relation to Minibonds will not qualify for the repurchase offer. However, the Banks have undertaken to the HKMA to make ex gratia payments to those customers that have already entered into settlements with the Banks and who would have been eligible to receive the repurchase offer where those customers have received settlement amounts less than they would have received under this agreement. The intention is to bring those customers in line with eligible customers under this agreement.

Notes :

1. The Banks are: (1) ABN AMRO Bank N.V.; (2) Bank of China (Hong Kong) Ltd; (3) Bank of Communications Co Ltd; (4) The Bank of East Asia, Ltd; (5) Chiyu Banking Corporation Ltd; (6) Chong Hing Bank Ltd; (7) CITIC Ka Wah Bank Ltd; (8) Dah Sing Bank Ltd; (9) Fubon Bank (Hong Kong) Ltd; (10) Industrial and Commercial Bank of China (Asia) Ltd; (11) Mevas Bank Ltd; (12) Nanyang Commercial Bank, Ltd; (13) Public Bank (Hong Kong) Ltd; (14) Shanghai Commercial Bank Ltd; (15) Wing Hang Bank Ltd; and (16) Wing Lung Bank Ltd.

2. Eligible customers will not include professional investors, corporate/non-individual investors (with specified exceptions) or experienced investors (meaning investors who in the three years preceding their first purchase of Minibonds, executed five or more transactions in Leveraged Products, Structured Products or a combination of these products. The definition also excludes those customers who have previously settled claims in relation to Minibonds with the Banks.

Hereunder are some of the criminal proceedings stemming from the billions of dollar losses suffered by retails investors in Hong Kong following Lehman's demise -

In HKSAR v Chu Lai Sze HCMA 527/2010, the appellant was convicted on her own plea of an offence of forgery contrary to section 71 of the Crimes Ordinance, Cap. 200. She was sentenced to four months' imprisonment against which she appealed. The appellant was an assistant financial services manager of a major bank in Hong Kong. A customer of the bank had purchased Lehman Brothers minibonds through the appellant on a previous occasion. The same customer later agreed with the appellant to purchase $200,000 of a subsequent series of minibonds but inadvertently did not sign the documents required to complete the transaction. When realizing the omission, the appellant forged the customer's signature on those documents. As a

result, the transaction proceeded and $200,000 was debited from the customer's account with the bank. The collapse of Lehman Brothers led to the uncovering of the forgery. The Court of First Instance allowed the appeal against the sentence. It was held that the appellant had no intention of causing any loss either to the bank or the customer. Her actions stemmed from folly or laziness. The circumstances of the case rendered an immediate custodial sentence unnecessary. In substitution, the appellant was ordered to perform community service for a period of 200 hours

In HKSAR v Wong Wai Ming KTCC 268/2010, a disgruntled investor in the Lehman Brothers minibonds was prosecuted in the Kowloon City Magistrates' Court for placing a quantity of starch in a sealed envelope and sending it to a bank. When opening the envelope, the bank officer was alarmed as he believed the white powder in the envelope was anthrax. The Police were alerted and emergency measures against anthrax were adopted to deal with the envelope. The defendant was convicted of criminal intimidation and was ordered to perform 120 hours of community service.

Below is one of the cases which attracted publicity -
In HKSAR v Tse Man Lai DCCC 1318/2011,
the defendant hacked into the website of the Hong Kong Exchanges and Clearing Limited by sending a large amount of attacking packets from his computer to the website. He did so for the purpose of promoting his computer software business. He was charged with two counts of obtaining access to computer with criminal or dishonest intent. He was convicted after trial in the District Court and sentenced to imprisonment.

The following are cases of successful corporate crime prosecutions launched in the District Court –

Against the chairman Yip Kim Po, directors and persons associated with them of the publicly listed company Ocean Grand Holdings Ltd, which was engaged in the manufacture of aluminium in the Mainland. A sentence of seven years' imprisonment was imposed on the Chairman whilst those who assisted him received sentences of imprisonment, ranging from 36 months to six years (HKSAR v Yip Kim Po and others DCCC 960/2007 and 551/2008).

A case was brought against a group of people responsible for running Moulin Global Eyecare Holdings Ltd, formerly the largest wholesaler of glasses manufacturer in the world, which went into liquidation as a result of fraudulent activities leaving debts of

$4.5 billion. The group included the Chairman, his son, the Financial Controller and some of their relatives who had been asked to set up front companies to receive the proceeds of the scam. Sentences of imprisonment were imposed ranging from two years for those who assisted them to 12 years for the main culprit (HKSAR v Ma Bo Kee and others HCCC 352/2009).

In HKSAR v Shawn Hanna DCCC 918/2011, the fraudsters set up a bio engineering company in Hong Kong in late 2010 and held a conference at a hotel in February 2011, inviting a famous female TV star to promote a private equity scheme. False representations were made that the Hong Kong company was associated with a company of similar name listed at NASDAQ in the USA and that investors would be allocated shares in the latter company in a year's time. The defendant, in full knowledge that the Hong Kong company was not associated with the US company, nonetheless participated in the scam and helped promote the business of the Hong Kong company to victims. The victims who were misled into joining the scheme suffered loss totalling $500,000. The defendant was convicted after trial of one charge of conspiracy to defraud and was sentenced to 39 months' imprisonment.

In HKSAR v Ma Bo Kee and others CACC 458/2010,
publicly listed company Moulin Global Eyecare Holdings Co Ltd., which was the biggest wholesaler and manufacturer of spectacles in the world, collapsed due to a fraud perpetrated by its directors and senior officers. The losses sustained by creditor banks and shareholders approximated $2.7 billion and $1.7 billion respectively. Ma was convicted after trial of one charge of conspiracy to publish a false statement and two charges of conspiracy to defraud. He was sentenced to imprisonment. Ma's son and the other applicant pleaded guilty and were sentenced to imprisonment. On appeal against their sentences, the Court of Appeal upheld the sentences imposed on Ma and his son and reduced the third applicant.

Price Rigging

In HKSAR v Li Jialin DCCC 1282/2010,
the defendant traded, between August 2007 and April 2008, in the shares of VST Holdings Ltd via three accounts which were controlled and operated by him. On 11 trading days, 128 transactions were carried out in these accounts. Of these transactions, 67 were wash sales which did not generate any economic benefit but had the effect of creating a false and misleading appearance of active trading in the VST

shares. As a result, the price of VST shares on each of the 11 days was up from one to eight spreads. The defendant also failed as required to notify VST and the Hong Kong Stock Exchange of his interest in those shares within three working days of acquisition. He was convicted after trial of price rigging and charges of failure to perform a duty of disclosure within the specified period. He sentenced to imprisonment for price rigging fined for the remaining charges, a disqualification order under section 303(2)(a) of SFO for 1 year and a costs order.

False Trading

The first case tried in the District Court that involved derivative warrants was HKSAR v Fu Kor Kuen, Patrick and Lee Shu Yuen, Francis DCCC 981-1020/2008
Fu Kor Kuen Patrick and another v HKSAR FAMC 7/2011
In June 2011, leave was granted to determine what the elements of the offence of false trading and the scope of the statutory defence. The Court of Final Appeal held that the legislative intent under section 295(7) was to impose a persuasive burden of proof as opposed to an evidential burden on a defendant to show, on a balance of probabilities, an innocent purpose of the proscribed conduct. Since at least a primary purpose that was not the proscribed purpose, namely to make a profit from the commission rebate scheme, existed, the appellants were successful in their appeals.

Fraud cases

HKSAR v Lily Chiang and 2 others DCCC 265 and 266/2009, two executive directors (D1 and D2) of a publicly listed company — Pacific Challenge Holdings Ltd ("PCH") — were charged with one count of conspiracy to defraud and two alternative counts of making false statements concerning the alleged granting of share options by PCH. In addition, D1 and D3, both executive directors of Eco-Tek Holdings Ltd ("Eco-Tek"), were jointly charged with fraud and authorizing the issue of a prospectus containing an untrue statement which offences related to the dishonest allotment of shares to D1's personal assistant prior to the listing of Eco-Tek on the GEM board of the Hong Kong Stock Exchange. After a 62-day trial, all three defendants were found guilty of the various charges and were sentenced to 3 years' 2 years' and 19 months' imprisonment respectively. D1 and D3 have lodged an appeal against both conviction and sentence whereas D2 has applied for leave to appeal against conviction only.

Venue of Trial

In Chiang Lily v Secretary for Justice, Court of Final Appeal (CFA) dismissed the Applicant's application for leave to appeal.
The Applicant faced five charges relating to commercial crimes in the District Court

(DC). She challenged inter alia by way of judicial review:
(i) that the SJ had failed to give due consideration to the principle of trial by jury under Basic Law 86 in reaching his decision;
(ii) that the SJ's power to decide the venue of trial should be exercised by the courts.

The CFA took the view that choice of the venue for a prosecution was clearly a matter covered by Basic Law 63 which gave control of prosecutions to the SJ without any external interference. (FAMC Nos. 64 & 65 of 2009 (26 March 2010))

The CFA referred to the Statement of Prosecution Policy and Practice (2009), which gives the following guidance for choosing the venue:
"In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors."
The CFA considered that these were matters that might properly guide the prosecutor.

The question of venue is a prosecutorial choice with the transfer following on a mandatory basis. (Department of Justice 2009 Statement of Prosecution Policy and Practice).

SFC vs CITIC demonstrates how the SFC used the 2 arms in respect of the same matter but different offenders.

The SFC sought restoration or compensation orders in the CFI to restore or compensate up to 4,500 investors who purchased CITIC shares between the date on which the false or misleading information was allegedly announced and the date the true financial position was disclosed. The allegations relate to a 12 September 2008 circular issued by the company stating that the directors were not aware of any adverse material change in the group's financial or trading position since the end of 2007. Just over a month later, on 20 October 2008, the company issued a profit warning which disclosed huge realised and mark to market losses arising from leveraged foreign exchange contracts of which it became aware on 7 September 2007, just prior to the circular containing the statement of no material adverse change. CITIC incurred a loss of US$2 billion from the forex derivatives, also known as "accumulators".

The day after the profit warning, the share price dropped 55% from HK$14.52 to HK$6.52 on 21 October 2008. According to press reports, about 100 million shares

were purchased during the relevant period which means that the compensation could be as high as HK$2 billion given the highest purchase price paid was HK$24.50 and the lowest was HK$3.66.

1/ Tsoi Bun, a futures trader, was convicted in Eastern Magistracy on five charges of market manipulation in January 2012 in respect of which he was sentenced to six months' imprisonment suspended for two years, fined HK$500,000 and ordered to pay the SFC's costs of investigation. This was the first criminal prosecution for market manipulation in Hong Kong's futures market.

2/ The SFC obtained a restoration order in January 2014 against Tsoi, which ordered him to pay HK$13.7 million to around 500 investors affected by his manipulation of the calculated opening prices of index futures contracts in the futures market between 2007 and 2009.

3/ The SFC also sought that CITIC and the five directors be sanctioned by the MMT. However, in Business of Bloomberg it was reported in this way -

"*Hong Kong Tribunal Finds No Misconduct With Citic, Directors By Alfred Liu April 10, 2017, 5:06 PM GMT+8 Updated on April 10, 2017, 8:25 PM GMT+8 A Hong Kong tribunal has cleared Citic Ltd. and five former directors of disclosing false or misleading information over losses by the company in 2008.*"

ANNEX B

MONEY LAUNDERING

Money laundering which has been viewed as the cleaning of dirty money generated by criminal activity has developed to recent cases which only involved money laundering not directly correlated with other crimes- stand-alone money launderers.

The Legislation:

Organised and Serious Crimes Ordinance (OSCO), Drug Trafficking (Recovery of Proceeds) Ordinance, United Nations (Anti-Terrorism Measures) Ordinance and Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

The Enforcement is dealt with by Hong Kong Police Force (HKP) and Customs and Excise Department (Customs). The Prosecutions Division of Department of Justice (DOJ) gives advice during investigation and prosecutes.

The Joint Financial Intelligence Unit (JFIU) jointly operated by HKP and Customs disseminates suspicious transactions reports and maintains a central register of money-changers and remittance agents. It assists by obtaining bank account details from financial institutions, identifying suspicious transactions, and advising on whether accounts should be frozen.

Penalties

The maximum penalty for money laundering offences is a fine of HK$5 million and imprisonment of 14 years.

Case Studies

Most money laundering offences are charged under section 25 of OSCO.
In *HKSAR v Pang Hung Fai* [2014] 6 HKC 487, the Court of Final Appeal (CFA) gave an authoritative interpretation of the *mens rea* required for "having reasonable grounds to believe" and affirmed that a defendant's own perception and evaluation of the objective facts (and not just the hard facts of the case alone) is to be taken into account when deciding whether the required *mens rea* exists.

The latest CFA's decision on 11 July 2016 in *HKSAR v Yeung Ka Sing, Carson* (2016) 19 HKCFAR 279 sets down the interpretation of section 25(1) of OSCO -

- No need for the prosecution to prove a predicate offence. It is not necessary for the Prosecution to prove that the property in question constituted the proceeds of an indictable offence to secure a conviction. A person can be liable for money laundering even if the money turns out to be "clean". However, a person with suspicion may obtain immunity under section 25A of the OSCO, under by making a report to the JFIU.
- The test for considering the *mens rea*. The defendant's personal beliefs, perceptions and prejudices should be considered in assessing his *mens rea*. If the defendant provides evidence as to their state of mind, and this evidence is accepted as true or potentially true, acquittal is called for since the *mens rea* is not established by the prosecution. This is so even if the asserted perceptions or beliefs appear naïve or gullible to others. But if the defendant's evidence of his state of mind is entirely disbelieved, the court can draw inferences based on the Prosecution's evidence.
- Rule against duplicity. Where a charge involves a series of deposits each of which is capable of being treated as a separate offence, the rule against duplicity is not infringed because the purpose of concealing the property comprising each of the deposits, known or reasonably believed to represent the proceeds of crime, provided a connection which made the individual deposits acts of a similar nature so that they could fairly be regarded as forming part of the same transaction or criminal enterprise.

Memorandum of Understanding

signed on 30 April 2014 setting out the framework agreed between the Commissioner of Customs and Excise, the Insurance Authority, the Monetary Authority and the Securities and Futures Commission to cooperate and communicate constructively in order to exercise their powers in relation to anti-money laundering and counter-terrorist financing ("AML/CFT") matters under the Anti-Money Laundering and Counter Terrorist Financing (Financial Institutions) Ordinance (Cap. 615).

I am indebted to my consultant, Mr. Raymond Kwong for drawing my attention to the the recent development towards the law of money laundering, notably the 2 recently decided Court of Appeal cases, HKSAR v. Salim Majed and Another [CACC 184/2013 and HKSAR v. Yeung Ka Sing Carson [CACC101/2014].

In the former case, the Court of Appeal quashed the convictions of the Defendants. On 10 February 2015, the Appeal Committee granted leave to the prosecution to appeal to the Court of Final Appeal on the point of law.

In the latter case, HK Court of Final Appeal, 14-Aug-2015 -

> Mr Yeung gets bail pending his final appeal to be heard from 31-May to 2-Jun-2016, on matters of "great and general importance", including the question of whether it is necessary for the prosecution to prove, as an element of the offence of money laundering, that the proceeds were in fact proceeds of an indictable offence. The outcome of the appeal could mark a turning point, because until now prosecutors have relied on defendants simply having "reasonable grounds to believe" that money is dirty without proving that it is, and numerous convictions have been based on that.

I am indebted to my External Examiner Dr. Felix Chan for drawing my attention to the following two cases –

HKSAR v Pang Hung Fai [2014] 6 HKC 487 (HKCFA)

HKSAR v Wu Wing Kit [2014] HKDC 1058

Wu Wing Kit was convicted before the CFA decision in Pang Hung Fai (FACC 8/2013) when Pang's conviction was quashed on 10 November 2014. The CA ordered a retrial in Wu case.

Literature -

- Court of Final Appeal explains Money Laundering Law by Peter So dated 9 January 2015.
- Conventus Law Monthly Round Up

On 19 September 2014, Wu Wing Kit (Wu), a solicitor and partner of Hong Kong law firm, Fred Kan & Co (FKC), was convicted under Section 25 of OSCO and sentenced to 6 years' imprisonment for money laundering. This case highlights the importance of solicitors carrying out due diligence in respect of their clients' identity and the transactions instructed to be carried out, in particular, the source of any funds that are to pass through or be held in the solicitor's bank accounts, and if there are grounds to support a suspicion, solicitors should make a report to the Joint Financial Intelligence Unit (JFIU).

Professionals deal with client's money on a day-to-day basis. Very often, client's money is transferred from one party to another party upon client's instructions without the professional making further inquiries as to the nature and source of funds and the purpose of transfer. However, as this case shows, professionals "turning a blind eye"

in dealing with client's money may already be sufficient to be convicted of the offence of money-laundering.

Amendment in Legislation

The Government gazetted the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 on 23 June 2017 which will be introduced into the Legislative Council on 28 June 2017. The Government proposes to implement the amendments on 1 March 2018. The Bill seeks to (1) apply statutory customer due diligence ("CDD") and record-keeping requirements to solicitors, accountants, real estate agents, and trust or company service providers ("TCSPs") when these businesses and professions engage in specified transactions; and (2) introduce a licensing regime for TCSPs to require them to apply for a licence from the Registrar of Companies and satisfy a "fit-and-proper" test before they can provide trust or company services as a business in Hong Kong.

I am indebted to my External Examiner Dr. Felix Chan for drawing my attention to Pang Yiu Hung Robert v Commissioner of Police [2003] 2 HKLRD 125 in respect of clients' instructions being covered by Legal Professional Privilege. This was covered by the following literature -

- REPORTING SUSPICIOUS TRANSACTIONS & LEGAL PROFESSIONAL PRIVILEGE (Security Bureau) by Catherine FUNG Assistant Director of Public Prosecutions (DoJ) dated 4 March 2011

ANNEX C

A synopsis till 30 June 2017 re the operations of the SFC, its relationships with the Department of Justice, and the regulatory bodies

The Securities & Futures Commission (SFC) is not Hong Kong Police (HKP) nor the Independent Commission Against Corruption (ICAC). Accordingly, both HKP and ICAC have the power to arrest and search and SFC does not have.

The HKP was formed in 1844 under Cap. 232. The HKP investigates all crimes.

The ICAC was set up on February 15 1974 under the Independent Commission Against Corruption Ordinance Cap. 204 204 administrating the Prevention of Bribery Ordinance Cap. 201.

Both do not have the right of audience. At the end of the investigations by HKP or ICAC, all papers are sent up to Prosecutions Division of Department of Justice (DOJ) and it is for Secretary of Justice (SJ) to decide whether or not evidence justifies the preferment of charges against any person. The Director of Public Prosecutor on behalf of SJ will make decision whether prosecution will be instituted against the persons involved and if so, the venue. Simple cases are prosecuted by Lay/Court Prosecutors appointed by the SJ under section 13 of the Magistrates Ordinance (Cap 227). DOJ prosecutes trials in District Court and above as well as appeals. The HKP or ICAC has no right of audience in all Courts.

Securities & Futures Commission (SFC) was set up as the single statutory securities market regulator. The Securities and Futures Ordinance (SFO) came into operation on 1 April 2003.

SFC has power to investigate market misconduct under Part XIII or XIV of SFO namely insider trading, false trading, price rigging, disclosure of information about prohibited transactions, disclosure of false or misleading information inducing transactions and stock market manipulation. The SFC does not have the power to arrest and search. The SFC can only issue a notice to interview suspects and/or compelling the production of any documents relating the SFO offence. The SFC does not have the power to grant bail pre-charge.

However, SFC has the right of audience in Magistrate Court under section 388(1) of the SFO Courts and to handle subsequent appeals.

SFC and the Prosecutions Division of Department of Justice (DOJ)

SFC refers all market misconduct under Part XIII or XIV of SFO to DOJ to consider the suitability and venue of a criminal prosecution (Article 63 of the Basic Law).

The Director of Public Prosecutor, on behalf of Secretary of Justice (SJ), may advise SFC to prosecute in its own name before the Magistrates' Courts and to handle subsequent appeals under section 388(1) of the SFO. DOJ prosecutes trials in District Court and above as well as appeals.

Where no criminal prosecution is recommended by DOJ, SFC has direct access to the Market Misconduct Tribunal (MMT) after obtaining the consent of SJ.

Under sections 283 and 307 of the SFO, the Court and MMT are mutually exclusive. No double jeopardy.

SFC and the Court

The maximum criminal sanctions are a maximum of 10 years' imprisonment and fines to up to $10 million. The court may also impose disqualification, cold shoulder and disciplinary referral orders. Failure to comply with a disqualification or cold shoulder order is an offence liable to a maximum fine of $1million and up to 2 years' imprisonment

- Difference between MMT and Court

Wrong-doers - Upon conviction, the Court can impose imprisonment and hence criminal record.
Victims - Criminal courts can make compensation orders to compensate a victim without the need for civil proceedings are lengthy and costly. Compensation orders must be made in conjunction with a sentence or other orders.

Market Misconduct Tribunal (MMT) has the power to disqualify a listed company director for up to five years.

Legislation
Part XIVA of the SFO in January 2013gave statutory backing to the Stock Exchange rules on timely disclosure of Material Non-Public Information
Literature
Hong Kong regulatory enforcement update: July - December 2015.

SFC's Right of audience and Venue of Trial

Under section 388 of the. SFO, the SFC can only prosecute in the Magistrates' Courts DOJ prosecutes trials in District Court and above as well as appeals.

Case Research

Chiang Lily v Secretary for Justice, Court of Final Appeal (FAMC Nos. 64 & 65 of 2009 (26 March 2010)

SFC statement on prosecutorial responsibility dated 30 Aug 2013 gave a very good background about SFC exercising of the statutory power to bring prosecutions before magistrates since 1989 and SFC referrals.

The following is the Memorandum signed between SFC and Department of Justice on 4 March, 2016 (MoU) -

Section 388 of the SFO provides for the prosecution by the SFC, in its own name, before a magistrate, of offences under the Securities and Futures Ordinance, Cap. 571, and certain offences under the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap.32, the Companies Ordinance, Cap. 622 and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, Cup. 615 + conspiracy to commit those offences.

- Paragraph 5 of MoU specifies cases to the DOJ for advice on whether criminal prosecution should be instituted and/or to determine the venue of trial (SFC referrals).
- Paragraph 8 of MoU gives the right to SFC to seek a review if it disagrees with the DOJ's advice or decision,
- For cases not within the SFC referrals, SFC will obtain legal advice from its Legal Services Division.
- Paragraph 7 states the Reviews and Appeals.

The above can also be found in DOJ Newsletter dated July 2016 Page 3 of 2016 Issue 1 Titled MoU with the SFC for criminal cases

Message from Chairman and CEO can be found in Securities and Futures Commission Annual Report 2015-16 about the MoU -.

The right regulation .... between the Mainland and global markets was further strengthened by the .... cooperation with the Department of Justice through a memorandum of understanding signed in March 2016.

Hong Kong regulatory enforcement newsflash dated 8 March 2016 by Simmons & Simmons commented the MoU signed on 4 March 2016 as a possible increase in criminal prosecution of market misconduct in the higher courts. It also draws my

attention to "*The DOJ taking into consideration views expressed by the SFC on referred cases and SFC ability to require the DOJ to review its decision on a case referred to it for advice or decision*."

- Paragraph 9 of MoU gives details regarding Market Misconduct Proceedings and Consent of the Secretary for Justice -

Section 252A of the SFO requires the SFC to obtain consent of the Secretary for Justice before instituting proceedings under Part XIII in the Market Misconduct Tribunal.
When seeking consent from the Secretary for Justice the SFC will provide:

(i) a copy of a draft notice specifying (a) the provision(s) of Part XIII of the SFO b) the identity of the person, and (c) brief particulars disclosing the nature and essential elements of the market misconduct; and
(ii) referral (if any) has been made to other law enforcement agencies.

If the request is refused, the SFC will be given the reasons for refusal set out in section 252A(2) of the SFO

Relationship between SFC & Hong Kong Stock Exchange (SEHK)
The SFC is the statutory supervisor and regulator of SEHK. It has the power to discipline SEHK.
SEHK has investigation and disciplinary powers against the listed companies. Egregious breaches of the Listing Rules are referred to SFC and disciplinary action being followed at the conclusion of any action brought by SFC.
Referral to SFC where there is suspected breaches of Part XV of the SFO namely (a) late disclosures; and (b) failing to complete the form in accordance with the directions and instructions in the form.
SEHK will return the form to the person asking for resubmission, failing which the case will be referred to the SFC which will issue a warning. If the person fails to do so within 5 days, the case will be investigated.

Information on the SFC's policy regarding investigation of cases involving suspected breach of the Disclosure of Interests provisions in Part XV of the Securities and Futures Ordinance (SFO) can be found in the SFC website.

- Dual filing in IPO Vetting

SEHK as front-line regulator and the only contact in all listing applications. SFC is to give final approval

- Except for takeovers and mergers, SFC advises complainant to refer the listing-related matters of the Hong Kong listed companies to the SEHK which has the duty, under section 21 of SFO, to ensure, as far as reasonably practicable, an orderly, informed and fair market for the trading of securities that are traded on it or through its facilities.

Relationship between SFC & Hong Kong Monetary Authority (HKMA)
Their relationship is spelt out in -
Memorandum of Understanding was signed on 12 December 2002 between SFC and HKMA to strengthen their co-operation

The Securities Enforcement regarding Complaints, Investigation Disciplinary actions and Appeals are set out in Paragraphs 8-11 of the MoU

Lehman-Brothers-related cases -

Since 17 October 2008, the HKMA has referred a total of 243 Lehman-Brothers-related cases to the SFC for further action involving 14 banks. These cases have been reviewed by the HKMA, which has determined that there are sufficient grounds for referring them to the SFC.

Since 17 October 2008, the HKMA has referred 379 Lehman Brothers-related cases, involving 16 banks, to the SFC.

The HKMA has, up to 8 January 2009, received 19,893 complaints concerning Lehman-Brothers-related products, of which 19,079 complaints have gone through the preliminary assessment process. Apart from the 243 cases referred to the SFC so far, the HKMA had formally opened investigations on 4,456 complaints and is currently seeking further information on 14,251 complaints. One hundred and twenty-nine complaints have been found to lack sufficient prima facie evidence to support further action quoted from Global Custodian magazine with analysis and commentary in the international securities industry.

On 9 April 2009 HKMA refers nine Lehman-Brothers-related cases to the SFC

Global Banking News-17 March 2009-HKMA refers Lehman cases to SFC(C)2009 ENPublishing - http://www.enpublishing.co.uk

Relationship between SFC and Financial Reporting Council (FRC)

FRC is a statutory body established by the Financial Reporting Council Ordinance to investigate into auditing and reporting irregularities in relation to listed entities, and to enquire into non-compliances with relevant accounting requirements in listed entities' financial reports.

Its relationship with Hong Kong Institute of Certified Public Accountants (HKICPA)
FRC investigates financial reports of auditors and listed entities and refers non-compliance to HKICPA for discipline

Its relationship with SFC is spelt out in Memorandum of Understanding was signed on 12 November 2007 between SFC and FRC covering Cases of overlapping authority and matters of common interests, conduct of concurrent investigations, co-operation, notification and consultation, annual meetings between the Executive Director of the Enforcement Division of SFC and the Chief Executive Officer of FRC, sharing of information and confidentiality with Schedule 1 covering auditing and reporting irregularities and Non-compliance

Its relationship with HKMA
The Financial Reporting Council Ordinance (the Ordinance) provides that the FRC shall notify the HKMA where the listed entity that is the subject of investigation or enquiry is an authorized institution or its related company (i.e. controller, subsidiary or fellow subsidiary), and that the investigator or enquirer has to consult the HKMA prior to exercising the relevant powers under the Ordinance for the purpose of such investigation or enquiry. The HKMA and the FRC entered into a Memorandum of Understanding on 19 November 2007 to elaborate on the mechanisms for communication and information exchange between them, as well as to enhance the ongoing cooperation and mutual assistance pursuant to investigations and enquiries conducted by the FRC under the Ordinance that relate to authorized institutions.

Relationship between SFC and the Financial Dispute Resolution Centre Limited (FDRC)

a non-profit making organisation which provides individual customers with an independent and affordable avenue, as an alternative to litigation, for resolving monetary disputes with financial institutions. The FDRC administers a financial dispute resolution scheme (the Scheme) by way of “mediation first, arbitration next”.

All financial institutions authorized/licensed by the HKMA/SFC are members of the Scheme and agree to abide by the rules and procedures in respect of the Scheme.

The HKMA, together with the SFC, has signed a Memorandum of Understanding with the FDRC to delineate the respective roles and responsibilities between the FDRC and the two regulators as well as the information sharing arrangements, including the FDRC providing information relating to systemic issues and/or suspected serious misconduct cases to the regulators. The information will assist the HKMA in identifying systemic and/or misconduct issues as soon as practicable, and appropriate supervisory actions can be taken on a timely basis.

This MoU takes effect from 19 June 2012.

APPENDIX FOUR

The following changes till 30 June 2017 affect investment environment and SFC enforcement –

(I) **The SFC enforcement has expanded to embrace "A" Share not listed in Hong Kong leading to supervisory cooperation between SFC and the China Securities Regulatory Commission (CSRC)**

A-shares are shares of the Renminbi currency that are purchased and traded on the Shanghai and Shenzhen stock exchanges. These A shares are now available for trading through Shanghai and Shenzhen Stock Connect.

1/ Shanghai-Hong Kong Stock Connect was launched on 17 November 2014.
Joint Announcement of China Securities Regulatory Commission (CSRC) and SFC 10 Nov 2014 about the official launch by the Shanghai Stock Exchange (SSE), the Stock Exchange of Hong Kong Limited (SEHK), China Securities Depository and Clearing Corporation Limited (ChinaClear) and Hong Kong Securities Clearing Company Limited (HKSCC) of the pilot programme to provide mutual trading access between the Shanghai and Hong Kong stock markets (Shanghai-Hong Kong Stock Connect).
Memorandum of Understanding signed on 17 October 2014 between the CSRC and the SFC on Strengthening of Regulatory and Enforcement Cooperation under Shanghai-Hong Kong Stock Connect for investor protection and facilitating the sound development and effective operations of both stock markets and the SFC press release about the MoU 17 Oct 2014
2/ Shenzhen-Hong Kong Stock Connect was launched on 5 December 2016
Joint Announcement of the CSRC and SFC dated 25 Nov 2016
Under these programs, investors in each market are able to trade shares on the other market using their local brokers and clearing houses. CSRC and SFC approved the official launch by the Shenzhen Stock Exchange, The Stock Exchange of Hong Kong Limited, China Securities Depository and Clearing Corporation Limited and Hong Kong Securities Clearing Company Limited of mutual trading access between the Shenzhen and Hong Kong stock markets (Shenzhen-Hong Kong Stock Connect).

The following is SFC response re enforcement
Comprehensive enforcement and supervisory cooperation between the SFC and the China Securities Regulatory Commission because investors in each of our markets are

increasingly exposed to risks in the other market and those intent on misconduct can operate from the other jurisdiction. (A speech entitled "Front Loaded, Transparent and Direct: A New Approach to Regulation for Changing Markets" delivered by Mr. Ashley Alder on 13 July 2017 available on the SFC website.

Literature
Financial articles regarding the Share Connects are in Annex C

3/ MSCI's adding A-share to key emerging markets beginning 2018.
The MSCI is a New York-based index provider designed to measure the performance of the large and mid. cap segments in the stock market. It will add 222 A-shares on a gradual basis beginning 2018 to its benchmark emerging markets index.
The impact of the inclusion will shift the A-share trading upwards in the SEHK through Shanghai and Shenzhen Stock Connect.

(II) **Change of the convention dual filing system under SEHK's non-statutory Listing Rules to Early Targeted intervention for decision-making in listing matter under The Securities and Futures (Stock Market Listing) Rules (SMLR)**

Under the convention dual filing system, SEHK is the front line regulator of listed companies and single point of contact in all listing matters. SFC pass its comments in writing to SEHK for it to raise with the applicant and its advisers without direct communication.
The speech of Mr. Ashley Alder, Chief Executive Officer on 13 June 2017 @ HKSI Institute Roundtable Luncheon Series Titled Front-loaded, transparent and direct: A new approach to regulation for changing markets (hereinafter referred to as Ashley speech) that

> "*inquiries into corporate governance or disclosure issues, insider dealing and market manipulation have more than doubled since 2011, and the number of formal disciplinary and other proceedings have increased by more than 50%*".

On top of which was the June 27 "crash" when small-cap stocks plunged up to 90 per cent involving multi-billion dollars loss in one day, is still under investigation.

Ashley speech revealed the setting of special operational team (ICF) in 2016 under SMLR.
ICF uses powers in SMLR under the dual filing system without changing the SEHK's Listing Rules. ICF is at the front line when making decisions under the SMLR. It needs to explain those decisions to the market, interact directly with affected companies that can appeal against its final decisions.

Using SFC's powers in SMLR under the dual filing system

- without changing the SEHK's Listing Rules
- with no increase in the annual cost in adopting the "expedited procedures" to improve the current vetting mechanism.

Intake filter and prioritization

ICF has been formed with a view to reduce the complaints significantly by improving the enforcement system i.e. to reduce overall caseload through culling low-priority cases and filtering out new cases which are not within SFC's concern and re-aligned priorities by focusing on e.g. Corporate Fraud after the June 27 crash.

SMLR vetting does not bypass the SEHK but it shortens the procedures by direct communication of the SFC concern instead of via SEHK.

Literature

SFC's Statement on recent GEM listing applicants dated 13 Mar 2017 @ www.sfc.hk/.../news...statements.../statement-on-recent-gem-listing-appl with data in paragraphs 2 and 3 explaining why Guidance was given in early 2017.

Ashley speech revealed

New Guidance Gem IPO, in early 2017, on the obligations of sponsors, underwriters and placing agents making it plain that directors and independent financial advisers have a clear responsibility to make sure that professional *valuers* engaged by listed companies cannot be allowed to use unrealistic valuation assumptions to justify acquisitions or disposals at unsupportable prices. The failure by a director is a serious breach of duty leading to disqualification or compensation orders. The SFC may object to the IPO if it becomes clear afterwards that a mismanaged placing has led to a disorderly market, expect a suspension of trading and possible SFO sanctions to follow.

At this juncture, I have to explain that suspension is an early protective action during an investigation when SFC may require a listed corporation and other persons to produce any books and records under section 179(1) of the SFO.

Response from the market – Some companies delay sub-standard listing plans, and others to include a public offer to achieve a wider spread of genuine shareholders.

Action up to 30 June 2017

- SFC objected to a GEM IPO because of an exceptionally high shareholding concentration;
- SFC objected under SMLR to three listings;
- SFC suspended trading in seven stocks for investor protection because the

share issues could not be in the interests of public shareholders;
- an existing listed company's proposal to issue shares to a small group of subscribers at a price very significantly lower than the market price.

Literature

- Economist Intelligence Unit, Country Finance Hong Kong dated 15 September 2016 commented that SMLR Vetting would strengthen the reputation of the territory's stock-market. It was described as "strong, as the current listing regulations are weakly enforced and have given rise to some notably poor listings, resulting in scandals."
- The secretary for financial services and the Treasury, Chan Ka-keung, has sounded positive on the proposed changes, stating that he does not believe that they will lead to over-regulation.
- However, legislators representing the financial sector's functional constituencies in the Legislative Council have opposed the reforms.

Early Targeted intervention under SMLR by ICF

(I) Vetting of IPO

First, assessment of listing applications: The SMLR are concerned with the more serious disclosure and public interest issues. ICF will no longer relay its comments on listing applications via SEHK.

Second, when there is a prima facie case to raise an objection to a listing, a formal "letter of mindedness" with detailed reasons given to enable the applicant to respond properly. If the matter cannot be resolved, then a final decision notice will be issued. The applicant has a statutory right of appeal to the independent Securities and Futures Appeals Tribunal.

Third, Applicants and their advisers are to communicate directly with ICF.

SEHK's role remain unchanged =

- even a letter of mindedness to object under the SMLR, the SEHK still has the discretion to continue or suspend its own listing process.
- the "suitability" for listing will continue to be decided on by the SEHK's Listing Rules, and not in the SMLR: it is open to the SEHK to reject an IPO as being unsuitable even if the SFC has not identified grounds for objection under the SMLR.
- SFC continues to supervise the regulation of these listing applications through an enhanced, published audit or review of the SEHK's listing

regulation work with a view that the audit or review is thorough, fair and constructive.

(II) Post-IPO under the SMLR

(c) Objection to equity offerings by listed companies

If the SFC intends to object, it will normally issue a letter of mindedness with details of its concern. ICF will then make themselves available for discussion with the company and its advisers. The listed company has the opportunity to respond before any final decision is made. The final decision will be appealable.

(d) Direction to suspend trading

SFC will issue a "show case letter" to the listed company detailing the concerns behind its mindedness to suspend trading and giving the listed company an opportunity to respond. The company can appeal for a resumption for trading.

(III) **Belt & Road Initiative with potential IPOs from 65 Asian, African and European countries with China-centered trading network may lead to a change of market composition**

Hong Kong's attractiveness to act as the major fund-raising centre by

(4) being the "super-connector" between China, the 65 Belt and Road countries, and investors and businesses worldwide.
(5) being a leading international financial centre and the gateway for the two-way flow of investment funds between China and the rest of the world,
(6) playing a key role in the development of infrastructure, trade and economic cooperation through large parts of Asia, Africa and Europe with a legal system based on English common law and offers access to experts in the fields of finance, infrastructure development, project management, accounting and legal services.

Ashley speech reveals that "*a statement in April about potential IPOs by Belt and Road infrastructure companies..We wanted to explain how we would take a sustainable and measured approach to the question of country risk, and at the same time provide a clear pathway for these companies to list from a market development angle"*.

(IV) **Dual class share structure**

SEHK is exploring the idea to attract new-economy companies to list allowing a dual class share structure, and secondary listing for those already publicly –traded in the mainland and the US. The latter means that Alibaba which gave up on Hong Kong and

listed in New York in 2013 due to restrictions on a dual-class share structure to return to Hong Kong for secondary listing. The consultation is still underway.
Ashley speech gave "a few high-level observations" regarding the New Board available at ww.sfc.hk/web/EN/files/ER/PDF/Speeches/CEO%20speech%20at%20HKSI%20final_13%20Jul.pdf.

This can lead to a change in Listing Rules.

Literature
Reports on others work inter alia The Economist Intelligence Unit, Country Finance Hong Kong (2016). Three cross-border platform for trading by overseas institutional investors. All have positive impact in Hong Kong's financial services sector & its economic growth -
(A) Shares Connects
1/ Shanghai-Hong Kong Stock Connect launched on 17 November 2014
l Literature – The launch of the Stock Connect scheme marks another important step in opening China's capital account By Economist Intelligence Unit, Country Finance Hong Kong Updates ng/ArticleList/Updates
Analysis
through Stock Connect global investors have gained direct access to China's capital markets.
China's decision to waive capital gains tax on foreign investors in its capital markets for an unspecified period
exempt southbound investors from capital gains tax for three years. The share link has already had a significant impact on share values in Hong Kong by removing the premium that dual-listed shares had previously exchanged hands for in the territory.
Impact on the forecast
positive impact on activity in Hong Kong's financial services sector
2/ Shenzhen-Hong Kong stock connect launches on 5 December 2016
· Literature: The scheme has not fallen foul of mainland policymakers' mounting concerns about capital outflows by Economist.
Analysis
offers mainland investors another channel through which to buy foreign-currency denominated assets.
It improves investor access to the Shenzhen market, which has a greater share of private-sector firms than the Shanghai stock exchange.
strengthen Hong Kong's role as a global financial hub, confirming its status as a gateway to the mainland's financial markets.

Impact on the forecast
Hong Kong's economic growth incorporate the marginally positive effects stemming from the scheme's launch.

APPENDIX FIVE Re Professor Howell E Jackson's Briefing Paper

I have used Chapter One to address the anomalies in the system raised in Professor Howell E Jackson's Briefing Paper in in **PART ONE of APPENDIX FOUR** and hence the intention to provide -.

- Guide for further Academic Research
- a handy manual for legal practitioners and/or
- a Guide for the general public and investors

The misconceptions of SFC's securities enforcement by academic researchers e.g. the authors of *Professor Howell E Jackson's Briefing Paper* and by Hong Kong Legal Practitioners are largely attributed to the following factors -

- Unlike the HKP and the ICAC, the SFC does not have the power to arrest and search as well as to grant bail;
- The HKP and the ICAC do not have the right of audience in all Courts but the SFC has the right of audience in Magistrate Court under section 388(1) of the SFO Courts and to handle subsequent appeals from Magistrate Court. Accordingly, it is wrong to say that "Criminal proceedings involving market misconduct are generally prosecuted by the Department of Justice" quoted from the Hong Kong Lawyer heading "**Section 213 – SFC Does It "Its Way"** dated **March 2017.**
- Venue of Trial – Under Article 63 of the Basic Law, SFC refers all market misconduct under Part XIII or XIV of SFO to DOJ to consider the suitability and venue of a criminal prosecution i.e. criminal court or Market Misconduct Tribunal.
- SFC can only investigate market misconduct under Part XIII or XIV of SFO.

Chapter Two.

I have applied Chapter Two to address the anomalies in the system raised in Professor Howell E Jackson's Briefing Paper in **PART TWO of APPENDIX FOUR**

Part One

Application of my learning (updated till 30 June 2017) to address the anomalies in the system mentioned raised in Professor Howell E Jackson's Briefing Paper (FINAL DRAFT Last updated May 11, 2008)

Anomaly 1

I refer to page 33-34 of *Professor Howell E Jackson's Briefing Paper* in respect of the difference in the burden of proof having a dampening effect on bringing criminal prosecutions under the heading of G. The Commercial Crime Unit of the Department of Justice (CCU)

The burden of proof in Court is beyond (my underlining) reasonable doubt (not as stated in footnote 21 of page 21) and the Market Misconduct Tribunal (MMT) makes its findings on balance of probabilities. The decision as to whether to take civil or criminal proceedings in relation to suspected market misconduct is made in accordance with the Prosecution Code which provides two criteria - there is sufficient evidence for a criminal prosecution and that a criminal prosecution is in the public interest. If the 2 tests are not met, suspected market misconduct will be dealt with through civil proceedings before the MMT.
Unlike US, Hong Kong does not have settlement without admission of guilt. In Hong Kong every wrongdoer is given an opportunity to be heard.

Insider Dealing is securities enforcement in Hong Kong whether it be by SFC in Magistrates Court or MMT or by DOJ in District Court.

It is not easy to get statistics in respect of serious securities violations. It always takes years from arrest, adjournment, hearing, conviction and appeals to the Court of Appeal and the Court of Final Appeal.

Literature

Guidance by the DOJ and co-operation and collaboration between the DOJ and the SFC pages 5-7 of the Memorandum of Understanding dated 4 March 2016 signed between SFC and DOJ (MoU)

According to MoU, Insider Dealing is not Part XIV or section 107 offences. However

it is caught under 5(iv) as indictable offences because the maximum criminal sanction is 10 years' imprisonment and fines of up to $10 million.

It is the DOJ's decision as to how SFC referrals are to be prosecuted but when making any decisions (including the choice of counsel and the question of bail), the DOJ will consider any views expressed by the SFC.

If the SFC disagrees with the DOJ in respect of a case referred for advice or decision, the SFC may seek a review.

Anomaly 2

I refer to pages 20-22 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) regarding Insider Dealing and MMT/IDT.

The SFO provides for six market misconduct offences that may trigger civil or criminal liability:
Insider Dealing (Sections 270 and 291)
False Trading (Sections 274 and 295)
Price Rigging (Sections 275 and 296)
Stock Market Manipulation (Sections 278 and 299)
Disclosure Of Information About Prohibited Transactions (Sections 276 and 297)
Disclosure Of False Or Misleading Information Inducing Transactions (Sections 277 and 298)
However, the following three offences are subject only to criminal liability -
Use of Fraudulent Or Deceptive Devices In Transactions In Securities, Futures Contracts Or Leveraged Foreign Exchange Trading (Section 300)
Disclosure of False Or Misleading Information Inducing Others To Enter Leveraged Foreign Exchange Contracts (Section 301)
Falsely Representing Dealings In Futures Contracts On Behalf Of Others (Section 302)
Insider Dealing is one of the six market misconduct offences that may trigger civil or criminal liability.

Page 21 of Professor Howell E Jackson's Briefing Paper gave details of MMT's powers. MMT can order what the Court can order except imprisonment. Once convicted by the Court, the defendant will have criminal record.

Anomaly 3

I refer to pages 42-43 of *Professor Howell E Jackson's Briefing Paper* (FINAL

DRAFT Last updated May 11, 2008) in respect of SFC Enforcement.

Unlike the U.S. Securities and Exchange Commission (SEC) which investigates and prosecutes, in Hong Kong, there is a division of labour. SFC, after investigation, refers all cases to DOJ to consider the suitability and venue of a criminal prosecution (Article 63 of the Basic Law). If no criminal prosecution is recommended, SFC is empowered to have direct access to the MMT under the SFO after obtaining the consent of SJ.

Although under section 388(1) of the SFO, the SFC may prosecute offences in its own name before the Magistrates' Courts yet to give primacy to DOJ's control of criminal prosecutions, SFC cannot bring action to Court without SJ's consent.

Under paragraph 5 of the MoU -

The SFC will refer the following for advice on whether criminal prosecution should be instituted according to the Prosecution Code and/or to determine the venue of trial:

(i) offences under Part XIV and section 107 of the SFO;

(ii) other offences under the SFO involving fraud element of intent to defraud;

(iii) offences under the CWUMPO, CO and AMLCTFFIO which fall within the purview of the SFC;

(iv) indictable offences which may be dealt with summarily where the maximum term of imprisonment following conviction on indictment exceeds 2 years imprisonment;

(v) any other cases where the SFC considers it necessary to seek advice from the DOJ on whether the case should be prosecuted on indictment

Cases not SFC Referral cases

Advice from SFC Legal Services Division on whether criminal prosecution should be instituted. If so, those cases will be prosecuted by the SFC summarily in the Magistrates' Courts pursuant to section 388 of the SFO. In making prosecutorial decisions and in conducting these prosecutions, the SFC shall act in accordance with the Prosecution

Code.

The Prosecution Code (last updated on 5 November 2015).
a set of statements and instructions to guide DOJ in conducting prosecutions of all criminal matters. In deciding whether to prosecute, the DOJ must consider the Sufficiency of evidence and Public interest

Section 107: Offence to Fraudulently or Recklessly Induce others to Invest Money
Part XIV SFO are not within the definition of 'market misconduct' and are therefore not liable to proceedings before MMT and are instead subject to criminal proceedings only.
Use Of Fraudulent Or Deceptive Devices In Transactions In Securities, Futures Contracts Or Leveraged Foreign Exchange Trading (Section 300)
Disclosure Of False Or Misleading Information Inducing Others To Enter Leveraged Foreign Exchange Contracts (Section 301)
Falsely Representing Dealings In Futures Contracts On Behalf Of Others (Section 302)

Literature
Potential Liabilities under Hong Kong Law in Connection with the Publication of a Prospectus on the Listing of Company on the Stock Exchange of Hong Kong by Charlston dated February 2015
Anomaly 4
I refer to page 44 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) in respect of SFC Prosecutions/Civil Enforcement Proceedings.
Since *Professor Howell E Jackson's Briefing Paper* is titled The Overview of Securities Enforcement in Hong Kong, the data will be distorted if "prosecution" does not include serious crimes prosecuted by the DOJ.
Proceedings before the MMT and serious market misconduct prosecutions by DOJ should be collected in addition to the market misconduct prosecutions by SFC in Magistrates' Courts.
Anomaly 5
I refer to page 45 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) about the severity of the sanctions.

There is limitation in the jurisdiction of the Magistrates' Courts
http://m.judiciary.hk/en/publications/judfactsheet.htm**:**
Magistrates exercise criminal jurisdiction over a wide range of offences. Although there

is a general limit of two years imprisonment or a fine of $100,000, certain statutory provisions give Magistrates the power to sentence up to three years imprisonment and to impose a fine up to $5,000,000.

If DOJ considers that heavy penalty is warranted for a particular case, DOJ will advise that the case be transferred to District Court or Court of First Instance.

Anomaly 6

I refer to page 45 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) in respect of pattern of prosecutions.

DOJ controls criminal prosecutions in accordance with Article 63 of the Basic Law and makes decision in accordance with the Prosecution Code.

Literature

The SEC AGENCY FINANCIAL REPORT shows that the U.S. SECURITIES AND EXCHANGE COMMISSION has power to take the following actions which the Hong Kong Securities & Futures Commission does not have -

- *Actions Involving Financial Fraud and Issuer Disclosure*

The Commission brought a number of cases in FY 2011 involving accounting and financial fraud, issuer disclosure, and reporting violations at public companies.

https://www.sec.gov/about/secpar/secpar2011.pdf#bios

Investigation of the above is done by HKP.

Accordingly it is a misconception that " *After the investigation stage*,(my underlining) *the SFC :*

• *Criminal sanctions,*

For more serious crimes, referral to the Hong Kong police or Independent Commission Against Corruption for further investigation." (page 16)

The accounting fraud case Semi-Tech (Global) given in page 59 was investigated by HKP and prosecuted by DOJ. It was not a SFC referral.

SFC only has power to investigate the offences under

(i) market misconduct offences under Part XIV of the SFO and offences to fraudulently or recklessly induce others to invest money under section 107 of the SFO;

(ii) offences under the SFO and its subsidiary legislation which involve an element of intent to defraud (other than those under Part XIV and section 107 of the SFO);

(iii) Certain offences under the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32, the Companies Ordinance, Cap. 622 and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, Cap. 615.

Anomaly 7

I refer to page 46 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) in respect of Referrals.

Serious insider dealing or those within Parts XIII and XIV of the SFO is not beyond the SFC's jurisdiction. SFC does all the investigation although the venue of trial has to be District Court or above because of the seriousness or being "complex". SFC does not have the right of audience before the District Court or above.

SFC referrals which the DOJ will prosecute
6.1 It is the DOJ's decision as to how SFC referrals are to be prosecuted but when making any decisions (including the choice of counsel and the question of bail), the DOJ will consider any views expressed by the SFC.
6.2 The SFC will provide such assistance as may be necessary to the DOJ and counsel instructed to prosecute SFC referrals, including attendance at conferences, the preparation of hearing bundles and submissions, the disclosure of materials (both used and unused by the Prosecution at trial), the liaison with prosecution witnesses and attendance at court hearings. Pages 6-7 of the MoU

Frand

Serious crime of fraud are investigated by HKP but the following case has created a

case precedent to be investigated by ICAC -

HKSAR v Lily Chiang and 2 others DCCC 265 and 266/2009, a good example for securities enforcement because the two executive directors of a publicly listed company — Pacific Challenge Holdings Ltd ("PCH") — were charged with one count of conspiracy to defraud and two alternative counts of making false statements concerning the alleged granting of share options by PCH. In this case, report was made to the ICAC.

Literature - SEC AGENCY FINANCIAL REPORT shows that the U.S. SECURITIES AND EXCHANGE COMMISSION has power to take the following actions which the Hong Kong Securities & Futures Commission does not have -

- *Actions Related to Financial Reporting/Accounting and Disclosure Fraud*
- *Actions Related to Microcap Fraud*
- *Actions Related to Securities Offering-Related Violations and Ponzi and Pyramid Schemes*

https://www.sec.gov/about/secpar/secafr2016.pdf

- *Actions Involving Financial Fraud and Issuer Disclosure*

The Commission brought a number of cases in FY 2011 involving accounting and financial fraud, issuer disclosure, and reporting violations at public companies.

https://www.sec.gov/about/secpar/secpar2011.pdf#bios

- *Actions Involving Offering Frauds/ Ponzi Schemes In FY 2010, offering frauds comprised 22 percent of the cases brought by the Commission. Many offering frauds involved Ponzi schemes where investors are guaranteed unrealistic returns for their investment.*

https://www.sec.gov/about/secpar/secpar2010.pdf

In Hong Kong, all fraud cases are investigated by the HKP e.g. Semi-Tech (Global) given in page 59 was investigated by HKP and prosecuted by DOJ. The case was not referred by SFC after investigation. Accordingly, care must be taken.

Anomaly 8

I refer to page 58 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT

Last updated May 11, 2008) about DOJ.

There is no easy way out to get the wanted statistics. Legal research is qualitative i.e. case studies.

In February 2010, the Prosecution Division has been reconstructed.

All the cases reported by DOJ are qualitative not quantitative because it usually takes years from investigation to appeal and these involve various Sub-divisions in DOJ.

Since the reported prosecutions were qualitative description, the safest way to determine whether or not a particular case has to be included in the aggregate data is to go through the facts of each case in the DOJ Annual Reports.

I used the accounting fraud case Semi-Tech (Global) mentioned in page 59 of the *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) as demonstration.

The citation of the case - use the Defendant's name Ting James Henry -

In the judgement of the Court of Final Appeal dated 5 November 2007 of Ting James Henry v HKSAR (FACC4/2007) on appeal from CACC 318/2005 available @

http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=58986&currpage=T

The above research shows

(1) Semi-Tech (Global) later known as Akai Holdings is listed in the Hong Kong Stock Exchange (SEHK 0448)

(2) James Henry Ting was charged under section 19 of the Theft Ordinance. The charge shows that it was not an offence under SFO. The charge shows that he must be arrested by police. This is confirmed in the newspaper.

In Hong Kong, it was a commercial fraud of a listed company investigated by the HKP. This case is treated the same as **Lily Chiang** and 2 others DCCC 265 and 266/2009 mentioned above. The only difference is the venue of trial. James Ting's case was a High Court case while Lily Chiang was a District Court case.

All cases reported by DOJ are qualitative. It took 6 years from Semi-Tech and Akai went bankrupt in 2000 to Ting's conviction being overturned by Hong Kong's Court of

Appeals in 2006.

Anomaly 9

I refer to page 67 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) regarding the collection of data about the frequency of serious criminal prosecution of securities violations by traditional law enforcement authorities.

The venue of trial for all serious securities crime is District Court and above, and prosecutions against them is DOJ.

(a) for traditional law enforcement authorities (HKP and ICAC) – the DOJ annual reports; and
(b) for SFC – the SFC annual reports and the DOJ annual reports.

Anomaly 10

I refer to page 30- 31 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) under the heading of "E. Regulation of Accounting"

The FRC *Press Release 15 May 2017*

Completed investigation

On 11 May 2017, the FRC adopted the investigation report on the audit of the consolidated financial statements of a listed entity for the year ended 31 March 2011 (the Relevant Financial Statements). The Audit Investigation Board (the AIB) found that the auditor failed or neglected to observe, maintain or otherwise apply a number of professional standards in the audit concerning a number of financial instruments and the assessment of the going concern assumption in preparing the Relevant Financial Statements. The investigation report has been referred to the Hong Kong Institute of Certified Public Accountants (HKICPA) to determine if any disciplinary actions are warranted.

http://www.frc.org.hk/upload/press_release/original/065812908156.PressRelease_20170515_CompletedInvestigation_1_Eng.pdf

Page 59 of P*rofessor Howell E Jackson's Briefing Paper under the heading of* 4. Accounting Enforcement in respect of a. Financial Reporting Council Data is updated as follows -

OPERATIONS STATISTICS – 1 January 2017 to 31 July 2017

REVIEW OF COMPLAINTS 1

Brought forward

14

Pursuable complaints received 1 *119*

Suspended complaints 2

Recommenced complaints *---*

-

Completed with no follow-up action 3

(10)

Resolved by complainee *--*

-

Referred to specified enforcement agencies 4

(1)

Initiated investigation and/or enquiry 5

(6)

In progress at end of period *116*

Notes

1. *Of these complaints, 101 (2016:97; 2015: 22) appear to have come from the same source and are directed at a single audit firm.*
2. *Reviews may be suspended pending results of investigations by specified enforcement agencies. (See Note 4)*
3. *After the FRC reviewed the complaints by reference to the materials provided by the respective complainants and the additional information obtained from the parties concerned, it considered that the complaints had no merit or the parties concerned had provided a satisfactory explanation to support that there was no auditing or reporting irregularities, or non-compliance with accounting requirements.*
4. *Includes cases that were referred directly to specified enforcement agencies because either the FRC identified potential issues not within the remit of the FRC or cases where auditing/reporting irregularities were identified and the FRC decided not to initiate investigation. According to the FRC Ordinance, "specified enforcement agency" means the Commissioner of Police of Hong Kong, the Commissioner of the Independent Commission Against Corruption, the Hong Kong Institute of Certified Public Accountants, the Hong Kong Exchanges and Clearing Limited, the Securities and Futures Commission, the Registrar of Companies, the Monetary Authority, the Insurance Authority, the*

Commissioner of Inland Revenue, the Official Receiver, the Mandatory Provident Fund Schemes Authority, or the Market Misconduct Tribunal.

5. *After the review of complaints, the FRC identified potential auditing/reporting irregularities or non-compliance with accounting requirements. Hence, investigations or enquiries were initiated.*

http://www.frc.org.hk/upload/os/original/436470915319.170430%20OS-Review_of_Complaints_Eng.pdf

My experience is that the cases in Note 4 will immediately be referred directly to HKP/ICAC if there is a crime element however slight. Prevention of crime is also the duty of the HKP. FRC will not initiate investigation. Regulatory Authorities like FRC, only gives statistics and not qualitative It takes time for investigation after referral. There can be No Further Action after investigation if no crime disclosed.

I refer to page 67 of *Professor Howell E Jackson's Briefing Paper* in respect of Accounting fraud.

US Position

Literature

SEC AGENCY FINANCIAL REPORT shows that the U.S. SECURITIES AND EXCHANGE COMMISSION can take action Related to Financial Fraud, Issuer Disclosure, and Gatekeepers. The Hong Kong Securities & Futures Commission does not have such power.

In the Matter of Ernst & Young LLP, Press Rel. 2014-136 (July 14, 2014)
www.sec.gov/News/PressRelease/Detail/PressRelease/1370542298984

Actions Related to Financial Fraud, Issuer Disclosure, and Gatekeepers

In July, the SEC charged Ernst & Young LLP with violating key auditor independence rules as a result of its subsidiary lobbying congressional staff on behalf of two audit clients – the first action charging violations of the independence rules in this context. Such lobbying activities were impermissible under the SEC's auditor independence rules because they put the firm in the position of being an advocate for those audit clients. According to the SEC's order, Ernst & Young repeatedly represented that it was "independent" in audit reports issued on the clients' financial statements despite being involved in these lobbying activities. Ernst & Young agreed to pay $4 million to settle the SEC's charges.

Hong Kong Position

Taking the Akai case (the Semi-Tech) as an example, the following is what happened to Ernest & Young and its auditors -

Ernst & Young settled Akai case on
SEPTEMBER 24, 2009 available @
https://www.ft.com/content/634b539a-a82b-11de-8305-00144feabdc
Ernst & Young on Wednesday agreed to make an undisclosed “substantial payment” to liquidators of Hong Kong’s biggest ever bankruptcy, after admitting that certain audit documents produced were no longer reliable.

Speaking in Hong Kong’s high court on Wednesday, Leslie Kosmin, barrister for liquidators Borrelli Walsh, described the settlement as “a very favourable outcome for the creditors of Akai Holdings and another milestone in the winding up of the company”. Ernst & Young had been Akai’s auditor prior to the Hong Kong consumer electronic company’s collapse. The liquidators began suing the accounting firm for a $1bn negligence claim in 2002. The case has dragged on for years but took a dramatic turn last week in the High Court, when Borrelli Walsh claimed that more than 80 Akai-related files produced by Ernst & Young had been doctored or faked.

Akai’s audit manager also partner of Ernest &Yeung was suspended after internal inquiry revealed that “certain documents produced for audits in 1998 and 1999 could no longer be relied on due to [his actions] in early 2000”.

He was David Sun Tak-kei. This was confirmed by
http://www.scmp.com/article/694159/ernst-young-chief-steps-down on Thursday, 1 October 2009 =
The Hong Kong and China chairman of Ernst & Young, whose Hong Kong offices were raided on Tuesday by the police in connection with a fraud probe, has stepped down from his post.

It further revealed that "the police Commercial Crime Bureau is investigating Ernst & Young Hong Kong after the firm was accused in court of falsifying documents to shield itself from an audit negligence claim from the liquidators of its former client, Akai Holdings".

Another Hong Kong partner, Edmund Dang, previously a manager on the Akai audit, was arrested on Tuesday on suspicion of forgery. He was released on bail without being charged.

In the case of negligence, Akai's liquidators alleged that Ernst & Young's evidence contained files from the firm's Akai audits that had been tampered with or invented after Ting's empire collapsed. The liquidators alleged that Dang's handwriting was on some of the suspect files. But the Queen's Counsel the liquidator also claimed that the

files that had been tampered dated as far back as 1994 and Dang only joined the Akai audit team in December 1997,

On the other hand, from 1991-99, Sun was Ernst & Young's independent partner in charge of the Akai audit. It was his job to review the firm's handling of Akai's financial statements.

On September 23, Ernst & Young paid hundreds of millions of dollars to settle the negligence claim. The liquidators used the altered papers in witness statements, court pleadings and expert reports.

Ernst & Young Hong Kong sent a memo to staff saying it was assisting and co-operating with police inquiries. It confirmed that a partner who had been suspended (without naming Dang) had been arrested. Sun was replaced.

Anomaly 11

I refer to page 33 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008) stating that "*The HKMA is not a securities regulator".*

Literature
The SFC's "leaflet explains how you can make effective complaints to the Securities and Futures Commission (SFC) and how we handle them".
http://www.sfc.hk/web/EN/files/ER/PDF/How%20to%20make%20a%20complaint_Eng.pdf
The complainants are directed to report the matter to HKMA direct and not "*If the SFC receives a complaint about a registered institution, it will refer the matter to the HKMA*".

In view of the above, the HKMA is a securities regulator, and its figures should be included in any analysis of the securities markets.

Lehman Brothers cases
16,000 complaints were made to HKMA about the collapse of Lehman Brothers in 2008 when the draft of *Professor Howell E Jackson's Briefing Paper* was updated May 11, 2008 =

In Hong Kong more than 43,700 individuals have invested in HK$15.7 billion of "guaranteed mini-bonds" (迷你債券) from Lehman. Another HK$3 billion has been invested in similar like derivatives.

Literature titled The HKMA's role in handling banking complaints available at http://www.hkma.gov.hk/eng/key-functions/banking-stability/complaints-about-banks/faq.shtml

"The HKMA does not have power to order banks to pay compensation.

If your complaint is about a monetary dispute, you could consider using the mediation and arbitration services provided by the Financial Dispute Resolution Centre. The FDRC provides financial consumers with an independent and affordable avenue, as an alternative to litigation, for resolving some monetary disputes with financial institutions.

If our assessment identifies supervisory concerns (e.g. the bank appears to have breached our supervisory guidelines or the Code of Banking Practice) or disciplinary concerns (e.g. there appears to have been misconduct on the part of the bank or its staff), the HKMA may follow up with the bank or open a case for investigation. The HKMA may take disciplinary action where there are grounds for doing so (e.g. where an investigation reveals misconduct by a relevant individual). In other cases, the HKMA may refer the complaint to other relevant regulators or enforcement agencies for them to consider taking further action.

Anomaly 12

Failure of inclusion of the following in the Professor Howell E Jackson's Briefing Paper (FINAL DRAFT Last updated May 11, 2008) which affects the Remedies under SFO –

These have been available since 2003, five years before Professor Howell E Jackson's Briefing Paper (FINAL DRAFT Last updated May 11, 2008)

Sections 281 and 305 of t**he Securities and Futures Ordinance ('SFO')**

Under sections 281 and 305 of the SFO, market misconduct when established attract deemed civil liability to compensate any person who has suffered resulting pecuniary loss. This liability can also extend personally to management of institutions and corporations found to have consented or connived in the misconduct

The Investor Compensation Fund under SFO

The SFO imposes a duty on all officers of a corporation to take reasonable measures to prevent a corporation from perpetrating market misconduct. The definition of 'officer' is wide and includes 'any person occupying the position of director and

persons involved in management of the corporation.

Under the SFO, the victims of market misconduct can use the determination of the Market Misconduct Tribunal as evidence when taking civil action against the wrongdoers.

A criminal conviction constitutes conclusive evidence that the person committed the offence. The courts are able to impose injunctions in addition to or in substitution for damages.

Anomaly 13

Failure of inclusion of the following in the Professor Howell E Jackson's Briefing Paper (FINAL DRAFT Last updated May 11, 2008) which affects the Remedies before taking Private Action

(F) Hong Kong Statutory Bodies

a/ Consumer Council

The Consumer Council was established in April 1974 under the Consumer Council Ordinance (Cap. 216).

The difference in the conciliation work done by the Consumer Council and the Financial Dispute Resolution Centre is that the former deals with complaints outside the purview of the Financial Dispute Resolution Scheme relating to sales practice and service quality which are not monetary disputes and/or by financial service providers nor regulated by the Hong Kong Monetary Authority or the SFC.

There is no second tier i.e. the DOJ because the Consumer Legal Action Fund gives easier consumer access to legal remedies by providing financial support and legal assistance for the benefit of consumers, particularly, groups with similar grievances in cases involving significant public interest and injustice.

The Fund granted assistance to four Lehman Brothers related applications.

Lehman-related Financial Product
ttps://www.consumer.org.hk/sites/consumer/files/yearbook/2012/13_0.pdf

https://www.consumer.org.hk/ws_en/profile/annual_reports/2014.html

No report regarding Lehman-related case or securities enforcement found in Annual Report of the Consumer Legal Action Fund 2015-16

https://www.consumer.org.hk/sites/consumer/files/yearbook/2015/103-110_CLAF.pdf

b/ Financial Dispute Resolution Centre (FDRC) involves a financial institution who is a member of the FDRS

Update

From 1 January 2013 to 31 December 2013, FDRC received 31 applications for mediation services under the FDRS.

Among the 31 applications, 29 were accepted for mediation, 1 was rejected as not within the Intake Criteria of the ToR and 1 was under vetting.

At the time of revising this Project -

Case Status as at 31 December 2015

Among the 21 applications, 20 were accepted, 1 was rejected as not within the Intake Criteria of the ToR. Among the 20 cases accepted, 17 went through the mediation process, 14 were completed and closed. 3 were under consideration for submission of the Notice to Arbitrate. Among the 14 completed and closed cases, 14 were settled at different stages of the mediation process. To conclude the mediation case status in 2015, out of the 14 completed and closed cases, all 14 cases reached settlement. The success rate was above 90%.

In addition to the abovementioned 21 applications received, 6 applications received in previous years were carried forward to 2015, 1 of which was rejected as not within the Intake Criteria of the ToR. The remaining 5 entered into the dispute resolution process, 2 of which were completed and closed in mediation process, 3 proceeded to arbitration. Arbitral Awards were rendered in 2 of the 3 cases proceeded to arbitration.

For the year ended 31 December 2015, the FDRC received 21 applications for services under the FDRS.

Only cases received within 2015 were counted.

http://www.fdrc.org.hk/en/annualreport/2015/files/download/FDRC_annual_report.pdf

Anomaly 14

A consumer having a dispute with a financial institution involving monetary loss may lodge a complaint with the relevant financial institution or report the case to the regulators such as the Hong Kong Monetary Authority (HKMA) or the Securities and Futures Commission (SFC).

The regulators can investigate and discipline the financial institution but do not adjudicate on financial remedy for the consumer. Accordingly, the customer need to make the monetary claim in court.

Since the regulators are the HKMA or SFC, the statistics reported can be treated as securities enforcement.

Private Right to Sue

Actions taken in accordance with Anomaly 12.

In Hong Kong there is no class action where a group (a class) sues another party, originated in the US. Accordingly, in Hong Kong each individual investor has to bring civil action in Court for their losses or compensation.

An investor has to pay the legal cost first before taking private action unless he passes the means test in order to be eligible for legal aid. Since the legal profession is not fused in Hong Kong, an investor has to pay the Counsel fee in addition to the solicitor fee because solicitor has no right to appear as advocate in open proceedings in the High Court and in the Court of Final Appeal.

Moreover, in Hong Kong there is no contingent fee as in the US i.e. fee is payable only if there is a favourable result.

However, the investor can get Legal Advice and Assistance offered by The Duty Lawyer Service – free preliminary legal advice to people as to their legal position in genuine cases.

If the claim is less than $50,000, it is within the jurisdiction of the Small Claims Tribunal. The hearing is informal and no legal representation is allowed

If the claim is more than $50,000, aggrieved person

- seek conciliation through the Consumer Council or
- seek mediation through Financial Dispute Resolution Center (FDRC) provided the financial institution is in Hong Kong, a member of the FDRC and the sum involved is less than HK$500,000.

Under the doctrine of res judicata [Latin, A thing adjudged.] A rule that a final judgment on the merits by a court having jurisdiction is conclusive between the parties to a suit], the aggrieved person of crimes may sue the convicted person civilly by using the determination of the Courts.

Criminal courts can make compensation orders for loss or damage that results from an offence. Compensation orders are intended to compensate a victim in a summary way and avoid the need for civil proceedings which can be lengthy and costly. Compensation orders are not standalone, and must be made in conjunction with a sentence or other orders.

Part Two

Application of my learning (updated till 30 June 2017) to address the concern re Chinese Enterprises raised in Professor Howell E Jackson's Briefing Paper

The Red Chip

With effect from 1 January 2012, the red chip mentioned in the footnote 107 of page 63 of the *Professor Howell E Jackson's Briefing Paper* 2008 has been amended by SEHK for the purpose of quoting statistics -

• "Red chip" to refer to overseas incorporated entities controlled by PRC government entities.

• "Non-H share Mainland private enterprises" to refer to overseas incorporated entities controlled by PRC individuals and private enterprises.

The market composition raised in pages 64-65 of the *Professor Howell E Jackson's Briefing Paper* is updated as follows -

At the end of July 2016, the SEHK was the eighth largest in the world. It is fourth largest in Asia. There were 1,924 listed companies with 980 (51%) were Mainland enterprises (233 H-share, 152 red-chip and 595 Non H-share). The Mainland enterprises accounted for 62.6% of the market capitalization and 69.9% of the equity turnover of listings on SEHK.

The observations and conclusions at page 7 of *Professor Howell E Jackson's Briefing Paper* are incorrect about the dominance of Mainland enterprises. As at July 2016, Chinese issuers was 51% the same as May 11, 2008 when *Professor Howell E Jackson's Briefing Paper* was last updated.

Accounting Fraud

(A) Investigated by the Hong Kong Police

The Semi-Tech (Global) mentioned in page 59 of *Professor Howell E Jackson's Briefing Paper* (FINAL DRAFT Last updated May 11, 2008).

The defendant James Henry Ting was arrested and investigated by HKP in 2003 and convicted on two counts of false accounting on 29 June, 2005 and was sentenced to six years in prison. After serving only one year, Ting's conviction was overturned by Hong Kong's Court of Appeals and he escaped retrial.

The HKP started investigating Ernst & Young Hong Kong after the firm was accused in court of falsifying documents to shield itself from an audit negligence claim from the liquidators of its former client, Akai Holdings.

Ernst & Young agreed to settle on 16 December 2015. The settlement was described by the liquidator as "a very favourable outcome for the creditors of Akai Holdings.

The Hong Kong and China chairman of Ernst & Young, David Sun Tak-kei whose Hong Kong offices were raided by the HKP in connection with a fraud probe, was suspended after internal inquiry and replaced. Another Hong Kong partner, Edmund Dang, previously a manager on the Akai audit, was arrested on suspicion of forgery.

The liquidators alleged that Dang's handwriting was on some of the suspect files. But the liquidator also claimed that the files that had been tampered dated as far back as 1994 and Dang only joined the Akai audit team in December 1997. From 1991-99, Sun was Ernst & Young's independent partner in charge of the Akai audit. It was his job to review the firm's handling of Akai's financial statements.

SFC plays no part in the investigation of the case. The creditors were protected.

(B) Investigated by SFC –

(a) section 213 of the SFO

Qunxing Paper Holdings Co. Ltd. [SEHK 3868]

SFC has power to apply to the Court for an interim injunction to freeze up its billion

assets and to appoint interim receivers to take over Qunxing on the basis of its breach of continuing obligations.

On 12 December 2013, SFC obtained an interim injunction under section 213 of the SFO to freeze up to $1.97 billion assets of Qunxing for allegedly disclosing false or misleading information in its initial public offer in 2007 and the announcements of its annual results for 2007 to 2011. Qunxing raised substantial funds in Hong Kong through the IPO in October 2007 and an open offer of new shares and an issue of unlisted warrants in January 2011. Its financial statements ended 30 June 2013 showed its net assets of over RMB3.2 billion.

(b) On 1 January 2013, SFC launched the statutory disclosure regime of inside information (previously known as price sensitive information in Listing Rules). Listed companies are required to disclose important developments in a timely manner. On 31 March 2014 on the ground of Qunxing's failure to provide price-sensitive information jeopardizing the interests of Qunxing's public shareholders, SFC applied receivers and managers for Qunxing.

SFC escalated its regulatory action against Qunxing after it found that a mainland court accepted a restructuring proceeding application under the mainland bankruptcy law from Shandong Qunxing Paper, the wholly owned subsidiary of Qunxing. The company did not make the disclosure even after SFC's requests.

Shandong Qunxing is the sole operational arm of Qunxing and held most of the listed company's 3.27 billion yuan (HK$4.1 billion) in assets.

(c) Under sub-rule 8(1) of the Listing Rules, the SFC has directed SEHK to suspend trading in shares of Qunxing in 30 March 2011.

China Securities Regulatory Commission (CSRC)

I refer to

(1) China and the Enforcement Gap.

In our opinion, the combination of increasing Chinese dominance and the current enforcement gap remains the most significant obstacle facing the Hong Kong securities regime. Because the Companies Ordinance, which imposes civil and criminal liability for misstatements in prospectuses, does not apply extraterritorially to reach Chinese issuers, the SFC must rely on voluntary regulatory cooperation from the mainland CSRC to investigate and pursue corporate information from China-based companies. In essence, at least with respect to listing, Hong Kong has uniform rules and disparate ability to enforce those rules. Although steps have been taken to handle this problem, this arrangement potentially creates a large regulatory gap and conflicts of interest page 7 of *Professor Howell E Jackson's Briefing Paper* under the heading of Observations and Conclusions

(2) T*he Companies Ordinance, which deals with misstatements in prospectuses, did not apply extraterritorially to reach Chinese issuers, the SFC must rely on voluntary regulatory cooperation from the mainland CSRC to investigate and pursue corporate information from China-based companies.*" page 19 under the heading of 5. Cooperation with Mainland Regulators of *Professor Howell E Jackson's Briefing Paper*

An amendment to Mainland securities laws in 2006

After the amendments SFC may request assistance from China Securities Regulatory Commission (CSRC) in obtaining Mainland information for investigations. The CSRC may seek court sanctions against those who refused to supply information sought. The SFC and CSRC enhanced cross-border enforcement on 2 Apr 2007 by exchanging side letters to the Memorandum of Regulatory Co-operation 19 June 1993and the Memorandum of Regulatory Co-operation Concerning Futures 4 July 1995 to co-operate in the investigation of cross-border crimes and regulatory breaches

Ernst & Young Hong Kong (EY)

confirms the obligations of accounting firms in Hong Kong towards SFC in obtaining audit papers for investigation under section 185 of the SFO.

In August 2012, EY claimed that the relevant records were held by its joint venture partner in mainland China, and that the documents could not be produced to the SFC because of various restrictions under PRC laws and regulations including auditors'

duty of confidentiality and the law concerning state secrets.
SFC applied to the Court of First Instance to inquire into the circumstances of EY's non-compliance with SFC requests for these records under sections 179, 180, 181 and 183 to gather information. On May 23 2014 Court order granted on SFC application ordering EY to produce accounting records which EY claimed they could not produce because of restrictions under PRC. Details in Annex B

Amendments to legislation and listing rules -

(1) In order to enable the SFC to better monitor potential risks and gives participants useful information –

The Securities and Futures (Short Position Reporting) Rules came into effect in June 2012. As from September 2012, weekly short position reports in specific shares on the SFC website to increase market transparency.

(2) In order to monitor unusual trading movement of a listed company -

Since 1 January 2013, listed companies are statutory required to disclose important developments in a timely manner. Breaches of this requirement can result in sanctions (including fines up to HK$8 million) imposed by the Market Misconduct Tribunal ((Securities & Futures (Stock Market Listing) Rules Cap. 571V).

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The continuing obligations have been amended: initiating a recommended practice for listed companies to report their environmental, social and governance performance; and introducing a "comply or explain" requirement under which listed companies should have a policy concerning board diversity. The changes place the burden on the listed company to confirm that there is no undisclosed PSI. This obligation also applies for a trading suspension/halt. There is no need for SEHK to initiate any enquiries of unusual trading movement of a listed company's securities.

Literally paragraph 5 of the Memorandum of Understanding signed by SFC and DOJ, applications made under sections 185, 212 and 213, there is no need to refer to DOJ -

5. Referral of cases by the SFC to the DoJ

5.1 The SFC will refer the following types of cases to the DoJ for advice on whether criminal prosecution should be instituted according to the Prosecution Code and/or to determine whether the case should be prosecuted in the Court of First Instance, District Court or Magistrates' Courts:

(i) market misconduct offences under Part XIV of the SFO and offences to fraudulently or recklessly induce others to invest money under section 107 of the SFO;

(ii) offences under the SFO and its subsidiary legislation which involve an element of intent to defraud (other than those under Part XIV and section 107 of the SFO);
(iii) offences under the CWUMPO, CO and AMLCTFFIO which fall within the purview of the SFC;
(iv) indictable offences which may be dealt with summarily where the maximum term of imprisonment following conviction on indictment exceeds 2 years imprisonment; and
*(v) any other cases where the SFC considers it necessary to seek advice from the DoJ on whether the case should be prosecuted on indictme*nt.