THE PRIVILEGE AGAINST SELF-INCRIMINATION IN HONG KONG REGULATORY INVESTIGATIONS UNDER THE SECURITIES AND FUTURES ORDINANCE

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Regulatory Alert

On 11 February 2019, in the case of *AA & EA v The Securities and Futures Commission* [2019] HKCFI 246, the Hong Kong Court of First Instance ("**CFI**") dismissed an application for judicial review against a decision of the Securities and Futures Commission ("**SFC**") to share with Japanese regulators information obtained by the SFC under compulsion.

This case is important, because it examines the scope of a variety of the SFC's investigatory powers under the Securities and Futures Ordinance ("**SFO**"). It also examines the SFC's statutory obligation to share information with foreign regulators versus its obligation to preserve the secrecy of information it obtains when conducting an investigation. The CFI held that, in certain instances, recipients of a notice issued by the SFC under s.181 of the SFO can avoid disclosure by claiming privilege against self-incrimination.

BACKGROUND

In 2014, upon receiving a report of suspected market manipulation regarding shares of a company listed on the Tokyo Stock Exchange, the SFC issued a s.181 notice to AA, the investment manager of a hedge fund. The s.181 notice demanded that AA provide information about the fund and its transactions. Further, it contained a warning that non-compliance may constitute an offence, but it did not contain any reference to AA's right to remain silent or any warning against self-incrimination.

AA provided the demanded information, and also voluntarily disclosed additional information it believed would aid the SFC in its investigation.

The SFC then commenced an investigation under s.182(1), issuing two notices under s.183 to AA as a "person under investigation" demanding production of documents and written answers regarding the fund and the trading activities in question. The SFC issued another s.183 notice to EA, one of AA's two responsible officers and its majority shareholder, to attend an interview.

In the course of the investigation, pursuant to s.186, the SFC shared information with Japanese regulators. EA's interview also took place in the presence of their representatives.

Throughout the investigation, the SFC repeatedly reminded the Japanese regulators that the information was being shared pursuant to s.378 (which requires the SFC and other parties receiving information related to an investigation to preserve secrecy) and should not be disclosed to any third party other than in accordance with the International Organization of Securities Commissions Multilateral Memorandum of Understanding. Before EA's

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interview, the SFC also obtained the Japanese regulator's undertaking not to use the information in any criminal proceedings.

Notwithstanding that undertaking, the Japanese regulators publicly announced that it recommended an administrative monetary penalty against AA for market manipulation. An administrative proceeding against AA in Japan ensued, and a penalty calculated on the basis of AA's profits was imposed on AA.

Upon being penalized, AA and EA commenced an application for judicial review in Hong Kong.

THE GROUNDS OF JUDICIAL REVIEW AND REASONS FOR DISMISSAL

Three grounds were advanced by AA and EA for judicial review:

1. Information was unlawfully transmitted to the Japanese regulators for use in criminal proceedings in Japan.
2. The transmission was made without ensuring adequate secrecy as required under the SFO.
3. s.181 was unconstitutional for abrogating the privilege against self-incrimination and in contravention of Article 10 of the Hong Kong Bill of Rights Ordinance.

The first two grounds were dismissed by the CFI upon the factual findings that the administrative proceedings were not criminal in nature and that the SFC had taken sufficient measures to require adequate secrecy.

The CFI's ruling on the third ground turned on its statutory interpretation of s.181.

The CFI held that s.181 empowered the SFC to compel disclosure of information about a client, details of a transaction, and instructions relating to the transaction, from a licensed person or registered institution, and s.181(7) imposed criminal liability on a person who failed to comply with a requirement "without reasonable excuse".

In interpreting the meaning of "without reasonable excuse", the SFC clarified that it was not their position that s.181 precluded the exercise of the privilege against self-incrimination. A distinction was drawn between s.181 and other provisions in the SFO, such as s.179(16) and s.184(4), which explicitly preclude a claim of privilege against self-incrimination for non-compliance. The CFI accepted the SFC's submission, but also commented that the privilege does not protect a person from being required to produce independently-existing documents. In other words, though a recipient of a s.181 notice may, in appropriate circumstances, elect to remain silent, that person must still comply with a demand for pre-existing records.

KEY TAKEAWAYS

The SFC has broad powers under s.186 to share the fruit of an investigation with overseas regulators, provided that information is not used in criminal proceedings.

However, as this case illustrates, companies and individuals being investigated by the SFC should carefully consider what they disclose in light of the SFC's obligation to share information with overseas regulators, who may launch independent criminal proceedings or parallel civil investigations arising out of information obtained through the SFC's investigation.

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The privilege against self-incrimination may be available to a recipient of a s.181 notice. However, the recipient must determine clearly whether the demand is for an answer to be given by the recipient or is a demand for the production of pre-existing records. The latter is not protected by the privilege.

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