

# Hong Kong Court of Final Appeal Confirms Jurisdiction over Insider Trading of Securities Listed Overseas

5 November 2018

On 31 October 2018 in [The Securities and Futures Commission v. Young Bik Fung and others \[2018\] HKCFA 45](#), the Court of Final Appeal upheld findings of contraventions under section 300 of the Securities and Futures Ordinance (“SFO”) regarding misuse of inside information concerning securities listed overseas.

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**Background.** As we summarized in [a previous Client Update](#), the Securities and Futures Commission (“SFC”) alleged that Ms Betty Young Bik Fung (“Young”) and Mr Eric Lee Kwok Wa (“Lee”) contravened SFO section 300 by engaging in fraud or deception in transactions involving securities of Hsinchu International Bank Company Limited (“Hsinchu”). In summary, the facts of the case are as follows:

At the time in question, Young was a solicitor seconded to a bank to assist with the intended takeover and privatization of Hsinchu, a company listed on the Taiwan Stock Exchange. During her secondment, Young obtained inside information concerning the bank’s recommended tender price for the takeover, which represented a 75 percent premium over the price at which Hsinchu’s shares were trading. Despite knowing that she was obliged to maintain the confidentiality of this information and to not use it for personal gain, Young disclosed this information to Lee. Lee’s sister then opened an account in her own name that enabled her to trade shares listed on the Taiwan exchange. Over a period of one week, she purchased 1,576,000 shares of Hsinchu stock on behalf of the defendants. After the tender offer was announced, the defendants accepted the offer, resulting in a profit of HK\$2,685,000.

**SFO Section 300.** Section 300 of the SFO states that:

*“A person shall not, directly or indirectly, in a transaction involving securities, futures contracts or leveraged foreign exchange trading –*

*(a) employ any device, scheme or artifice with intent to defraud or deceive; or*

*(b) engage in any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception.”*

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**Significance.** This is the first case prosecuted under SFO section 300. Typically, insider trading offences are prosecuted under section 270 or section 291 of the SFO. However, these provisions are only applicable when the trading occurs on the Hong Kong Stock Exchange. By upholding the finding that the defendants have contravened SFO section 300, the Court of Final Appeal confirms that the SFC may investigate and prosecute misuse of inside information which occurs in Hong Kong even if the securities concerned are listed on overseas exchanges. This sends a clear message that the Hong Kong courts can be expected to take a robust approach to any misuse of inside information in Hong Kong, especially given the Court of Final Appeal's position in its ruling that insider dealing is considered "a species of fraud and cheating" and "a fraud on the public and not a victimless crime".

It is also important to note that a violation of SFO section 300 is a criminal offence and thus subject to the higher burden of proof of beyond reasonable doubt, in respect of which the "dual enforcement regime"<sup>1</sup> applicable to other types of market misconduct does not apply. However, it would appear that if the authorities were to decide not to pursue a criminal prosecution under SFO section 300, the SFC could nonetheless pursue a civil claim under SFO section 213 seeking a declaration of contravention of SFO section 300 and consequential remedial orders, including a restoration order.

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Please do not hesitate to contact us with any questions.

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<sup>1</sup> The dual enforcement regime would allow the authorities to either bring criminal prosecutions or civil proceedings in the Market Misconduct Tribunal regarding market misconduct.