Hong Kong court examines the exercise of the privilege against self-incrimination in the context of SFC investigations and the SFC's power to assist overseas regulators

DENTONS

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In a recent judgment, the Court of First Instance (CFI) dismissed an application for judicial review of a decision of the Securities and Futures Commission (SFC) to provide compelled materials to Japanese regulators. The CFI dismissed all three grounds the applicants relied on, those being:

1. The SFC unlawfully transmitted information obtained by compulsion to the Japanese regulators for use in criminal proceedings in Japan.
2. The SFC made the transmission without ensuring adequate secrecy as required under the Securities and Futures Ordinance (SFO).
3. Section 181 of the SFO is unconstitutional on the basis that it violates the privilege against self-incrimination and contravenes articles 10 and 11(2)(g) of the Hong Kong Bill of Rights.

The First Applicant is an SFC-licensed corporation and the Second Applicant is its responsible officer and majority shareholder.

Brief background

In 2004, the SFC conducted an investigation into suspected market manipulation by way of trading of the shares in Nitto Denko Corporation (NDC), a company listed on the Tokyo Stock Exchange. The SFC issued notices to the First Applicant (i) to inquire into its trading in the shares of NDC, pursuant to section 181 of the SFO, and (ii) to demand its production of documents, pursuant to section 183 of the SFO. The First Applicant and its then-solicitors responded to the notices and provided information without claiming privilege against self-incrimination. The SFC also compelled the Second Applicant to attend an interview, in respect of which the Second Applicant claimed privilege against self-incrimination.

The SFC later acceded to a request for assistance from Japanese regulators, namely the Financial Services Agency (FSA) and the Securities and Exchange Surveillance Commission (SESC), pursuant to section 186 of the SFO and the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding (IOSCO MMOU). The SFC allowed the Japanese regulators to attend the interview with the Second Applicant at the SFC's offices and subsequently provided them with an audio recording of the interview, as well as materials that had previously been supplied by the First Applicant in response to the section 181 and 183 notices.

The CFI's findings

In relation to the first ground, the CFI considered that the fine imposed by the SESC was intended to compel the First Applicant to disgorge profits derived from the breach of regulations in relation to its trading of shares in NDC, and was neither punitive nor deterrent. Therefore, the proceedings in Japan were civil and not criminal in nature.

In relation to the second ground, the CFI examined the factual circumstances and found that the SFC had taken all reasonable steps and fulfilled its secrecy obligations in accordance with international standards of practice by ensuring the confidentiality of materials provided to the Japanese regulators.

In relation to the third ground, the CFI dismissed the constitutional challenge and held that section 181 does not abrogate the privilege against self-incrimination. The privilege against self-incrimination may constitute a reasonable excuse for non-compliance under section 181. Further, the limitation of the privilege against self-incrimination in these circumstances (if any) would be proportionate to the legitimate aim of ensuring the effective regulation of Hong Kong's financial markets. It is noteworthy that the CFI nevertheless cautioned the SFC to address a recipient of a section 181 notice of the right not to provide the information in exercising the privilege against self-incrimination, even though that did not render the provision unconstitutional.

The CFI also held that the application was made after the required deadline, with no satisfactory explanation provided for the delay to justify an extension of time.

Key takeaways

The CFI confirmed that the privilege against self-incrimination can be exercised under section 181 of the SFO. While section 181(7) imposes criminal liability on a person who fails to comply with a requirement "without reasonable excuse," section 181 does not preclude the exercise of the privilege against self-incrimination. When the SFC requires that a person furnish any information relating to transactions under a section 181 notice, that person may elect to remain silent relying on the privilege against self-incrimination, which amounts to a "reasonable excuse" for non-compliance under section 181.

This position is to be contrasted with other SFO provisions relating to the SFC's investigative powers, such as sections 179(16) and 184(4), that preclude the exercise of the privilege against self-incrimination. That is to say, in relation to an SFC demand for production of pre-existing records (as opposed to materials created in response to an investigation) where (i) there is suspected defalcation, fraud, misfeasance or other misconduct relating to listed corporations, pursuant to section 179, or (ii) the SFC has reasonable cause to believe a person has in his possession such records that are relevant to an SFC investigation, pursuant to 183, that person is not excused from complying with the demand on the ground of privilege against self-incrimination.

The SFC will continue to engage in cross-border investigations with overseas financial regulators by cooperating with and helping them to perform their functions. In the case of section 181 notices, companies and individuals subject to SFC investigation should carefully consider what they disclose to the SFC and claim the privilege against self-incrimination where appropriate, particularly in light of the SFC's obligations to provide assistance to overseas regulators.

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