

LEGISLATION UPDATE

CORPORATE DERIVATIVE LIABILITY FOR MARKET MISCONDUCT OFFENCES

Amendments to the Securities and Futures Act introduce new attributed liability concept

Under general principles of corporate law, a corporation is not liable for any contravention of law or offence committed by its employees, except to the extent that the employee can be said to constitute or otherwise represent the directing mind of the company. Typically, the corporation would be attributed with liability only where the employee is a very senior person. In the context of Part XII (Market Conduct) of the Securities and Futures Act (the "SFA"), it may therefore be possible for a corporation to reap the benefit of any market misconduct carried out by its more junior employees.

To address this, the new amendments to the SFA will make a corporation liable if any provision in Part XII of the SFA is contravened by its employee (of whatever seniority or position within the corporation) provided that the contravention was committed for the benefit of the corporation.

There are two levels of derivative liability for the corporation:

- (a) where the contravention was committed with the consent or connivance of the corporation; and
- (b) where the contravention was attributable to the negligence of the corporation;

Consent or connivance of the corporation

For a corporation to be liable under this head, the level of proof of knowledge or criminal intent is high. As a guide, a new section 236B(8) of the SFA sets out certain fact situations which, if proven, would establish consent or connivance on the part of a corporation. These are:

- (a) where the corporation's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the contravention;
- (b) where a "high managerial agent" (ie. a person whose duties are such that his conduct can fairly be assumed to represent the corporation's policy) intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the contravention; or

- (c) where a corporate culture existed within the corporation that directed or encouraged non-compliance with the relevant provision.

Negligence of the corporation

The level of culpability is lower under this head. The new section 236C(7) directs the court, when deciding whether a contravention is attributable to the negligence of a corporation, to take into account the following, amongst other factors:

- (a) whether the corporation has established adequate policies and procedures for the purposes of preventing and detecting market misconduct; and
- (b) whether the corporation has consistently enforced compliance with its policies and procedures.

Liability

Where derivative liability has been established, the Monetary Authority of Singapore (the “**MAS**”) can commence a civil penalty action against the corporation under section 232 of the SFA. The maximum civil penalty which can be imposed is an amount not exceeding three times the amount of the profit gained or the loss avoided or \$100,000 (whichever is the greater). If the corporation did not gain a profit or avoid a loss, a civil penalty between \$50,000 and \$2 million can be ordered against the corporation.

Where the corporation has gained a profit or avoided a loss, it is also subject to civil liability in an action brought by any person who, contemporaneously with the contravention, had entered into a transaction and has suffered loss by reason of the difference between the price at which the transaction was entered into, and the price at which the transaction would have been entered into if the contravention had not occurred.

Further, the corporation is also liable to criminal prosecution in a case where there is consent or connivance.

Similar rules on attribution have been enacted for partnerships and limited liability partnerships.

Liability attributable to individual and order for disgorgement

Conversely, the SFA amendments have also introduced a regime whereby, if a corporation, partnership or limited liability partnership has contravened the market misconduct provisions of the SFA with the consent or connivance of, or as a result of any neglect on the part of, an individual, the MAS may bring a civil penalty action against that individual. In addition, where that individual has gained a profit or avoided a loss as a result of the contravention, that individual is also exposed to civil liability in an action that may be brought by any person who has suffered loss.

Finally, new rules have also been introduced to empower the court to make an order for disgorgement against a third party who has received the benefit (in whole or in part) of a contravention of the market misconduct provisions. The sum paid out under an order of disgorgement would then be distributed rateably to all claimants in respect of that contravention.

References

The Securities and Futures (Amendment) Bill 2009 was passed by Parliament on 19 January 2009, but has yet to come into force. To refer to the Bill, please click [here](#).

If you have any queries about this update or wish to discuss how the changes may potentially affect you or your business, please feel free to contact the corporate and finance lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our [website](#)), or:

Eric Chan

Associate Director (Corporate & Finance)

T: +65 6531 2784

E: eric.chan@drewnapier.com

The contents of this update are only intended to provide general information on the subject covered. Nothing in this publication should be treated as specific professional legal advice concerning any particular business, operational or other situations with which you might be faced. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of, the information contained in this publication, and does not accept any liability for any loss or damage arising from any reliance thereon.

OUR BUSINESS GROUPS AND PRACTICE AREAS

BANKING

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

BIOMEDICAL SCIENCES

Tony Yeo
T +65 6531 2512
F +65 6220 0324
E tony.yeo@drewnapier.com

BUILDING & CONSTRUCTION

Tan Liam Beng
T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Petrus Huang

T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

CHINA BUSINESS GROUP

David Chin
T +65 6531 2304
F +65 6535 1952
E david.chin@drewnapier.com

COMPETITION LAW

Cavinder Bull, SC (contentious)
T +65 6531 2416
F +65 6533 3591
E cavinder.bull@drewnapier.com

Lim Chong Kin (non-contentious)

T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

CORPORATE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

CORPORATE (cont'd)

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Yeo Wee Kiong
T +65 6531 2500
F +65 6535 4864
E weekiong.yeo@drewnapier.com

CORP INSOLVENCY & RESTRUCTURING

Sushil Nair
T +65 6531 2410
F +65 6533 9029
E sushil.nair@drewnapier.com

Manoj Sandrasegara
T +65 6531 4156
F +65 6533 9029
E manoj.sandra@drewnapier.com

EMPLOYMENT & IMMIGRATION

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

FAMILY & MATRIMONIAL

Randolph Khoo
T +65 6531 2418
F +65 6532 7149
E randolph.khoo@drewnapier.com

FUND MANAGEMENT, REIT & PRIVATE EQUITY

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

INSURANCE & REINSURANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

IP

Morris John (Patents)
T +65 6531 2503
F +65 6533 0694
E mj@drewnapier.com

Dedar Singh Gill (Trade Marks)

T +65 6531 2507
F +65 6533 0694
E dedar.singh@drewnapier.com

INT'L ARBITRATION

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

LITIGATION

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

Indranee Rajah, SC

T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

PROJECT FINANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

Valerie Kwok

T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo

T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

PROPERTY

David Chin
T +65 6531 2304
F +65 6535 1952
E david.chin@drewnapier.com

SHIPPING & INT'L TRADE

Ian Koh
T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

TAX & PRIVATE CLIENT SERVICES

Ong Sim Ho
T +65 6531 2250
F +65 6535 4864
E simho.ong@drewnapier.com

TMT

Lim Chong Kin
T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

TRANSNATIONAL & CROSS-BORDER WORK

Julian Kwek
T +65 6531 2485
F +65 6533 9029
E julian.kwek@drewnapier.com

OTHER OFFICES**Shanghai Office**

#2501 Office Tower
Bund Center
222 Yan An Road East
Shanghai 200002
China
T +86 21 6335 1628
F +86 21 6335 0638
E china@drewnapier.com

Drewmarks Patents & Designs (Malaysia) Sdn Bhd

9th floor
Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur, Malaysia
T +603 2162 2522/2162 2529
F +603 2162 2804
E drewmark@tm.net.my

PT Drewmarks Konsultama

Correspondence address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503/6531 2504
F +65 6533 0694
E ip@drewnapier.com

DrewCorp Services Pte Ltd

20 Raffles Place
#09-01 Ocean Towers
Singapore 048620
ROC No. 200102492H
T +65 6531 2266
F +65 6533 1542/6533 7649
E services@drewcorpservices.com

Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of information or opinion contained in this publication. This publication covers a wide range of topics and is not intended to be a comprehensive study of the subjects covered nor is it intended to provide legal advice. It should not be treated as a substitute for specific advice on specific situations.