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## SFC BRINGS FIRST ACTION FOR BREACH OF LISTED COMPANIES' OBLIGATION TO DISCLOSE INSIDE INFORMATION UNDER PART XIVA SECURITIES AND FUTURES ORDINANCE

The Securities and Futures Commission (**SFC**) has started proceedings for the first time for breach of listed companies' obligation to announce inside information as soon as reasonably practicable under Part XIVA of the Securities and Futures Ordinance (Cap. 571) (the **SFO**) which came into force on 1 January 2013. On 22 July 2015, the SFC started proceedings in the Market Misconduct Tribunal (**MMT**) against AcrossAsia Ltd (**AAL**) for failing to disclose highly sensitive inside information as soon as reasonably practicable in breach of section 307B of the SFO. The SFC's allegations relate to AAL's 13-day delay in announcing the commencement of insolvency-related proceedings in Indonesia against AAL related to enforcement proceedings brought by AAL's subsidiary for repayment of its loan to AAL. The SFC is also bringing proceedings under section 307G of the SFO against AAL's Chairman and CEO for reckless or negligent conduct resulting in the company's breach of the disclosure obligation. For further information, please see the SFC's press release<sup>1</sup> of 27 July 2015 and its notice to the MMT.<sup>2</sup>

### Regulatory Background

Part XIVA of the SFO was introduced in January 2013 due to concerns that the framework governing listed companies' disclosure of inside information (or price sensitive information as it was then referred to) previously set out in the Listing Rules of the Hong Kong Stock Exchange lacked "statutory teeth". As a non-statutory body, the Hong Kong Stock Exchange (the **Exchange**) had no power to impose fines for breach of the disclosure requirements and the available remedies were restricted to issuing criticisms or, in the most severe cases, delisting. Under the new SFO regime, civil proceedings can be brought in the MMT against a listed company, its directors and other senior officers and the MMT is empowered to fine the company and its directors up to HK\$8 million.

To date, regulatory actions against listed companies for non-disclosure of inside information have related to breach of the pre-2013 Listing Rule 13.09 which required listed companies to disclose price sensitive information. Sanctions imposed by the Listing Committee generally involved censures, criticisms, and requirements to undertake Listing Rule compliance training and/or appoint a compliance adviser. The SFC has however also used its powers under section 214 of the SFO against companies breaching their disclosure obligations. Section 214 entitles the SFC to seek a range of orders from the court, including orders for the disqualification of directors or to restore parties to their original financial position, where, among others, a listed company's business has been conducted in a manner

1 SFC. "SFC commences MMT proceedings against AcrossAsia Limited, its Chairman and CEO for late disclosure of inside information". 27 July 2015. Available at <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=15PR78>

2 Notice to the MMT in the Matter of the Listed Securities of AcrossAsia Limited pursuant to Section 307I(2) of and Schedule 9 to the Securities and Futures Ordinance. 22 July 2015. Available at [http://www.mmt.gov.hk/eng/rulings/AcrossAsia\\_Ltd%20\\_22072015\\_e.pdf](http://www.mmt.gov.hk/eng/rulings/AcrossAsia_Ltd%20_22072015_e.pdf).

resulting in some or all of its shareholders not being given information in respect of the company that they might expect to receive, or involving misconduct towards the company's shareholders.

### The AAL Case: the Facts

AAL is a Cayman Islands-incorporated investment holding company which was listed on the Growth Enterprise Market of the Exchange in July 2000. AAL's key asset is its 55.1% shareholding in PT First Media Tbk (**FM**) which is listed on the Indonesian Stock Exchange. AAL's income and profit is derived from the operations of FM and its subsidiaries which provide digital telecommunication services.<sup>3</sup>

The other 2 defendants in the case are Mr. Albert Saychuan Cheok (**Cheok**) and Mr. Vicente Binalhay Ang (**Ang**) who were the Chairman and Chief Executive Officer of AAL, respectively at the relevant time.

### The Indonesian Arbitration Proceedings

The SFC's allegations relate to arbitration proceedings brought by FM against AAL in Indonesia to recover the principal of a US\$44 million loan it had made to AAL which became due on 30 June 2012. The timeline of events is summarised below.

Date	Event
30 Jun. 2011	AAL borrowed US\$44 million from FM at an interest rate of 4.75% per annum for 3 months, to be automatically rolled over for up to one year.
30 Jun. 2012	AAL failed to repay FM on the due date.
30 Aug. 2012	FM commenced arbitration proceedings at the Indonesian National Board of Arbitration ( <b>BANI</b> ).
12 Sept. 2012	BANI made an arbitral award in favour of FM ordering AAL to pay FM US\$46,774,403 (principal plus interest) (the <b>BANI Award</b> ).
13 Sept. 2012	Registration of the BANI Award at Central Jakarta District Court ( <b>CJDC</b> ).
14 Sept. 2012	1) AAL received the registered BANI Award. 2) Dealing in AAL shares was suspended. 3) AAL published an announcement of the suspension of trading <sup>4</sup> in its securities pending the announcement of information relating to the arbitration proceedings.
20 Sept. 2012	The BANI Award was disclosed as price sensitive information under Rule 17.10 of the GEM Listing Rules <sup>5</sup> together with notice of the resumption of trading in AAL shares in a Stock Exchange announcement. <sup>6</sup>
24 Sept. 2012	CJDC declared the BANI Award enforceable.
27 Sept. 2012	FM applied to CJDC to enforce the BANI Award.
1 Oct. 2012	CJDC summoned AAL to be present in court on 16 October 2012 for an "Official Warning" to settle the BANI Award ( <b>Summons A</b> ).
3 Oct. 2012	Summons A was served on AAL. AAL held an emergency board meeting (attended by Cheok and Ang) to discuss the proceedings and the BANI Award.

<sup>3</sup> The second largest shareholder of First Media is Lippo Group which holds 33.76% of its shares through PT Multipolar Tbk.

<sup>4</sup> AAL announcement of Suspension of Trading on 14 September 2012: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2012/0914/GLN20120914005.PDF>

<sup>5</sup> Rule 17.10 of the GEM Listing Rules previously set out issuers' obligation to disclose price sensitive information.

<sup>6</sup> AAL announcement dated 20 September 2012 disclosing the BANI Award as price sensitive information and resumption of trading: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2012/0920/GLN20120920026.pdf>.

### Emergency meeting

An emergency meeting of AAL's board of directors was held on 3 October 2012 to discuss the ramifications of the Indonesian proceedings and the BANI Award in particular. The emergency meeting which was attended by Cheok and Ang noted that any breach of the Indonesian court rulings would "potentially have serious material adverse effects on the company". Indonesian counsel had advised that the potential consequences of not complying with the Indonesian court order included that:

1. FM might bring further actions in Indonesia to seize AAL's assets including AAL's shares in FM;
2. FM might seek to wind up AAL; and
3. either of the above actions would be likely to affect AAL's ability to carry on its business as a going concern which could in turn affect its ability to remain listed in Hong Kong.

The sequence of events following the emergency board meeting was as follows:

Date	Event
16 Oct. 2012	CJDC adjourned Summons A first to 30 October 2012 and then to 27 November 2012.
27 Nov. 2012	CJDC gave AAL a final warning to pay the BANI Award by 5 December 2012.
5 Dec. 2012	AAL failed to pay the BANI Award.
20 Dec. 2012	FM initiated insolvency-related proceedings in Indonesia and sought to: <ol style="list-style-type: none"> <li>1) temporarily suspend AAL's obligation to pay debts in order to allow a composition plan to be presented to FM; and</li> <li>2) appoint administrators to manage AAL's assets.</li> </ol> <b>(Insolvency Petition)</b>
26 Dec. 2012	Registration of Insolvency Petition with the Indonesian Court.
28 Dec. 2012	CJDC summoned AAL to appear in court on 4 January 2013 ( <b>Summons B</b> ).
2 Jan. 2012	AAL received Summons B in Indonesian Bahasa language by fax.
4 Jan. 2013	An English translation of Summons B was circulated to AAL officers, including Cheok and Ang.
8-15 Jan. 2013	Cheok and Ang attended the hearing of the Insolvency Petition in Indonesia. The SFC, via the Exchange, demanded AAL to issue a holding announcement in relation to the Indonesian proceedings.
15 Jan. 2013	Indonesian Commercial Court granted the Insolvency Petition. Dealing in AAL shares was suspended at AAL's request pending the release of inside information. <sup>7</sup>
17 Jan. 2013	AAL made a holding announcement disclosing the Indonesian proceedings to the public. <sup>8</sup>
22 Feb. 2013	AAL shares resumed trading but the share price fell by 22.5% <sup>9</sup> and AAL published an announcement regarding the Insolvency Petition. <sup>10</sup>

7 AAL made a trading suspension announcement dated 15 January 2013: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2013/0115/GLN20130115005.PDF>

8 AAL holding announcement dated 17 January 2013 updating public investors about the Indonesian proceedings: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2013/0117/GLN20130117045.PDF>

9 Hang Seng Index (HIS) fell 0.54% on the same day <http://finance.yahoo.com/q/hp?s=%5EHSI&a=01&b=21&c=2013&d=01&e=22&f=2013&g=d>

10 AAL made announcements on 22 February 2013 regarding trading resumption and an update on the Indonesian proceedings: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2013/0222/GLN20130222007.pdf>.

## Relevant Provisions

Section 307B(1) of the SFO requires a listed corporation to disclose inside information to the public as soon as reasonably practicable after such information has come to its knowledge. Inside information is defined as specific information about a listed corporation, a shareholder or officer of the corporation, or the listed securities of the corporation or their derivatives, which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation, but would if generally known to them be likely to materially affect the price of the listed securities. A listed corporation is taken to have knowledge of inside information when the information is known, or ought reasonably to be known, by an officer of the corporation provided that a reasonable person acting as an officer of the corporation would consider the information to constitute inside information.

Section 307G(1) of the SFO further requires the officers of listed corporations to take *all reasonable measures* to ensure that proper safeguards exist to ensure the corporation's compliance with its disclosure obligations. While breach of this provision is not punishable in itself, where a listed corporation breaches the inside information disclosure obligation, an officer will also be regarded as in breach of the disclosure requirement if: (i) his intentional, reckless or negligent conduct resulted in the breach; or (ii) he failed to take reasonable measures to ensure the existence of proper safeguards to ensure the corporation's compliance with the disclosure obligation.

## SFC Allegations

The SFC alleges that the Insolvency Petition and Summons B together with the information they contained constituted inside information within the definition set out in section 307A(1) of the SFO, in that it was specific information about AAL which was not generally known to those accustomed or likely to deal in its listed securities, but would, if generally known, be likely to materially affect the price of those securities.

The SFC's Notice to the MMT states that the inside information came to the knowledge of Cheok and Ang, officers of AAL, on or about 4 January 2013 in the course of performing their duties. Since a reasonable person, acting as an officer of AAL, would have considered the information to be inside information in relation to AAL, AAL therefore had knowledge of the information on or about 4 January 2013. It was therefore obliged to announce that information as soon as reasonably

practicable under section 307(B)(1) of the SFO. In fact, the information was not announced until 17 January 2013, a delay of 13 days.

The SFC notice alleges that AAL's failure to disclose the Insolvency Petition and Summons B as inside information as soon as reasonably practicable after it came to its knowledge on or about 4 January 2013 breached section 307(1)(B) of the SFO.

It also alleges that Cheok and Ang, as AAL officers, were or may be guilty of reckless or negligent conduct in failing to ensure that AAL complied with its disclosure obligation, and that conduct resulted in AAL's breach of the disclosure requirement. Cheok and Ang are therefore alleged to be in breach of the disclosure requirement by virtue of section 307G(2)(a) of the SFO.

## Company Response

AAL made an announcement regarding the proceedings on 27 July 2015 stating that it is "in the process of considering the SFC's allegations and seeking legal advice" and made no further comments on the matter.<sup>11</sup>

<sup>11</sup> Announcement made by AAL on 27 July 2015 in relation to legal proceedings involving the company and its directors: <http://www.hkex.com.hk/eng/csm/ShowNews.asp?mkt=hk&FileName=http://www.hkexnews.hk/listedco/listconews/gem/2015/0727/GLN20150727031.pdf>.

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