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Prospectus Liability: HK and Singapore

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I INTRODUCTION

The Monetary Authority of Singapore and the HK Securities and Futures Commission

The Monetary Authority of Singapore (MAS) was established by the Monetary Authority of Singapore Act 1970 and is Singapore's *de facto* central bank.[1] It also acts as the securities, banking and insurance regulator. Securities regulation is overseen by the Capital Markets Group. The idea of the MAS, or a group within it, becoming an even more powerful securities regulator, with the exchanges hiving off some of their regulatory functions to it, due to conflicts of interest given their modern for-profit status, has been mooted.[2] One of the first steps in that direction was the transfer of the responsibility for prospectus registration from the then Registry of Companies and Businesses to the MAS. This was at the same time that the relevant fundraising provisions were shifted from the Companies Act 1967 to the Securities and Futures Act 2001 (SFA) in July 2002.[3] More recently there has been the migration of the powers of supervision over broker-dealers from the Singapore Exchange (SGX) to MAS.[4] By contrast, Hong Kong has a separate Securities and Futures Commission (HKSFC) that comes closer to the US SEC in form but perhaps less in substance as they appear to work even more closely with the Hong Kong Exchanges and Clearings Ltd (HKEx) when it comes to prospectus registration. This may be because (as we see below), their prospectus requirements for shares and debentures are still in their companies' legislation and corporate regulators were not in the past fully equipped to deal with fundraising of listed companies.

Securities and Futures Act and various HK Ordinances

Unlike in the UK and Australia the legislative framework has not been streamlined to the same extent. The legislation in those two countries cover most financial service providers and financial

1 Its concern is with the external value of the Singapore dollar rather than domestic interest rates.

2 Editorial, 'All Regulators under One Roof?' *Business Times* (Singapore, 8 November 2002).

3 The Companies Act 1967 still remains relevant, with provisions like s 201B concerning the audit committee requirements for publicly listed companies.

4 Ong Chong Tee, Deputy Managing Director, Monetary Authority of Singapore, 'Regulatory Landscape for 2016: Positioning for a Dynamic, Trusted and Vibrant Market', keynote address at the SGX Equities Dialogue 2016 (28 January 2016).

products within a single piece of legislation (although Australia is looking at change[5] as it includes core corporate legislation in the same Corporations Act 2001 (Cth) which Singapore's SFA is carved out of). In HK the Securities and Futures Ordinance[6] (SFO) exists alongside other functional banking[7] and insurance[8] legislation. Prudential requirements, licensing and supervision of intermediaries still therefore occur along separate lines, although there is convergence in areas such as the use of a risk-based capital approach across all financial sectors. However, having separate legislation does make sense since it has been pointed out that banking and insurance regulations are not disclosure statutes,[9] with the focus on the financial institution itself, whereas disclosure has become the primary focus of securities regulation, particularly in the context of corporate fundraising. The further complication for HK is that prospectus disclosure for shares and debentures is still governed by the Companies Ordinance[10] (CO) and even more so the Companies (Winding Up and Miscellaneous Provisions) Ordinance[11] (CWUMPO). It is anticipated that the provisions will, in the near future, be moved to the SFO (which relevant provisions such as s 103 were drawn from the UK's Prevention of Fraud (Investments) Act 1958 and presently covers other securities, structured products and collective investment schemes).[12]

Since the Asian financial crisis that began in mid-1997, the MAS has clearly embraced a different regulatory philosophy towards public fundraising. It has moved from a merit-based system of regulation where the regulator (at that time perhaps more the exchanges) decides what financial product comes to the market to a more disclosure-based regime which empowers investors to make informed decisions. Under this approach, the regulators' concern is with full and frank disclosure. Prospectuses are now subject to public exposure for two weeks between its lodgment and registration (with further changes in 2010 shortening this to a week in some cases). The MAS is empowered to refuse to register a prospectus where there are misstatements or it is in the public

[5] Australian Law Reform Commission, *Review of the Legislative Framework for Corporations and Financial Services Regulation, Interim Report C* which was tabled before Parliament on 22 June 2023.

6 Cap 571.

7 Banking Act 1970 (Singapore), Banking Ordinance Cap 155 (HK).

8 Insurance Act 1966 (Singapore), Insurance Ordinance Cap 41 (HK).

9 Tamar Frankel has stated that a banking or insurance law 'is not a disclosure statute; it is a statute that regulates a type of financial institution': letter to K MacGarth, Director, Securities and Exchange Commission 1 (26 January 1990).

[10] Cap 622.

[11] Cap 32.

12 Lo Qu and Charles Zhen Qu, *Law of Companies in Hong Kong* (3rd edn, Sweet & Maxwell 2018). Section 103(3)(a), (b) and (c) import the prospectus requirements and exemptions from Parts II and XII of CWUMPO.

interest to do so, and also to require a supplementary or replacement prospectus, or to issue a stop order if a registered prospectus is later found to be misleading or deficient.[13] HK also moved away from merit regulation from the start of the millennium,[14] and the issuer would also need a supplementary prospectus if aware of any changes[15]. The difference with Singapore is that the HKEx and HKSFC appear to have streamlined the process so that more of it remains with the exchange than statutory regulator which has delegated some of its powers to the exchange (although given regulatory competition and technology Singapore has also smoothened her process even if MAS continues to play a relatively larger role in corporate fundraising).

Equity markets

Equity markets in Singapore have had a difficult time in terms of amounts raised in the primary markets for a while now. In 2015, for example, even though the SGX's market capitalisation remained near US$750bn for much of the year and trading volume that year on both its main and secondary board was around 350 billion shares valued at US$202bn,[16] the initial public offering (IPO) market that year only saw new issuers raising US$0.4bn (which included sums raised off-exchange). One explanation for this was the absence of real estate investment trust (REIT) IPOs, due to measures taken to cool the property market in Singapore, as well as removal of some of the tax advantages such as the stamp duty remission for instruments of transfer of Singapore properties to SGX-listed Singapore REITs which had been given in 2005 and was discontinued in 2015. What this shows perhaps is the importance of the property market in general in Singapore, but also in the context of the stock market, which has many listed entities linked to the property sector.[17] Things improved markedly in 2016 with IPOs totalling UAS$1.8bn although this in itself further proves the point about the link between the equity and property markets as much of this were by REITs. This was confirmed in 2022, where again because there were no REITs, only USD$0.4bn was raised against a market capitalisation of US$620bn and 645 companies. This was in contrast to 2021 where US$1.3bn was raised (with 1 REIT). In 2022, a difficult year, HK still raised US$13.7bn against a market capitalization of US$4.7trn, and is the much larger equity market,

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13 For the first case in which the Monetary Authority of Singapore utilised this power, see Monetary Authority of Singapore, 'MAS Issues Interim Stop Order on EC-Asia International Limited', press release (28 May 2003).

14 HK Exchange and Clearing Ltd, *Third Submission to Expert Group to Review the Operation of the Securities & Futures Market Regulatory Structure* (December 2002).

15 Rules 2.03(2); 11.07; 11.13; Paragraphs 2 and 3(2) of Practice Note 6; HKEx-LD61-1.

16 Singapore Exchange, *Monthly Market Statistics* (December 2015) at p 2.

17 Melissa Tan, 'IPO Market Likely to See More Reit, Catalist Floats in 2016' *Business Times* (Singapore, 31 December 2015).

with around 2500 listed companies (even though the property market is just as important there).

However, developed economies usually do not have the stock market providing much net capital given the amount of share repurchases and takeovers going on at the same time.[18] It has quite recently been observed that businesses may no longer require equity financing from the public and can rely on debt and private equity, with the numbers of listed firms in the US peaking in 1997 and almost halving by 2017.[19] This is a sign of a mature market with the Singapore market perhaps now being one.[20] There is also a growing trend in the US of companies staying private longer[21] which has led to the phenomenon of the 'listing gap' in the US and possibly Singapore as well. There has also been a reduction in the number of listed companies in Europe, with mergers and acquisition activity, delistings, failures and the development of private equity markets.[22]

Conversely, in a June 2019 paper, the World Bank found that the amount of financing raised in capital markets by East Asian[23] firms increased since the 1990s and were driven by domestic rather than international issuances.[24] The total amount of equity and bond financing raised per year (relative to GDP) in the median East Asian economy doubled between 1990-1998 and 2008-2016

18 John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer, and Jennifer Payne, *Principles of Financial Regulation* (Oxford University Press 2016) 42.

19 Kathleen M Kahle and Rene M Stulz, 'Is the US public corporation in trouble?' (2017) 31 Journal of Economic Perspectives 67. See now Petri Mantysaari, *Stocks for All: People's Capitalism in the Twenty-First Century* (De Gruyter, 2021) 1, which begins by stating that 'Public stock markets are too small'. See also Craig Doidge, G Andrew Karolyi and René Stulz, 'The US listing gap' (2017) 123(3) Journal of Financial Economics 464. See also Elisabeth de Fontenay, 'The Deregulation of Private Capital and the Decline of the Public Company' [2017] 68 Hastings Law Journal 445 and Gustavo Grullon, Yelena Larkin and Roni Michaely, 'Are US industries becoming more concentrated?' (2019) 23(4) Review of Finance 697 – more references on the listing gap and the origin of the term in the US context.

20 John Armour *supra* n 18 at 42. It remains important, certainly for the emerging economies in East Asia.

21 The Editors, 'Where have all the public companies gone?' *Bloomberg,* (9 April 2018) <https://www.bloomberg.com/opinion/articles/2018-04-09/where-have-all-the-u-s-public-companies-gone> accessed 14 September 2023. 2021 was an exceptional year post Covid-19.

22 Tanya Panova and Jonathan Haynes, 'Oxea study on the functioning of primary and secondary equity markets' (ECGI-SSE Riga 'SMEs, Families and Capital Markets' Conference, 19 June 2020).

23 The economies of China, Hong Kong SAR, Indonesia, Korea, Malaysia, Philippines, Singapore, Taiwan, Thailand and Vietnam were selected as 'East Asian Economies' in this report. The analysis in the report was focused on the median economy as anything else could have been skewed by the size of China or financialized economies like HK and Singapore. See Facundo Abraham, Juan J Cortina and Sergio L. Schmukler, 'The Rise of Domestic Capital Markets for Corporate Financing: Lessons from East Asia' World Bank Working Paper No. 154 (June 2019) 7.

24 *Ibid*, 3.

with domestic equity itself increasing between 85 to 97% in that period.[25] HK, even though a mature financial market, has been clearly situated in what may be one of the fastest growing areas in the world and even though, as we will see, its securities laws differ only marginally from those in Singapore, the levels of fundraising remain dramatically higher.[26] As such, laws may matter less than political economy in the growth of equity markets.

Comparison of Singapore and HK IPO Markets (US Dollars)

Year	Singapore (MAS and PWC)	HK (Asia Times and Statista)
2013	4.7 billion	21.5 billion
2014	2.6 billion	30.0 billion
2015	0.4 billion	34.2 billion
2016	1.8 billion	25.3 billion
2017	3.5 billion	16.7 billion
2018	0.5 billion	37.4 billion
2019	2.3 billion	40.7 billion
2020	1.0 billion	52.0 billion
2021	1.3 billion	43.1 billion
2022	0.4 billion	13.7 billion

Source: MAS Monthly Statistical Bulletin, Financial Markets, Table III SGX-ST: Price Index, Number of Listed Companies, Turnover and Capitalisation and MAS Annual Report 2016/7, Statistical Annex G1 at 16 and PWC, Equity Capital Markets Watch Singapore, 2017-2022 year in review. HK Asia Times 2013-14 and Statistia 2015-2022

Debt Markets

In contrast, new corporate debt issuance in Singapore in 2015 and 2022 was valued at USD$129bn

25 *Ibid*, 11.

26 There are signs that this may be waning: Kaye Wiggins and Hudson Lockett, 'JPMorgan star faded away at Hong Kong stock exchange' *Financial Times* (London, 29 December 2023). This will be discussed below.

and US$143bn respectively[27], although comparing debt markets can be misleading as much are debt reissuances. Still, at the end of 2022, SGX's listed debentures, loan stocks and warrants had a 'market capitalisation' of more than US$2 trillion and was notionally much larger than the equities market. It is really this part of the capital market that was experiencing exponential growth even though debts listed on SGX may not have raised funds in Singapore but in some other part of Asia, including HK. Listing is, however, usually required for bonds before they can, for various regulatory reasons, be purchased by financial institutions. Levels of disclosure, both initially and on a continuing basis, are much lower than for equity listings and retail bonds.[28] They are almost all issued using one of the exceptions for accredited investors or a specific debt exception that Singapore has created discussed below. This requires listed bonds and debentures to usually carry a principal amount of at least $200,000. The vast majority of these wholesale bonds either have little secondary market activity or are very thinly traded off-exchange by dealers. To be fair, it is not altogether that different in the US where it was said that while equity trading has changed substantially in the past 30 years, bonds are still sold over the phone between traders.[29] The usual consequence of this is that trading volumes are much lower than in the equity markets, and dominated by institutional investors.[30]

It is the same in HK in that debt has increased from 36 to 80% in the period 1990-1999 and 2008-2016 except that we have seen that, unlike Singapore, so did domestic equity issues. In HK debt is usually offered to professional investors only and are exempted from statutory prospectus requirements. As in Singapore, however, the listing document must contain the information that professional investors would expect to find in the prospectus. In Singapore this comes under the general part of the SGX listing rules applicable to debt securities (rule 313) while it is the same in HKEx Mainboard Listing Rules 37.29, except that the provision there is found in the part for debt securities to professional investors. In general, it can be said that HK differentiates different types of investors more than in Singapore (where it is really only with respect to prospectus exclusions). This was also true in the equity markets where HK had a planned Rusal listing that could only be

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27 MAS Annual Debt Market Survey: <https://www.mas.gov.sg/publications/singapore-corporate-debt-market-developments>.

28 See further International Organization of Securities Commissions, *Regulatory Reporting and Public Transparency in the Secondary Corporate Bond Markets: Consultation Report* (CR06/2017, 2017).

29 Edward Robinson, 'Meet the 80-year-old Whiz Kid Reinventing the Corporate Bond' *Bloomberg* (3 February 2015): <https://www.bloomberg.com/news/articles/2015-02-03/meet-the-80-year-old-whiz-kid-reinventing-the-corporate-bond> accessed 4 January 2024.

30 John Armour *et al*, *supra* n 18, 156–157.

offered to sophisticated investors.[31] This reflects the fact that there are many more such institutional and accredited investors in Hong Kong than Singapore.

II LEGAL BASIS

The legal basis for prospectus liability in both jurisdictions is largely statutory, based on the SFA in Singapore and the CWUMPO/SFO in HK. These Acts do not remove the possibility of suing at common law for fraudulent or negligent misstatements but they create strict liability (subject to a due diligence defence) for a list of prescribed persons who are involved in the preparation of the prospectus (HK/Singapore) or who has an economic interest (Singapore) in it.

In general, in both Singapore and Hong Kong, enforcement of securities regulation primarily lies with the public regulator via largely civil penalty or less so criminal actions, and not privately. This is partly due to the absence of formal class action litigation procedures and restricted use of contingency or conditional fees and third party litigation funding.[32] Both countries have been studying the area for some time.[33] Without private litigation, issues like tracing and causation requirements have not been fully explored although it is likely that these are not issues in HK and Singapore given that almost all IPOs also involve an exchange listing, few founder shares can be sold during a listing where there is a moratorium, and the statute can be seen not to require reliance or causation,[34] which is its big advantage over the common law where even with fraud, reliance

31 See further Stephen Choi, 'Regulating Investors Not Issuers: A Market-Based Proposal' (2000) 88(2) California Law Review 279-334.

32 Wan, Wai Yee, Chen, Christopher and Goo, Say H, 'Public and Private Enforcement of Corporate and Securities Laws: An Empirical Comparison of Hong Kong and Singapore' (2019) 20(2) EBOR 319–361.

33 In September 2007, the Committee to Develop the Singapore Legal Sector issued a report that considered the scope of the existing provisions on representative proceedings too limited. It recommended further consideration of class actions but this was not followed up by the Government. Class actions were recommended by the HK Law Reform Committee in 2009 and then in the May 2012 *HK Law Reform Commission Report on Class Actions* which suggested an incremental approach. They have not, however, been implemented in HK although there is discussion that it may be introduced for areas like consumer and competition law.

34 Low, Chee Keong & Low, Tak Hay, 'Forest for the Trees: Aren't Directors Responsible for Disclosures in Prospectuses?' (2020) 15(4) Capital Markets Law Journal 509 at 512 (referring to UK and Australian legislation from who HK ('on the faith of') and Singapore ('as a result of') have adopted their respective legislation.

is said to be 'essential'[35] and also reasonable[36].

Both HK and Singapore have also been described as 'market-dominant small jurisdictions' [37], with the former concerned with fundraising for China and the latter wealth management. Given the nature of their financialised economies, it is understandable that investor protection may not be as important in other places. For example, s 5 of the SFA, which otherwise incorporates the President's Committee of the International Organisation of Securities Commissions (IOSCO) 1998 (2003 revised) 3 objectives of securities regulation, replaces 'protection of investors' with facilitating 'efficient markets for the allocation of capital and the transfer of risks'. This is consistent with the fact that Singapore sees disclosure as part of a *caveat emptor* system, and HK may be moving that way latterly even though it was in general more protective of consumers[38]. This is different from how it was seen in the US in the 1930s when it was associated with *caveat venditor*.[39] It has been argued that investor protection can be sometimes sacrificed for capital

[35] Arthur Cunningham, *Civil Litigation of Commercial Fraud* (Clarus Press, 2021) 1-60. Similarly, leading US torts academics have argued for the central place of reliance in fraud: John CP Goldberg, Anthony J Sebok and Benjamin C Zipursky, 'The Place of Reliance in Fraud' (2006) 48 Arizona Law Review 1001.

[36] *Davies Review of Issuer Liability* (March 2007) para 54.

[37] Christopher Bruner, *Re-Imagining Offshore Finance: Market-Dominant Small Jurisdictions in a Globalizing Financial World* (OUP 2016).

[38] There is arguably more consumer protection in HK with the adoption in 1995 of the Unconscionability Contracts Ordinance Cap 458. Although a Consumer Protection (Fair Trading) Act 2003 has now been enacted in Singapore, it does not encompass a general doctrine of unconscionability or misleading or deceptive conduct. Instead, specific instances of unfair practices are regulated. Although MAS requested that the government look at the issue of including financial services under that Act, this was rejected after a second round of public consultation. It was only in 2010, after the sub-prime mortgage crisis and the Lehman Minibond problem that financial services were finally brought under the ambit of the Act.

39 Congressional Record, 73 Cong, 1st Sess, 23 March 1933, pp 937, 954. In the US, initial feeling was to adopt an even stricter approach and this was reflected in the first Bill that went to Congress in March 1933. But President Roosevelt was attracted by Louis D Brandeis' philosophy which stressed the disclosure regime over the more paternalistic form of merit regulation (which in the US at that time was favoured by the third SEC Chairman and who followed Brandeis onto the Supreme Court, William Douglas). Indeed, this second philosophy attracted Huston Thompson, the former Federal Trade Commissioner, who was tasked with drafting the Securities Act, but President Roosevelt had by then embraced Brandeis' philosophy. A different drafting team had to be formed, which came up with a new draft incorporating the disclosure-based approach over one weekend: see Joel Seligman, *The Transformation of Wall Street: a history of the Securities and Exchange Commission and Modern Corporate Finance* (3rd edn, Aspen Publishers 2003) Ch 3.

formation.[40] In that vein, it can be argued that both HK and Singapore sees the raising of capital as useful in its own right and for the development of their financial markets, and perhaps less than the EU in terms of SME growth and job creation.

III SCOPE OF APPLICATION

Prospectus requirements

In Singapore SFA section 240 provides that no person shall make an offer of securities (which is defined as shares, debentures or units in business trusts) or securities-based derivatives contracts unless the offer is made in or accompanied by a prospectus (lodged with and registered by the MAS) that meets the 'reasonable investor' standard for disclosure set out in section 243. The prospectus will also have to include matters prescribed by the MAS (these disclosure checklists are found in the various Schedules accompanying the Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives) Regulations[41] (Offers Regulations)). Section 239(6) confirms that an offer includes an invitation to treat. In contrast, HK does not have a statutory reasonable investor standard in the SFO or CWUMPO but the HKEx listing rules contains it in a slightly weaker form.

The importance of prospectus disclosure in the context of the primary market (as opposed to the secondary market where information is already circulating about companies whose shares are already quoted, usually on a securities exchange, in which case they fall within the statutory continuous disclosure rules of section 203) was seen in the 19th Century as a reason for the reification of shares and debts as property.[42]. This is especially important in the context of instruments being sold that are inherently difficult in practice for members of the public to value. Unlike the sale of goods, or physical assets like real property, these intangible choses in action have a valuation that may not be directly related to the underlying assets which they have a call upon. Prospectus disclosure was thus thought vital.

However, there is perhaps too much information created today which is then itself liable to confuse

[40] Daniel Langevoort, *Selling Hope, Selling Risk* (OUP 2016) pp 16-17. While Singapore does not specify investor protection as one of its objectives of organized markets (SFA s 5), it is interesting that the new CEO of the UK Financial Conduct Authority said in July 2016 that it was time to put the phrase *caveat emptor* back on the agenda to counter what may be seen to be too much consumer protection: Andrew Bailey, Financial Conduct Authority 2016 annual public meeting (19 July 2016).

41 S 611/2005.

42 See, *eg*, *Twycross v Grant* (1887) 2 CPD 469, 483.

investors given information overload[43]. With the listing of risk factors in a prospectus sometimes running into what was probably the total length of the longest prospectuses in the early 1980s, including ‘banalities’,[44] the challenge for any disclosure-based regime, and its enforcement, is that crucial information does not get hidden away in plain sight.

Indeed, this was the driving force behind the introduction of the profile statement, which is ‘an extract from, or an abridged version of, a prospectus’,[45] in the SFA to encourage investors to read the disclosure documents accompanying an offer of securities before subscribing for them. Section 240(4) of the SFA allows issuers to distribute a profile statement instead of a full prospectus subject to certain conditions.

More recently, where simplifying disclosure is concerned, issuers have incrementally, since 2010, been required to use a product highlights sheet (PHS). The PHS is a much simpler summary short form disclosure document than a prospectus or profile statement.[46] As a profile statement is already an abridged version of the prospectus, the MAS does not require a PHS to be given to investors where a profile statement is distributed. However, for the purposes of statutory liability, the PHS does not attract prospectus liability under the SFA, although it is stipulated that it shall not contain any statement that is false or misleading in the form or context in which it is included. This would come under the general provision proscribing the making of false and misleading statements in the securities markets – section 199 SFA, which, however, requires the proof of loss and causation, and liability is not strict but fault based.

In HK, the equivalent provisions are again in the HKEx listing rules. Abridged prospectuses come under HKEx LR 11A.07 which states that the HKSFC’s powers under section 38B(2A)(b) of the CWUMPO to authorise in any particular case the form and manner of publication of any extract from or abridged version of a prospectus have been transferred to the HKEx in so far as they relate to shares or debentures which have been approved for listing on the Exchange. The abridged prospectus is not treated as a prospectus for liability but is an advertisement that is regulated by

[43] Tyro A Paredes, ‘Blinded by the Light: Information Overload and Its Consequences for Securities Regulation’ (2003) 81 Washington University Law Quarterly 417-418; Henry TC Hu, ‘Too Complex To Depict? Innovation, “Pure Information,” and the SEC Disclosure Paradigm’ (2012) 90 Texas Law Review 1601.

44 Simon C Y Wong, “A Call to Reform US Disclosure-based Regulation” (2010) 25 JIBFL 77, 78.

45 SFA s 240(4).

46 Monetary Authority of Singapore, *Guidelines on the Product Highlights Sheet* (SFA 13-G10, 21 October 2010; revised 8 October 2018). These have been formalised by s 240AA of the SFA, introduced by the Securities and Futures (Amendment) Act 2012 (Act 34 of 2012), which came into force in August 2016.

the SFO.[47] The general provisions there against false and misleading statements are found in sections 108 and 277. Again this shows that by and large there seems to be a more streamlined process in HK where approval is in practice by one institution, HKEx, even though prospectuses are formally subject to dual filing under the Securities and Futures (Stock Market Listing) Rules. This requires listing applicants and listed companies to also file applications and disclosure materials with the HKSFC, but this is via HKEx (HKSFC in turn provides its comments via the HKEx).

'Securities' and 'Offer to the Public'

The SFA introduced, among other things, new provisions, modelled largely on the Australian Corporations Law (now Corporations Act 2001), relating to prospectus and other requirements for offers of shares, debentures and units in business trusts. Collective investment schemes (which replaced the former prescribed or participatory 'interest' regime under section 113 of the Companies Act)[48] when offered for subscription or purchase must also be accompanied by a prospectus under section 296 of the SFA (with business trusts previously under section 282C). In some jurisdictions, these would all be considered forms of securities. In Singapore and Hong Kong, however, collective investment schemes are recognized as slightly different from plain vanilla securities like shares and debentures with more involved regulation. The difference is that in terms of interpretation, the HKSFC may still provide a wider meaning to collective investment schemes than MAS. In particular, the US case of *SEC v Howey* may be applicable there when it has been expressly said not to be in Singapore.[49] This has ramifications for the development of the initial

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[47] See HKSFC, *Guidelines on use of offer awareness and summary disclosure materials in offerings of shares and debentures under the Companies Ordinance* (March 2003).

48 The definition of a collective investment scheme has requirements that require delegation to a manager or pooling of monetary contribution and profits, and the sharing of profits in pecuniary form ('the profits or income from which payments are to be made to them are pooled' and 'profits, income, or other payments or returns' rather than 'profits, rent or interest' as was the case in the definition of 'interests' under s 107 of the Companies Act 1967. The long list of exclusions also relates to schemes that generate such financial returns. The Securities and Futures (Amendment) Act 2017 (Act 4 of 2017) amended the definition so that it is closer to the UK and HK definition in that it can have the characteristic of having contributions from and profits of investors pooled (which may not have been the case with some 'land banking' schemes), *or* the property managed by a manager for the investors (and not both as previously required under the SFA).

49 The SFC has said that all property funds are included and it is really only the sale of individual units without more that is outside the CIS definition. In 2013, the attempted Apex Horizon hotel room sale by Cheung Kong (Holdings) had to be withdrawn (with 360 buyers having their deposits refunded) as the SFC saw that as an unauthorized CIS given that the operator continued to allocate guests to the rooms: Enoch Yiu, Peggy Sito and Joyce Ng, 'Cheung Kong's sales of Apex Horizon hotel suites cancelled over investment breach', *South China*

coin offerings (ICO) market discussed in the last part.

The meaning of 'securities' in the SFO would also cover certain derivatives but there is a specific exemption for structured products in Hong Kong (section 38AA CWUMPO, which applies to the SFO by virtue of s 103(3)(a)). Singapore may exempt them elsewhere in the SFA even though prima facie the prospectus requirements cover both 'securities' and 'securities-based derivatives'[50]. The inclusion of the last term means that some cash-settled derivatives with underlying securities would need to be offered with a prospectus but MAS has said that appropriate exemptions would be provided where the instruments or the underlying are listed and where disclosure requirements already apply to them. Both countries have active derivatives markets with HK focusing on OTC equity-linked derivatives and Singapore exchange-traded futures contracts of financial indices.

Most importantly, the phrase 'offer to the public' of "securities is strictly no longer relevant in Singapore. This is because the Securities and Futures (Amendment) Act 2005 removed the concept of a public offer, as opposed to a private offer, and all offers of securities are *prima facie* subject to the prospectus requirements of the SFA unless the offer is an excluded or exempted one. As such, full discussion of the dividing line between private and public offers will not be attempted here,[51] although it should be borne in mind that many of the exclusions and exemptions discussed below are based on that philosophical divide. HK still recognises the distinction between private public offers in section 6 CO (for shares and debentures) and s 103 SFO (for other securities, structured products and collective investment schemes) although they also have detailed exclusions and exemptions not dissimilar to those in Singapore. It does appear, however, that it is still possible to argue that an offer of securities not falling within a specified exclusion or exemption is still a private offer in HK.

Exclusions and Exemptions: Crowdfunding

There are full exclusions from the prospectus requirements, while others may be seen as partial exemptions in that some alternative form of disclosure is still required and in some cases restrict how the excluded offer is advertised. The exclusions or exemptions in Singapore will be contrasted with those in HK in relation to shares and debentures which are largely applied to securities more broadly by SFO s 103(2)(ga) (in brackets and similar unless stated otherwise). These are:

Morning Post (HK 13 May 2013). MAS has acknowledged that digital tokens could be CISs in its update to the *Guide to Digital Offerings* in November 2018 but has also said that the *SEC v Howey* test does not apply in Singapore.

[50] Introduced by the Securities and Futures (Amendment) Act 2017. Contrast US 'security-based swaps' introduced in August 2023 through a new regulation 9j-1.

51 See further Hans Tjio, Wan Wai Yee and Yee Kwok Hon, *Principles and Practice of Securities Regulation* (3rd edn, LexisNexis 2017) Ch 6.

(a) an issue or transfer of securities or securities-based derivatives contract for no consideration[52] (HK 17th Schedule Part 1 section 7 CWUMPO (hereinafter 'HK Clause 7'))

(b) a small personal offer where the total amount raised from such offers within a 12-month period does not exceed $5m or such amounts as may be prescribed by the MAS[53] (HK Clause 3 - HKD$5 million without the 'personal offer' requirement which MAS relaxed somewhat to promote crowdfunding);

(c) a private placement to no more than 50 persons within any period of 12 months and under certain conditions[54] (HK Clause 2);

(d) an underwriting agreement relating to securities or securities-based derivatives contract[55] (HK Clause 5);

(e) a rights issue of an entity that is not listed for quotation on an approved exchange or which is not formed or constituted in Singapore, which does not have a primary listing on an approved exchange in Singapore[56] (HK does not have a specific jurisdictional provision like this but Clause 1(b) states that references in the safe harbours to an offer do not include the offer to the extent that it is made to persons who are outside Hong Kong);

(f) a compromise or scheme of arrangement in a winding up or a takeover scheme[57] (HK Clause 6);

(g) an offer to qualifying persons like employees of the corporation or its related corporations under the specified conditions[58] (HK Clause 8);

(h) an offer to institutional investors like financial institutions[59] (HK Clause 1);

(i) an offer to sophisticated/accredited investors with net worth of $2 million, half of which

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52 Securities and Futures Act s 272.

53 Securities and Futures Act s 272A.

54 Securities and Futures Act s 272B.

55 Securities and Futures Act s 273(1)(*cc*).

56 Securities and Futures Act s 273(1)(*cd*). An 'approved exchange is one that is approved by the Monetary Authority of Singapore.

57 Securities and Futures Act ss 273(1)(*a*) to 273(1)(*cb*).

58 Securities and Futures Act ss 273(1)(*f*): Corporation $10m (Spore), HK$40m.

59 Securities and Futures Act s 274. 'Institutional investors' are defined in s 4A(*c*) of the SFA. The institution to which the securities are issued is restricted from dealing with them for a certain period: see SFA s 276.

must be in financial assets, or in tranche sizes of at least $200,000[60] (HK Clause 1 and also Clause 4 (HK$8 million portfolio or investment tranches HK$500,000);

(j) an offer of certain securities of an entity whose shares already listed for quotation, whether by means of a rights issue or otherwise.[61] An offer information statement in the form prescribed in the Sixteenth Schedule of the Offers of Investment (Securities and Securities-based Derivatives) Regulations has to be lodged with the MAS. This statement is treated as a prospectus for the purposes of liability under sections 253 and 254 of the SFA (though not for other sections) (HK CWUMPO s 38(5) dispenses with the need for a prospectus for all rights issues and offers of a class of already listed securities. An abridged prospectus is required but this is not considered a prospectus under HKEx Rules but an advertisement specified under the CWUMPO or regulated by the SFO);

(k) an offer of international debentures.[62] The debentures must be issued by a corporation incorporated outside Singapore whose shares are listed on a recognised stock exchange. The debentures must be denominated in foreign currency with a face value equivalent to US$5,000 or its equivalent in another currency (HK does not have this specific exemption or the next one which focus on developing the bond market and does not implicate the public/private offer divide that are the focus of HK's exceptions);

(l) an offer of debentures by the government or an international financial institution of which Singapore is a member[63];

In addition, the use of section 274/275 to institutional and sophisticated investors carries with it the additional conditions under section 276 that, in effect, restrict subsequent offers and resales of the securities, by these financial or institutional investors or accredited investors within the first 6 months. There are also particular advertising restrictions that need to be observed and these have been said to be more generally more stringent in Singapore than in HK.[64]

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60 Securities and Futures Act s 275. Such investors ('relevant persons') are defined in s 275(2). There is a restriction on dealing with the securities after issue: see s 276 of the SFA. With the coming into force of the Amendment Act 2017, all such persons must 'opt in' before they will be considered an 'accredited investor' whereas prior to this they were automatically so. This was the position in HK which Singapore adopted, see Hong Kong Securities and Futures Commission's *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* Chpt 15.

61 Securities and Futures Act section 277 read with s 273(1)(*ce*).

62 Securities and Futures Act s 278.

63 Securities and Futures Act s 279.

64 Alexander Loke, 'The Surprising Liberality of Securities Crowdfunding Regulation in Hong Kong' [2020] Sing JLS 242, 252.

Given these exceptions, both Singapore and HK did not feel it was necessary to construct any specific crowdfunding exceptions, unlike, eg, with the US JOBS Act. In reality, those asking for more exceptions were platforms that acted as intermediaries between the investors and the SMEs (whose fundraising would have fallen within the exceptions.)[65] Hence, crowdfunding has simply changed the middlemen from underwriters and issue managers to platforms often set up by financiers. These platforms are required to be licensed by the MAS as holders of capital markets services licences (not exchanges) and are expected to perform various duties, including conducting due diligence on issuers, instituting policies to handle issuer defaults, and complying with advertising rules.[66] More platform regulation is being explored given the fees they charge, the leverage they provide, the possibilities of market abuse, the creation of derivatives and the safety of the custodial functions they provide.[67] It would appear, however, that at least initially, Singapore had the greater 'keenness to foster the growth in the market for financial intermediation by a number of incremental yet significant changes; this, while firmly maintaining the gatekeeping strategy'.[68] Hong Kong's exceptions, even though they had lower thresholds, did not channel the use of platforms and intermediaries in the same way and SME issuers were free to raise funds themselves given that there are fewer advertising restrictions on them. In particular, section 103(2)(ga) SFO provides that any invitation to the public that is related to an offer within the safe harbours of Schedule 17 to the CWUMPO is exempted from the prohibition on unauthorised investment advertisements.

IV MISLEADING PROSPECTUS

To facilitate disclosure, section 243 of the SFA requires that the prospectus 'contain all the information that investors and their professional advisers would reasonably require to make an informed assessment' of the following matters:

(*a*) the rights and liabilities attaching to the securities or securities-based derivatives contract;

(*b*) the assets and liabilities, profits and losses, financial position and performance, and prospects of the issuer that is to issue or has issued the securities or securities-based derivatives contract;

(*c*) if the person making the offer or invitation is one who controls the entity's underlying the

65 Loke, *ibid*, 253.

66 Monetary Authority of Singapore, *Controls and Disclosures to Be Implemented by Licensed Securities-Based Crowdfunding Operators* (Circular No CMI 27/2018). For the first crowdfunder to be imprisoned for not obtaining a capital markets services licence under SFA s 82, see *Public Prosecutor v Nancy Tan Mee Khim* [2020] SGDC 230.

67 *MAS Publishes Investor Protection Measures for Digital Payment Token Services* (July 2023).

68 Loke, *supra* n 64, 258.

offer or invitation, the assets and liabilities, profits and losses, financial position or performance, and prospects of that entity; and

(*d*) in the case of units or options over shares or debentures, the capacity of the person making the offer or invitation to issue or deliver the relevant shares or debentures.

Consistent with the practice in the UK and Hong Kong, the 'reasonable investor' test is supplemented by detailed checklists that have been promulgated under the SFA Regulations. The equivalent 'reasonable investor' standard in Hong Kong is not, however, statutory but found in HKEx Listing Rules 11.07 although the checklist is in the Third Schedule of the CWUMPO. As such there may be more flexibility in HK.

It is debatable whether a degree of merit regulation remains in the offering process. The equivalent Australian provision to section 243 was applied in *Exeter Group Ltd v Australian Securities Commission*[69] (*Exeter*). Although the reasonable investor test is not supplemented by checklists in Australia, *Exeter* was interesting because that was a case in which full disclosure was made regarding the absence of any detailed plans on the part of the management of the investment fund which sought to raise funds from the public as to the types of companies it would invest in. There was thus nothing misleading in, or omitted from, the prospectus. Despite this, the now Australian Securities & Investments Commission refused registration on the basis that a higher, not lower, standard of disclosure applied where a prospectus was targeted at small or retail investors.[70]

In deciding what constitutes information which 'investors and their professional advisers would reasonably require to make an informed assessment' of the securities being offered, section 243(4) of the SFA provides that regard shall be had to:

(*a*) the nature of the securities or securities-based derivatives contract and the nature of the entity concerned;

(*b*) the matters that likely investors may reasonably be expected to know; and

(*c*) the fact that certain matters may reasonably be expected to be known to the professional advisers of such investors.

In *Exeter,* the court refused to accept the plaintiff's argument that retail investors would be expected to consult advisers so that section 243(4)(*c*) of the Act reduced the amount of disclosure required, particularly as the investments were offered in A$2000 tranches. The disclosure must be

69 [1998] 16 ACLC 1382. It is unlikely that the common law imposed a duty to disclose; although some cases supported the position that if anything is said it cannot be misleading: *New Brunswick and Canada Railway and Land Co v Muggeridge* (1860) 1 DR & SM 363. There were also judicial statements that refer to the duty of 'utmost candour and honesty' on the part of promoters who invite members of the public to invest in a company: *Central Railway of Venezuala v Kisch* (1867) LR 2 HL 99, 113 *per* Lord Chelmsford. This could be seen as the 'Golden Rule' that did not create a firm foothold: Editorial note, "*R v Kylsant*: A New Golden Rule for Prospectuses" (1932) 45 Harv L Rev 1078.

70 See also *Fraser v NRMA Holdings Ltd* (1995) 15 ACSR 590.

for both retail and sophisticated investors.[71] It cannot therefore be assumed that advice would be given to the investors in an offering, and the information that is disclosed must have a sufficient degree of content and detail, particularly concerning the business plans of the issuer and what it intends to do with the funds that are raised from the public. The problems caused by the facts in *Exeter* are less likely to arise in Singapore and Hong Kong given the detailed checklists required there. The absence of any inadequate disclosure cases brought against issuers of debentures (using a base prospectus under a SFA section 240A debenture issuance programme) during the Lehman Minibond saga in Singapore 2007–2009 also suggest that it is enough to warn investors of the risks involved in an offering, even if those risks are not clearly specified. The position in HK was not dissimilar as the settlements overseen by the HK authorities were not based on inadequate prospectus disclosure but the lack of suitability of the investment products recommended,[72] as was the case in Singapore (although the compensation levels in HK were generally higher).

Today, Special Acquisition Purpose Vehicles (SPACs) are structured in precisely the way that caused problems in *Exeter*, as funds are raised from public investors in order to invest in target companies that have not yet been identified (but will be within 2 to 3 years)[73]. Although there are increasing criticisms of SPACs in the US,[74] the 'reasonable investor' standard has been able to accommodate SPACs in both Singapore and Hong Kong. This because industry norms, relevance and reliability of information guide the courts in determining what the reasonable investor and their professional advisers expect to be disclosed, and this changes over time.[75] Section 243(2) of the SFA provides that the prospectus should contain information:

(*a*) only to the extent to which it is reasonable for investors and their professional advisers to expect to find in the prospectus; and

(*b*) only to the extent that a person whose knowledge is relevant: (i)actually knows the

71 See also, in the US, *Feit v Leasco Data Processing Equipment Corp* 332 F Supp 544 (EDNY, 1971).

72 In particular, it was stated that 'the SFC also took into account the Constellation Notes were a sound product likely to have been suitable for customers with a higher tolerance of risk and with the necessary experience and knowledge of trading in derivatives': SFC, HKMA and DBS Bank (Hong Kong) reach agreement on Lehman Brothers - related Constellation Notes <https://www.hkma.gov.hk/eng/news-and-media/press-releases/2010/07/20100714-4/> accessed 14 September 2023.

73 Umakanth Varottil, 'Special purpose acquisition companies: A discordant tale of two Asian financial centres' (2023) 18(2) Capital Markets Law Journal 202, Walter Wan, 'SPAC Regulation in Singapore and Hong Kong: Designing a Regulatory Framework for New SPAC Markets' (2023) Sing JLS 113.

74 Michael D Klausner, Michael Ohlrogge and Emily Ruan, 'A Sober Look at SPACs' (2022) 39:1 Yale Journal on Regulation 228; Connor Haaland, 'SPACs: A Post-Mortem and a Path Forward' (2023) Harvard Journal on Legislation (forthcoming).

75 *Pancontinental Mining v Goldfields Ltd* (1995) 16 ACSR 463.

information; or (ii) in the circumstances ought reasonably to have obtained the information by making enquiries.

This sets the boundaries on the amount of disclosure required as reasonableness also acts as a constraint on what investors and their advisers can expect.[76] *Pancontinental Mining v Goldfields Ltd*[77] ('*Pancontinental*') is instructive in this respect. Although that case involved a takeover and the sufficiency of disclosure in the offer documents relevant to a takeover, the reasonable investor standard of disclosure was expressed in a similar fashion to that applicable to prospectuses under section 710 of the Australian Corporations Act 2001. This is also the position in Singapore given that General Principle 10 and rule 8.2 of the Singapore Code on Take-overs and Mergers states that the standard of care expected in any document or advertisement addressed to the shareholders is similar to that of a prospectus. It is the same in HK under the Code on Takeovers and Mergers and Share Buy-backs General Principle 5 and Rule 9.1. While it is true that in a usual takeover these shareholders would usually only require information about the offer price, there are securities exchange offers where they are asked to exchange their shares in the target for shares in the bidder or offeror (and these are in turn excluded from full prospectus requirements as there is Code disclosure). It is also increasingly the case that bidders are expected to disclose their financing sources and what they intend to do with the target company if they were to succeed in the takeover.

In *Pancontinental*, the relevant information concerned the post-acquisition prospects of the offeror. It was held that the offeree shareholders were entitled to have business forecasts clearly set out, as these were 'of real and material assistance to show offerees what they may receive'[78] and that such forecasts were the norm in that particular segment of the economy. *Pancontinental* was in turn referred to in *Fraser v NRMA Holdings Ltd*[79] where it was said that investors were entitled to have the relevant information presented clearly, and not to have the information scattered throughout an offer document. In contrast, in *Solomon Pacific Resources NL v Acacia Resources Ltd*,[80] it was

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76 See the *Explanatory Memorandum to the Corporate Law Economic Reform Programme Bill* 1998 para 8.5, discussing the Australian equivalent of SFA s 243(2)(*a*). This is consistent the need for reasonable reliance for common law fraud and s 90A of the Financial Services and Markets Act: *Davies Review of Issuer Liability* (March 2007) para 54.

77 (1995) 16 ACSR 463. See also *Wesfi Ltd v Blend Investments Pty Ltd* (1999) 31 ACSR 69 at 72. Harold A J Ford, Robert P Austin & Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Australia, 15th Ed, 2013) para 22.330, however, argues that it 'may be that *Pancontinental* should be confined to its special facts, and not seen as authority for any general disclosure requirement', relying on the more recent case of *GIO Australian Holdings Ltd v AMP Insurance Investment Holdings Pty Ltd* (1998) 29 ACSR 582 for the proposition that a forecast should be given only where there is a reasonable basis to do so.

78 *Pancontinental Mining v Goldfields Ltd* (1995) 16 ACSR 463, 471.
79 (1995) 15 ACSR 590.

80 (1996) 19 ACSR 238.

thought that forecasts were inherently unstable. The latter position reflects the fact that what has to be disclosed can be industry and context specific.

In terms of forward looking statements like profit forecasts, there are no special rules in Singapore or Hong Kong, unlike, eg, the US Private Securities Litigation Reform Act 1995 safe harbour.[81] The practice in Singapore for equity IPOs was that it was very rare for profit forecasts to be included, and even under the Take-over Code it is stated that such information should be introduced only with greatest circumspection.[82] In particular, what was identified as the main reason why profit forecasts were seldom provided by issuers in their offering documents[83] is the first requirement in the SF Guidelines on Disclosure of Financial Information in Prospectuses which states that 'where a profit forecast is included in the prospectus, an expert must be engaged to provide an opinion on the reasonableness of the assumptions underlying a profit forecast or estimate; and there has to be disclosure of the scope of engagement and work by the expert.'[84] The forecast created potential liability for the issuer and offer manager, but also for the expert, who, under section 249, would have been required to give its written consent to the issue of the prospectus containing its statement or expert opinion (see next section).

Separately, the fact that there is this link between what has to be disclosed and the reasonable investor could also help remove problems seen, eg, in the Netherlands with establishing causation in the primary markets.[85] It is about reasonableness on the part of a notional plaintiff and its expectations rather than how it is usually understood in terms of the standard of care expected of a defendant. This ties in with the 'truth-in-the-market' doctrine that exists in the US which may require a misstatement to be seen in the context of what is already known in the market and so

[81] See eg Marc I Steinberg, Wendy Gerwick Couture, Michael J Kaufman, Daniel J Morrisey, *Securities Litigation Law Policy, and Practice* (2nd edn, Carolina Academic Press 2021) 244.

[82] Singapore Code on Take-overs and Mergers r 25, UK City Code on Takeovers and Mergers r 28. For a discussion of the latter, see Tunde Ogowewo, 'Profit Forecasts and the City Code' (2003) 24 The Company Lawyer 11. As to what constitutes a profit forecast in an offer document, see r 25.6.

[83] Serena Ng, 'Doing without experts' *Business Times* (Singapore, 13 December 2003) where it was stated that in the 60 odd initial public offerings from mid-2002 to end-2003, only 10% of the issuers provided profit forecasts for the remainder of the fiscal year at the time of offer.

[84] Paragraph 20 of the Securities and Futures Guidelines on Disclosure of Financial Information in Prospectuses (last revised 8 October 2018) provides that the expert's statement (which should be found in the subsection in the prospectus on 'Trend Information and Profit Forecast or Profit Estimate') should say that the profit forecast has been stated by the directors or equivalent persons of the entity after due and careful consideration, and that no matter has come to his attention which gives him reason to believe that the assumptions do not provide reasonable grounds for the profit forecast.

[85] Arnoud Pijls, 'Prospectus Liability and Causation' (2023) Journal of European Tort Law (forthcoming) <https://ssrn.com/abstract=4561443> accessed 30 September 2023.

may affect the scope of any required reliance or materiality standard.[86]

It is not clear, however, how the reasonable investor standard would tie in with the requirements for sustainability disclosures in a prospectus. It has been discussed above how that standard is industry and time specific, and separately argued how only firms that represent themselves as adopting ESG concerns may create real duties of compliance.[87] With prospectuses, it is only ESG funds (collective investment schemes) that have certain prescribed requirements of disclosure in Singapore.[88] For other publicly listed companies only on the secondary market, the SGX has required an annual sustainability report on a 'comply or explain' basis since 2017, with climate reporting from 2022. In FY 2023, the latter became mandatory for issuers in the financial, energy, and agriculture, food and forest products industries. Those in the materials and buildings and transport industries must do so from FY 2024.[89] This may be used as guidance for what should be in a prospectus but even with secondary market disclosure they may not be fully actionable given that they are only in the listing rules (like the Code of Corporate Governance). HKEx's sustainable reporting guide for listed issuers came out in 2013 and it has striven to provide more comparability over time with international norms.[90] Where prospectus disclosure is concerned, however, it is also only with ESG funds that there are any formal requirements and in a recent update the SFC referred to the EU's Sustainable Finance Disclosure Regulation.[91]

V THE PARTIES WHO CAN BE SUED

Liability for misleading statements and omissions

The following persons in Singapore are statutorily criminally and civilly liable where there is a false or misleading statement or omission to state any information required in a prospectus, or a new circumstance has arisen since lodgment requiring further disclosure.

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[86] Steinberg *et al*, *supra* n 81, 248-9.

[87] Hans Tjio, 'Sustainable Directors' Duties and Reasonable Shareholders' EBOR (e-published 30 November 2023).

[88] MAS Circular No. CFC 02/2022, Disclosure and Reporting Guidelines for Retail ESG Funds (28 July 2022) Part C.

[89] SGX Practice Note 7.6 Sustainability Reporting Guide. See further Adrian Ang and Elsa Chen, 'ESG In Singapore: Trends And Developments' IFC Review (19 April 2023) <https://www.ifcreview.com/articles/2023/april/esg-in-singapore-trends-and-developments/> accessed 14 December 2023.

[90] Alexander Burdulia, 'Towards ESG Comparability In Hong Kong' IFC Review (19 April 2023) <https://www.ifcreview.com/articles/2023/april/towards-esg-comparability-in-hong-kong/> accessed 14 December 2023.

[91] SFC Circular to management companies of SFC-authorized unit trusts and mutual funds - ESG funds (29 June 2021).

(a) The person making the offer or invitation;
(b) If the offeror is an entity, the directors or equivalent persons of the entity;
(c) If the offeror is an entity, the persons who were named in the prospectus with their consent as proposed directors or equivalent persons;
(d) Where the issuer is controlled by the offeror, one or more related parties of the offeror;
(e) An issue manager to the offer of securities or securities-based derivatives contract named in the prospectus with his consent (note that for criminal liability this is only if the misstatement was made intentionally or recklessly);
(f) An underwriter (but not a sub-underwriter) named in the prospectus with his consent (note that for criminal liability this is only if the misstatement was made intentionally or recklessly);
(g) A person named in the prospectus with his consent as having made a statement that is included in the prospectus or on which a statement in the prospectus is based, but only in respect of the inclusion of that statement (note that for criminal liability this is only if the misstatement was made intentionally or recklessly);
(h) Any other person who made the false or misleading statement or omission but only in respect of the inclusion of the statement of the omission to state the information or circumstance (note that for criminal liability this is only if the misstatement was made intentionally or recklessly).

For this purpose, a prospectus includes a deemed prospectus under section 257 and the liability provisions specifically cover a profile statement, which is not otherwise a prospectus under section 239. This is also the case with the offer information statement under section 277 for offers of securities of an already listed entity, which is used for eg bond issues by companies already listed on the SGX. There is no statutory liability, however, attached to the more recently mandated summary disclosure document, the PHS or Product Highlights Sheet.

HK regulations only state that a director, a promoter or other person responsible for the prospectus will be liable (CWUMPO s 40). HKSFC has, however, taken the view that sponsors which in HK are like formal issue managers recognized by the exchange are subject to prospectus liability but this view has been criticized as the policy in HK is focused on the person preparing the prospectus (see definition of promoter) and the sponsor may not if it only has an economic interest. [92] This is unlike the position in Singapore where MAS has specifically said that prospectus liability covers both those involved in the preparation of the prospectus and those with economic interests. In HK CWUMPO s 41 also states that a prospectus includes a deemed prospectus although a summary disclosure document is not a prospectus but could be an advertisement if seen as an extract from or abridged version of a prospectus that needs authorization under s 38B.

VI THE PARTIES WHO CAN SUE

92 Syren Johnstone, Antonio M Da Roza and Nigel Davis, 'IPO Sponsors and Prospectus Liability: The Bridge Too Far?' (August 31, 2015). Asian Institute of International Financial Law (AIIFL) Working Paper No. 17 <https://ssrn.com/abstract=2803793> accessed 14 December 2003. See also Ernest Lim, 'Sponsors' Prospectus Liability in Initial Public Offerings in Hong Kong' (2013) 8 Capital Markets Law Journal 177.

Such a person would clearly include an investor that subscribes[93] or purchases[94] shares in a public offering. Representative actions against issuers by subscribing investors will not be hard to form given that every investor would be relying in the same way on the prospectus which has a 6 month lifespan. This is important as Order 15 Rule 12 of the *Singapore Rules of Court (ROC)* which is found in most Commonwealth countries requires everyone who is part of a representative action to have the 'same interest' in the claim. As most public offerings in Singapore and Hong Kong include a listing on the stock exchange, which rules heavily regulate the sale of founder shares in an IPO and there is a moratorium on sub-sales thereafter, the issue of whether a purchaser from an existing shareholder during an IPO is covered by the provision has not been tested. It would in any case certainly be covered by the general provisions on the making of false or misleading statements in the securities markets under s 199 SFA and s 108/277 SFO but those require proof of reliance and causation, and liability is not strict but fault based.[95] This makes any representative action hard to put together outside a situation where a prospectus has a short life span (eg, with some fund prospectuses). Where a club sold memberships over a 10-year period and would have made different agreements and representations to the potential members over that period, the Singapore High Court in *Koh Chong Chiah v Treasure Resort Pte Ltd*[96] held that the members did not have the 'same interest' needed to form a representative action. Both Singapore and HK have not created specific class action procedures removing the 'same interest' requirement, nor is there much relevant in the way of conditional fee arrangements nor third party litigation funding.[97]

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93 To subscribe includes taking securities, that were yet to be allotted, for cash with a liability to pay the nominal value: *Government Stock and Other Securities Investment Co v Christopher* [1956] 1 WLR 237, 242, or the taking of such securities in exchange for shares: *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609. See also *Akerhielm v De More* [1959] AC 789. It has been held that the subscription of shares is not a purchase of those shares: *In re VGM Holdings, Ltd* [1942] Ch 235.

94 'Purchase' in SFA s 243 may cover subsales by founder shareholders but CWUMPO s 40 only refers to 'subscribe'.

[95] Cf Low & Low, *supra* n 34, 511 who believe that in HK s 277 SFO only requires that the misstatement is 'likely' to induce a purchase or subscription of shares. 'Likely' has been seen to require 'probability' rather than 'possibility' but the greater difficulty with this provision, as interpreted by Singapore courts in the context of the equivalent SFA s 199 is that it requires some form of subjective recklessness on the part of the statement maker: see Tjio *et al*, *supra* n 51, 654-663.

[96] [2012] SGHC 239. In the UK, the 'same interest' requirement was recently implemented strictly in *Lloyd v Google LLC* [2021] UKSC 50. There, however, the Group Litigation Order was introduced in 2000 to make it slightly easier for class actions although that has not led to a large number of securities class actions.

[97] On 12 January 2022, the law in Singapore was amended to permit CFAs with an uplift and litigation funding in international and domestic arbitration proceedings, and certain proceedings in the Singapore International Commercial Court.

It is largely for these reasons that even though the statute provides a clear avenue for the investor to sue various specified persons mentioned in the previous section, there has been no private litigation with respect to prospectus liability. As was stated earlier, in both countries the enforcement is more public in nature. For prospectus liability, this is by way of a criminal prosecution by the state in Singapore as civil penalties are obtainable by the MAS only with secondary market abuse. In HK, the prosecutor can also bring criminal actions. However, there is also a Market Misconduct Tribunal set up in 2003 to hear cases by their regulators for civil penalties although initially there were few of such cases (4 in the first 5 years) compared to criminal prosecutions.[98] Things have changed with an average of about 4 reported cases a year in the past 5 years. This includes actions against issuers for misstatements in a prospectus. It does not appear as if any compensation can be awarded by the MMT. Instead, the SFC is empowered by s 213 SFO to apply for orders from the courts against a company or individual to restore investors to the position they were originally in before the transaction was entered into. This obviates the need for class actions in Hong Kong and was used in 2022 for prospectus misstatements by Tianhe Chemicals Group Ltd in parallel with a civil penalty action before the MMT.[99]

Even if no statutory liability attaches to a professional adviser, such as a lawyer or accountant, however, it may still have liabilities at common law for the legal or financial opinions which it issues to an issuer or underwriter as part of a due diligence exercise. This may not be easy to prove given that the standard of care is that of a reasonable professional and not one professing to have any special skills or ability.[100]

VII AVAILABLE REMEDIES

The potential civil liability faced is monetary compensation payable to any person who suffers loss or damage as a result of the false or misleading statement in or omission from the prospectus. One difficulty that has not been fully resolved with respect to investor actions at common law (or even under statute) is the case of *Houldsworth v. City of Glasgow Bank*[101]. This requires shareholders to rescind a share purchase before they can claim damages from the company which could be a

[98] The Hong Kong Securities and Futures Commission obtained 10 convictions with 7 sentences of imprisonment in 2008-9. In contrast, the Market Misconduct Tribunal, which was set up in 2003 to hear actions for civil fines, had only four completed cases in that time period (ie 5 years). It is now on average 4 a year.

[99] <https://www.deminor.com/en/news/prospectus-liability-hong-kong-market-misconduct-tribunal-sanctions-tianhe-chemicals-group-ltd> accessed 14 December 2023. A similar action was brought against China Forestry Holdings Company Limited in 2017.

100 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1. For a full discussion, see Tjio *et al*, *supra* n 51, Ch 6.

[101] (1880) 5 App Cas. 317.

bar to securities litigation. That position has been reversed by statute in the UK by section 111A of the Companies Act 1985 *(UK)*, which was inserted by the Companies Act 1989 *(UK)* (now section 655 of the Companies Act 2006 *(UK)*), and this was adopted in HK in 1997 (see CWUMPO s 40B). However, it is a rule which may still be applicable in Singapore, given that no such similar provision has been introduced into her Companies Act 1967. In Australia, it was held that the rule does not apply to both purchasers on the open market, and even perhaps subscribers for shares, who have statutory claims for deceptive and misleading conduct against a company that has breached its disclosure obligations.[102] This has been confirmed by changes in s 247E of Australia's Corporations Act 2001. Singapore has not made these changes. What helps though is that Chua Lee Ming J in *Song Jianbo v Sunmax Global Capital* [103] said that:

> The fact that the defendant was an unlimited company and the plaintiff therefore had a proportionate liability to contribute towards payment of the defendant's liabilities (if the assets were insufficient) was a factor that influenced the House of Lords' decision in *Houldsworth*.

Listed companies will not be of a partnership nature today and so *Houldsworth* should not be an issue in Singapore. Chua J, however, acknowledged, however, that the case before him did not involve the priority of these shareholder claims with respect to creditors in an insolvency. This is where s 121 of the Insolvency Restructuring and Dissolution Act only states that:

> (g) a sum due to any member in that member's character of a member by way of dividends, profits or otherwise is not a debt of the company payable to that member, in a case of competition between that member and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

Section 510(b) of the *US Bankruptcy Code* also subordinates claims of defrauded securities holders to those of other claimants against the company who have priority upon payment in bankruptcy that is greater than or equal to the priority of the underlying security held by the defrauded parties (except that defrauded common stockholders get equal priority to other common stockholders). And Australia, which removed the effect of *Houldsworth*, at the same time strengthened their

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[102] *Sons of Gwalia Ltd v. Margaretic* [2007] HCA 1. The claimants could be treated as creditors of the company and would rank equally with unsecured creditors for the amounts of their claims but this was seen as fatal to the Australian insolvency regime: see Andrew Bilski and Patrick Brown 'Sons of Gwalia versus shareholder subordination: Fairness versus efficiency' (2008) 26 C & SLJ 93. See also *Cadence Asset Management Pty Ltd v. Concept Stores Ltd* [2005] FCAFC 265. See further Elizabeth Boros, 'Shareholder litigation after Sons of Gwalia v Margaretic' (2008) 26 C & SLJ 235. The UK Treasury stated that it will monitor how the Australian Corporations and Markets Advisory Committee deals with the issue.

[103] [2021] SGHC 217 [82].

equivalent of s 121(1)(g) ie s 563A Corporations Act 2001 *(Aus)*, by widening it to subordinate 'any other claim that arises from buying, holding, selling or otherwise dealing in shares in the company' to other creditors. There was a fear that insolvency restructuring would not be possible without this clear subordination. As we have seen, HK has by statute reversed the first part of *Houldsworth* but may also have issues with priorities although that rule has increasingly been departed from in other parts of the Commonwealth.[104]

VIII FAULT

Unlike the case with secondary market liability, liability on the primary market is strict in Singapore. It is slightly different in HK where s 38 CWUMPO provides that a director or other person involved in the prospectus (though not the promoter expressly who may be subject to srict liability) would not be liable if (a) as regards any matter not disclosed, he proves that he was not cognisant thereof; or (b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part.

There are a number of defences available to the persons statutorily liable against liability for misstatements or omissions in a prospectus. In Singapore (HK in brackets), these include the circumstances where:

(a) the person had 'made all inquiries (if any) that were reasonable in the circumstances' and, 'after doing so, believed on reasonable grounds that the statement was not false or misleading, or that there was no omission'[105] (HK CWUMPO s 40(2)(d));

(b) the person has reasonably relied on information given to him by someone other than his employee or agent (if the person is an individual) or someone other than its director or equivalent person, employee or agent (if the person is an entity)[106] (HK CWUMPO s 40 has reasonable grounds for belief as a defence but not reasonable reliance although the former may encapsulate the latter);

(c) being a person named in the prospectus as a proposed director or underwriter, the maker of a statement included in the prospectus or the maker of a statement on the basis of which a statement is included in the prospectus, that person has publicly withdrawn his consent from being named in the prospectus in that way[107] (HK

[104] *In The Matter of HQP Corporation Ltd (in Official Liquidation) (FSD 190 of 2021 (DDJ)* (the Grand Court of the Cayman Islands, July 2023).

105 Securities and Futures Act ss 255(1) and 255(2).

106 Securities and Futures Act s 255(3).

107 Securities and Futures Act s 255(5).

CWUMPO s 40(2)(a));

(d) the person was unaware of a new circumstance that had arisen since the lodgment of the prospectus[108] (HK CWUMPO s 38(4) has a general 'honest mistake' defence);

Materiality is not an issue in Singapore with respect to civil liability. An additional defence against criminal liability is to demonstrate that the false or misleading statement, or omission, or new circumstance that is omitted from disclosure, is not materially *adverse* from the point of view of the investor.[109] In HK there is criminal liability only if the misstatement is not 'immaterial' under CWUMPO s 40A(1) although there is another defence for directors and persons involved in the preparation of the prospectus (though not promoters) in CWUMPO s 38(4)(c) if the non-compliance or contravention was immaterial and they ought reasonably to be excused from the contravention.

The defences set out in paragraphs (a) and (b) above constitute what can be called an informal or implicit due diligence defence, which may be utilised by persons like directors and underwriters. Such persons would otherwise be jointly liable regardless of their actual involvement in the preparation of a prospectus under sections 253 (criminal liability) and 254 (civil liability). These provisions taken together subject a person to liability only when it is not reasonable for that person to rely on another for the accuracy of matters outside his sphere of responsibility; and where he himself did not make reasonable inquiries of matters under or within his own purview. Again, it appears that what is considered the making of reasonable inquiries to establish the defence will be judged in the light of established best practices.[110] In Singapore, the Association of Banks of Singapore Listings Due Diligence Guidelines on how due diligence must be conducted for a company listing its shares became part of SGX's Mainboard listing rules on 10 January 2020. Similarly in HK, there is a HK Sponsors Due Diligence Guidelines (2020 Edition) for the purpose of promoting standards in the conduct of due diligence in respect of new Hong Kong listings of equity securities.

IX/X CAUSATION AND DAMAGES

Unlike the situation in the EU and US, the prospectus provisions in the securities regulations of HK and Singapore provide not just the regulatory framework but also detailed liability rules. As such, private law is unnecessary with respect to liability and there is no need to turn to implied

108 Securities and Futures Act s 255(6).

109 Securities and Futures Act s 253(3).

110 Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (8th edn, LexisNexis 2012) para 8.26.

rights of actions such as in the case of s 10(b) of the US Securities Exchange Act 1934 or state law in the EU. Issues like causation, reliance and remoteness are not seen as problems for compensatory claims under the statute.[111] However, the absence of facilitative class action procedures, contingency fees or third-party litigation funding has meant that there have been no cases brought by investors.

It is even less likely that private actions will be brought at common law. Even in the case of fraud, the most important requirement in claims which otherwise seems to have a directness test for damagers/loss is inducement and reasonable reliance[112]. The test for inducement requires that the claimant is 'within the class of persons within their contemplation as likely to be deceived'.[113] The plaintiff must have acted upon the false statement.[114] Although the misrepresentation does not have to be the sole reason for the investment it has to be operative and reliance is 'essential'.[115] Where fraud can be shown, the rules of causation are more favourable, and damages are awarded to fully compensate the person for all losses caused by the misrepresentation.[116] In such an action, the defence of contributory negligence probably cannot be raised.[117]

In contrast, there is a need to establish a duty of care for negligence liability. Since the landmark case of *Hedley Byrne v Heller & Partners*,[118] there has been tortious liability for negligent misstatements where it can be shown that a special relationship exists between the company, or its directors, and the investors relying on the prospectus. This has been superseded somewhat by

[111] Low & Low, *supra* n 34, 512 (referring to UK and Australian legislation from which HK ('on the faith of') and Singapore ('as a result of') have adopted their legislation.

[112] *Davies Review of Issuer Liability* (March 2007) para 54.

[113] *Standard Chartered Bank v Pakistan National Shipping Corporation No 2* [1998] 1 Lloyds Rep 684, 696 and in Singapore, *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435, [14](b).

[114] *Panatro ibid,* 14(c).

[115] Cunningham, *supra* n 35, 1-60. Similarly, leading US torts academics have argued for the central place of reliance in fraud: Goldberg *et al, supra* n 35.

[116] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; with *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 preferring the general test of directness rather than the old 'date of transaction' rule that was based on the difference between price paid and value of shares received at the date of transaction. In Singapore, see *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] SGHC 158.

[117] *Standard Chartered Bank v Pakistan National Shipping Corporation* [2001] QB 167; *cf Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560. In Singapore, see *Oversea-Chinese Banking Corporation Ltd v Asia Pacific Links Ltd & Anor* [2010] SGHC 301 at [242].

[118] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

section 2(1) of the Misrepresentation Act 1967. This has made the proof of negligence easier by requiring the representee to only prove that the statement was false, which then imposes the burden on the representor to prove that it had reasonable grounds to think that the statement was true. The additional advantage the statute brings is that it may utilize the fraudulent, rather than common law negligence, measure for damages.[119]

With prospectus disclosure, the duty may be owed to only those expected to subscribe for the shares or to purchase them from founder shareholders during the IPO, and not on the secondary market. In addition, damages are only recoverable for common law negligence when the loss suffered was foreseeable,[120] and contributory negligence may be a defence to such a claim. In the case of innocent misrepresentations, the only remedy available is rescission, which is available for all forms of misrepresentation, and is usually the more realistic remedy given the difficulties of proving that shares were not worth what the investor paid for them because of the misrepresentation. Under section 2(2) of the Misrepresentation Act 1967, a court may, however, grant damages in lieu of rescission for innocent and negligent misrepresentations. It is clear, however, that the measure of damages would be quite different from that under subsection (1).[121]

XI/XII LIMITATIONS OF LIABILITY

In *Hedley Byrne* itself the court found that disclaimer of liability there was sufficient to protect the defendants from misstatement liability. This is another reason why the statutory claim is to be preferred as there does not appear to be any way the issuer itself can avoid liability (the due diligence defence should be available to other parties but not the issuer itself as it is based on reasonable reliance).[122]

With respect to statutory criminal liability, it was held in *Auston International Group Ltd v Public*

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[119] *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, but this was doubted in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, especially by Lord Steyn at 283. See Alexander Loke, 'Adequate and just compensation for fraud-induced acquisition of shares' [1997] Sing JLS 318. In Singapore, see *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2014] SGCA 62.

[120] *The Wagon Mound (No 2)* [1967] 1 AC 617 (PC).

[121] *Halsbury's Laws of Singapore, Contract* (LexisNexis, 2016 Reissue) vol 7, para 80.213.

[122] In fact, for prospectus liability under §11 of the US Securities Act 1933, 15 USC §77a *et seq*, the company is strictly liable, while officers, directors and third-party intermediaries are only liable for negligence as they are provided with a due diligence defence. The quasi-due diligence defence in SFA s 255 is silent as to who cannot rely on it.

Prosecutor,[123] that in the closely held listed company there, the controllers were more culpable than the company itself in overstating its profits. Lee Seiu Kin J thought that the chief executive officer and chief financial officer were really at fault rather than the company, even though at common law it has been held that a company remains liable even where a prospectus had been prepared by professionals.[124] For such inaccurate disclosures, both the issuer and directors are clearly statutorily liable under sections 253 (criminal) and 254 (civil) of the SFA but the judge severely reduced the fine that had been imposed on the issuer on the basis that a deterrent sentence had no effect on the corporation, as opposed to the individuals managing it.[125]

In cases of misstatements at common law, the limitation period is usually 6 years from the time the cause of action accrued or 3 years from when the plaintiff discovers it has a right of action (although in cases of fraudulent statements it could be 6 years from discovery of the fraud). Under the statute, in Singapore, s 254(5) SFA provides that no action can be commenced after the expiration of 6 years from the date on which the case of action arose. In HK, the statutes are silent as to when civil proceedings may be brought but criminal proceedings under both the CWUMPO and SFO must be brought within 3 years of the commission of the offence. Arguably this also applies to the compensation order that the SFC can seek on behalf of investors under s 213 SFO.

XIII CLASS ACTIONS AND COLLECTIVE REDRESS

If class actions are to be facilitated in HK and Singapore, something being considered, both countries may need consider a shorter limitation period given that there will be law firms and litigation funders on the lookout for securities claims which logically then should not have such long limitation periods. China's is usually 2 years for civil suits generally starting from the day when the plaintiff knows or ought reasonably to know and the 2003 Third Circular applied this to securities litigation (as is the case also in Taiwan which has the alternative of 5 years from the trade). For the US rule 10b- 5 actions, it is the earlier of one year after discovery of the fraud, or three years after the fraud took place. There does not seem to be any special limitation period in Australia which is otherwise similar to the position in Singapore and HK, which may explain why they have had so many class actions. This has led the *Australian Parliamentary Joint Committee Report* in December 2020 to call for controls on third party litigation funding and also Federal

[123] [2007] SGHC 219.

[124] Ellis Ferran, *Principles of Corporate Finance Law* (Oxford University Press, 2008), 446, citing *Lynde v Anglo-Italian Hemp Co* [1896] 1 Ch 178 and *Mair v Rio Grande Rubber Estates* [1913] AC 853.

[125] *Auston International Group Ltd v Public Prosecutor* [2007] SGHC 219 [19]. See further *Australian Securities & Investments Commission v Chemeq* [2006] FCA 936; (2006) 58 ACSR 169, [98], discussed in Hans Tjio, "Enforcing Corporate Disclosure" [2009] Sing JLS 332, [18].

control of contingency fees (as opposed to conditional fee arrangements).

Class actions were recommended by the HK Law Reform Committee in 2009 and then in the May 2012 *HK Law Reform Commission Report on Class Actions* which suggested an incremental approach. They have not, however, been implemented in HK although there is discussion that they may introduce it for areas like consumer and competition law. But we have seen that it is not the procedures themselves that prevent securities class action litigation as there are representative procedures in both HK and Singapore that investors can use for prospectus misstatements as they satisfy the 'same interest' requirement (unlike with continuous disclosure which requires a 'fraud on the market' theory). The problem is with litigation funding. There are no conditional fee arrangements or third-party litigation funding[126] permitted in HK. In 2022, Singapore amended its laws to permit CFAs with an uplift, as well as third party litigation funding, only in international and domestic arbitration proceedings, and certain proceedings in the Singapore International Commercial Court.

XIV CONFLICT OF LAWS

Being 'market-dominant small jurisdictions' focussing on different aspects of finance, both HK and Singapore are well aware of the dangers of overextending the reach of their securities regulation. Even the US has been circumspect in that respect. Under *Morrison's* [127] 'transactional test', US securities laws such as the anti-fraud claim under section 10(b) would only allow purchasers of securities on a US exchange or in a US transaction standing to bring the claim there.

Where prospectus liability is concerned, any offers of securities out of Singapore and HK would not be regulated if they are focused mainly on foreign investors (see respectively MAS *Guide to Digital Token Offerings* and section 1(b) Part 4, Schedule 17, CWUMPO). It would appear therefore that the concern is less with where the issuer is or where the offer emanates from but where the investors are. This would be a modification of the effects doctrine applied by IOSCO in the context of the exercise of regulatory authority over Cross-border securities activities on the Internet which are: (1) whether the offeror of securities or services is located in a regulator's own jurisdiction; or (2) whether the offer of securities or services has a significant effect upon residents or markets in the regulator's jurisdiction.[128] Guidance is provided on (2) and that guidance is replicated in the Singapore SF (Offers of Investments) (Securities and Securities-based Derivatives

[126] It has been argued that there should be global cooperation on the ethics of third party litigation funding including some form of Model Code of Conduct: Victoria Sahani, "Governing Third-Party Funders" (5 November, 2021). <https://ssrn.com/abstract=3957742> accessed 14 December 2023.

[127] *Morrison v National Australia Bank* 130 S Ct 2869 (2010).

[128] IOSCO, *Report on Securities Activity on the Internet II, Report of the Technical Committee* (June 2001).

Contracts) Regulations, regulation 39.[129]

XV STRENGTHS AND WEAKNESS ANALYSIS

Regulatory Competition

We have seen that the equity markets in Singapore are much smaller than in Hong Kong due largely to the latter's Chinese hinterland. The fact that there are also large numbers of foreign companies that are listed on the Main Board of the SGX or its sponsor supervised listing platform Catalist (in April 2023, out of 645 listed companies, 69 were from China, and 155 were from other foreign countries) shows the importance of an SME hinterland which Singapore lacks. Where such listings are concerned, however, the SGX is competing with the valuations and liquidity of NASDAQ, Shanghai, Shenzhen and Hong Kong exchanges. Singapore's statutory regulators and exchange have had to innovate to stay relevant. Regulatory competition, however, means that the HKEx often moves in tandem with changes in Singapore and vice versa.

Further liberalization of the fundraising rules occurred in 2018 with first amendments to the Companies Act and then the SGX Listing Rules to permit dual class shares (DCS) with certain safeguards. After some resistance, HK also now permit DCSs subject to a minimum paid up capitalization of $500 million but like Singapore non-voting shares (as opposed to shares with multiple votes) are still not permitted. However, with the decline in the stock prices of soft tech even in the US, DCS structures may have fallen out of favour as they entrench tech founders and may be seen to destroy shareholder value.[130]

The same could be said of SPAC's poor performance[131], although SGX adopted rules permitting these in September 2021, and HK followed suit in January 2022. There were 3 SPACs listed in Singapore in 2022 (the first of which identified its business target in October 2023 compared to

[129] A similar provision in the context of collective investment schemes is found in the Securities and Futures (Offers of Investments) (Collective Investment Schemes) reg 38.

130 Chris Bryant, 'Giving Mark Zuckerberg Unquestioned Power Was Asking for Trouble' *Bloomberg* (1 November 2022). See further Jill E Fisch and Steven Davidoff Solomon, 'Dual Class Stock' in the Oxford Handbook of Corporate Law and Governance (forthcoming) <https://ssrn.com/abstract=4436331> .In contrast, it has been argued that having too many safeguards has hampered the use of DCS structures in HK and Singapore: Min Yan, 'The myth of dual class shares: lessons from Asia's financial centres' (2021) 21 JCLS 397.

131 See discussion at *supra* n 74.

HK's first De-SPAC transaction in September 2023[132]). SPACs helped raise US$0.4 billion in Singapore's equity markets in 2022, which was still a very small sum (compared to HK's US$13.7 billion) as investors may have moved into competing investments like digital assets.

Both countries also still rely on the public enforcement of securities regulation with much less private enforcement. This is due to the relative absence of class action litigation procedures and limited contingency fee arrangements or third-party litigation funding. As such, they have not had to confront issues in private litigation linked to IPOs like the tracing requirement and causation.[133]

Digital Assets

Blockchain technology can and has allowed issuers to avoid prospectus requirements altogether to reach investors directly and to provide additional sources of funding for small and medium enterprises. Such fundraising activities now commonly take the form of ICOs, which involve the sale of digital tokens that may be classified as payment, utility and asset tokens.[134] Payment tokens are essentially cryptocurrencies and come under the Payment Services Act 2019 where the concern is with AML rules. Utility tokens grant purchasers digital access to goods and services, while asset tokens confer participatory rights in the issuers' underlying business and assets, and hence are analogous to equity, debt and other security assets. The proliferation of ICOs in recent years has sparked concerns about how they should be regulated as many are hybrids.

Singapore has seen a hive of ICO activities since its emergence as a novel form of fundraising. Out of the worldwide 211 ICOs in 2017, 20% of that took place in Singapore according to the Association of Cryptocurrency Enterprises and Startups (Singapore), making Singapore the third largest ICO jurisdiction in the world.[135] At that time, however, the issuance of most tokens was largely unregulated as tokens were thought to be like bearer coins, where the focus was not on the underlying asset they represented. This perception suited token issuers, who wanted to avoid prospectus disclosure.

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[132] Stanley Yupu Li, 'Inside Hong Kong's first-ever de-SPAC transaction" International Financial Law Review (2 October 2023). See further, Henry TC Hu, 'Decoupling and Motivation: Re-Calibrating Standards of Fiduciary Review, Rethinking "Disinterested" Shareholder Decisions, and Deconstructing "De-SPACS"' (2023) 78:4 The Business Lawyer 999.

[133] Contrast the position in the US: Marc Steinberg, 'U.S. Prospectus Liability — An Overview and Critique' (2023). Journal of European Tort Law (forthcoming).

134 Swiss Financial Market Supervisory Authority, FINMA, *Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs)* (16 February 2018).

135 Shiwen Yap, 'Singapore Emerges as Third Largest Global ICO Hub' *Deal Street Asia* (27 November 2017).

In November 2017, however, MAS issued *A Guide to Digital Token Offerings*[136]. This stated that 'digital tokens that constitute capital markets products' had to comply with the offering requirements of the Securities and Futures Act, including the need to prepare a prospectus. Offerors could avail themselves of the exclusions and exemptions in the Act, the most important of which were offers to accredited investors and the $5m small offer exception (which we have seen has existed since 2002 and why MAS felt there was no need for further 'crowdfunding' exceptions that issuers lobbied for before ICOs became more fashionable).

The *Guide to Digital Token Offerings* makes clear that utility tokens do not amount to capital market products as they do not generally bear the substantive traits of a share, debenture, a unit in a business trust, a securities-based derivative contract, or a unit in a collective investment scheme (CIS). However, both utility and asset (or security) tokens are potentially tradable on blockchain-settled systems. It has therefore been argued that regulation is needed to turn these technology assets into stronger proprietary assets where the focus is not on the notional token but the underlying dematerialised asset that it represents.[137]

Digital assets could also come under the CIS definition[138] where the effect or purpose of the scheme is to obtain economic benefits, particularly since the current definition (which was amended in 2018 to be the same as HK's) has reduced the need for the collective nature of the scheme, making the pooling requirement an alternative rather than a concurrent requirement.[139] MAS acknowledged this in its update to the *Guide to Digital Token Offerings* in November 2018, but also said that the *SEC v W J Howey Co*[140] test (which was not mentioned in the initial Guide) used in the US does not apply in Singapore. Perhaps this was because US securities as an 'investment contract'[141] can be interpreted more widely than a CIS, and so most digital assets in

136 Monetary Authority of Singapore, *A Guide to Digital Token Offerings* (last updated 26 May 2020).

137 Hans Tjio and Hu Ying, 'Collective Investment: Land, Crypto and Coin Schemes—Regulatory "Property"' (2020) 21 *European Business Organization Law Review* 171.

138 Securities and Futures Act s 2.

139 Under SFA s 2, the definition of a 'collective investment scheme' states that it is an arrangement where, *inter alia*, (a) the property is managed as a whole by or on behalf of a manager; or (b) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled.

140 328 US 293 (1946). This was applied to the analysis of digital assets by the SEC Statement, Framework for 'Investment Contract' Analysis of Digital Assets (2019) <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> accessed 14 December 2023.

141 SEC Statement *ibid*. The focus there is more on the expectation of benefit as opposed to actual benefit: see Adrian McCullagh and John Flood, 'Treasury Consultation Paper on ICOs in Australia, The Technology, The Market, and The Regulation of ICOs' (February 2019) paras 39–43. In Singapore, the 'collective investment scheme'

the US are seen as securities when this may not be the case in Singapore. In April 2019[142], the SEC said that one important test is the developmental stage at which the underlying business was at. This makes sense since any digital assets sold prior to actual formation of a business would just be a *spes* or hope, whereas one sold to provide interests in goods or services of an existing business could be characterised as a utility token. In Singapore, however, digital assets would only be seen as securities if they have characteristics of a voting share or a unit trust where the underlying assets of the trust are themselves securities or real estate.[143]

Much of this depends on the approach taken by regulators and the amount of deference given to them by the courts. We have seen that in HK the regulators took a stricter interpretation of a CIS that is otherwise similar to that in Singapore and this also likely influenced their more restrictive approach to digital assets in general from 2021-23.[144] Initially, however, in September 2017, the HKSFC approach was similar to Singapore's in that these digital tokens would be seen as securities only if they were in the nature of equity, debt, or a CIS, and they were more usually seen as 'virtual commodities'.[145] As in Singapore the concern was less with primary market disclosure than with the AML concerns. But things did not take off the way they did in Singapore, possibly because so much capital formation continued to be seen in the HK equity markets. Also, the regulators did not follow up on promoting platforms the way it has been said was the case in Singapore and platforms may be foundational to the creation and trading of digital assets. Most recently, however, possibly due to regulatory competition, they have gone back again to promoting the use of digital assets[146]. This may be because the most recent IPO figures suggest that only US5.3 billion was raised in Hong Kong in 2023, which was the lowest amount in more than 20 years.[147]

It may be that both Singapore and Hong Kong have taken the view that the last war in securities regulation was to prevent avoidance of prospectus disclosure by having a broad classification of securities, and there is no point fighting that. This is especially given the small sizes of their

definition in the Securities and Futures Act s 2 requires the scheme to have the effect or purpose of returning economic benefit which excludes things like timeshares.

142 SEC Statement *ibid*.

143 Grace Leong, 'MAS Warns Coin Offering Issuer Over Securities Act Breach' *The Straits Times* (Singapore, 25 January 2019).

144 'Hong Kong regulator warns investors against digital tokens and ICOs' *Forkast* (31 August 2021).

145 In November 2017, the Secretary for Financial Services and the Treasury issued a press release which confirmed that digital tokens should usually be considered as virtual commodities rather than currencies.

146 'Hong Kong Is Courting Crypto. What's Behind the Switch' *Barron's* (barrons.com) (11 April, 2023).

147 Kate Wiggins and Hudson Lockett, 'JPMorgan star faded away at Hong Kong stock exchange' *Financial Times* (London, 29 December 2023).

respective jurisdictions and their difficulties enforcing prospectus requirements on online issuers. While tokens may or may not be securities, however, it may be that they should all be treated as investment or financial products that should fall within a more comprehensive secondary market framework to govern the exchange, clearing, trading, lending, custodial, financing, and derivative aspects of platforms. This was certainly what Singapore may have been trying to do with some of their prospectus exclusions channelling the use of platforms and recent proposals on further ways to regulate them due to failures in Singapore of crypto platforms and funds.[148] The goal is to regulate not just the AML aspects, but also the borrowing and lending of digital assets, the creation of derivatives based on them, the custodial safeguarding of them, and eventually also preventing market abuse and unfair trading practices. Hong Kong is not far behind in this respect. It remains to be seen whether there are systemic risks in this approach and if the costs outweigh the benefits. While platforms have failed, there is a great deal of restructuring work required given their multi-lateral nature and multi-layered complexity. This could be a form of Keynesian job-creation for legal and accounting professionals.[149] At the same time, however, their unregulated nature may have given them an advantage over regulated exchanges which may have impacted the SGX more adversely than the HKEx.

Finance versus Industry

We have seen that HK's prospectus provisions still largely repose in company legislation and the actual registration process is managed more by the HKEx than the HKSFC. This may make HK's equity markets slightly more responsive to market needs when compared to Singapore. Still, Singapore's statutory and exchange regulators are market driven given the competition they face from other financial jurisdictions and so the rules in the two countries are more similar than dissimilar and we have seen convergence in areas such as the development of wholesale debt, derivatives, DCS, SPACS and more recently digital assets. Any minor differences in rules and regulations in Singapore and Hong Kong are dwarfed by the rich hinterland of China as shown by the large disparity in equity markets in both countries. The law matters thesis in relation to stock market development has also recently been questioned in relation to the UK stock market.[150]

Relative to most European countries, however, both Singapore and Hong Kong are city-states and

[148] See *supra* n 67.

[149] As opposed to reducing unemployment of blue-collar workers through digging holes and refilling them: John M Keynes, *The General Theory of Employment, Interest and Money* (1936) 129.

[150] Brian R Cheffins and Bobby V Reddy, 'Law and Stock Market Development in the UK over Time: An Uneasy Match' (2023) 43:4 OJLS 725.

also 'market-dominant small jurisdictions' (Brunner[151] points out that Singapore focuses on wealth management and HK financing China). They are driven more by financial sector growth *per se* (which does not require large amounts of locked-in capital) and may worry less about their own SME financing than many parts of Europe today where there are SME exclusions in securitization and bank capital adequacy rules. Given this we have seen that their move towards a disclosure-based regime is associated with a *caveat emptor* regime that focuses more on capital formation in a wider sense and less on investor protection. As such, they have very large exchange-traded derivatives and wholesale bond markets which are far less regulated than retail equity markets. Being small states, they also have difficulties in enforcing rules outside their jurisdiction and both take a liberal stance towards offers from within their jurisdictions that are targeted at outside investors.[152]

XVI CONCLUSION

The prospectus rules in Singapore and HK are roughly similar with competition resulting in convergence. Any minor differences that remain cannot explain the vast differences in the size of their public equity markets and their regulated securities exchanges. One difference identified earlier by Loke when examining the prospectus rules in both countries was that in Singapore the advertising and marketing restrictions linked to excluded or exempted offers such as small offers and offers to institutional and accredited investors channelled private offerings to the use of licensed platforms.[153] Issuers on the other hand could reach investors more directly in HK as there were fewer, if any, restrictions on advertisements in the case of excluded offers. While such an approach attests to a pro-ICO pro-platform approach that was seen more clearly in Singapore, and the creation of new intermediaries, it is not fully clear how these platforms should be regulated given the possible systemic risks created by their fee making activities which may include creating derivatives and leveraged financing, which create systemic risks over and above their exchange and custodial functions. Certainly, there have been failures with digital asset platforms and funds originating in Singapore that have created complex restructuring cases. There is pressure on HK to compete, but pressure also on both financial regulators and the courts to come up with ways to regulate trading of investment products (which may have escaped prospectus disclosure) on the

[151] Christopher Bruner, *supra* n 37. The UK, which is obviously an extraordinarily large financial centre, is also re-examining its rules given the poor performance of its stockmarkets: Cheffins and Reddy, *ibid*; Gerard McMeel in Chapter … of this book.

[152] See MAS *Guide to Digital Token Offerings* case study 4 and section 1(b), Part 4, Schedule 17, CWUMPO.

[153] *Supra* n 64.

secondary markets. As Hal Scott[154] has suggested, it may be that regulators are more relaxed about capital formation on the primary markets (where only 5 out of 23000 digital assets in existence are registered with the SEC as securities) but need to increase their focus on investor protection in the secondary markets where market manipulation and fraud is the greater concern. Licensing is an important tool at this stage and how intermediary platforms are monitored and the content of rules governing them will be the next war that has to be fought in financial regulation.[155]

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[154] Hal Scott, 'Investors at risk in absence of adequate US crypto regulatory regime' *Financial Times* (London, 23 June 2023. Vikram Khanna *et al* in a forthcoming crypto asset survey found that investors wanted to know more about who the large investors were rather than about the digital asset itself which suggests a recalibration of securities market disclosure.

[155] Or perhaps even with all forms of business organisations: Mark Fenwick, Joseph A McCahery & Erik PM Vermeulen, 'The End of 'Corporate' Governance: Hello "Platform' Governance"' (2019) 20 EBOR 171.