

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Securities and Futures Bill
Part XI & Schedule 7
(Securities and Futures Appeals Tribunal)**

Banking (Amendment) Bill 2000

INTRODUCTION

This paper sets out the major features of Part XI of the Securities and Futures Bill (“**SF Bill**”) which, together with Schedule 7, provides for the appeal by persons who are the subject of certain decisions made by the Securities and Futures Commission (“**SFC**”) and for related matters. The related proposals in the Banking (Amendment) Bill 2000 (“**BAB**”) that provide for the appeal by exempt authorized institutions (“**exempt AI**”) against decisions made by the Hong Kong Monetary Authority (“**HKMA**”) with respect to their conduct of the regulated activities are also covered.

2. Part XI provides for the establishment of an independent avenue of appeal against decisions made by the SFC, namely the Securities and Futures Appeals Tribunal (“**SFAT**”), which is a new independent full-time appellate body, for persons (other than an AI) who are the subject of decisions made by the SFC (referred to in the SF Bill and below as “**specified decisions**”). Together with the BAB, the SF Bill also provides a separate avenue of appeal to the Chief Executive in Council (“**CE in Council**”) for decisions made by the SFC in respect of AIs in their capacity as exempt AIs or associated entities of intermediaries (referred to in the SF Bill and below as “**excluded decisions**”); and for certain decisions made by the HKMA as introduced by the BAB.

3. Part XI of and Schedule 7 to the SF Bill derive from the existing appeal provisions in the Securities and Futures Commission Ordinance (Cap. 24) (“**SFCO**”) and the Leveraged Foreign Exchange Trading Ordinance (Cap. 451). At the **Annex** is a table comparing the provisions in Part XI and Schedule 7 with existing legislation.

POLICY OBJECTIVES AND MAJOR PROPOSALS

4. The principal policy intention under Part XI of the SF Bill is to provide rights of appeal to persons who are the subject of various important decisions made by the SFC and for the expedited disposal of such appeals by an independent full-time body which will review the merits, as opposed to purely the legality, of SFC decisions.

Decisions that can be appealed to the SFAT

5. Part 2 of Schedule 7 to the SF Bill itemizes the specified decisions that can be appealed to the SFAT. In an effort to give subjects of SFC decisions (of the type suitable for merits review) greater power to challenge them, the number of decisions that may be appealed to the SFAT has been increased significantly to 64 covering a wide range of matters, as compared with the much narrower range appealable to the Securities and Futures Appeals Panel (“**SFAP**”) under existing law. The specified decisions can be broadly categorized as: -

- (a) requirements for a recognized exchange company to pay to the SFC the costs of imposing a suspension order on it under Part III;
- (b) decisions relating to automated trading services (“ATS”) under Part III (including refusal to grant authorization; amendments, etc of authorization conditions; withdrawal of authorization);
- (c) decisions relating to collective investment schemes and the promotion of investment opportunities under Part IV (including refusal to grant authorization; amendments, etc of authorization conditions; withdrawal of authorization) ;
- (d) licensing decisions under Part V (including refusal to grant licences; approval of accreditation, responsible officers and substantial shareholders, etc; amendments, etc of conditions, refusal to grant modifications or waivers);
- (e) decisions relating to permission to carry on business despite being in breach of the Financial Resources Rules under Part VI;
- (f) decisions relating to the appointment of an auditor to conduct an audit of a licensed corporation or its associated entities under Part VI (including the appointment of auditors and the direction to pay costs and expenses);
- (g) decisions to discipline licensed persons and responsible officers under Part IX (including the imposition of fines; reprimands; suspension and revocation of licences and approvals);
- (h) decisions to intervene in a licensed corporation’s business to impose restrictions under Part X;
- (i) decisions relating to exemptions from the disclosure of interests in listed corporation under Part XV; and

- (j) decisions to impose conditions on any approval the SFC may give under the SF Bill, under Part XVI.

A large number of the decisions itemized above that have equivalence in existing legislation are not appealable to the SFAP. For example, decisions under paragraphs 5(a), (c), (f) and (g) in relation to reprimand, etc are in the current regime non appealable items.

6. Part 3 of Schedule 7 to the SF Bill itemizes 13 excluded decisions in relation to AIs that can be appealed to the CE in Council. The decisions itemized are of similar nature to those in Part 2 of Schedule 7, to the extent they are applicable to AIs as an exempt AI or an associated entity of an intermediary.

7. Not all decisions made by the SFC are suitable for appeal to the SFAT for reasons set out in paragraphs 8 to 12 below, but in all circumstances, we have made sure sufficient checks and balances are in place.

Intermediate decisions

8. Many decisions are intermediate decisions with no substantial conclusive effect on the rights or interests of persons who are the subject of them. By way of illustration, a decision to commence an investigation under clause 175 is merely the beginning of a process which may, for example, lead to a decision to prosecute the person who is the subject of the investigation, or to take other regulatory action. The substantial conclusive effect of such process is felt at its end. For an SFC investigation leading to a criminal prosecution, the process ends when the court acquits or convicts that person and, in the latter event, sentences them to imprisonment or imposes a fine.

9. To subject intermediate decisions without a substantial conclusive effect on a person's rights or interests to a right of appeal under Part XI may result in numerous appeals to be made for tactical reasons, to delay SFC action or to make such action expensive and troublesome. This would hamper SFC ability to take timely regulatory action to protect investors and be to the detriment of the public interest. It is more appropriate to grant a substantive means of challenge, such as a right of appeal to the SFAT, at the end of the full process when a decision is taken which has a substantial, conclusive effect on a person's rights or interests. This is also in line with the arrangements under existing legislation. Means to challenge such decisions already exist through judicial review or complaint to the Ombudsman. Of course, both civil and criminal proceedings brought by the SFC are subject to their own established checks and balances and are subject to appeal to higher courts (please see paragraphs 25 to 26 below).

Decisions followed by an application to the court

10. Clause 199 empowers the SFC to require a person to transfer custody of property to the SFC or to a person appointed by the SFC in that behalf. The SFC is then obliged under clause 199(4)(a) to apply to the Court of First Instance (“CFI”) as soon as is reasonably practicable for an order in respect of the relevant property. Given the involvement of the court shortly after the imposition of the requirement, we take the view it is not appropriate to provide a right of appeal to the SFAT as it might be exercised tactically to delay the Commission’s access to the court. In view of the court’s oversight of the matter, we consider that it is not necessary to provide any additional review mechanism in this case.

Decisions involving broad policy

11. Some SFC decisions involve broad policy questions that go beyond the rights or interests of a single person or body affected by them, such as a decision to make rules or issue guidelines which will affect many is subject to public consultation and negative vetting by the Legislative Council where appropriate. Other SFC decisions are purely internal, such as budgetary decisions and those regarding the delegation of the exercise of certain powers to SFC staff of an appropriate level of seniority. These are all decisions that the SFAT is not a suitable body to resolve.

Decisions subject to other specialized merits review appeal mechanisms

12. Lastly, some SFC decisions are already subject to specialized merits review appeal mechanisms. For example, SFC decisions under the Hong Kong Codes on Takeovers and Mergers and Share Repurchases are appealable to the Takeovers Panel and in some circumstances to the Takeovers Appeals Committee. Both the Panel and the Committee are served by a majority of members who are independent from the SFC.

Market comment on the scope and presentation of appealable decisions

13. We have received a market comment that all decisions of the SFC should be appealable to the SFAT subject to the general criteria excluding those that cannot be appealed to the SFAT and some specified exceptions, as opposed to the approach under the SF Bill to itemize decisions that can be appealed against. We consider the alternative approach impracticable. It would make the coverage of appealable decisions less certain and make it hard for those subject to SFC decisions to determine what decisions are appealable. It would also allow scope for tactical appeals to delay timely SFC regulatory action to the detriment of the interest of the public by initiating an appeal to challenge a decision which had not been foreseen as one that would be appealable and which had not been expressly excluded from the SFAT jurisdiction. On balance, itemizing the decisions which may be appealed accords the greatest practicable level of transparency and is the most user-friendly manner of determining the remit of the SFAT.

14. We have invited the industry to propose to us individual decisions under the SF Bill that are not currently appealable but which they think should be appealable, so that consideration can be given to including them in Schedule 7. It is our understanding that their concern is about the possible omissions in the list of appealable decisions that are not identified before the passing of the SF Bill. In this connection, clause 227 of the SF Bill empowers the CE in Council to amend the list in Schedule 7 by way of subsidiary legislation for timely response to market needs.

Establishment of the SFAT chaired by a full-time high court judge

Constitution of the SFAT

15. Under the current law, persons (other than exempt persons) may appeal to the SFAP a limited range of SFC decisions concerning registration, imposition of registration conditions, refusal of approval of a substantial shareholder of a registrant, discipline and restrictions on registrants' business. The SFAP has a chairman and a deputy chairman, both of whom are, normally, Senior Counsel. The remainder of the SFAP consists of a pool of experienced and respectable people drawn from the markets, academia, business and legal and accounting professions, from which two lay members will be selected to assist the chairman or the vice chairman (as the case may be) for the hearing of each case. Hearings are usually held after office hours and at weekends.

16. Clause 210 of the SF Bill establishes the SFAT, a full-time independent appellate body to replace the SFAP with an expanded jurisdiction as set out in paragraph 5 above. The constitution of the SFAT is set out in clauses 1 to 20 of Part 1 of Schedule 7 to the SF Bill. The SFAT is made up of three members (except for the hearings explained in paragraph 18(d) below) including a judge as Chairman. The Chief Executive is responsible for the appointment of both the Chairman and a panel of members who are expected to be appointed from experienced and respectable members in the markets, business and legal and accounting professions. For the hearing of each case, the Chairman will sit with two lay members appointed by the Secretary for Financial Services from the panel. The Chief Executive may divide the SFAT into divisions if necessary, say to deal with a large caseload in a timely fashion.

17. The policy behind the replacement of the SFAP with the SFAT is to provide an independent, high level tribunal which may subject decisions of the SFC to more thorough scrutiny and a review of the merits involved. By sitting full time, the tribunal may avoid delays in scheduling hearings and the backlog of cases to which the SFAP is prone.

Procedures and Powers of the SFAT

18. We have also taken the opportunity to review the current operation of the SFAP and identify areas where improvements could be made for the operation of the SFAT.

Transparency of hearing

- (a) At present, hearings before the SFAP are conducted in private. For greater transparency in the administration of justice, clause 25 of Part 1 of Schedule 7 to the SF Bill provides that hearings before the SFAT will be held in public unless application is successfully made by a party, or unless the Tribunal of its own motion decides in the interests of justice, to hear the appeal, or a particular part of it, in private.

Decisions of the SFAT

- (b) The SFAP now undertakes a review of the decision appealed against and then determines on the merits whether that decision should be upheld, varied or overturned. To ensure that the SFAT can provide an effective remedy in each case, it is empowered under clause 212 of the SF Bill not only to strike down or vary an SFC decision but also to substitute its own decision. The SFAT is also empowered to remit the matter to the SFC with directions to revisit the decision. Before making a decision, the SFAT must give the parties a reasonable opportunity of being heard and when determining any matter of fact, the SFAT is required to make its findings on the balance of probabilities.

Enhanced authority of the SFAT

- (c) Clause 214 of the SF Bill gives the SFAT the same powers as the CFI to punish contempt of the Tribunal. Vesting the SFAT with this power, which the SFAP lacks, is intended to strengthen the authority and ability of the SFAT in enforcing its own procedures. A person will not face the “double jeopardy” of being punished by the SFAT for contempt and being criminally prosecuted for the same conduct.

Preliminary conferences, consent orders and chairman as sole member of the SFAT

- (d) Clauses 31 to 37 of Part 1 of Schedule 7 to the SF Bill confer the SFAT with added flexibility in handling appeals. First, preliminary conferences and consent orders are introduced to expedite the hearing of an appeal. If the Chairman of the SFAT considers appropriate and both parties agree, the Chairman may direct holding a preliminary conference for the identification by the parties of the issues which will be determinative of the appeal. The Chairman will be empowered to give directions for the disposal of the appeal and for the making of consent orders where both parties so apply and agree to the terms of the directions. Secondly, the Chairman may sit alone to handle an appeal on application by both parties to the review, or an application for stay of specified decisions (please see paragraph 22 below).

19. Save as mentioned above, the functioning of the SFAT is largely similar to that of the SFAP. By way of illustration, the rules of evidence are not applicable to the SFAT or the SFAP. Moreover, clause 213 of the SF Bill has largely carried down to the SFAT the existing power of the SFAP for the purposes of conducting a review, including the powers to: consider any material, require witnesses to attend and testify or produce evidence and administer oaths and affirmations. As in existing legislation, clause 213 of the SF Bill also makes it an offence to disobey an SFAT order. Under clause 216 of the SF Bill, the SFAT may award costs to the parties and to witnesses. This is similar to the power of the SFAP to award costs to a successful party. Clause 27 of Part 1 of Schedule 7 provides that parties may represent themselves, be represented by a lawyer or, with the leave of the SFAT, by another person (for example, a financial adviser).

Application for review

20. Clause 211 details the procedure for appealing to the SFAT. A person aggrieved by a specified decision may apply for a review of the decision by serving a written notice on the SFAT stating their grounds of appeal. The application for review must be made within 21 days of receiving notice of the SFC decision.

Time when specified decisions take effect and application for stay

21. Clauses 224 and 225 stipulate that a majority of SFC decisions do not ordinarily take effect until the time for an SFAT appeal has expired or, if an appeal is made, until the appeal is withdrawn or determined. However, the decisions listed in clauses 224(2) and 225(4) (including decisions to impose, vary or revoke conditions on the grant of authorization to provide ATS, withdrawal of such authorization, imposing, amending or revoking licensing / exemption conditions, disciplinary fines and restrictions imposed on a licensed corporation's business) will ordinarily take effect at the date when the decision is notified to the person concerned. This is required for investor protection. By way of illustration, the conditions imposed under clause 142(2) whereby a licensed corporation is permitted to continue the conduct of a regulated activity, albeit not in compliance with the specified amount requirements under the Financial Resources Rules, need to take effect almost immediately. For decisions relating to licensing conditions and decisions to intervene in licensed intermediaries' businesses, this reflects the existing law. As for the other excepted decisions, they are either related to new proposals or the relevant decisions are not appealable under existing legislation and thus no comparison can be made. Clauses 224(3) and 225(5) further vest in the SFC a residual power to, in the public interest or in the interest of the investing public, specify in a notice of decision that the decision shall take effect at such earlier time as may be specified. We shall propose a Committee Stage Amendment to Part 2

of Schedule 2 to the SF Bill to the effect that this residual power under clauses 224(3) and 225(5) will only be exercisable by the full Commission, and hence should be non-delegable.

22. Clause 220 enables a person who has applied to the SFAT for review of a specified decision to apply for a stay of that decision pending determination of the appeal. Such an application must be heard as soon as reasonably practicable and a stay may be granted upon conditions as to costs or otherwise as the SFAT considers appropriate. This power to stay decisions applies to the aforesaid excepted decisions and is considered as a check and balance against the making of those specified decisions that deviate from the general rule on when decisions can take effect.

Appeals from SFAT

23. Clause 221 confers on a party to a review a right of appeal on a point of law to the Court of Appeal (“CA”) with respect to findings and determinations of the SFAT. The CA may allow or dismiss the appeal or remit the matter to the SFAT with such directions as it considers appropriate. The CA may also make any order as to costs it sees fit. Clause 222 stipulates that an appeal to the CA regarding an SFAT finding or determination does not operate as a stay of execution of that finding or determination unless the CA otherwise orders. This is to avoid tactical appeals by appellants whose purpose is simply to delay the taking effect of the decision.

Appeal mechanism for decisions made in respect of AIs

24. Similar policy applies to the rights of appeal of exempt AIs and associated entities that are AIs, but is carried into effect slightly differently. Under the Banking Ordinance (Cap. 155), prescribed decisions of the HKMA are appealable to the CE in Council. Consistent with such an approach and also in recognition of that the banking and securities operations intertwine in some cases and circumstances, clause 225 of the SF Bill provides that an AI which is aggrieved by an excluded decision made by the SFC in respect of it may appeal to the CE in Council which should under the Administrative Appeals Rules (Cap.1 sub.leg.) be made within 30 days of receiving notice of the decision. Moreover, the BAB empowers the HKMA to reprimand an exempt AI, to give approval in relation to the financial year end of an AI and to give consent to the appointment of executive officers of an exempt AI. Clause 12 of the BAB adds to section 132A of the Banking Ordinance decisions relating to the aforesaid three aspects, to the effect that they will also be safeguarded with the appeal mechanism. This also addresses the market query on the different mechanisms for handling appeals from an AI and non-AI.

Other mechanisms for challenging decisions of the SFC

25. Appeal to the SFAT will supplement the existing means to challenge SFC decisions, including applying for judicial review, complaining to the Ombudsman, the Privacy Commissioner or the Independent Commission Against Corruption, and appealing to the CE in Council and the Takeovers Panel. In combination, these review mechanisms provide a powerful and varied armory of powers to persons who are subject to SFC decisions to challenge those decisions by the means that are appropriate to the nature of the decision being challenged in any given instance.

26. Finally, a new independent review body called the Process Review Panel (“**PRP**”) has been established to serve as an additional check on the exercise of SFC powers. Members of the PRP are appointed by the Chief Executive and are drawn from eminent members of the community. The role of the PRP is to audit the process by which decisions have been made by the SFC. This is to ensure consistency in decision-making; compliance with applicable procedures; and that the matter has been conducted with due propriety. The PRP is required to submit an annual report to the Financial Secretary on its findings and recommendations, which will be published within the constraint of the statutory secrecy provisions.

Miscellaneous

27. Clause 215 of the SF Bill provides that nothing in Part XI and Schedule 7 requires an AI acting as the banker or financial adviser of a person lodging an appeal with the SFAT to disclose information about the affairs of any of its customers other than that person.

28. Clause 217 of the SF Bill requires the SFAT to deliver its decision together with reasons for it as soon as reasonably practicable after the conclusion of the appeal. If any part of the appeal has been held in private, the SFAT may prohibit the publication or disclosure of any determination or order, or any reason for such determination or order, in whole or in part.

29. Clause 219 of the SF Bill provides that any order of the SFAT may be registered with the CFI, whereupon the registered order shall become for all purposes an order of the CFI. The effect of this provision is that orders of the SFAT can be enforced as if they were orders of the CFI.

30. Finally, clause 38 of Part 1 of Schedule 7 to the SF Bill gives all persons involved in SFAT proceedings the same privileges and immunities they would have if they were involved in civil proceedings before the CFI.

MARKET COMMENTS

31. Key areas of concern to the market in respect of Part XI of and Schedule 7 to the SF Bill were identified and addressed. They are discussed below.

Remit of SFAT

32. We have received a market comment that all decisions of the SFC should be appealable. Please see paragraphs 8 to 14, and 25 to 26 above for the reason why the present approach is preferred. However, we have an open mind to any further suggestions from the industry as to the additions to the list of appealable decisions in Schedule 7.

Cost-effectiveness of SFAT hearings

33. Some market participants commented that with the “upgrading” of the SFAT, costs of appeal would increase. We consider that the SFAT should decrease costs as, being a full time tribunal with pre-hearing procedures focussed on the speedy identification of issues and resolution of procedural disputes, it will be able to hear appeals in fewer sittings thus decreasing attendance fees for lawyers, as compared with the SFAP. In addition, an appellant may seek to be represented by a person other than a lawyer.

Representation of SFAT lay members

34. We have received a market comment that for appeals involving stockbrokers, the SFAT should have stockbrokers as its majority members. As with the SFAP, SFAT lay members will be drawn from business and related professions and will include market participants like stockbrokers. Lay members would be appointed on the basis of their having relevant knowledge and experience and not as representatives of any sector of industry. If expert knowledge is required, the parties are at liberty to call expert witnesses.

Extension of appeal period

35. We have also considered the request by some market participants for extending the time limit of 21 days for lodging appeals. Setting the appeal period involves balancing the public interest in having SFC decisions taking effect without undue delay as against affording a potential appellant sufficient time to decide whether to lodge an application for review and to prepare such application. Having regard to the fact that the decisions in question are only made after an exchange of letters (in which each side presents its reasons for their views on the matter and the SFC usually provides documentary evidence pertinent to its case) between the potential appellant and the SFC, the proposed appeal period should provide him with ample time to consider whether to apply for a review, and if so upon which grounds, as all the issues will be well known to him and his advisers.

Stay of specified decisions pending determination of appeal by the CA

36. There was a market comment that decisions of the SFC should not take effect even after the relevant determination of the SFAT, but only after determination of any further appeal to the CA. We have not taken on board this comment as we are concerned that such may be deployed to deliberately delay the enforcement of SFC decisions. Even though an appeal to the CA does not operate automatically as a stay of the SFAT decision, the CA may order a stay of execution on application if it considers it appropriate to do so. We believe that this will be adequate to address the market concern.

Effective date of appealable decisions

37. Some market participants argued that the SF Bill should stick to the current practice of allowing appealable decisions to take effect only after determination of the relevant appeals. The argument is factually incorrect. Under existing law, decisions relating to licensing conditions and decisions to intervene in licensed intermediaries' businesses can take effect prior to determination of the relevant appeals. The SF Bill generally preserves the existing situation. (Please see paragraphs 21 to 22 above for details.)

INTERNATIONAL COMPARISON

United Kingdom

38. Sections 132 & 133 of the Financial Services and Markets Act ("FSMA") will establish a Financial Services and Markets Tribunal ("FSMT"), administered by the Lord Chancellor's Office. The FSMT will have merits review jurisdiction in relation to a limited number of decisions including decisions relating to licensing, the exercise of disciplinary powers and the imposition of civil fines for "market abuse" (or "market misconduct" as it is termed in the Bill). The FSMT may also be given the power to review disciplinary decisions of exchanges and clearing houses. The FSMT may consider any material, including material not before the FSA at the time of making the decision. At the end of a hearing, the FSMT does not issue its own judgement as such but decides what action the FSA should take in relation to an appeal before it and remits the matter to the FSA with directions to take the appropriate action. The FSMT will also be able to make recommendations to the FSA on its "regulating provisions" and procedures. FSMT decisions will be appealable to the Court of Appeal on a point of law with the leave of the FSMT or the Court of Appeal itself. On appeal, the court may if it considers an FSMT decision wrong in law remit the matter to the FSMT for rehearing or make the decision itself.

39. The FSMT will be a full time tribunal established by the Lord Chancellor's Department. Under section 132(3) of the FSMA, the Lord Chancellor may make rules in respect of the conduct of proceedings before the FSMT. These rules have yet to be finalised. The FSMT will be constituted by a mix of lawyers who will chair the tribunal and lay members chosen for their relevant expertise. If necessary, experts can be appointed to assist the FSMT. Under the rules yet to be finalised, it is understood that the FSMT will generally sit in public but will have discretion to sit in private. The FSMT will have power to compel the production of evidence and the giving of testimony by witnesses. Based on clause 13 of Schedule 13 to the FSMA and the rules yet to be finalised, it is understood that each party will bear their own costs unless the FSMT decides that a party acted frivolously, vexatiously or unreasonably in which case it may order that party to pay part or all of the other party's costs. Alternatively, if it decides that the FSA decision was unreasonable or unfounded it may order the FSA to pay part or all of the other party's costs.

Australia

40. The Administrative Appeals Tribunal ("AAT") has general jurisdiction over a broad range of Australian federal government decisions and is a full time tribunal. Many Australian Securities and Investments Commission ("ASIC") decisions have been subject to merits review by the AAT.¹ Several types of ASIC decisions are excluded from the AAT jurisdiction, notably most enforcement and investigatory decisions. The AAT is divided up into divisions which hear particular types of applications, but appeals in respect of ASIC decisions are not heard by a specialised division.

41. Anyone whose interests are affected by an appealable ASIC decision may apply to the AAT for review. When deciding an application, the AAT may affirm, vary or set aside the decision under review and, if setting aside a decision, substitute its own decision or remit the decision to the ASIC for remaking in accordance with any directions or recommendations the AAT might make. An AAT decision may be appealed to the Federal Court of Australia ("FC"), on a point of law. Also, the AAT may, on its own motion or on an application by the parties, refer a point of law to the FC.

42. The head of the AAT, the President, is a judge of the FC. Other judges may be appointed to the AAT, who must be presidential members. Other categories of member are Deputy Presidents, senior members and members. Members are given tenure or fixed 7 year appointments and may only be dismissed by parliament.

43. The Tribunal is constituted of between 1 and 3 members. It may, in its discretion, stay a decision that is being reviewed or make other orders, and may dismiss a frivolous or vexatious application for review. The Attorney

¹ Sections 1317A-1317C Corporations Law and section 244 ASIC Law

General may intervene in AAT proceedings. The rules of evidence do not apply in proceedings before it. The AAT has the power to compel sworn testimony and the production in evidence of books, documents or other material. Directions hearings and preliminary conferences may be held. Preliminary conferences are often held to narrow the issues in dispute and explore the chances of settlement. AAT proceedings are in public unless the AAT decides otherwise on the basis of the confidential nature of any evidence or for any other reason, having regard to the general preference for matters to be heard in public.

United States

44. In the US, matters are somewhat different. For example, many decisions of the Securities and Exchange Commission (“SEC”) are made at first instance by “administrative law judges”(“ALJs”), who act as fact finders and decision makers and are effectively independent of the SEC hierarchy. Proceedings have detailed rules but are conducted expeditiously and the strict rules of evidence and court proceedings do not apply. Decisions of ALJs may be reviewed by the SEC Commission, which also acts rather like a tribunal with SEC staff and the subject of a decision appearing before it to argue matters. Counsel may also appear and usually do². We understand that proceedings before ALJs are public. SEC orders and, in some cases, the exercise of some of its rule making powers are subject to judicial review.

45. The SFAT in its composition, procedures and scope of jurisdiction is comparable with the merits review regimes in the U.S., U.K. and Australia.

**Securities and Futures Commission
Hong Kong Monetary Authority
Financial Services Bureau
18 April 2001**

² L Loss and J Seligman, *Fundamentals of Securities Regulation*, 1994 (3ed), New York, Little, Brown and Company, pp 1219-1229.

Securities and Futures Bill
Part XI
Comparison Table

Legend:

LFETO = Leveraged Foreign Exchange Trading Ordinance (Cap. 451)

SFCO = Securities and Futures Commission Ordinance (Cap. 24)

SIDO = Securities (Insider Dealing) Ordinance (Cap. 395)

SFAPPR = Securities and Futures Appeals Panel Proceedings Rules

Clause	Contents	Derivation	Notes
	<i>Division 1 – Interpretation</i>		
209	Interpretation of Part XI	New	Clause 209 creates definitions used in other provisions concerning the SFAT.
	<i>Division 2 – Securities and Futures Appeals Tribunal</i>		
210	Securities and Futures Appeals Tribunal	s.18 SFCO & s. 58 LFETO	Clause 210 is similar to s.18 SFCO except for differences owing to the different status, composition and jurisdiction of the SFAT compared with the SFAP. Therefore, (4)-(7) are new and (1)-(3) reflect the differences in the SFAT's status, composition and jurisdiction.

211	Applications for review of specified decisions	ss.19(1)-(3), 21(3) & 44(1) SFCO, ss. 56-57A & 58(a) LFETO, r. 3(1) & Sch. SFAPPR	Clause 211(1) replicates existing law in ss 19(1)-(3), 44(1) SFCO and ss. 56-57A & 58(a) LFETO but Part 2 of Sch. 7 allows a broader range of SFC decisions to be reviewed via the definition of “specified decision”. Clause 211(2) sets out in the main Ordinance the basic requirements in respect of notice of application for review in line with r 3(1) and the Sch SFAPPR. Clause 211(3) replicates s. 21(3)(a) SFCO and s.58(a) LFETO and while the appeal period is shorter, there is the express obligation for SFC to give notice under (a)(ii) or (b) where no specific obligation exist existing legislation. Clause 211(4) is also new.
212	Proceedings before Tribunal	s. 21(7) SFCO & s.58(a) LFETO	Clause 212(1) & (2) basically re-enacts s. 21(7) SFCO & s.58(a) LFETO with some minor changes. Clauses 212(3) & (4) are new.
213	Powers of Tribunal	s.21(5)(b) to (d) SFCO & s.58(a) LFETO & ss.17 & 20(1) & (2) SIDO,	Clause 213(1) is an expansion of s.21(5)(b) to (d) SFCO, and is based on s 17 SIDO except for cl. 213(1)(e) & (i). Clause 213(2) is based on ss. 20(1) & (2) SIDO with some reorganisation and simplification. Clause 213(3) is new.
214	Contempt dealt with by Tribunal	New	New
215	Privileged information	s. 21(1)(a) SIDO	Clause 215 re-enacts but simplifies s. 21(1)(a) SIDO.
216	Costs	s.21(9)(a) SFCO & s.58(a) LFETO	Clause 216 elaborates on and expands s. 21(9)(a) SFCO. Provisions for costs to be awarded to witnesses and taxation of costs are new.
217	Notification of Tribunal determinations	s.21(7) SFCO	Clause 217 is an expansion of s.21 SFCO
218	Form and proof of orders of Tribunal	s. 28 SIDO	Clause 218(1) & (2) is modelled on s 28 SIDO.

219	Orders of Tribunal may be registered in Court of First Instance	s. 29(1) SIDO	Clause 219 is modelled on s 29(1) SIDO
220	Applications for stay of specified decisions <i>Division 3 – Appeals</i>	New	New
221	Appeal to Court of Appeal	ss. 31 and 32 SIDO	Clause 221 is modelled on ss. 31 and 32 rather than the existing SFAP case stated provisions in ss. 22 SFCO which was only available with the leave of the SFAP. The case stated provisions in the White Bill (cl. 213) have been dropped as somewhat redundant in light of a right of appeal on a question of law. The provisions are simplified.
222	No stay of execution on appeal	s. 33 SIDO	Clause 222 is modelled on s. 33 SIDO
223	No other right of appeal <i>Division 4 – Miscellaneous</i>	s.21(8) SFCO	Clause 223 is modelled on s.21(8) SFCO
224	Time when specified decisions to take effect	ss. 19(4) & (5), 21(4) & 44(2) SFCO & ss. 56(2) & 58(a) LFETO	Clause 224(1) is new. Clause 224(2) preserves the effect of the existing law save that (a) is new. Clause 224(3) is new.
225	Appeals to Chief Executive in Council in respect of excluded decisions	New	New. Appeal scheme based on ss.53 and 132A Banking Ordinance (Cap. 155)
226	Rules by Chief Justice	ss.21(1) SFCO, s.58(a) LFETO & s.36 SIDO	Clause 226 replaces the existing power of the Chief Executive in Council to make rules and replaces it with a provision modelled on s.36 SIDO.
227	Amendment of Parts 2 and 3 of Schedule 7 Schedule 7 – Securities and Futures Appeals Panel <i>Part 1</i> <i>Appointment of members and proceedings of tribunal etc</i>	New	New

1	New, Sch. s 1 SIDO	Definitions of “chairman”, “member” and “Tribunal” are adapted from Sch. s. 1 SIDO; other definitions are new.
2	s.18(2)(a) SFCO	Reproduced from s. 18(2)(a) SFCO but requirement that appointment be on recommendation of Chief Justice is new.
3	Sch. s. 2 SIDO	Reproduced from Sch. s. 2 SIDO
4	s. 18(3) SFCO & Sch. s. 4 SDIO	Reproduced from s.18(3) SFCO & Sch. s. 4 SDIO
5	Sch. s.5 SIDO	Adapted from Sch. s.6 SIDO
6	Sch. s.7 SIDO	Reproduced from Sch. s.7 SIDO
	<i>Appointment of appeal panel</i>	
7	s.18(2)(b) SFCO	Reproduces s.18(2)(b) SFCO but panel members must now not be public officers (particularly members must not be SFC directors or employees.
8	s.18(3) SFCO	Reproduces s.18(3) SFCO.
9	s.18(3) SFCO	Reproduces s.18(3) SFCO.
10	Sch. s.6 SIDO	Reproduces Sch. s.6 SIDO
	<i>Appointment of ordinary members</i>	
11	s.15(2) & Sch. s.3 SIDO	Reproduces the effect of s. 15(2) and Sch. s.3 SIDO except that the ordinary members are appointed by the Secretary for Financial Services rather than the SFAT chairman as is the case with the existing SFAP under s.20(1) SFCO.
12	Sch. s.3 SIDO	Adapted from Sch. s.3 SIDO.
13	s.18(3) SFCO & Sch. s. 4 SIDO	Reproduces s.18(3) SFCO and Sch. s.4 SIDO

14	New	New
15	Sch s.7 SIDO	Adapted from Sch s. 7 SIDO
16	Sch ss.8 & 9 SIDO	Adapted from Sch ss.8 & 9 SIDO
17	New	New
18	New	New
19	New	New
20	Sch. s.10 SIDO	Adapted from Sch. s.10 SIDO.
21	Sch. s.11 SIDO	Adapted from Sch. s.11 SIDO.
22	New	New
23	ss. 20(1) & (2) SFCO & Sch. ss. 12 & 13 SIDO	Adapted from ss. 20(1) & (2) SFCO and Sch ss. 12 & 13 SIDO with the existing practice that the chairman decides questions of law made explicit.
24	New	New.
25	Sch. s.14 SIDO	Adapted from Sch. s.14 SIDO. Previously, appeals were heard in private.
26	Sch s 15 SIDO	Adapted from Sch s.15 SIDO.
27	s. 21(5)(a) SFCO & Sch. s. 16 SIDO	Adapted from s.21(5)(a) SFCO & Sch. s. 16 SIDO.
28	Sch. s. 19 SIDO	Adapted from Sch. s. 19 SIDO.
29	New	New.
30	New	New.
31	New	New.
32	New	New.
33	New	New.
34	New	New.

35	New	New.
36	New	New.
37	New	New.
38	s.21(6) SFCO	Reproduces substance of s.21(6) SFCO.