



# Litigation & Dispute Resolution

**Issue 3 of 2011: December**

**Importance of Staff Training on Insider Dealing ..... 1**

**Regulators seek help from the Public ..... 2**

**The Companies Ordinance – An International Statute? ..... 2**

**The New ICC Arbitration Rules .... 4**

**Hong Kong’s Competition Bill – What businesses in Hong Kong need to know ..... 7**

## Importance of Staff Training on Insider Dealing

**by Joseph Kwan (joseph.kwan@deacons.com.hk)**

Two cases have highlighted the importance of providing training for your staff (irrespective of their seniority) on insider dealing. A former independent non-executive director (the INED) of Hong Kong Aircraft Engineering Company Limited (HAECO) faces criminal prosecution for insider dealing. It was alleged that the INED purchased shares after being told about a proposed sale by a substantial shareholder of HAECO of its shares in the listed company to another company. The deal triggered a general offer for the shares in HAECO at a price 25% above the market price for the shares. The INED denied insider dealing, but apparently admitted that he had not followed company policy by buying the shares inadvertently, without obtaining approval from the Chairman of the Board.

Previously, the Market Misconduct Tribunal had found that a trainee solicitor of a law firm in Hong Kong had engaged in insider dealing. It was determined, that whilst working on a proposed general offer of a target listed company shares, the trainee passed this piece of price sensitive information to her then boyfriend, who bought the shares in the target company before the announcement of the deal. Both were found to have engaged in insider dealing.

In the case of the trainee solicitor and the INED, the profits allegedly made were not substantial, only about HK\$80,000. Yet, the consequences were very serious. The INED’s case will be tried in January 2012 and further

details will be available then. However, both cases have highlighted the importance for companies and firms who might have to deal with price sensitive information to provide training to their staff on insider dealing and market misconduct. Although the prosecution and MMT findings were not against the defendants' employers, the damage to reputation and time and costs the employers might incur in dealing with the SFC investigation should not be underestimated.

If you would like to organise internal training on issues such as insider dealing and market misconduct, please feel free to contact our partner, Joseph Kwan.

## Regulators seek help from the Public

**by Joseph Kwan (joseph.kwan@deacons.com.hk)**

Regulators around the world are using different ways to obtain information to assist them to detect wrongdoings or enforce the law. For example, there is now a new section on the SFC's website which publishes photos and details of people who are either subject to an arrest warrant or are believed to have important information that may assist SFC investigations. In the UK, the Serious Fraud Office (SFO) has set up a new service called "SFO Confidential", which gives insiders, who know or suspect any fraud or corruption, to report it in confidence to the SFO. This service is not intended for victims of fraud, who should report the matter to the police. It is for people who have information about serious fraud or corruption, whether by their employers, colleagues or even competitors. The trend is for regulators and law enforcement agencies to use different ways of seeking help from the public in gathering information about suspected wrongdoing.

## The Companies Ordinance – An International Statute?

**by Robert Clark (robert.clark@deacons.com.hk)**

Hong Kong operates on a system of statute based law, the common law and equity. Before the handover on 1 July 1997 Hong Kong operated a legal system which was to all real intent and purpose, an image of that in England and Wales (albeit with some local peculiarities, such as laws relating to concubines). The court of final appeal, pre-handover, was the Privy Council in London.

However, since 1 July 1997, Hong Kong has become an independent jurisdiction. It has a mini constitution. It continues to operate on the basis of its own statutes, common law and equity. There has been a significant change, however, in its ability to draw legal analogies from other common law jurisdictions. This is particularly relevant in the context of case precedent. However, as this article discusses, it is also relevant in the context of statutory provisions.

Hong Kong's Companies Ordinance (Chapter 32) is a classic example of a commonwealth developed local statute, modelled on the England and Wales original. Interestingly, however, in more recent years, the Ordinance has been amended, in some commentators' opinions, rather haphazardly. It is intended to completely rewrite the Companies Ordinance and indeed earlier this year the Companies Bill was gazetted and introduced into the Legislative Council for its first reading. It is interesting that the Secretary for Financial Services and the Treasury in a press release on the day the Companies Bill was gazetted said:

*"Rewriting the Companies Ordinance (CO) allows us to leverage the developments regarding company law in other comparable jurisdictions and enhance our competitiveness".*

The focus of this article is on one section of the current Companies Ordinance, Section 152FA. This section provides statutory rights to shareholders of companies which statutory rights do not exist in England and Wales. It is therefore a departure from the legal system in

England and Wales. Section 152FA is modelled on Section 247A of the Australian Corporations Act 2001. It also bears comparison with Section 178 of the New Zealand Companies Act 1993, and Section 254 of the Companies (New South Wales) Code.

Section 152FA was introduced into the Companies Ordinance in Hong Kong in July 2005. It enables a minority shareholder or group of minority shareholders to make an application to the Court for an order to inspect any records of the company of which they are shareholders: the right to inspect, being both on the part of the shareholder and authorised persons of the shareholder (not necessarily the shareholders themselves).

The Court can only make an order for inspection if it is satisfied that the application for the order is made in good faith and the inspection applied for is for a proper purpose.

So the section exists in order to grant shareholders “generous access to corporate information in order to protect their interests in the company.” (per Harris J in *Wong v Hung and Applied Development Holdings Limited* (HCMP 1602/2010)).

The question of what is good faith or a proper purpose has been determined, it seems, as two separate and independent tests.

According to Harris J, this is;

*“...a subjective and an objective test: the applicant must first establish that he believes his purpose in applying for an inspection order is proper (i.e. that he is acting in good faith) and secondly, the court must believe the circumstances are such that the inspection applied for is for a proper purpose.”*

The Court found that the requirement of good faith “merely requires that the applicant himself acts “honestly” with a purpose that he himself believes to be proper”.

In terms of proper purpose, the explanation that Mr. Justice Harris gave was that although a shareholder

does not have a proprietary interest in the assets of the company itself, he has an economic interest in the company and:

*“...can reasonably expect to be able to protect this interest and Section 152FA facilitates this by providing the member with access to corporate information, which might not otherwise be available to him.”*

As Mr. Justice Harris put it, Section 152FA affords shareholders an often overlooked yet powerful right by which to expose wrongful conduct in relation to the company’s affairs. He said:

*“Where shareholders and directors are at loggerheads, the right of access to corporate information is particularly important: in these circumstances, even if a member suspects that something is amiss, for example an egregious breach of fiduciary duty, he will be unable to protect his economic interest and financial investment within the company (through, for instance, a derivative action) unless he is able to obtain sufficient information.*

*By enacting Section 152FA, the legislature provided an important new procedure for the protection of shareholder rights and interests and the community more general interest in the maintenance of good corporate governance”.*

As Mr. Justice Harris found, where a member seeks to protect his economic interests in the company, he should, prima facie, satisfy the “proper purpose” requirement.

This approach, however, of Mr. Justice Harris is slightly at odds with an earlier decision by Deputy Judge Coleman S.C., who observed that the Court would only exercise its discretion to grant an inspection order in “exceptional and rare cases”.

Deputy Judge Coleman S.C. appears to have found that the proper purpose criteria would only normally be satisfied where the applicant has a specific or personal right which can only be protected through the inspection of the relevant records of the company. With this, Mr. Justice Harris disagreed.

The Annotated Ordinances of Hong Kong give some examples from relevant court cases in Australia and say that the following purposes have been regarded as “proper purposes”:

- (a) a determination of the value of shares;
- (b) an investigation as to whether legal proceedings may be appropriate to challenge certain transactions which have adversely affected shareholders’ investment in the company; and
- (c) a decision whether or not a shareholder’s rights in respect of a company may or ought to be exercised.

On the other hand, improper purposes have been found to be:

- (a) the ascertainment of whether a company is solvent;
- (b) assistance in the preparation of a take-over bid for a company; and
- (c) assistance in challenging directors in their daily management of a company.

Pulling all of these strings together, what we now have is a developing area of jurisprudence dealing with a section which has, oddly, been on the statute books for five years before it was first engaged in a court room. We have noted at least four cases in the Courts this year dealing with the section. So, it appears to be a weapon that shareholders and their litigation lawyers are making more use of.

It is undoubtedly a useful tool in shareholders’ and litigators’ armoury in order to procure information, which might not otherwise be made available to a shareholder, which may give rise to an ability to establish, for example, a derivative action which otherwise would never be brought.

## The New ICC Arbitration Rules

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### Introduction

The International Chamber of Commerce (“ICC”) has launched a much-anticipated revised version of its Rules of Arbitration (“ICC Rules”). According to the ICC, its revised ICC Rules aim at better serving the existing and future needs of businesses and governments engaged in international commerce and investment.

The revised ICC Rules will come into force on 1 January 2012 and apply to all ICC arbitrations commencing on or after that date, unless the parties agree otherwise. The revised ICC Rules take into account current requirements and developments in arbitration practice and procedure, as well as developments in information technology, since their last revision in 1998.

Some of the more notable revisions include new provisions i) in respect of multi-party and multi-contract disputes; ii) for the appointment of an emergency arbitrator to order urgent interim or conservatory measures; and iii) to facilitate the handling of disputes arising under investment treaties and free trade agreements. Other amendments, in the form of new or improved case management procedures and requirements in relation to information to be provided by the Claimant in his Request and by the Respondent in his Answer, aim to make the arbitral process more expeditious and cost-effective.

The following is a brief overview of the more notable changes.

### 1. ICC Arbitration

Some of the changes seek to provide clarification on the respective roles of the International Court of

Arbitration of the ICC (“the ICC Court”), its Secretariat and arbitral tribunals.

New Article 1 makes it clear that the ICC Court is the only body authorized to administer arbitrations under the ICC Rules, including the scrutiny and approval of awards rendered in accordance with the ICC Rules. Further, new Article 6 makes it clear that, by agreeing to arbitration under the ICC Rules, the parties have accepted that the arbitration shall be administered by the ICC Court. These clarifications aim at preventing parties from adopting so-called hybrid arbitration clauses, pursuant to which the arbitration is to be governed by the ICC Rules, but administered by an institution other than the ICC.

The revised ICC Rules also clarify that ICC arbitration is not only available for international commercial arbitration but also for a full range of disputes, including treaty investment arbitrations. Changes have been made so as to recognise the specifics of treaty investment arbitrations.

## **2. Request for Arbitration and Answer**

Requirements for the Claimant’s Request for Arbitration (Article 4) and the Respondent’s Answer to the Request (Article 5) have been revised. A Claimant, who intends to make claims under more than one arbitration agreement, is now required to include in his Request an indication of the arbitration agreement under which each claim is made. In addition, in the Request, a Claimant must now describe not only the nature and circumstances of the dispute giving rise to the claim, but also the basis upon which his claims are made. The Request must also now include not just comments (as previously required), but all relevant particulars and any observations or proposals for the place of the arbitration, applicable rules of law and language of the arbitration. Similarly, a Respondent is now also required to state in his Answer (and any Counterclaim), the basis upon which his claims are made and include any observations or proposals in relation to the place of arbitration, applicable rules of law and language of the arbitration.

## **3. Notifications and Communications**

Changes have been made with regard to written notifications and communications to reflect changes in technology and modes of communication. Provision is made in the new rules for notifications or communications from the Secretariat and arbitral tribunal to the parties or their representative, to be made by email.

## **4. Emergency Arbitrator Provisions**

New Article 29 allows a party to seek the appointment of an emergency arbitrator, to order, against signatories to the arbitration agreement or their successors (but not third parties), urgent conservatory or interim measures, which cannot await the constitution of the arbitral tribunal. The Emergency Arbitrator Rules are contained in a separate Appendix V to the revised ICC Rules.

The appointment of an emergency arbitrator has been previously introduced into the Arbitration Rules of the Singapore International Arbitration Centre and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and it is not surprising that the revised ICC Rules follow this trend.

The revised ICC Rules permit a Claimant to make an application for interim relief before he has filed his Request for Arbitration, although the Claimant is required to submit his Request within 10 days after his application for relief, unless a longer period is granted by the emergency arbitrator. Failure to do so results in termination of the emergency arbitrator proceedings.

Since the ICC Secretariat serves an application for the appointment of an emergency arbitrator on the other party, the emergency arbitrator procedure is not suitable for *ex parte* applications (such as *Mareva* injunctions), which remain a matter for the courts.

The emergency arbitrator's order is binding on the parties but not on the arbitral tribunal, which can therefore modify or annul it.

The availability of relief from an emergency arbitrator may be of less importance in Hong Kong courts, where it may be faster to obtain such relief from the courts. However, the ICC Rules are intended for use worldwide in proceedings conducted in any language and subject to any law and the availability of an emergency arbitrator could be of crucial importance where national courts do not have the jurisdiction or are unlikely to provide such relief to a party involved in an arbitration.

Notably, the revised ICC Rules give parties the option to "opt out" of the emergency arbitrator regime. However, parties should consider possible adverse consequences of doing so. The emergency arbitrator provisions will not apply to arbitration agreements concluded before 1 January 2012.

## 5. The Arbitral Tribunal

While under the previous ICC Rules a prospective arbitrator was required to make a statement of independence, new Article 11 extends the requirements to require a prospective arbitrator to make a statement of acceptance, availability and impartiality, as well as independence.

Requiring a potential arbitrator to confirm his availability will help ensure that the arbitrator is able to devote sufficient time to the arbitration.

As part of the revision of the language of the ICC Rules, an arbitral tribunal is now presided over by a "president" rather than a "chairman", so as to reflect gender neutrality.

## 6. Improving Time and Cost Efficiency

One of the main aims of the revised ICC Rules is to improve efficiency, and cost control in arbitrations, so as to avoid unnecessary delay and expense.

Accordingly, Appendix IV to the revised ICC Rules

gives examples of case management techniques which the arbitral tribunal and the parties can use to control time and costs. Further, new Article 24 introduces a mandatory Case Management Conference (to be convened by the arbitral tribunal when drawing up the Terms of Reference or as soon as possible thereafter) at which the arbitral tribunal shall consult the parties on the appropriate procedural measures to be adopted. Those measures may include one or more of the case management techniques referred to in Appendix IV.

New Article 27 requires the arbitral tribunal to inform the parties at the close of the proceedings of the date by which it expects to submit its draft award to the ICC Court for approval.

The parties' conduct may now have direct costs consequences, as Article 37 expressly empowers the arbitral tribunal, when making a costs award, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

## 7. Multi-Party, Multi-Contract Arbitration and Consolidation

New Articles 7 to 10 provide for joinder of additional parties, claims between multiple parties, arbitrations involving multiple contracts and the consolidation of arbitrations.

Article 7 provides that a party wishing to join an additional party to the arbitration shall submit a Request for Joinder against the additional party. However, no additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party agree.

In multi-party arbitrations, Article 8 permits any party to make claims or counterclaims against any other party without the authorization of the arbitral tribunal up until the Terms of Reference are signed or approved by the ICC Court. After that, the arbitral tribunal determines the procedure for making a claim or counterclaim.

Where claims arise out of or in connection with more than one contract, Article 9 permits such claims be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the ICC Rules.

Article 10 provides that the ICC Court, at the request of a party, may consolidate two or more arbitrations pending under the ICC Rules into the arbitration which commenced first, where (a) the parties have agreed to consolidation; or (b) all of the claims in the arbitrations are made under the same arbitration agreement; or (c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements to be compatible.

## 8. Confidentiality Orders

New Article 22(3) expressly provides for confidentiality orders, permitting the arbitral tribunal, upon the request of any party, to make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and to take measures for protecting trade secrets and confidential information.

This is of particular importance where the governing arbitration law does not impose on the parties express confidentiality obligations (for example as they do in Hong Kong, under section 18 of the new Arbitration Ordinance) or implied confidentiality obligations (for example as they do in England).

As well as clarifying and updating some of the existing ICC Rules, the revised rules introduce some innovative changes, which will no doubt speed up the arbitral process and make it more cost-effective.

# Hong Kong's Competition Bill – What businesses in Hong Kong need to know

by Karen Dicks ([karen.dicks@deacons.com.hk](mailto:karen.dicks@deacons.com.hk))

## Introduction

Hong Kong's long awaited Competition Bill had its first reading in LegCo on 14 July 2010. Since then, the business community (including chambers of commerce, trade associations and small and medium enterprises (SMEs), District Councils, academics and professional bodies have been consulted for their views and concerns. On 25 October 2011, the Bills Committee considered the Government's proposed amendments to the Bill, to take into consideration the concerns raised by the business community, in particular, by the SMEs.

## What is the purpose of the new Competition Ordinance?

The purpose of the proposed Competition Ordinance is to:-

- 1) prohibit conduct that prevents, restricts or distorts competition in Hong Kong;
- 2) prohibit mergers that substantially lessen competition in Hong Kong; and
- 3) establish a Competition Commission and Competition Tribunal.

## Progress so far:

2 July 2010:	Competition Bill introduced into LegCo
14 July 2010:	1st Reading in LegCo
8 October 2010:	Bills Committee formed
25 October 2011:	Bills Committee considered Government's proposed amendments to Bill

## Who will it apply to?

It will apply to any entity, regardless of its legal status or the way it is financed, engaged in economic activity and including individuals. Statutory bodies are to be exempt, but scope is provided for the Chief Executive, in certain circumstances, to apply the provisions to a specified statutory body or a statutory body engaged in a specified activity.

The Chief Executive is also to have wide powers to exempt:-

- 1) specified agreements or conduct:
  - a) if there are exceptional and compelling public policy reasons; or
  - b) to avoid a conflict between the Competition Ordinance and an international obligation relating to Hong Kong;
- 2) from the First Conduct Rule, agreements which contribute to improving production or distribution or promoting technical or economic progress; and
- 3) from the First and Second Conduct Rules, services of general economic interest.

The Competition Commission will be able to issue a block exemption in respect of particular categories of agreement either of its own volition or upon application by an undertaking. An undertaking will be able to apply to the Competition Commission for a decision as to whether a particular agreement qualifies for an exemption under the Ordinance.

The First and Second Conduct Rules will not apply to agreements made for the purpose of complying with a legal requirement (any enactment in force in Hong Kong or imposed by a national law applying in Hong Kong).

## What is prohibited?

### First Conduct Rule

The original Bill contains a “First Conduct Rule”,

generally prohibiting anti-competitive agreements and concerted practices and decisions, having the object or effect of preventing, restricting or distorting competition in Hong Kong. Businesses, and SMEs in particular, have expressed concern about the lack of certainty about the type of conduct that would be caught by this catch-all, general prohibition, which could result in them unwittingly breaching the Ordinance and incurring heavy fines. In response to these concerns, the Government now proposes that a distinction be made between “hardcore” and “non-hardcore” activities and that the types of “hardcore activities” be specified.

“Hardcore activities” are to include price fixing, bid-rigging, market allocation and output control. “Non-hardcore activities” are to include things such as restrictions on advertising, collective refusal to supply and development of standardization agreements, in relation to which there will be no hard and fast rule as to whether they breach the Ordinance and it will be for the Competition Commission to conduct a competition analysis, based on the facts and circumstances of each case. In respect of non-hardcore activities, it is proposed that the Competition Commission send a warning notice to the undertaking in question requesting them to stop the contravening conduct within a specified period, failing which the Commission may institute proceedings in the Competition Tribunal.

In respect of hardcore activities (to be called “serious anti-competitive conduct”), it is proposed that the Commission will be able to take enforcement proceedings immediately, without issuing a warning notice and giving the undertaking an opportunity to take remedial steps.

### Second Conduct Rule

The “Second Conduct Rule” prohibits an undertaking that has a substantial degree of market power in a market from abusing that power by engaging in conduct with the object or effect of preventing,

restricting or distorting competition in Hong Kong. Conduct may constitute such an abuse if it involves predatory behaviour towards competitors. At present, there is no definition of what constitutes a “substantial degree of market power”, but the Competition Commission is expected to issue guidelines which will include clarification of the same.

### **Territorial Application of the Rules**

The First Conduct Rule is to apply to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if:-

- 1) the agreement or decision is made or given effect to outside Hong Kong;
- 2) the concerted practice is engaged in outside Hong Kong;
- 3) any party to the agreement or concerted practice is outside Hong Kong; or
- 4) any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

The Second Conduct Rule is to apply to conduct having the object or effect of preventing, restricting or distorting competition in Hong Kong even if:-

- 1) the undertaking engaging in the conduct is outside Hong Kong; or
- 2) the conduct is engaged in outside Hong Kong.

### **Regulatory Framework**

The Bill provides for the establishment of a Competition Commission to investigate conduct that may contravene the Ordinance and enforce its provisions.

The Competition Commission may initiate proceedings in a Competition Tribunal, to be established by the Ordinance. The Competition Tribunal is to consist of Judges of the Court of First Instance.

Rather than initially proceeding in the Competition Tribunal, the Competition Commission will be able to issue an infringement notice. The infringement notice will contain an offer not to initiate proceedings in the Tribunal if the undertaking in question agrees to comply with certain specified requirements. Under the original Bill, one of the possible requirements was for the undertaking to pay up to HK\$10 million to the Government. Many in the business sector considered that such payment would place an unreasonable burden on SMEs and would be too low a figure to act as a real deterrent for big undertakings. In response to such concerns, although the Government intends to retain the infringement notice procedure in the revised Bill for hardcore contravention of the First Conduct Rule and contravention of the 2nd Conduct Rule, it proposes to remove the requirement of payment of the sum of up to HK\$10 million.

### **De Minimis Arrangements**

Competition laws in other jurisdictions, commonly provide de minimis arrangements so that agreements below certain thresholds are not subject to any enforcement action by the competition authorities. The original Bill did not contain any such de minimis provisions. In response to concerns of SMEs, the Government now proposes to introduce a de minimis framework to exclude from the First Conduct Rule all agreements between undertakings with a combined turnover not exceeding HK\$100 million in the preceding financial year. This exclusion will not apply to agreements involving the four types of hardcore anti-competitive practices (i.e. price fixing, bid rigging, market allocation and output control) since such activities almost always have an appreciable adverse effect on competition.

### **Pecuniary Penalties**

The original Bill provides for a penalty of up to 10% of global turnover for each year in which the contravention continues. In response to criticism that this is disproportionately severe when compared to penalties in the EU, UK and Singapore, the

Government now proposes to revise the maximum penalty to 10% of the local turnover for each year of infringement, up to a maximum of 3 years. If the infringement lasts for more than 3 years, the three years of infringement with the highest turnover would be chosen.

### **Stand Alone Private Actions**

The original Bill provides that private actions could be brought by persons who had suffered loss or damage as a result of contravention of a Conduct Rule. These private actions were to either follow on from determination of contravention of a Conduct Rule or be brought as stand alone actions (i.e. in cases where no such determination had been made). In response to SMEs' concerns that large companies could make use of the stand alone right of private actions to harass SMEs, the Government now proposes to remove the right to take private stand alone actions. However, it intends to review the need to introduce such in a few years' time.

### **Mergers**

The original Bill prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. The "Merger Rule" currently applies only to cases when one of the parties holds a carrier licence issued under the Telecommunications Ordinance or controls an undertaking holding such licence. In response to concerns that other merger activities could be caught under the First and Second Conduct Rules, the

Government now proposes to specifically exclude merger activities from the First and Second Conduct Rules, although the merged undertakings would still be subject to such.

### **What should businesses be doing now?**

With the prospect of the new Competition law coming into effect within the next year or so, businesses should:-

- 1) Familiarize themselves with the provisions of the Competition Bill and identify any potential areas of risk in respect of their current activities;
- 2) Keep abreast of the Competition Bill and what the provisions could mean for their business;
- 3) Promote in-house awareness and training to ensure that key decision-makers know what:-
  - a) types of agreements and practices may breach the Ordinance;
  - b) types of agreements and practices are exempt from the Ordinance, or could be exempt, upon application to the Competition Commission;
- 4) Devise and implement policies and procedures to ensure compliance with the Ordinance.

## contacts

For further information, please contact one of the contacts listed here

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Whilst every effort has been made to ensure the accuracy of this publication, it is for general guidance only and should not be treated as a substitute for specific advice.

If you would like advice on any of the issues raised, please speak to any of the contacts listed.