

Integrity and Compliance with Local Laws in Cross-Boundary Operations



Further reform and opening up of China's economy have facilitated cross-border trade and exchanges between the Mainland and Hong Kong, while globalisation has also created enormous opportunities for Hong Kong small and medium enterprises (SMEs) in overseas markets. To maintain a level playing business environment, the world has placed greater importance on anti-graft work. For instance, the Chinese Government has recently taken stern measures against corruption and commercial bribery and some countries have enforced more stringent anti-corruption legislations like the UK Bribery Act 2010. Apart from observing the anti-corruption law of Hong Kong, Hong Kong SMEs engaging in cross-boundary business have to remind their staff to abide by local laws while working in other jurisdictions to avoid inadvertent breach. Not only business reputation will be tarnished, company directors and enterprises may also be held legally liable.

This article will illustrate and explain the anti-corruption laws of the Mainland and Hong Kong and the points-to-note for enterprises having business dealings in the UK. Three case scenarios of Hong Kong SMEs engaging in cross-boundary business will be used to exemplify the laws.

Scenario 1: Shareholder's Acceptance of Advantage from Mainland Supplier

Mr Chan started a joint-venture garment trading company along with his friends to purchase garments on the Mainland for exports to overseas markets. Mr Wong, a shareholder of the company, was familiar with the Mainland market operations, so he was tasked with the procurement of garments on the Mainland and would often have direct contacts with different suppliers.

Chan discovered recently that the company had often placed large orders with a particular supplier with whom Wong was exceptionally well acquainted. During the Lunar New Year, Wong brought the expensive red wines and dried seafood offered by that supplier to Hong Kong for distribution to his relatives and friends.



There were rumours that Wong received rebates from the supplier through his wife's bank account in Hong Kong. However, neither Chan nor other shareholders had any knowledge of the matter.

Major Points of Law

According to Section 9 of the Prevention of Bribery Ordinance (PBO) of Hong Kong, an agent is prohibited from soliciting or accepting an advantage in relation to the business of his principal without his principal's permission. Otherwise, he would commit an offence under the PBO. The offeror is also guilty of the offence.

Rebates, expensive red wines and dried seafood offered by the supplier to Wong are advantages as defined in the PBO. According to the PBO, individual shareholders or directors are agents of the company. Prior to soliciting or accepting any advantages in the course of business, Wong should have obtained the permission from the board of directors (his principal).

Moreover, if any part of the bribery act (including promising, agreeing, soliciting, offering or accepting of unauthorised advantage) can be proved to have taken place in Hong Kong, the case can be pursued under the PBO. Regardless of whether the advantage is directly or indirectly delivered to the taker of the bribe or through a third party, as long as it is proved that the bribed person is the ultimate beneficiary, the taker of the bribe can be considered to have accepted the advantage. In this scenario, if Wong did receive rebates from the Mainland supplier through his wife's account in Hong Kong for placing orders with the supplier, he might have committed an offence under the PBO. The offering party might also be guilty of an offence.

Recommendations

Chan should formulate a code of conduct for his company stating clearly its stance and policy in governing acceptance of advantages by board members and staff. The procedures for declaring acceptance of advantages and the channels for enquiring about such issues should also be clearly indicated to staff for their compliance. Furthermore, Chan should not tolerate any illegal activity and should report to the ICAC on any suspected corruption as soon as possible.



Scenario 2: Company Offering Bribes to State Officials



Mr Lee was the Hong Kong representative of a China-Hong Kong joint venture in electronic components trading and held 60 percent of the shares in the company. Last year, the company started to build a parts production plant on the Mainland, which would go into operation before Easter. But upon completion of the new plant, the fire prevention authority discovered that the fire service facilities failed to meet the required standard and ordered a refitting of the facilities at the plant. The refitting would delay the operation and bring considerable loss to the company. While Lee was bothering with the issue, the Mainland shareholder suggested arranging a meeting with the two responsible fire safety officials to ask for a favour and paying a “service charge” if necessary

Major Points of Law

According to Article 389 of the Criminal Law of the People’s Republic of China, any person, for the purpose of seeking illegitimate benefits, offering money or property to State functionaries may commit the offence of offering bribes. In fact, if it was with Lee’s consent that the Mainland shareholder offered bribes to the fire safety officials for their turning a blind eye to the substandard fire service facilities at their plant, both Lee and the Mainland shareholder might have committed offences.

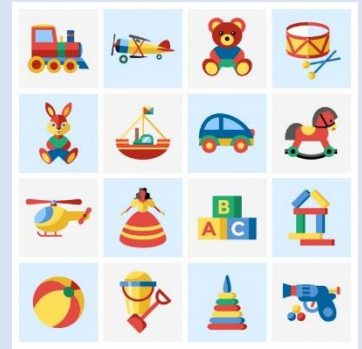
Likewise, if a company offers a bribe with an aim to secure illegitimate benefits, or, in violation of State regulations, offers rebates and service charges to State functionaries, and where the circumstances are serious, the company may commit the offence of unit offering bribes.

Recommendations

Lee should flatly refuse the suggestion of the Mainland shareholder, otherwise both of them and the company might be subject to criminal prosecution. On the other hand, the fire safety facilities should be fixed up as soon as possible, otherwise lives might be put at risk should any accident occur.

Scenario 3 : Employees Offering Advantage and Entertainment to UK Retailers

Mr Leung had been engaged in the toy business in Hong Kong for years. To expand his business into European markets, his company set up a subsidiary in London last year for supplying toys imported from the Mainland.



Michael, Leung’s business partner, was posted to the London office as the Sales Director in charge of promoting their products to potential clients and overseeing the sales operations.

Leung found that Michael had recently incurred substantial entertainment expenses for buying expensive VIP packages for the London Olympics. Upon Leung’s enquiry, Michael explained that the packages, comprising VIP spectator boxes for the Olympic games and fine dining, were offered to senior staff members of several retail chain stores in the UK.

According to Michael, competition among toy suppliers was keen and the expenses were necessary for building up good relationship with the retailers. To stand out from other competitors and get potential clients on their side, Michael even suggested offering them gifts like luxury watches or antiques.

Though the sales orders from these potential clients would be large, Leung had reservation about Michael’s suggestion for fear that Michael or the company might have breached UK laws.

Major Points of Law

The UK Bribery Act 2010, in force from 1 July 2011, mainly consists of four bribery offences -- including offering bribes to another person, being bribed, bribing a foreign public official and failing to prevent bribery. Though the Act was enacted in the UK, the Act may also apply to non-UK citizens and corporations registered outside the UK. These include Hong Kong companies, as non-UK corporations which carry on business or any part of their business in the UK. These persons and companies can be prosecuted in the UK even though no corruption took place in the UK.

An employee might breach the Act if he or she bribes another person by offering a financial or other advantages with an intent to encourage the person to perform improperly a relevant function or activity. In this case, if Michael has offered advantages (e.g. watches and antiques) to senior staff members of UK retailers in exchange for sales orders, he might be guilty of the offence. Though the Act does not prohibit “reasonable and proportionate” business hospitality, Michael might still face the risk of breaching the Act if the hospitality was disproportionately lavish or extravagant and was offered with an intent to bribe.

Furthermore, any commercial organisation carrying on a business or part of a business in the UK will be guilty of an offence under the Act if an “associated person” (e.g. an employee or agent) of the organisation bribes another person intending to obtain or retain business for that commercial organisation. It will, nevertheless, be a defence for the organisation to prove that it has in place “adequate procedures” designed to prevent its employees or associated persons from bribing. Therefore, if Michael, the Sales Director of Leung’s company, bribes another person when carrying out business in the UK for the purpose of obtaining business, Leung’s company might have to bear criminal liabilities for a failure to take “adequate procedures” to prevent bribery from taking place.

Recommendations

Leung should not condone the use of bribery means by Michael to obtain business despite intense competition. Furthermore, Leung’s company should put in practice “adequate procedures” to prevent corruption risks by referring to the principles set out in the **Bribery Act 2010 Guidance** issued by the UK Ministry of Justice. The company should also formulate clear guidelines on offering hospitality and advantages. Such guidelines may cover the form and standards of hospitality expenses, requirements related to prior consent from the company, reports on each hospitality-related expense or occasion and proper records of the expenses incurred.



Corruption Prevention Recommendations for Cross-boundary Business Operations

- Understand and observe the laws of different places, and, say NO to corruption
- Formulate a code of conduct, establish policy on the acceptance of advantages and regulate the provision of entertainment and hospitality
- Conduct risk assessment for organisations; regularly review and strengthen system control
- Cultivate an ethical culture and arrange integrity training for staff
- Adopt a zero tolerance stance against corruption and report to relevant law enforcement agencies on any corruption and bribery act

ICAC Services

- Formulate or review a company code of conduct
- Arrange staff integrity training
- Provide tailor-made corruption prevention advice on system control, procurement, marketing, accounting, staff management, etc

This article is provided by the Hong Kong Business Ethics Development Centre of the ICAC, which offers a full range of free corruption prevention services for Hong Kong SMEs. Please contact the Centre on 2826 3288 for details.



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Note: Descriptions and explanations of the relevant laws above are necessarily general. In case of doubt, readers should refer to the original text of the laws, the Bribery Act 2010 Guidance (see links below) and “Integrity and Compliance with the Law: A Guide to the Prevention of Corruption for SME Entrepreneurs Investing in Guangdong and Hong Kong”, and seek legal advice as and when necessary.

Prevention of Bribery Ordinance (Laws of Hong Kong Cap. 201): www.legislation.gov.hk

UK Bribery Act 2010: www.legislation.gov.uk/ukpga/2010/23/contents

Bribery Act 2010 Guidance: www.justice.gov.uk/legislation/bribery