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Anti-Corruption

Hong Kong
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Haldanes

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Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

China became a signatory to the United Nations Convention Against Corruption (UNCAC) on 10 December 2003 and ratified it on 13 January 2006.

As per Articles 153 of the Basic Law of Hong Kong, the application to Hong Kong of international agreement to which China is or becomes a party shall be decided by the Central People's Government of China in accordance with the circumstances and the needs of Hong Kong and after seeking the views of the Hong Kong government. The Hong Kong government agreed that the UNCAC should apply to Hong Kong. As such, the UNCAC came into force in Hong Kong on 12 February 2006, on the same day as in China.

1.2 National Legislation

In Hong Kong, most corruption offences are enacted in the local legislation with a few common law offences in parallel.

The key anti-bribery legislation is the Prevention of Bribery Ordinance, (POBO). It sets out the legal framework in deciding what amounts to bribery by dividing it into both public sector and private sector. It also vests the specialist enforcement agency with investigative powers, some of which are distinct from the normal criminal investigation conducted by the Police Force.

The anti-corruption law enforcement agency, the Independent Commission Against Corruption (ICAC), was established in 1974 under section 3 of the Independent Commission Against Corruption Ordinance (ICACO). The ICACO not only provides the statutory foundation for the ICAC, but also sets out its investigational jurisdiction. It is worth noting that the Commissioner of the ICAC is also empowered to investigate non-corruption crime. In practice, the ICAC often comes across offences such as money laundering and fraud in the course of investigating a bribery case under the POBO.

The ICAC is also empowered to investigate election-related offences, as specified under Election (Corrupt and Illegal Conduct) Ordinances.

Hong Kong has never repealed the common-law offence of bribery. However, due to the comprehensive legislation in force in relation to corruption and bribery, Hong Kong no longer employs the common-law offence of bribery to prosecute.

However, one common-law offence still used in prosecution is "misconduct in public office". Having this offence enables Hong Kong to satisfy the obligation imposed by Article 19 of the UNCAC, which requires HK to criminalise the act of any

public official who abuses his or her function or position even if no bribery is involved. The most famous case is that of Hong Kong's former Chief Executive Donald Tsang, who was prosecuted and convicted of this common-law offence. In 2019, he was acquitted after appealing all the way up to the Court of Final Appeal.

To ensure full compliance with the UNCAC, Hong Kong issued three orders in December 2007, which are the Fugitive Offenders (Corruption) Order, the Mutual Legal Assistance in Criminal Matters (Corruption) Order and the Organised and Serious Crimes Ordinance (Amendment of Schedule 2) Order, respectively.

The Fugitive Offenders (Corruption) Order sets up an extradition mechanism among signatories in compliance with Article 44 of the UNCAC.

The Mutual Legal Assistance in Criminal Matters (Corruption) Order allows signatories to obtain evidence out of jurisdiction in order to achieve the international co-operation which is the requirement stated under Articles 46 and 57 of the UNCAC.

The Organised and Serious Crimes Ordinance (Amendment of Schedule 2) Order enables the prosecutor in bribery cases to rely upon Hong Kong's domestic legislative framework for the restraint and confiscation of the proceeds of crime set up by the Organised and Serious Crimes Ordinance (OSCO). This Order has, in practice, far-reaching implications because every suspect investigated under the POBO faces the risk of his or her assets being restrained during the investigation or confiscated after conviction.

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Unlike those in the UK, Hong Kong authorities do not have any guidelines with binding effect on the interpretation and enforcement of the aforementioned laws.

It is worth noting that, pursuant to section 31 of the POBO, the ICAC is required to obtain the consent of the Department of Justice (DOJ) in order to prosecute an offence under POBO, whilst the Police Force and other investigation agencies in Hong Kong are not subject to this mandatory requirement and can exercise their discretion to prosecute on their own.

When the DOJ is reviewing the ICAC case file before giving such consent, the DOJ will follow its Prosecution Code, which sets out the factors to be considered in exercising its prosecutorial power.

Since Hong Kong is a common-law jurisdiction, the case laws are also an important source of guidelines for the interpretation and enforcement of the legislation, including the scope of ICAC investigative powers, the interpretation on the elements of bribery, etc.

The ICAC has a Corruption Prevention Department which sets up the Corruption Prevention Advisory Service (CPAS), specifically dedicated to providing professional corruption-prevention advice and services to private companies, organisations and individuals.

The CPAS has issued various guidelines by sector/industry, including the Integrity and Corruption Prevention Guide on Managing Relationship with Public Servants and the Anti-Corruption Programme – A Guide for Listed Companies.

1.4 Recent Key Amendments to National Legislation

The domestic legislation referred to in 1.3 Guidelines for the Interpretation and Enforcement of National Legislation has been evolving incrementally by way of case laws.

There have been no key amendments to the domestic legislation in 2020.

2. Classification and Constituent Elements

2.1 Bribery

All the bribery offences (except for common-law offences) are set out in Part II of the POBO. Section 4 and Section 9 set out the framework of the bribery offences in the public sector (s.4) and the private sector (s.9). The rest of the offences under Part II are the variants to s.4 and s.9.

Elements of a Bribe under s.4 and s.9

In order to prove the most common form of bribery, the prosecution needs to prove the factors in the first point below beyond reasonable doubt:

- (a) capacity and conduct, namely:
 - (i) being a public servant in the public sector, corruption to solicit or accept (s.4); or
 - (ii) being an agent in the private sector, corruption to solicit or accept (s.9); or

- (b) being any person to offer (both s.4 and s.9);
 - (i) any advantage;
 - (ii) for an inducement to or reward for relating to either the public servant's capacity as public servant in the public-sector corruption (s.4), or the agent's principal's affairs or business in the private-sector corruption (s.9);
- (c) to do so without lawful authority or reasonable excuse.

Although the POBO does not contain the word “corrupt”, evidence of offering an inducement or reward as detailed above serves as the proof of corruptive purpose.

Other Offences under Part II of the POBO

Offences without corruptive purpose – s.3, s.8 and s.10

Not every offence under Part II of POBO requires proof of corrupt purpose: S.3 and s.8 are the mirrored offences in terms of actus reus (ie, the criminal act). S.3 concerns the act of solicitation or acceptance, whilst s.8 concerns the act of offering. Since no corrupt purpose is required, s.3 and s.8 impose a lesser evidential burden upon the prosecution. Any prescribed officer who solicits or accepts any advantage under s.3 or any person who is having dealings with the public bodies and offers any advantage to any prescribed officer or public servant under s.8 would be guilty of these respective offences.

It is worth noting that the Chief Executive of Hong Kong who is the head of all prescribed officers is not subject to these two provisions.

S.10 is also free from requiring proof of corruption. A prescribed officer shall be guilty of this offence if he or she is living beyond their means, either by maintaining a standard of living incommensurate with his or her government income or by being in control of pecuniary resources or property disproportionate to his or her government income.

Offences relating to specific types of transactions – s.5, s.6 and s.7

S.5 is a narrow form of s.4 which is confined solely to bribery in relation to the contracts of public bodies. In addition, s.5 imposes a greater penalty than s.4, as corruption relating to government contracts is of a particularly serious nature.

S.6 criminalises the conduct of bribing any person to withdraw or not to make a tender for a contract with a public body, whilst s.7 prohibits the conduct of bribing any person to refrain from bidding at auctions conducted by or on behalf of a public body.

The offences stated above are the offences under Part II of the POBO, which are the key codified bribery offences. There are other offences under the POBO which mostly relate to the non-

compliance with investigation powers vested with the ICAC. For example, the ICAC, with a court order, can request any person to provide the documentary records in his or her possession, failing which he or she could be held criminally liable unless he or she has a reasonable excuse.

Failure to Prevent Bribery

Unlike that in the UK and USA, the current anti-bribery legal regime in Hong Kong does not impose an obligation upon either individuals or corporations to prevent bribery.

It is the statutory duty of the ICAC to prevent bribery. To fulfil this obligation, the CPAS is responsible for issuing guidelines by industry/sector to advocate the establishment of internal anti-corruption mechanisms and raising anti-corruption awareness via training. However, none of the guidelines has a binding effect.

Gifts and Hospitality

The POBO specifically defines provision of food or drink for consumption as “entertainment” and excludes entertainment from the definition of advantage under normal circumstances. Hence, receiving or offering food or drink for consumption is normally permitted under the POBO.

Advantage is defined in section 2 of the POBO as including “any gift, loan, fee reward or commission consisting of money or of any valuable security or of other property or interest in property of any description”. The Ordinance does not set any monetary limit on an “advantage”. It appears that cash gifts such as red packets, even of a fairly small amount, may constitute “advantage”.

Entertainment

Advantage also includes any other service or favour, other than entertainment. “Entertainment” is defined as “the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time as, such provisions”.

It is easier to draw the line in the public sector, as the public bodies set out in Schedule 1 of the POBO often issue their internal guidelines to cope with the situation involving gifts and hospitality.

Although the PBO does not prohibit the acceptance of entertainment, the government, public bodies and many companies nevertheless set out guidelines limiting the circumstances under which employees may accept entertainment.

The Integrity and Corruption Prevention Guide on Managing Relationship with Public Servants, published by the ICAC

and the Corruption Prevention Advisory Service, advises that while entertainment is an acceptable form of business and social convention, entertainment which may be seen as excessive or inappropriate, or which would give rise to a potential conflict of interest situation in relation to one’s duties/capacity or the perception, or allegations of an intention to “sweeten” should generally be avoided.

Customs Not to Be a Defence

Section 19 of the Ordinance provides that “in any proceedings for an offence under this Ordinance, it shall not be a defence to show that any such advantage as is mentioned in this Ordinance is customary in any profession, trade, vocation or calling”.

Entertainment means the provision of food and drink for immediate consumption, whereas dried seafood, spirits or red packets are advantages. The offeror cannot offer bribes in excuse of “an established custom in the trade” or “trade practice”. According to Section 19 of the PBO, the court will not accept such a defence on the part of either the offeror or the acceptor, but will only consider whether or not the acceptor has the permission of the principal.

Permission

As previously mentioned, the court ultimately will only consider whether or not the acceptor has the permission of the principal. Section 9(3) provides that:

“If an agent solicits or accepts an advantage with the permission of his principal, being permission which complies with subsection (5), neither he nor the person who offered the advantage shall be guilty of an offence under subsection (1) or (2).”

Further, section 4(4) provides that:

“For the purposes of subsection (4) permission shall—

(a) be given before the advantage is offered, solicited or accepted; or

(b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,

and for such permission to be effective for the purposes of subsection (4), the principal shall, before giving such permission, have regard to the circumstances in which it is sought.”

The section actually allows permission to be given before the advantage is offered as well as permission to be given retrospectively. It is, therefore, always prudent to declare any kind of

advantages to avoid being caught by the Ordinance, in which the term “advantage” casts a wide net.

The key issue is whether the receipt of such gifts and hospitality is declared and approved and in what capacity does the person offer or accept such gifts and hospitality. These have to be examined in the context and all the circumstances have to be taken into account.

As for the private sector, the ICAC will normally investigate into whether that private organisation has any internal anti-bribery guidelines in relation to accepting gifts and hospitality in order to decide whether the employee has complied with his or her employer’s internal guidelines.

Facilitation Payments

Advantages are widely defined under the POBO, including “the exercise or forbearance from the exercise of any right or any power or duty”. Therefore, the POBO prohibits facilitation payments, even if it is simply to smooth the process and to prompt the person to exercise his or her own duty, as it would amount to an advantage under the POBO.

Definition of a Public Official

A Public Official is categorised under the POBO as a “Prescribed Officer” and a “Public Servant”. Prescribed Officer is a narrower term of Public Servant, which refers to a group of government officials. It explains why s.3, which only targets Prescribed Officers, can be relaxed from the requirement for proof of corrupt purpose.

The category of Prescribed Officers as defined under the POBO has two limbs. The first, under s.2(1)(a), is the generic description of a person holding an office of emolument, whether permanent or temporary, under the Government. The second, under s.2(1)(b), specifies a list of prescribed officers.

As for a Public Servant, it is defined as “any Prescribed Officer and also any employee of a public body”. The POBO provides a comprehensive list of public bodies in Schedule I of the POBO. As is shown in the list, it includes many government-owned enterprises, including China Light and Power Company Limited, The Stock Exchange of Hong Kong Limited, etc.

Bribery of a Foreign Official

Only s.4 of the POBO includes a reference to extraterritorial language by adding “whether in Hong Kong or elsewhere”, which gives the ICAC the authority to investigate any individuals or corporations or public servant outside of Hong Kong. However, this section applies only to the advantages offered to Hong Kong public servants, which excludes foreign officials.

Hong Kong is not a party to the Organisation for Economic Co-operation and Development Convention (OECD Convention) which criminalises bribery of a foreign official and the POBO does not have an explicit provision in this regard. However, a foreign official could be covered by the agent/principal relationship under s.9 of the POBO.

In *HKSAR v Krieger & Another*, the defendants were charged with conspiracy to offer a bribe to the then-Secretary of Transport and Public Works of Macau, ie, a foreign official. The defendants were convicted after trial and appealed to the Court of Appeal. The Court of Appeal compared s.4 and s.9 and pointed out that s.4 specifically adds the extraterritorial reference “whether in Hong Kong or elsewhere” whilst s.9 contains no such words. Given the differentiation, the Court of Appeal held that s.9 is limited to offers made in Hong Kong, due to the lack of an extraterritorial reference. Since the offer in *Krieger* was made in Macau, not in Hong Kong, s.9 cannot apply and therefore the convictions were quashed.

Krieger clarified the extraterritorial reach of the POBO in the private bribery offence and it confirms that s.9 can still apply to the bribery of a foreign official provided that any such offer is made in Hong Kong.

Bribery between Private Parties in a Commercial Setting

S.9 of the POBO is specifically enacted to tackle private-sector bribery. It is an offence for an agent to solicit or accept, or for a person to offer to the agent, any advantages without the consent of the agent’s principal when that agent is acting in his or her principal’s affairs or businesses.

2.2 Influence-Peddling

The advantage is widely defined under the POBO, including any tangible and intangible benefit. Hence, depending on the context of the influence that is sought, influence-peddling could amount to an advantage and is thus prohibited by the law.

The word “influence” is mentioned only in s.5 of the POBO, which prohibits any person from offering or any public servant from soliciting or accepting any advantage in exchange for a public servant’s assistance or for using their influence in regard to contracts with public bodies.

The POBO does not single out bribery of foreign public officials in general, nor is there any mention of any specific reference to influence-peddling of a foreign public official. However, it could be covered under s.9 of the POBO when a foreign public official acts as the agent of their principal.

2.3 Financial Record-Keeping

Hong Kong anti-bribery laws do not impose any obligations regarding financial record-keeping, which should be within the ambit of company laws.

However, s.9(2) of the POBO criminalises the conduct of an agent with intent to deceive his or her principal by using any documents which contain a false or erroneous or defective statement.

S.14 of the POBO empowers the ICAC to issue a Notice sanctioned by a court to obtain information in relation to a suspected offence. It is an offence to provide a false answer to the Notice. In addition, s.29 of the POBO prohibits any person from making a false report of the commission of the offence.

S.14 and s.29 of the POBO provide a mechanism to deter the dissemination of false information.

2.4 Public Officials

Misappropriation of public funds by Public Official is not singled out under the current legal frameworks, as this conduct is well covered by various laws, including the Theft Ordinance and Misconduct in Public Office. In the event of public funds being misappropriated by a public official while acting in his or her official capacity, this is an aggravating factor when it comes to sentencing.

2.5 Intermediaries

The Interpretation Clause in s.2 of the POBO makes it very clear that indirect bribery is prohibited. It makes no distinction between any person who solicits, accepts and offers the advantage made by himself or herself or by any other person. It also makes no distinction between the person who solicits, accepts and offers the advantage for his or her own benefit or for the benefit of any other person.

3. Scope

3.1 Limitation Period

There is no limitation period applied to the aforementioned offences.

3.2 Geographical Reach of Applicable Legislation

As confirmed by *HKSAR v Krieger & Another*, the Court of Appeal clarified that s.4 of the POBO includes the extraterritorial reference which enables the prosecution against bribery of the Hong Kong public servant, irrespective of whether the bribe takes place within or outside of Hong Kong.

For those offences without any such extraterritorial reference, the geographical reach will be limited to Hong Kong only.

3.3 Corporate Liability

POBO does not specifically define the word “person” used in the legislation. However, it is defined under Interpretation and General Clauses Ordinance to include any public body and any body of persons, corporate or incorporate. Hence, a corporate body theoretically can be liable for the offences under the POBO.

In practice, however, the ICAC will investigate an individual, as the current elements of bribery are designed to target an individual’s culpability via proof of the mens rea (a guilty mind) and the actus reus (the elements of the offence). It is rather difficult to adopt the same test in assessing a corporate’s culpability without an express corporate offence or corporate penalty regime, such as the deferred prosecution agreements which were introduced in both Singapore and the UK.

4. Defences and Exceptions

4.1 Defences

There are two major defences for the offences under Part II of the POBO; S.4(1) and (2) and s.9(1) and (2) have the in-built statutory defence “lawful authority and reasonable excuse”, which enables the suspect to raise the defence if the prosecution has proven all the elements of the bribe, as previously stated.

S.4(3) and (4) and s.9(4) and (5) also single out one specific defence, namely, the principal’s consent, which is one type of lawful authority deriving from the POBO itself. It is worth noting that the principal consent under s.4, ie, public-sector bribery, specifically requires that such consent be in writing, whilst s.9, ie, private-sector bribery, has no such requirement. This subtle difference can only be discernible by way of the explicit provisions, rather than resorting to the ordinary meaning of “lawful authority”.

It is possible that a person who honestly but mistakenly believed that there was lawful authority can rely on the defence of “reasonable excuse” stipulated under S.4(1) and (2) and s.9(1) and (2).

4.2 Exceptions

There are no exceptions to the defences stated under 4.1 Defences.

4.3 De Minimis Exceptions

The anti-bribery laws in Hong Kong do not provide de minimis exceptions. However, the Prosecution Code compiled by the Department of Justice of Hong Kong will take into account vari-

ous factors in order to decide whether it is in the public interest to prosecute, including “whether or not the offence is trivial, technical in nature, obsolete or obscure”.

4.4 Exempt Sectors/Industries

Hong Kong anti-bribery laws apply equally to all industries or sectors and therefore there are no sectors or industries exempt from the aforementioned offences.

4.5 Safe Harbour or Amnesty Programme

Since Hong Kong does not have the mechanism of Deferred Prosecution/Non Prosecution Agreements in place and does not pursue the corporate liabilities in practice, there is no safe harbour or amnesty programme based on self-reporting or adequate compliance procedures/remediation efforts which is recognised by the anti-bribery laws in Hong Kong.

However, an individual could self-report in exchange for applying for an immunity from prosecution and providing a non-prejudicial witness statement. However, there are no certainties as to whether the person in question could be immune from prosecution and it would be subject to the discretion of the Department of Justice.

5. Penalties

5.1 Penalties on Conviction

As previously discussed, “person” is defined to include both an individual and a corporate body. The POBO does not distinguish individual or corporate liabilities, hence both individual and legal entities are theoretically subject to the same penalties.

S.12 of the POBO sets out the penalties for all the offences under Part II of the POBO. For certain public-sector bribery stipulated under s.5, s.6 and s.10, the maximum sentence is ten years’ imprisonment, together with a fine of up to HKD1 million. For normal public-sector bribery (s.4) or private-sector bribery (s.9), the maximum sentencing is seven years’ imprisonment with a fine of up to HKD500,000.

It has been well-established via the case laws in Hong Kong that an immediate custodial sentence shall be the norm in order to deter corruption, unless there are wholly exceptional circumstances that may warrant a suspended sentence or community service order, which are two types of non-custodial sentences.

S.12 (1) and (2) also empower the court to give Restitution Orders to the amount or value of any advantage received. A Restitution Order is not a fine, nor is it the same as a compensation order. Its effect is to restore to a party property to which it is legally entitled.

S.12AA creates the confiscation power against any person who is convicted on indictment for possessing unexplained property under s.10(1)(b) of the POBO. The sentencing court is entitled to order the confiscation of any pecuniary resources or property which are found at the trial to be in that person’s control.

5.2 Guidelines Applicable to the Assessment of Penalties

Given the serious nature of the corruption offences, the sentencing options are rather limited; namely, immediate imprisonment (or a suspended sentence) in most cases and, very occasionally, a community service order for minor offences.

Case law sets out clear guidelines which indicate that immediate imprisonment should be the norm, unless there are wholly exceptional circumstances that justify deviation from this norm.

The following factors have been argued before the Hong Kong courts, but are regarded as non-exceptional circumstances:

- age;
- a clear record;
- an isolated and unpremeditated act;
- pleading guilty;
- providing assistance to the ICAC;
- loss of employment;
- loss of associated financial benefits;
- medical conditions;
- ignorance of the law;
- bribery was widespread in the workplace;
- the bribery was not initiated by the accused;
- the accomplice was not charged;
- the loss of the right to emigrate to another country; and
- the lack of a victim, etc.

Despite the above non-exhaustive list and the lack of a formula to define exceptional circumstances, the possibility cannot be ruled out that, sometimes, features which on their own may not be so regarded, can, when taken together, create a cumulative effect that enables them to be properly characterised as exceptional.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Unlike in the UK and USA, the current anti-bribery legal regime in Hong Kong does not impose mandatory duties upon either an individual or a corporation to prevent bribery.

However, the Corruption Prevention Department of the ICAC has set up the Corruption Prevention Advisory Service (CPAS), which has issued various guidelines by sector/industry to promote the establishment of internal compliance programmes.

For example, the CPAS issued an Anti-Corruption Programme – A Guide for Listed Company. This Guide provides a series of recommendations for setting up a top-level Anti-corruption Programme and Policy, introducing a Code of Conduct establishing the mechanism for corruption risk identification/assessment/audits and promoting anti-corruption training.

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Individuals and/or companies are not obliged under the anti-bribery laws in Hong Kong to report any corruption to the authorities.

However, if the company has an internal compliance programme which requires internal reporting, employees of the company will be subject to the company's policy to disclose any identified corruption, and the consequences of failing to do so.

6.3 Protection Afforded to Whistle-Blowers

The POBO protects the whistle-blower's name and address from disclosure and his or her information with regard to the offence from being admitted in evidence in any civil or criminal proceedings, unless that whistle-blower wilfully provides false information or the court is of the opinion that justice cannot be fully done between the parties without disclosure of the name of whistle-blower.

In the event that the whistle-blower is going to testify as a witness in court, whilst the ICAC is of the view that the witness's safety or well-being may be at risk as a result of being a witness, the ICAC could arrange witness protection and other assistance, including the provision of a new identity, to the witness pursuant to the Witness Protection Programme.

6.4 Incentives for Whistle-Blowers

Since Hong Kong has not introduced the mechanism of Deferred Prosecution/Non-Prosecution Agreements, there is neither an established mechanism to encourage whistle-blowing within the corporation nor incentives conferred by law offered to the whistle-blowers.

If a person is allegedly participating in an unreported bribery offence, he or she could try to provide that information to the ICAC in exchange for being offered immunity from prosecution. However, it is not a guaranteed "get-out-of-jail free" card, as it is always subject to the assessment and discretion of the

Department of Justice, which would require a non-prejudicial witness statement to assess the cogency of the evidence.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

S.30A of the POBO sets out the protection for an informant.

In the event that the whistle-blower is also a witness in court while his or her safety or well-being may be at risk, the Witness Protection Ordinance empowers the ICAC to enlist him or her onto the Witness Protection Programme.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

The anti-bribery laws in Hong Kong are offences of a criminal nature and are all punishable by imprisonment.

In addition, s.12(1) and (2) also empower the criminal courts to give a restitution order to recover the full amount of advantages accepted that are civil in nature. Despite the courts being vested with this power, the POBO does not specify further the enforcement mechanism in the event of default of payment.

7.2 Enforcement Body

The ICAC has been set up as a body that is independent of any other law enforcement agency to investigate bribery offences.

The POBO does not confer the ICAC with the right to prosecution. Pursuant to section 31 of the POBO, the ICAC is required to obtain consent from the Department of Justice in order to prosecute the offences under the POBO.

7.3 Process of Application for Documentation

S.13 and s.14 of the POBO provide the legal basis for the ICAC to compel the provision of documents or information by way of an ex parte application to the court. Non-compliance with such a request is in itself a criminal offence.

S.13 of the POBO enables the ICAC to inspect and require production of the accounts, books, documents or other articles relating to the offences. It could also compel the recipient of the request to confirm whether there are any accounts, books, documents or other articles liable to investigation, inspection or production at any bank, company or other place.

S.14 is a power to obtain information compulsorily. There are six types of information, which are set out as follows:

- s.14(1)(a): request that the suspect himself or herself provide the information in relation to any property, the expenditure incurred by the person and his or her spouse, parents or children, and the liability incurred by the person and his or her agents or trustees;
- s.14(1)(b): request that the suspect himself or herself provide the information in relation to the money or other property sent out of Hong Kong;
- s.14(1)(c): request that other persons provide information in relation to any property;
- s.14(1)(d): request that other persons, whom the ICAC believes to be acquainted with any facts relevant to the investigation, provide all information in their possession or to which they may reasonably have access;
- s.14(1)(e): request that the person in charge of the public body, or any department, office or establishment of any public body, produce or furnish information in his or her possession, or under his or her control or to which he or she may reasonably have access; and
- s.14(1)(f): request that the manager of any bank submit the accounts of suspect and his or her spouse, parents or children at the bank.

7.4 Discretion for Mitigation

There are neither explicit incentives for self-reporting nor deferred prosecution agreements and non-prosecution agreements in place in Hong Kong. Hence, there is no direct implication between the active mitigation from the suspects and their later treatment during the course of an investigation or prosecution. This is left to the discretion of the courts.

7.5 Jurisdictional Reach of the Body/Bodies

As previously discussed, Hong Kong anti-bribery laws have very limited extraterritorial reach.

Only s.4 of the POBO contains an extraterritorial reference which targets the bribery of a Hong Kong public servant, irrespective of whether that bribe is made within or outside of Hong Kong.

However, it does not give the ICAC or the DOJ the extraterritorial power to arrest or prosecute the suspect in question who is not within Hong Kong's jurisdiction. In that case, the DOJ will need to seek mutual legal assistance from overseas authorities via The Fugitive Offenders (Corruption) Order and The Mutual Legal Assistance in Criminal Matters (Corruption) Order.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

After decades of effort, Hong Kong public servants enjoy the highest praise for their low corruption rates. The ICAC these days focuses primarily on private-sector cases, as 572 out of 995 complaints between January and June 2020 were from the private sector. The percentage was even higher for the same period in 2019.

In addition, the ICAC reinforces its collaboration with other regulatory agencies, including the Securities Futures Commission (SFC). In June 2019, the ICAC and the SFC undertook a landmark joint operation by conducting office searches against two sponsors' firms and arresting the employees of the Listing Department of Hong Kong Exchanges and Clearing Limited, which is a public body defined under the POBO. After the joint operation, on 19 August 2019, the SFC and the ICAC entered into a Memorandum of Understanding to formalise and strengthen co-operation in combating financial crime.

As for the landmark decision, in June 2019 the Court of Final Appeal acquitted the former Chief Executive of Hong Kong Donald Tsang of the charge of Misconduct in Public Office. Tsang was originally charged with two counts of this charge.

Charge 1 concerned Tsang's acceptance of advantages, namely, the refurbishment and re-decoration of a three-storey residential property from a shareholder of an applicant who was applying for sound broadcasting licences whilst Tsang was involved in that approval process, contrary to s.4 of the POBO. Charge 1 could not be agreed upon by the jury after two trials.

Charge 2 concerned the same factual matrix, but with the emphasis on the non-disclosure of the aforementioned personal dealing with the applicant and therefore was in contravention of the common-law offence of Misconduct in Public Office. Tsang was convicted for Charge 2 and appealed all the way to the Court of Final Appeal.

The Court of Final Appeal found that the elements of Misconduct in Public Office required the prosecution to prove the wilfulness and seriousness of such misconduct. The prosecution had linked both Charge 1 and Charge 2 and, as a result, the element of wilfulness and seriousness would have been proved had Tsang been convicted for Charge 1. However, the Prosecution failed to contemplate the situation where Tsang was not convicted for Charge 1 and the trial judge failed to give adequate directions to the jury on the element of wilfulness and seriousness of the non-disclosure. Hence, Tsang's conviction on Charge 2 was quashed.

As previously mentioned, while s.3 and s.8 specifically regulate the prescribed officers and spare the prosecution from having to prove corrupt intent, the Chief Executive of Hong Kong, as the leader of all prescribed officers, is not subject to these provisions. As a result, Tsang was not prosecuted for s.3 of the POBO but was prosecuted for s.4 and the common-law offence of Misconduct in Public Office instead.

Since the occurrence of the Tsang case, the Legislative Council had discussed the need for the Chief Executive to be subject to s.3 and s.8 of the POBO. The current Chief Executive, Carrie Lam, during her campaign once advocated for this inclusion. However, in a recent interview, in November 2020, Carrie Lam stated that any such legislative enactment will not take place during her term.

7.7 Level of Sanctions Imposed

A criminal offence in Hong Kong can be categorised as an indictable offence and a summary offence, based on the severity of the offence and the applicable criminal procedure.

S.12 of the POBO sets out the penalty for bribery offences in the POBO as follows:

On conviction on indictment:

- S.10 of the POBO: for possession of unexplained property by the Chief Executive of HK or a prescribed officer, a fine of up to HKD1 million and/or imprisonment for ten years;
- S.5 & s.6 of the POBO: for bribery for giving assistance in relation to contracts with a public body or for procuring withdrawal of tenders, a fine of up to HKD500,000 and/or imprisonment for ten years;
- for other offences of the POBO, a fine of up to HKD500,000 and/or imprisonment for seven years.

On summary conviction:

- S.10 of the POBO: for possession of unexplained property by the Chief Executive of HK or a prescribed officer, a fine of up to HKD500,000 and/or imprisonment for three years;
- for other offences, a fine of up to HKD100,000 and/or imprisonment for three years.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

Under the current legal regime, s.3 and s.8 of the POBO do not apply to the Chief Executive of the Hong Kong Special Administrative Region (HKSAR).

In May 2012, the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests submitted its report to the Government, recommending the enactment of legislation to provide that the Chief Executive must obtain permission from a statutory independent committee prior to the acceptance of advantages, in order to make the system under s.3 of the POBO applicable to the Chief Executive. However, the amendment process has not yet been initiated.

After the Donald Tsang case, the Legislative Council in 2019 again followed up on this issue and enquired when the Government was planning to initiate the enactment to bring the Chief Executive within the ambit of s.3 and s.8 of the POBO.

The HKSAR government replied that this proposed enactment would have implications for the political structure of HKSAR and the constitutional status of the Chief Executive in HKSAR as prescribed in the Basic Law. The Government is now studying carefully the relevant issues on amending the POBO to extend the application of sections 3 and 8 to the Chief Executive in accordance with the constitutional framework set out in the Basic Law and the existing legal requirements. On completion of the study, the Government will report its findings to the Legislative Council as early as possible. Since the study is still in progress, the Government does not have a specific date for submitting the report or introducing the amendment bill on the POBO to the Legislative Council at this stage.

The current Chief Executive, Carrie Lam, in her recent interview in November 2020, stated that any such legislative enactment will not take place during her term.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

No significant changes to the current legal regime are proposed, including the introduction of deferred prosecution/non-prosecution agreements which would have enacted specific articles for corporate liabilities and for the protection of whistle-blowers.

Haldanes is the best-known criminal law firm in Hong Kong and has specialised in criminal defence for over 40 years. The firm also has the largest criminal department in Hong Kong – five partners, six associates and one consultant who are fully devoted to criminal law practice. Two of the senior partners are solicitor-advocates with higher rights of audience before all criminal courts in Hong Kong, from Magistrates’ Courts up to the Court of Final Appeal. Haldanes has a wealth of experience in defending clients in a broad spectrum of criminal matters, from petty crimes to complex listed-company fraud and international corruption cases. The firm regularly deals

with various investigation authorities, including the Hong Kong Police Force, the Independent Commission Against Corruption (ICAC), the Commercial Crime Bureau (CCB), the Securities & Futures Commission (SFC), the Stock Exchange of Hong Kong (SEHK), the Hong Kong Monetary Authority (HKMA), the Immigration Department, the Inland Revenue Department, the Customs and Excise Department and various professional councils and regulatory bodies. Haldanes’ solicitors frequently appear as advocates in the Magistrates’ Courts and the District Court, and engage counsel whenever required, especially in the appellate courts.

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