

THE ANTI-BRIBERY AND  
ANTI-CORRUPTION  
REVIEW

SIXTH EDITION

Editor  
Mark F Mendelsohn

THE LAWREVIEWS

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ANTI-CORRUPTION  
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# PREFACE

This sixth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company *Petróleo Brasileiro SA* (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US\$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US\$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US\$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US\$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US\$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

IMDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US\$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US\$965 million in fines and penalties for making bribe payments of over US\$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US\$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations, and

remediation of internal controls and compliance programmes. The Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

**Mark F Mendelsohn**

Paul, Weiss, Rifkind, Wharton & Garrison LLP  
Washington, DC  
November 2017

# HONG KONG

*Kareena Teh*<sup>1</sup>

## I INTRODUCTION

Hong Kong has a long and successful history of fighting corruption, evident in the recent high-profile convictions of the former Chief Secretary for Administration of the Hong Kong Government Rafael Hui Si-yan and former Chief Executive Donald Tsang Yam-kuen. Hong Kong's bribery laws date back to as early as 1898, when bribery was first made an offence under the Misdemeanours Punishment Ordinance (MPO) enacted in 1898, and then in the Prevention of Corruption Ordinance, which replaced the MPO in 1948.<sup>2</sup> From 1971 till today, the main anti-corruption legislation in Hong Kong has been the Prevention of Bribery Ordinance, Chapter 201 (POBO), which targets both official and commercial bribery. The POBO is enforced by the Independent Commission Against Corruption (ICAC), an independent body established in 1974, just a few years after the POBO came into force. The ICAC is accountable only to Hong Kong's Chief Executive, led by a Commissioner who is directly appointed by the Chief Executive,<sup>3</sup> and as of the end of 2016, it has a force of 1,457 employees or officers.<sup>4</sup> It has been and remains an integral part of Hong Kong's fight against corruption and is one of the main reasons that Hong Kong enjoys a reputation as one of the least corrupt places globally (currently ranked 15 out of 176 countries on Transparency International's 2016 Corruption Perceptions Index).<sup>5</sup>

## II DOMESTIC BRIBERY: LEGAL FRAMEWORK

### i Definition of a bribe

The POBO does not, despite its name (Prevention of Bribery Ordinance), include in its enumerated offences the term 'bribe', nor does it define it. Instead, it proscribes the offering, soliciting or accepting of an 'advantage', which is defined in Section 2 to cover:

- a* 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;
- b* any office, employment or contract;

---

1 Kareena Teh is a partner at Dechert. The author would like to thank Yim Tze Hin Ernest, who was an intern with Dechert, for his assistance with this chapter.

2 See 'Hong Kong: The Facts – ICAC', at [www.gov.hk/en/about/abouthk/factsheets/docs/icac.pdf](http://www.gov.hk/en/about/abouthk/factsheets/docs/icac.pdf).

3 See Article 57 of the Basic Law of the Hong Kong Special Administrative Region.

4 See 'ICAC Annual Report 2016' at [www.icac.org.hk/filemanager/en/content\\_27/2016.pdf](http://www.icac.org.hk/filemanager/en/content_27/2016.pdf)

5 Transparency International, CPI 2016: [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016).

- c* any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- d* any other service or favour (other than entertainment; see Section II.iv);
- e* the exercise of or forbearance from the exercise of any right or any power or duty; and
- f* any offer, undertaking or promise, whether conditional or unconditional, of any advantage as set out in (a) to (e).

## **ii The offences**

The POBO includes a range of offences governing both the public and the private sector:

- a* Under Section 3 of the POBO it is an offence for prescribed officers (see further explanation in Section II.iii) to solicit or accept an advantage without the general or special permission of the Chief Executive.
- b* Under Section 4 of the POBO it is an offence to offer an advantage (without lawful authority or reasonable excuse) to a public servant or the Chief Executive for the performance of an act (or for abstaining from the performance of an act) in their official capacity or to influence the transaction of any business with a public body. It is also an offence under Section 4 of the POBO for any such public servant or the Chief Executive to solicit or accept such an advantage.
- c* Under Section 5 of the POBO it is an offence to offer an advantage (without lawful authority or reasonable excuse) to a public servant or the Chief Executive for assistance in influencing the promotion, execution or procurement of any contract with a public body or the payment of moneys provided in such a contract. It is also an offence for a public servant or the Chief Executive to solicit or accept an advantage under the same circumstances.
- d* Under Section 6 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer, solicit or accept an advantage as a reward for the withdrawal of a tender for any contract with a public body.
- e* Under Section 7 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer, solicit or accept an advantage as a reward for refraining from bidding at any auction conducted by or on behalf of any public body.
- f* Under Section 8 of the POBO it is an offence for any person (without lawful authority or reasonable excuse) to offer an advantage to any prescribed officer of the government or public servant employed by such a public body while having dealings with the government or public bodies.
- g* Section 9 of the POBO covers bribery of agents and is most commonly relied on by the ICAC in its enforcement of the POBO because of its broad scope. Under Section 9 it is an offence to offer to an agent (without lawful authority or reasonable excuse), and for the agent to solicit or accept (without lawful authority or reasonable excuse), an advantage for doing (or forbearing to do) any act or showing favour or disfavour to any person in relation to the business of that agent's principal. Because of the broad nature of the term 'agent', Section 9 of the POBO applies to the bribery of public officials (where it functions as a catch-all clause for the specific conduct that is not already covered by Sections 3 to 8) as well as to commercial bribery (see further explanation in Section II.x).
- h* Under Section 10 of the POBO it is an offence for prescribed officers and the Chief Executive (current or former) to maintain a standard of living or be in control of pecuniary resources or property that is disproportionate with their present or past emoluments and that cannot be satisfactorily explained.

For all the POBO offences it is irrelevant whether the improper conduct (for which the advantage was offered, solicited or provided) was undertaken or not – according to Section 11 of the POBO, it is not a defence to liability under the POBO that the recipient of the bribe had no power or right to undertake the relevant conduct, never intended to undertake the relevant conduct or did not undertake the relevant conduct: liability arises so long as the recipient of the bribe believed that the bribe was given as an inducement for his or her undertaking the requested conduct.

In addition to the various POBO offences, there is also the common law offence of misconduct in public office that applies where a public official deliberately misconducts himself or herself in relation to his or her public office without any reasonable excuse. The misconduct has to be serious for charges to be laid.

### iii Public officials

Public officials under the POBO are divided into three distinct categories:

- a Prescribed officers who according to Section 2(1) of the POBO include mainly persons holding an office of emolument in government, officials of the Monetary Authority, members of the ICAC, judicial officers and the Chairman of the Public Service Commission in Hong Kong.
- b Public servants who according to Section 2(1) of the POBO include prescribed officers and employees of public bodies in Hong Kong.
- c The Chief Executive of Hong Kong.

While Sections 4, 5 and 8 of the POBO have a wider scope and apply to public servants, Sections 3 and 10 are more specific and apply only to prescribed officers. Further, Sections 3 and 8 of the POBO currently do not apply to the Chief Executive. This loophole was identified by the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests in its report issued in May 2012.<sup>6</sup> However, as of August 2017, no steps have been undertaken to close the loophole.

### iv Gifts, travel, meals and entertainment

The definition of ‘advantage’ under the POBO is very wide and covers gifts and travel. In addition, there is no *de minimis* exception excluding payments or gifts of small amounts. As such, any gift or payment for travel for any agent (whether private counterparties or public officials) could lead to exposure under the POBO because of the wide scope of the applicable provisions (e.g., Section 9 of the POBO).

The POBO does, however, provide a narrow exception that excludes ‘entertainment’ from the scope of ‘advantage’ but the definition of ‘entertainment’ under the POBO is narrow and applies only to ‘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, the term ‘advantage’ under the POBO does not apply to entertainment that is provided together with meals or drinks (e.g., music). There are, however, several government guidelines that require civil servants to avoid ‘lavish, or unreasonably generous or frequent entertainment, or any entertainment that is likely to give rise to any potential

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<sup>6</sup> ‘Report of the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests’ dated May 2012: [www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca0604-rpt20120531-e.pdf](http://www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca0604-rpt20120531-e.pdf).

or real conflict of interest, put the officers in an obligatory position in the discharge of their duties, compromise their impartiality or judgement, or bring them or the public service into disrepute bearing in mind public perception'.<sup>7</sup> For politically appointed officials, similar guidelines provide that such officials should not accept entertainment of an excessive nature that could lead to embarrassment for the official in the discharge of his or her functions or that may bring the official and the public service into disrepute.<sup>8</sup>

More specifically for gifts, officials are also subject to guidelines beyond the scope of the POBO. Politically appointed officials are, for example, required to retain a register of any 'gift, advantage, payment, sponsorship (including financial sponsorships and sponsored visits) or material benefit received by them or their spouses' that in any way relates to their office.<sup>9</sup> In addition, specifically for prescribed officers, the Acceptance of Advantages (Chief Executive's Permission) Notice 2010 provides a narrow exception for gifts: prescribed officers can receive low value gifts on specific occasions such as weddings (up to HK\$1,500) and on any other occasion (up to HK\$250) provided that the person making the gift has no official dealings with the prescribed officer or his or her department.<sup>10</sup>

## v Political contributions

Political contributions are not directly covered by the POBO. In a recent high-profile case, the former Chief Secretary for Administration in Hong Kong, Rafael Hui Si-yan (the second highest office after the Chief Executive in Hong Kong's government hierarchy), the co-chair of a leading property developer and two other individuals associated with him were convicted of bribery and received long jail terms for a number of payments made by the property developer to Hui and Hui's rent-free use of an apartment belonging to the property developer, despite the fact that Hui was not expected to perform any particular act in exchange and only to remain favourably disposed to the property developer. This case shows that the relevant power or duty of the officer or the office will affect the seriousness of misconduct in public office. Since Hui had an important political role in the Hong Kong government, his behaviour will attract higher scrutiny from the enforcement authorities in Hong Kong.

More specifically for donations made to candidates during elections, the Elections (Corrupt and Illegal Conduct) Ordinance, Chapter 554 (E(CIC)O) includes a number of provisions that govern, *inter alia*, the proper use of election donations and the requirement for receipts to be issued for election donations of more than HK\$1,000 and the requirement to disclose all election donations (including copies of the receipts issued) to the appropriate authority.

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7 See publication of the Administration of the Civil Service, Summary of the Regulatory Regime on Acceptance of Advantages and Entertainment by Civil Servants (para. 18): [www.csb.gov.hk/english/admin/conduct/files/aae\\_e.pdf](http://www.csb.gov.hk/english/admin/conduct/files/aae_e.pdf).

8 Chief Executive's Office, Code for Officials under the Political Appointment System, Chapter 5.10, [www.cmab.gov.hk/doc/issues/code\\_en.pdf](http://www.cmab.gov.hk/doc/issues/code_en.pdf).

9 Chief Executive's Office, Code for Officials under the Political Appointment System, Chapter 5.14, [www.cmab.gov.hk/doc/issues/code\\_en.pdf](http://www.cmab.gov.hk/doc/issues/code_en.pdf).

10 Acceptance of Advantages (Chief Executive's Permission) Notice 2010, [www.csb.gov.hk/english/rcim/central/files/aan\\_e.pdf](http://www.csb.gov.hk/english/rcim/central/files/aan_e.pdf).



**vi Payments through third parties or intermediaries**

Bribes paid through third parties or intermediaries can expose the ultimate bribe-giver to liability under the POBO. Additionally, reaching an agreement with third parties or intermediaries to pay a bribe can also expose the ultimate bribe-giver and the third parties or intermediaries to a charge of conspiracy under Section 159A of the Crimes Ordinance, Chapter 200, so long as the bribe that is the subject of the conspiracy is triable in Hong Kong.

**vii Individual and corporate liability**

The POBO offence provisions apply to all ‘persons’, which is defined by Section 3 of the Interpretation and General Clauses Ordinance, Chapter 1 to include both natural persons as well as public bodies and bodies of persons, corporate or unincorporated. As such, individuals and companies can be prosecuted for bribery. In the recent past, however, prosecutions of companies have been extremely rare. Instead, Hong Kong’s bribery enforcement has largely focused on the prosecution of individuals.

**viii Enforcement**

The ICAC is the main government agency responsible for investigating bribery-related cases and enforcing the POBO and the common law offence of misconduct in public office. Following the ICAC’s investigations, the Secretary of Justice has to give consent before a suspect who is being investigated by the ICAC can be prosecuted (Section 31(1) of the POBO).

**ix Leniency and plea-bargaining**

Hong Kong anti-bribery laws do not contain any specific provisions on leniency or plea-bargaining. Generally, under the Prosecution Code, a suspect who cooperates with the prosecution will ordinarily receive a discount on sentence reflecting the nature and extent of the cooperation offered to the prosecution, and, in exceptional circumstances, a witness may be offered immunity from prosecution.

Under the Prosecution Code, plea negotiations and agreements are possible and usually involve the defence inviting the prosecution to resolve a matter by agreeing to the accused pleading guilty to fewer or lesser charges than those already laid. Negotiated pleas will, however, not be accepted in Hong Kong if the accused maintains his or her innocence to the charge.

**x Commercial bribery**

As set out above, Section 9 of the POBO (advantages being offered to or accepted by an agent in relation to the business of that agent’s principal) applies to both public and private sector bribery because of the broad nature of the term ‘agent’. As such, Section 9 of the POBO functions as the main provision in the POBO for the prosecution of commercial bribery in private transactions.

**xi Defences**

The Sections 4 to 9 offence provisions under the POBO include a defence: an accused may have a statutory defence if he or she can prove (on the balance of probabilities) that he or she had a ‘lawful authority or reasonable excuse’ for making the offer or accepting an advantage. Such lawful authority could, for example, be permission for the acceptance of the advantage

by the public body that a prescribed officer is employed by (Section 4(3) of the POBO) or by the agent's principal (Section 9(4) of the POBO). Such permission has to be obtained in writing and has to be given either before the advantage is offered or accepted or as soon as reasonably possible thereafter if prior permission could not be obtained.

## **xii Penalties**

The offence in Section 3 of the POBO is a summary offence and carries a maximum prison term of one year and a maximum fine of HK\$100,000.<sup>11</sup> All the other bribery offences under the POBO are indictable offences and (upon indictment) carry a maximum prison sentence of 10 years (Sections 5, 6 and 10) and seven years for all other offences.<sup>12</sup> The maximum fine for a Section 10 offence (upon indictment) is HK\$1 million. All other offences carry a maximum fine of HK\$500,000 (upon indictment). Additionally, offenders can be ordered to disgorge the advantage received (or a sum not exceeding the value of the unexplained property for Section 10 of the POBO),<sup>13</sup> and subject to mandatory confiscation and restitution orders under Section 12 of the POBO. Such confiscation or restitution orders can be enforced in the same manner as a civil judgment of the High Court.

An offender who has been convicted of the common law offence of misconduct in public office can be sentenced to a maximum prison term of seven years and a fine under Section 101I(1) of the Criminal Procedure Ordinance (Chapter 221).

## **III ENFORCEMENT: DOMESTIC BRIBERY**

The ICAC is very active in its enforcement of the POBO. In recent years, there have been several high-profile official bribery investigations and prosecutions that received a lot of media attention. These included several cases involving high-ranking former government officials, such as the case against the former Chief Secretary for Administration, Rafael Hui Si-yan, and the former Chief Executive, Donald Tsang Yam-kuen, the two highest-ranking posts within the Hong Kong government.

Former Chief Secretary for Administration Hui was convicted and sentenced to a jail term of more than seven years for payments and the rent-free use of an apartment that Hui accepted from companies and intermediaries connected with a Hong Kong property developer. When receiving those advantages, Hui was not expected to undertake any specific act for the property developer, but rather was expected to remain favourably disposed towards the property developer in his capacity as the second-highest-ranking government official at that time. Together with Hui, the co-chairman of the property developer and two other persons were also sentenced to long jail terms. Hui and the other persons who were convicted had their appeals unanimously dismissed by the Court of Final Appeal in June 2017.

Former Chief Executive Tsang was charged in October 2015 with two counts of misconduct in public office. Tsang is alleged to have failed to declare his interest in a luxury residential unit in Shenzhen, the People's Republic of China (China) owned by the majority shareholder of a radio station at the time when the government was considering and approving the radio station's various licences. Tsang is also alleged to have referred an interior designer for consideration for nomination for a government award when the interior designer was

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11 Section 12(2) POBO.

12 Section 12(1) POBO.

13 Section 12(1), (2), (3) POBO.

working on the luxury residential unit in Shenzhen. In October 2016, the prosecution, with the High Court's leave, amended the charges laid to include an additional count of 'accepting an advantage' under the POBO in his capacity as Chief Executive (at the relevant times). The additional charge alleged that Tsang accepted an advantage in the form of the refurbishment and redecoration of the same luxury residential unit in Shenzhen in exchange for performing an act as Chief Executive (i.e., giving his approval for the radio station's licences and the appointment of the radio station's director and board chair). In February 2017, Tsang was found guilty on one count of misconduct in public office and sentenced to 20 months' imprisonment (reduced from 30 months for his good character and contributions to Hong Kong) in the Court of First Instance. Tsang has filed an appeal against his conviction and sentence. Tsang will face a retrial in the Court of First Instance on the charge of bribery (which the jury failed to reach a decision on at the first trial).

The ICAC has also been actively investigating and taking enforcement action against commercial bribery. In July 2017, a former assistant project manager of an engineering company pleaded guilty to two charges of conspiracy and was sentenced to 24 months' imprisonment for accepting illegal rebates of approximately HK\$430,000 for recommending refurbishing works to two electrical engineering firms, contrary to Section 9(1)(a) of the POBO and Section 159A of the Crimes Ordinance. In June 2017, a renovation worker pleaded guilty and was sentenced to two months' imprisonment for offering HK\$23,500 to the chairman of the incorporated owners of a residential building for assigning a total of 31 minor repair works to him.

Recently, the ICAC's enforcement efforts have also focused on the financial services industry. In July 2017, the director of a manufacturing company was convicted and sentenced to four months' imprisonment for offering a bribe of 9,999 yuan twice to an assistant manager of a bank to open a bank account for his company. In July 2016, the ICAC charged a former bank manager of an international bank with conspiring with customers to accept bribes totalling 2.7 million yuan for handling the accounts of the companies maintained with the bank that were controlled by or associated with the customers, contrary to Section 9(1)(a) of the POBO. In another case, a bank customer was sentenced to a six-month jail term for attempting to bribe a bank manager of an international bank with a gift of perfume to facilitate the opening of a bank account for his company. In all these cases, the banks involved had rendered full assistance to the ICAC. Following similar investigations by the US authorities, the ICAC has also investigated the hiring practices of a large multinational banking and financial services company in relation to the hiring of relatives of public officials or business owners in Hong Kong and China. As part of the ICAC's investigations, the former head of the China investment banking department of the financial services company was arrested. There have been no publicly available updates about the ICAC's investigations since the arrest.

## **IV FOREIGN BRIBERY: LEGAL FRAMEWORK**

### **i Foreign bribery law and its elements**

Hong Kong does not have a separate legal regime governing foreign bribery. Rather the POBO provisions set out above are applied to address foreign bribery as well as domestic bribery. Recent cases have, however, established that there is very little scope to apply the POBO provision to foreign bribery.

Section 4 of the POBO is the only provision in the POBO that expressly extends the scope of the POBO beyond the borders of Hong Kong by specifying that it is an offence to offer an advantage to a public servant or the Chief Executive or for them to solicit or accept an advantage ‘in Hong Kong or elsewhere’. However, as Section 4 of the POBO only applies to Hong Kong public servants or the Chief Executive (and not to foreign officials of places outside Hong Kong), it would be an offence if a bribe was paid to a Hong Kong public official in Macao but not an offence if a bribe was paid to a Macanese public official.

In addition, Section 9 of the POBO that governs bribery of ‘agents’ in relation to the business of that agent’s principal has been successfully applied to bribery of foreign officials. The courts have held<sup>14</sup> that the broad term ‘agents’ includes foreign public officials if they are bribed in relation to their duties as officials of a foreign government or administration. However, as Section 9 (unlike Section 4) does not include the words ‘in Hong Kong or elsewhere’ when describing the conduct of offering, soliciting or accepting a bribe, the relevant conduct of offering, soliciting or accepting the bribe has to occur in Hong Kong. This means that, while technically Section 9 of the POBO can apply to the bribery of foreign public officials, it only does so if the relevant conduct takes place in Hong Kong (i.e., if the foreign official travels to Hong Kong and the bribe is offered, solicited or paid to the foreign official while he or she is in Hong Kong).

## **ii Definition of foreign public official**

The POBO does not refer to foreign public officials and does not have a definition of foreign public officials. As set out above, the courts have interpreted the broad term ‘agent’ in Section 9 of the POBO to include foreign public officials, and it is now possible for charges to be laid for bribing foreign officials in relation to their principal’s affairs (i.e., their duties as an official of a foreign government or administration) as long as they are bribed in Hong Kong. Otherwise there is no other specific definition of a foreign official under the POBO. The broad scope of the term ‘agent’ under Section 9 of the POBO would also apply to an employee of a state-owned enterprise if he or she is bribed (in Hong Kong) in relation to the business of that state-owned enterprise.

## **iii Gifts, travel, meals and entertainment**

The definition of what constitutes an advantage in the limited circumstances where the POBO applies extraterritorially or to foreign public officials is identical to the definition of an advantage for domestic bribery (see Section II.iv).

## **iv Facilitation payments**

The POBO does not include a facilitation-payments exception nor any *de minimis* exception. As such, payments of any amount that are made to a foreign public official in relation to his or her duties as an official of a foreign government or administration (including to expedite a routine government action) may constitute an offence under the POBO (as long as the payments are made while the foreign public official is in Hong Kong).

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14 Hong Kong Court of Final Appeal, *B v. Commissioner of the Independent Commission Against Corruption* [2010] HKEC 122.

**v Payments through third parties or intermediaries**

Bribes paid through third parties or intermediaries can expose the ultimate bribe-giver to liability under the POBO or for conspiracy to bribe in foreign bribery cases in the same way as domestic bribery cases. For conspiracy to bribe a foreign official, however, the bribe has to be offered or made in Hong Kong.

**vi Prosecution of foreign companies**

Foreign companies based in Hong Kong can be prosecuted in the same way that local Hong Kong companies can for bribes made in Hong Kong (whether to Hong Kong or foreign public officials and commercial counterparties) and overseas (to Hong Kong public officials) within the limited scope of Section 4 of the POBO. However, as noted above, Hong Kong's anti-bribery laws are generally enforced against individuals, and the prosecution of companies is very rare.

**vii Penalties**

Penalties for foreign bribery are identical to the penalties set out for domestic bribery in Section II.xii.

**V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING**

**i Financial record-keeping laws and regulations**

The POBO does not specifically include a requirement for companies to maintain proper books and accounts. Section 9 of the POBO, however, proscribes and makes it an offence for an agent, with the intent to defraud his or her principal, to use any receipt, account or other document that contains any statement that is false or erroneous or defective in any material particular.

Outside the POBO, there is a general requirement for Hong Kong companies to keep accounting records that are sufficient to explain the company's transactions and disclose with reasonable accuracy the company's financial position and performance (Section 373(2) of the Companies Ordinance (Chapter 622)). Failure to comply with this general provision may lead to a fine or at worst to imprisonment of up to 12 months for a director of the company (if the relevant offence was committed wilfully).

**ii Tax deductibility of bribes**

The tax deductibility of bribes is not addressed in the applicable laws of Hong Kong. However, given that bribery is a criminal offence, and bribes are proceeds of crime, bribes would not be deductible as a legitimate business expense in Hong Kong.

**iii Money laundering laws and regulations**

The Organized and Serious Crimes Ordinance, Chapter 455 (OSCO) is the primary legislation addressing the crime of money laundering. It is an offence under Section 25 of the OSCO to deal with property 'knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence'. Section 25 of the OSCO applies to proceeds from bribery offences under

the POBO as the relevant offences in the POBO are indictable offences. An offence under Section 25 of the OSCO can lead to a fine of up to HK\$5 million and imprisonment for up to 14 years upon conviction on indictment.

While there is no duty under the POBO to report bribery offences, the OSCO imposes a positive duty to report knowledge or suspicion of proceeds of bribery and other indictable offences. Under Section 25A of the OSCO, any person who knows or suspects that any property directly or indirectly represents proceeds of an indictable offence shall as soon as possible disclose that knowledge or suspicion to the relevant authorities, such as the Joint Financial Intelligence Unit and the Hong Kong police.

## VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

As set out above, the application of the POBO to foreign bribery is very limited. As such, there have only been a few cases that either involve a foreign public official or the extraterritorial application of the POBO.

The first case confirmed that the definition of ‘agent’ in Section 9 of the POBO is wide enough to cover a public official from a place outside Hong Kong. In that case, which ultimately went on appeal to the Court of Final Appeal,<sup>15</sup> Hong Kong’s highest appellate court, the chair of a Hong Kong company had conspired with others to offer in Hong Kong ‘advantages’ to a public official of a place outside Hong Kong as a reward for that public official’s assistance in the company’s business ventures in that place outside Hong Kong. The Court of Final Appeal held that an offence under Section 9 of the POBO is constituted where an advantage is offered in Hong Kong, even if the recipient of the advantage is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his or her public duties in that place outside Hong Kong. Further, a conspiracy under Section 159A of the Crimes Ordinance was also constituted as the main offence (i.e., the giving of the advantage under Section 9 of the POBO was triable in Hong Kong).

In a similar case a few years later, the Court of Final Appeal confirmed that despite the application of Section 9 of the POBO to foreign public officials, the scope of Section 9 nevertheless remained limited to conduct that is undertaken in Hong Kong: this second case involved the offering of a bribe to a foreign official of Macao. The Hong Kong Court of Final Appeal<sup>16</sup> (confirming the decision of the Court of Appeal)<sup>17</sup> held that if the relevant conduct (i.e., the offer of the bribe) was made outside Hong Kong, there would be no triable offence in Hong Kong as Section 9 does not apply extraterritorially. In that case, two individuals planned to bribe a Macao official to obtain or retain contracts for a waste management company controlled by them in Macao. While the planning of the bribery took place in Hong Kong, the ultimate offer was made outside Hong Kong. The Court of Appeal reversed the initial conviction of the two individuals, holding that the offer of the bribe had to be communicated to the intended recipient for the offer to be completed. As the offer was communicated outside Hong Kong, no triable offence under Section 9 of the POBO was constituted. In turn, the planning of the bribe that was undertaken in Hong Kong, was

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15 Hong Kong Court of Final Appeal, *B v. Commissioner of the Independent Commission Against Corruption*, [2010] HKEC 122.

16 Hong Kong Court of Final Appeal, *HKSAR v. Lionel John Krieger*, [2014] HKEC 1323.

17 Hong Kong Court of Appeal, *HKSAR v. Lionel John Krieger & Tam Ping Cheong James*, [2013] HKCU 2898.

also not triable in Hong Kong as a conspiracy charge under Section 159A of the Crimes Ordinance requires that the underlying offence that is the subject of the conspiracy is a triable offence in Hong Kong.

## **VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS**

Hong Kong is subject to the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. While it is not a member of either, they were extended to it by China, which is a member. Hong Kong is a member of the Financial Action Task Force. Neither Hong Kong nor China are members of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

## **VIII LEGISLATIVE DEVELOPMENTS**

Currently, the main issue that has been identified by the government and will need to be addressed is a loophole in the POBO that excludes the Chief Executive from the application of some of the provisions in the POBO. Sections 3 and 8 of the POBO, while applicable to public officials under the political appointment system and civil servants, do not apply to the Chief Executive. While this loophole was picked up in a report presented to the government in 2012,<sup>18</sup> as of August 2017, no steps have yet been taken to amend the POBO accordingly.

## **IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION**

There are a number of laws and legal principles that are important when dealing with corruption cases in Hong Kong.

### **i Legal professional privilege**

Legal professional privilege is recognised and protected by the Basic Law<sup>19</sup> and the common law. Legal professional privilege consists of legal advice privilege that covers communication between lawyers and their clients for the purpose of obtaining and giving of legal advice, and litigation privilege that covers communication between lawyers and their clients and certain third parties for the dominant purpose of existing or contemplated litigation. Section 15 of the POBO expressly recognises that protection and provides that legally privileged information, documents, etc., are protected from disclosure. Legal professional privilege is frequently invoked and used to protect the relevant categories of documents from production to the authorities in corruption investigations.

### **ii Data protection**

Hong Kong has strict data protection laws. These laws are found in the Personal Data Privacy Ordinance, Chapter 486 (PDPO) and are enforced by the Office of the Privacy Commissioner

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18 See Report of the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests dated May 2012 ([www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca0604-rpt20120531-e.pdf](http://www.legco.gov.hk/yr11-12/english/panels/ca/papers/ca0604-rpt20120531-e.pdf)).

19 Article 35 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

for Personal Data and the police. The PDPO defines personal data very broadly to cover any data relating directly or indirectly to a living individual in an accessible or processable form that can be used to ascertain the identity of that person. The PDPO includes six Data Protection Principles,<sup>20</sup> which set out, *inter alia*, how personal data can be collected, retained, used and disclosed. Because of the wide-reaching protection afforded to personal data by the PDPO, specific attention has to be given to issues such as access and disclosure of personal data in corruption investigations.

### **iii Whistle-blowing**

Informers who provide information to the ICAC are protected. Under Section 30A of the POBO, the name and address of an informer have to be kept confidential and any documents that may lead to disclosure of the informer's identity have to be redacted prior to disclosure in civil or criminal proceedings. In addition, ICAC informers can receive witness protection under the Witness Protection Ordinance, Chapter 564, including protection for personal safety or well-being.

## **X COMPLIANCE**

The POBO does not set out any mandatory requirements or best practices for corporate compliance programmes; nor does it have defences or offer leniency for effective corporate compliance programmes. The ICAC does, however, offer consultancy services on corporate compliance programmes through its Hong Kong Business Ethics Development Centre.

Companies in Hong Kong are generally sophisticated and have implemented comprehensive compliance programmes in conjunction with applicable local laws and, because of the cross-border nature of the operations of many Hong Kong companies, with the laws of other jurisdictions such as China, the United States and the United Kingdom.

## **XI OUTLOOK AND CONCLUSIONS**

Hong Kong has a good reputation and is known as one of the least-corrupt jurisdictions in the world. Its reputation is partly based on its effective anti-corruption laws and on active enforcement of the relevant laws by the authorities, most notably, the ICAC. Hong Kong's public perception has suffered, though, in recent years most notably because of several high-profile investigations that revealed corruption at the highest levels of the government. With the conviction of a majority of those accused, it remains to be seen whether the public's confidence in Hong Kong can and will be restored through the successful investigation and conviction of the suspects, or whether a further tightening of the applicable laws and an increase in enforcement activity will be required for Hong Kong and its government to rebuild the trust of its citizens and outside investors.

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<sup>20</sup> See Schedule 1 of the PDPO.



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Kareena Teh represents corporates and individuals on corporate investigations, including into bribery, corruption, market misconduct, money laundering and securities fraud issues, government prosecutions, administrative actions, and related civil actions. She also advises clients on legal and regulatory compliance, remediation and risks mitigation. Previously a practising barrister in New Zealand, Ms Teh has substantial experience running both civil and criminal defence cases. Her broad grounding in various aspects of contentious legal work and wide range of skills and expertise provides her with a unique advantage when conducting corporate investigations, and defending prosecutions and administrative actions. As the first female solicitor in Hong Kong to be granted higher rights of audience to represent clients in civil matters at all levels of Hong Kong's judicial system, she is also ideally suited to handle associated civil actions that arise out of such investigations.

Ms Teh is 'Highly Commended' in the *Financial Times* 'Asia-Pacific Innovative Lawyers' Report 2017 for her work in the dispute resolution category, and is well regarded by her clients and peers. She is recognised by *The Legal 500 Asia Pacific* 2016 for her regulatory, anti-corruption and compliance work in Hong Kong and *Chambers Asia Pacific* 2017 for her dispute resolution practice in China. In addition, *Global Investigations Review* profiled her as part of their 'Women in Investigations' feature on the 100 top women in investigations globally.

Ms Teh is a qualified lawyer in Hong Kong, New Zealand and England and Wales. She speaks English, Bahasa Malaysia and Chinese.

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