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A safe haven from which to plan foreign bribes: The lack of extra-territoriality of Hong Kong's anti-bribery laws

The Hong Kong Court of Final Appeal ("**CFA**") has confirmed that Hong Kong's much feted anti-graft laws do not apply to conspiracies made in Hong Kong to offer bribes abroad, whether to foreign public officials or private corporations, even if the bribes result in a benefit to a Hong Kong company.

In its 6 August 2014 decision[1], the CFA upheld a lower court's decision to set aside the convictions of two executives for conspiracy to offer bribes to a government official in violation of Section 9(2) of the Prevention of Bribery Ordinance ("**POBO**"). Because the parties conspired in Hong Kong but the bribes were offered by an agent in Macau, the CFA agreed that Hong Kong did not have jurisdiction over the crime.

Background

Lionel Krieger and James Tan were the former President and a Director respectively of Companhia de Sistemas de Residuos Limitada ("**CSR**"), a waste services company that was set up as a joint venture held 80% by a Hong Kong company and 20% by a Macau-based company. The two were convicted in February 2012 of entering into a conspiracy in Hong Kong with Federico Nolasco, a Macau businessman and owner/operator of Nolasco Ltd, to offer advantages (bribes) to the former Macau Secretary for Transport and Public Works, Ao Man Long ("**Ao**"), in order to ensure the continuing award of public waste contracts to CSR. Ao was sentenced to 29 years imprisonment in Macau for his receipt of these bribes. Nolasco gave evidence at trial against Krieger and Tan under an immunity agreement.

Krieger and Tan appealed their respective convictions to the Court of Appeal.

Of particular importance on appeal was the fact that whilst Krieger, Tan, and Nolasco all conspired with one another within Hong Kong to offer bribes to Ao, the offers of bribes themselves were made to Ao by Nolasco outside Hong Kong's jurisdiction, in Macau.

Krieger and Tan had been indicted for a conspiracy to commit an offence under Section 9(2) of the POBO.[2] The prosecution argued that the offer of a bribe to Ao was complete as soon as the conspiracy was made (notwithstanding that the offer had not yet been communicated to Ao). Accordingly, the prosecution argued, as the conspiracy was made in Hong Kong, this was sufficient for jurisdiction, even if Hong Kong did not have jurisdiction over the actual bribery, in Macau. The District Court agreed, and it was on this basis that Krieger and Tan were convicted.

The Court of Appeal (whose judgment was subsequently approved by the CFA) rejected this analysis. It ruled that even if a conspiracy to offer bribes abroad was made within Hong Kong, such a conspiracy was not within the jurisdiction of Hong Kong, as the conspiracy itself did not constitute the offering of a bribe. Accordingly, as the criminality agreed to be embarked upon (i.e., the offering of bribes) would take place outside Hong Kong's jurisdictional reach, the courts of Hong Kong had no jurisdiction over the conspiracy. The Court of Appeal set aside the convictions of Krieger and Tan.

[1] *HKSAR v. Lionel John Krieger* [2014] HKEC 1323
[2] Under § 159A Crimes Ordinance ("**CO**")

Analysis

This has created a weakness in Hong Kong's anti-corruption laws, whereby employees of a Hong Kong company are free to plan within Hong Kong the offering of bribes to a foreign public official or private individual, in return for favourable treatment towards the Hong Kong Company, as long as the bribes are offered offshore.

To be clear, Hong Kong law does prohibit the bribery of Hong Kong public officials, wherever that takes place,[3] as well as any conspiracy to commit a bribery offence within Hong Kong, wherever that conspiracy is made. The concern however is that the *Krieger* ruling will send a message to companies and individuals in Hong Kong that they are safe to continue planning and sourcing foreign bribes from Hong Kong, relying on the lack of effective enforcement by foreign states and the impossibility of enforcement domestically.

This limitation in Hong Kong's anti-bribery laws is in stark contrast to the position under the US Foreign Corrupt Practices Act and the UK Bribery Act ("**UKBA**"), which criminalize the bribery of foreign public officials regardless of where it takes place. Furthermore, the UKBA also criminalizes the bribery of private individuals wherever it takes place. It is also inconsistent with the anti-corruption laws of most other Asia Pacific countries such as the PRC, Japan, Singapore, Australia, Malaysia, Taiwan, the Philippines, and Indonesia.

Since the creation of the Independent Commission Against Corruption ("**ICAC**") in 1974, Hong Kong's reputation regarding corruption has radically improved, from being one of the most corrupt places on Earth to being one of the cleanest. Hong Kong is now rated 15th out of 177 countries by Transparency International, on its influential and widely consulted Corruption Perceptions Index.[4] However, as revealed by the *Krieger* ruling, the city's legal framework does not prevent the export of corruption to foreign jurisdictions. It is estimated that Hong Kong exports around HK$30 billion (USD 3.9 billion) per year in corruption to developing countries by way of bribes to foreign public officials.[5]

The CFA's ruling means that legislation explicitly prohibiting the offshore bribery of foreign public officials or private individuals is now the only way that this loophole can be closed. It remains to be seen whether Hong Kong will do so and affirm its commitment to fighting corruption.

[3] § 4 POBO
[4] www.transparency.org - 2014
[5] Source: Bloomberg.com

Contact

Wendy Wysong
Partner

T: +852 2826 3460 (Hong Kong)
+1 202 290 7634 (Washington)
E: wendy.wysong@cliffordchance.com

Nish Shetty
Partner

T: +65 6410 2285
E: nish.shetty@cliffordchance.com

Diana Chang
Partner

T: +61 28922 8003
E: diana.chang@cliffordchance.com

Michelle Mizutani
Counsel

T: +81 3 5561 6646
E: michelle.mizutani@cliffordchance.com

Yu Bing
Counsel

T: +86 21 2320 7372
E: bing.yu@cliffordchance.com

Richard Sharpe
Senior Associate

T: +852 2826 2427
E: richard.sharpe@cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

www.cliffordchance.com