

China: Hong Kong

I. Brief Introduction to the Legal System of Hong Kong

From July 1, 1997, Hong Kong has become a Special Administrative Region of the People's Republic of China (the "PRC"). Although Hong Kong is part of the PRC, it maintains its own common law legal system under the "one country, two systems" policy.¹ The legal framework of Hong Kong is based on the common law system developed in the United Kingdom and is significantly different from the legal system that operates in the PRC. Principles such as rule of law and independence of the Judiciary are fundamental in Hong Kong.

The Basic Law,² Hong Kong's constitutional document, sets out the various policies and systems to be practiced in Hong Kong. It was enacted by the National People's Congress in accordance with the Constitution of the PRC and provides the constitutional basis upon which Hong Kong has continued to protect its capitalist system, way of life and the rights and freedoms of its residents. Hong Kong has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication.³ Under the Basic Law, all the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the Hong Kong legislature.⁴ The laws that are previously in force include the common law, rules of equity, ordinances, subordinate legislation, and customary law. National laws of the PRC shall not be applied in Hong Kong except for those listed in Annex III to the Basic Law,⁵ which mainly relate to defense and foreign affairs.

¹ According to the concept of "one country, two systems", the socialist system and policies in PRC shall not be practiced in Hong Kong, and the previous capitalist system and way of life is to remain unchanged for 50 years. This principle is expressly stated in Article 5 of the Basic Law.

² It was promulgated on 4 April 1990 and took effect on 1 July 1997 on the establishment of the Hong Kong Special Administrative Region.

³ Article 2 of the Basic Law.

⁴ Article 8 of the Basic Law.

⁵ Article 18 of the Basic Law.

In other words, the laws that are in force in the Hong Kong are the Basic Law, the laws previously in force in Hong Kong (as explained above), and the laws enacted by the Hong Kong legislature.

II. Hong Kong's Anticorruption Laws

Anti-bribery law

The main anticorruption law in Hong Kong can be found in the Prevention of Bribery Ordinance (Cap. 201) (the "Bribery Ordinance"). Section 4 of the Bribery Ordinance deals with the general bribery offenses for the public sectors while sections 5 to 8 contain additional public sector bribery offenses that deal with specific situations such as bribery concerning public contracts, procuring the withdrawal of tenders, auctions, and bribery by persons who deal with public bodies in Hong Kong.

Pursuant to section 4 of the Bribery Ordinance, any public servant⁶ who without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for performing or abstaining from performing duties in his capacity as a public servant shall be guilty of an offense and be liable to (on conviction on indictment) a fine of HK\$500,000 and to imprisonment for 7 years or (on summary conviction) a fine of \$100,000 and to imprisonment for 3 years.⁷ He shall also be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify. The offeror of the advantage shall also be guilty of the same offense.⁸

Defense

The only express defense to the above offense is that when the public servant (other than the prescribed officer) solicits or accepts an advantage with the written permission of the public body of which he is an employee.⁹ It is expressly stated in the Bribery Ordinance that it shall

⁶ "Public servants" are defined in the Bribery Ordinance and include prescribed officers and employees of public bodies and exclude foreign officials.

⁷ Section 12(1)(b)(ii) of the Bribery Ordinance.

⁸ Section 4(1) of the Bribery Ordinance.

⁹ Sections 4(3) and 4(4) of the Bribery Ordinance.

not be a defense to show that any such advantage as is mentioned in the Bribery Ordinance is customary in any profession, trade, vocation, or calling.¹⁰

Other bribery offenses

Similar provisions can be found in sections 5 to 8 of the Bribery Ordinance that deals with bribery offenses under specific situations. For example, section 5 of the Bribery Ordinance deals with bribery concerning public contracts. Any public servant who without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for giving assistance or using influence in matters relating to any contract with a public body shall be guilty of an offense and be liable to (on conviction on indictment) a fine of HK\$500,000 and to imprisonment for 10 years¹¹ or (on summary conviction) a fine of \$100,000 and to imprisonment for 3 years.¹² He shall also be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify. The offeror of the advantage shall be guilty of the same offense.¹³

Covered officials

Sections 3 and 10 of the Bribery Ordinance relate to “prescribed officer”¹⁴ and are very broad in scope. Any prescribed officer who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offense.¹⁵ Section 10 of the Bribery Ordinance further imposes an obligation on the Chief Executive and the prescribed officers to give a satisfactory explanation as to how they have been able to maintain their standard of living or how pecuniary resources or property disproportionate to his present or past official emoluments came under his control.

Bribery of foreign officials

¹⁰ Section 19 of the Bribery Ordinance.

¹¹ Section 12(1)(a)(ii) of the Bribery Ordinance.

¹² Section 12(1)(b)(ii) of the Bribery Ordinance.

¹³ Section 5(1) of the Bribery Ordinance.

¹⁴ “Prescribed officer” is defined in section 2(1) of the Bribery Ordinance.

¹⁵ Section 3 of the Bribery Ordinance.

The Bribery Ordinance does not have a specific offense of bribery of foreign officials. Instead, this crime is dealt with through section 9 of the Bribery Ordinance, which concerns the corrupt transactions with agents. It prohibits the offering of an advantage to an agent to induce or reward the agent for an act or omission, or for showing favor or disfavor, in relation to his/her principal's affairs or business¹⁶ and it also prohibits an agent from soliciting or accepting an advantage for the same purpose.¹⁷ The Bribery Ordinance defines an agent as "a public servant and any person employed by or acting for another."¹⁸ In the case of *B. v. Commissioner of the ICAC*,¹⁹ the Court of Final Appeal held that the definition of "an agent" includes a public official of a place outside Hong Kong and that bribery of foreign officials could be caught by section 9 of the Bribery Ordinance where the offer occurs in Hong Kong. This case involves the bribery of a Hong Kong resident who had been employed by the consulate of a foreign government as an investigator to examine work visa applications.

To facilitate investigation, section 30 of the Bribery Ordinance criminalizes any person who without lawful authority or reasonable excuse, discloses to a person the subject of an investigation in relation to corruption or any other person the fact that he is so subject to investigation or any details of such investigation. The offender shall be liable on conviction to a fine of \$20,000 and to imprisonment for 1 year.²⁰

Common law bribery offense

In addition to the statutory offenses, there are also common law offenses of bribery and misconduct in public office in Hong Kong. An offense of misconduct in public office serves to criminalize misconducts that fall outside the express corruption offenses provided in the Bribery Ordinance and extends the reach of criminal law beyond bribery into corrupt conduct that does not involve the acceptance of an advantage offered by another person. The elements that constitute this offense²¹ are (a) a public official, (b) in the course of or in relation to the public office, (c) willfully and intentionally,²² (d) culpably misconducts himself and the

¹⁶ Section 9(2) of the Bribery Ordinance

¹⁷ Section 9(1) of the Bribery Ordinance

¹⁸ Section 2(1) of the Bribery Ordinance

¹⁹ FACC No. 6 of 2009

²⁰ Section 30(1) of the Bribery Ordinance

²¹ Civil Servants' Guide to Good Practices by the Civil Service Bureau of Hong Kong

²² "Intentionally" means voluntarily doing the acts amounting to misconduct. "Willfully" carries with it the additional meaning of "knowledge of or advertence to the consequences"

misconduct is serious.²³ The essential feature of the offense is an abuse by a public official of the powers, discretions or duties exercisable by virtue of his official position, conferred on him for the public benefit.

As to anticorruption conventions, the United Nations Convention has been ratified by the Central People's Government²⁴ and entered into force for PRC including Hong Kong. The PRC is not a ratifying country of the OECD Convention nor is it a member of GRECO. Nonetheless, Hong Kong is one of the participants in the Asian Development Bank/OECD Anticorruption Initiative for Asia-Pacific (the "Initiative") and has committed to action against corruption. The Initiative's members have jointly developed the Anticorruption Action Plan for Asia and the Pacific and work together towards its implementation. The Action Plan sets out the goals and standards for sustainable safeguards against corruption in the economic, political and social spheres of the countries in the region.

III. Assessment

Hong Kong is one of the participants in the Asian Development Bank/OECD Anticorruption Initiative for Asia-Pacific (the "Initiative") and has committed to action against corruption. The Initiative's members have jointly developed the Anticorruption Action Plan for Asia and the Pacific and work together towards its implementation. The Action Plan sets out the goals and standards for sustainable safeguards against corruption in the economic, political and social spheres of the countries in the region. The Initiative has conducted thematic reviews of specific areas of its members' anticorruption efforts since 2006. In 2010, the Initiative published a final report on its thematic review on the topic of "The Criminalization of Bribery in the Asia and the Pacific"²⁵ (the "Review Report"). The Review Report provides an in-depth analysis of the existing bribery offenses and policies in each member of the Initiative and identifies means for further improvement.

Generally speaking, Hong Kong has implemented an effective regime of criminalization of bribery. The anticorruption law in Hong Kong covers non-monetary bribes by adopting a wide definition of "advantage" in the legislation and expressly states that there is no defense that a gratification is customary. It also covers bribery of foreign public officials. These aspects are largely in line with the international standards.

²³ Whether the misconduct is serious or not is to be determined by the Court having regard to the responsibilities of the office and the office-holder, the importance of the public objects which they serve, and the nature and extent of the departure from those responsibilities.

²⁴ The PRC signed the UNCAC on 10 December 2003 and ratified it on 13 January 2006.

²⁵ The full text of the Final Report can be found in www.oecd.org/site/adboecdanticorruptioninitiative/46485272.pdf

According to the Review Report,²⁶ Hong Kong has “an impressive arsenal of investigative tools in bribery cases.” The Independent Commission against Corruption (ICAC) was established in 1974 to conduct criminal corruption investigations in Hong Kong. The Bribery Ordinance contains a wide range of means to gather financial, tax, and other information and records for investigations. In bribery cases, covert investigative techniques and property restraint orders are available. Comprehensive guidelines are in place to deal with plea bargaining and the granting of immunity to offenders in return for cooperation.

The Initiative has made some suggestions for Hong Kong to further strengthen its regime. The first suggestion is on the penalty for bribery offenses for legal persons. In Hong Kong, any person (including both natural persons and legal persons) who commits a bribery offense is liable to a fine and/or imprisonment sentences. Because of the potential length of the custodial sentence, these maximum sanctions are effective, proportionate, and dissuasive for natural persons. However, these sanctions are not regarded as effective for legal entities as jail sentences are not available. The Initiative suggests that Hong Kong could consider increasing the maximum fines for legal persons who commit the bribery offenses to address the deficiency.

The second suggestion concerns the use of forfeiture in practice. According to the statistic, forfeiture was imposed in just four cases out of the 85 convictions for active and passive domestic bribery in the years 2004 to 2008.²⁷ These figures indicate that the use of forfeiture appears to be very low. This deviates from the express guideline in the official prosecution policy in Hong Kong. As stated in paragraph 26.1 of the official prosecution policy,²⁸ the prosecutor should seek to ensure that the offender does not profit from his criminal conduct. The confiscation of the proceeds of crime is an issue to be considered from the outset of all cases where profit is or may be involved. Confiscation should not be viewed as a mere optional addition to sentence proceedings or to the conduct of a prosecution. The Initiative thus suggests that Hong Kong could consider increasing the use of forfeiture in practice in the future.

The PRC ratified the United Nations Convention²⁹ and it entered into force for the PRC including Hong Kong. The PRC is not a ratifying country of the OECD Convention nor is it a member of GRECO. Hong Kong is ranked 14 on Transparency International’s 2012 Corruptions Perceptions Index.

²⁶ The Hong Kong section can be found in pages 191 to 212 of the Review Report.

²⁷ Detailed enforcement statistics on active and passive domestic and foreign bribery offenses involving natural persons in 2004-2008 can be found in page 206 of the Review Report.

²⁸ The Statement of Prosecution Policies and Practices – Code for Prosecutors, Department of Justice

²⁹ The PRC signed the UNCAC on 10 December 2003 and ratified it on 13 January 2006.

IV. Texts

Please see the footnotes for links to websites.

Prevention of Bribery Ordinance (Cap. 201)³⁰

Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554)³¹

Independent Commission Against Corruption Ordinance (Cap. 204)³²

Anticorruption Action Plan for Asia and the Pacific³³

The Criminalization of Bribery in the Asia and the Pacific: Thematic Review – Final Report, 2010³⁴

Ian McWalers (2010) Bribery and Corruption Law in Hong Kong, 2nd Ed., LexisNexis

³⁰[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/\\$FILE/CAP_201_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf)

³¹[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/4F5BE2F0A9A7AE91482575EF0019E514/\\$FILE/CAP_554_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/4F5BE2F0A9A7AE91482575EF0019E514/$FILE/CAP_554_e_b5.pdf)

³²[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A3E9ED78744D8631482575EE004CB37D/\\$FILE/CAP_204_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A3E9ED78744D8631482575EE004CB37D/$FILE/CAP_204_e_b5.pdf)

³³<http://www.oecd.org/site/adboecdanticorruptioninitiative/meetingsandconferences/35021642.pdf>

³⁴<http://www.oecd.org/site/adboecdanticorruptioninitiative/46485272.pdf>