

Rapporteur: Brian Leung

Joint Lunchtime Seminar

International legal developments in anti-corruption regimes: the UK Bribery Act, US Foreign Corrupt Practices Act and other jurisdictions/ Are International Governmental Organization immunities absolute?

Date: 14 May 2015(Thursday)

Time: 12:30-14:00

Venue: Small Moot Court, Room 723, Cheng Yu Tung Tower

Speakers: Patrick Duffy, *Barrister, 23 Essex Street*

Alex Haines, *Barrister, Bretton Woods Law*

Overview of anti-corruption regimes -- Mr. Patrick Duffy

- Few people were concerned by bribery a decade ago – it was just a simple fact of business.
- The US Foreign Corrupt Practices Act (FCPA) was enacted in 1977. But it was not used regularly and there were only a handful of cases each year.
- The situation has changed over the last 15 years. The main reason has been the economic loss suffered. The most recent figures show that bribery contributed to 10% of the cost of all businesses.
 - Trillions of dollars have been lost due to bribery each year in the UK. Therefore, more robust legislation is needed.
- In HK, the Prevention of Bribery Ordinance (POBO) has been domestically enforced and applies to both the public and private sector. It is more flexible than the US's FCPA, since the latter only applies to public officials.
- In HK, there were more prosecutions of high-profile individuals, such as famous tycoons, in HK. It was great for HK.
- Recently, the Chief Executive of HK stated in a meeting of the Independent Commission Against Corruption (ICAC) that HK is absolutely clean and safe.
- Duffy cannot agree with this optimistic view. Since HK is a global financial center and a lot of money go through it, there must be bribery and corruption, similar to the situations in London and Manhattan.
- Bribery and corruption have already become internationally organized crimes.

- **The UK Bribery Act**

- The UK Bribery Act received the Royal Assent on 8 April 2010, and came into force on 1 July 2011.
- A variety of offences have been created under this statute.
- Section 1 and Section 2 create offences of “bribing another person” and “requesting or accepting bribery” respectively. Section 6 covers the offence of “bribery of foreign public officials” which is like that of the US. Section 7 extends liability to “failure of preventing bribery”.
- For example, GlaxoSmithKline (GSK), a British multinational pharmaceutical company, is largely investigated for its dealings with large Chinese corporations. Three months ago, there were remarkably four bribery cases going on.
- Initially, there was a very low level of prosecution under the UK Bribery Act, which concerned small cases involving 500 pounds.
- Since the Act has no retrospective effect, it needs several years to develop.
- At the same time, there is a huge industry of law firms giving advices to companies on how to comply with the UK Bribery Act.
- As far as massive jurisdictional bribery cases are concerned, they involve top, complex police units, investigators, forensic accountants and many lawyers.
- The reason why there is a low rate of prosecution is that it is extremely hard to prosecute the suspects. To do so involves jurisdictional issues, different big corporations, agencies and organizations competing with each other.
- It is also very difficult to collect documents from foreign countries.
- In the UK, when serious crimes are involved, jury trials can be used. But jury trial has not been used in complex bribery cases.
- It would be better to use jury trial in these complex bribery cases. Although a jury cannot deal with the massive amount of documents, they can better decide other questions, for example, the defendant’s purpose of receiving money.

- **Important sections of the UK Bribery Act**

- According to Section 1 of the UK Bribery Act, a person is guilty of an offence if he (a) offers, promises or gives a financial or other advantage to another person, and (b) intends the advantage— (i) to induce a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity.
- Another situation where liability arises is where a person knows or believes

that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

- Section 1(5) stipulates that whether the advantage is offered through a third party is irrelevant.
- Section 2 concerns the recipient of bribe and has similar wordings with Section 1.
- “Financial advantage” is not defined in the Act. So, people are even wary of accepting a free coffee or lunch.
- Section 3 defines the “function or activity to which bribe relates” must fall within (a) any function of a public nature, (b) any activity connected with a business, (c) any activity performed in the course of a person’s employment or (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).
- Alternatively, the function or activity should meet one or more of the following conditions.
 - Condition A is that a person performing the function or activity is expected to perform it in good faith.
 - Condition B is that a person performing the function or activity is expected to perform it impartially.
 - Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
- Section 7 is more academically interesting as it imposes a positive duty on companies to prevent bribery.
- For the purposes of section 7, a person is associated with the defendant if that person is a person who performs services for or on behalf of the defendant. It includes your subsidiary, employee, agent or someone for work for your agent.
- Under Section 7, a “relevant commercial organization” means a body carries on a business in the UK. Clearer definition from the courts about the meaning of this is required.
- For example, if you own a Hong Kong company which has services and/or offices based in the UK, you could fall under this Act.
- However, whilst the police have a finite budget to conduct investigations, firms generally have hundreds of millions of pounds. For example, a company was fined three billion pounds by the Department of Justice in the UK. It is very difficult to compete with them.
- Further, according to Section 12, an offence is committed if any act or omission takes place in that part of the UK, or outside of the UK if the

person has a “close connection with the UK”. “Close connection” is a very broad phrase and is an open door for prosecution.

- It is a defence if the company has a clear anti-corruption strategy that complies with all guidelines.
 - That strategy needs to establish an anti-corruption culture. It must be of top-level commitment. It should also be conducted fairly and honestly, with zero tolerance of bribery. Any bribery found should be reported.
 - It should also incorporate the principle of risk assessment that the anti-corruption policy should be commensurate with the risk of the activity involved. Other required principles include due diligence and proper communication.
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- **The Foreign Corrupt Practices Act (FCPA) in the US**
 - The FCPA has very wide extra-territorial jurisdiction. It has been very aggressively enforced.
 - The pro-business sector, who is against any kind of regulations, clashes with the Department of Justice.
 - There is a reward-system for uncovering any bribery in the US, if which the UK does not have similar system.

Are International Governmental Organization immunities absolute? – Mr. Alex Haines

- Imagine: James wants to work for a private local bank while Patrick wants to work for an international organization, such as the European Bank for Reconstruction and Development (EBRD).
- Both James and Patrick become victims of harassment, retaliation, constructive dismissal or even discrimination.
- For James, he can go to the civil courts.
- However, Duffy's employer, which is an international organization, enjoys absolute immunity.
- The EBRD will simply instruct the biggest law firm to say: "My client is an international organization and is immune from lawsuits. Don't touch him."
- However, an advisory opinion called *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* said in 1954 that "[it would] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals [. . .] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them"
- Further, August Reinisch, a professor in international law, also expressed that "it is increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice."
- The most important case supporting this that has emerged from the European Court of Human Rights is *Waite and Kennedy* [1999]. While the Court acknowledged that the immunity of international organizations was "an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments", it held that a "material factor in determining whether granting immunity from jurisdiction is permissible is whether the applicants had available to them *reasonable alternative means* to protect effectively their rights under the Convention".
- A recent practical case concerns the EBRD. Two IT contractors in their fifties had been employed by the EBRD for thirty years; their contract was not renewed in order to hire younger staff for lower wages.
- The EBRD argued that they were only contractors, not employees.
- Haines argued in the EBRD tribunal that the two IT contractors had become *de facto* employees.

- However, the EBRD further argued that the two IT contractors could not use its internal justice system, which was only available to employees, not contractors.
 - Haines also launched a case in the England Employment Tribunal. The EBRD made the argument that there was no recourse in UK courts either due to the immunity that they enjoyed.
 - Finally, the EBRD tribunal accepted that the two contractors were de facto employees.
- Comparison between the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IDB)
 - In 2013, the IDB revised its internal law, abolishing the conciliation committee and establishing a system of compulsory mediation. It becomes a one-tier justice system depriving employees of their right to appeal.
 - However, the right of appeal is recognized as an ‘essential safeguard in law’ in international organizations, in the case of *Bangasser and others v ILO* [1994].
 - In contrast, a worker in the EBRD can enjoy a two-tier system. The first tier involves a grievance committee which is a quasi-court with an external independent judge. Lawyers are involved and case laws are relied on. Proceedings are recorded and sent to the lawyers. Moreover, the client can have the right to appeal to the second tier of an EBRD Administrative Tribunal.
 - They might have access to justice in local jurisdictions. But the cultures around the world have different conceptions of immunity.
 - For example, the US judges emphasize a lot on immunity.
 - In contrast, Latin America countries, such as Venezuela and Brazil, often sue the US banks if their victims have been harassed by the US companies. In these cases, the courts are likely to grant a relief.
 - In the middle of the spectrum, a Dutch court has ruled that forty years is not a reasonable time for the victim to get access to justice. It has knocked down the immunity of a huge international organization.
 - Although different countries have different interpretations on immunity, one certain thing is that international organizations are not above the international law. They are bound by the latter and are created within it.

- Haines started a research project, comparing different internal justice system of international organizations. The IMF, the World Bank and the UN perform quite well.
- Ironically, if you are an employee in the International Criminal Court, it is very unlikely that you can get protection and relief if you are harassed or discriminated against. So, a good institution does not mean a good internal protection.
- Finally, August Reinisch suggests that the fact “that national courts are increasingly looking not only at the availability of such alternative means of protection but also at their adequacy from a ‘fair trial’/‘due’ process perspective should not be viewed as a threat to administrative tribunals.”
- “Rather, in the sense of an enlightened judicial dialogue which might contribute to the strengthening of fundamental rights, it should support administrative tribunals in their quest for reforming their own methods of the ‘administration of justice’.”
- Although different regions of international laws are not binding on each other, they are highly persuasive and should shape the internal administrative justice of international organizations.

- Q&A Part

1. *Is there any connection between anti-corruption laws and international organizations’ immunity?*

- Haines: There are two interesting links. First of all, the US Security and Exchange Commission was prosecuting a Japanese company for bribery in Africa. In parallel, it was operating and sharing information with the African Development Bank’s investigative office during the prosecution. Both sides realized the advantages. This links to my second point. The World Bank’s investigative office does not have police powers. But it can confer its investigation to national prosecuting authorities. Last year, the World Bank’s investigative office called up the London City Police to investigate a southern England company. Then two World Bank investigators could also get involved in the investigation. This shows that the international organizations can operate not only with the Department of Justice, but also the police.
- Duffy: Different units and organizations can and do cooperate. But they have to be careful of a conflict of interest between different organizations. In terms

of the question raised, some international organizations, such as the EBRD which is based in London, are certainly caught by the UK Bribery Act. It would be extremely interesting to see cases involving both the UK Bribery Act and international organizations. These organizations, which deal with development projects involving billions of billions dollars, are the risky industry for corruption.

2. *You (Duffy) mentioned the UK Bribery Act 2010. I am sure there should be an older version of this Act. What is the difference between the old one and the new one? Is there any improvement?*
 - Duffy: In 19th century, there was already anti-corruption legislation which was very advanced in the world; there have also been common law offences for acts of bribery for many years. However, it was very difficult to prosecute and to gather evidence. The common law offence is still valid and there are still cases brought under this.

3. *You (Haines) said that the International Criminal Court has bad records for its internal justice system. Do they demand any immunity so that they do not have to confront a local jurisdiction?*
 - Haines: When the ICC was built, no one thought about it. The judges and the courts have nothing to deal with the internal justice system – this was left to the registry. As a comparison, everybody in the European Court of Human Rights can get access to the internal tribunal. So, it was an oversight and arrogant of the ICC and its internal justice system should be amended.

4. *There was a political scandal about bribery under Tony Blair's administration in 2006 to 2007 which was stopped for political reasons. Besides, given the close relation between US corporates and the Saudi Arabia government, the latter was bombing Yemen with American-supplied cluster munitions. To what extent can the law really enter these political-financial relations, especially with the UK corporations?*
 - Duffy: Crimes become more political. And the Security Committee is often involved. Yes. There are certainly political considerations and pressures for prosecution.

5. *China is currently in the midst of an anti-corruption campaign. Do you have any comment on this campaign and its impact?*

- Duffy: There is obviously a strong political movement to crack corruption. In a country like China that has such huge growth, anti-corruption is always a good thing; however, I don't really know much about it. I hope it will be successful.

6. *Hong Kong is a common law system and most common law systems adopt restrictive immunity. If a new international investment bank is created in China, how do you see the conflicting attitudes on immunity between two regions?*

- Haines: In China, it will have absolute immunity as far as employment is concerned. What internal justice system will the Asian Infrastructure Investment Bank (AIIB) provide? I don't know. It also depends on whether the constitution of the AIIB has provision to say that Chinese law applies. It is possible. In theory, it will have its own tribunal with its own judges.