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Q: What should investors conducting business in mainland China or Macao know about the legal requirements as far as anti-corruption and anti-bribery issues are concerned?

- A:** — Investors doing business in mainland China or Macao must understand the provisions of the laws and regulations specific to the area where the investment is located and refrain from giving advantages to anyone in exchange for convenience in business dealings.
- In mainland China, investors should pay attention to the anti-corruption and anti-bribery provisions of *Criminal Law of the People's Republic of China* (CLPRC). Since the principles of *lex situs* (law of the place) and *lex personalis* (law of the person) apply to the CLPRC and cover all offences committed in the PRC, all businesspersons, including non-local investors engaging in trade activities in mainland China, will be punished in the same way — and to the same extent as any person from the PRC — if they break anti-corruption and/or anti-bribery laws.
 - In Macao, businesspersons should also familiarise themselves with the stipulations relating to corruption and bribery offences under the *Penal Code* of Macao. Under the Territoriality Principle and Nationality Principle of the *Penal Code* — also with the adoption of the Protective Principle and Principle of Universal Jurisdiction — Macao has jurisdiction over cases involving criminal acts wholly or partially committed within the Macao SAR. Macao authorities have jurisdiction over cases involving criminal acts committed outside the Macao SAR in which the feisor or victim is a Macao citizen and with the caveat of meeting certain statutory requirements.

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Q: What should business operators know about Hong Kong's *Prevention of Bribery Ordinance* (PBO) when they conduct business in Hong Kong?

- A:** — Any persons in Hong Kong, regardless of their nationality, are bound by the laws of Hong Kong, including the PBO. If anyone from mainland China intends to offer an advantage to another party in Hong Kong, he/she must first make clear in what capacity the party is being employed. If the other party is a government officer or an employee of a public body, it is prohibited to offer any advantage to him/her as this constitutes an offence under the law. If the other party is an employee of a private business organisation, he/she should clarify whether the acceptor has obtained his/her employer's permission to accept such advantages; otherwise, such acceptance will be in breach of the PBO.
- If any persons from mainland China or Macao wish to accept an advantage in Hong Kong in relation to their duties, they must first obtain prior approval from their employers; otherwise, such acceptance will constitute an offence under the law. Both offering and acceptance of illegal advantages are offences under the PBO. State functionaries from mainland China who accept illegal advantages in Hong Kong may also breach the CLPRC.

Q: What should businesspersons know about the law *Prevention and Suppression of Bribery in the Private Sector of Macao*?

- A:** — Anyone conducting business in Macao is bound by the law *Prevention and Suppression of Bribery in the Private Sector*. Pursuant to this law, any person performing duties on behalf of a private sector entity — such as an employee, trustee or intermediary — who gives or promises an undue advantage to an individual, private enterprise, organisation or community group as a reward for, or for refraining from, performing his/her functional duties, commits a bribery offence in the private sector. This applies, regardless of whether an employment contract is made between the parties.
- Businesspersons should note that in cases of offering a bribe, it is not necessary to prove the actual acceptance of a bribe by the other party or the actual offering of a bribe. The offence of offering a bribe is committed so long as a promise to offer a bribe is given or the request for a bribe is acceded. If a person working in a private entity expresses his/her intention to solicit a bribe or agrees to accept a bribe, he/she commits the offence of accepting a bribe in the private sector.
 - If an act of bribery in the private sector is adequate to cause damage to the health and safety of third parties, or induces any unfair competition, and/or the case involves acquisition of assets and services totally or partly from public funds, it is considered a 'public offence'. Law enforcement organisations can initiate investigations into these cases without a complaint from the victim.
 - Pursuant to the general provisions of the *Penal Code*, the time limit for reporting a crime is six months from the date on which the victim comes to knowledge of the crime and the principal offender. If the victim does not pursue the matter within the time limit, the victim will lose the rights to report the crime. However, it should be noted that the victim may still pursue the case with regard to the civil or disciplinary liability.
 - With the law *Prevention and Suppression of Bribery in the Private Sector* coming into force on 1 March 2010 — only acts carried out after that date are regulated by the law. The new law does not have any retrospective effect on acts carried out before that date.

Q: What are the issues of concern when offering commission or rebates to employees of trade partners in business dealings?

- A:** — According to the PBO of Hong Kong, commission and rebates are both considered advantages. The party accepting an advantage must seek approval from his/her principal, i.e. his/her employer, for such acceptance to be legitimate. To avoid breaking the law in Hong Kong, a person who intends to offer an advantage to an employee of a trade partner should first ensure that the company concerned allows its employees to accept such advantages.
- In mainland China, businesspersons who buy or sell products are permitted to offer explicit discounts or intermediary commissions to trade partners. Details of such offers, however, should be included in the relevant business contract. Offering rebates or handling fees of any kinds secretly and without written approval may constitute the criminal offence of 'offering a bribe to non-State functionaries'. The party accepting the advantages will therefore commit the offence of 'accepting a bribe by non-State functionaries' or the offence of 'accepting a bribe by State functionaries' if State functionaries are involved in the case.
 - Given that commissions and rebates are defined as advantages in Macao, it is therefore necessary to first ascertain if the relevant trade partners allow their employees to accept commissions, rebates or other advantages. Regardless of what advantages are offered, there should be no intent to buy over the other party as a reward for not following company rules. One should clarify with the employer, trustee, or intermediary their exact policy regarding advantage acceptance to avoid any inadvertent breach of the law.

Q: SMEs may often have to conduct business negotiations with buyers of enterprises. If the buyers demand a rebate, it is actually very difficult to verify whether they have been granted permission by their employers to accept it. How should one protect oneself from committing a corrupt offence under such circumstances?

A: — Before offering any advantages to the buyers, the best practice is to obtain the permission of the buyers' employers. However, if this is not feasible, the following points should be considered:

- whether the advantage requested is stipulated in the contract;
 - whether an official receipt will be issued by the company for accepting the rebate; and
 - whether the buyer demands payment in cash or through the bank account of a third party.
- In case the rebate demanded is not supported by documentation or the means of obtaining the rebate appears unusual, the employee is likely to be deliberately concealing such acceptance of rebate from his/her company. In other words, the risk of offering a bribe is high and the request should be declined.

Q: How can businesspersons avoid breaking the law if they wish to offer gifts to government officials during festivals?

A: — In Hong Kong, extra care should be exercised when having business dealings with government departments or public bodies. According to the PBO of Hong Kong, it is an offence if public servants accept any advantages from people with official dealings, such as gifts, red packets and tips offered on festive occasions. There are also rules set out for government officials accepting gifts in their private capacity from people whom they have official dealings with, or even from friends and relatives.

- Mainland China Law stipulates that State functionaries who have accepted gifts in economic dealings or external activities should submit them to their own units for appropriate action, and failure to do so will mean they commit a bribery offence under Article 394 of the CLPRC. Employees of a company or enterprise unit accepting gifts are required to report to their unit leaders for disposal decisions.
- In Macao, there are stringent legal provisions governing the acceptance of advantages by government officers. It is an offence for any government officer to accept illegal financial or other advantages directly or indirectly at any time when executing his/her duties.

Q: In mainland China, Hong Kong or Macao, what legal liabilities do businesspersons incur if they offer gifts or tips to officials in order to expedite approval procedures of their applications for telephone lines, electricity supply or certificates of approval?

- A:** — In mainland China, all officials handling applications for telephone lines, electricity supply or certificates of approval are State functionaries. They are thus not permitted to accept any advantages from their clients; otherwise, they will be in breach of Article 385 of the CLPRC. By the same token, people offering any advantage to State functionaries are in violation of Article 389 of the CLPRC. Both parties — the offeror and the acceptor — will be pursued for criminal liability.
- In Hong Kong, companies providing electricity and gas supply and similar utilities are public bodies bound by Section 4 of the PBO. Since public bodies generally forbid their employees from accepting advantages in relation to their duties, applicants for public utility services will commit bribery offences if they offer any advantages to such employees.
 - In Macao, employees of public utilities enterprises such as telephone, electricity and water are equivalent to government officers, as defined in the *Penal Code*. Therefore, anyone offering them advantages in return for expediting the processing of applications commits the offence of 'bribing a government officer' irrespective of whether the officer concerned is required to act in contravention of his/her official obligations or not. The acceptor of the advantage also commits the offence of 'accepting an advantage'.

Q: What should businesspersons do if they wish to subsidise their mainland business partners' overseas duty visits and travel allowances?

- A:** — In drawing up a partnership contract or agreement, businesspersons should consider clearly listing all the items related to the project including subsidies for overseas duty visits and travel allowances provided to their business partners. Contracts relating to business in mainland China should be written in accordance with all relevant laws, including provincial and municipal laws and regulations. This serves to protect the legitimate interests of businesspersons in case problems later arise.

Q: What sorts of legal sanctions will Hong Kong businesspersons face if they employ intermediaries to deliver advantages or favours in exchange for greater business convenience in mainland China or Macao?

- A:** — Under Article 389 of the CLPRC, Hong Kong businesspersons employing intermediaries to deliver advantages or favours in order to gain convenience in business dealings are liable to charges of bribery if State laws are breached. The intermediaries may also commit the offences of 'introducing bribes' and/or 'being accomplices to the crime'. The party accepting a bribe is also held criminally liable.
- In Macao, any person, who solicits or accepts an advantage personally — or through an intermediary with his/her consent or ratification — commits a criminal offence. If the transferred advantage is not permitted by the other party's employer and the motive is to make the other party betray the interests of acceptor's employer through bribery, such act constitutes the offence of 'active bribery in the private sector'.

Q: Does treating trade partners or their employees to a banquet during business negotiations in Hong Kong, Macao or in mainland China constitute the offence of 'offering an advantage'?

- A:** — Entertainment is a common social activity throughout mainland China, Hong Kong and Macao. Businesspersons, however, should not rely on providing entertainment to trade partners or their employees as a means of helping secure business. In the long run, they should strengthen their competitiveness by improving product and service quality.
- According to the provisions stipulated by discipline inspection authorities in mainland China, leaders of State-owned enterprises are prohibited from accepting gifts which may influence their impartiality in the execution of their duties.
- In Macao, though entertainment in the private sector is a common social activity, any person offering 'excessive or frequent' entertainment to trading partners or their employees in the hope of securing 'preferential treatment' in future business dealings may also commit a criminal offence. For instance, if a businessperson requests a trading partner to acknowledge receipt of his/her company's defective goods and the trading partner, agrees to this — in view of the gifts and favours he/she received from the businessperson — at the expense of his/her employer; both parties commit the crime of embezzlement.

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Q: How can a company avoid erosion of its interests resulting from employees' acceptance of frequent business entertainment?

A: — It is almost inevitable that employees, as representatives of their company, will at some stage be offered business entertainment. If, however, employees accept unreasonably frequent or lavish entertainment, it may affect their impartiality in performing their duties, thus damaging the company's interests. A company should therefore issue clear guidelines to all its employees on acceptance and offers of business entertainment and constantly remind them to stick to these rules.

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Q: If government officials solicit advantages from businesspersons, what should the businesspersons do?

A: — In mainland China, Article 387 of the CLPRC stipulates that State bodies, State-owned companies, enterprises, institutions or public organisations which illegally solicit property from another person to help secure benefits may, if the circumstances warrant, be charged with 'unit accepting bribes'. If the above-mentioned units try to solicit advantages from businesspersons, the latter should immediately report the matter to the People's Procuratorates.

— In Hong Kong, it is against the law for government officers to solicit any advantage in return for providing favours in their official duties or to secure personal gains by abuse of their power. In such cases, businesspersons should decline the request and report it to the ICAC.

— In Macao, it is an offence under the anti-bribery law for a government officer to solicit any advantage from stakeholders. Any person agreeing to a government officer's request for an advantage, irrespective of whether the officer is required to act in contravention of his/her official obligations or not, shall commit offence of 'offering an advantage'. Under such circumstance, businesspersons are advised to decline such requests and report the case to the CCAC as soon as possible.

Q: If employees of business partners solicit advantages from businesspersons in the course of business negotiations, what should the businesspersons do?

- A:** — If the advantages solicited are not specified in the contract and no official receipts are issued by the organisation, the request should be turned down and the matter should be reported to the appropriate authority immediately.
- In mainland China, corruption reports can be made to the People's Procuratorates or relevant Public Security Bureau — with respect to the location of the work unit concerned, the location of the crime, or the place of residence of the subject of the crime.
 - In Hong Kong, corruption reports can be made to the ICAC Report Centre or any ICAC Regional Offices.
 - In Macao, the request should be turned down and the matter immediately reported to the CCAC.
 - Whether in mainland China, Hong Kong or Macao, corruption reports can be made by mail, in person or by phone. Anyone making a false accusation will be pursued for legal liability.

Q: Will Hong Kong businesspersons contravene the CLPRC if they offer red packets to State functionaries who are invited to officiate at a ribbon-cutting ceremony, in celebration of the opening of a new company?

- A:** — In mainland China, the discipline inspection authorities stipulate that any red packets or gifts received by a State functionary during official dealings must be submitted to the State. The State functionary concerned would violate the stipulations under Article 394 of the CLPRC if they kept red packets or gifts for personal use. Any Hong Kong businesspersons offering an advantage to State functionaries for securing illegitimate benefits also commits the offence of 'offering a bribe' under Article 389 of the CLPRC even if the advantage is presented as a token of gratitude.

Q: Does it constitute the offence of 'offering a bribe' if Hong Kong businesspersons apply to mainland Chinese or Macao government authorities for approval certificates through intermediaries, such as consultancy firms, that charge a prescribed fee?

A: — In mainland China, businesspersons can apply to government authorities for approval certificates — like those for trademarks or patents — through intermediaries. Paying a fee to these intermediaries for such services does not constitute the offence of 'offering a bribe'.

— In Macao, any person can authorise an intermediary to handle government procedures. If an intermediary asks for favourable treatment through corrupt means to secure endorsements — and such act is with the full knowledge of the client or with the objective exclusion of the client's innocence — the client and intermediary both commit the offence of bribery.

Q: Sometimes private enterprises may need to file urgent applications for approval certificates to the government. An additional fee might be charged by government officials, for instance, as compensation for overtime work. Does it constitute a bribery offence if businesspersons pay for such overtime charges?

A: — In Hong Kong, there are standard procedures for applying for licences or services from the government. All the charges, if any, are made public by the relevant government departments concerned and a receipt will be issued for any payment with no exception for special cases. The fee concerned should be paid at the Treasury or other specified locations such as post offices or via crossed cheque payable to 'The Government of the Hong Kong Special Administrative Region'. A government bill can also be settled by posting a crossed cheque together with the bill to the Treasury. One should never pay cash to a government officer in private without getting a receipt. If someone is asked for an additional charge or for a charge with no receipt, he/she should consider its legitimacy and be mindful of the risk of being deceived or committing the offence of 'offering a bribe'. In case of doubt, enquiries can be made directly to the government department concerned.

- In mainland China, there are also standard procedures for applying to the government for licences or services. If a charge is involved, the department concerned will notify the public of such charge, and issue a receipt upon receiving the fee. There is no exception for special circumstances. Paying a fee according to stipulated regulations does not constitute the offence of 'offering a bribe'.
- In Macao, public officers are prohibited from asking applicants privately for overtime work payment even if such overtime work has actually been carried out. All administrative fees are charged under the Statutory Schedule of Rates, including charges for expediting application processing procedures, and are payable directly to the government. Therefore, the case of public officers asking stakeholders for overtime payment constitutes the offence of 'soliciting advantages' while stakeholders giving overtime payments to public officers constitutes the offence of 'offering a bribe to public officials' regardless of whether the overtime services provided have contravened their obligation as a public officer or not.

Q: During the Spring Festival, if a company holds a spring reception and takes the opportunity to advertise its products during the occasion, is it legal for the senior management to distribute red packets to journalists attending the reception?

A: — In the Hong Kong, if a journalist accepts red packets from an event organiser without the approval of his/her employer, he/she will commit the offence of 'accepting a bribe' under the PBO. According to the Code of Ethics stipulated by the Hong Kong Journalists Association, Hong Kong journalists are forbidden from receiving any advantages, including red packets and tips, in the course of reporting news or covering social activities. This is to prevent journalists from misleading the public or disseminating inaccurate information.

— In mainland China, if a journalist accepts red packets or gifts in the course of his/her duties, he/she must hand them back to the State. The journalist will violate the CLPRC if he/she retains it for personal use. Meanwhile, if a businessperson offers money or property to a journalist under the pretext of gratitude but actually for the purpose of securing illegitimate benefits, he/she will commit the offence of 'offering a bribe' under the CLPRC.

— In Macao, journalists of publicly-funded, wholly-owned or majority-owned media organisations, and journalists of media organisations operating public properties are classed as 'government officers' as defined in the *Penal Code*. It is, therefore, unlawful for them to accept advantages, including red packets, in the course of executing their official duties. In a similar vein, offering red packets to journalists of other media organisations, who are categorised as employees working for an entity in the private sector, as a reward for breaching regulations or professional codes of their respective organisations, shall constitute the offence of 'active bribery in the private sector'.

Q: How are the duties of the ICAC in Hong Kong separate from those of departments specialising in the investigation of commercial crimes?

- A:** — The Operations Department of the ICAC is mainly responsible for investigating alleged offences against:
- the PBO;
 - the *Independent Commission Against Corruption Ordinance*; and
 - the *Elections (Corrupt and Illegal Conduct) Ordinance*.
- ICAC investigators are empowered to investigate and execute arrests in relation to alleged offences against the *Theft Ordinance* and the *Criminal Procedure Ordinance* and offences related to perverting the course of justice, if such crimes are uncovered during their investigations into corruption offences.
- The Hong Kong Police Force and other relevant law enforcement agencies are empowered to handle other non-corruption related commercial crimes.

Q: How are the duties of the mainland Public Security Bureaux separate from those of the People's Procuratorates in the aspect of crime control?

- A:** — According to the *Criminal Procedure Law of the People's Republic of China*, the mainland Public Security Bureaux are responsible for the investigation, detention, execution of arrests and preliminary inquiry in criminal cases. On the other hand, the People's Procuratorates are responsible for procuratorial work, authorising approval of arrests, conducting examination before prosecution, initiating public prosecution in criminal cases, as well as filing 'selected' criminal cases for investigation. Such 'selected' criminal cases are those of embezzlement, bribery, dereliction of duty by State functionaries, and criminal infringement of others' rights.
- General criminal cases, such as commercial bribery cases, are put on file for investigation by the Public Security Bureaux. These include: acceptance of bribes by non-State functionaries under Article 163 and offers of bribes to non-State functionaries under Article 164 of the CLPRC. Cases of a special criminal nature are handled by specific agencies as required by specific legal stipulations.

Q : Does the ICAC in Hong Kong or Macao handle cases of cross-boundary corruption or bribery?

- A :** — If an employee of a local private company commits a corruption or bribery offence outside Hong Kong, and part of the act takes place in Hong Kong — including offering, soliciting or accepting a bribe and agreeing on or processing the illegal deal — then the ICAC is empowered to investigate.
- If Hong Kong's public servants, including government officers and employees of public bodies, are involved in cases of soliciting or accepting a bribe in mainland China, the Hong Kong ICAC can conduct an investigation according to the PBO.
 - Macao has jurisdiction over cases involving criminal acts wholly, or partially, committed in Macao, and also cases involving bribery acts committed outside Macao in which the feisor or victim is a Macao citizen and with the caveat of meeting certain statutory requirements. For individual cases, over which Macao authorities have no jurisdiction as concluded from the CCAC's analysis, the party concerned will be advised to lodge a complaint with the anti-bribery agency where the crime took place.

Q : Are there any referral services for corruption and bribery cases between mainland China, Hong Kong and Macao?

- A :** — Due to disparity in the legal systems and anti-bribery laws among the three locations, referral services are not currently available for corruption and bribery allegations. Advice will, however, be offered to the party concerned to report to the anti-bribery agency where the crime took place.

Q: If an employee of a private enterprise takes advantage of his/her position to embezzle public funds and steals from his/her company, and someone helps conceal the crime, is this considered a commercial crime or a bribery offence? Should this be reported to the anti-corruption and anti-bribery authorities?

A: — In Hong Kong, commercial bribery is governed by the PBO. It is a bribery offence for an employee or agent to embezzle company properties by abusing his/her official position or intentionally using false documents to deceive the employer. Any person who accepts a bribe and, in return, helps conceal the above criminal acts for an employee is also liable to be charged with a bribery offence. In such cases, the matter should be reported to the ICAC, which will then carry out an investigation based on the complaint. If a complainant has reasonable suspicion that bribery has occurred, even though he/she cannot provide full evidence, the ICAC will still be able to process the case in accordance with the law. If the crime concerned has no connection with bribery, or no evidence of bribery is found after preliminary investigation, the ICAC will then obtain the consent of the complainant to refer the case to other relevant law enforcement agencies, such as the Hong Kong Police Force, for further investigation.

- In mainland China, employees of private enterprises who misappropriate funds and steal from the enterprise commit the offence of embezzlement through dereliction of duty under Article 271 and misappropriation of a unit's funds under Article 272 of the CLPRC. Reports of these criminal acts can be made to any Public Security Bureaux.
- In Macao, the CCAC is tasked with investigating corruption and corruption-related deception cases in the private sector. Business operators may report cases of a similar nature to the CCAC for follow-up. If the cases show no sign of corruption, or the cases are found not to be under the CCAC's purview after their investigation and analysis, they will be referred to relevant law enforcement agencies for follow-up in accordance with the law.

Q : Are the offeror and acceptor of a bribe subject to the same legal liability?

- A :** — In Hong Kong, according to the PBO, both the offeror and acceptor of a bribe are subject to the same legal liability and shall be liable to a maximum penalty of a HKD500,000 fine and 7 years' imprisonment upon conviction.
- In mainland China, the legal responsibility for the offence of accepting a bribe is usually heavier than that for offering a bribe. The maximum penalty for accepting a bribe is capital punishment while that for offering a bribe is life imprisonment. Mitigation or exemption of criminal punishment may even be granted to the offeror of bribes if they confess voluntarily before legal proceedings. The party who is solicited for bribes does not accede to the request and does not commit the offence of offering a bribe, but the party who solicited the bribe without obtaining illegitimate gains in the end is still liable to severe penalty according to the law.
- In Macao, an acceptor of bribes is usually subject to heavier penalties than an offeror. For instance, the maximum penalty for a government officer accepting bribes is 8 years' imprisonment, while that for offering bribes is 3 years' imprisonment. In the private sector, the maximum penalty for accepting bribes is 3 years' imprisonment, while that for offering bribes is 2 years' imprisonment. These penalties are subject to lawmakers' consideration that the acceptor of bribes, who is vested with official authority, should perform an obligation — especially a moral one — and therefore be liable to heavier penalty for breach of trust and abuse of power for personal gains.

Q : How will the cases involving a bribe of less than \$5,000 be handled in the three locations?

- A :** — In mainland China, it is stipulated in Article 383(1)(4) of the CLPRC that individuals who have committed corruption with a bribery amount of less than RMB5,000, with the situation being serious, are to be sentenced to less than 2 years of fixed-term imprisonment or criminal detention. If the situation is not serious, they will be dealt with by administrative action to be decided by the unit to which they belong or the higher administrative organ.
- In Hong Kong or Macao, since the law does not stipulate any 'minimum amount' to constitute a bribery offence, the amount of money offered or received as a bribe has no bearing on the outcome of the conviction. Therefore, the case will be handled by the ICAC of Hong Kong and CCAC of Macao regardless of the monetary amount of a bribe.