

COMPLYING WITH CHINESE ANTI-BRIBERY LAW

I. INTRODUCTION

As the number of U.S. companies that are doing business in China, or considering to do business in China, continues to increase each year, U.S. businesspeople and their legal counsel are increasingly facing the dilemma of international bribery. Unfortunately, differences in the fundamental notions on which the U.S. and China base their laws can confound American businesspeople. U.S. legal jurisprudence strives to make clear by statutory language what conduct is prohibited by law and what is allowed, but in China, much relevant information is simply assumed as part of the general education. Accordingly, Chinese statutes are often very general and lack definition of key terms; nevertheless, penalties for violating Chinese statutes are often quite harsh.

Even a gratuity that would be routine in the United States can be perceived as illegal bribery in China. This example is from my personal experience. When I was still a college student in Beijing, I took a summer job in a hotel. On the first day, my co-worker, a girl who was also new at the hotel, and I were assigned to clean hotel rooms. After we cleaned a room, the guest in the room seemed very happy to see the room he messed up became so clean, and he gave my co-worker a tip of ten yuan (US\$1.25). The next day, my co-worker was fired because she accepted a “bribe” in the view of the hotel. She received money for something that was “part of her duty” – cleaning the hotel room. (I think the guest did not tip me, because I was wearing the managerial suits the hotel provided to college interns. Otherwise, I would probably have been fired too.)

Understanding bribery in China requires more than examining written law. China’s laws are structured with consideration of Chinese social norms, customs, mores and regional interpretations of them. They operate by expecting a minimum understanding from its citizens – *and* from anyone who has relations with the country.

II. ENCOUNTERING CHINESE ANTI-CORRUPTION LAWS

Fighting corruption has been a key political issue in China for years. The 1989 Tian’en Men Square tragedy developed from the citizens’ demand to curb governmental corruption. Since the Tian’en Men Square incident, China’s leaders have been making efforts to stop corruption, which is widely recognized as endemic in China. In becoming a member of the WTO, China has promised to continue to combat corrupt practices as part of its pledge to other members of the international business community.

Chinese anti-bribery laws are primarily directed to “bribe-takers,” i.e., governmental officials, state personnel (guojia gongzou renyuan) and high ranking company managers and directors. The laws impose severe penalties, including such sanctions as asset confiscation and death, on governmental officials who exploit their offices and extort bribes. The severe penalties reflect China’s recognition of its problem; they are intended to deter corrupt activities. China is also stressing enforcement of the

anti-corruption provisions in trade laws to provide a more transparent and honest environment for international trade.

The government has enhanced its enforcement power over anti-corruption laws by establishing more investigation offices and by strengthening companies' accounting management systems. Now, prosecuting agencies of all levels in almost every major city, such as Beijing, Shanghai, Guangzhou and Shandong, have made themselves more accessible to the public by establishing websites with "corruption hotlines" and e-mail addresses for reporting corrupt activities. State trade departments and other government offices have also increased the transparency of their operations. For instance, the Committee of Science and Technology has made their international contract bidding system available on the Internet. Both domestic and international companies will be able to participate and to compete on the same basis in obtaining government contracts from that department.

The government has been capturing wrongdoers inside its "team." For example, in 2000, China's Justice Minister, Gao Changli (former vice head of the Chinese Supreme Court) was detained for "irregularities." Earlier in that year, the deputy head of China's legislature, Cheng Kejie, was executed for corruption. More recently, more than a dozen officials in southern China were given death sentences after they were linked to a major smuggling ring in the coastal city of Xiamen.

Meanwhile, the laws also chastise parties who offer bribes to state officials by administrative fines, revoking business licenses and penal punishments. U.S. companies that are doing business in China must take action to avoid exposure to the anti-corruption laws. Being in a different business environment where social customs can be so different from western countries, American businesses will find it helpful to study these laws and understand the cultural and social realities embodied in the laws.

III. CHINESE LAWS THAT GOVERN CORRUPTION AND BRIBERY

Examining Chinese anti-bribery laws and their practical application will illustrate key differences between the U.S. and Chinese legal systems as well as some of the social cultures underlying those laws.

A. Chinese Criminal Law

The Chinese Criminal Code (the "Criminal Code") defines the crime of bribery and regulates it on the penal level. The original Criminal Code of China was promulgated in 1979 and was amended in 1997. The 1997 amended Criminal Code has a substantially expanded coverage of corruption offenses.

Similar to the criminal law system in other countries, the Criminal Code has jurisdiction over anyone "who committed a crime within the territory of the People's Republic of China, except for the ones that shall be governed under special regulations

under law.” (Article 6) Therefore, U.S. businesses and individuals that violate Chinese penal laws are subject to Chinese Criminal Code within the territory of China.

Under the anti-corruption provision, by literal translation, the crime of bribery is to “provide cash or property to state personnel for the purpose of seeking unjust benefits.” (Art. 389.1) It is also a form of bribery to “provide a relatively large amount of money in the course of economic transactions against the State’s regulations, or to provide state personnel kickbacks or commissions of any kind.” (Art. 389.2)

Though being the most complete statute to date that governs bribery as a crime in China, the Criminal Code is vague in language and problematic in application.

First, the Criminal Code does not define “bribery.” The express language of the statute limits illegal considerations to cash or tangible property, and only money and tangible property can be assigned a liquidated value. On the other hand, a court has explained that the definition of “bribery” also includes “stocks, certificates” and other cash equivalents. Although the Chinese legal system does not use the doctrine of *stare decisis*, and there are no binding judicial precedents in China, nowadays, previous decisions play an increasingly important role in the judicial system. Chinese courts now frequently refer to previous decisions in issuing their rulings. This follows from a new interest in China to access every available resource to make sound judicial decisions.

Second, it is not clear what amount of money will constitute a bribe under the Criminal Code. One can not determine in advance what a “relatively large” amount of money will be for the purpose of the Criminal Code in order to be certain one is in compliance. On the other hand, because China is a fast-developing country, its currency value, living expenses, commodity prices and other social factors are changing considerably. Using a flexible criterion rather than a fixed amount probably better serves China’s need to control corruption in a changing social reality.

I believe that from standard education and involvement in society, Chinese people do have a good grasp of what a “relatively large” amount of money is even though being able to read the language of the statute does not make one understand the law. This is a good example how Chinese law incorporates fundamental notions of fairness without any attempt to define the notion in a concrete way.

Third, the statute does not indicate the *mens rea* for the crime of bribery. The law does not specify the mental status required for committing the crime. Thus, in my introductory example, it may not matter under Chinese law that the western businessman had no thought of bribing the hotel employee (who could have been regarded as “state personnel”). For that woman, such a small gratuity might actually be considered a “relatively large amount of money” in some parts of China. Of course, in practice, Chinese courts do consider such issues to be very important and will generally imply some level of *mens rea*.

In addition to the penal code, the National People's Congress (the "NPC"), the lawmaking body of China, promulgated the Supplementary Provisions Regarding Crimes of Corruption and Bribery (the "Supplementary Provisions") in 1988. Under the Supplementary Provisions, the receipt of gifts (liwu) of substantial value from foreign interests is specifically identified as illegal. (Art. 10) Apparently, no proof of a *quid pro quo* is necessary.

B. Company Law

Another important statute is contained in the Chinese Company Law ("Company Law"), which governs business organizations.

The Company Law holds a foreign company directly liable for the civil liabilities of its branches in China. Under the Company Law, "a foreign company is a foreign legal person and its branches established within Chinese territory do not have the status of Chinese legal persons." It further specifies that "a foreign company shall assume civil liability for the operational activities of its branches within Chinese territory." (Art. 203) However, Article 203 does not include foreign company subsidiaries that are incorporated in China.

As to bribery, the Company Law provides that "when a director, supervisor or manager exploits his position to accept bribes or other illegal income, the illegal income shall be confiscated, and the wrongdoer shall be subject to sanctions by the company. If the violation constitutes a criminal offense, criminal liability shall be investigated in accordance with the law; ..." (Art. 214)

Therefore, when a branch of a U.S. company, its directors or officers commit a violation of the anti-bribery provision in the Company Law, the foreign company will be held liable. However, it is not clear if the assets of the branches of a foreign company will be subject to confiscation or other legal enforcement under the law.

In addition, the NPC also published the Decision on Punishment over Crimes against the Company Law (the "Decision") as an effort to suppress corruption within companies in 1995. Under the Decision, "a company's director, supervisor or staff member who exploits his office to extort or accept bribery of a relatively large amount, shall be sentenced to up to five year's imprisonment or criminal detention; and, if the bribery is of a huge amount, to five year's imprisonment or above, together with asset confiscation." In essence, the Decision applies the same criminal penalties on company managers engaged in commercial transactions that the Criminal Code imposes on state personnel generally.

Within the Chinese legal system, special laws trump general laws. Therefore, the Decision, as a special code, will trump Company Law, a general law, in the areas where the Company Law conflicts with or overlaps the Decision. As a result, corporate managers who violate the anti-bribery provision in the Company Law will be subject to the penalty stipulated in the Decision, instead of the related provisions in Criminal Law.

C. Anti-Unfair Competition Law

To get business accomplished in China, there was and still is, to a certain extent, a heavy reliance on “*guan xi*” (connections), i.e., “who you know” or “who you have a relationship with,” rather than on “the system” and its laws. While family members and subordinates of the communist party members are used extensively as intermediaries to transact business, in the market place, businesspeople have very limited access to merchandise. Businesspeople often find, as a practical matter, that they need to bribe managerial personnel to remain competitive in merchandise procurement and in product distribution channels.

In restructuring its economic system from a planned economy to a market economy, China is working to change this “practical reality” in market transactions. The Anti-Unfair Competition Law (“AUCL”) and its implementing regulations expand the law of bribery to commercial transactions. Under the AUCL, businesses are prohibited to “bribe through cash, property, or any other means in order to sell or purchase merchandise. Anyone who gives the other party any kickbacks shall be deemed to have committed bribery and punished accordingly.” (Art. 8.1) The AUCL also provides that “any commissions to intermediaries or discounts to any buyers must be recorded in the accounting books of the company. The other party who receives commissions or kickbacks secretly shall also be deemed and punished as accepting bribery.” (Art. 8.2)

U.S. businesses that possess financial and technological advantages may find themselves in a more competitive position in the market. But when a foreign company attempts to break into a new market in China, it may face a choice of the “easy way” – seeking favorable government treatment by the old practices; or the “hard way” – playing within the new system. A company should keep the legal consequences in clear focus when making its decision.

VI. OPINION TO BUSINESS CLIENTS

Despite the factors that increase the risk of exposure, there are preventive measures that U.S. companies active in China can institute to assure compliance with and minimize potential liability under the anti-bribery laws. U.S. parties with activities in the PRC may want to consider the following practical tactics to shield themselves from corrupt practices in China.

1. Adopting Internal Measures

Educate your employees on the severe monetary and criminal penalties associated with a violation of the Chinese anti-corruption laws, noting that these law apply both to business entities and to individual company employees and officers. Make company policies that are firm on bribery and similar corrupt demands.

2. Using All Resources

Sometimes government official who demand bribes may only be bluffing or testing you and your company. Try to confirm what the other side tells you with other sources, such as businesses that have dealt with the government department before.

3. Involving Professional Advisors

Local foreign counsel will have relevant legal knowledge and ideas of how to deal with local governments. They also have greater access to information and personal contacts – intangible assets that are invaluable in moving the deal along. Consulting with Chinese legal professionals, financial advisors and banking experts will be very important to reach business goals without violating the laws.

4. Learning Some Chinese Laws

Even though being able to speak and to read Chinese will not guarantee a thorough understanding of the Chinese legal system, becoming acquainted with Chinese laws is both doable and useful. As in any country, knowledge of the Chinese laws is very helpful in conducting business in the country.

5. Seeking Governmental Assistance

China now provides many ways to report governmental and corporate corrupt practices. Use governmental assistance as a weapon to deter bribery demands in business transactions.

6. Conducting Due Diligence

Carefully study the social customs and governmental practice before choosing the business strategies. Try to select a geographical area where your business nature fits the local culture.

7. Be Patient

Cross-border deals are almost always more complicated and time-consuming than domestic deals. Just assume that doing business in a foreign land will involve the same risks and rewards as traveling abroad: by accepting the unexpected and responding flexibly, you can have valuable experiences that you cannot have at home. Be patient!

VII. CONCLUSION

The construction and application of Chinese laws can be problematic from a Western perspective. However, understanding the culture and learning how cultural values are used in the judicial system will help U.S. companies do business successfully in China.

With China entering into the WTO, American businesses now have unprecedented and largely unrestricted access to the world's biggest marketplace. The Chinese government is making diligent efforts to curtail corrupt practices in China. It has been improving, and promises to continue to improve, the rules and policies related to business transactions to make China a fairer destination for international businesses. Minimizing exposure to Chinese anti-corruption laws is manageable for American businesses through studying the culture and customs, besides reviewing the literal meaning of the written codes. The new millennium holds much economic promise for Americans that are doing business within sight of the Great Wall!

Finally, one more suggestion to new visitors to China: Don't tip anyone, unless you first make sure it is ok!

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