



Article printed from CDR - (Commercial Dispute Resolution) | <http://www.cdr-news.com>

Home ▶ Featured articles ▶ Beware clients bringing gifts



## Beware clients bringing gifts

**BEN RIGBY** 19 DECEMBER, 2016

**Christmas is a time for gift-giving and for the mutual appreciation of business relationships. Clients should be careful about the scale of Christmas largesse they receive.**

When is a gift not a gift? When it is a bribe, is one answer. The Christmas season is a time for gift giving, recognising team, individual, and business achievements, showing appreciation in the interests of relationship building.

Given a crackdown in both mainland China and Hong Kong on the perceived threat, and actual exercise, of bribery, the use of gifts and hospitality has to be handled carefully. As **Shaun Wu**, of **Kobre & Kim** in Hong Kong points out, “prosecutors in mainland China act vigorously on such allegations with the renewed focus by President Xi’s administration on bribery and corruption”.

He explains that throughout 2016, Chinese authorities have widened the scope of enforcement – criminalizing the offering of bribes to relatives of present and former state officials, and defining bribes to include intangible benefits and payments after benefits are received.

That means in-house lawyers need to make careful reference to Chinese anti-bribery statutes and others with a longer reach, like the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act.

Prosecutors are increasingly talking to one another says **Rob Hunt**, of **Herbert Smith Freehills** (HSF) in Hong Kong, who says that as corruption allegations become increasingly international, “we have seen national enforcement agencies working together more and more too”.

“Arrangements have also become formalised with memoranda of understanding and bilateral agreements being signed between various states,” he says.

## CRIME COSTS

The consequences of not obeying the rules can be severe; fines have been levelled against companies in recent years over lavish gifts, hospitality and tours in Asia.

“It can be hard to decide where acceptable relationship building stops and the crime of bribery starts, but companies can no longer ignore this area of corporate compliance,” said **Kyle Wombolt**, global head of corporate crime at HSF.

“We are seeing law enforcement agencies, both international and domestic, focusing on gifts, hospitality, donations, travel perks, conferences and tours in their investigations. And new legislation in the region supports this broader scope.”

In China’s case, Wombolt notes, “President Xi Jinping’s anti-corruption drive has shone a spotlight on the activities of Chinese public officials, and in turn, those who have dealings with them.”

He points out: “The threshold for acceptance of benefits has been tightened considerably in recent years. [Whether] paying travel expenses to attend a board meeting, or an honorarium, are bribes will depend on the costs involved, and the nature of the relationship between the parties and the reason for payment.”

## A QUESTION OF SPORT

Sporting events form one such risk. On a recent visit to Asia, *CDR* asked Wombolt how the authorities might view an invitation issued to the chief executive of a large state controlled company, who, while visiting the UK for business meetings, is invited by a fellow chief executive, a customer, to the men’s final at Wimbledon. What issues would such an invitation present?

Wombolt says that, as an employee of a state-controlled company, the executive is a foreign public official. Depending on the circumstances, issues may arise under the UK Bribery Act in relation to the supplier executive as well as his company.

He explains why: “Companies may be liable for the acts of their employees, subject to having reasonable procedures in place to prevent bribery.” That said, he notes, “it is important to emphasise that the Bribery Act is not intended to prohibit reasonable business hospitality that has a proper business purpose.”

“Hospitality provided with the intention of influencing a foreign public official and securing business as a result is, on the other hand, prohibited,” he notes.

In *CDR*’s example, an official visiting the UK on business who is invited to a prestigious sporting event could accept the invitation, provided it was a part of that ongoing relationship. “Provided that the invitation is not an attempt to improperly influence the official, there should not be a problem,” says Wombolt.

“However, the higher the value of the entertainment in question, the greater the inference that it is intended to influence the official to grant some sort of business advantage. The seniority of the parties is relevant – as chief executives, both can influence business decisions. If there is an ongoing tender, the invitation may pose much more of an issue,” he argues.

That is not the only such factor to be borne in mind; many corporates also have hospitality policies, so both the giver and the recipient should have these in mind.

## **CORPORATE LARGESSE MONITORED**

Wombolt emphasises that “many UK companies adopt stricter requirements for entertainment to public officials”. For their part, officials are subject to their own rules of conduct, as well as their national bribery laws.

“For example, state officials in China are highly restricted in what they may accept by way of gifts and hospitality.”

Frequency is also an issue, he notes: “One-off benefits are less of a problem than an aggregation of multiple benefits. High-end hospitality offered repeatedly to a foreign public official could give rise to an inference that it is intended to influence the official to grant a business advantage to the company.”

Likewise, it may make things difficult for the official, placing them in breach of their own conduct rules. As Wombolt says, “the business relationship and the status of ongoing and prospective business between the parties would be highly relevant”.

From a practical perspective, Kyle says: “Companies need risk-based controls that take on board not only the law but the market, relationship and culture.” Wu agrees, saying: “Businesses must now prepare for the regulatory landscape here with a more localised approach to risk regulation on the ground.”

For Wu, foreign corporations, in particular, “need to know how best to oversee policies for China and when to conduct small-scope internal reviews should any issues arise”.

**Tagged with:** Competition & Business Crime - White-Collar Crime



**Copyright © 2017 - Global Legal Group**