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Business Entities' Liability for 'Associated Persons' Corruption in Malaysia: Key reflections

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Abstract
Section 17A of the Malaysian Anti-Corruption Commission Act 2009 imposes liability on business entities and their management if persons associated with them offer a bribe for their benefit. It provides a new regulatory capture to the meaning 'Associated Persons' and corporate liability. This doctrinal research highlights the associated persons' legal framework that business entities should take cognisance of and incorporate in business operations. A comparative approach is undertaken to investigate how other jurisdictions deal with the issue. The study's findings are significant to Malaysia's business entities in curbing the associated persons' corruption acts.

Keywords: corporate liability; associated person; corporate corruption; risk assessment

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1.0 Introduction

The pervasiveness of corruption knows no bounds (Omar et al., 2020). Businesses are one of the four segments of private sectors corruption (Sartor & Beamish, 2020), where common business corruption includes commercial bribery, kickbacks, corporate fraud, collusion, and insider trading (Sartor & Beamish, 2020). A World Bank's Enterprise Survey highlights up to 51 per cent of companies experience at least one bribe payment request per year in some countries (UNODC, 2019a). In 2020, according to Pricewaterhouse Coopers (PWC), bribery and corruption were among the four most disruptive forms of fraud experienced in Malaysian organisations in the last two years, apart from asset misappropriation, customer fraud, and cybercrime (PricewaterhouseCoopers, 2020). Bribery in business is a central focus of international conventions such as The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) 1997 and The United Nations Convention against Corruption (UNCAC) 2003 (Lord et al., 2018). The United Nations Global Compact tenth principle on anti-corruption 2004 states that businesses should work against corruption in all its forms, including extortion and bribery, and proactively develop policies and concrete programmes to address corruption internally and within their supply chains (United Nations Global Compact, n.d.).

In Malaysia, to curtail business entities and their associated persons' corruption, a corporate liability provision in Section 17A of the Malaysian Anti-Corruption Commission (MACC) Act 2009 Act (Act) (Malaysian Anti-Corruption Commission Act (Amendment) 2009, 2018)

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was introduced on 1 June 2020 (Low, C. K., & Low, 2020). This section imposes liability on business entities and their officers holding managerial positions ("management") if persons associated with them offer a bribe to a third person for the business entities' benefit. The MACC first prosecution against Pristine Sdn Bhd for its former director alleged bribery and Deleum Primera Sdn Bhd's chief operating officer receiving the bribery marked a new direction to business entity's liability allowing authorities to take action against companies whose employees have been found guilty of corruption offences (Raof et al., 2021). The National Anti-Corruption Plan 2019-2023 has also been developed to address issues on corruption and integrity in Malaysia (National Centre for Governance Integrity and Anti Corruption (GIACC), 2019). Business entities commit an offence if their 'Associated Persons' are involved in outbound gratification intending to benefit the former (Section 17A(1) the MACC Act). The 'Associated Persons' are the (i) directors, (ii) partners, (iii) employees or (iv) persons who perform services for or on behalf of the business entities (Section 17A(6) of the MACC Act) (Associated Persons). Nevertheless, as regards (iv), the determination is via reference to all the relevant circumstances. It is not just dependent on the type of personal and business interactions. The risk of business entities being charged for corruption due to corrupt acts by individuals or entities within the phrase 'Associated Persons', as is the 'relevant circumstances', are not to be taken lightly. The failure to prevent and control corruption will be an offence under section 17A MACC Act. The crime carries a maximum fine of ten times the bribe sum or RM1 million, whichever is greater, or both (Raof et al., 2021). Thus, this study aims to examine the categories of Associated Persons involved in corrupt activities under Sections 17A (1), 17A (6) and 17A (7) of the MACC Act and the extent of the involvement of the Associated Persons that give rise to the liability of business entities. The research objective is to compare 'Associated Persons' legal position under the MACC Act to the United Kingdom Bribery Act 2010 (UKBA) and the United States Foreign Corrupt Practices Act 1977 (USFCPA) for comparison study and insights.

2.0 Literature Review

Numerous scholars asserted that corruption is detrimental to business (Keremis, 2020) as it creates market entry barriers for companies, hurts their innovation and productivity capabilities (Paunov, 2016). Other studies supported that corporation is an innocent victim obligated to pay bribes to do business (Cuadrado, 2005). Argandona argued various factors exist, which resulted in a country criminalising corporate corruption (Argandoña, 2007). Castro defined corporate corruption as 'the misuse of formal power by a corporate representative for personal and/or organisation benefit' (Castro, 2020). Castro further stressed corporate corruption continues to be an unresolved issue, undermining business trust and interfering with the effective functioning of competitive markets. In recent years, corruption has been exposed at a real who's who of the corporate elite, including Airbus, Goldman Sachs, McKinsey, Novartis, Siemens, and Rolls Royce (Castro, 2020). According to Stigler, regulations are essential in combatting corruption (Stigler, 1971). Many of the most significant corruption probes involve corporations rather than individuals. Corporate liability is a fundamental aspect of the global fight against corruption (UNODC, 2019b). Some literature help clarify corporate criminal liability. King and Lord emphasised that law sanctioning procedures should deal with corporate crime to achieve criminal justice and associated enforcement (King & Lord, 2018). According to Nesterova and Datsiuk, it is essential to realise that, while corporations are fictitious, they are essentially groupings of individuals who suffer real and severe repercussions when corporate criminal laws are enforced (Datsiuk & Nesterova, 2020). In Malaysia, before the enactment of Section 17A MACC Act, the prosecution is against the individuals under Sections 16, 17, 18 and 21. Nevertheless, issues were highlighted on the absence of any definition or guidance on the phrase 'relevant circumstances' under Section 17A(7) MACC Act (Low, C. K., & Low, 2020). Further, the difficulty is regarding the broad identity of 'a person who performs services for and on behalf' of the business entities. Numerous individuals and entities could be charged with a corrupt act for violating section 17A(1) MACC Act (Low, C. K., & Low, 2020). Failure to prevent and control corruption within business organisations will expose them and their associates to an offence. Under Section 17A(2) MACC Act, the penalty is a fine of not less than ten times the sum or the value or RM1 million, whichever is greater, for failing to prevent and control corruption within their business entities. The punishment may impact innocent third parties. Although there are no direct financial losses, society may also be adversely affected (Kurniawan et al., 2020). The research aims to shed light on this phenomenon by examining how the UK and the US approach the subject, as Malaysia currently lacks relevant case law. A thorough analysis is conducted in the hope of making a notable contribution.

3.0 Methodology

This paper is based on doctrinal research, which is predominantly library-based. Legislation and case laws as primary legal sources are identified and analysed. The pivotal legislations are the MACC Act, the UKBA and the USFCPA, relevant guidelines and authoritative materials. The secondary legal sources reinforced the data from primary legal sources. Legal journals and articles, books, webpage, news reports and reliable websites and blog sites are gathered to obtain relevant and vital information and a profound understanding of the liability of the business entities due to corrupt acts of the Associated Persons (Azmi et al., 2021). Critical reviews were conducted on the concept of corporate liability, Associated Persons, third party and corporate corruption utilising sources from online databases such as Web of Science (WoS), Scopus, Lexis Nexis, HeinOnline and the Current Law Journal. The data acquired from databases were later analysed using thematic and content analysis. The analysis was carried out within the selected themes, namely 'corporate corruption', 'corporate liability', 'Associated Persons under the context of corporate corruption' and 'third party under the context of corporate corruption'. The output from critical reviews over databases sources were later triangulated with data acquired from the critical analysis of the selected statutes using the same themes. Similarly, the comparative approach is embarked upon by elucidating the data based on the thematic analysis technique using the essential themes in the study. The process of thematic analysis involves data reduction, where the raw data is reduced into meaningful groupings (Grbich, 2007).

4.0 Findings

4.1 Applicable Laws

4.1.1 Statutes

Section 17A MACC Act, Section 7 UKBA and the USFCPA create anti-corruption and anti-bribery rules for organisations with extraterritorial effects. In Section 17A MACC Act and Section 7 UKBA, a commercial organisation commits an offence if an associated person corruptly gives gratification or bribes another person for its benefit. A 'commercial organisation' is a business entity comprising partnerships, limited partnerships, limited liability partnerships, and companies formed and incorporated in either country or elsewhere with business in both countries. A sole proprietorship is excluded. Business entities can avoid liability if adequate procedures as per the guidelines issued by the authorities can be proven to be in place. In general, the USFCPA prohibits offering to pay, paying, promising to pay, or authorising the payment of money or anything of value to a foreign official to influence his act or decision in the official capacity or to secure any improper advantage to obtain or retain business (Boles, 2014; Young, 2020). It does not address private commercial bribery (Mendelsohn, 2020). The scope of the UKBA is larger than the USFCPA as it criminalises corruption in the private sector (Kobets, 2020). The Resource Guide provides guidance to the USFCPA. The USFCPA applies to 'issuers', 'domestic concerns' (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020), certain persons or entities acting within the US, and their associates (Mendelsohn, 2020). Other than an issuer, a domestic concern is any person who is a US citizen, national or resident; or any corporation or partnership established under the laws of the US or its states, territories, possessions, or commonwealths (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020). There are two affirmative defences to the USFCPA's anti-bribery provisions: (1) the payment was legal under the foreign country's written laws (the 'local law' defence), and (2) the money was spent demonstrating a product or fulfilling a contractual obligation (Young, 2020). In the US, having a compliance programme is not a defence, but prosecutors examine its effectiveness when evaluating whether or not to file a criminal charge against a company (Hess, 2018).

4.2 Guidelines

Guidance on measures to control corruption and bribery exists for all three jurisdictions. Similar adequate procedures guidelines are available in Malaysia and the UK, although not exact chronology. The MACC Act's Guidelines on Adequate Procedures under Section 17A(5) uses the acronym T.R.U.S.T. to aid businesses in establishing liability protection plans. T.R.U.S.T. stands for Top Level Commitment, Risk Assessment, Undertake Control Measures, Systematic Review, Monitoring and Enforcement and Training and Communication (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister's Department Malaysia, 2018b). The Malaysian Code on Corporate Governance has a similar risk governance process. The GIACC website features case studies on T.R.U.S.T. (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister's Department Malaysia, 2018a). In the UK, the Ministry of Justice outlines six bribery prevention principles, namely Proportionate Procedures, Top-level Commitment, Risk Assessment, Due Diligence, Communication (including training) and Monitoring and Review (UK Guidance) (The Bribery Act 2010 - Guidance, 2011). The Start Guide offers a quick guide on the UK Guidance (The Bribery Act 2010 Quick Start Guide, 2011). However, the mere existence of bribery policies is not sufficient. In Director of the SFO v. Airbus SE (Case No. U20200108) [2020] 1 WLUK 435, Airbus SE has anti-corruption policies but were easily circumvented. A corporate culture allowed bribery by Airbus SE business partners and/or employees to occur globally. The USFCPA Resource Guide details the commitment from senior management and a clearly articulated policy against corruption, code of conduct and compliance policies and procedures, oversight, autonomy, and resources, risk assessment, training and continuing advice, incentives and disciplinary measures, third-party due diligence and payments, confidential reporting and internal investigation, continuous improvement: periodic testing and review, mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration, and investigation, analysis, and remediation of misconduct (Young, 2020).

4.3 'Associated Persons'

4.3.1 Director and Partner

A director and a partner are 'Associated Persons' under Section 17A MACC Act. Under the Malaysian Companies Act 2016, a director includes a de facto, a shadow, an alternate or a substitute director and a nominee director (Rahman & Salim, 2010). A partner is subject to the Malaysian Partnership Act 1961 or the Limited Liability Partnerships Act 2012 (LLPA). Concerning a limited liability partnership, partner means any person admitted as a partner therein under an agreement and includes a salaried partner (Section 2, LLPAct). A director and a partner are also deemed to commit corruption when the business entity commits corruption unless the proof of disapproval is shown and the performance of due diligence is conducted to prevent the offence. The UK Court in the Airbus SE case found that Airbus SE had failed to prevent the directors from bribing those involved in the purchase of aircraft by AirAsia and AirAsia X from Airbus. The bribes were meant to gain or keep business for Airbus SE (*Regina v Airbus SE Statement of Facts*, 2020). Officers and directors are also captured in the USFCPA (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020).

4.4 Employee
'Associated Persons' include employees of business entities in the MACC Act and the UKBA. The MACC Act does not define the term 'employee', prompting serious challenges about part-time or temporary personnel (Low, C. K., & Low, 2020). Imposition of liability on employees and others who undertake services for the business entities may not meet the proportionality test laid out by the Federal Court in Pendakwa Raya v Gan Boon Aun, Criminal Appeal No 06-2-05/2016, as the defendant's fundamental rights may not be adequately protected (Low, C. K., & Low, 2020). All Section 7 enforcement actions involving third parties under the UKBA included the company's employees (Giles, 2021). Senior workers were involved, as were employees and third parties, with the employees knowing the third parties' actions. In R v Skansen Interiors Limited (Case No: T20170224 [2018], corporate employees paid bribes. Standard Bank plc (Case No. U20150854) [2015] 11 WLUK 804 involved employees of a local sister company, while R v Sweett Group Plc (unreported) involved employees of a local subsidiary (Giles, 2021). In the Airbus SE case, Airbus SE employees and other intermediaries bribed third parties to ensure the purchase of Airbus aircraft (Director of the Serious Fraud Office and Airbus SE, 2020). The USFCPA (The Foreign Corrupt Practices Act, 2015) covers employees of issuers (i.e., public companies) (US Department of Justice, 2020). Tim Leissner, as Goldman Sachs' employee and agent, had pleaded guilty to acting in violation of Section 30A of the Exchange Act in the case of In the Matter of Tim Leissner, Respondent (Reporter, 2019). He had used interstate commerce to bribe foreign officials, hoping they would use their official positions to help Goldman Sachs obtain bond deals and other business (Reporter, 2019).

4.5 Subsidiary
Section 17A MACC act does not mention 'subsidiary' as a business associate. However, a 'subsidiary' is considered an associate under the UKBA. Petrofac Limited (Petrofac) violated Section 7 UKBA on 4 October 2021. The Petrofac board oversaw the Group's strategic and governance activities, including agent appointments and other subsidiary activities. While Petrofac did not sign any of the indictment's contracts, its subsidiaries did. Although the contracts were entered into through subsidiaries, the court found that bribes were paid for Petrofac's benefit (Cogman et al., 2021). Under the USFCPA, a parent company may be liable for bribery paid by its subsidiary in two ways: i) a parent may have directly participated in the activity. ii) traditional agency principles may attract parent-subsidiary liability. Control is an essential feature of an agency (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020).

4.6 Person who performs services for or on behalf of the business entities and determination is by reference to all the relevant circumstances
Section 17A MACC Act and Section 8 UKBA contain these requirements. The phrase 'relevant circumstances' is nevertheless not defined. Anyone can potentially be charged with a corrupt act. Section 8 UKBA explicitly states such a person may be the employee, agent or subsidiary of the business entities. They may mean those actors operating within the organisation, such as the employees or senior managers, or on behalf of the organisation, for example, intermediaries, subsidiaries, or agents (Lord et al., 2018). Companies' most significant bribery risks come from third parties and intermediaries. These threats develop as corporations expand into new areas and outsource more activities (Transparency International, 2018). The UKBA and USFCPA make no distinction on types of third parties (Transparency International, 2018). Four out of eight Section 7 UKBA enforcement actions included intermediaries who assisted in gaining contracts by bribing government officials and/or private individuals (Giles, 2021). The cases are Rolls-Royce (Case No. U20170036) [2017] 1 WLUK 189, [2017] Lloyd's Rep FC 249, *XYZ (Sarclad) Ltd* (Case No. U20150856) [2016] 7 WLUK 211, *Airbus SE and* Director of the SFO v. Airline Services Limited *(Case No. U20201913*) [2020] 10 WLUK 606. Business partners helped Airbus SE expand its international reach and win sales contracts in several nations in the Airbus SE case. When Airbus SE sold an aircraft, it would typically pay the business partners a percentage of the sale price or a fixed sum per aircraft sold (Shih, 2020). Companies have been found accountable or investigated under the USFCPA for numerous third parties' unlawful acts. However, the top ten USFCPA settlements involved bribery initiated within firms and channelled through third parties, including consultants, agents, and joint venture partners (Transparency International, 2018). Payments made to other parties or intermediaries are expressly prohibited under the USFCPA (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020). Businesses can limit third-party agent risks by having a practical compliance approach that includes agent due diligence (Criminal Division of the U.S. Department of Justice & the Enforcement Division of the U.S. Securities and Exchange Commission, 2020). The third-party can consist of advisors and consultants (tax, legal, financial, business), service providers (logistics, supply chain management, storage, maintenance, processing), contractors/subcontractors, lobbyists, marketing and sales agents, customs or visa agents (Transparency International, 2018), trustees and distributors. As agents are authorised to represent the company, they are the most vulnerable. However, other intermediaries, such as lobbyists and law firms, may also be bribed. To get a high-level perspective of the risk profile of its third-party population, a corporation needs to acquire basic information on all third parties. This step applies to all existing third parties, and business entities must develop rules and procedures for all new third parties (Transparency International, 2018).

5.0 Discussion
Businesses must follow proper procedure rules and establish a robust anti-corruption policy to avoid corruption risks exposure. Considerable confusion around 'Associated Persons' and 'relevant circumstances' exists. How can Section 17A MACC Act be appropriately applied to 'Associated Persons', given the challenges in applying the identification or attribution principle to such a potentially broad group of individuals or entities (Low, C. K., & Low, 2020)? The term 'Associated Persons' is expansive. Although the person provides services to the business entities, they do not always control them. In borderline cases, the court must evaluate whether someone is linked with the

organisation based on the nature of the relationship and all relevant circumstances (Lederman, 2020). Businesses can accurately assess corruption risks associated with 'Associated Persons', and internal control systems can be developed and promoted to prevent unlawful behaviours (Lederman, 2020). Appropriate procedure guidelines are a must-have resource. External and internal hazards should be considered when assessing a risk (UNODC, 2019). Organisations must conduct regular evaluations of their corruption risks to improve accountability, trust, and openness. It is critical to foster ethical company culture and be cautious when dealing with third parties (UNODC, 2019). Businesses must show that they have taken reasonable steps to keep 'Associated Persons' from committing the offence in question to defend themselves against corruption charges. The language suggests that the courts and enforcement agencies will be given latitude and discretion to examine the facts and circumstances of the case (Lederman, 2020). The courts will decide if the business entities followed proper procedures.

6.0 Conclusion and Recommendations

Due to the early stage of Section 17A MACC Act implementation, questions about ‘Associated Persons' and ‘relevant circumstances' remain elusive. Considering Section 17A MACC Act was modelled after UK and US anti-corruption laws, their knowledge and experience may help Malaysia grasp the implication and seriousness of the provision. Future studies could use qualitative methods to analyse the provision's impact on businesses. The list of people included in the phrase ‘Associated Persons’ is not exhaustive. Despite extensive anti-corruption procedures, business entities may be unable to prevent 'Associated Persons' from engaging in corrupt conduct. The business's survival depends on the availability of appropriate procedures and their observance to prevent prosecution for the strict liability offence under Section 17A MACC Act.

Paper Contribution to Related Field of Study

This study assists legal professionals and business entities comprehend potential liability for corruption under Section 17A MACC Act.

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