



Corruption or Corporate Hospitality: An Analytical Discourse of Section 17A of the Malaysian Anti-Corruption Commission Act 2009

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Abstract

Commercial organisations practise corporate hospitality to develop loyalty and trust, keep in touch with clients, and weather business. A challenge exists where corporate hospitality may camouflage corruption. One of the pertinent issues is addressing the obscuring boundaries of corporate hospitality to ensure commercial organisations in Malaysia are not trapped in the labyrinth of corruption affecting business sustainability. This research employs a doctrinal study and content analysis approach that utilises library-based research to procure primary and secondary sources. The research outcome may assist the government, policymaker, and commercial organisations' stakeholders in combating corrupt practices within their organisations.

Keywords: commercial organisations; corporate corruption; corporate hospitality; guidelines

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1.0 Introduction

This paper aims to examine the extent of applying corporate criminal liability for corruption under section 17A of the Malaysian Anti-Corruption Commission (MACC) Act 2009 (Act) concerning corporate hospitality (CH) in Malaysia. CH is a significant corruption risk for commercial organisations (COs) when they engage in CH without knowing the differences between corruption and CH. COs resort to CH by providing gifts or tickets to free sporting events to develop loyalty and trust, keeping in touch with clients, and weather business. A challenge exists where CH may camouflage corruption. Failure to prevent and control corruption will expose the COs and the management to an offence under section 17A of the Act. The offence imposes a fine of not less than ten times the bribe sum or value of RM1 million, whichever is higher or maximum imprisonment of 20 years, or to both, subject to the defence of having adequate procedures in place. 2013 and 2019 global surveys (Foley & Lardner LLP, n.d.; Piper, 2019) highlighted smaller businesses need encouragement and support to battle corruption. The majority of the respondents globally argued insufficient guidance for the sector (Piper, 2019). A CH risk exists especially for the small and medium industries (SME) because it may equal corruption (Piper, 2019). In Malaysia, 98.5% of businesses are SMEs, contributing to 36.6% of the total GDP (Hisham, 2019). One of the pertinent issues is addressing the obscuring boundaries of CH to ensure COs are not trapped in the labyrinth of corruption, which will affect the business's sustainability. Many works of literature discuss adequate procedures' defence. Still, there is a lack of comprehensive discussion on CH, which may amount to corruption and an offence under Section 17A of the Act (Balasingam, 2021), which thus necessitates this discussion.

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2.0 Methodology

This study was conducted using doctrinal analysis and a comparative approach on the legislative framework governing corporate corruption and CH in Malaysia, the United Kingdom (UK), and the United States of America (US). Doctrinal research is library-based research (Ali et al., 2017). The primary sources comprised statutes, guidelines, reported and unreported case law. Acquisition of the secondary sources was through online databases inclusive of journal articles, books, reports, and online news reporting. Comparative legal research is a usual way for researchers to examine the law and provide views for future legal development (Nuraisyah Chua Abdullah, 2018). The Act, the UK Bribery Act 2010 (UKBA), the US Foreign Corrupt Practices Act of 1977 (FCPA), and the guidelines were thoroughly studied using three specific themes. They are the (i) interpretation, and (ii) laws of corporate corruption and CH, and (iii) best practices addressing offences of corporate corruption and CH. The doctrinal study involves an analysis of legal cases to see the decision pattern adopted by the judges in the three jurisdictions. The literature review that forms the foundation for studying this area was conducted using content analysis. The content analysis was adopted to determine the presence of certain words, themes, or concepts within the study of corporate corruption and CH in the secondary sources. The data from the doctrinal research and content analysis were later analysed and triangulated to finalise the findings and recommendations on corruption and CH laws in Malaysia and learn from the best practices of the UK and the US.

3.0 Results and Discussions

3.1 Corruption and CH

The abuse of entrusted power for personal benefit is corruption (Transparency International UK., 2011). The word 'corrupt' is '*doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions*' and '*purposely doing an act which the law forbids*' (Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2) [1977] 1 MLJ 15). Corruption ruins the corruptors and can go beyond to destroy the entire country. Corruption is damaging to a country because decisions serve private interests (Søreide, 2005). Malaysia enforced a corporate liability provision in Section 17A of the Act on 1 June 2020. Its objective is to address and curtail the problem of corruption by CO and their associated persons. Previously, only employees could be charged for offences under the Act (Low, C. K., & Low, 2020). Section 17A is also consistent with Article 26 of the United Nations Convention Against Corruption which Malaysia ratified in 2008 (Low, C. K., & Low, 2020).

Incentive travel, customer and staff entertainment are examples of CH activities that assist organizations that want to entertain clients, prospective clients, or workers (Saluja, M., & Mai, 2015). Hospitality is given or received to initiate, cement, or develop relationships. (Global Infrastructure Anti-Corruption Centre, 2020; Transparency International UK, 2018). The legitimate business hospitality is limited (i) to provide coffee, tea, sandwiches, and other refreshments during a business meeting, (ii) to permit meeting of staffs from two or more organisations over a moderately priced lunch or dinner, with the objective of a more efficient working relationship, and (iii) to look after visiting personnel from another organisation in a reasonable and hospitable manner (Global Infrastructure Anti-Corruption Centre, 2020). Hospitality also refers to out-of-pocket expenses related to business meetings. Hospitality requires the host to be present because otherwise, the expenditure is a gift (Transparency International UK, 2018). Proponents argued that it provides a relaxed and neutral environment where hospitality can start business relationships and activities, foster information, respect, and show trust. Hospitality is vulnerable to corruption, and it is difficult for businesses to manage because most regulations do not set clear limits. There are also long-standing customs relating to gifts and hospitality (Transparency International UK, 2018).

3.2 Corruption and CH: Law in Malaysia

Under Section 17A of the Act, a commercial organisation commits an offence if an associated person corruptly gives any gratification for its benefit. COs can avoid liability if adequate procedures can be proven to be in place. The top management may also avoid liability upon establishing the associate committed the corrupt acts without his consent or connivance. Further, due diligence has been conducted to prevent the commission of the offence (Section 17A(2)(3) Act). COs comprise partnerships, limited liability partnerships, and companies formed and incorporated in Malaysia or elsewhere with business in Malaysia (Section 17A(8) Act). Gratification includes monetary and non-pecuniary bribes (Chew et al., 2021). The Guidelines on Adequate Procedures was made under Section 17A(5) of the Act, utilising the T.R.U.S.T principle (Adequate Procedure Guidelines) (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister's Department Malaysia, 2018b). CH is addressed in Principle III, namely U (Undertake Control Measures). COs will have to establish policies and procedures on CH in proportion to the organisation's scale, nature, industry, risk, and complexity. There are four more principles apart from principle III. Principle I is T (Top-Level Management), Principle II is R (Risk Assessment), Principle IV is S (Systematic Review, Monitoring and Enforcement), while Principle V is T (Training and Communication). The Adequate Procedure Guidelines are assisted by case studies provided by Governance, Integrity, and Anti-Corruption (GIACC) Malaysia (Case Studies). A review of the Case Studies shows that they illustrate how the COs can apply the principles of T.R.U.S.T in preventing corruption (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister's Department Malaysia, 2018a). The one pertinent to CH is case study 3 entitled 'Mitigating moral hazard in gifts and hospitality'. Review of case study 3 highlights that the policy and procedures on CH must cover all elements of T.R.U.S.T principles and not merely Principle III to avoid corruption risk. It is thus of utmost importance for COs to ensure policies that provide clear guidance about CH, as highlighted in case study 3, are established.

The National Anti-Corruption Plan 2019-2023 (Plan) has been developed to address issues on corruption and integrity in Malaysia (National Centre for Governance Integrity and Anti-Corruption (GIACC), 2019). Bursa Malaysia has amended the Main and ACE Market Listing Requirements effective 1 June 2020 (collectively "Listing Requirements") to encapsulate anti-corruption measures in support of the Plan for listed companies (Bursa Malaysia, 2019). Establishing and implementing such policies will provide a measure of assurance and

defence against corporate liability for corruption (Bursa Malaysia, 2019). CH is subject to a few requirements in the Bursa Malaysia Anti-Corruption Policy (Bursa Malaysia, 2020). Firstly, there is a good purpose of facilitating networking to strengthen business relationships or promote mutual understanding for future partnerships or transparent collaborations. Secondly, the host is present or participating in the event. Thirdly, CH is modest and proportionate to the occasion. Employees are not allowed to solicit gifts, entertainment, or travel from other sources. They are prohibited from accepting or donating gifts, entertainment, or travel from parties participating in a tender or competitive bidding process (Bursa Malaysia, 2020). In *Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 6 MLJ 182, the Court held that the Listing Requirements have statutory force. The rules of the exchange have their genesis in the contract. A listed company agrees to comply with the obligations contained in the Listing Requirements (*Law Siew Ngoh & Anor v Bursa Malaysia Securities Bhd* [2019] 7 MLJ). In the Anti-Corruption & Anti-Bribery Policy of a solicitors' firm, Lee & Azrina, gifts, hospitality, and entertainment, exchange of business courtesies may be offered to or received only where appropriate, reasonable, modest, and bona fide to do so. They must not influence business decisions, and any such business courtesies offered or received on behalf of the firm must be approved by a founding partner (Azrina & Solicitors, n.d.).

As far as the researcher is aware, Malaysia has no judicial decision on CH vis-à-vis corruption in COs yet. There is at present only one case law under Section 17A of the Act involving *Pristine Offshore Sdn Bhd* (Pristine), and it does not concern CH. Its former director was accused of paying a bribe of RM312,350 to *Deleum Primera Sdn Bhd's* chief operating officer for Pristine to be given a subcontract from *Petronas Carigali Sdn Bhd* (Huan et al., 2021; Yen, 2021). This case was set for case management on 11 October 2021 (Yatim, 2021). However, the Court has scrutinised the meaning of 'entertainment' under the Income Tax Act 1967 (ITA). In *United Detergent Industries Sdn Bhd v Director General Of Inland Revenue* [1998] MLJU 138, the Court analysed Section 18 of the ITA and believed the definition of "entertainment" was not exhaustive. Reference was made to "entertainment" in *The Concise Oxford Dictionary and Webster's New Dictionary*. The word "hospitality" connotes the action of entertaining someone without him having to subscribe towards the cost incurred by the host to entertain him. The case was referred to in *NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 441. The Court in *Aspac Lubricants (M) Sdn Bhd (Formerly Known As Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 65 mentioned entertaining involves unavoidably the characteristic of hospitality.

From the above cases, it appears that the Court equates hospitality to entertainment. It remains to be seen whether the Court will consider the above instances in CH vis-à-vis corruption dispute. Suppose CH is corporate entertainment. To what extent must the entertainment be offered so as not to fall under the corruption trap. Thus, to have further information and a clearer understanding of CH vis-a-vis corruption, we will look at the law and practices of other jurisdictions. Table 1 generally summarises the position of corruption and CH in Malaysia.

Table 1: Corruption and CH - Malaysia's position

Section 17A of the Act	<ul style="list-style-type: none"> uses the phrases "corrupt" & "gratification" silent on "hospitality"
The Adequate Procedures Guidelines	<ul style="list-style-type: none"> "hospitality": principle III of the principle of T.R.U.S.T, which is "U" (Undertake Control Measures) one reference on "hospitality and "entertainment"
Case studies for the Adequate Procedures	<ul style="list-style-type: none"> one case study, i.e., "Case Study 3: Mitigating moral hazard in gifts and hospitality" where 20 "hospitality" provisions are incorporated in all elements under T.R.U.S.T
United Detergent Industries Sdn Bhd v Director General Of Inland Revenue	<ul style="list-style-type: none"> "hospitality": the action of entertaining someone without him having to subscribe towards the cost incurred by the host to entertain him
NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri	<ul style="list-style-type: none"> referred to <i>United Detergent Industries Sdn Bhd v Director General Of Inland Revenue</i>
Aspac Lubricants (M) Sdn Bhd (Formerly Known As Castrol (M) Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri	<ul style="list-style-type: none"> "entertaining" involves the characteristic of "hospitality"

3.3 Laws in other Jurisdictions

3.3.1 UK

Section 7 of the UKBA makes COs liable for the corrupt acts of any associated person as a consequence of bribery for the advantage of the COs. COs are partnerships, limited partnerships, and body corporate in or outside the UK with business in the UK or elsewhere (Section 7(5) UKBA). The UKBA also provides a mechanism for the defence of "adequate procedures". When the UKBA was going to be enforced, the issue existed on corporate gifts, including hospitality regarding the distinction and boundary (Allridge, 2012). According to Allridge (2012), the UK Guidance to Section 7 of the UKBA (UK Guidance) should establish criteria for determining appropriate hospitality levels for private and public business partners, clients, suppliers, foreign public officials, and the types of hospitality applicable in various situations. Nevertheless, the UK Guidance seems clearer as opposed to the Malaysian guidelines. Bona fide hospitality,

business expenditure that seeks to improve the organisation's image or establish cordial relations is allowed. Prosecutors would have to consider the standards or norms applying in a particular sector when considering whether bribery occurred. The UK Guidance clarifies that businesses must continue to create and distribute suitable standards for hospitality, promotional, and other similar expenditure (Sanders, 2011). The Quick Start Guide to the UK Guidance emphasises the proportionality elements. If it is appropriate, buying tickets to sporting events, taking customers out to dinner, giving clients gifts as a token of goodwill, or paying acceptable travel fees to demonstrate goods or services to clients is not bribery if it is proportionate (Sanders, 2011). In October 2012, the phrase 'legitimate business expenditure' was incorporated into the UK Guidance since 'bribes are sometimes disguised as legitimate business expenditure' (IBE, 2012). The intent to induce improper conduct is a test for whether or not gifts or hospitality can be considered a bribe (Section 1 UKBA). Offer of gifts of hospitality must be made in 'good faith and are not regarded as legitimate if the offer is made with the intent that the person who accepts the gift will perform a function partially (IBE, 2012).

The criticism is although an affordable gift or hospitality is unlikely to be penalised, it is difficult to quantify the same because of the obscure line between a legitimate expenditure and an unlawful bribe (Bu, 2018). Thus, the UK's Serious Fraud Office (SFO) would only prosecute upon evidence of systematic bribery rather than a one-off payment (Bu, 2018). The post-legislative scrutiny report on the UKBA acknowledged that the UKBA is silent on CH. The UK Guidance had left businesses unsure of what comprises CH (Select Committee on the Bribery Act 2010, 2019). Although the UK Guidance was clear in the absence of any judicial interpretation of the relevant provisions, businesses may have treated the giving and acceptance of CH too strictly. The report suggested the UK Guidance should provide clearer examples on the boundary between bribery and legitimate CH. Questions arise as to what constitutes 'normal' expenditure within a given sector, what is the meaning of "reasonable and proportionate hospitality", and what are the "standards of norms applying in a particular sector"(Select Committee on the Bribery Act 2010, 2019). There is no ceiling stated in the UKBA for expenses in gifts and hospitality (Bu, 2018). Table 2 below succinctly states the UK's position on corruption and CH.

Table 2: Corruption and CH – Position in the UK

UKBA	uses the phrases "corrupt" & "gratification" silent on "hospitality"
UK Guidance (incorporating Case Studies)	"hospitality" to be reasonable and proportionate 30 phrases on "hospitality" and one word on "entertainment" throughout the UK Guidance relevant to COs Specifically on Section 7 UKBA: Individual organizations or corporate representative bodies are responsible for establishing and disseminating suitable norms for hospitality and promotional or other comparable expenditure Four case studies highlighting "hospitality": (i) Case study No 2 (proportionate procedures) (ii) Case study No 3 (joint venture) (iii) Case study No 4 (hospitality and promotional expenditure) (iv) Case study No 7 (communicating and training) One case study highlighting "entertainment", namely Case study No 4 (hospitality and promotional expenditure)
Quick Start Guide	A question and answer on "hospitality"

3.3.2 US

In the US, the FCPA is the anti-bribery legislation that prohibits the payment or offers to pay anything of value to a foreign official to obtain or retain business (Keremis, 2020; Latimer, 2017; Ryznar & Korkor, 2011). There is no express definition of "anything of value", but the phrase has been construed widely (Ryznar & Korkor, 2011). Government regulators' past practice implies that the word encompasses actual and intangible products and services, regardless of whether payment is made directly or through intermediaries such as agents, consultants, and contractors. Scholarships to colleges, sexual favours, and job opportunities have been valuable items (Ryznar & Korkor, 2011). The US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) issued a Resource Guide on the FCPA on 14 November 2012. Still, its usefulness is limited (Trautman, L. J. & Kimbell, 2018). The Resource Guide suggests that enterprises avoid a one-size-fits-all approach to anti-corruption risk assessment. The level of effort should be proportionate to an enterprise's risk profile. Categorising risks by group (e.g., high, medium, or low) is critical to determining the resources to allocate to various anti-corruption compliance program elements (Anti-Corruption Risk Assessment Taskforce, 2013).

Further, industry, country, size, the form of transactions, and amount of third-party payments are all suggested as elements to examine when assessing corruption risk (Anti-Corruption Risk Assessment Taskforce, 2013). The hypotheticals outlined in the Resource Guide provide a general understanding of the level of gift gifting and entertainment expenses the DOJ and SEC would deem permissible (Foley & Lardner LLP, n.d.). However, the Resource Guide does not differentiate between good client entertainment and payments that could be interpreted as violating the FCPA or other anti-corruption laws (Foley & Lardner LLP, n.d.). In practice, the line between a bona fide business expenditure and a bribe is uncertain. Although abundant hospitality may trigger FCPA liability, it is difficult to distinguish when hospitality is seen as an inappropriate inducement to seek business (Bu, 2018). The FCPA does not set the limits for expenses in gifts

and hospitality (Bu, 2018). The Resource Guide was updated in July 2020 (Justice, 2020), where there are new deliberations concerning hospitality (Cassin, 2020).

In 2019, Telefônica Brasil agreed to pay a US\$4.13 million civil penalty for the violation in connection with the provision of sporting tickets and hospitality to foreign government officials relating to two high-profile soccer tournaments (Wilson Sonsini Goodrich & Rosati, 2019). Telefônica Brasil offered and provided tickets and hospitality to government officials who were directly involved with, or in a position to influence, legislative actions, regulatory approvals, and business dealings involving the company. The company thus failed to adequately enforce its corporate anti-corruption policies (2019 SEC LEXIS 1072, 2019). The case illustrates an imperative warning of the serious risks of providing officials gifts and entertainment (Wilson Sonsini Goodrich & Rosati, 2019). Table 3 briefly highlights the US's position on corruption and CH.

Table 3: Corruption and CH- Position in the US

FCPA	<ul style="list-style-type: none"> • uses the phrase "corrupt" and "anything of value" • no definition of "anything of value"
Resource Guide	<ul style="list-style-type: none"> • provide six questions and answers to a hypothetical on gifts, meals, and entertainment • three references on "hospitality" and 19 references to "entertainment" throughout the Resource Guide relevant to COs

4.0 Conclusion and Recommendations

CH is an important and legal component of doing business, but it can also hide corruption. From the practices of other jurisdictions on the provision of CH, although there are limitations, it is evident that the UK Guidance and the US Resource Guide provide many examples on CH instead of merely one case study as in the Case Studies for the Adequate Procedure Guidelines. Further, the relevant factors to be taken into consideration in offering CH are also spelled out. It will eventually be up to the courts to use their judgment. Nevertheless, for clarity and avoidance of ambiguity, the Case Studies should provide more examples on the boundary between corruption and CH. Professional organisations and trade associations in Malaysia should provide guidance, especially when expensive and lavish items are involved. There is no cut-and-dried answer, which means the policy and procedures of the COs must be as clear as possible. COs must act immediately on any red flags as CH could amount to corruption. Effective anti-corruption compliance is a must. Future research may gain further insight into the understanding of the COs concerning the differences between corruption and CH by embarking on a quantitative study.

Paper Contribution to Related Field of Study

The research is consistent with the National Anti-Corruption Plan 2019-2023, an anti-corruption policy that Malaysia has developed to address issues on corruption and integrity. It also highlights Malaysia's commitment to achieving the Sustainable Development Goals (SDGs), discussed at the Twelfth Malaysian Plan.

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