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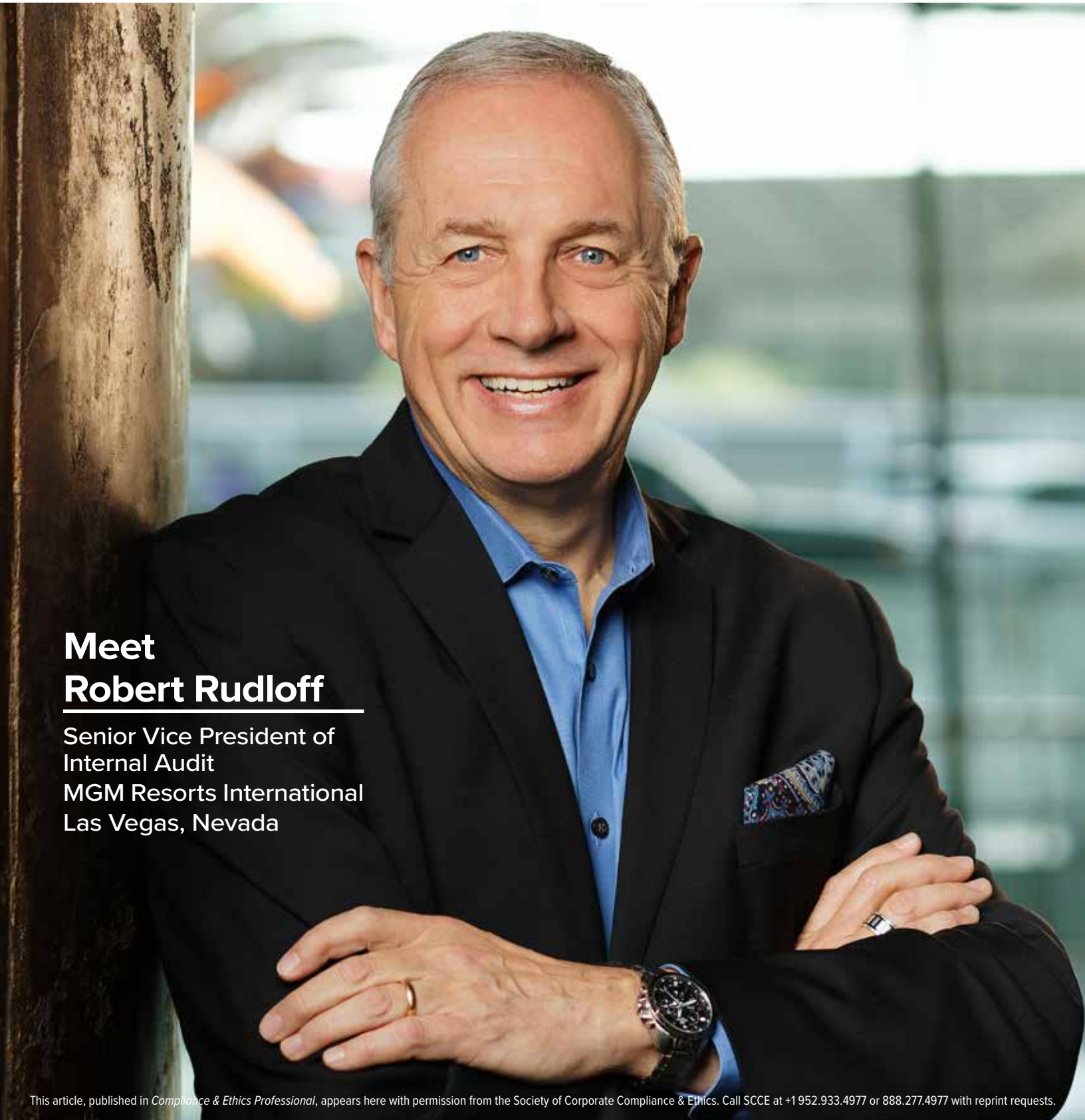

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UK Bribery Act 2010: An analysis of Section 7

» As per Section 7 of the UK Bribery Act 2010, the onus is on the commercial organization to prove that there were indeed procedures to prevent bribery.

» The UK Bribery Act is principle-based.

» The relevant principles include proportionate procedures, top-level commitment, risk assessment, due diligence, communication and training, and monitoring and review.

» The underlying assumption is that the act of bribery can be prevented.

» Where there is indeed an act of bribery committed by the associated person, then it becomes a case of deemed probabilities as a defense for the commercial organization.

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Section 7 of the UK Bribery Act 2010 stipulates that a relevant commercial organization is guilty of an offence if it fails to prevent bribery.

How does one prevent bribery?

The Act is principle-based and puts the onus squarely on the relevant commercial organization to prove that there were indeed adequate systems, processes, and procedures in place so that any person associated with the relevant commercial organization may not commit such an act.

The guidance note issued by the Ministry of Justice on the UK Bribery Act 2010 states that, "In accordance with established case law, the standard of proof which the commercial organization would need to discharge in order to prove the defense, in the event it was prosecuted, is the balance of probabilities."[1]

Relevant commercial organization has been defined as:

1. A body incorporated in the United Kingdom and carrying on business there or elsewhere
2. A body wherever incorporated which carries on business in any part of the United Kingdom
3. Is similar to a partnership

Pillai

Associated person is defined as a person who performs services on behalf of the relevant commercial organization. The capacity in which a person performs services does not matter (e.g., employee, agent or subsidiary are included). The fact that a person performs services will have to be determined by reference to all circumstances and not by virtue of relationship alone, and employee-employer relationship presumes the act.

Section 7 provides a comprehensive scope of all persons who are connected to the organization and are capable

of an act of bribery on behalf of the organization.

Principles

The guidance on the UK Bribery Act provides for the following principles to be followed. These principles are not prescriptive but, once followed, would certainly give one a pragmatic view of the safeguards put in place by the organization to combat bribery.

1. Proportionate procedures

These are in the nature of both policies and procedures and essentially have to be implemented at the operational level for achieving the objective. It shall be directly proportional to the list of bribery risks the organization is operating with. An important point to be noted is that these procedures are either mapped separately as a stand-alone policies and procedures document or are carefully and diligently embedded into the various company policy documents.

2. Top-level commitment

Tone at the top is an important aspect of bribery prevention. Top management has to take the lead in addressing the risk of bribery and take the necessary steps in its prevention. Communication and active top management involvement would help in fulfilling this objective.

Top management has to take the lead in addressing the risk of bribery and take the necessary steps in its prevention.

3. Risk assessment

The risk assessment process involves carving out a separate risk assessment on bribery apart from the enterprise-wide risk assessment that an organization conducts. Bribery risk assessment would entail a detailed study of bribery risks and the steps taken to mitigate them within a stipulated time frame. The risks are prioritized and monitored for appropriate treatment and mitigation.

4. Due diligence

It involves a clear and concise assessment of bribery risks associated with the organization and ensures a deep dive on the issues based on risk priority. It entails further funneling down the risk so that the root cause of the control failure, if any, is identified and adequate and appropriate procedures are recommended as a risk-mitigation strategy.

5. Communications and training

Communication is one of the primary means of bribery prevention. It encompasses the board, top management, the vendors, customers, and the employees at large so that everyone is aware of the dos and don'ts. Training is another important aspect of bribery prevention and shall act as a deterrence for the associated persons. Specialized anti-bribery training can also be imparted to top management and persons in key functional areas like Procurement, Financial Reporting, Supply Chain, Treasury, etc.

6. Monitoring and review
Management may have adequate systems in place: implementation of an anonymous reporting call line/email to hear employee grievances, establishment of employee feedback mechanisms on training and other ethical dilemmas, appointment of a chief ethics officer and other investigation officers who are adequately trained in the latest investigation procedures. The organization may also obtain certification from anti-bribery certification authorities evidencing appropriate procedures are in place to face any eventuality with respect to bribery.

Hypothetical example

Let us take an example to understand this better. A parent company incorporated in the UK has a wholly owned subsidiary in India. The Indian subsidiary is a captive offshore entity of the parent, and the business model does not permit any business with customers other than the parent. The subsidiary is in the process of implementing all policies and procedures followed by the parent, albeit customizing to the Indian environment. The subsidiary follows the anti-bribery policy of the parent and communicates it regularly to the employees. However, the company is still in the process of executing a mobile-free operation floor policy and establishing a toll-free hotline for employee confidential reporting. The vendor integrity policy is also in the draft stage. There was no training conducted during the year due to budget constraints.

The organization may also obtain certification from anti-bribery certification authorities evidencing appropriate procedures are in place.

The subsidiary has appointed a vendor for its housekeeping services, and the contract is for a sum of $100,000 (USD), with a flexible pricing of employee cost plus service charge subject to the overall price limit. The vendor engages with a manpower agency to supply people to work at the client's premises. The manpower agency appoints people on their payrolls as well as on a contractual basis. Tom, the head of Procurement and Administration for the subsidiary, is a partner in a recruitment firm that sources candidates for the manpower agency; the candidates so sourced are either taken on the rolls of the agency or employed on direct contract.

The manpower agency has contracts with other housekeeping vendors also. The contract between the housekeeping vendor and the subsidiary does not specify as to the fact that the staff should be hired only from the manpower agency. The vendor is free to hire from agencies other than the manpower agency. The vendor works on thin staff strength solely on the outsourcing model, and the operational arrangement is known to the subsidiary. Tom has no business relationship with the housekeeping vendor.

The vendor, as a matter of fact, sources people only from the manpower agency, and the manpower agency sources only from the recruitment firm. The recruitment firm has partners other than Tom, and none of them are related or associated with the subsidiary.

According to the parent company, the contract was awarded after following due process. Any award of contract goes

Table 1: Evaluation of housekeeping vendors

Parameter	Vendor 1	Vendor 2	Vendor 3
Financial: 3 years	Loss making	Loss making	NA
Credit worthiness	Not evaluated	Not evaluated	Not evaluated
Market reach	Local	Global	Local
Management	Private Limited Company	Private Limited Company	Proprietor
Reputation	Sound	Sound	Sound
Supply and service	Yes	Yes	Yes
Housekeeping products	Third party	Third party	Third party
People strength	Outsourcing	150	60
Financial quote	L1	L3	L2

through the process of calling for bid, bid validation and evaluation based on pre-defined parameters, vendor evaluation, vendor selection, and final securing of contract. There is a contract committee comprising the HR head, the Finance head, and the head of Procurement and Administration, which deliberates and takes the final decision.

In the relevant case, three bids were solicited, the bids validated, and vendors evaluated. Finally, the housekeeping vendor was selected. The minutes of the contract committee meeting list the quorum present as the Procurement and Administration head and the HR recruitment manager (proxy for the HR head who was traveling). The Finance head was not well and hence absent. The minutes of the meeting were later ratified by the Finance head after the award of the contract. The vendor evaluation sheet is produced as Table 1.

The contract is awarded to Vendor 1 for the following reasons:

1. Lowest quote
2. Reputation of the management in delivery of work
3. Ability to provide quality resources on time

The procurement piece of the risk assessment matrix is reproduced as Table 2 on page 58.

On an analysis of the risk assessment facts, the following observations are pertinent and evident:

1. Although the organization had a documented anti-bribery policy, the subsidiary was lagging behind in execution.
2. Top-level commitment was not to the level of expectation. There is a clear conflict of interest in the same person being made the head of Procurement and Administration that has not been addressed.
3. Risk assessment, though performed at the organization level, has not been followed up with a clear risk mitigation strategy and execution.
4. No risk assessment was conducted separately for anti-bribery risks.
5. Due diligence is lacking in the award of the contract, as the design of the constituents of the contract committee was flawed *ab initio.* The Legal head and/or managing director/CEO should be part of the committee, and the role of HR head is something to be rethought. There was no proper follow-up mechanism to check the means by which the vendor

Table 2: Risk assessment matrix

Risk function	Sub function	Risk owner	Risk: What could go wrong	Probability of occurrence	Significance of impact	Overall score	Risk mitigation
Procurement	Bid evaluation	Procurement head	The parameters for evaluation are all qualitative and could lead to subjective decision	High	High	High	To work on quantitative parameters and all further evaluation should be based on both criteria of qualitative and quantitative
-do-	-do-	-do-	Limits for contract to be defined so that the higher the stakes, the more representatives from management who are involved in decision-making are needed	High	Medium	High	MD/CEO and Legal head to form part of Contract Committee with clearly stipulated financial thresholds

would be supplying the requisite manpower to the company.

6. The company has been regularly communicating the anti-bribery policy to employees. However, over the last year, training was shelved, and it does not augur well for its anti-bribery campaign, because empirical studies point to the fact that when you put a bunch of people in a training room, the results will be much more effective than when sending out mailers or brochures.
7. The company lacked a clear monitoring system to ensure appropriate compliance. The approval of all the members of the contract committee was important before the award of the contract.

Conclusion

The above points clearly reflect what the company lacked in addressing the anti-bribery risks that were inherent in the organization. A case of conflict of interest is established wherein Tom definitely has a business interest in supplying manpower to the ultimate vendor of the subsidiary. The subsidiary's failure would invariably make the parent company also punishable under Section 7 of the UK Bribery Act 2010. ✳

1. Ministry of Justice: The Bribery Act 2010, Quick Start Guide. Available at https://bit.ly/1Hqycbq.