

# Legal Analysis of Wynn v. Okada

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## I. Introduction

Wynn Resorts is a world-class developer of destination resort casinos, and owns resort casinos through its wholly owned subsidiary, Wynn Las Vegas, LLC and through Wynn Macau, Limited. Mr. Okada is a citizen of Japan, and a director of Wynn Resorts. He was member of the Board of Directors of both Wynn Resorts and Wynn Macau. From October 2002 up to and until October 2011, Okada also served as Vice Chairman of Wynn Resorts.

Okada approached Mr. Wynn with an idea of creating a casino resort in the Philippines, but Mr. Wynn and the Board of Directors did not agree. Okada created a casino in the Philippines through his company Universal in 2008. In May 2011, Mr. Wynn, the chairman of Wynn Resorts, and almost all the Board of Directors approved a \$135 million donation to University of Macau<sup>1</sup>, but Okada opposed it and commenced litigation on January 2012. Therefore, the conflict between both sides arose.

## II. The Conflict between Mr. Wynn and Mr. Okada

Wynn Macau made a commitment to the University of Macau Development Foundation (UMDF) in support

of the new Asian-Pacific Academy of Economics and Management. The pledge was considered by the Boards of Directors of both Wynn Resorts and Wynn Macau and approved by 15 of the 16 directors who serve on those boards. The sole dissenting vote was Mr. Okada whose stated objection was to the length of time over which the donation would occur, not its propriety. He commenced litigation in Nevada alleging facts which could implicated the *Foreign Corrupt Practices Act of 1977* (FCPA)<sup>2</sup>. Following Mr. Okada's lawsuit, the company received a letter from the U.S. Securities and Exchange Commission (SEC) requesting that in connection with an informal inquiry by the SEC, the Company preserve information relating to the donation to the University of Macau, any donations by the Company to any other educational charitable institutions, including the UMDF, and the Company's casino or concession gaming licenses or renewals in Macau. The Company intends to fully comply with the SEC's request. As Okada alleged in his complaint "Wynn Macau's gaming concession expires in June 2022" – the last year of Wynn's donation commitment.<sup>3</sup> According to Okada's complaint, he objected to this donation, called it unprecedented in University history"<sup>4</sup>, and he alleged the university sits on land owned by the Chinese government. Nevada gaming officials have ended their investigation into allegations by Okada, and determined the "allegations are unfounded".<sup>5</sup>

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Shortly thereafter, Wynn accused Okada of separate and distinct conduct that could implicate the FCPA.<sup>6</sup> According to the above-mentioned report by the former FBI director, Mr. Okada and his associates engaged in making payments and gifts to two chief gaming regulators in Philippines for gaining casino license, which violated of U.S anti-corruption laws and the Company's code of conduct.<sup>7</sup> Mr. Wynn claimed that Mr. Okada was “unsuitable person”<sup>8</sup> in the company.

The friendship and partnership between Mr. Wynn and Mr. Okada broke up, actually their rancor had accumulated to some extent. Wynn Resorts removed Okada from the Board of Directors based on a report by a former FBI director Freeh and forcibly redeemed his nearly 20% stake at a 30% discount for \$1.9 billion promissory note payable in 10 years.<sup>9</sup>

Both sides have traded accusations of unethical or illegal conduct during a bitter legal and personal dispute for more than a year, and separately sued each other in Japan and America, the case is still pending at present. Both sides' accusations and allegations will be analyzed in the following chapters.

### III. Analysis of Wynn's Donation to UM

I will state my humble opinions as to whether the donation to university was against the nature and objective of company, whether the donation breached the FCPA and other laws and regulations.

The concept of company is stated in Article 184-1 of *Macau Civil Code*, “a people-based legal person whose members bind themselves to contribute, with goods or services, to the exercise in common of a certain economic activity, not merely of enjoyment, with the purpose of sharing the resulting profit or of generating an economy”<sup>10</sup>, and the concept of commercial enterprise is also stated in Article 2-1 of *Macau*

*Commercial Code*, “any organization of productive factors for the exercise of an economic activity aimed at production for systematic and lucrative exchange”.<sup>11</sup> From the statute law, we can see the nature and objective of company is to seeking for profit. Nevertheless, the company as the entity of society has its social accountabilities and obligations for society. A company cannot only seek for profit from society; it should burden its responsibility for society and feedback to society by making contribution, especially for those large-scale companies. The bigger the company is, the heavier responsibility the company carries. In Macau, there has law of operation of lucky gaming in casino (Law No. 16/2001), which stipulates that concessionaries (those companies who have right to create and operate casinos) must make contributions (not exceeding 2% of gross operating revenues of gaming) to a public foundation that has the purpose of promotion, development and study of culture, society, economy, education, science, academic research and charity activities.<sup>12</sup>

From where I stand, I absolutely object the opinion that the donation to University of Macau breaches the nature and purpose of company, because the donation was one kind of obvious and good manifestations of company's fulfilling its obligations. As a separate legal person, company must burden its responsibility and fulfill its obligations to exist and make profit in society in the long run.

Charitable donations are not in and of themselves prohibited by the FCPA's anti-bribery provisions, seeing from 2009 FCPA Opinion Procedure Release. Yet, such donations do carry FCPA risk, and best practices are to have adequate controls as to charitable donations.

Here is a case about charitable donations in 2004. In the enforcement action, the SEC alleged that Schering-Plough violated the FCPA when its wholly-owned Polish subsidiary (S-P Poland) improperly recorded a bona fide charitable donation to a

Polish foundation that restored castles where the founder/president of the foundation was also a director of a government health fund that provided money to hospitals throughout Poland for the purchase of pharmaceutical products. Although the SEC and Schering-Plough ultimately resolved the matter based only on violations of the FCPA books and records and internal control provisions, the enforcement action is commonly viewed as standing for the proposition that “payments to a bona fide charity could violate the FCPA if made to influence the actions of a government official”.<sup>13</sup>

Wynn Macau made a commitment to UMDF in support of the new Asia-Pacific Academy of Economics and Management. The pledge was consistent with the Company’s longstanding practice of providing philanthropic support for deserving institutions in the markets in which it operates. The pledge was made following an extensive analysis which concluded that the gift was made in accordance with all applicable laws.

The founder and president of the foundation (the donation was made to) was a government official whom had power related to the company, and the donation would influence the actions of the government official, benefiting the company. In Wynn Macau’s donation, there was no evidence that one of members of the foundation was a government official who had power to decide the company’s casino or concession gaming licenses or renewals in Macau. Even if there had such officials, it is difficult to prove that the intention of the donation was to influence the officials to take actions beneficial to the company. Additionally, it is not easy to define and prove that “influence”, because it is blurred.

In my humble opinion, Wynn Macau’s donation did not violate FCPA, and there was no proof that it violated any laws and regulations, because Wynn case did not meet the characteristics of the above case. On the contrary, I think this decision was a full of wisdom

business strategy that did not infringe any laws.

#### IV. Analysis of the Okada’s Bribery

Bribery, it means that paying money to some government officials for profit. From the angle of the operation of a company, it means that giving money to the government official and the company may have a normal or better operation. No matter what is the purpose of bribery, it is always illegal which is known by everybody. Of course it is known by Okada in Wynn v. Okada case, but it is not a simple question of violating law.

People are always the one who can do anything, including bribing someone. And people have their intentions and targets of doing anything which are always relevant to the profit and benefit. As a director of Wynn Resort, he should be loyal to Wynn Resorts. But how to show one’s loyalty? We should know, all shareholders or administrators want the company to get benefit because they can get money at the same time, which is the reason of company would be created. Company should have a good operation to fulfill its objective. However, in many countries, foreign companies’ creation and operation are restricted or limited by the government. The reason of that situation is that there is a conflict between the governments’ interest and the companies’ interest. Solving this conflict, in developed countries, is not a big problem because they have already made a mature system of laws. But in some developing countries such as Philippines, they do not have those perfect laws, which mean that their governments have a very powerful authority. They may make operations of companies hard through some official actions just for their benefit.

According to law, yes, it is forbidden. However, it cannot stop all governments from exploiting foreign companies even it is violating law. For the company,

there are two choices. One is to ask for help after the government does something harmful for the companies, another choice is that doing something that would make the government happy. What kind of choice a company should make depends on the interest of a company. In this case, Okada made his choice, and he believed, when doing business in Asia, he is permitted to directly or indirectly provide gifts or other valuable things for government officials. From where he stands, bribing the government officials is better than following law.

The *Macau Commercial Code* has definitely forbidden this kind of action. Nonetheless, what they consider is not whether they will breach law in the operation of a company but whether the cost of following law will exceed the cost of violation of law. And they will also consider whether the benefit they can get if they follow law will exceed the benefit they can get if they violate law.

In this case, we cannot just focus on the fact that Okada violates law. The question is how law and the companies' profit affect the company. Okada thinks that providing gifts to the Philippines officials is good for the company, of course, also good for his personal benefit. We may try to analyze in that way. If they do not bribe the government officials, what kind of situation do they may face? The company may not be in normal operation, they may be harassed by the government, and they may not get the support from the government. We all know, if the companies cannot cooperate with the government, they may be forced to get out of this country because of power rent-seeking.<sup>14</sup> So we can see that Okada know he have to do something that can make them be supported by the government even illegal.

What about another choice? If this company chooses to follow law, can they operate that good in this case? We cannot imagine that, but the Philippines government may do something not so good for the company's operation. There will be only two choices for the company in this situation. One is to make a

negotiation with government. This is a peaceful way for the company but hard to have a good consequence. The other way is to ask law for help, sue the Philippines government at law, but it is also a hard way. The host country will always submit the objection of jurisdiction. Thus the proceedings can last for most two years, and the time of other proceeding may exceed several years. This way will not only consume money and time, but also leave a bad reputation to the company. What is of most significance, the dispute will distract the normal operation of a company. Following and using law for a foreign company costs too much in this country, and bribing the government officials may evade the investigation and make a better operation. These questions occurred to us: why should Okada follow law, and why should he risk the company of losing many chances?

I do not mean that bribing the government officials is right. It is criminal, and breaches the fair competition. It must be forbidden. But it is impossible to forbid this just through considering bribery as a crime. Just like I have discussed above, it actually has something to do with the balance of the profit. Government has their profit, as well as companies. Hence, it is necessary to balance the profit between government and company. This can be completed by law. The point is that, if the benefit of government's following law will exceed the benefit of the gifts or something valuable from company, there is no need for government to get benefit from bribery.

Bribery, of course, is illegal, but in some countries, it is necessary for foreign companies to survive. Simply by stipulated forbidding in statute law it cannot be a best way to stop this. The radical method is to find a way to solve the conflict between the profit of company and the profit of host country government. To conclude, all of them mean one thing: company will do everything for their operation, in other words, for their benefit and so do government. If we understand this sense, we can

understand the bribery in this case and will know how to solve this problem and will know how to make a proper and better law to regulate company.

## V. Conclusion

From this case, we can see the game and gambling of both sides. Once the friendship and partnership broken up, the parties will try their best to get most profit and benefit at the end, through so many ways, say, political or legal ways. Mr. Okada accused Mr. Wynn of the donation to UM on basis of FCPA, and Mr. Wynn accused Mr. Okada of bribery in the Philippines on the same basis. In China, there is an old saying, “deal with a man as he deals with you”, this case is just a good example of this old saying.

Actually, whether Wynn’s conduct or Okada’s conduct is good for the companies, as well as their profit and benefit of companies and themselves. There is no

need to criticize and blame them so much in the purpose and intention of their conducts. The only difference is that Mr. Wynn’s conduct is not illegal, but Mr. Okada’s is. From this story, we can see that Mr. Wynn is good at taking advantage of legal limbo, instead of breaching law. And he is also good at defeating his opponents with law, whereas, Mr. Okada’s fault and mistake may lead to failure in this case.

How to balance the benefit of government and company, how to balance the benefit of company and shareholders, and how to balance the benefit of shareholders each other, are of most importance for companies, governments, scholars and businessmen like Mr. Okada and Mr. Wynn to think deeply. Only if the government provides a fair competition environment for local companies and non-local companies, only if there have perfect legal system or dispute resolution mechanism, only if the cost of violation of law is too high and there is no need to bribe government, can companies develop fast and healthily.

## Notes :

- <sup>1</sup> UMDF Receives a Donation of MOP 200 Million from Wynn Resorts (Macau) S.A.. Available at the website of University of Macau: [http://news.umac.mo/nrs/faces/pub/viewItem.jspx?id=16647&locale=en\\_US](http://news.umac.mo/nrs/faces/pub/viewItem.jspx?id=16647&locale=en_US). 16<sup>th</sup> May 2011.
- <sup>2</sup> Koehler, M. (2014). Foreign Corrupt Practices Act Ripples. *American University Business Law Review*, Volume 3, Number 3. Available at the website of Southern Illinois University: [http://www.law.siu.edu/\\_common/documents/publications/koehler/koehler-fcpa-ripples-2014.pdf](http://www.law.siu.edu/_common/documents/publications/koehler/koehler-fcpa-ripples-2014.pdf). 30<sup>th</sup> March 2016.
- <sup>3</sup> Okada v. Wynn Resorts (Complaint). Available at the website of Scribd: <http://zh.scribd.com/doc/81530108/Okada-v-Wynn-Resorts-Complaint>. 14<sup>th</sup> February 2012.
- <sup>4</sup> Wynn Resorts \$135 Million University of Macau Donation the Subject of SEC Scrutiny. Available at the website of Face Professor: <http://www.fcpaprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny>. 14<sup>th</sup> February 2012.
- <sup>5</sup> Okada claims against Wynn Resorts ruled baseless. Available at the website of Las Vegas Review-Journal: <http://www.reviewjournal.com/business/casinos-gaming/okada-claims-against-wynn-resorts-ruled-baseless>. 4<sup>th</sup> February 2012.
- <sup>6</sup> Wynn Resorts, LTD. v. Kazuo Okada et al. (complaint). Available at the website of U.S. Securities and Exchange Commission: <http://www.sec.gov/Archives/edgar/data/1174922/000119312512071603/d304177dex991.htm>. 30<sup>th</sup> March, 2016.

- <sup>7</sup> Wynn's Boardroom Battle Royale. Available at the website of Face Professor: <http://www.fcpaprofessor.com/wynns-boardroom-battle-royale>. 20<sup>th</sup> February 2012.
- <sup>8</sup> Koehler, M. (2014). Foreign Corrupt Practices Act Ripples. *American University Business Law Review*, Volume 3, Number 3. Available at the website of Southern Illinois University: [http://www.law.siu.edu/\\_common/documents/publications/koehler/koehler-fcpa-ripples-2014.pdf](http://www.law.siu.edu/_common/documents/publications/koehler/koehler-fcpa-ripples-2014.pdf). 30<sup>th</sup> March 2016.
- <sup>9</sup> Kazuo Okada Resigns from Wynn Resorts Board of Directors. Available at the website of Business Wire: <http://www.businesswire.com/news/home/20130221006475/en/Kazuo-Okada-Resigns-Wynn-Resorts-Board-Directors#.VfqZHRrTMZyU>. 21<sup>st</sup> February 2013.
- <sup>10</sup> *Macau Civil Code*. Available at the website of Macau SAR Government Printing Bureau.
- <sup>11</sup> *Macau Commercial Code*. Available at the website of Macau SAR Government Printing Bureau.
- <sup>12</sup> *Law of Operation of Lucky Gaming in Macau Casinos* (Law No. 16/2001), merely Chinese and Portuguese editions are available at the website of Macau SAR Government Printing Bureau, this article was translated by the author.
- <sup>13</sup> Wynn Resorts \$135 Million University of Macau Donation the Subject of SEC Scrutiny. Available at the website of Face Professor: <http://www.fcpaprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny>. 14<sup>th</sup> February 2012.
- <sup>14</sup> See more information about Rent-seeking at the website of Wikipedia: <https://en.wikipedia.org/wiki/Rent-seeking>.