Bribery in Business: A Legal Perspective

Most codes of business conduct condemn bribery, and virtually all of the world’s legal systems prohibit at least some forms of bribery and extortion. This note provides an overview of the principal rationales that have been offered for these restrictions and touches briefly on some of the most important laws in this area.

The Definition of Bribery

By one scholar’s reckoning, “a concept that could be rendered in English as ‘bribe,’... a gift that perverts judgment,” had arisen in the Near East by the fifteenth century B.C., and enforceable sanctions against it existed by the time of the Roman Republic in the first century B.C. Although bribery has been defined in many ways, it typically involves the following elements:

- giving or offering something of value to a party entrusted to act on behalf of another (e.g., a principal such as a public institution, a company, or a private individual);
- for the purpose of influencing the recipient to favor the giver in violation of a fiduciary or other duty to exercise independent judgment on the principal’s behalf; and
- resulting in a personal benefit to the recipient and an unfair advantage to the giver (or a third party) relative to others who are similarly situated, while also depriving the principal of that to which it is entitled.

Bribery is thus fundamentally about inducing or colluding in a breach of trust, though it is generally associated with misuse of assets and unfair competition as well. The oldest forms of bribery are those involving public officials. Indeed, virtually all countries have adopted laws prohibiting the bribery of public sector officials. Increasingly, countries are also criminalizing commercial or private sector bribery. The complexity of commercial bribery as an offense is reflected in the variety of legal theories used to challenge it. In some jurisdictions, the focus is on misuse of assets; in others, it is on breach of trust, loyalty, and fiduciary duty; in still others, it is on damage to competition.

The topic of bribery is often approached through the concepts of “grand” and “petty” corruption. Generally speaking, grand corruption “involves the distortion or corruption of central functions of government such as legal, economic or other policy-making [functions], the development and enactment of legislation, or judicial independence.” Petty corruption involves “the exchange of very small amounts of money or minor favours by those seeking preferential treatment, the employment of friends, etc.” So-called “facilitating payments” or “grease payments”—that is, payments “to get things done which are legal in themselves and should be done in the normal course of a person’s
job”—are examples of petty corruption. Although such payments are considered bribery by many, anti-bribery laws often include explicit exemptions for such payments, as discussed below.

Reasons for Restricting Bribery

Arguments for prohibiting bribery emphasize the economic distortions and distributional inequities it creates. An important international anti-bribery convention adopted under the auspices of the OECD (discussed below) observes that bribery “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.” The United Nations (UN) and Transparency International (TI, an “international non-governmental organisation devoted to combating corruption”) have argued that “bribery provides an incentive for over-regulation and over-bureaucratization of procedures to enable more people to benefit from graft,” resulting in “lost time and a higher cost of doing business.”

Other negative economic consequences of such corruption include the diversion of resources to inefficient uses; loss of tax revenues; reduced “quality of contracted works”; and loss of investor confidence. Economist Shang-Jin Wei has argued that “high levels of corruption have the same effect as high taxes on foreign investment,” and TI has estimated that “the amount lost due to bribery in government procurement is at least US$400 billion per year worldwide.”

More broadly, bribery is thought to have a damaging impact on democratic processes and social stability, advocates of strict prohibitions on bribery arguing that it “undermines public and business confidence, breeds cynicism, increases inefficiency, and leads to other crimes such as money laundering.” The effects of bribery also, it is argued, fall disproportionately on the poor; “[m]oney spent on bribes can reduce resources for shelter, food, water, health and education,” and “when confronted with a choice of paying a bribe or spending time in jail, the poor often have no choice,” increasing their “risk of violence and injuries.”

Among companies that have implemented internal anti-corruption programs, the rationales vary considerably; senior management’s personal convictions, ethical considerations, compliance with law, and the increased costs of doing business resulting from corruption are among the most commonly cited.

U.S. Laws Prohibiting Bribery

Public officials The Supreme Court has described federal law “governing the acceptance of gifts and other self-enhancing actions by public officials” as “an intricate web” and (mixing metaphors) further observed that “the criminal statutes” in this area “are merely the tip of [a] regulatory iceberg” that also includes “the promulgation of ethical rules for each branch of the Federal Government.” One particularly important federal law, however, is the broadly worded prohibition of bribery of public officials and others performing public functions.

This law provides for fines and/or imprisonment of anyone who directly or indirectly offers or promises anything of value to a public official (or public official-elect) intending to influence an official act or to induce the official to violate his lawful duty. The statute similarly covers actions by any such official (or official-to-be) who “corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value” to such ends, as well as acts already “performed or to be performed,” and bribery of witnesses. The latter provision addresses conduct that might also be construed as extortion by a public official, which is also prohibited under U.S. federal law.
the distinction between bribery and extortion can be blurry, “extortion” is generally understood to involve the “obtaining of property . . . by wrongful use of actual or threatened force, violence, fear, or under color of official right.”

Open-ended as this prohibition on the giving of “anything of value” may sound, the Supreme Court has at least partially delineated its outer boundaries. Noting that such language might “criminalize, for example, token gifts to the President” such as a championship sports team’s jersey, “a high school principal’s gift of a school baseball cap to the Secretary of Education,” or even “a complimentary lunch” provided by farmers to the Secretary of Agriculture in connection with a speaking engagement, the Court has read the statute’s “official act” language to require proof of “a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”

**Public officials overseas** The Foreign Corrupt Practices Act (FCPA)—passed in 1977 following SEC investigations in which “over 400 companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties”—also prohibits bribes paid to foreign officials for “obtaining or retaining business.” In general, the FCPA prohibits any direct or indirect offer or payment for such purposes made by a U.S. business or its representative (i.e., an officer, director, employee, stockholder, or agent) to a foreign official, political party, party official, or political candidate. This prohibition also extends to foreign businesses and individuals, but only if such conduct occurs “while in the territory of the United States.”

The FCPA explicitly does not, however, prohibit a “facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action” (e.g., processing permits, licenses, or visas, or providing police protection, mail service, or utilities). It also provides for an “affirmative defense” where the offer or payment was “lawful under the written laws and regulations” of the country in question, or was “a reasonable and bona fide expenditure” (e.g., “travel and lodging expenses”) relating to “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract” with the foreign government.

**Private-to-private** Additionally, U.S. law prohibits commercial bribery, which, as discussed earlier, involves only private sector actors. For example, federal law prohibits “any person engaged in commerce” from paying or receiving “anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise.” Sector-specific laws governing, for example, obtaining loans from financial institutions, similarly restrict such payments. In addition, various state laws prohibit private sector bribery under rubrics such as anti-kickback laws, fair trade laws, and commercial bribery laws.

**International Laws Prohibiting Bribery**

Perhaps the most important international anti-corruption law is the OECD “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (the OECD Convention). This agreement, which was signed in December 1997 and entered into force in February 1999, “includes all 30 OECD Member countries and 6 non-member countries (Argentina, Brazil, Bulgaria, Chile, Estonia and Slovenia).”

Among other things, the OECD Convention requires that each signatory make it a criminal offence “for any person intentionally to offer, promise or give any undue pecuniary or other
advantage, whether directly or through intermediaries, to a foreign public official ... in order to obtain or retain business or other improper advantage in the conduct of international business.”

As under the FCPA, neither “facilitation” payments, nor payments “permitted or required by the written law or regulation of the foreign public official’s country,” nor so-called “private-to-private” bribery are covered, but unlike the FCPA, the OECD Convention addresses only so-called “active corruption” or ‘active bribery’, meaning the offence committed by the person who promises or gives the bribe” (“as contrasted with ‘passive bribery’, the offence committed by the official who receives the bribe”). In 1998 the United States amended the FCPA as required to implement the OECD Convention, including “broaden[ing] the reach of potential FCPA bribery violations by expanding the scope of persons covered by the Act to include some foreign nationals.” (The OECD maintains an archive of domestic implementing legislation enacted by parties to the OECD Convention.)

Other important international anti-corruption efforts have been undertaken under the auspices of the UN, the Organization of American States, the EU, the Council of Europe, the Pacific Basin Economic Council, the WTO, and the Bretton Woods institutions.

The Persistence of Corruption

Notwithstanding such domestic and international efforts, however, bribery in international business remains a pervasive problem worldwide. According to TI’s “Corruption Perceptions Index” for 2004 (“a poll of polls, reflecting the perceptions of business people and country analysts”), “106 out of 146 countries score less than 5 against a clean score of 10,” and 60 countries “score less than 3 out of 10, indicating rampant corruption.”

Likewise, TI’s 2002 “Bribe Payers Index” (based on Gallup surveys of 835 business executives working in 15 emerging markets) found “very high levels of bribery in developing countries by corporations from Russia, China, Taiwan and South Korea, as well as numerous leading industrial nations, all of which now have laws making corrupt payments to foreign officials a crime.” U.S. multinationals were found to “have a high propensity to pay bribes to foreign government officials” (scoring “5.3 out of a best possible clean 10” and tying with Japan for 13th place among 21 home countries for multinationals considered in the survey), despite the FCPA having been on the books for 25 years. In fact, “the propensity of US firms to pay bribes abroad appear[ed] to have increased” since the 1999 survey.

“Just one in five of the respondents” were “aware of the OECD Anti-Bribery Convention,” and only 7% “said their companies had an anti-bribery compliance programme.” “The laws are not being properly enforced,” concluded TI Chairman Peter Eigen, the data suggesting that “corporations clearly do not see the risks of criminal prosecution as particularly significant.” Thus bribery remains widespread, and the unfortunate reality continues to be that most managers will encounter it at some point in their careers.
Endnotes


2 Anti-bribery laws were extended to private individuals only in the late nineteenth century (New York being “the pioneer”). Ibid., pp. 578-79.


5 Ibid., pp. 10-14. According to the analysis provided in this report, countries with anti-commercial bribery criminal laws reflecting the first category include Spain, Switzerland, Italy, and Poland; those reflecting the second are England/Wales, France, the Netherlands, Japan, the United States, Korea, Sweden, and Italy; those reflecting the third are Germany, Switzerland, Italy, the Czech Republic, and England/Wales, as well as the European Union.


7 Ibid.


9 See ibid.

10 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter the OECD Convention), Nov. 21, 1997, OECD, DAFFE/IME/BR(97)20, Preamble.


12 “Tools to Promote Transparency in Local Governance,” § 1.3.

13 Ibid.

14 See Berenbeim, p. 10.


17 “Tools to Promote Transparency in Local Governance,” § 1.3.

18 Berenbeim, p. 20.


20 18 U.S.C.S. § 201(b)(1) (2005). More specifically, this provision applies to anyone who “directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official,” or who “offers or promises” them “to give anything of value to any other person or entity,” intending that such action will “influence any official act,” influence such person to “collude in, or allow, any fraud . . . on the United States,” or “induce” such person “to do or omit to do any act in violation of the lawful duty of such official or person.”
21 18 U.S.C.S. § 201(b)(2)-(4), (c).
24 Sun-Diamond, pp. 406-07, 414. While the Court’s opinion specifically construes section 201(c)(1)(A) of the statute, relating to official acts already “performed or to be performed,” the same “official act” requirement also appears in certain other sections of the statute. See generally, 18 U.S.C.S. § 201. The Court also observed that numerous other such federal laws and regulations, unlike this one, “contain exceptions for various kinds of gratuities given by various donors for various purposes.” Ibid., p. 411.
29 15 U.S.C.S. §§ 78dd-1(b) and (f)(3), 78dd-2(b) and (h)(4), 78dd-3(b) and (f)(4).
30 15 U.S.C.S. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).
34 “Anti-Bribery Convention: Entry into Force,” available at http://www.oecd.org/documentprint/0,2744, en_2649_34859_2057484_1_1_1_1,00.html.
35 OECD Convention, Art. 1(1).
37 Serafini, pp. 722-23.
38 See “Anti-Bribery Convention: National Implementing Legislation,” available at http://www.oecd.org/document/30/0,2340,en_2649_34859_2027102_1_1_1_1,00.html.
39 See Serafini, pp. 742-45.