

Foreign Anti-Corruption Laws – Why You Need a Corporate Policy on Foreign Anti-Corruption (and Foreign Political Contributions) and What it should contain

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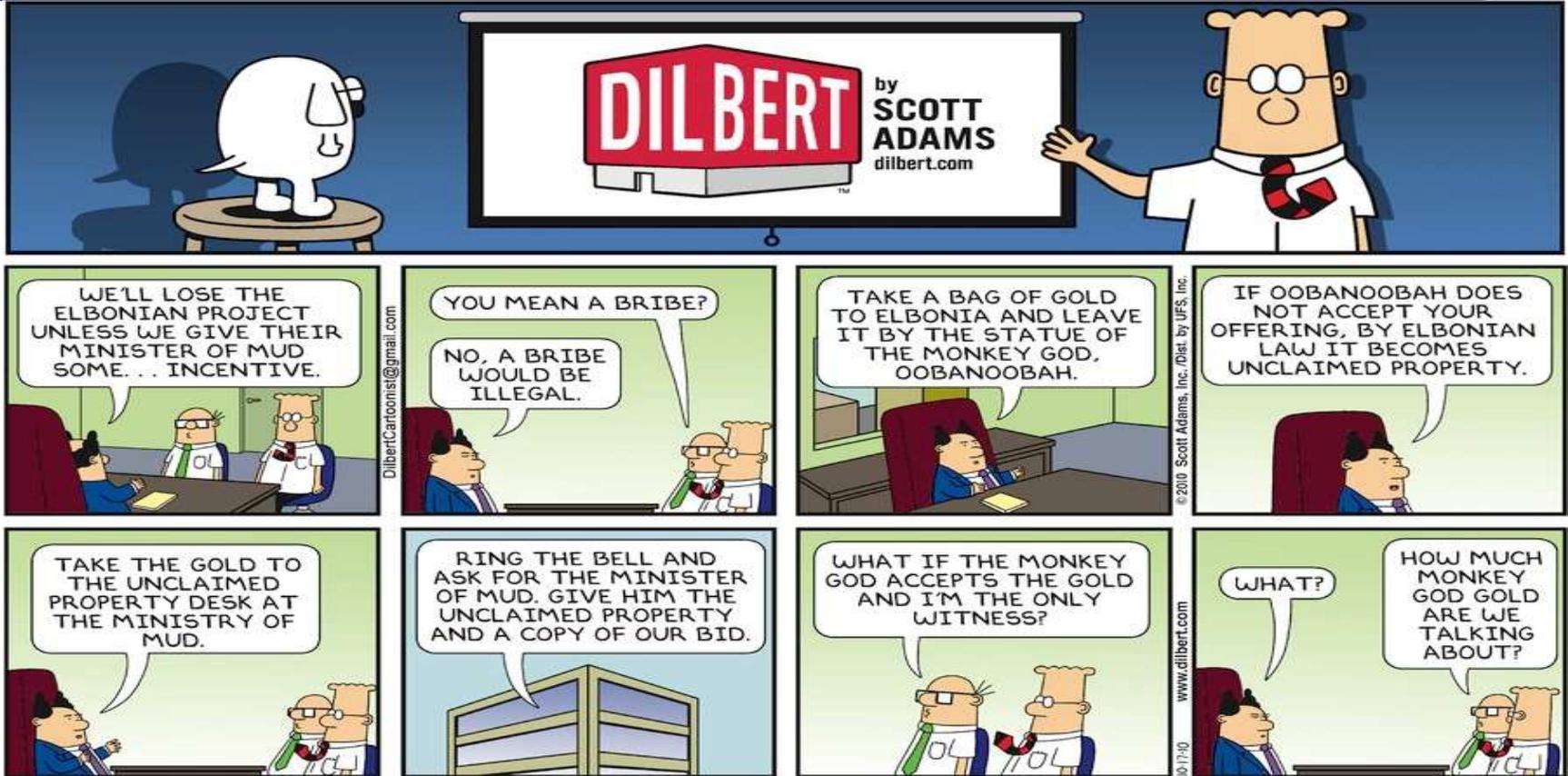
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International Legal Context

- There is a developing web of domestic laws intended to prevent corruption or the “bribing” of foreign public officials.
- *Black’s Law Dictionary* defines “bribery” as the offering, giving, receiving or soliciting any item of value in order to influence the actions of an official or other person in charge of a public or legal duty.
- In the international context, the prime act at issue is the bribing of foreign public officials in an attempt to obtain or retain business or obtain an advantage in the course of business.

Anti-Corruption: 101



International Legal Context

- The US was the first country to aggressively target foreign corruption with the introduction of the *Foreign Corrupt Practices Act (FCPA)* in 1977.
- Concerns that this had disadvantaged US companies resulted in US-led international efforts to develop comprehensive international rules targeting foreign corruption.
- These efforts (eventually) resulted in two primary international treaties:
 - the *OECD Convention on Combating Bribery of Foreign Public Officials* and
 - the *UN Convention Against Corruption*
- These international agreements are now generating an extensive web of domestic laws.

Some Existing National Laws of Relevance

- UN Convention has 144 signatories.
- All 38 OECD Members have signed the OECD Convention and all signatories now have domestic laws in place.
- Canada has the *Corruption of Foreign Public Officials Act (COFPOA)*.
- The US has the FCPA.
- The UK has the *Bribery Act of 2010*.

Nationality Principle (Art 4(2)): The G7 Nations

US

- *Foreign Corrupt Practices Act § 78dd-2(i)*

UK

- *Bribery Act, 12(4)*

Germany

- *German Act on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 2, Section 3*

France

- *Anti-Corruption Act, Article 435-1 – 435-5; Penal Code, Article 113-6*

Italy

- *Act No. 300 of 29.9.2000*

Japan

- *Unfair Competition Prevention Law*

Canada

- *Corruption of Foreign Public Officials Act, s. 5(1)*

Some Existing National Laws - Jurisdiction

- Initially, Canada exercised jurisdiction based on “territoriality”. Under common law, the COFPOA only applied where there was a “real and substantial connection” between a prohibited act and Canada. A real and substantial connection resulted primarily from the location of the act - that is, a material aspect of the crime had to have occurred in Canada.
- Amendments made in 2013 changed the jurisdictional scope of CFPOA to both “territoriality” and “nationality”, so the Act now applies to Canadians and Canadian incorporated companies wherever they may be.

Principles of Jurisdiction

- Territoriality (effects doctrine: *Alaska v. Jack*)
- Nationality
- Passive personality
- Protective
- Universality

US v. Yousef, 327 F. 3d 56 (2003, 2nd Cir.)



Some Existing National Laws - Jurisdiction

- The US and the UK also exercise jurisdiction based on both territoriality and nationality.
- The FCPA will apply if the actor is a “US person” (e.g. a US citizen or resident, US incorporated company, or a US “issuer”) or the act occurs within the US.
- Same is true in Canada under *CFPOA*
- The UK *Bribery Act* will apply if the actor has a “close connection” to the UK (e.g. UK citizens or residents, UK incorporated companies and *any other company carrying on business in the UK regardless of locus of incorporation*) or if the act occurs within the UK.

The concurrent jurisdiction headache

- **French citizen working for a Canadian company incorporated in Delaware with a listing on the LSE who bribes a government official in Nigeria.**
- **Potential jurisdictions:**
 - (1)France;**
 - (2)Canada;**
 - (3)United States;**
 - (4)Great Britain; and**
 - (5)Nigeria.**

Some Existing National Laws - Jurisdiction

- **COFPOA contains a provision relating to double-jeopardy and generally prevents a conviction under COFPOA for the same offence previously penalized in another jurisdiction.**
- **Canada follows British law in this regard**
- **United States takes a completely different path**

Double Jeopardy

Section 11(h), *Canadian Charter of Rights and Freedoms*:

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

• **5th Amendment, *Bill of Rights***

No person...shall...be subject for the same offence to be twice put in jeopardy of life or limb[.]

Judicial Recognition of International Double Jeopardy (Canada)

A judgment of conviction or acquittal by a **Court of competent jurisdiction in a foreign country** will sustain a plea of *autrefois convict* or *acquitt* if an accused is charged with the same offence in this country.

R. v. Stratton, [1987] O.J. No. 3536 (CA) at para. 22, Martin J.A.

This is avoided by the common law doctrine of *autrefois acquit* or *autrefois convict*, a doctrine which has always applied whether the previous conviction or acquittal **based on the same facts** was by an English court or foreign court.

Treacy v. DPP, [1971] 1 All ER 110 at 122, Lord Diplock

Domestic Double Jeopardy does not apply in United States

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns...the same act may be an offence or transgression of the law of both.

Moore v. Illinois, 55 US 13, 16 (1852)



When a defendant in a single act violates the “peace and dignity” of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences’ .

Heath v. Alabama, 474 US 82, 88 (1985)

US v. Jeong, 624 F.3d 706 (2010)

- South Korean national convicted in South Korea for paying bribes to American public officials (2 month jail sentence and \$21,000 USD fine)
- **U.S. submitted MLAT for evidence: “The [G]overnment understands that Jeong was convicted earlier this year of the offense of Interference with Foreign Trade in the ... Republic of Korea, and therefore, it is not seeking to further prosecute Jeong”.**
- **Defendant lured to USA**
 - Indicted for bribery (§201) + conspiracy
 - **Sentenced to 5 years + \$50,000 fine**

Some Existing National Laws - Jurisdiction

- In light of the complex web of potentially applicable national laws many companies now simply choose to comply with the highest common denominator – in most (but not all) cases that will be the FCPA and/or Bribery Act

Overview of the Basic Prohibition

- In very general terms, most national laws contain the same primary prohibition – thou shall not “directly or indirectly” “bribe” a “foreign public official” in order to “obtain or retain business or obtain an advantage in the course of business”. Where they can differ is in the specific definitions attached to these various constituent terms.
- Most laws cover both direct as well as indirect bribery. The notion of “indirect” applies both to the “giver” (e.g. paying bribes through a third party or “agent”), as well as the “receiver” (e.g. paying the bribe to the president’s wife, brother or child, etc.).

Overview of the Basic Prohibition

- **Most laws define the content or “value” of the bribe in an expansive or comprehensive way, not limited simply to the payment of cash money (e.g. “loan, reward, advantage or benefit of any kind”).**
- **“Foreign public officials” normally includes elected representatives of a foreign state, all manner of foreign bureaucrats, many employees of state-owned enterprises (SOEs) and officials of public international organizations (e.g. UN). The FCPA also captures candidates for public office and political parties.**

Overview of the Basic Prohibition

- **The requirement that the bribe be paid in order to “obtain or retain business” or “an advantage in the course of business” means that the offence will cover bribes paid to obtain or retain business from a foreign government or a SOE (such as procurements or other contracts) as well as to obtain other “advantages”, such as favourable decisions from the government or SOE (e.g. project approvals or legislative, regulatory, fiscal or enforcement “flexibility”).**

Overview of Basic Prohibition

- **Most domestic laws also provide numerous other related or “subsidiary” offences, such as conspiracy, aiding and abetting, accessory after the fact, and laundering or possessing the proceeds of crime.**
- **Foreign corruption is a criminal offence under most of these laws - in Canada, maximum of 14 years imprisonment for persons and unlimited fines for corporations.**

Overview of Basic Prohibition – Exceptions and Defences

- **Most laws provide for similar exceptions and defences, including:**
 - Payment made to facilitate an “act of a routine nature” – so-called “grease payments”;
 - Specific act or payment is permitted or required under the (written) laws of the country at issue;
 - Reimbursement for, or payment of, reasonable expenses directly relating to promotion of a good/service or performance of a contract.

Some Important Differences

- **UK jurisdiction appears expansive (any corporation that carries on business in the UK), although the UK has suggested that such jurisdiction will only be exercised when a UK person has been negatively affected.**
- **US law has a civil “books and records” strict liability offence – most prosecutions in the US relate to civil violations of this accurate bookkeeping requirement.**
- **US definition of “foreign public official” covers candidates for public office, meaning that US law can apply to any payments made to such candidates or their political parties, including all types of “campaign contributions”.**

Some Important Differences

- With respect to the “consistent with local law” exception, US and UK law only applies to “written” laws. Canadian rules are not as restrictive.
- UK law provides no “facilitation payments” defence (although often difficult to see how a true facilitation payment could be an offence). UK has stated that it is not in the public interest to prosecute inconsequential violations. (An amendment deleting that defence in COFPOA has not yet been declared in force.)
- UK law provides an additional defence for corporations of having adequate procedures in place to prevent bribery.

Some Important Differences

- Provisions of the 2010 US “Dodd-Frank Act” extended the SEC’s “whistleblower bounty” program to violations of the FCPA. A whistleblower who voluntarily provides “original information” to the SEC regarding a violation of federal securities laws that leads to a successful enforcement action resulting in monetary sanctions exceeding (US) \$1 million is eligible for an award of 10 to 30% of the amount of the sanctions imposed. Nothing similar exists in Canada or the UK.

Special Issue of Foreign Political Contributions

- As noted, FCPA defines “foreign public official” as including candidates for public office and political parties. UK and Canadian law only applies to office holders. No doubt, however, that the rules will still apply to foreign political contributions in many circumstances.
- Under both Canadian and US Federal law, corporate contributions at the Federal level are prohibited. Many countries have similar rules.
- Moreover, such contributions can often give rise to the appearance, that may be difficult to overcome, that they were paid in order to obtain or retain business or to obtain an advantage in the course of business.

R. v. Niko Resources

- **Niko was involved in natural gas developments in Bangladesh. A blow-out at one cause significant damage to a local village at the same time the company was in price negotiations with the Bangladeshi Government.**
- **Niko then “donated” an expensive SUV (\$200K) to the Energy Minister and also paid for his trip to Calgary, Chicago and New York (\$5K).**

R. v. Niko Resources

- The “gift” of the SUV was widely reported in the Bangladeshi press as being a bribe.
- The Minister was forced to resign and DFAIT reported the allegations to the RCMP.
- Following the RCMP investigation Niko pled guilty and was fined \$9.5 million.

R. v. Griffiths Energy International

- **Company's initial founders/senior management had entered into agreements with the Chadian Ambassador (and subsequently his wife and others) that resulted in the Company paying them \$2 million once it successfully obtained production-sharing agreements with the Chadian government.**
- **The arrangements came to light after senior management had changed and the Company was preparing for an IPO and management then self-reported to the RCMP.**
- **Company was fined \$10.35 million.**

R. v. Karigar

- **First contested case under COFPOA.**
- **Karigar was hired by Cryptometrics Canada to provide “strategy advice” on obtaining an Air India contract for a new security system.**
- **The US parent transferred \$450K to his personal account which allegedly was then used to pay bribes to Ministry of Civil Aviation and Air India officials. No proof that bribes were actually paid, but clear evidence of a plan and the money disappeared.**
- **Karigar was found guilty and sentenced to three years in jail.**

R. v. Karigar

- **What about senior management?**
- **Canadian management had cooperated with the investigation.**
- **In June, RCMP issued Canada-wide warrants for three others – two US citizens (CEO and COO of the US parent) and a UK citizen (an employee of the US parent who took over the scheme after the falling out with Karigar).**
- **These three are not located in Canada and yet to be seen if Canada will attempt to extradite them.**

Corruption: Bad for Business

- **STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL TRADE - April 11, 2000**
- **Mr. Len Homeniuk (President, Cameco Gold Ltd.):**
- **Their public officials are paid incredibly low wages. This combination sets the stage for demands for personal gain. Succumbing to corrupt practices is not only illegal under the anti-corruption statutes adopted by Canada, it is also bad business practice, marking the participant as fair game.**

Corruption: Bad For Business People

- **by: Canadian Press – October 15, 2015**

SOFIA, Bulgaria — Canadian former mining CEO Len Homeniuk is free to leave Bulgaria after ...Kyrgyzstan's chance to ...have him extradited. Homeniuk was detained after Kyrgyzstan issued an Interpol red notice, saying he was wanted on corruption charges.

Homeniuk had described the charges as completely baseless and an attempt to pressure his former company into signing a new revenue-sharing deal with the Kyrgyz government

Is a Specific Policy Necessary?

- **Some factors to bear in mind:**

- Canadian law applies to all acts within Canada;
- Jurisdiction under Canadian law likely to be expanded based on nationality;
- Risk that US, UK or other law will apply, regardless of whether Canadian law is applicable;
- A specific corporate policy assists in isolating management and the board of directors from liability;
- Presence of a robust policy:
 - in the UK, provides a corporate defense;
 - in the US, is an important factor under Sentencing Guidelines; and
 - in Canada, will be an important factor considered by the Crown in assessing whether to prosecute and by the court in sentencing.

Developing an Effective Foreign Anti-Corruption Policy – Basic Principles

- The development of an adequate policy and related procedures should generally be based on the following six basic principles:
 1. Proportionality – policy needs to be proportional in relation to the size, complexity and risk areas of the business;
 2. Risk Assessment – what is the risk of non-compliance? The policy needs to take into account country, sectoral, transactional, business opportunity and business partnership risks;

Developing an Effective Foreign Anti-Corruption Policy – Basic Principles

3. Due Diligence – the policy must provide for due diligence procedures that will adequately inform the application of the proportionate measures. Such measures will vary depending on level of risk. High risk situations (e.g. using agents in “bad” countries) may require direct investigations, research and ongoing monitoring;
4. Communication – the policy must “get the message out”, both internally and externally, and should usually include mandatory training and refreshers;

Developing an Effective Foreign Anti-Corruption Policy – Basic Principles

5. Monitoring and Review – the policy should be monitored on an on-going basis and regularly reviewed to ensure continued effectiveness; and
6. Top-Level Commitment – must have top-level buy-in and ongoing involvement.

Developing an Effective Foreign Anti-Corruption Policy – Some Specifics

- **While the policy will vary depending on the risk assessment, etc., the written policy should likely deal with the following specific issues:**
 - Basic “Code of Conduct”
 - Assignment of managerial and governance responsibility;
 - Internal communications, educational materials and training;

Developing an Effective Foreign Anti-Corruption Policy – Some Specifics

- Procedures and guidance, including specific guidance on;
 - Permissible foreign payments;
 - Permitted gifts, entertainment and travel;
 - Foreign charitable contributions;
 - Foreign political contributions;
 - Retaining foreign agents and sales representatives;
 - Reporting and investigating potential violations;

Developing an Effective Foreign Anti-Corruption Policy – Some Specifics

- Annual compliance certifications by relevant employees and agents;
- Due diligence check-lists for the retention of foreign agents and joint venture partners;
- Sample anti-corruption contractual provisions for use in all relevant agreements with agents, sales representatives, etc.;
- Disciplinary standards and procedures; and
- Documentation of compliance efforts.

Questions?