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2013 CARIBBEAN COMMERCIAL LAW WORKSHOP

UK BRIBERY ACT OF 2010

by Dave Kissoon, London House Chambers

This paper outlines the applicable provisions of the UK. In so doing, it aims to provide the Caribbean Practitioner a better understanding of the applicable provisions, and in so doing, enable the reader to give practical advice to affected clients.

I. UK BRIBERY ACT OF 2010

The UK Bribery Act of 2010 is an Act of the Parliament of the UK that establishes the criminal law relating to bribery. The Act repeals all previous statutory and common law provisions related to bribery and has been described as “the toughest anti-corruption legislation in the world.”

II. SECTIONS 1-7 OF THE ACT – BRIBERY OFFENSES

A. Section 1 - Active Bribery: Promising or Giving a Financial or Other Advantage

1. The Criminal Offense:

“Bribery” has a broad definition – it is defined as “a financial or other advantage.” Under the act, it is an offense to bribe another person by promising, offering, or giving a bribe in exchange for improperly performing a “relevant function or activity.” A “relevant function or activity” is later defined in Section 3 as any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person’s employment; or any activity performed by or on behalf of a body of persons, whether corporate or unincorporated.

In deciding what is expected of a person performing a “relevant function or activity,” an objective expectation test applies – what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. If a reasonable person would not expect what they have received, it may be deemed “lavish” and criminal sanctions will apply. (The term “lavish” has not yet been defined and may be for a jury to decide). Additionally, the burden of proof shifts to the defendant to prove that it was not lavish.

A bribery can occur in the context of both private and public functions where there is an expectation that the business will be carried out in good faith or impartially, and where the person performing the function is in a position of trust.

2. Practical Applications:

- a. A businessman, Mark, gives his friend, John, who works with Bob, £20,000 to give to Bob, to persuade him to send Mark confidential information about the company that Mark wants in connection with his own business. Mark has committed an offense under Section 1.
- b. Sarah tells Kevin, who works for a rival firm, to supply certain information about the firm that could benefit Sarah's business significantly. In return, Sarah says she knows the chairman of the rival firm (they play golf together) and will see to it that Kevin becomes a director within days. Sarah has committed an offense under Section 1.

B. Section 2 - Passive Bribery: Agreeing to Receive or Accepting a Financial or Other Advantage

1. The Criminal Offense:

It is an offense to be the subject of a bribery by requesting, agreeing to receive, or accepting a bribe in exchange for improperly performing a "relevant function or activity." This is true whether or not the person actually receives the bribe.

2. Practical Applications:

- a. Sam asks Karen for £15,000. In return, Sam and his colleague will destroy supporting documents submitted by rival bidders for a contract Karen is hoping to secure with Sam's employer. Sam has committed an offense under Section 2.
- b. Jill is well known as a provider of large "rewards" to officials who give her work priority. Hoping to secure some financial reward, Rob moves up Jill's planning application to the top of the list for consideration. When Jill subsequently discovers this, Jill sends Rob a "reward" of £2,000. Jill has committed an offense under Section 1 and Rob has committed an offense under Section 2.

C. Section 6 - Bribery of Foreign Public Officials

1. The Criminal Offense:

In order to ensure that the Act complies with the UK's commitments under the OECD Anti-Bribery Convention, this section contains a separate offence pertaining to the bribery of foreign public officials.

It is an offense to promise, offer, or give a financial or other advantage to a foreign public official, either directly or through a third party, where such an advantage is not legitimately due. Foreign public officials include officials from government, public agencies, international organizations, and the judiciary.

Unlike the general bribery offenses, there is no requirement to show that the public official acted improperly as a result.

2. Practical Applications:

- a. Dave offers to reward a foreign public official £15,000 if he or she will award Dave a contract, which the official has the capacity to do. Dave has committed an offense under Section 6.
- b. Scott is asked by a foreign public official to pay a sum of money to Bob. In exchange, the foreign public official will award Scott's contract. Scott has committed an offense under Section 6.

D. Section 7 - Corporate Offense: Failure of Commercial Organizations to Prevent Bribery by an Associated Person

This is the most notable provision of the Act because it creates corporate liability for failing to prevent bribery.

1. The Criminal Offense:

Under the Act, a "commercial organization" commits bribery where a person associated with the organization bribes another person, intending to obtain or retain business, or an advantage in business, for the organization.

A "commercial organization" is wide in scope and includes both domestic and international companies that have business in the UK. A person is "associated" with a commercial organization if they perform services for or on behalf of the organization and can include employees, agents, or subsidiaries.

2. "Adequate Procedures" Defense:

A commercial organization will not be held criminally liable if it can show that "adequate procedures" have been put in place to prevent bribery by those associated with the organization. The Ministry of Justice has issued guidance on prevention measures to ensure companies are adhering to "adequate procedures." The 6 principles include:

- a. Risk Assessment: Companies should regularly and comprehensively assess the nature and extent of the risks relating to bribery to which it is exposed.

- b. Top Level Commitment: A company's top level of management should be committed to preventing bribery and establishing a culture within the organization in which bribery is never acceptable.
- c. Due Diligence: A company must have due diligence policies and procedures which cover all parties to a business relationship, including the organization's supply chain, agents and intermediaries, all forms of joint venture and similar relationships, and all markets in which the company does business.
- d. Clear, Practical and Accessible Policies and Procedures: The company's policies and procedures to prevent bribery must be clear, practical, accessible and enforceable.
- e. Effective Implementation: The company must effectively implement its anti-bribery policies and procedures and ensure they are embedded throughout the organization.
- f. Monitoring and Review: The company must institute monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identify any issues as they arise. The company must implement improvements where appropriate.

3. Practical Applications:

- a. An English company, XXX Corp., with no previous experience of operating overseas, sets up a subsidiary to act on its behalf, YYY Corp., in a country where payment of bribes to secure contracts is commonplace. XXX does not have any anti-bribery policies, and does not look closely into how YYY does its business. YYY pays a bribe in order to secure an important contract on XXX's behalf. XXX has committed an offense under Section 7. Because there was no anti-bribery policy in place, the adequate procedure defense will not be available.
- b. An English company, ABC Corp., that has anti-bribery policies and procedures in place of which employees are periodically reminded, takes over a company, XYZ Corp., based in a country where bribery by companies is common. Immediately following its takeover, a former employee of XYZ (now an employee of ABC) bribes an official to secure a contract. The employee's superior (also a former employee of XYZ) says that she was still coming to terms with ABC's new ways of operating, and had not fully appreciated the wholly categorical nature of the new policy. ABC has committed an offense under Section 7. However, ABC

may have a good defense if it can show it had adequate procedures in place designed to prevent the commission of bribery.

- c. A law firm in Guyana brings a London-based potential client to Trinidad to discuss a potential representation. During the trip, the firm’s head partner takes the potential client to a cricket game and they use the firm’s box at the Queen’s Park Oval. The firm may have committed an offense under Section 7 if it is determined that the use of the skybox was “lavish” (See Section 1).

III. SECTION 11 – PENALTIES FOR VIOLATIONS

- A. Individuals: If an individual is found guilty on summary conviction, he may be imprisoned for up to 12 months and fined up to £5,000. If an individual is found guilty on conviction on indictment, he faces imprisonment for up to 10 years and an unlimited fine.
- B. Corporations: If a corporation is found guilty on conviction on indictment, it faces an unlimited fine.

IV. SECTION 12 – GEOGRAPHIC SCOPE

A bribery will fall within the scope of the Act in one of two ways:

- A. The crime is committed inside the UK; or
- B. The crime is committed outside the UK, but the person’s acts or omissions would be a crime if committed within the UK and that person is “closely connected” with the UK. Those with a “close connection” are defined to include British citizens, individuals ordinarily residing in any part of the UK, bodies incorporated under the law of any part of the UK, and Scottish partnerships.

V. COMPARISON OF UK BRIBERY ACT TO FCPA

<u>FCPA</u>	<u>UK Bribery Act</u>
Covers governmental bribery.	Covers governmental and non-governmental (private-sector) bribery.
Does not cover the recipient of the bribe.	Covers the recipient of the bribe.

<u>FCPA</u>	<u>UK Bribery Act</u>
No specific corporate offense (although a corporation can be vicariously liable for acts of its employees).	Specific corporate offense – corporation will be held strictly liable if it fails to prevent bribery from taking place – regardless of awareness or intent.
No defense for companies to avoid penalties.	“Adequate procedures” defense allows a company to avoid penalties if it can prove proper compliance.
Exception for “facilitation payments” to speed up routine business such as customs checks or visas.	No distinction between bribery and facilitation payments.

VI. ENFORCEMENT

This Act clearly provides the UK government with broadened powers to prosecute bribery within the UK and beyond. While its effects are yet to be seen, it is likely that the Act will result in an increased number of prosecutions – for both individuals and companies. An increase in prosecutions in the UK may also lead to an increase in parallel investigations in other jurisdictions. This is particularly true for companies with business in both the UK and the United States, given the close relationship between the UK’s Serious Fraud Office and the United States Department of Justice.

Companies must be proactive in increasing their compliance measures. In doing so, it is suggested that they follow the 6 principles offered in the Guidelines provided by the Ministry of Justice.

VII. SAMPLE FACT PATTERN

A. Facts:

1. DaveCo. is a privately-held manufacturer of coconut products based in Guyana. DaveCo. opened offices in Brussels, Trinidad and Miami. These offices, operated by US citizens, were encouraged to expand into nearby countries.
2. 2009 – Trinidad staffer engaged a consultant to help secure contracts in Port of Spain. Staffer paid the consultant \$10,000 cash per month. No invoices were submitted. Sales rose sharply.

3. 2009 – Brussels staffer engaged a consultant in Dublin to help promote sales in Ireland and Scotland. Staffer conducted background check to establish bona fides of consultant and tweaked form DaveCo. contract to include pledge to respect FCPA.

B. Outcome under UK Bribery Act:

1. The staffer's relationship with Scotland brings the staffer and DaveCo. within the scope of the UK Bribery Act (see Section 12).
2. Although the contract includes a pledge to respect the FPCA, the staffer and DaveCo. must also adhere to the more stringent policies outlined in the UK Bribery Act. This means:
 - a. Individuals will be criminally liable for bribes they make (see Section 1).
 - b. Individuals will be criminally liable for bribes they agree to take (see Section 2).
 - c. Individuals will be criminally liable for bribing foreign public officials (see Section 6).
 - d. The company, DaveCo., will be liable for bribes it makes, whether through the company or an individual associated with the company (see Section 7). Thus, in order to protect itself, DaveCo. should follow the 6 principles set forth in the Guidelines.
3. If DaveCo. fails to adhere to the UK Bribery Act, there may be a parallel investigation in the UK and the United States due to the relationship between the UK Serious Fraud Office and the US Department of Justice.
4. If DaveCo. is convicted of bribery, it will face an unlimited fine. If the individuals within the company are convicted of bribery, they will face fines and imprisonment.

VIII. PRACTICAL CONSIDERATIONS FOR CLIENTS

When advising clients, it goes without saying, a practitioner must assess the applicability of the UK Bribery Act as it relates to their client's affairs. Much will depend on factors such as the size and business profile of the organization. However, measures to consider including in your advice include:

1. developing clearly written policies and guidance;
2. implementing a staff training programme and effective processes to convey anti-bribery policies to employees;
3. whistle-blowing procedures and policies;
4. ensuring that sub-contractors and other organisations the company or their subsidiaries deal with have similar cultures of compliance;
5. inserting termination provisions into service contracts which can be applied if a person/association is suspected of bribery;
6. systematic investigation and due diligence of consultants and agents and requiring them to comply with relevant policies;
7. monitoring relationships with third parties on an ongoing basis; *and*
8. setting criteria for bonafide hospitality and business expenses and ensuring employees know it.