

Anti-Corruption Regulation

in 44 jurisdictions worldwide

2014

Contributing editor: Homer E Moyer Jr



Published by
Getting the Deal Through
in association with:

Advokatfirman Delphi
Afridi & Angell
Anagnostopoulos Criminal Law & Litigation
Anderson Mōri & Tomotsune
Andreas Neocleous & Co LLC
Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)
Assertia Pty Ltd
AZB & Partners
BDO AS
Bennett Jones LLP
BON, Advocates
Dr Kai Hart-Hönig Rechtsanwälte
ELIG Attorneys-at-Law
Goussanem & Aloui Law Firm
Governance Latam - Guillermo Jorge, Fernando Basch & Asociados
Greenberg Traurig SC
Hoet Peláez Castillo & Duque
Horn & Co Law Offices
Ivanyan & Partners
K&L Gates LLP
Kensington Swan
Kim & Chang
Kruk and Partners Law Firm
Lampert & Schächle Attorneys at Law Ltd
Lebray & Associés
Mamić Perić Reberski Rimac
Matheson
Mboya Wangong'u & Waiyaki Advocates
Miller & Chevalier Chartered
Moalem Weitemeyer Bendtsen Law Firm
Ndikum Law Offices
Norton Rose Fulbright (Asia) LLP
OECD
Oliva-Ayala Abogados
Orihuela Abogados | Attorneys at Law
Paz Horowitz Robalino Garcés
Peters & Peters
Plesner Law Firm
PLMJ – Sociedade de Advogados, RL
Schellenberg Wittmer Ltd
Sedgwick Chudleigh Ltd
Sofunde, Osakwe, Ogundipe & Belgore
Studio Legale Pisano
The Law Firm of Salah Al-Hejailan
Transparency International
Vasil Kisisil & Partners
Veirano Advogados

Anti-Corruption Regulation 2014

Contributing editor:
Homer E Moyer Jr
Miller & Chevalier Chartered

Getting the Deal Through is delighted to publish the eighth edition of *Anti-Corruption Regulation*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 44 jurisdictions featured. New jurisdictions this year include Algeria, Bermuda, Cameroon, Denmark, Ecuador, Malaysia, Peru and Portugal. There is also a new chapter on asset recovery, in addition to a global overview and the perspectives of Transparency International and the OECD.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Homer E Moyer Jr of Miller & Chevalier Chartered for his continued assistance with this volume.

Getting the Deal Through

London
February 2014

Global Overview	3	Canada	52
Homer E Moyer Jr Miller & Chevalier Chartered		Milos Barutciski Bennett Jones LLP	
Anti-corruption: progress on enforcement	9	China	59
Monty Raphael QC Transparency International UK		Amy L Sommers and Cecilia Dai K&L Gates LLP	
Fifteen years of the OECD Anti-Bribery Convention	10	Croatia	67
Nicola Bonucci and Leah Ambler OECD		Natalija Perić Mamić Perić Reberski Rimac	
Asset recovery: an essential tool in the fight against corruption	12	Cyprus	71
Stéphane Bonifassi Lebray & Associés		Panayiotis Neocleous and Costas Stamatiou Andreas Neocleous & Co LLC	
Algeria	14	Denmark	76
Khaled Goussanem and Salima Aloui Goussanem & Aloui Law Firm		Andreas Bernhard Kirk and Christian Bredtoft Guldmann Plesner Law Firm and Moalem Weitemeyer Bendtsen Law Firm	
Argentina	18	Ecuador	82
Fernando Basch and Guillermo Jorge Governance Latam · Guillermo Jorge, Fernando Basch & Asociados		Bruce Horowitz Paz Horowitz Robalino Garcés	
Australia	25	France	86
Jane Ellis and Rob Smith Assertia Pty Ltd		Stéphane Bonifassi Lebray & Associés	
Bermuda	33	Germany	91
Alex Potts and Chen Foley Sedgwick Chudleigh Ltd		Kai Hart-Hönig Dr Kai Hart-Hönig Rechtsanwälte	
Brazil	41	Greece	96
Luiz Navarro Veirano Advogados		Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti Anagnostopoulos Criminal Law & Litigation	
Cameroon	46	India	101
Philip Forsang Ndikum Ndikum Law Offices		Aditya Vikram Bhat and Richa Roy AZB & Partners	

Publisher

Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions

Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers

George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd
87 Lancaster Road
London W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2014
No photocopying: copyright licences do not apply.
First published 2007
Eighth edition 2014
ISSN 1754-4874

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2014, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Ireland	110	Norway	172	Switzerland	231
Carina Lawlor and Bríd Munnelly Matheson		Erling Grimstad BDO AS		Peter Burckhardt, Paul Gully-Hart and Roland Ryser Schellenberg Wittmer Ltd	
Israel	117	Peru	177	Turkey	238
Yuval Horn, Ohad Mamann and Alon Harel Horn & Co Law Offices		Sandra Orihuela Orihuela Abogados Attorneys at Law		Gönenç Gürkaynak and Ç Olgü Kama ELIG Attorneys-at-Law	
Italy	122	Philippines	182	Ukraine	245
Roberto Pisano Studio Legale Pisano		Francisco Ed Lim and Chryssilla Carissa P Bautista Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)		Yaroslav Teklyuk, Viacheslav Pieskov and Valeriia Tryfonova Vasil Kisil & Partners	
Japan	129	Poland	188	United Arab Emirates	252
Kenichi Sadaka and Kei Akagawa Anderson Mōri & Tomotsune		Jarosław Kruk and Aleksandra Matwiejko-Demusiak Kruk and Partners Law Firm		Charles Laubach Afridi & Angell	
Kenya	135	Portugal	194	United Kingdom	259
Godwin Wangong’u and CG Mbugua Mboya Wangong’u & Waiyaki Advocates		Alexandra Mota Gomes and Dirce Rente PLMJ – Sociedade de Advogados, RL		Monty Raphael QC Peters & Peters	
Korea	141	Russia	202	United States	274
Kyungsun Kyle Choi and Liz Kyo-Hwa Chung Kim & Chang		Vasily Torkanovskiy Ivanyan & Partners		Homer E Moyer Jr, James G Tillen, Marc Alain Bohn and Amelia Hairston-Porter Miller & Chevalier Chartered	
Liechtenstein	146	Saudi Arabia	209	Venezuela	282
Siegbert Lampert and Rudolf Schächle Lampert & Schächle Attorneys at Law Ltd		Robert Thoms and Sultan Al-Hejailan The Law Firm of Salah Al-Hejailan		Fernando Peláez-Pier and Gerardo Briceño Hoet Peláez Castillo & Duque	
Malaysia	151	Singapore	212	Appendix: Corruption Perceptions Index Transparency International	287
Edmund Bon and New Sin Yew BON, Advocates		Wilson Ang Norton Rose Fulbright (Asia) LLP			
Mexico	156	Spain	220		
Luis Rubio Barnetche, Bertha Alicia Ordaz-Avilés and Héctor Cuevas González Greenberg Traurig SC		Laura Martínez-Sanz and Jaime González Gugel Oliva-Ayala Abogados			
New Zealand	161	Sweden	224		
Hayden Wilson Kensington Swan		Olof Rågmark and Sofia Karlsson Advokatfirman Delphi			
Nigeria	168				
Babajide O Ogundipe and Chukwuma Ezediaro Sofunde, Osakwe, Ogundipe & Belgore					

Bermuda

Alex Potts and Chen Foley

Sedgwick Chudleigh Ltd

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Bermuda is a self-governing British overseas territory, whose legal system is based on the English legal system. As such, the common law, the doctrines of equity and the acts of Parliament of England of general application, which were in force in England at the date when Bermuda was first settled on 11 July 1612, have the force of law in Bermuda, subject to:

- any local Bermuda legislation enacted since 1612;
- any UK legislation enacted and expressly extended and applied to Bermuda since 1612; and
- any legal precedent established by the case law emanating from Bermuda's domestic courts (including the Supreme Court of Bermuda, the Court of Appeal for Bermuda and the Privy Council, sitting as Bermuda's final court of appeal).

British overseas territories such as Bermuda do not have the authority to become a party to international treaties in their own right, unless they have been expressly authorised and entrusted to do so by the UK government.

Bermuda's government has been entrusted by the UK government to enter into tax information exchange agreements and certain other bilateral and multilateral commercial agreements of local concern, pursuant to various entrustment agreements dated 12 September 1968, 27 July 2005 and 1 December 2009, but the scope of this entrustment does not extend to all international treaties.

For the most part, the UK must extend international treaties to Bermuda, subject to consultation with and the agreement of Bermuda's government. This is sometimes done at the time of the UK's ratification of an international treaty, but it is occasionally done at some later date.

At present, neither the United Nations Convention against Corruption (UNCAC) nor the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) have been formally extended by the UK to Bermuda.

The OECD's Working Group's Phase 3 Report (March 2012) and Transparency International have expressed some criticism of the length of time being taken by the UK to extend the convention into all of the UK's overseas territories. Currently, UNCAC has only been extended to the three Crown dependencies (Jersey, Guernsey and the Isle of Man, on 9 November 2009) and to one of the 14 overseas territories (British Virgin Islands, on 12 October 2006). The OECD Anti-Bribery Convention has only been ratified by the three Crown dependencies and one of the overseas territories (the Cayman Islands).

On 14 March 2013, Bermuda's Governor George Fergusson announced that the UK is expected to extend the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to Bermuda, but this has still not yet occurred.

Separately, some local politicians in Bermuda have called for the introduction of a local Anti-Corruption Commission, and they have gone so far as to prepare and publish draft legislation, although this has not yet been endorsed by the Bermuda government or enacted by Bermuda's Parliament.

Although not an anti-corruption convention, the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 was extended to Bermuda in February 1995.

The Criminal Justice (International Co-Operation) (Bermuda) Act 1994 gives effect to the Vienna Convention in Bermuda, and it enables Bermuda's government and courts to cooperate by way of mutual legal assistance with other countries in criminal proceedings and investigations, by empowering, for example, Bermuda's Attorney-General to assist criminal justice agencies outside Bermuda in the investigation and prosecution of any criminal matter, including the service of criminal process and the gathering of evidence. The scope of this legislation could extend to the provision of mutual legal assistance for the investigation and prosecution of crimes against foreign anti-corruption laws, such as the US Foreign Corrupt Practices Act of 1977 (FCPA) and the UK Bribery Act 2010.

In the context of the UK Bribery Act 2010, it should be noted that:

- a number of individuals and corporate entities resident in Bermuda may be subject to the extra-territorial reach of the UK Bribery Act 2010 (as indeed they may be subject to the extra-territorial reach of the US FCPA); and
- Bermuda's Criminal Code Act 1907 contains a provision, at section 149, that provides that any person who, without lawful excuse (the proof of which is expressed to rest on him, although this 'reverse burden' defence may be the subject of a potential constitutional challenge in the future) does any act which he is, by any act or act of the UK Parliament, forbidden to do, or omits to do any act which he is, by the provisions of any such act or act of the UK Parliament, is guilty of a summary offence, unless some mode of proceeding against him for such disobedience is expressly provided by the act or act of the UK Parliament, and is intended to be exclusive of all other punishment.

It is also important to note that there are various extradition laws applicable in Bermuda, including the UK's Extradition Acts 1870 and 1873, Bermuda's Extradition Act 1877 and various orders made thereunder. These extradition laws were considered by the Privy Council in *Deuss v The Attorney-General for Bermuda* [2009] UKPC 38.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Domestic bribery laws

Common law

Bermuda's criminal law has been codified in statute, under the Criminal Code Act 1907 (as amended from time to time). The Privy Council has held, on a number of occasions, that Bermuda's Criminal Code was 'intended to replace the common law' and that 'the principles of liability in crime are governed in Bermuda by the Criminal Code, under the Criminal Code Act 1907'. See, eg, *Furbert v The Queen* [2000] 1 WLR 1716 and *Robinson v The Queen* [2011] UKPC 3.

In the circumstances, it is doubtful that any common law offence of bribery would be recognised in Bermuda (even though such a common law offence was recognised under English common law until the UK Bribery Act 2010 came into force on 1 July 2011).

Legislation

Bermuda's foreign and domestic anti-bribery and anti-corruption laws have not been consolidated into a single statute. They are instead derived from a number of sources of primary and secondary legislation.

Although Bermuda's criminal law has been codified in the Criminal Code Act 1907, and the Criminal Code contains a number of important provisions relating to bribery and corrupt behaviour, there are also a number of other pieces of legislation that contain laws and regulations that relate to certain other types of corrupt behaviour, some of which are more obscure than others.

This legislation includes, for example:

- the Foreign Recruiting Act 1874;
- the Post Office Act 1900;
- the Evidence Act 1905;
- the Municipalities Act 1923;
- the Commissions of Inquiry Act 1935;
- the Quarantine Act 1946;
- the Parliament Act 1957;
- the Marine Board Act 1962;
- the Bermuda Constitution Order 1968;
- the Legislature (Appointment, Election and Membership Controversies) Act 1968;
- the Public Treasury (Administration and Payments) Act 1969;
- the Jurors Act 1971;
- the Commissioners for Oaths and Notaries Public Act 1972;
- the Police (Discipline) Orders 1975;
- the Real Estate Agents' Licensing Act 1976;
- the Parliamentary Election Act 1978;
- the Companies Act 1981;
- the Barristers' Code of Professional Conduct 1981;
- the Audit Act 1990;
- the Bermuda International Conciliation and Arbitration Act 1993;
- the Consumer Protection Act 1999;
- the Employment Act 2000;
- the Ombudsman Act 2004;
- the Internal Audit Act 2010;
- the Justice Protection Act 2010;
- the Good Governance Act 2011;
- the Good Governance Act 2012;
- the Referendum Act 2012; and
- the Bermuda Fire and Rescue Service (Discipline) Regulations 2013.

The most relevant laws which prohibit the bribery of domestic 'public officers' (or persons appointed to carry out public functions even though they might not be characterised 'public officers' in a narrow sense), relate to bribery and other forms of corruption, including:

- corruption in the determination of arbitral proceedings;
- corruption in the appointment of liquidators of companies;
- corruption by 'public officers', and those employed in the public service, in the discharge of their duties;
- corruption by 'public officers' which amounts to extortion;
- corruption in the conduct of judicial proceedings by a member of the judiciary;
- corruption in the conduct of judicial proceedings by a court official, or someone concerned with the administration of justice;
- corruption of an agent in connection with the business affairs of his principal;
- corruption of an officer of the Internal Audit Department;
- corruption of or by a member of parliamentary office;
- corruption in connection with a parliamentary election;
- corruption in connection with a referendum;
- corruption in connection with the work of the Public Service Commission; and
- collusion in the awarding of government contracts.

There are also important constitutional provisions that require that various constitutional officers, including the Attorney-General, the Director of Public Prosecutions, the Ombudsman for Bermuda, the Public Service Commission, the Auditor General, and the Constituency Boundaries Commission, shall not be subject to the direction or control of any other person or authority, save that the Supreme Court of Bermuda may exercise jurisdiction in relation to any question whether such officers have exercised their functions in accordance with the Constitution.

It is also worth noting that under Bermuda's Commissions of Inquiry Act 1935, the Governor of Bermuda has the power to initiate a commission of inquiry into the conduct of any civil servant, the conduct or management of any department of the public service, or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.

Foreign bribery laws

There is, as yet, no local Bermuda statute that specifically relates to bribery of a foreign public official, and in the absence of express legislative provision, it is unlikely that a court would conclude that there is such an offence under Bermuda's common law.

It is, however, potentially arguable that the bribery and corruption provisions of the Criminal Code Act 1907, and the other pieces of Bermuda legislation referred to above, might be broad enough to encompass bribery of foreign public officials (although this is not yet an argument that has been developed before, or considered by, a Bermuda court).

As discussed elsewhere, however, it is likely that the OECD Anti-Bribery Convention will soon be extended by the UK to Bermuda.

In the meantime, since many Bermuda business entities are international in scope, they must operate on the basis that they, and their business activities, may well be covered by the laws of other jurisdictions such as the US and the UK. All international businesses based in Bermuda should pay very close attention, therefore, to the provisions of the US FCPA and the UK Bribery Act 2010.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Not applicable.

4 Definition of a foreign public official

How does your law define a foreign public official?

Not applicable.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Not applicable.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Not applicable.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Not applicable.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Not applicable.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Not applicable.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Not applicable.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Not applicable.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Not applicable.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Not applicable.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Not applicable.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Not applicable.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Not applicable.

Financial record keeping**17 Laws and regulations**

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

There are a number of statutes and statutory instruments in Bermuda that contain legal rules requiring the keeping of accurate corporate books and records.

Which specific rules apply in any particular case depends on the legal nature of the public body or corporate entity (whether a company, a segregated accounts company, a partnership, a trustee, an investment fund or a liquidator) and the extent to which that corporate entity is regulated locally by a local regulator such as the Bermuda Monetary Authority (the BMA) or the Bermuda Bar Council under various regulatory statutes (which will depend, in turn, on the nature of its business or service). The main regulated business sectors in Bermuda are insurance, investment, bank and deposit taking institutions, trust businesses, and corporate service providers and professional service providers.

The Companies Act 1981 is the primary statutory source of company law in Bermuda, and contains provisions relating to financial reporting of companies.

Under the Companies Act 1981, accurate records must be kept by every company in relation to: all sums of money received and expended by the company, all sales and purchases of goods by the company and the assets and liabilities of the company. These records are to be kept for a period of five years.

Unless all the company's members and directors have dispensed with the requirement to do so, its directors are required to present the company's financial statements at the company's annual general meeting. The statements include:

- a statement of the reports of its operations for the period;
- a statement of any retained earnings or deficit;
- its balance sheet;
- a statement of any changes in the company's financial position or cashflow;
- notes to the financial statement; together with
- any other information required to be presented by virtue of the company's constitutional documents.

Every shareholder is entitled to request and see a copy of the company's financial statements.

In addition to the general rules prescribed by the Companies Act 1981, a number of industry specific rules have been introduced by the Bank and Deposit Companies Act 1999, the Insurance Act 1978, the Trusts (Regulation of Trust Business) Act 2001, the Investment Business Act 2003, the Investment Funds Act 2006, the Credit Unions Act 2010 and the Corporate Service Provider Business Act 2012. These acts are supplemented by regulations, as well as guidance texts including Statements of Principles, Codes of Conduct and Guidance Notes.

Although the specific rules governing the frequency with which accounts are to be prepared and filed with the island's financial regulator, the BMA, vary from sector to sector, there are a number of hallmarks that are common to all industries.

Entities regulated by the BMA must appoint independent auditors, failing which one is appointed by the regulator. Generally, auditors of regulated entities are required to notify the BMA when they resign or do not seek reappointment, or where they modify, qualify, deny or reissue their audit opinion, or where they issue an adverse audit opinion. Depending on the industry, guidance may be

provided which makes clear what the auditor is to regard as being of 'material significance' to the audit. Where the guidance has been issued, it generally makes reference to misstatements, doubts relating to solvency, material weaknesses in internal controls, misconduct of senior officers in connection with the accounts, and evidence of fraud.

Separately, it is worth mentioning that Bermuda has a well-established framework of anti-money-laundering laws. Both the Proceeds of Crime Act 1997 and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 contain a number of provisions that promote accurate financial reporting, with a view to identifying criminal conduct and preventing the concealment of proceeds of criminal conduct.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Where bribery or corruption has a material effect on the financial affairs of a company, the auditor may be obliged to report it to the BMA.

Where there is suspicion, or knowledge, of money-laundering in connection with corrupt practices, a duty to report that suspicion or knowledge is imposed by Bermuda's anti-money-laundering laws.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

We are not aware of Bermuda's corporate laws relating to financial record keeping being used in any systematic fashion to prosecute domestic or foreign bribery offences. However, financial records (or the lack of financial records in breach of record keeping obligations) often provide important evidence for the investigation and prosecution of such offences.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Section 351 of the Criminal Code Act 1907 makes 'false accounting' an offence, liable on summary conviction to a fine of BMD\$10,000 or imprisonment for five years, or both and on conviction on indictment to a fine of BMD\$100,000 or imprisonment for 10 years or both.

Section 353 of the Criminal Code Act 1907 makes 'false statements by company directors' an offence, liable on summary conviction to a fine of BMD\$10,000 or imprisonment for five years or both; and on conviction on indictment to a fine of BMD\$100,000 or imprisonment for 10 years or both.

Sections 395 and 396 of the Criminal Code Act 1907 make certain 'frauds' and 'false statements' by officials of corporations and companies an offence, including the falsification or making of false entries in any books or accounts of a company, liable on conviction by a court of summary jurisdiction to imprisonment for 12 months and on conviction on indictment to imprisonment for two years.

Section 397 of the Criminal Code Act 1907 makes 'fraudulent false accounting' an offence, liable on conviction by a court of summary jurisdiction to imprisonment for 12 months and on conviction on indictment to imprisonment for two years.

Section 398 of the Criminal Code Act 1907 makes 'false accounting by public officers' an offence, liable on conviction by a court of summary jurisdiction to imprisonment for 12 months and on conviction on indictment to imprisonment for two years.

Otherwise, no sanctions are provided for under local Bermuda law for violations of accounting rules specifically relating to the payment of bribes.

As discussed in question 17, however, every company must keep proper accounts. Where a company fails to do so, every officer of that company is liable to a fine of BMD\$500. If any director of a company fails to take all reasonable steps to comply with the obligation to lay financial statements before the company in general meeting, he is liable to a fine of BMD\$1,000.

Also as discussed in question 17, the auditor of a regulated entity is obliged to notify various states of affairs to the BMA. That duty will arise where, for example, discovery of corruption leads the auditor to resign, qualify their report, revise a previously issued report, or where the auditor believes the bribe is otherwise of 'material significance' to their audit. If an auditor fails to notify the BMA when a duty to do so is triggered, they commit a criminal offence and, depending on the sector in which the company is engaged, face a fine of between BMD\$25,000 and BMD\$50,000.

Separately, where the directors of a company seek to hide the fact that bribes have been paid, by for example failing to comply with the requirement to produce the company's financial statements at its general meeting, they can each face a fine of BMD\$1,000. Where insurers seek to hide the fact that bribes have been paid by delaying or failing to comply with their duties to file statutory financial statements or their annual return, they can be liable to penalties ranging from BMD\$500 per week to BMD\$5,000 per week for each breach.

Where corruption engages Bermuda's anti-money-laundering regime, conviction of a money-laundering offence carries with it a fine of up to BMD\$50,000 on summary conviction, or alternatively a fine of up to BMD\$750,000 and imprisonment for two years if convicted on indictment.

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Bermuda's tax laws do not generally contemplate the deductibility of expenses, but it is unlikely that payments for domestic or foreign bribes would be accepted as a deductible expense in any event.

By way of explanation, Bermuda does not have a complicated domestic tax regime comparable to that which exists in many other jurisdictions. There are, for example, no corporation taxes or taxes on capital gains, although there are annual government fees payable by various types of legal entity. As an equivalent to personal income tax, employers and their employees are liable to pay payroll tax (which is charged on a sliding scale) as well as social insurance and pension contributions on behalf of their employees.

There are stamp duties payable on a wide range of instruments and transactions, real property taxes payable on real estate in Bermuda, and estate duties payable on the estates of deceased Bermuda residents (which is one area, conceivably, where deductions of certain expenses might be sought to be made). Other taxes payable in Bermuda are set out in the Taxes Management Act 1976 (principally relating to consumption taxes payable on goods and services) and the Corporate Services Tax Act 1995 (under which a corporate services tax is payable on gross earned revenue).

In general terms, therefore, it would not be possible to offset any taxes or contributions payable by a company by taking account of sums paid in bribes, or for facilitation payments.

Domestic bribery

22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

As discussed in question 2, there is no unified, or consolidated, anti-bribery statute in Bermuda. Instead, there are numerous sources of law relating to the prohibition of bribery and corruption. We set out below the individual elements of the local laws prohibiting the

bribery of domestic public officials that we believe are most relevant in the context of international and domestic commerce.

Interference with the Governor or Ministers, section 97 of the Criminal Code Act 1907

This offence applies to any person who deliberately carries out any act which is calculated to interfere with the free exercise by a government minister of his or her duties, or with the authority or his or her office.

Official Corruption, section 111 of the Criminal Code Act 1907

This offence applies to any person who is employed in the public service (ie, the civil service), or any person who holds a public office. The offence is committed where that person corruptly: asks for, receives or otherwise obtains any property or any benefit, either for himself or for someone else, in exchange for doing something or omitting to do something, in the discharge of his or her office.

The offence of official corruption can also be committed by any person who corruptly gives, confers or otherwise procures, upon any person in the public service or any person who holds public office, any benefit of any kind in exchange for undertaking some act, or omitting to take some act.

For the purpose of the offence of official corruption only, the term 'public officer' is defined to include members of both the Bermuda Regiment and the Bermuda Police Service.

Extortion by Public Officers, section 112 of the Criminal Code Act 1907

This offence applies to any person employed in the public service. The offence is committed when that person accepts any reward or property that is beyond their regular pay and remuneration or accepts a promise of reward, in exchange for performing their duties.

Judicial Corruption, section 116 of the Criminal Code Act 1907

This offence applies to any person who holds judicial office. The offence is committed when that person corruptly: asks for, receives or otherwise obtains any property or benefit, either for himself or for someone else, in exchange for carrying out, or omitting to carry out, some act in their judicial capacity. The provision also creates an inchoate offence of judicial corruption.

Official Corruption that is not Judicial but relates to the Committing of Offences, section 117 of the Criminal Code 1907

This offence can be committed by a justice of the peace or a person employed in connection with the prosecution of offenders, but who does not act in a judicial capacity. An offence is committed when such a person corruptly: asks for, receives or otherwise obtains any property or benefit, either for themselves or for someone else, on account of doing something, or omit to do something, with a view to corrupt or improper interference with the administration of justice, or the prosecution of an offender. The offence is also committed by any person who: confers, procures or promises any property or other benefit to a justice of the peace or person employed in connection with the prosecution of offenders.

Corrupting a Holder of Judicial Office, section 118A of the Criminal Code Act 1907

This offence applies to any person who: by offering benefits or who through the promise of a benefit of benefits, or by any other corrupt means, influences, a person who holds judicial office or a law enforcement official.

The offence also applies to any person, who being either a judicial officer or a law enforcement official, accepts any benefit or promise of a benefit, on account of doing some act in that capacity.

Office of collusion relating to government contracts, section 33B of the Public Treasury (Administration and Payments) Act 1969

This offence applies to any appointed or elected official who attempts to influence the awarding of a government contract, regardless of whether or not he has any interest (whether legal, beneficial, fiduciary, family or otherwise) in any of the persons bidding for the contract.

Further, if a contractor attempts to gain an unfair advantage when bidding for a government contract by obtaining, from a public officer or from an appointed or elected official, information which is not available to all persons bidding for that contract, the contractor and the public officer or the appointed or elected official commit an offence.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

In terms of law prohibiting the bribery of local public officials:

- the offence of official corruption can be committed by the payer and the receiver;
- the offence of extortion by a public officer prohibits receiving 'any reward beyond his proper pay and emoluments';
- the offence of judicial corruption applies to both paying and receiving 'any property or benefit of any kind';
- the offence of official corruption that is not judicial corruption but relates to the committing of offences applies to paying or receiving 'any property or benefit of any kind'; and
- the offence of corrupting a holder of judicial office applies to both giving and receiving 'benefits or promises of benefits of any kind'.

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The term 'public officer' is defined by both Bermuda's Constitution and the Interpretation Act 1951.

Section 102 of the Constitution defines 'public officer' to mean the holder of any 'public office', and includes a person appointed to act in any public office. 'Public office' is separately defined to include any paid office of the 'public service', excluding:

- members of the House of Assembly or Senate;
- Supreme Court and Court of Appeal judges;
- members of the public Service Commission;
- members of governmental boards; and
- employees of any corporation established by the government for public purposes which is not directly controlled by either the Governor or any government minister, for example a quasi-autonomous non-governmental organisation (or 'quango').

The Interpretation Act 1951, which applies to the interpretation and construction of every act of the Bermuda Legislature, adopts a similar definition. It provides, at section 3, that a 'public officer' means any paid office in the 'public service'. The 'public service' is defined separately to include mean the service of the Crown in a civil capacity in respect of the government of Bermuda.

As noted in question 22, for purposes of the offence of official corruption only, 'public officer' is defined to include members of the Bermuda Regiment and the Bermuda Police Service.

The Supreme Court of Bermuda has held that the meaning given to the words 'public officer' accords with that adopted in most Commonwealth states that have written constitutions, in that it seeks to replicate the British structure of an independent civil service, which in the case of Bermuda has been designated as a 'public service' (see *Junos v Minister of Tourism and Transport* [2009] Bda LR 2).

A temporary holder of non-established or temporary offices, ie, a person employed in the public service on a non-permanent basis, to fulfil a non-permanent role, is to be regarded as 'public officer'. A consultant hired by a government department or ministry is not however, a 'public officer'.

For the purpose of section 33B of the Public Treasury (Administration and Payments) Act 1969, 'appointed or elected official' means a member of parliament, a senator, a person who is appointed or elected to any municipality, parish council or any other public authority, and includes a person who has held any such office at any time within the five years immediately preceding the commission of an offence under that section.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

For the purpose of section 33B of the Public Treasury (Administration and Payments) Act 1969, section 33B(3) provides that an appointed or elected official who bids for a government contract does not commit an offence of collusion relating to a government contract solely by reason of that fact.

There is no blanket prohibition on the participation of public officers in private commercial activities. The Conditions of Employment and Code of Conduct (the Code of Conduct), which form part of the Bermuda Public Service Commission Regulations, recognise that public officers may have private interests that from time to time conflict with their public duties. The Code of Conduct provides that '... there is a reasonable public expectation that where such conflict occurs it will be resolved in favour of the public interest rather than your own'.

Public officers are required to disclose potential conflicts of interest, not only those involving business acquaintances, but also those involving relatives or close friends. Public officers are also subject to a positive obligation to 'stand down' in any decision making process where their independence is compromised.

In the interests of transparency, section 30(6) and (7) of the Bermuda Constitution disqualifies any person from election to the House of Assembly, or appointment to the Senate, where they fail to disclose any interest they have in a government contract within seven days of their nomination as a candidate for election, or within seven days of their appointment to the Senate taking effect.

There exists in Bermuda a convention whereby members of parliament and senators voluntarily register all pecuniary interests which either they, or their spouse, possess, which can give the impression of influencing any action they may take in their legislative capacity. Such interests include remunerated and unremunerated directorships, remunerated employment or other occupational compensation, vocational or trade activities, and the provision of client services which relate to the legislator's position in Parliament or the Senate. Legislators should also disclose corporate interests where the company has a market value of BMD\$50,000 or greater, of where they hold beneficial interests in more than 1 per cent of the issued share capital. The Parliamentary Register of Interests is publicly available online via the Bermuda Parliament website, www.parliament.bm.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The Code of Conduct prohibits public officers from accepting gifts or favours, including free accommodation, free travel and entertainment vouchers, in connection with the performance of their official duties. The prohibition applies not only for gifts and favours they themselves receive, but also gifts and favours offered to members of their family.

Where the provision of gifts, travel expenses, meals or entertainment to a member of the public service in exchange for them doing, or omitting to do, something in the discharge of their office, it may amount to official corruption, which contravenes section 111 of the Criminal Code 1907.

There is no express restriction on providing members of the House of Assembly and Senate with gifts, travel expenses, meals or entertainment. Where it is done with the intention to sway a government minister in the exercise of his discretion, it may contravene section 97 of the Criminal Code, which prohibits the interference with the free exercise by a minister of the duties or authority of his office as such.

In the interests of transparency, members of parliament have adopted a convention whereby voluntary disclosure is given of gifts received which are valued at BMD\$500 or greater, or any material advantage received that has a value 0.5 per cent or greater of the legislator's parliamentary salary. It does not matter whether the gift was received from a local or foreign company, organisation or person. Disclosure should be made where the gift or advantage is received by the legislator, their spouse or a company or organisation in which the legislator or their spouse holds a controlling interest. Disclosure should also be made of any hospitality given or services offered, either for free or at a price below that which is generally charged to members of the public.

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The Criminal Code provisions on corruption and extortion contain no exemptions relating to types of gifts and gratuities. Accordingly, all gifts and gratuities that are caught by the Criminal Code provisions, no matter how small, will trigger liability.

Generally, members of parliament and members of the Senate do not disclose details of gifts, benefits, hospitality, and beneficial shareholdings which are below a specific threshold, see question 26.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Section 392 of the Criminal Code 1907 makes it an offence for private individuals to engage in 'corrupt practices'. A person is guilty of engaging in 'corrupt practices' where he:

- acts as an agent for another and corruptly accepts or obtains a gift or other form of consideration as an inducement or reward for doing (or forbearing to do) any action in relation to his principal's business or affairs, or for forbearing to show favour or disfavour to any person in connection with his principal's affairs; or
- corruptly gives or agrees to give any gift or consideration to any agent as an inducement or reward for doing or forbearing to do any act in relation to the principal's business or affairs, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs.

Directors and officers of companies owe a fiduciary duty towards the company in respect of which they serve as a director, and they must at all times act honestly, in good faith and with a view to the best interests of the company. No director is entitled to earn a secret profit on account of his office. A director or officer is deemed not to be acting honestly and in good faith if he fails on request to make known to the auditors of the company full details of any emolument, pension or other benefit that he has received or it is agreed that he should receive from the company or any of the company's subsidiaries, or any loan he has received or is to receive from the company or any of its subsidiaries; or if he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors his interest in any

Update and trends

As discussed above, it is anticipated that the UK will extend the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to Bermuda relatively soon, with associated domestic legislation being enacted in Bermuda.

Although this has not yet occurred, it will represent a very significant development when it does, whether or not Bermuda seeks to replicate the form and content of the UK's Bribery Act 2010.

Even without comprehensive new anti-corruption legislation yet in place, it is likely that prosecutions for corruption and bribery offences will increase in the future in Bermuda.

One reason for this is the heightened scrutiny that is being applied generally to the conduct of public officials in Bermuda, including by way of the recently introduced offence of collusion relating to government contracts, as discussed above.

Another reason is that there is now statutory protection in place for whistleblowers. The Employment Act 2000 has been amended to introduce protections for whistleblowers who notify authorities of crimes committed by their employers, or where they are directed by their employer to engage in conduct that is unlawful.

An increase in investigations and prosecutions for bribery and corruption offences would be consistent with the fact that there has been a considerable increase in Bermuda in the number of regulatory and criminal investigations and prosecutions for money-laundering and recovery of the proceeds of crime, as a result of the Bermuda government's commitment to comply with international standards in this respect.

material contract or proposed material contract with the company or any of its subsidiaries or his material interest in any person that is a party to a material contract or proposed material contract with the company or any of its subsidiaries.

Section 250 of the Companies Act 1981 makes it an offence for private individuals to corruptly induce shareholders or creditors of a company to secure his appointment or nomination as the company's liquidator.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

A person who is found guilty of official corruption, extortion by public office, judicial corruption, official corruption that is not judicial in nature but relates to the committing of offences, or corrupt practices, is liable to a fine of BMD\$50,000 and/or imprisonment for five years on summary conviction, or an unlimited fine and/or imprisonment for 15 years if convicted on indictment.

A person found guilty of corrupting a holder of judicial office is liable to punishment on summary conviction to a fine of BMD\$50,000 and/or imprisonment for five years, and on conviction on indictment to a fine of BMD\$100,000 and/or imprisonment for 10 years.

A person found guilty of collusion relating to government contracts contrary to section 33B of the Public Treasury (Administration and Payments) Act 1969 is liable on summary conviction to a fine of BMD\$50,000 or to imprisonment for five years, or both; and on conviction on indictment to an unlimited fine or imprisonment for 15 years, or both.

There are a range of other sanctions applicable to the other miscellaneous rules governing bribery and corrupt practices under the Bermuda legislation referred to in question 2.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

No distinction is made under Bermuda statute law between bribes on the one hand, and facilitation payments or 'grease' payments on the other. We are not aware of local bribery laws having been enforced with respect to such payments.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Prosecutions for offences of corruption and bribery are relatively rare in practice in Bermuda, although in recent years, there have

been a number of investigations, and a number of both successful and unsuccessful prosecutions, not all of which have been publicly reported.

In *Soares and Outerbridge v Duffy* [1989] Bda LR 74, the court upheld a conviction for the offence of corrupt practices. In his judgment, Hull J noted that 'this was the first occasion on which persons have been prosecuted for offences under section 392 (1) of the Criminal Code, although it has existed as a crime for many years'.

Although not directly engaging an offence of bribery or corruption, it is of interest that in *Martyn v R* [2006] Bda LR 83, the defendant lost an appeal against conviction for the offence of conspiracy to defraud, by falsely obtaining Bermudian status through the use of falsely notarised birth and marriage certificates.

In *The Commissioner of Police v Bermuda Broadcasting Co Ltd* [2007] Bda LR 40, the Supreme Court of Bermuda had to consider whether to restrain the Bermuda media from publishing confidential police documents relating to a lengthy police investigation into allegations of corruption conducted between 2002 and 2004 regarding the affairs of the Bermuda Housing Corporation. This investigation resulted in a decision taken by the then acting Director of Public Prosecutions in July 2004 not to recommend any prosecution, given the state of the evidence and Bermuda law in this area. The court refused to restrain publication, noting 'the media's constitutional right to inform the public about serious allegations concerning important public figures'. The judgment was upheld both by the Court of Appeal for Bermuda and by the Privy Council in *Commissioner of Police v Bermuda Broadcasting Co Ltd* [2008] UKPC 5.

The most recent reported judgment relating to a local prosecution for bribery and corruption offences is *Cosham v Wilson* [2012] Bda LR 13. The prosecution appealed against the sentence that had been imposed on the defendant by the magistrate. The defendant had been employed by the Bermuda Police Service as a civilian data entry clerk, and she was assigned to the magistrates court where she was responsible for entering traffic tickets onto the court's computer system. That meant that she had access to the database, and could manipulate it. In particular, she could withdraw parking tickets. The prosecution's case was that the respondent had withdrawn 79 parking tickets, nine of which related to a vehicle registered to her sister.

After initially pleading not guilty, she eventually pleaded guilty at trial to offences of fraudulent conspiracy and corruption. In imposing a custodial sentence of 12 months, Chief Justice Ground held that:

These were very serious offences. This young lady was put in a position of trust. She was employed by the police service working in a court environment and she must have understood what that involved and required of her. She was given access to sensitive information and the ability to change it. She did that. The evidence was plain that she was doing it for money.... People who are put in positions of responsibility and trust like this have to understand that if they breach that trust it is not just a matter of a fine. You cannot

buy your way out of these things. Nor is it an excuse to say, as she did, that it was just part of the culture. I do not in fact accept that, but even if it were, if you are offered the opportunity at this level and if you see that those around you are corrupt, then you should stand up to that, and the law will encourage people to stand up for what is right and honest by penalising them if they do something that is wrong and dishonest. The Magistrate should have understood that. He was quite wrong to impose fines. I understand that they were substantial fines but they could not meet the vice that was present here. Corrupt offences like this require sentences of immediate imprisonment and that is what the court should always impose bar really exceptional circumstances. Family circumstances, even young children, are not really exceptional circumstances, and an immediate sentence of imprisonment should have been imposed here.

It is also of interest that in the course of the trial that led to the appeal against conviction in *Bolden v Bolden v R* [2012] Bda LR 34, one of

the defendants made a number of allegations during the course of his evidence of corruption on the part of various public officials. It has been reported that those allegations have been the subject of further investigation, but as yet no further prosecution has been initiated.

More recently, there have been two reported court decisions relating to the powers of the Ombudsman for Bermuda to conduct investigations into maladministration by public authorities, arising out of a specific investigation into the affairs of the Corporation of Hamilton, and its decision to grant a lease to develop the Hamilton waterfront. *In Re the Office of the Bermuda Ombudsman* [2013] SC (Bda) 72 Civ, the Supreme Court of Bermuda held the Mayor and the Deputy Mayor of the Corporation of Hamilton to be in contempt of the Ombudsman's investigations; and in *The Corporation of Hamilton v The Ombudsman for Bermuda* [2014] SC (Bda) 1 Civ, the Supreme Court of Bermuda rejected the Corporation of Hamilton's challenge to the legality of the Ombudsman's investigation into their affairs.

**Sedgwick
Chudleigh**

**Alex Potts
Chen Foley**

**alex.potts@sedgwicklaw.com
chen.foley@sedgwicklaw.com**

EW Pearman Building
20 Brunswick Street
Hamilton HM10
Bermuda

Tel: +1 441 296 9276
Fax: +1 441 296 9276
www.sedgwick-chudleigh.com

GETTING THE DEAL THROUGH

Annual volumes published on:

Acquisition Finance	Life Sciences
Air Transport	Mediation
Anti-Corruption Regulation	Merger Control
Anti-Money Laundering	Mergers & Acquisitions
Arbitration	Mining
Asset Recovery	Oil Regulation
Banking Regulation	Outsourcing
Cartel Regulation	Patents
Climate Regulation	Pensions & Retirement Plans
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection & Privacy	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign Judgments	Restructuring & Insolvency
Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
Gas Regulation	Shipping
Insurance & Reinsurance	Tax Controversy
Intellectual Property & Antitrust	Tax on Inbound Investment
Investment Treaty Arbitration	Telecoms and Media
Islamic Finance & Markets	Trade & Customs
Labour & Employment	Trademarks
Licensing	Vertical Agreements



For more information or to purchase books, please visit:
www.gettingthedealthrough.com



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American Corporate Counsel Association

Published by Getting the Deal Through
in association with Transparency International

