

**OUTLINE OF MIDDLE EAST LAWS ON BRIBERY,
PROHIBITED PAYMENTS AND CONFLICT OF INTEREST**

by

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INTRODUCTION

The Middle East³ has been the situs for many of the well-publicized controversies in the mid-1970s which led to enactment of the U.S. Foreign Corrupt Practices Act.⁴ Perhaps as a result, some Westerners have concluded that bribery may be more prevalent in the Middle East than in the Western world, for reasons

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 3. For purposes of this chapter, references to the Middle East generally refer to the Arabic-speaking countries of the region, excluding Algeria, Morocco and Tunisia.
 4. House Comm. on Interstate and Foreign Commerce, Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 640, 95th Cong., 1st Sess. 4 (1977); Senate Comm. on Banking, Housing, and Urban Affairs, Foreign Corrupt Practices and Domestic and Foreign Investment Improper Disclosure Acts of 1977, S. Rep. No. 114, 95th Cong. 1st Sess. 10, reprinted in [1977] U.S. Code Cong. & Ad. News 6306; *Multinational Corporations and United States Foreign Policy, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. 848-49 (1975); Hearing and Markup Sessions of the House Comm. on International Relations, 94th Cong. 2d Sess. 5 (1976); The Activities of American Multinational Corporations Abroad, Hearings before the Subcomm. on International Economic Policy of the Comm. on International Relations, House of Representatives, 94th Cong., 1st Sess. 17 (1975).*

including culture, politics, and religion.⁵ This is vaguely reminiscent of the reportedly widespread prejudice in the Middle East, over thirteen centuries ago, that Christians and Jews were particularly susceptible to bribes and therefore unsuitable for employment in government.⁶

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5. See, e.g., Hill "Foreign Representatives: Saudi Law And the FCPA", Middle East Executive Reports (March, April and May 1990) (referring to the book by a self-proclaimed middle-man or "fixer", Aburish, Pay-Off - Wheeling and Dealing in the Arab World (1985)); Hershey, "Group that Promotes Ties with Iraq Feels Glum", N.Y. Times, 20 August 1990, p.C8 (an official of U.S./Arab trade organization observing that "the approach of foreign companies has historically been 'to find a prince to be your agent' and to be prepared to offer bribes"). One legal commentator, while acknowledging that bribery is wide-spread throughout the world, suggested that the general Middle East "legal system model" (as constructed by that author) "has fewer inherent checks against arbitrary government action than does the American model"; and that "questionable payments" by foreign companies may therefore be the only method for ensuring fair treatment by the ("model") Middle East ruler. See McLaughlin, "The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis", 46 Fordham Law Review 1071 (1978), at 1094-97. That author makes some brief references to bribery laws in the Middle East, but clearly appears unaware of the relatively substantial body of local jurisprudence (treatises and court decisions) on bribery and related laws. Of course, there are substantial difficulties to overcome in researching the laws of the Middle East, where scholarly treatises and published court decisions are written in a language -- Arabic -- which is relatively inaccessible to most Western lawyers.
 6. The suggestion reportedly came from the Muslim Caliph Omar. F. Rosenthal, "Gifts and Bribes: The Muslim View", Proceedings of the American Philosophical Society, 108 (1964) p. 137, footnote 12.

Such perceptions (or prejudices) could certainly be the basis for a careful and scholarly investigation.⁷ But in the meantime, and in the relatively recent aftermath of the Pentagon bribery scandals⁸ and the Chicago "greylord" judiciary bribery scandals,⁹ to pick but two recent and well-publicized U.S. examples, it seems more constructive for the international commercial lawyer to recognize that bribery is an evil encountered, and generally condemned, in both Middle Eastern and Western legal systems.¹⁰ To that end, we offer the following brief and preliminary outline on some of the more important laws,

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7. Suse, "Questionable Payments in the Middle East: Potential Liability of American Corporations", Journal of Comparative Corporate Law and Securities Regulation 101 (1982), at p. 117-18. Although it may be useful to examine the incidence and practical degree of bribery in particular countries or regions, such a study should be sensitive to the relative economic resources and power available of that country, its political, judicial and business systems, and the like.
 8. See, e.g., Shenon, "Pentagon Inquiry Hears of Payoffs From Contractors", New York Times p. 1 (16 June 1988); Drew and Povich, "Defense probe focuses on a corrupted system", Chicago Tribune p. 1 (3 July 1988); "The Defense Scandal" (cover story), Business Week (4 July 1988).
 9. See, e.g., Keegen, "Inside Greylord", Chicago Tribune, Tribune Magazine section (December 17, 1989), p. 12; Tuohy and Warden, "The Boys in the Bag", Chicago Tribune, Tribune Magazine section (January 15, 1989), p. 1.
 10. Khafagi, "Bribing Negotiators of International Contracts Under Egyptian Penal Legislation -- 'Commissions'", 66 Al-Muhamah 38 (1982) (Egyptian bar publication).

regulations and government policies against bribery, prohibited payments and conflicts of interest in the Middle East.¹¹

Middle East governments have enacted legislation prescribing criminal liability (jail or imprisonment) for those involved in bribery. These "modern" bribery laws (usually derived from European penal codes) have often been influenced by, and are consistent with, early Islamic law precepts prohibiting bribery.

Middle East countries have also enacted other related laws containing punishments (generally short of jail or imprisonment) for certain activities involving prohibited payments and conflicts of interest. These latter laws have typically included rules which limit the use of commercial agents, intermediaries or brokers (e.g., special commercial agency laws or tender regulations) and which prescribe some parties with whom one may not have business dealings (e.g., civil servants regulations).¹²

I. Bribery Laws

11. The information in this article is based on materials currently available in our law firm's Cairo and Chicago offices. The purpose of this chapter is generally to summarize and analyze certain bribery and related conflict of interest laws, but it is not intended to provide legal advice on any specific aspect of local law.

12. Suse, supra note 7, at 102.

A. Shariah (Islamic Law)

The primary sources of Islamic law are the Koran (the revealed word of Allah) and the sunna (the sayings and actions of the Prophet Mohamed). These sources expressly prohibit bribery. For example, the Koran states:

Do not consume your property among yourselves wrongly, nor use it with judges in order to knowingly and wrongfully deprive the property of others.¹³

In addition, various sayings (hadith) of the prophet Mohamed forbid bribery, the most notable being "God curses the briber, the recipient of the bribe and the intermediary between them"; and "God curses the briber and the recipient of the bribe in securing a judgment".¹⁴

13. The Koran, Chapter Two ("The Cow"/al-baqara), verse 188. Under a literal translation of the Arabic text of this verse, the words "the property of others" may also mean "property of the people" or "public property". See Abdullah Yusuf Ali, trans. Glorious Qur'an v.1, at p. 75 fn. 201.

14. And see Ghanem, "Commercial Litigation in the Yemen Arab Republic", 2 Arab Law Quarterly 230 (1987), at p.238 and n.4. Some experts debate over whether the hadith was limited to judicial officials, or broader to include other administrative government officials. Rosenthal, supra note 6, at p. 135-144. "[A]ccording to at least one school of law, a judge (Qadi) in an Islamic court is formally forbidden to receive any gifts. Ruxton, Maliki Law (1916) at 280, quoted in Suse, supra note 7, at fn. 18.

Another somewhat lesser-known hadith relates to a government deputy who, upon returning from collecting alms with much wealth, insisted that such wealth came from "personal" gifts given to him. The prophet Mohamed is said to have rebuked the official and told him that he should have remained at home and seen how many "personal" gifts he would have received: "What is the matter with certain people, who we employ to oversee that which God has made us stewards, who say ... 'This is for you and this other was given as a gift for me'? Why doesn't he sit in his father's house and see whether or not anyone gives him a gift?"¹⁵

Islamic Law divides punishable acts into three categories. First, "huddud" crimes, the penalties for which are specifically defined or established in the Koran.¹⁶ Second, "qisas" crimes,¹⁷

15. This hadith, related by Abu Hamid al-Saadi, and the other two hadiths quoted above, are found in the Explanatory Memorandum to the Saudi Arabian Regulations for Combatting Bribery, Royal Decree M/16 (1962). See Rosenthal, supra note 6, at p. 137. It was also recognized that bribery was prohibited in seeking to obtain a judicial post. See Schacht, An Introduction to Islamic Law (1964), p. 188.

16. The Koran contains defined penalties for Huddud crimes. Prosecution and punishment for such crimes are mandatory. Huddud crimes are (i) illicit sexual relations, (ii) defamation, (iii) drinking alcoholic beverages, (iv) theft, (v) robbery, and (vi) apostasy. See Coulson, "The State and the Individual in Islamic Law", 6 International and Comparative Law Quarterly 49 (January 1957), at p. 53.

17. Qisas crimes are not always given a specific criminal definition or penalty in the Koran. What constitutes such crimes has evolved instead through academic, judicial, and even political supervision. These crimes are, however,

which involve aggression against individuals, which are homicide and wounding. Third, "ta'azir" crimes¹⁸, which include crimes committed against public order, the punishment for which is left to the discretion of the judge, depending upon the size and nature of the wrongful act committed by the criminal.

The crime of bribery is a ta'azir crime. Although various Islamic law sources clearly prohibit bribery, the penalties for that crime were not specified and therefore a matter for the judge to determine. Apparently the most likely penalty for a government official's acceptance of a bribe was dismissal from office. Other penalties were also possible, such as imprisonment, flogging, public exposure of the crime, and monetary fines (presumably including forfeiture of the bribe).¹⁹

specifically listed within the Koran. They are (i) murder, (ii) voluntary and involuntary homicide, (iii) intentional and unintentional crimes against the person. See Bassiouni, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", The Islamic Criminal Justice System (1982), at p. 24.

18. Ta'azir, as is suggested by the basic meaning of the word, comprises various types of punishment by which the judge (qadi) "reprimands" the offender. Khadduri and Liebesny (eds.), Law in the Middle East (1955), Chapter IX: "Uqubat: Penal Law", p. 224 at p. 231. In contrast with huddud and qisas penalties, which are of an essentially retributive nature, the primary purpose of ta'azir penalties is "to serve as a correction for the offender himself and a deterrent for others". Coulson, supra note 16 (footnote omitted).
19. Rosenthal, supra note 6, at p. 143; Khadduri and Liebesny, supra note 18, at pp. 231-32.

According to some Islamic law sources, a party is permitted to pay a bribe in order to obtain a right or prevent an injustice. Perhaps in this light, Article 143 of the Iranian Criminal Code (1925-26) provides: "Should it be established that the person offering a bribe was forced to bribe in order to protect his legitimate rights, he shall be exempt from punishment." However, even in these circumstances, it is not permissible to accept the bribe.²⁰

There are examples of modern legislation influenced by the above-described Islamic law rules.²¹ For example, the Yemen Arab Republic Draft Law on Crimes and Shari'a Penalties invokes the above-quoted Koranic verse as the basis for prohibiting bribery. Article 132 of that draft law specifies up to ten years' imprisonment for a corrupt public servant and up to three years for the person offering the bribe.²² Saudi Arabia, one of the few Middle East countries which has not adopted a Western-styled

20. See, e.g., Rosenthal, supra note 6, at p. 140 and 142; Khafagi, supra note 10, at p. 39. Compare the 1977 Senate Report, supra note 4, which observed that "a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose".

21. The somewhat notorious Sudanese Penal Law is beyond the scope of this chapter. See, e.g., Gordon, "The Islamic Legal Revolution: The Case of Sudan", 19 International Lawyer 793 (1985).

22. Ghanem, "The Development of the Hadawi Doctrine", 4 Arab Law Quarterly 3 (1989), at p. 14.

criminal code, has nonetheless enacted bribery regulations, Royal Decree M/16 (1962). The explanatory memorandum to the Saudi bribery regulations emphasizes the Islamic law basis for punishing bribery, but also refers to more general reasons for these regulations:

Safeguarding government administration from corruption requires the pursuit of any government employee who exploits his position or trades on his influence, whether this exploitation is made as the result of a promise or a threat, and whether this influence is real or claimed. This is done out of concern for the integrity of government administration and to safeguard the public interests which public employees oversee.

This explanation could equally be used to explain the basis for the "secular" bribery provisions of penal codification like the Egyptian Penal Law, just as many of the Saudi bribery rules parallel the bribery provisions of the Egyptian Penal Law. Assuming that the Saudi regulations were derived from Egyptian or other penal code sources, such borrowing (or "reception") is not inconsistent with the Islamic law concept of ta'azir crimes, the rules and punishments for which the judge or legislator is permitted to develop and elaborate.²³

23. See, e.g., Hosni, "Islamic Fundamentalism and the Criminal Law", L'Egypte Contemporaine 5 (January - April 1988), at p. 16.

B. Egyptian Penal Law

In most Middle East countries today, Western criminal legal systems have been enacted, i.e., national penal laws and criminal procedure laws developed according to Western (continental/civil law) patterns. Two factors had particular significance in this development.

First, Islamic law generally had not worked out an adequate comprehensive penal law system; as a result, Muslim governments historically had more freedom in this area of law to develop their own decrees.²⁴

Second, the existence of European penal law codifications made it relatively easier for Middle Eastern countries to "receive" or adopt and adapt such penal laws.²⁵ Such penal codes were among the earliest Western-style laws adopted in the Middle East -- for example, such penal codes were first enacted in Turkey in 1858 and in Egypt in 1883.²⁶ Such "reception" of

24. Khadduri and Liebesny, supra note 19, at p. 223.

25. See Liebesny, "The Impact of Western Law in the Countries of the Near East", 22 George Washington Law Review 127 (1953).

26. Dr. Naguib Hosni, an Egyptian criminal law scholar, offers the following perspective: "[The Islamic legal system] was replaced by Western laws during a period of colonization, without the consent of the people of these states. Hence, the application of Western laws was considered as an aggression against an element of nationality and sovereignty. The claim for the reapplication of Islamic laws is a sort of

European law to the Middle East has become more selective over the course of the 20th century, however, particularly when compared with the wholesale reception which existed in the 19th century: by adopting different codes (e.g., penal, commercial, civil) from different European countries, by picking the best provisions from various codes and legal writings,²⁷ and most recently by adapting Western principles in those codes to the Islamic legal traditions of the region.

For illustrative purposes, we concentrate our analysis on the relevant bribery provisions of the current Egyptian Penal Law (enacted in 1937, but reflecting subsequent amendments). The Egyptian bribery provisions are among the broadest and most detailed bribery rules in the Middle East. (A translation of these provisions is appended to this chapter.) In fact, the Egyptian bribery provisions have been criticized as excessively complex, and their punishments as excessively severe. A revised draft penal law in 1966 attempted to address these criticisms, but that draft was not enacted.

revendication [sic] of sovereignty and a response to national [and religious] sentiment. Hosni, supra note 23, at p. 11.

27. For example, the Libyan penal code had French origins for its general criminal principles and Italian origins for its specific criminal rules. Other examples of such selective reception are the criminal codes of Lebanon and Syria. Liebesny, supra note 25, at p. 139.

Bribery is a serious crime under Egyptian law, especially when it involves a government employee (also referred to in the Egyptian Penal Law as a "public official" or simply an "official"). Although private sector employees who are recipients of bribes are also punished under the Egyptian Penal Law (as discussed below), the bribery provisions are primarily directed to public employees. The provisions of the Egyptian Penal Law dealing with bribery are contained in that portion of the Penal Law covering "crimes harming the public interest". (Other such crimes are the misappropriation of public funds and forgery.)

The prohibition against bribery is to ensure that the government will function properly, and that no public employee will use his position or influence to obtain any benefit or realize any personal gain. Bribery involves the trading, or "peddling", on a position (office). It requires two parties: first, the official requesting or accepting a payment or a promise in exchange for performing (or refraining from performing)²⁸ a function of the position -- the recipient of a bribe; and second, the briber, one who makes the offer of a bribe or simply agrees to pay the bribe requested. The primary aspect of the crime of bribery is the conduct of the official; bribery

28. While most bribery laws contain provisions which apply equally to a public official's act or abstention from an act, the Saudi Arabian bribery law contains separate articles prohibiting bribery in exchange for an official's action (Article 1) and for abstention therefrom (Article 2).

is deemed to have occurred as soon as the official actually and seriously agrees to a payment or promise with the intention of abusing the duties of the position.²⁹ Thus, the primary focus in bribery under Egyptian law is on the official. Nonetheless, as discussed below, separate provisions and crimes have been developed for punishing the briber and any intermediary.

1. Elements of Bribery

There are three elements needed to establish the crime of bribery under Egyptian law: (a) the status of the recipient of the bribe as a "public official"; (b) the so-called "material" element, the gift, benefit or promise thereof; and (c) the requisite criminal intent. These three elements of bribery are analyzed in further detail in the following discussion.

(a) The "public official" and "official duties"

29. Mostafa, Treatise on the Penal Law (8th ed. 1982), Specific Section (Al-Qism Al-Khas), Part 1, Chapter 1, "Bribery", p. 9. The following analysis relies primarily on this late scholar's commentary on the bribery provisions of the Egypt Penal Law. See also Hosni, Treatise on the Penal Law (Cairo 1987), Specific Section (Al-Qism Al-Khas), Part 1, Chapter 1, "Bribery", p. 14.

According to Article 111 of the Egyptian Penal Law, "public officials"³⁰ (for purposes of these bribery provisions) are considered to be:

- (i) Employees in departments affiliated with the government or those under its supervision.
- (ii) Members of the general or local legislative assemblies, whether elected or appointed.
- (iii) Arbitrators and experts, debtors' trustees, liquidators and judicial receivers.
- (iv) Any person entrusted with public service.
- (v) Members of the boards of directors, managers, and employees of associations,

30. The definition and application of a category of "public officials" is limited to the specific text for which that definition is created, such as the crime of bribery. For example, the scope of the term "public official" is different for purposes of instituting public lawsuits against officials under Article 63 of the Egyptian Criminal Procedure Law, i.e., the term does not apply to employees in nationalized companies or those companies in which the state shares in its capital. Mostafa, supra note 29, at pp. 15-16.

companies, societies, foundations or establishments, if the state or one of the public organizations contributes to its funding at any level and in any form whatsoever.³¹

The Egyptian courts also have decided that certain organizations, as indicated in their articles of associations and the like, are "public" and therefore workers in such organizations are considered public officials.

EXAMPLES: A boat pilot working in the Suez Canal is a public official, because the Suez Canal Authority administers a public utility, i.e., canal traffic. Similarly, the Public Authority for Agrarian Reform is a "public" entity, its property is public property, and its employees are public officials. (The same conclusion applies to employees in public establishments for flour and rice mills, and public cooperatives.)³²

As for employees in private-sector type companies, they are not considered public officials, even if the employer had been nationalized or government/public departments or

31. Compare Articles 16(4) and 229 bis of the Libyan Penal Law, Law No. 3 (1955) as amended.

32. Mostafa, supra note 29, at pp. 18-19.

organizations participate in that company. The Egyptian Court of Cassation has held that the nationalization of companies which took place in Egypt in 1961,³³ and the resulting transfer of ownership to the Egyptian government, did not change the nature or the status of the (private) employees in the nationalized companies.³⁴

Under Egyptian rules on bribery, trading on one's position is not deemed to occur unless the relevant (requested and/or promised) act was within the authority of the official.³⁵ 'Duties of the position' are understood as any act within the legal scope of the position assumed by the official. Where the act is within the official's competence, the Egyptian bribery law does not distinguish between whether the act requested or abstained from was right or not, fair or unfair, in other words, whether or not approved by regulations.

EXAMPLE: Although the cook at a government orphanage did not have primary responsibility for inspecting the

33. See Egyptian Law No. 117 (1961).

34. Mostafa, supra note 29, at p. 19. As discussed in section I.B.4. of this chapter, infra, other provisions of the Egyptian Penal Law have been added to apply to some technically "private sector" employees of public companies.

35. Compare the complaint filed in SEC v. Ashland Oil, Civil Action No. 86-1904 (D.D.C. 1986), published in 2 FCPA Reporter 696.95.

food delivered to that orphanage, that cook (by virtue of his job) was in a position to inform the proper authorities of any unwholesome food delivered to the orphanage. Therefore, a payment made to the cook -- to induce him to overlook the delivery of spoiled food -- was bribery.³⁶

Moreover, this element of the crime of bribery is satisfied even if the official wrongly believes or claims that the requested/promised act is within the official's duties. Government work will be equally harmed by this "illusory competency". The public interest to be protected is not only the integrity of government work, but also the reputation of the government and the public's trust in it. If an official in the latter circumstances has not actually traded on government work, he has nonetheless traded on the position itself.³⁷ Thus, this element of bribery is established even if the act which the official was asked to perform is indirectly related to his duties.

(b) The benefit (a promise or a gift)

36. Mostafa, supra note 29, at pp. 26-27.

37. Id., at pp. 31-32.

The benefit constituting the "bribe" may be the promise or payment of money received or requested by an official, or the briber's agreement to discharge a debt of the recipient of the bribe. Similarly, the benefit may be implied from the terms of a contract. Thus, any special benefit which an official obtains, for example, by selling his personal property for a price greater than its true value, or by purchasing property for himself at a reduced price, or by any other such imbalanced contract arising between the briber and the recipient of the bribe, is considered a "benefit".³⁸

The concept of benefit is not limited to a material (i.e., economic or financial) benefit. Thus, Article 107 extends punishment to the official who receives a benefit without precise monetary equivalent, such as obtaining employment (or promotion) for one of the official's relatives.³⁹

EXAMPLE: Judge A was able to obtain a job for his uncle in the offices of Merchant B, in exchange for ruling in favor of Merchant B in a court case before

38. Id., at pp. 39-40.

39. Article 105 of the Egyptian Penal Law would also prohibit an official from undertaking official acts (or abstention therefrom) as a result of so-called pleading or intercession (i.e., without promise or gift). Although such an act is not bribery, it is a similar concept, and therefore its legal text is included in the same general section with bribery crimes. Mostafa, supra note 29, at 41-42.

him. In these circumstances, Judge A has received a "benefit" for purposes of bribery rules.⁴⁰

The Egyptian bribery law does not make a distinction between the benefit which an official obtains for himself and the benefit requested or accepted for another party. Articles 103, 103 bis, 104 and 104 bis of the Penal Law applies bribery principles to "every public official requesting [a benefit] for himself or for another" (emphasis added), and Article 107 states that: "Any benefit obtained by the recipient of the bribe, or by the person designated by him [to receive the bribe] or knowing and agreeing to it, shall be considered a promise or a gift".⁴¹

The Egyptian bribery provisions are so broadly drafted that they reach virtually all forms of trading on a position or its duties (or an attempt to do so), regardless of what might be called the "timing" of the benefit. An official may be deemed a recipient of a bribe even though he did not actually accept a payment; and bribery may exist even absent an agreement for this between the official and the other party. The Egyptian bribery law has made an official's mere request a completed crime, even if such a request was not accepted by the

40. Id., at p. 40.

41. Id., at pp. 40-41.

other party, since an official who offers his position for sale is no less a criminal than one actually completing the bribery transaction.

The "usual" timing of bribery is when the recipient of the bribe receives a sum in advance in exchange for performing (or abstaining from) an action. However, bribery may exist even if the recipient of the bribe does not obtain a benefit paid in advance, for bribery is deemed complete when the recipient of the bribe accepts a promise to pay a benefit at a later time. The crime of bribery would not be conditional on the briber's actual subsequent payment of the bribe -- the official (by his mere agreement to a later payment) would have already traded on his position, and the public interest would have already been threatened by the official's abuse of his position.

Under a narrow definition of "bribery", the trading on a position is not deemed to have occurred unless the benefit or bribe is intended to be in exchange for the act (or the abstention) requested. This would require that the bribery agreement be prior to the official's performance (or abstention) requested. However, an official's acceptance of a gift after performance of the requested act (or abstention) without a prior agreement should not be permissible, for the official is entrusted to perform the duties of his position without receiving any compensation other than that which the government provides to him. Therefore, some penal laws stipulate that the official's action in this latter case is a special crime, if not technically

bribery, then very close to it. The Egyptian legislator adopted this approach.⁴²

(c) Criminal Intent

In accordance with general principles of criminal law "intent", the crime of bribery is not deemed to have occurred unless the recipient of the bribe realizes, at the time of the request or acceptance of a promise or the taking of a gift, that this is the reward for performance (or abstention) of a duty within his position, or which he claims or incorrectly believes is part thereof. If an official accepts a gift from a person believing that it was presented innocently, then the official has not committed bribery.

It is necessary that the acceptance on the part of the official be serious and true; thus, if he pretends acceptance of the offer in order to facilitate the authorities' apprehension of the offeror flagrante delicto, then the true acceptance by which the crime is completed does not exist, and the matter is no more than an offer without acceptance, for which only the one making the offer is penalized, in accordance with Article 109 bis.

42. Id., at pp. 38-39.

Criminal intent of both the official and the payor is an essential element of the crime of bribery. Thus, for the payor to be guilty of bribery, he must have intended to reward the employee for what he has done or to induce the employee to perform or to refrain from performing an act or to misuse his office.

EXAMPLE: Bribery should not be deemed to exist in circumstances where a farmer offers to pay money to the driver of an automobile in exchange for transporting the farmer's sugar cane crop, if the farmer did not know that the driver was a public official and that the automobile was government-owned.⁴³

Criminal intent may be proven in many ways, and whether from direct or circumstantial evidence. It is not necessary that such intent be expressly declared by the recipient of the bribe or by the briber orally or in writing. In deciding whether the element of criminal intent is present, the court is guided by the surrounding circumstances of the arrangement or the transaction. The burden of proving criminal intent is, of course, placed on the prosecuting authority of the government.

43. Id., at p. 44.

2. Punishment of Bribery

(a) Penalty on the recipient of the bribe

Under Articles 103 and 103 bis of the Egyptian Penal Law, the recipient of the bribe is punished by life imprisonment with hard labor and a fine not less than 1,000 pounds and not more than what was given or promised to him. If the intent of the bribe was to make the recipient of the bribe abstain from a function of his position or to violate its duties or to reward him for what he actually had done therefor, then Articles 104 and 104 bis provide that in addition to the imprisonment punishment, he would be penalized by double such fine. The doubled fine is apparently justified because the public official/recipient is not only trading on his position by accepting the bribe, but also is derelict by abstaining from the performance of his job.

Article 110 provides that "In all cases, confiscation will be ordered for what the briber or the intermediary paid as a bribe, in accordance with the preceding articles." Confiscation is a supplementary punishment, and in this instance an obligatory one. In all other cases, the confiscation is subject to the rule of Article 30 of the Penal Law. Thus, the rights of an innocent third party will be safeguarded. (An innocent third party is an

individual who does not participate in the bribery and who had an in-kind claim to the gift presented.)

If the judge imposes the felony punishment on the recipient of the bribe, this results in mandatorily depriving the felon of his rights and privileges as provided in Article 25 of the Penal Law. Thus, the official is dismissed and removed from membership in general or local or similar legislative bodies. The official may be shown leniency and convicted to a jail sentence in lieu of the felony penalty, in which case (under Article 27 of the Penal Law) he is dismissed for a period not less than twice the period of the jail term for which he was sentenced.

In accordance with Article 108 of the Egyptian Penal Law, if the purpose of a bribe was to commit an act which the law punishes more severely than that for bribery, then the recipient of the bribe shall be punished as provided for such other act, in addition to the fine provided for the crime of bribery.⁴⁴

A public official who commits bribery is also subject to disciplinary penalties, essentially a matter of administrative (rather than criminal) law. The disciplinary case is separate

44. Id., at pp. 45-49. Article 32 of the Egyptian Penal Law provides that if a single act constitutes more than one crime, the court shall apply the sentence for the crime providing the most severe punishment.

from the criminal case, and neither one is suspended because of the other. Moreover, the judgment issued in either case does not affect the other case.⁴⁵ There are different rules where both criminal and civil actions are involved. For example, under Article 265 of the Egyptian Criminal Procedures Law, Law No. 150 (1950) as amended, a civil action filed before the civil courts must be stayed until a final judgment has been issued in the related criminal action, regardless whether the latter action was initiated before or during the civil action. This stay of the civil action will only apply, however, if both cases arise from the same act or cause.

(b) Penalty on the briber (or intermediary)

Under Article 107 bis of the Egyptian Penal Law, the briber and the intermediary are considered accomplices in the crime of bribery if it takes place, and shall receive the same punishment as the recipient of the bribe.⁴⁶

45. Khafagi, supra note 10, at p. 41.

46. Article 12 of the Saudi bribery law is somewhat unusual for Middle East bribery laws, in that it includes the penalty of blacklisting. Suse, supra note 7, at p. 116. In addition, however, there are such additional penalties applicable to the briber but contained in other relevant laws. See footnote 55, infra.

(c) Exemption from Punishment for the briber (or intermediary)

As discussed above, the primary focus of the Egyptian bribery law is on the official. It is in this light that Article 107 (bis) provides: "The briber or the intermediary shall be exempted from punishment, however, if he reports the crime to the authorities or confesses to [the crime]." When this particular provision was initially enacted, it addressed what was seen at the time as wide-spread bribery in government departments and the inability of proving it. It was therefore decided that, in order to safeguard the public interest, bribers and intermediaries should be encouraged to assist the government in proving such bribery. This is accomplished by exempting them from punishment if they report or confess to the bribery. The exemption is reserved to the briber or the intermediary. The recipient of the bribe may not avail himself of it.

As noted above, there are two ways to obtain the exemption from punishment: reporting the bribery or confessing to it. The difference between the two is that reporting the bribery takes place before the discovery of the crime, whereas confessing the bribery occurs after the discovery of the crime, the apprehension of the defendants and commencing the investigation of them.

The Penal Law does not establish any special detailed or formal conditions as to the confession; it is described without any restriction in terms of time or place or manner. Hence, the judge should not place any restrictions on it, but confirm the meaning of the confession, and to verify that the confession is true, clear and unambiguous.⁴⁷

3. Aiding and Abetting; and Attempted Bribery

In some legal systems, bribery is considered a crime committed by the public official, with the payor of the bribe simply being an accessory. Under such a legal system, the payor (the accessory) cannot be convicted unless the public official (the principal) is convicted.

This general theory of "accessory" is consistent with some provisions of the Egyptian Penal Law, which provides that the crime of the accessory is derived from the crime of the principal. According to Article 40 of the Egyptian Penal Law, an accessory to a crime is anyone who incites, conspires with or aids, in any manner, any person who commits a crime. According to Article 41 of the Egyptian Penal Law, "any person who participates in a crime will be subject to the same punishment designated for the primary participant in the crime, unless there

47. Mostafa, supra note 29, at pp. 53-55.

is a specific provision in the law stipulating otherwise." There is no specific provision in the Egyptian Penal Law which provides for a different penalty for an accessory to bribery. On the contrary, according to Article 107(a) of the Egyptian Penal Law "the payor of the bribe and any intermediary shall be subject to the same punishment designated for the crime." Accordingly, an accessory will be subject to the same punishment provided for the primary participant.

If the briber's actions were left to general penal law rules of "accessory", however, the mere offer of a bribe could not be punished -- the attempt to bribe a public official would not be penalized if it did not result in the official's acceptance of the bribe. As the Egyptian court of cassation said:

Bribery has not been committed by the briber unless the public official seriously intends to accept it, but not when he pretends to accept the bribe, since then -- as in the categorical refusal -- there is not a real trading by the official of his position ... and the abuse of the official's position does not exist.⁴⁸

As a result, the Egyptian Penal Law now prohibits, in article 109 bis (First), the offering of a bribe. As was

48. Id., at pp. 11-13.

observed of the similar article of the Italian Penal Law: "[This article] provides for a specific crime, which is inciting an official to accept a bribe. Even if the offer is not accepted, the public interest is realized by providing a penalty on anyone who attempts to undermine the responsibility of the official ... ".⁴⁹

4. Private Sector Employees

The crime of bribery, under the Egyptian Penal Law, is considered a felony if a public official was the recipient of the bribe (principal) or was otherwise involved. Under Article 106 of the Egyptian Penal Law, however, if the employee was working in the private sector, the bribery is deemed a misdemeanor.⁵⁰

EXAMPLE: Under similar provisions of French bribery law, a manager of a hotel was penalized for bribery when, without the hotel owner's knowledge, that manager accepted money from a butcher in exchange for keeping the butcher's name on the hotel's list of acceptable suppliers.⁵¹

49. Id.

50. Id., at pp. 24-25.

51. Id., at p. 25.

However, the Egyptian nationalization of most large businesses in 1961, generally including all Egyptian joint stock companies, greatly expanded the importance of the so-called Egyptian "public sector" (government owned) company. As a result of this new situation, the Penal Law was amended in 1962, adding Article 106 bis (A) to cover the acts of management and employees of joint stock companies. The explanatory memorandum for this 1962 amendment stated: "[Article 106 bis (A)] was added to fit the development of a new society and harmonize with its requirements. Thus, it explicitly states that bribery involving shareholding companies shall be punished in the same manner as bribery involving public positions."⁵²

The 1962 amendment made bribery a felony crime for employees of joint stock companies. (There is some disagreement between Egyptian jurists on whether the felony applies only if the joint stock company is providing services for the public benefit.) In essence, these employees were considered public officials for purposes of the bribery provisions of the Penal Law. Although some underlying circumstances changed after the Egyptian Open Door Policy in 1974, when many private sector joint stock companies were formed, the provision of Article 106 bis (A) remained unchanged. The distinction between a felony and a misdemeanor punishment in these circumstances is significant:

52. Id., at pp. 22-23.

the difference between, respectively, 7 years or 2 years imprisonment.

Despite this uncertainty, the legislative history of Article 106 bis (A) reveals the intention of the legislator to apply that felony provision of the Penal Law to public officials, albeit including employees in (at least some) government-owned companies. We are not aware of any instance in which a private sector employee was prosecuted in Egypt in a bribery crime as a principal (recipient of a bribe), although the Egyptian public prosecutor has on a number of occasions indicted a private sector employee before the criminal courts as an accessory (payor) or an intermediary. This confirms that the attitude and practice of the prosecutor in applying the bribery provisions is primarily directed to public officials.

5. Miscellaneous Penal Law Provisions

The Egyptian Penal Law does not adopt the principle of criminal responsibility of juridical persons except with respect to specific economic crimes which are not relevant to this discussion. The Egyptian Court of Cassation has long ruled that "juridical persons are not criminally responsible for crimes

committed by their representatives. The persons who commit the crime are the ones who are personally responsible".⁵³

Egyptian penal law recognizes the concept of extraterritoriality. According to Article 2 ¶1 of the Egyptian Penal Law, the law applies to "any person who commits outside the country an act which makes him a principal or an accessory in a crime committed wholly or partially in Egypt".⁵⁴ Article 3 of the Egyptian Penal Law expands the scope of this criminal responsibility by providing:

Any Egyptian who, while he is outside Egypt, commits an act considered a felony or misdemeanor under this law shall be punished according to its provisions if he returns to Egypt, provided that the act committed was punishable according to the law of the country in which the act was committed.

Finally, under Article 15 of the Egyptian Criminal Procedures Law, there is a statute of limitations according to which felony actions shall abate after the passage of ten years from the date the act is committed, while the period is three years for misdemeanors and one year for infractions.

53. But compare Article 65 of the United Arab Emirates' Penal Law, Federal Law No. 3 (1987).

54. See also Suse, supra note 7, at pp. 118-19.

C. Other Laws Concerning Bribery

In addition to the relevant bribery provisions of penal codes, there are a significant number of other Middle East laws and regulations with punishments for bribery. For example, constitutions and civil service regulations prohibit government service or employment of individuals who have been guilty of bribery crimes, and tender laws disqualify bidders guilty of such crimes.⁵⁵

II. Prohibited Payment Laws

Foreign businesses operating in the Middle East may wish (or be required) to employ a local commercial agent, for example, in seeking government contracts. In recent years, however, several Middle East governments have amended their commercial agency laws to prohibit the use of or payment to any commercial agent or intermediary, at least in certain contracts. The scope of these laws varies widely, and the following is intended merely as a sampling.⁵⁶

55. For example, tender laws generally contain explicit penalties against parties guilty of bribery. Article 47(a)(3) of Syrian Decree 195/T, regulating certain public sector contracting, provides for blacklisting those who have committed bribery.

56. See Suse, supra note 7, at pp. 121-22.

A. Agency in Military Sales

One area of particular restrictions and rules is in the sale of military equipment, armaments and the like. (The U.S. federal government similarly has rules in this area.)⁵⁷ Although it is extremely difficult to provide definitive advice on unwritten government policies, particularly when those policies are subject to revision or change based on administrative discretion, the general outlines of the military procurement policies of Middle Eastern countries appear to be generally as follows. The prohibition generally applies not only to the payment of commissions to a commercial agent or intermediary in connection with military sales, but also to the use of a commercial agent or intermediary in such sales.⁵⁸ Usually, the relevant Ministry will have a two-fold rationale for its policy: to ensure that prices of products it purchases are not increased by the amount of commissions or contingent fees paid by the foreign supplier, and to ensure that the products purchased are of highest quality and were not purchased due to the influence of a commercial agent or intermediary.⁵⁹ These restrictions are sometimes contained in

57. See, e.g., Cartwright and Janetatos, "How Can Contractors Pay Their Foreign Sales Representatives?", Contract Management 8 (June 1986).

58. But see Hill, supra note 5, at pp. 16-17 (March 1990).

59. For example, a 1979 Egyptian Ministry of Defense letter, available at the Chicago Office of Baker & McKenzie, states that "it is the policy of the ministry of defence to deal directly with the original manufacturing companies, without any mediators, Agents or Dealers in between".

publicly available laws and regulations,⁶⁰ and sometimes only found in specific contractual provisions or tender documents "supplements" circulated only to potential contractors.⁶¹

In Saudi Arabia, Article 4 of the Service Agents Regulation provides, in part, that "[a]gency shall not be permitted in armaments contracts and services related thereto and shall not be permitted in contracts between the Saudi government and foreign

60. See, e.g., Articles 5 and 65 of the Kuwaiti Public Tender Law, the supplemental Kuwaiti Decree dated 11 October 1964 (defining the military products subject to the prohibition), and Ministry Circular No. 4A/88 (June 8, 1972).

61. In addition to the specific Kuwaiti regulations discussed above, the Ministry of Defense also requires assurances from suppliers either in the relevant government contract or by contractual supplement and/or affidavit. Bahraini government policy (implemented by explicit contract clauses) also prohibits the use of agents and middle-men in connection with the Bahraini Defense Force and other "national security" government procurement. Similarly, in the United Arab Emirates, as a matter of unwritten but established policy, the UAE federal government has decided that the use of any agent or intermediary is prohibited in connection with certain military procurement contracts. (Exceptions to this rule are made on a case-by-case basis, in light of a number of factors.) The UAE General Headquarters of the Armed Forces has sought to include a provision in some of its contracts which is expressed to prohibit "bribery", although very broadly drafted and arguably prohibiting any consultancy payments made "in order to facilitate and promote the negotiation and finalization of" the relevant contract. This provision prohibits the payment of any compensation or fees (expressly including consultancy fees) not only to a government official, but also to any person (whether inside or outside the UAE) for obtaining any "advantages" in connection with negotiation, signature or performance of a contract. This provision includes penalties for breach: a fine of 30% of the price of the relevant contract and/ or cancellation of the contract.

governments". Similarly, Council of Ministers Decision No. 1275 of 1975 (the "Decision") provides that "[i]t is not permitted for any company which enters into an armaments contract (including equipment and installations necessary thereto) with the Saudi government to pay any amount as commission to any intermediary, sales agent, representative or broker."⁶²

In Jordan, the Law on Commercial Agents and Intermediaries was provisionally enacted in 1974, provisionally amended in 1979 and enacted in final form by Law No. 44 in 1985. Article 3(E) of this law provides:

Despite what is provided elsewhere in this Law or in any other legislation, no person shall practice any agency or intermediation activity in any manner whatsoever in the purchase or import or sale of arms and their spare parts, the parts relating thereto or that develop same, and ammunition for the Jordanian Armed Forces, and this is subject to the penalties provided for in this Law.

The Prime Minister of Jordan sought to clarify this prohibition, in a letter to the Minister of Industry and Commerce, by stating

62. See also Cartwright and Hamza, "The Saudi Arabian Service Agents Regulation", 34 International Lawyer 475 (1979); Northrup Corp. v. Triad International Marketing, 811 F.2d 1265 (9th Cir. 1987); Triad Financial Establishment v. Tumpane, 611 F.Supp. 157 (D.C.N.Y. 1985).

that the prohibition is an exception which should not be broadly construed because it might otherwise be applied to sales of other equipment required for the Jordanian Armed Forces. This could result in the prohibition becoming the general rule, something which, according to the Prime Minister, would not be in the interest of the Jordanian Armed Forces.

Egyptian military procurement is the most significant exception to the general permissibility of commercial agents in Egyptian government contracts. The Ministry of Defense has adopted a policy prohibiting the use of any commercial agent, intermediary, or sales representative in connection with the purchase of military equipment. To further these ends, in a number of instances the Ministry of Defense has required bidders to include a statement with bid documents which is often along the following lines:

The price mentioned in this offer does not include any kind of direct or indirect commission, fees, etc., to any agent or representative or consultant or etc.

If a contract is concluded from this offer and it is proven that the Egyptian government has paid any kind of direct or indirect commission or fees, etc., relating to such contract, the Egyptian government shall have the right to reduce the contract value by the value of such commissions or fees, etc., besides

its substitutions resulting from any consequential damages.⁶³

Even if a Ministry of Defense contract does not contain such provisions, a foreign company should not conclude that it may utilize a commercial agent or intermediary in connection with that contract. The Ministry of Defense considers its policy a matter of public record and will assume that such policy is known to all bidders for its contracts.⁶⁴

63. Certain U.S. regulations contain generally similar language in connection with Foreign Military Sales ("FMS") transactions and in connection with FMS credit transactions. See, e.g., Munitions Control Newsletter No. 89, updating Newsletter No. 84, and DSAA (Defense Security Assistance Agency) Guidelines for FMS Loan Financing of Direct Commercial Contracts; see also DOD FAR (Department of Defense Federal Acquisition Regulations) Supp. 25.7305.

64. One Egyptian legal commentator has suggested that the Ministry of Defense policy reflects a fundamental domestic rule, "the promotion of which is necessary in view of safeguarding certain community objectives of prime importance." A. El-Kosheri, "Arbitration and the ICC Clause", Paper presented at Middle East Economic Digest Conference on Law and Business in Egypt, Cairo, Egypt, at 12-13 (March 17-18, 1986). In at least one instance, an Egyptian judge, acting as sole arbitrator in an International Chamber of Commerce arbitration, had to determine the legality of payments promised for services aimed at facilitating the award of a military procurement contract. "The Egyptian sole arbitrator declared the claimed payments illegal for being promised within the framework of an agreement having, [as its exclusive purpose,] the corruption of those vital institutions which must be kept immune from any possible traffic of influence. ... [Accordingly,] the sole arbitrator relied on the Egyptian domestic concept of nullity for illegal cause as a mandatory rule of national public order." Id. (referring to ICC Case No. 4409).

In general, a foreign contractor's breach of the agency prohibitions described above are not "criminal" in the sense that imprisonment of violators is usually not a specified penalty. (The Jordanian Law on Commercial Agents and Intermediaries provides for imprisonment of those acting impermissibly as an agent, however; a false certification to the Jordanian government of "non-agency" may also be criminal.) The relevant Ministry could reduce the contract value by the amount of the commission paid. Theoretically, that Ministry may also sue the contractor for any consequential damages resulting from breach of contract, assuming the prohibition on agents and intermediaries has been included in the contract documents. Possibly the most significant penalty that may be imposed on a foreign contractor in such circumstances is to "blacklist" the contractor. As mentioned above, these remedies have, at least in some instances, been expressly set out in provisions of Ministry of Defense contracts in the Middle East.

B. Agency in Other Government Contracting

Middle East governments sometimes restrict the use of agents and the payment of commissions in non-military government contracts. These restrictions may be in specific agency

regulations, or in provisions of the country's general tender law.⁶⁵

For example, the Saudi Arabian Service Agents Regulation, Royal Decree M/2 of 1978, requires (in general) that all "foreign contractors" have a Saudi Arabian service agent in connection with work in the Kingdom for the Saudi Arabian government (except for, inter alia, military sales discussed above). Article 8 of the Service Agents Regulation states that the commission paid by a foreign contractor to its Saudi service agent shall not exceed five percent of the price of the government contract.⁶⁶

Article 8 of Abu Dhabi Law No. 4 of 1977 imposes ceilings on the amount of commission an agent or intermediary may receive in connection with Abu Dhabi government contracts, ranging from two percent on transactions not exceeding ten million Dirhams, to one

65. For example, under Article 10 of Iraqi Law No. 11 (1983), the use of commercial agents or intermediaries was generally prohibited in contracts with Iraqi government entities. Instead, Iraqi government entities were required to conclude their import contracts by dealing directly with foreign manufacturers or suppliers, approved branches of such companies in Iraq, or through Iraq's commercial offices abroad. The Iraqi Revolutionary Command Council, in early 1989, issued an important new law which repealed those strict prohibitions. See Stovall, "New Legislation Lifts Controls on Agents", Middle East Economic Digest pp. 8-9 (23 June 1989).

66. Similarly, Omani Ministerial Decision No. 94 (1984) reportedly limits the tax deductibility of commercial agency and sponsorship fees to five percent of the taxpayer company's income in Oman.

percent on transactions equal to or exceeding fifty million Dirhams. In practice, the Abu Dhabi commission limitation is narrowly construed, and a foreign company is probably permitted to pay an additional fee or commission to a commercial agent for any services rendered by the latter which go beyond mere "sponsorship". We understand that it is not unusual for parties to enter into two separate agreements, one concerning the sponsorship (to which the statutory limitation would apply), and the other specifying commercial agency or other separate services to be carried out (for which a further percentage or fee would be paid and which should not be subject to the statutory limitation).⁶⁷

There are no general prohibitions or restrictions on the amount or rate of the commission paid to an Egyptian commercial agent, with the exception of those connected to certain government sales where the payment of sales commissions is prohibited. However, Article 14 of the Egyptian Commercial Agencies Law entitles the contracting government entity to deduct such commissions from the bid value and pay the commission directly to the commercial agent.⁶⁸ Some contracting government

67. See Santire, "Sponsorship Fees: Stated 'Maximum' Not a Limit", Middle East Executive Reports 3 (July 1981).

68. Article 14 states:

Ministries, official departments, municipal entities, public organizations and corporations and entities of the public sector shall consider in their tender contracts any rate of commission or brokerage likely to be paid to the commercial

entities have apparently exercised this option on occasion, directly paying the commission to the agent, in some instances after reducing the commission payment to an amount deemed "appropriate" by the government.

Syrian Decree No. 51 (1979) prohibits Syrian or foreign "brokers" or "middlemen" in connection with Syrian government or public sector contracts. Decree No. 51, and the Syrian government's clarification contained in Notification 14/B 271/15 (1980), are somewhat ambiguous and unclear. If use of a commercial agent in a particular Syrian government contract is permissible, the foreign principal may be required to disclose (on all invoices) the identity of the commercial agent and the amount of any commissions payable, and the commercial agent must furnish an official registration certificate; the foreign principal must also pay commissions to the commercial agent through a licensed Syrian bank. (Some of these requirements are contained in Syrian Legislative Decree No. 228 (1969) as amended, concerning public tenders.) In instances where the use of a

agent or commercial intermediary in case the tender is awarded, and the identity of the person(s) receiving such payment, which shall be deposited, in the currency agreed upon by the contract parties, to the accounts of those persons who have rights to such amounts, in any of the banks operating in Egypt and subject to the supervision of the Central Bank. The aforesaid entities have the authority to increase or decrease the tender by the amount of the commission or brokerage fee; these entities shall then pay to the commercial agent or intermediary the commission or brokerage according to the rate and requirements agreed upon.

commercial agent is not permissible, a foreign company may be required to sign an affidavit that it has not used an agent and is not paying a commission to any person in Syria in connection with the sales contract. A similar requirement is often included in letters of credit issued to foreign companies by the Central Bank of Syria.

C. Other Customer-Required Restrictions on Agency/Commissions

In certain transactions with particular Middle East customers, there may be additional restrictions or prohibitions on the use of commercial agents and/or payment of commissions. For example, as a matter of Qatari public policy, as well as the policy and contractual requirements of the Qatari General Petroleum Corporation, at least one broker was prevented from enforcing a claim to commission payments for oil sales transactions.⁶⁹ In the past, the Qatari General Petroleum Corporation has required at least some oil purchasers to sign the following contractual affidavit:

With reference to Crude Oil Sales Contract concluded between [QGPC] and your company ... we should like you to note and confirm the following:

69. Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd. (Queen's Bench Division - Commercial Court, 3 November 1987).

1. That this Contract has been negotiated directly with your company and us without involvement of any agent/brokers.
2. That during the tenure of this Contract or thereafter no commissions/discounts have been paid or will be paid to an agent/broker or any other person in receiving/obtaining benefits and consideration.
3. That any contravention of above would not only lead to termination of the Contract but also shall entitle the Seller to take all necessary measures to remedy any loss/damage caused as a consequence thereof.

Certain Egyptian public sector customers have similar special restrictions. As discussed above, a foreign company is prohibited from using or paying a commercial agent for sales of military equipment to the Egyptian Ministry of Defense. Moreover, in some instances, almost exclusively involving tenders from government entities or organizations in the petroleum industry or tenders for train or locomotive transportation equipment, provisions in other Egyptian government tender

documents contractually prohibit commercial agencies or intermediaries.⁷⁰

III. Conflict of Interest Laws

A. Public Sector Conflict of Interest

Most Middle Eastern governments prohibit public officials from engaging in outside business or acting as commercial agents, at least in matters relating to the official's duties or department. These prohibitions are intended to eliminate actual (and appearances of) conflict of interest and/or influence peddling.

1. Constitutions

Constitutions in many Middle East countries explicitly prohibit possible conflict of interest situations by government ministers and elected/appointed representatives. For example, one comparative analysis of Middle East constitutions⁷¹ indicates that, under the constitutions of Kuwait, Bahrain, Qatar

70. See Hamza and Stovall, "Egyptian Commercial Agency and Distributorship: Law and Practice", 20 Law & Policy in International Business 63 (1988).

71. See generally, W.M. Ballantyne, "The Constitutions of the Gulf States -- A Comparative Study", 1 Arab Law Quarterly 158 (1986).

and the UAE, government ministers may not practice a profession, industry, trade or financial transaction with the government.⁷² National Assembly members may not engage in conflicts of interest, which particularly includes a prohibition on most property transactions with the government.⁷³

2. Civil Service Laws

The Saudi Arabian Civil Service Regulation (Royal Decree M/49 of 1397H (1977)) provide a good example of the rules and restrictions applied under "civil service"-type regulations.⁷⁴ The Saudi Civil Service Regulation prohibits, at Article 13, any government employee from engaging in commercial activities, directly or indirectly, and from establishing, forming, sitting on the board of, or accepting employment by, companies. The Saudi Council of Ministers has authority to permit employment ("moonlighting"), but to our knowledge has not done so, certainly not on a regular basis.

72. "The Constitution of the Council of Ministers contains ... measures to avoid conflicts of interest in Ministers ..."
Id., at p. 159.

73. Id., at p. 168.

74. Compare, e.g., UAE Federal and Abu Dhabi Civil Service Laws, discussed in Laubach, "Anticorruption Laws in the Emirates", Middle East Executive Reports (April 1988), pp. 9 and 17-18.

Implementing regulations delineate what is considered to be engaging in commercial activities. Under Article 13(2) of the Saudi Arabian implementing regulations, for example, a civil servant's ownership of shares in a limited liability company is not a prohibited commercial activity, unless such shareholding is in a company that deals with the civil servant's own ministry.⁷⁵

Unlike the Saudi bribery regulations, no penalties (other than dismissal from government service) are provided by the Saudi Civil Service Regulation, and no provision suggests that anyone other than a government employee is subject to the Civil Service Regulation. (The Civil Service Regulation does refer at several points to the bribery law, but there are acts proscribed by the Civil Service Regulation but not the bribery regulations for which the only penalty is dismissal from government service.)

In Oman, Royal Decree 39/82 (the "Conflict of Interest Decree") establishes even more detailed rules and

75. Although the Saudi Civil Servant Regulations would permit civil servants in some circumstance to own shares and stocks, we understand that the Ministry of Commerce has received, a number of years ago, a letter from the Ministry of Interior requesting it to stop approving any articles of association of a company having a civil servant as a shareholder; as a result, the Ministry of Commerce issued internal circulars which in effect require all such articles to be turned over to the Minister of Commerce personally for his review and approval/disapproval.

procedures to avoid conflicts of interests by government officials. The Omani Decree provides both civil and criminal penalties against government officials who violate the Decree. Article 1 of the Omani Decree provides, in part:

"Any person holding a government post or undertaking government jobs, whether temporary or permanent, with or without pay (referred to hereafter in this decree as a "government official") is forbidden:

- a) to utilize his post or government office for personal benefit,
- b) to give or contribute in giving any natural person or legal entity assistance in securing private benefit or to favor other persons without legal authority,
- c) to act in a manner that defames the reputation of a government or its civil service."

Article 4 of the Omani Decree forbids a Government department from contracting or knowingly dealing with a company owned by a government official.

The Omani Decree does not prohibit all private business activities by government officials. Article 2 of the

Decree expressly prohibits government officials or certain relatives from having "any share or interest in any commercial enterprises or work that has to do with the Omani Government and that is intended for profit", unless (1) such interest was held prior to the individual becoming a government official and (2) the official made a detailed declaration of the interest when he joined the Omani Government.

Under Article 6 of the Omani Decree, a Government minister is forbidden "to combine his job in the Government permanently or temporarily with any other job" without prior approval from the Sultan. We understand this provision to apply only to active participation by an official in a business enterprise, and not to mere ownership interests in a company.

Finally, Egypt has enacted a number of "civil service"-type laws, including a law applicable to ministers. For example, under Article 77 (14) of Egyptian Civil Servants Law No. 47 (1978), a civil servant is prohibited from, inter alia,

- a) accepting any gift, benefit, commission or loan in connection with his performance of the duties of his position;
- b) engaging in any commercial activities, and in particular, having any interest in work,

contracting or bidding in connection with the activities of his position; and

- c)** participating in the establishment of companies, or accepting membership on their boards of directors, or any work for them, except as a representative of the government or public entities or local administrative units or public sector companies.

Similarly, under Article 79 of Egyptian Public Sector Employees Law No. 48 (1978), a public sector employee is prohibited from, inter alia,

- a)** combining his work with any other work if the latter is likely to conflict with the duties of his position, or does not conform to the dignity and demands of that position;
- b)** engaging in commercial work generally, as well as entering into bidding and public auctions and other aspects of activity connected with the functions of his position; and
- c)** participating in the establishment of companies, or accepting membership on their boards of

directors, or any work for them, except as a representative of the [employer] company, public sector units, the government or local administration.

B. Exploitation of Influence

Article 106 bis of the Egyptian Penal Law addresses a slightly different concern, punishing exploitation of influence by public officials (and other parties). In this latter crime, the perpetrator does not have, and does not claim, official authority to perform the requested act. Instead, the perpetrator is punished for using influence to obtain the intended aim.⁷⁶ Similar concerns are addressed in a provision of Article 3 of the Egyptian Commercial Agencies Law, wherein "first degree" relatives of public employees and government members are prohibited from registering as commercial agents.⁷⁷

76. See Mostafa, supra note 29, at pp. 33-36; Libyan Penal Law, Law No. 3 (1955) as amended, Article 233 (use of office for personal gain).

77. Although possibly omitted inadvertently, the prohibition applicable to "first degree" relatives is absolute. For example, it is irrelevant whether the latter was already carrying on commercial agency activities at the time a relative obtains government office. This can lead to some surprising results. For example, under another provision of Article 3 of the Egyptian Commercial Agency Law, a newly-elected member of the National Assembly can register additional commercial agencies, provided that he had carried on commercial agency business prior to election. The National Assembly member's son, however, could not register commercial agencies after his father's election to office, even if the son had previously conducted such commercial

Article 3 of the Omani Conflict of Interest Decree prohibits a government official from taking advantage of his influence as a government official on behalf of a commercial enterprise trying to do business with the Omani Government. That prohibition is further elaborated:

"[The government official] is also forbidden to act as broker or sponsor for any project that has any relation to his Government job, or to any other government work entrusted to him. A government official is also forbidden to be involved in offering any assistance or advice with the object of facilitating or securing the government's approval of any project or any assistance in making contracts with another government official with the purpose of influencing that official."

C. Private Sector Conflict of Interest

Certain private sector (or quasi-private sector) companies and entities in the Middle East also have internal conflict of interest rules. For example, as a matter of internal policy, all members of the board of directors and/or senior officers of Saudi Arabian Basic Industries Corporation ("SABIC") and any of its subsidiaries reportedly are not allowed to invest, serve on the board or otherwise participate in a joint venture

agency business.

Saudi company, without obtaining the prior written consent of SABIC or the relevant subsidiary. We further understand that although there is no definition for senior officer, it ordinarily applies to officers who enjoy the authority of making decisions which may affect SABIC or the relevant subsidiary.

In addition, Middle East company laws contain provisions prohibiting certain conflicts of interest. For example, under Article 69 of the Saudi Companies Law, a director generally may not have any interest, direct or indirect, in transactions or contracts made for the account of the company unless express authorization (to be renewed annually) is obtained from the general assembly of shareholders. Moreover, a director must in all instances declare any personal interest he may have in transactions or contracts made for the account of the company, and the interested director may not participate in voting in connection with such transactions or contracts.

4 November 1990

IV. Appendix

Unofficial translation of relevant provisions of Egyptian Penal Law on bribery.

Article 103

Any public official who requests or accepts or takes, for himself or another, a promise or a gift in exchange for performing a function of his position [job] is considered the recipient of a bribe, and shall be punished by life imprisonment with labor and a fine not less than 1,000 Pounds and not more than what was given or promised to him.

Article 103 bis

Any public official who requests or accepts or takes, for himself or another, a promise or a gift in exchange for performing or refraining from performing a function which he believes (incorrectly) or claims to be within the functions of his position is considered the recipient of a bribe and shall be punished with the same punishment provided for in the preceding article.

Article 104

Any public official who requests or accepts or takes, for himself or another, a promise or a gift in exchange for refraining from a function of his position, or in exchange for violating the duties of [that position], or to reward him for

something he had already done in that regard, shall be punished by life imprisonment with hard labor and double the fine mentioned in Article 103 of this Law.

Article 104 bis

Any public official who requests or accepts or takes, for himself or another, a promise or a gift in exchange for performing a function of his position, or which he believes (incorrectly) or claims to be within the functions of his position, or refraining from such [function] or violating the duties of the position, shall be punished by the same punishment for bribery provided for in the previous three articles according to the circumstances, even though he intended not to perform the act, or not to refrain from it, or not to violate the duties of the position.

Article 105

Any public official who accepts a present or a gift from a person for whom he has performed a function of his position, or refrained from performing a function of it or violating its duties, after completing such function or refraining from it or violating the duties of his position with the intent of being rewarded for that, even without a prior agreement, shall be punished by imprisonment and a fine not less than 100 Pounds and not more than 500 Pounds.

Article 105 bis

Any public official who performs a function of his position, or refrains from a function of his position or violates its duties as a result of a request, a recommendation, or intermediation, shall be punished by imprisonment and a fine not less than 200 Pounds and not more than 500 Pounds.

Article 106

Any employee who requests or accepts or takes, for himself or another, a promise or a gift without the knowledge and consent of his employer, in exchange for performing or refraining from a function of the work of which he is responsible, is considered a recipient of a bribe and shall be jailed for a period not to exceed two years and a fine not less than 200 Pounds and not more than 500 Pounds, or one of these two punishments.

Article 106 bis

Whoever requests or accepts or takes, for himself or another, a promise or a gift to exert real or claimed influence to obtain or try to obtain from any public authority: works, orders, judgments, decisions, medals, concessions, licenses, supply contracts, contracting jobs, or a position [job] or service or any benefit of any kind, is considered a recipient of a bribe and shall be punished by the punishment provided in Article 104 of this Law if he is a public servant, and by jail and a fine not less than 200 Pounds and not more than 500 Pounds

or only one of these two punishments in other cases [i.e., if he is not a public employee].

Every agency subject to the supervision of a public authority shall be considered to be a public authority.

Article 106 bis (A)

Any member of the board of a joint stock company or one of the cooperative societies or [labor or professional] unions created in accordance with the rules established by law, or one of the organizations or societies considered by law to be for the public good, as well as any manager or employee in one of them, who requests or accepts or takes, for himself or another, a promise or a gift in exchange for performing a function or refraining from a function of his position, or who believes (incorrectly) or claims it is among the functions of his position, or who violates its duties, is considered a recipient of a bribe and shall be punished by imprisonment for a period not to exceed 7 years and a fine not less than 500 Pounds and not more than what was given or promised, even if the offender had intended not to perform the act, or not to refrain from it, or not to violate the duties of his position.

The offender shall be punished by the same punishment if the request or the acceptance or the taking was subsequent to

performing the act, or refraining from it, or violating the duties of the position and he had intended to be rewarded for such, even without prior agreement.

Article 107

Any benefit obtained by the recipient of the bribe or by the person designated by him [to receive the bribe] or knowing and agreeing to it, whatever its name or kind and whether this benefit was material or non-material, shall be considered a type of promise or gift.

Article 107 bis

The briber and the intermediary shall be punished by the punishment designated for the recipient of the bribe. The briber or the intermediary shall be excused from punishment, however, if he reports the crime to the authorities or confesses to [the crime].

Article 108

If the purpose of the bribe was the perpetration of an act punishable under law more severely than that provided for bribery, then the briber and the recipient of the bribe and the intermediary shall be punished as provided for such [other] act, in addition to the fine provided for bribery. The briber or the intermediary shall be excused from punishment if he notifies the

authorities of the crime in accordance with the text of the last paragraph of Article 48 of this Law.

Article 108 (bis)

Any person designated to take a gift or a benefit or knowing of it and who is approved by the recipient of the bribe, or who takes or accepts something of such nature knowing of its purpose, shall be mailed for a period not less than a year and a fine equal to the amount which was taken or promised, provided that he had not intermediated in the bribery.

Article 109

[Repealed]

Article 109 bis

Whoever offers a bribe which is not accepted from him, shall be punished by jail and a fine not less than 500 Pounds and not more than 1,000 Pounds, if the offer was made to a public official. If the offer was made to someone other than a public official, the punishment is jail for a period not more than two years or a fine not to exceed 200 Pounds.

Article 109 bis (Second)

Without conflicting with any more severe punishment stipulated in the Penal Law or any other law, any person who offers or accepts to intermediate in bribery, if he did not go beyond offering or accepting, shall be punished by jail and a fine not less than 200 Pounds and not more than 500 Pounds or one of these two punishments.

If such was done by a public official, the offender shall be punished by the punishment provided in Article 104.

If such was done with the intent of intermediating with a public official, [the offender] shall be punished by the punishment provided in Article 105 bis.

Article 110

In all cases, confiscation will be ordered for what the briber or the intermediary paid as a bribe, in accordance with the preceding articles.

Article 111

In the application of the provisions of this section, public officials shall be considered:

- 1) Employees in departments affiliated with the government or those under its supervision.
- 2) Members of the general or local legislative assemblies, whether elected or appointed.
- 3) Arbitrators and experts, debtors' trustees, liquidators and judicial receivers.
- 4) [Repealed]
- 5) Any person entrusted with public service.

- 6) Members of the boards of directors, managers, and employees of associations, companies, societies, foundations or establishments, if the state or one of the public organizations contributes to its funding at any level and in any form whatsoever.