

Law Office
of
HOWARD L. STOVALL
2131 North Racine Avenue
Chicago, Illinois 60614
Telephone (773) 248-8896
Facsimile (773) 248-8897
E-mail Howard@Stovall-Law.com

**'SENSITIVE PAYMENTS' TO GOVERNMENT OFFICIALS
IN THE ARAB MIDDLE EAST**

by

Howard L. Stovall

I. INTRODUCTION

Two editorial cartoons recently caught my attention, reminding me of the variety of circumstances in which lawyers might confront bribery and corruption -- both in the Arab Middle East and elsewhere around the world.

The first cartoon, from a U.S. legal newspaper, shows a lawyer and his client standing in front of a judge. "Your honor", says the lawyer, "my client will give you five thousand dollars if you make these bribery charges go away". As discussed in the first part of this article (Middle East Business Strategies, 15 June 2005), every Arab country has enacted laws to combat such bribery of government officials.

The second cartoon, from an Arabic-language newspaper in Kuwait, is a bit more subtle. An open box of paper clips sits on a desk, next to a document fastened firmly by one of the paper clips. Each of the paper clips bears the image of an influential-looking man, wearing a traditional Gulf Arab headscarf -- a well-connected government official perhaps. The cartoon has a one-word caption: "al-waasitah", meaning

For over twenty-three years, Mr. Stovall has assisted clients on commercial law matters throughout the Arabic-speaking countries of the Middle East. He has served as an Arab law expert in judicial and arbitral proceedings in the United States and Europe, and recently taught "Comparative Commercial Law of the Arab Middle East" as an adjunct professor at John Marshall Law School in Chicago.

'intermediation' or the method for getting something accomplished. This cartoon refers to a somewhat less obvious aspect of corruption, as does the second part of this article: law and practice applicable to so-called 'sensitive payments' made to Arab government officials, specifically gifts and gratuities, travel expenses, and facilitating ('grease') payments.

I. GIFTS AND GRATUITIES

Arab anti-bribery rules follow a generally similar pattern: criminal penalties (fines and/or imprisonment) are applicable if a government official requests/accepts a benefit or promise thereof in return for performance (or abstaining from performance) of an official act. Arab anti-bribery laws consider a bribe to be any benefit obtained by the government official, whatever its name or nature, and whether or not material. The concept of 'benefit' is extremely broad, and does not distinguish between various types of business entertainment, promotional gifts, courtesies or hospitality.

As a matter of practice, however, a U.S. company might be permitted to provide certain customary gifts to Arab government officials on certain acknowledged occasions (e.g., during ceremonial presentations to visiting delegations, secular holidays like the New Year, or religious holidays like the feast after Ramadan). Such gifts are more likely to be permissible (at least in practice) if they are limited in value and have the U.S. company's name or logo on them, helping to indicate the gift was intended to be purely a business courtesy and for no other purpose. Mementoes or novelties of token or modest intrinsic value might include calendars, notebooks, pens, coffee cups, key chains, golf balls and inexpensive scale models.

The relatively limited value of such gifts could help to demonstrate that the parties lacked criminal intent -- one of the necessary elements for the crime of bribery, as discussed in the first part of this article. Although Arab legal treatises provide detailed analysis on such criminal intent, Arab anti-bribery laws do not explicitly address this issue. One example mentioned by Egyptian jurists: an individual is meeting with a government official to request an official decision and, during the meeting, offers the government official a cigarette or piece of chewing gum. The stick of gum or tobacco should not be deemed a 'benefit' for purposes of anti-bribery law analysis.

Greater concern probably arises in the context of other types of gratuities offered to Arab government officials, such as

travel expenses (payments for airfare, local transportation, meals and lodging, and other incidentals).

III. TRAVEL EXPENSES

(a) General Rules

The U.S. Foreign Corrupt Practices Act ("FCPA") contains an affirmative defense for a U.S. company's payments that are reasonable and bona fide expenditures, such as travel and lodging expenses, if directly associated with the promotion, demonstration or explanation of products or services (e.g., visits by Arab government officials for product demonstrations, or tours of the U.S. company's facilities), or in connection with the performance of a contract with a foreign government or agency.

In other contexts, however, U.S. companies might be best advised to generally avoid incurring hospitality expenses for Arab government officials -- such as payments for private lunch or dinner meetings. For example, all but the most modest of meals might raise issues under the broad definition of 'benefit' contained in Arab anti-bribery laws. In addition, a private meal between an Arab government official and a U.S. company's representative could give the appearance of impropriety. Many Arab civil service regulations contain strict penalties on government officials who divulge confidential information. Appearances might suggest that the purpose of a U.S. company's private meal with an Arab government official is to obtain information not accessible through a visit to the government official during regular office hours.

Given the potential abuses that might arise from such private meals and other forms of hospitality, a number of Arab government ministries have developed internal policies for their staff, as well as contractual restrictions for their suppliers. For example, I understand that the Qatari Ministry of Defense requires its employees to obtain permission from the Undersecretary before accepting any material benefits -- including meals and travel expenses -- in connection with their official positions. I also recently reviewed an Arab government contract containing a provision along the following lines:

The GOVERNMENT may terminate this Contract if it is found, after investigation by the GOVERNMENT, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the CONTRACTOR to any official of the GOVERNMENT with a view toward securing favorable treatment in the

making of any determinations with respect to performing such Contract. (emphasis added)

(b) Officially Authorized Trips

At least some Arab ministries and government departments have formal procedures to regulate these matters. For example, in at least a few instances, I have seen documents from Arab government ministries that expressly permit specified officials to make visits to a U.S. company's manufacturing plant or headquarters, state whether the U.S. company will bear any expenses arising from the officials' visit, and whether these payments should be made to the relevant Arab government department for disbursement in turn to the officials.

With respect to payment of travel expenses, I generally recommend that a U.S. company adopt the following principle: any payments should be provided in the framework of official Arab government activity, to reduce the appearance that payments are deemed for the personal benefit of the Arab government official rather than for the Arab government employer. The following suggested guidelines reflect that principle:

- i) The U.S. company's written invitation should include a brief background description on the purpose of the visit. In addition, the agenda and itinerary should be specifically described in the invitation, such as the inspection of plant and facilities, or business discussions and presentations at corporate headquarters.
- ii) The visit should be limited in time to the agenda and itinerary described in the invitation, and expenses paid by the U.S. company should be limited to reasonable airfare, hotel accommodations, meals and local transportation.
- iii) The invitation should be sent to a sufficiently high-level supervising official at the relevant Arab government entity.
- iv) The U.S. company might best be advised not to designate any specific individuals as invitees, but rather leave the selection process to the Arab government employer.

In addition, the U.S. company usually should pay directly for the relevant travel expenses, or directly reimburse the relevant Arab government department (not each individual

government official) for the costs properly incurred during the authorized visit.

IV. FACILITATING PAYMENTS

I was living in Cairo in 1987, when the International Bar Association convened its first Arab Regional Conference there. Meetings were held in the Zamalek Marriott Hotel, formerly a lavish palace built in the mid-19th Century by the Khedive Ismail. I recall that the large Aida Ballroom was filled to near-capacity for a presentation on the FCPA. Afterwards, an Egyptian lawyer in the audience, dressed in a two-piece leisure suit favored by Egyptian public servants, asked for a microphone and shared his thoughts: this FCPA is fine for a wealthy country like the U.S., but the typical Egyptian public servant is paid an extremely meager monthly salary; a little bit of 'baksheesh' might actually prompt a public servant to perform his job more energetically, while putting food on the table for his family.

The Egyptian lawyer's compatriots in the audience, most of whom it must be said were wearing expensive Western-style suits and ties, politely but firmly convinced him to sit down. The problem of low-paid government employees is not so easily solved.

Ironically, FCPA amendments enacted one year later (in 1988) created a broader statutory exception for facilitating payments given to foreign government officials to expedite or secure performance of "routine governmental action". The FCPA lists some examples of such action, including obtaining business permits, processing governmental papers such as visas, providing mail delivery, police protection, phone, power or water service, loading and unloading cargo, and other similar activities that are ordinarily and commonly arranged by a government official. These would be actions that the governmental official should be performing in any event, and the modest facilitating (or 'grease') payment might be seen as simply speeding the normal bureaucratic process.

By contrast, most Arab anti-bribery laws do not reflect the position espoused by the Egyptian lawyer at the Cairo conference (or the rule adopted by the FCPA). Rather, most Arab anti-bribery laws state that bribery exists even if the government official's induced act is a lawful function of his position. For example, Article 1 of the Saudi Arabian anti-bribery law states in part:

A public official who requests ... a gift in order to perform any of his official duties or what he claims to be

within his official duties -- even if such act is lawful -- shall be considered a bribe-taker (emphasis added)

Of course, even a short stay in the region has convinced many people of the substantial divergence between legal theory and day-to-day practice in regard to facilitating payments.

There also appear to be a few Arab anti-bribery laws that draw a legal distinction between a government official receiving a bribe in exchange for an act in conformity with his duties, as opposed to receiving a bribe to act in violation of his duties. For example, the UAE Federal Criminal Code penalizes a government official for requesting or accepting a gift or other benefit in order to perform (or abstain from performing) an act in violation of the duties of his position. By definition, facilitating payments are made in exchange for actions that the governmental official should be performing in any event, and thus the act/abstention by the government official does not run contrary to that aspect of his duties. (An important aside: the Dubai Penal Code, which was not expressly repealed by the UAE Federal Criminal Code, broadly prohibits a person from giving any benefit to a public servant whilst having current or impending dealings connected with the work of that public servant, his superiors or subordinates.)

* * * *

In the Islamic faith, various sayings (hadith, pl. ahaadith) of the prophet Mohamed forbid bribery and corruption, the most notable probably being "God curses the briber, the recipient of the bribe and the intermediary between them". The first part of this article discussed modern Arab laws designed to combat such bribery.

Another somewhat lesser-known hadith, more relevant to the discussion in the second part of this article, relates to a government deputy who, upon returning very wealthy from collecting alms, insisted that such wealth came from gifts given to him in his 'personal' (rather than his 'official') capacity. 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, whom 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 anyone gives him a gift?"