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SUMMARY OF MIDDLE EASTERN CRIMINAL CODE PROVISIONS

PROHIBITING BRIBERY

by

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INTRODUCTION

The Middle East has provided the stage for a number of well-publicized "corrupt payment" controversies -- including some which helped prompt enactment of the U.S. Foreign Corrupt Practices Act. Perhaps as a result, some observers have concluded that bribery may be more prevalent in the Middle East than elsewhere in the world, for reasons attributed to local culture, politics, and religion. This perception (or prejudice) is reminiscent of the reportedly widespread view in the Middle East, over thirteen centuries ago, that Christians and Jews were particularly susceptible to bribes and therefore unsuitable for employment in Moslem governments.

In the context of modern international commerce, however, it seems more constructive for lawyers to recognize that bribery is an evil encountered, and generally condemned, in both Middle Eastern and Western legal systems. In fact, Middle East governments have enacted legislation imposing harsh criminal liability on those

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involved in bribery. These Middle Eastern anti-bribery laws (usually derived from European criminal codes) have often been influenced by, and are consistent with, early Islamic law precepts prohibiting bribery.

BRIBERY UNDER MIDDLE EAST PENAL LAW

Most Middle East countries have adapted and enacted criminal codes and procedure laws derived from Western (continental/civil law) patterns. The existence of well-developed European penal law codifications allowed Middle Eastern countries to easily "receive" or adopt such criminal codes -- which were among the earliest Western-style laws adopted in the Middle East. (For example, such criminal codes were first adapted and enacted in Turkey in 1858 and in Egypt in 1883.)

For illustrative purposes, this summary focuses on the broad and detailed anti-bribery provisions of the current Egyptian Penal Law (enacted in 1937, but reflecting subsequent amendments). This summary also contains, for comparative purposes, cross-references to provisions in other Middle East anti-bribery laws.

Bribery is a serious crime under Middle East penal laws, especially when involving a government employee (also referred to as a "public official" or simply an "official"). Although, in some circumstances, a private sector employee who receives a bribe is also punishable under the Egyptian Penal Law, most Middle East anti-bribery provisions are primarily directed to public officials. For example, Egyptian anti-bribery rules 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 personal benefit or gain. Bribery involves the trading, or "peddling," on a public office or position. Bribery usually involves two parties: first, the recipient of a bribe, the official requesting or accepting a benefit in exchange for performing (or refraining from performing) a function of the position; and second, the briber, one who makes the offer of a bribe or simply agrees to pay the bribe requested. Bribery is deemed to have occurred as soon as the official actually and seriously agrees to a benefit in exchange for abusing the duties of the position. Although the primary punishment in bribery crimes is imposed on the public official, separate provisions and

crimes have been developed for punishing the briber and any intermediary.

1. Elements of Bribery

There are three elements to the crime of bribery under Egyptian law: (a) the recipient of the bribe as a "public official" with "official duties"; (b) the so-called "substantive" element, meaning the benefit (such as a gift or promise thereof); and (c) the requisite criminal intent.

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

Under Article 111 of the Egyptian Penal Law, "public officials" (for purposes of the anti-bribery provisions) are:

(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, 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.

The Egyptian courts have also decided that some organizations, given their nature, purposes or the like, are "public" and consequently that their employees are considered public officials.

EXAMPLE: 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.)

Under Egyptian anti-bribery rules, trading on one's position is not deemed to occur unless the relevant (requested and/or promised) act was within the duties of the official's position. 'Duties of the position' are understood as any act within the legal scope of the official's position. Where the act is within the official's general competence, Egyptian anti-bribery law does not examine whether the official's substantive act/abstention was correct and proper under internal service regulations. Moreover, this element of bribery is established even if the relevant act is only indirectly related to the official's duties.

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

Similarly, this element of the crime is satisfied even if the official wrongly believes or claims that the requested/promised act is within the official's duties. (See also Article 188 of the Bahraini Penal Law of 1976.) Government work will be equally harmed by this "mistaken 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.

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

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 otherwise owed by the official. 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 price less than its true value, or by any other such imbalanced contract arising between the briber and the recipient of the bribe, is considered a "benefit". (See also Article 109 of the Qatari Penal Law of 1971, as amended.)

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. (This rule has also been adopted in Article 38 of the Kuwaiti Penal Law of 1960, as amended.)

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

The Egyptian anti-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 apply anti-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."

Middle Eastern penal laws do not expressly permit promotional gifts, good will presents, courtesies and such. In practice, it may be permissible to provide customary gifts on certain acknowledged occasions (*e.g.*, the Islamic new year, or the end of Ramadan), particularly if such gifts are limited in value and perhaps have the giver's name on them (*e.g.*, calendars, cigarette lighters, pens), which would help to indicate the gift was intended to be purely promotional and for no illicit purpose.

Such a limited exception has support not only in practice, but also in law. As discussed above, many of the Middle East anti-bribery laws apply to any benefit, whether or not material. Therefore, the relatively limited value of promotional gifts would not refute a finding that a benefit had been provided to a government official. However, the size of the gift would have significance in determining the absence of requisite criminal intent. Thus, one Egyptian criminal law scholar has opined that the value of a gift might be so minute as to preclude it from being considered a benefit for purposes of anti-bribery law analysis. For example, if an individual meets a government official to request an official act or decision, and in the course of the meeting offers the government official a cigarette, this should not be considered bribery under Egyptian law.

The Egyptian anti-bribery provisions are so broadly drafted as to reach virtually all forms of trading on a government position or its duties (or an attempt to do so). Thus, Egyptian anti-bribery rules deem an official's mere request to be a completed crime, even if such a request was not accepted by the other party, since an official who offers his position for sale is no less a criminal than one actually completing the bribery transaction.

In most cases, 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 briber's promise to pay a benefit at a later time. The crime of bribery would not be conditional on the briber's 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 abstention) being requested. Such a narrow definition would require that the bribery agreement be prior to the official's performance (or abstention). However, an official's acceptance of a gift after performance of the requested act (or abstention) should not be permitted even absent a prior agreement, for the official should perform his duties without receiving any outside compensation. Therefore, some penal laws (including Egypt's) create a special crime for the official's action in this latter case. (See also Article 157 of the Omani Penal Law of 1974, and Article 153 of the Yemeni Penal Law of 1994.)

(c) Criminal Intent

In accordance with general principles of criminal 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 benefit, that this is the reward for performance (or abstention) of a duty within his position (or which he claims or incorrectly believes is within his position). Thus, if a public official accepts a benefit from a person believing that it was presented innocently, then the official has not committed bribery. (Compare the Dubai Penal Law of 1970, which also prohibits a person from offering anything of value to a Dubai official without consideration, regardless whether in connection with an official act.)

Moreover, the official's acceptance of the bribe must be serious and true; thus, if he pretends to accept the bribe in order to facilitate the authorities' apprehension of the offeror flagrante delicto, then the true acceptance does not exist, and the matter is merely an offer without acceptance, for which only the one making the offer is penalized, under Article 109 bis of the Egyptian Penal Law.

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 official for what he has done or to induce the official to perform or to refrain from performing an act or to misuse his office.

EXAMPLE: Bribery should not be deemed to exist where a farmer offers to pay 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.

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 government prosecuting authority.

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 the benefit given or promised to him. If the intent of the bribe was to make the official abstain from a function of his position or to violate its duties, 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 acting improperly in the substantive 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, the felon must be deprived of his rights and privileges as provided in Article 25 of the Egyptian Penal Law. Thus, the official is dismissed and removed from membership in general or local legislative bodies. The official may be shown leniency and convicted to a misdemeanor jail sentence in lieu of the felony penalty, in which case (under Article 27 of the Egyptian Penal Law) he is banned from membership in legislative bodies for a period not less than twice the period of the misdemeanor jail term for which he was sentenced. (See also Article 13 of the Saudi Arabian Law for Combatting Bribery of 1992, allowing the Council of Ministers to reconsider the ban on public service after five years from the violator's completion of punishment.)

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.

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

(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. (See also Article 172 of the Jordanian Penal Law of 1960.)

(c) Exemption from punishment for the briber/intermediary

As discussed above, the primary focus of the Egyptian anti-bribery law is on the public official. In this light, 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 provision was initially enacted, it addressed what was seen at the time as widespread bribery in government departments and the inability of proving it. The Egyptian legislature 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 the exemption.

3. Aiding and Abetting; and Attempted Bribery

If the briber's actions were left to general Egyptian Penal Law rules of "accessory", 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 a result, the Egyptian Penal Law was amended to prohibit, in Article 109 bis (First), the mere offering of a bribe. As was observed of the similar article of the Italian Penal Law: "[This article] provides for a special 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 ... ". (See also Article 111 of the Qatari Penal Law of 1971, as amended.)

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.

EXAMPLE: Under similar provisions of French law, a hotel manager 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.

However, Egyptian nationalization of most large businesses in 1961, including many Egyptian joint stock companies, greatly expanded the importance of the so-called Egyptian "public sector" (government owned) company. As a result of this 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."

The 1962 amendment made bribery a felony 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 public benefit.) In essence, these employees were considered public officials for purposes of the anti-bribery provisions of the Penal Law. Although some underlying circumstances changed after liberalization of the Egyptian economy in 1974, when many private sector joint stock companies were formed, the provision of Article 106 bis (A) remained unchanged. In this context, there is a significant distinction between a felony and a misdemeanor punishment: 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. Research has not revealed 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. In applying Egyptian anti-bribery provisions, the prosecutor's gaze 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 (e.g., corporations), 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, but rather the persons who commit the crime are personally responsible. (But see Article 19 of the Saudi Arabian Law for Combatting Bribery of 1992, and Article 65 of the UAE Federal Penal Law of 1988.)

The Egyptian Penal Law recognizes the concept of extra-territoriality. According to paragraph 1 of Article 2 of the Egyptian Penal Law, that 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". 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. The statute of limitations period is three years for misdemeanors, and one year for lesser infractions.

OTHER LAWS COMBATTING BRIBERY

In addition to the anti-bribery provisions of Middle East criminal codes, there are a significant number of other Middle East laws and regulations with punishments for bribery. For example, various Middle East 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. (See, e.g., Articles 83(f) and 85(b) of the UAE Federal Armed Forces Tender Law of 1986, and Article 63(1)g of the Kuwaiti Ministry of Public Works standard contract.)