

Treatment of Bribery under Indian Anti-Corruption Laws

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BACKGROUND

- Traces of corruption in the British Raj.
- Traditional souvenirs and gifts.
- Global perception and rankings.
- Emerging India: privatisation, successive pay commissions, e-governance, right to information and professionalism in the government machinery.
- Moving beyond piecemeal measures to systemic reform.

PREVENTION OF CORRUPTION ACT

- Primary legislation dealing with corruption in India.
- Ingredients of Offence in respect of a Bribe Taker under Section 7-
 - accused must be a public servant or expecting to be a public servant.
 - accused must accept or agree/ attempt to accept gratification other than legal remuneration (for himself or any other person).
 - such gratification must be a motive or reward for doing or forbearing to do an official act or to show favour or disfavour to someone in the exercise of his official functions.

PCA (Contd.)

➤ Key Issues-

- focus on public servant.
- “gratification” is not restricted to pecuniary gain and is understood quite widely.
- gratification should be for a favour.
- for lawful as well as unlawful activities.
- not necessary that a favour is ultimately granted or if the public servant is capable of granting the favour.

➤ Section 11 (offence broader than under Section 7)-

- prohibits a public servant from accepting anything of value for less or no consideration from any person who is likely to be concerned with any business before a public servant.

PCA (Contd.)

- Ingredients of Offence in respect of those Influencing a Public Servant under Section 8-
 - accused may be any person (not necessarily a public servant).
 - accused must agree to accept, or agree/ attempt to obtain, any gratification.
 - such gratification must be a motive or reward for inducing by corrupt or illegal means any public servant to do/ forbear from doing an official act or to show favour/ disfavour or render any service to any person.

PCA (Contd.)

- Offence by those Influencing a Public Servant under Section 9-
 - similar to Section 8 except that the influence of a public servant under Section 9 is by personal influence (not corrupt or illegal means as provided under Section 8).
- Key Issues-
 - recipient of bribe need not be a public servant.
 - not necessary that the recipient of the gratification should have attempted to induce a public servant.

PCA (Contd.)

- Offence in respect of a Bribe Giver under Section 12-
 - any abetment of an offence under Section 7 or 11; abetment may involve (i) instigation, or (ii) engaging in a conspiracy, or (iii) intentionally aiding the commission of the offence.
 - *Courts have held that a person instigates another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement.*

- Key Issues-
 - mere offer of bribe is an offence.
 - bribe giver alone can be prosecuted for the offence.

FOREIGN CORRUPT PRACTICES ACT

- Applies to issuers of registered securities, domestic concerns and foreign companies acting within the territory of USA; includes agents of such entities.

- Common ingredients of offence under the FCPA-
 - corrupt payment of or offer of anything of value.
 - to a foreign government official, political party and candidate for political office.
 - for influencing any official act or securing an improper advantage, for obtaining or retaining business.

FCPA (Contd.)

- FCPA also prohibits-
 - payment or offer to any person while knowing that it would be used to influence or secure advantage for obtaining or retaining business.
 - “knowing” would include awareness of a high probability of occurrence, deliberate ignorance implying a duty to investigate.
- Key Issues-
 - internal compliance, guidance and training.
 - thorough due diligence.
 - clear documentation of responsibilities of agents.
 - Representations.

FCPA (Contd.)

- Other provisions under FCPA-
 - exception for payments for expediting or facilitating the performance of a routine governmental action.
 - affirmative defenses: (i) legality of actions under domestic law, (ii) bona fide expenses in relation to promotion, demonstration of products/ services and execution of contracts.
 - accounting and book keeping provisions, adequate internal controls relating to issuers.

KEY COMPARATIVE ISSUES BETWEEN PCA AND FCPA

- Aspects on which PCA is more stringent-
 - requirement of business purpose not present under PCA.
 - payment to expedite routine process within the net of illegal gratification under PCA.
- Aspects on which the FCPA is more stringent-
 - definition of “foreign official” broader than “public servant”, foreign official includes officers or public international organisations and any person acting on behalf of the government in an official capacity.
 - FCPA applies to payments made to political parties and candidates.

COMPARATIVE ISSUES (Contd.)

- FCPA addresses “supply side” of corruption while the focus of PCA is on the “demand side”. Payments made with the knowledge that the same would be used for bribery may not be sufficient to prove the ingredients under the PCA.
 - Actions legal under PCA- implications on affirmative defenses under FCPA?
 - Lack of clear provisions regarding liability of a company and its directors under the PCA-
- criminal liability of a company-dependent on interpretation of prevailing case law.
- vicarious liability of director/ manager not provided for.

PENALTIES UNDER THE PCA, FCPA AND US CODE

- Punishment for Offences under the PCA-
 - usually imprisonment between 6 months and 5 years and in certain cases of habitual offenders up to 7 years.
 - amount of fine not quantified (except in certain cases)
- Punishment for Offences under the FCPA-
 - persons who are not natural persons punishable with criminal penalty up to \$ 2000,000 and civil penalty up to \$ 10,000.
 - natural persons, including employees, directors and agents of companies, are punishable with criminal penalty up to \$ 1000,000 and/or imprisonment up to 5 years and civil penalty up to \$ 10,000.

PENALTIES (Contd.)

- Punishment for Offences under the 18 U.S.C.A.-
 - generally, bribe takers and bribe givers, involved in influencing an official act, could be fined up to three times the monetary equivalent of the thing of value or with imprisonment of not more than 15 years or both.
 - bribe takers and bribe givers, in relation to the performance of an official act, are liable to a fine or imprisonment of 2 years or both.
 - bribery for influencing the business or transactions of a financial institution could attract a fine of \$1000,000 or three times the monetary equivalent of the thing of value involved (whichever is greater) or imprisonment of not more than 30 years or both.

UNITED NATIONS CONVENTION AGAINST CORRUPTION

- Adopted by the General Assembly on October 31, 2003. Currently, 136 countries are parties to the Convention.
- India signed the Convention on December 9, 2005, however, has not yet ratified it.
- General obligation on state parties to build a rigorous anti-corruption regime.
- Specific aspects on which State parties are required to take anti-corruption measures-
 - hiring of public officials, public procurement and management of public finances.

UNCAC (Contd.)

- private sector practices: focus on accounting/ auditing, development of standards, prescription of appropriate penalties, disallowance of tax deductibility of bribes.
- bribes to foreign public officials.
- bribes to persons engaged in, and embezzlement in, the private sector.
- liability of legal persons.
- enforcement: national and international cooperation, mutual legal assistance, asset recovery, extradition, joint investigations.

OECD ANTI BRIBERY CONVENTION

- Entered into force on February 15, 1999 and has been adopted by 38 countries including emerging markets such as Brazil, Argentina and Chile.
- Targeted at curbing bribery in international business transactions with the objective of providing a level playing field.
- Bribery of foreign officials to constitute an offence under the domestic laws of each party- present FCPA reflects the provisions of the Convention to a large extent.
- Political parties and candidates excluded from the definition of foreign public officials

OECD (Contd.)

- Prescription of “effective, proportionate and dissuasive penalties” and accounting measures.
- International cooperation in terms of mutual legal assistance, extradition.
- Other key OECD initiatives-
 - recommendations on disallowance of tax deductibility of bribes, export credit supports and public procurement.
 - guidelines for multinational enterprises.

LAW ON CORRUPTION IN THE PRIVATE SECTOR

- Implications of Corrupt Practices in the Private Sector-
 - criminal offences: breach of trust, cheating, fraud.
 - company law: breach of fiduciary and/ or other duties.
 - liability under special acts such as those relating to auditors.

- A bill introduced in 2001 which sought to include employees of companies in which state agencies hold 1% or more of the share capital and institutions which have received concessions or incentives from the state in the definition of “public servant” under the PCA.

- Key Issues in the Private Sector-
 - lack of specific legal provisions.
 - the immediate need for reform (in view of issues regarding corporate governance, public interest in sensitive sectors).

LAW RELATING TO PERSONS WITH KNOWLEDGE OF BRIBERY

- Every person who is aware of the commission of, or of the intention of any other person to commit certain offence punishable is obliged to inform a magistrate/ police officer.
 - arguable whether this provision extends to offences under anti-corruption laws.

- Assuming the obligation to inform applies to offences under anti-corruption laws-
 - if a person intentionally omits to give information in respect of any offence which such person knows has been committed or has reasons to believe has been committed, he is punishable with imprisonment for up to 6 months and/ or with fine.

 - if a person intentionally omits to give any other information regarding another person's intention to commit an offence, he is punishable with imprisonment for up to 1 month and/ or a fine.

FOREIGN EXCHANGE REGULATIONS

- Foreign Contribution (Regulation) Act, 1976-
 - prohibition on receipt of foreign contribution by political parties, candidates and certain other specified persons.
 - organizations of a political nature, not being political parties may except foreign contribution only with the prior permission of the Central Government .
 - punishment for acceptance or “assistance” in accepting a contribution in contravention of the Act is punishable with 5 years imprisonment.

EXCHANGE REGULATIONS (Contd.)

- Important definitions under the FCRA-
 - “foreign contribution” is defined as donation, delivery or transfer of anything of value by a foreign source.
 - “foreign source” includes government of any foreign country or its agency, any international agency (other than U.N., I.M.F or World Bank), any foreign company or its subsidiary, an Indian company with a majority foreign ownership, any other corporation or association based/ registered abroad.

EXCHANGE REGULATIONS (Contd.)

- Foreign Exchange Regulations: their impact on “Demand” from India-
 - all transactions in foreign exchange have to be conducted only through authorized dealers.
 - all foreign payments to residents of India only through inward remittance in India.
 - penalties may be up to three times the sum involved in the contravention.

EXCHANGE REGULATIONS (Contd.)

- Foreign Exchange Regulations Impacting the “Supply” from India-
 - Indian parties permitted to make overseas investments only if the overseas JV/ Subsidiary is engaged in bona fide business activities.
 - any donation from India in excess of USD 10,000 per annum requires prior approval from the RBI.
 - penalties may be up to three times the sum involved in the contravention.

OTHER GUIDELINES

- Guidelines, recommendations, codes of the Central Vigilance Commission.
- Conduct of officers of companies required to be in accordance with their internal codes of conduct. Listed companies are required to develop a code of conduct under their listing agreement.

THE WAY FORWARD

- Amendments required in the present law with respect to bribe taking-
 - broadening the definition of “public servant”.
 - monetary penalty to be punitive.

- Comprehensive legislation for addressing the “supply” side of corruption required in tune with international developments.

- Clear rules with respect to liability of companies/ directors.

- Specific attention to corrupt practices in the private sector.

Thank You!

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