

Japan

Kenichi Sadaka, Koya Uemura and Emi Sakai

Anderson Mōri & Tomotsune

International anti-corruption conventions

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

Japan is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention').

This was signed on December 17, 1997 and ratified on 13 October 1998. Based on this, the Unfair Competition Prevention Act (Act No. 47 of 1993; see question 2 below) (the 'UCPA') was amended in 1998 and bribery of foreign public officials came to be criminalised in Japan.

The United Nations Convention against Transnational Organized Crime was signed in December 2000 and ratified on 14 May 2003.

The United Nations International Convention against Corruption was signed on 9 December 2003 and ratified on 2 June 2006.

Foreign and domestic bribery laws

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

Bribery of foreign public officials is criminally punishable under the UCPA. Violators may be imprisoned for up to five years and fined up to ¥5 million (article 21, paragraph 2 of the UCPA) (approximately US\$48,900).

Bribery of domestic public officials is criminally punishable under the Penal Code (Act No. 45 of 1907).

The prohibitions on foreign bribery and domestic bribery are based upon different philosophies. That is to say, the former is aimed at securing and promoting the sound development of international trade, while the latter is aimed at ensuring the rectitude of the Japanese public service and maintaining people's trust in such rectitude. As a consequence of this difference, the foreign bribery prohibition was not incorporated in the Penal Code, but in the UCPA.

Foreign bribery

- 3** Describe the individual elements of the law prohibiting bribery of a foreign public official.

In order for bribery of a foreign public official to be punished under the UCPA, the bribe must be paid with regard to an 'international commercial transaction' (article 18, paragraph 1). An 'international commercial transaction' means any activity of international commerce, including international trade and cross-

border investment. The bribe must be provided to foreign public officials or others as defined in question 4.

The prosecutor must then establish that the bribe was made 'in order to obtain illicit gains in business'. Here, 'gains in business' means any gains that business persons may obtain during the course of their business activities, which include, for example, the acquisition of business opportunities or governmental approvals regarding the construction of factories or import of goods.

Further, the prosecutor must establish that the bribe was made 'for the purpose of having the foreign public official or other similar person act or refrain from acting in a particular way in relation to his or her duties, or having the foreign public official or other similar person use his or her position to influence other foreign public officials or other similar persons to act or refrain from acting in a particular way in relation to that person's duties'.

Please note that not only the giving of the bribe, but also the offering or promising of the bribe is punishable under the UCPA.

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- 4** How does your law define a foreign public official?

Under the UCPA, it is prohibited to give bribes not only to foreign public officials per se, but also to other persons in a position of a public nature, such persons included in the definition of 'foreign public officials, et cetera'. Article 18, paragraph 2 of the UCPA defines foreign public officials, et cetera, as:

- (i) a person who engages in public service for a foreign state, or local government (a public official in a narrow sense);
- (ii) a person who engages in service for an entity established under a special foreign law to carry out special affairs in the public interest (ie, a person engaging in service for a public entity);
- (iii) a person who engages in the affairs of an enterprise:
 - of which the number of voting shares or the amount of capital subscription directly owned by one or more foreign state or local governments exceeds 50 per cent of that enterprise's total issued voting shares or total amount of subscribed capital; or
 - of which the number of officers (including directors and other persons engaging in the management of the business) appointed or designated by one or more foreign state or local governments exceeds 50 per cent of that enterprise's total number of officers; and
 - to which special rights and interests are granted by the foreign state or local governments for performance of their business, or a person specified by a Cabinet Order

(for such Cabinet Order, please see below) as an ‘equivalent person’ (ie, a person engaging in the affairs of an enterprise of a public nature);

- (iv) a person who engages in public services for an international organisation constituted by governments or intergovernmental international organisations; and
- (v) a person who engages in affairs under the authority of a foreign state or local government or an international organisation.

The Cabinet Order referred to in (iii) above (Cabinet Order No. 388 of 2001) specifies as an ‘equivalent person’ referred to in (iii) above any person who engages in the affairs of the following enterprises (see below) to which special rights and interests are granted by foreign state or local governments for performance of their business:

- (a) an enterprise of which the voting rights directly owned by one or more foreign state or local governments exceeds 50 per cent of that enterprise’s total voting rights,
- (b) an enterprise of which the shareholders’ resolution cannot become effective without the approval of a foreign state or local government; or
- (c) an enterprise:
 - of which the number of voting shares or the amount of capital subscription directly owned by foreign state or local governments or ‘public enterprises’ (defined below) exceeds 50 per cent of that enterprise’s total voting shares or capital subscription;
 - of which the number of voting rights directly owned by foreign state or local governments or public enterprises exceeds 50 per cent of that enterprise’s total voting rights; or
 - of which the number of officers (including directors and other persons engaging in the management of the business) appointed by foreign state or local governments or Public Enterprises exceeds 50 per cent of that enterprise’s total number of officers.

The Cabinet Order defines ‘public enterprise’ as an enterprise as set forth in the item (iii) above, and an enterprise as set forth in the items (a) and (b) above.

An ‘international organisation’ referred to in (iv) above must be constituted by a governmental or intergovernmental international organisation (for example, the UN, ILO, WTO, etc). Therefore, international organisations constituted by private organisations are outside of the scope of the foreign bribery regulations under the UCPA. According to the Guidelines for the Prevention of Bribery to Foreign Officials set by the Ministry of Economy, Trade and Industry (the ‘METI’) in 2004 (the ‘Guidelines’), an illicit payment to an officer of the International Olympic Committee cannot be punished because it is constituted by private organisations.

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

The UCPA does not have any rules differentiating gifts, travel expenses, meals or entertainment from other benefits to be provided to foreign public officials. This means that the provision of any gifts, travel expenses, meals or entertainment could be considered as illegal bribery in the same way as the provision of cash or any other benefits.

- 6** Do the laws and regulations permit facilitating or ‘grease’ payments?

The UCPA does not explicitly permit ‘facilitation payments’. However, the Guidelines provide that, since small facilitation payments:

- are not made for the purpose of procuring administrative service which the payer would otherwise have no right to receive;
 - are solely for the purpose of facilitating procedures the benefit of which the payer is rightfully entitled; and
 - are considered acceptable under the OECD Convention
- they should also be considered acceptable under the UCPA. In other words, such small facilitation payments should not be considered to be given ‘in order to obtain illicit gains in business’. According to the Guidelines, for example, to the extent that gifts, travel expenses, meals or entertainment are provided for the abovementioned purpose of facilitating day-to-day administrative services, such as issuance of visas, such gestures will be considered as ‘small facilitation payments’ and are not punishable. Please note, however, that the Guidelines are an interpretation of the UCPA by the METI and that the Japanese courts may take a different view.

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

Payments of bribes to foreign public officials are prohibited, whether they are made directly or through intermediaries. While the relevant provision makes no express reference to intermediaries, it is sufficiently broad to capture and punish the payment of bribes through intermediaries.

However, in order for a person to be held liable for paying a bribe to foreign public officials through intermediaries, such person must recognise that the cash or other benefits provided by him or her to the intermediaries will be used for the payment of a bribe to such officials. For example, if a person appoints an agent in order to obtain an order from a foreign government and the appointer fully recognised that part of the fee he or she pays to the agent would be spent for the payment of a bribe to an official of the foreign government, then the appointer may be punished. On the other hand, if the appointer was unaware of such fact, then the appointer will not be punished.

- 8** What are the penalties for individuals and companies violating the foreign bribery laws and regulations?

Individuals violating the foreign bribery laws may be imprisoned for up to five years, and fined up to ¥5 million (article 21, paragraph 2 of the UCPA) (approximately US\$48,900). When a representative, agent or any other employee of a company has violated the foreign bribery laws with regard to the business of the company, the company may be fined up to ¥300 million (article 22, paragraph 1 of the UCPA) (approximately US\$2.93 million).

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

Yes, both individuals and companies can be held liable for bribery to foreign public officials (article 22, paragraph 1 of the UCPA).

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

As mentioned above, Japanese foreign bribery laws are included in the UCPA. The UCPA was originally intended to prohibit unauthorised use of others' trademarks (registered or unregistered) or trade secrets, as well as other activities which are against fair competition. The UCPA defines such acts as 'Unfair Competition' (article 2), and there are special civil remedies and related treatments available for Unfair Competition, such as an injunction, presumed damages and documents production system, etc.

However, foreign bribery is explicitly excluded from the definition of 'Unfair Competition,' and there are no special civil remedies or related treatments available for the violation of foreign bribery restrictions under the UCPA.

Regarding claim for damages and compensation, it may be possible based upon tort. However, in reality, it would be difficult for a plaintiff to prove the necessary causal relationship between the bribe and his or her loss of business opportunity as well as the amount of damages. So far, there has been no case reported where victims of foreign bribery (for example, competitors of a violator who lost business opportunities because of the violator's payment of a bribe) filed a civil lawsuit against the violator to recover the damages they suffered.

As to criminal enforcement, please see 2 and 11.

11 Which government agencies enforce the foreign bribery laws and regulations?

There is no special government agency to enforce the foreign bribery laws and regulations. Like other criminal laws, the foreign bribery laws are enforced by the Public Prosecutors Office and police departments of each prefecture.

12 Describe any recent shifts in the patterns of enforcement of the foreign bribery laws and regulations.

We must admit that the enforcement of the foreign bribery laws in Japan has not been active enough. In 2002, some media agencies reported that Mitsui & Co, a Japanese leading trading company, provided a bribe to high-ranking Mongolian officials in connection with official development assistance for the provision of diesel power generation facilities to Mongolia. However, the Tokyo District Prosecutors Office decided not to prosecute the violators, and the reasons for such decision were not publicly announced.

There is only one case reported in which the foreign bribery laws were enforced. In 2007, the news media reported that two employees of a Filipino subsidiary of Kyushu Electric Power Co gave Filipino government officials golf sets whose value was approximately ¥800,000 in relation to the subsidiary's entry into the Filipino market for digital fingerprint recognition systems. The two individuals were prosecuted for violation of the UCPA. Both of the individuals admitted that they had violated the foreign bribery laws, and were fined ¥500,000 and ¥200,000, respectively.

13 In what circumstances can foreign companies be prosecuted for foreign bribery under your legal system?

Like Japanese nationals and companies, foreign companies can be prosecuted for foreign bribery because Article 22, Paragraph 1 of the UCPA (see 8 above) does not make any distinction between domestic companies and foreign companies.

However, this does not mean that foreign companies can be prosecuted with no jurisdictional basis. Under the Japanese criminal law system, any crime committed within the territory of Japan should be punishable (article 1 of the Penal Code), and it is generally construed that when all or part of an act constituting a crime was conducted in Japan or all or part of the result of a crime occurred in Japan, such a crime is deemed to have been committed within Japan and therefore is punishable.

For example, if an employee of a US company, who may or may not be a Japanese national, invites a public official of the Chinese government to Japan and provides a bribe to that official in Japan in violation of the UCPA, then not only the very employee, but also the US company can be punished under the UCPA. However, from a practical point of view, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against such a foreign company if it has no place of business in Japan or no business activities in Japan.

Another possible circumstance where foreign companies can be prosecuted under the UCPA is where a foreign company hires a Japanese national and the Japanese national gives a bribe to a foreign official on behalf of his employer (the foreign company), either inside or outside of Japan. This is because the UCPA stipulates that Japanese foreign bribery laws shall apply to any Japanese nationals who commit foreign bribery not only in Japan, but also outside of Japan (article 21, paragraph 6 of the UCPA, article 3 of the Penal Code).

For example, if a US company, which has no Japan-based business, hires a Japanese national in the US and the Japanese national gives a bribe to an official of the US government in the US, then we could not deny the theoretical possibility that the US company could be prosecuted under the UCPA of Japan. From a practical point of view, however, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against foreign companies in such circumstances.

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

No. If a person who committed a crime surrendered himself or herself before being identified as a suspect by an investigative authority, his or her punishment may be reduced (article 42, paragraph 1 of the Penal Code). However, since this provision obviously assumes that a violator is an individual, companies themselves will not be able to enjoy the benefit of self-surrender under the said provision.

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

Japanese criminal procedure does not have such systems as plea bargaining or settlement agreements. However, public prosecutors (who are exclusively granted the power to decide whether or not to prosecute criminals under article 248 of the Code of Criminal Procedure (Act No. 131 of 1948)), may choose summary proceedings at summary courts; provided, however, that the summary proceedings are conditioned on the consent of the criminals (article 461-2, paragraph 2 of the Code of Criminal Procedure). In this summary procedure, summary courts can only impose on criminals fines of up to ¥1 million, and the summary courts cannot sentence the criminals to imprisonment (article 461 of the Code of Criminal Procedure).

- 16** Identify and summarise recent landmark decisions or investigations concerning violations of your laws prohibiting bribery of foreign officials.

On 12 February 2008, Bridgestone Corporation, a Japanese company and a leading manufacturer of rubber-based products, announced that it suspected that some of its Asian subsidiaries had made ‘inappropriate payments’ to their local agents in connection with the order of marine hoses (rubber-based hoses mainly used for the transfer of oil at sea), and part of such payments were provided to foreign officials of local governments. Bridgestone further announced that it reported the possible violation of foreign bribery laws to the Tokyo District Public Prosecutors Office and the US Department of Justice.

Financial record keeping

- 17** Which laws and regulations require accurate corporate books and records, effective internal company controls, periodic financial statements and external auditing?

Laws and regulations that require companies to keep accurate corporate books and records, prepare periodic financial statements and, in the case of large companies, undergo external auditing include the Companies Act (Act No. 86 of 2005) and the Company Accounting Regulations. In addition, the Financial Instruments and Exchange Law (Act No. 25 of 1948) (the ‘FIEL’) requires public companies to keep accurate corporate books and records, prepare periodic financial statements, and establish effective internal control systems.

- 18** Are such laws used to prosecute domestic or foreign bribery?

They are not directly intended to be used for prosecution of domestic or foreign bribery. However, it would be possible to use such laws in order to indirectly punish bribery if a company engages in false bookkeeping in order to create a large slush funds for the purpose of bribery.

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

Companies are not obligated to disclose violations of anti-bribery laws or associated accounting irregularities under the laws regarding financial record keeping. In the case of public companies, if the associated accounting irregularities are considered so ‘material’ that the irregularities may affect the decision-making of investors, then the companies may be required to disclose such irregularities under the FIEL.

- 20** What are the penalties for violations of the accounting laws and regulations associated with the payment of bribes?

There are no specific sanctions for violating of the accounting laws associated with the payment of bribes. However, if there is a materially false statement in securities reports to be submitted by a company under the FIEL, the person who submitted such securities reports may be imprisoned up to 10 years and fined up to ¥10 million (article 197, paragraph 1 of the FIEL) (approximately US\$97,900), and the company may also be fined up to ¥700 million (article 207, paragraph 1 of the FIEL) (approximately US\$6.85 million). Whether such false statements are deemed as ‘materially’ false statements will depend on the amount of the bribe, the financial conditions of the company and other factors.

- 21** Do your country’s tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Article 55, paragraph 5 of the Corporate Tax Law stipulates that the amount spent for domestic or foreign bribes shall not be tax-deductible. A criminal court need not determine that such expenditure took the form of a bribe in order for tax authorities to deny the deductibility of such expenditure.

Domestic bribery

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

Public official

In the Penal Code, the term ‘public official’ means a national or local government official of Japan, a member of an assembly or committee, or other employees engaged in the performance of public duties of Japan in accordance with laws and regulations’ (article 7, paragraph 1 of the Penal Code).

Bribe

Cash, gifts or anything that satisfies one’s desires or demands can be a bribe under Japanese domestic bribery law, provided that it is given in connection with the public service of a public official.

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

Yes, both paying for and receiving a bribe are prohibited by the Penal Code. See question 29.

- 24** Are any public officials not covered or accorded different treatment under these laws?

No, the relevant provisions stipulate that bribery crimes in the Penal Code shall apply to all public officials including legislators and judges.

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

National public officials are prohibited from participating in commercial activities while serving as public officials, except when approved by the National Personnel Authority (article 103, paragraphs 1 and 2 of the National Public Service Act (Act No. 120 of 1947)). Local public officials must obtain similar approval from those who appointed them to their posts in order to participate in commercial activities (article 38, paragraph 1 of the Local Public Service Law).

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

Even if gifts, entertainment or other benefits are intended as a courtesy, they could be considered an illegal bribe (regardless of their value), as long as they are given for and in connection with the power and authority of the relevant public official.

Certain high-level national government officials are obliged to report any gifts or benefits from business entities if the value of such gifts or benefits exceeds ¥5,000 (article 6 of the National Public Official Moral Code) (approximately US\$49). Please note that whether or not this reporting requirement applies is different from whether the gifts or benefits in question constitute bribes.

Update and trends

On 31 March 2008, a Japanese newspaper reported that two Japanese visa agencies had made suspicious payments of money into the bank account of a staff member of the Indonesian Embassy in Japan in order to facilitate the issuing of Indonesian visas.

The newspaper reported that these agencies paid an approximate amount ranging between ¥100,000 and ¥300,000 per month, and a total of approximately ¥20,000,000 in the last five years. It further stated that, in return for such payment, these agencies would sometimes be issued Indonesian visas within only one day of application, notwithstanding that the issuance of visas normally takes between a few days and several weeks.

We are not sure, however, whether the Public Prosecutors Office would be interested in prosecuting this case or not.

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

Please see question 26.

- 28** Does your country also prohibit private commercial bribery?

Japanese law does not impose a general prohibition on private commercial bribery. However, some special laws prohibit private commercial bribery for companies the business of which is closely related to the public interest. For example, under the Act on Nippon Telegraph and Telephone Corporation, bribes to employees of Nippon Telegraph and Telephone Corporation are prohibited. Further, if a director, or similar official, of a stock corporation, in response to unlawful solicitation, accepts, solicits or promises to accept any benefit of a proprietary nature in connection with his or her duties, such person may be punished by imprisonment for up to five years or a fine of up to ¥5 million (approximately US\$48,900). In addition, the benefit received by such person shall be confiscated, while the person who gives, offers or promises to give the benefit may be punished by imprisonment for up to three years or a fine of up to ¥3 million (articles 967 and 969 of the Companies Act) (approximately US\$29,300).

- 29** What are the penalties for individuals and companies violating the domestic bribery laws and regulations?

A person who gives, offers or promises to give a bribe to a public official may be imprisoned for up to three years or fined up to ¥2.5 million (article 198 of the Penal Code) (approximately US\$24,500). Companies are not punished for their employees' violations of domestic bribery laws.

Sanctions against public officials are different, depending on the circumstances. A public official who simply accepts, solicits or promises to accept a bribe in connection with his or her duties may be imprisoned for up to five years (article 197, paragraph 1 of the Penal Code). If an official agrees to perform a certain act in response to a request, the sanction may be increased to imprisonment for up to seven years (article 197, paragraph 1 of the Penal Code). If a public official commits any of the conduct described above and later actually acts illegally or refrains from acting in the exercise of his or her duty, he or she may be imprisoned for one year or longer (article 197-3 paragraphs 1 and 2 of the Penal Code). A former public official may be imprisoned for up to five years, if he or she received a bribe in connection with his or her duty during his or her public service in the past (article 197-3, paragraph 3 of the Penal Code).

A bribe accepted by a public official will be confiscated. If all or part of the bribe cannot be confiscated, then an equivalent sum of money shall be collected (article 197-5 of the Penal Code).

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

Yes. Japanese domestic bribery law does not differentiate 'grease' payments from other benefits, and such payments can constitute a bribe.

- 31** Identify and summarise recent landmark decisions and investigations concerning violations of domestic bribery laws, including any investigations or decisions involving foreign companies.

Recently, a high-ranking official of the Ministry of Defence was prosecuted for receiving bribes (including golf outings) from an ex-director of Yamada Corporation, a trading company specialising in military weapons. This scandal gathered much public attention, and the media reported that General Electric suspended transactions with Yamada Corporation because of this scandal.

Anderson Mōri & Tomotsune

Kenichi Sadaka
Koya Uemura
Emi Sakai

kenichi.sadaka@amt-law.com
koya.uemura@amt-law.com
emi.sakai@amt-law.com

Izumi Garden Tower, 6-1
Roppongi 1-chome
Minato-ku
Tokyo 106-6036
Japan

Tel: +81 3 6888 1000
www.andersonmoritomotsune.com