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Anti-Bribery Laws in Korea and Their Distinct Characteristics

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One measure of determining whether a developing country can become a developed country and continue to prosper is to examine how transparent the society is. During the last half century, Korea has enacted and enforced anti-bribery laws and regulations to become a transparent society.

The Korean anti-bribery laws can be largely divided into two categories: laws that regulate domestic bribery and laws prohibiting foreign bribery.

The domestic bribery laws can be further subdivided based on who the recipient of a bribe is - If the recipient is a public official or a person deemed as a public official, it will fall under the category of public official bribery, while bribery of a non-public official constitutes private commercial bribery. Enforcement against public official bribery offenses is relatively easy, because all that is required to be proven is that an economic benefit was given to a public official in connection with his or her official duties. Private commercial bribery, on the other hand, requires proving not only that an economic benefit was provided in connection with his or her duties, but also that an improper request was made to the recipient of the bribe.

The Korean Criminal Code (the "Criminal Code") is the primary Korean law governing domestic bribery. The types of punishable domestic bribery crimes have been broadened and the extent of punishment enhanced through enactment of other special laws.

Foreign bribery is primarily regulated by the Foreign Bribery Prevention in International Business Transactions Act ("FBPA") which was enacted in 1998 to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Anti-Bribery Convention"). Under the FBPA, anyone who provides, promises or offers a bribe to a foreign public official will be subject to punishment.

The Korean government has exerted efforts to enact and implement anti-bribery laws to reduce corruption. Since such Korean laws, including the Criminal Code, were largely modeled after the civil law, there are characteristics that distinguish them from anti-bribery laws of common law countries, such as U.S. and U.K. Below we lay out some of such distinct characteristics, providing, when necessary or helpful, comparisons with the Foreign Corrupt Practice Act of the U.S. ("FCPA") or laws of other jurisdictions.

1. Vicarious Liability

Korean jurisprudence has long debated whether a corporate entity has capacity to commit a crime and, thus, could be criminally punished as a principal of a crime. The current majority view holds, and Korean courts have ruled, that a corporate entity cannot become a principal of a crime. This means that a corporate entity can be penalized only when vicarious liability is expressly provided for in the relevant criminal law.

The Criminal Code is silent on this issue and, therefore, corporate entities cannot be held vicariously liable pursuant to the Criminal Code. However, there are other Korean laws that contain vicarious liability provisions.

Since, as mentioned above, domestic bribery in Korea, comprised of public official bribery and private commercial bribery, are primarily governed by the Criminal Code, corporate entities cannot be vicariously penalized for domestic bribery pursuant to the Criminal Code. This contrasts with U.S. and U.K. anti-bribery laws and practices.

One may question whether it is reasonable to punish only the bribing individual and not the entity the individual is working for, especially considering the fact that in many bribery cases, an individual provides a bribe for the benefit of his or her company, rather than for personal gain. This also defeats the legislative purpose of improving the business culture and enhancing transparency by inducing companies to establish anti-bribery compliance measures for fear of strict punishment.

As noted above, some Korean laws specifically provide for vicarious liability for bribery and rebates. For example, under the Pharmaceutical Affairs Act, a company can be punished for its employee's illegal rebate. Despite such provisions, vicarious liability does not always attach to a company for its employee's criminal act. This is because the Korean Constitutional Court has held in many cases that vicarious liability provisions in various administrative laws are unconstitutional on the ground that such provisions could impose criminal liability on a corporate entity without any specific fault on the part of the corporate entity. Notwithstanding its decisions, however, the Constitutional Court further held that the notion vicarious liability itself is not unconstitutional, reasoning that an employer could be held liable for failure to properly supervise its employees and holding such employer vicariously responsible serves the purpose of encouraging supervision over its employees.

Taking into consideration the Constitutional Court's reasoning, the Ministry of Justice has established measures to make vicarious liability provisions enforceable. Such measures include a wide-ranging overhaul of the penal provisions in various administrative laws, such as limiting the applicable scope of vicarious liability to cases where an employee committed a crime in the course of performing his or her duty, and exempting a corporate entity from vicarious criminal liability if it is demonstrated that it has adequately supervised and fulfilled its duty of care over its employees. This is similar to Article 7 (failure of commercial organizations to prevent bribery) of the UK Bribery Act, where a company could put forth an affirmative defense to vicarious liability for acts of bribery committed by its employee if the company can prove that it has put in place "adequate procedures designed to prevent persons associated with the company from undertaking such conduct".

Interestingly, in contrast to the Criminal Code regulating domestic bribery, the FBPA contains a vicarious liability provision for foreign bribery. This is probably due to the fact that the FBPA was enacted in accordance with the OECD Anti-Bribery Convention. This begs the question of whether it is reasonable to treat domestic bribery and foreign bribery differently in terms of vicarious liability.

2. Bribery Crime Unique to Korean Law

Among all the bribery crimes, the crime that makes headlines most often in Korean newspapers is a crime called "*al-son-soo-jae*". This crime, which is somewhat unique to Korean law and is governed by the Act Concerning Aggravated Punishment of Specific Crimes, is committed if a person who is not a public official receives or requests a payment or an economic benefit in return for a promise to lobby or influence a public official in connection with his or her duty. Many relatives and family members of past presidents and high-ranking public officials have been punished for this crime.

This crime is conceptually similar to corrupt payment through an intermediary punishable under the FCPA. The FCPA makes it unlawful to provide a bribe to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.

The Korean crime "*al-son-soo-jae*" is different in a significant respect: Unlike under the FCPA, the giver's knowledge about how the paid money will be used is not an element of the crime. Thus, the crime "*al-son-soo-jae*" is committed as soon as an intermediary receives or requests any payment in return for a promise to lobby or influence a public official, irrespective of where or how the money was used. Of course, if a giver conspires with an intermediary to provide all or a portion of the giver's payment to a public official, the giver could be punished as an accomplice of bribery.

One additional important difference is that the giver cannot be punished for "*al-son-soo-jae*" - only the intermediary can be punished.

Due to the secretive nature of bribery, it is difficult to find compelling evidence in many instances. In case of "*al-son-soo-jae*", however, since the giver is not punished, a confession by the giver often plays an important role in investigation and prosecution.

Some legal scholars and commentators have pointed out that it is unfair not to punish a bribe giver who benefits most from the bribe. Others have taken a different position that criminal liability for "*al-son-soo-jae*" infringes on constitutional rights including the right to petition, because it places restriction on appropriate or lawful lobbying of the government.

3. Facilitating Payment

Facilitating payment refers to a payment of to a low-ranking public official to facilitate a routine governmental action.

Unlike the FCPA, the Criminal Code does not recognize an exception for facilitating payments. Accordingly, Korean courts have consistently ruled that a facilitating payment made to a registration official for speedy registration constitutes a bribe.

Notably, the FBPA carves out an exception for a small amount paid or promised to a foreign public official in order to facilitate an official function involving a routine and repetitive task.

The reason for different treatment between domestic bribery and foreign bribery cases is not known. It can be speculated, however, based on the Phase 3 Report on implementing the OECD Anti-Bribery Convention in Korea, that since the FBPA was enacted pursuant to the OECD convention, Commentary 9 to the convention setting out a facilitating payment exception had influence over the decision to include a similar exception in the FBPA.

Against the foregoing background, the facilitating payment exception under the FBPA is expected to be very narrowly applied in practice. The exception is inconsistent with the other anti-bribery laws of Korea. Also, it appears that the legislature did not assign an important meaning to the exception.

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