

Anti-Corruption Regulation

In 43 jurisdictions worldwide

Contributing editor
Homer E Moyer Jr



2015

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Anti-Corruption Regulation 2015

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Malaysia

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1 International anti-corruption conventions

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

On International Anti-Corruption Day, 9 December 2003, Malaysia signed the United Nations Convention against Corruption (UNCAC). Malaysia later ratified UNCAC on 24 September 2008 with a reservation to article 66, paragraph 2. In addition, Malaysia signed the United Nations Convention against Transnational Organized Crime (UNTOC) on 26 September 2002 and ratified the same on 24 September 2004.

2 Foreign and domestic bribery laws

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

The Malaysian Anti-Corruption Commission Act 2009 (MACC Act) came into force on 1 January 2009 and has 74 sections dealing with a wide range of corrupt practices and abuse of power in the public and private sectors. Bribery of foreign and domestic public officials is prohibited under the MACC Act.

One of the major features of the MACC Act is the establishment of the Malaysian Anti-Corruption Commission (MACC), which is empowered to search premises, seize assets, investigate cases and arrest offenders. An Anti-Corruption Advisory Board, Special Committee on Corruption and Complaints Committee function as part of an internal mechanism to audit the MACC's work.

Sections 161 to 165 of the Penal Code provide for various offences of bribery of domestic public officials such as the giving or receiving of gratification to influence a public servant in exercise of his or her public duties.

Other relevant laws and regulations governing bribery include the Customs Act 1967, the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLA) and the Public Service Department's Guidelines for Giving and Receiving Gifts in the Public Service (No. 3 of 1998).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Section 22 of the MACC Act prohibits bribery of a foreign public official. Any person who by himself, or in conjunction with any other person, gives to a foreign public official any gratification as an inducement or reward on account of the official using his or her position to influence any act or decision, or to procure the granting of any contract for the benefit of any person, or generally to perform or abstain from performing his or her official duties, commits an offence. Further, it is an offence for a foreign public official to solicit, accept or obtain such gratification.

4 Definition of a foreign public official

How does your law define a foreign public official?

Section 3 of the MACC Act defines a foreign public official as including any person who holds a legislative, administrative or judicial office, who exercises a public function for a foreign country including a person employed

by a commission or corporation established to perform a duty or function on behalf of a foreign country or who is authorised by a public international organisation to act on behalf of the organisation.

5 Travel and entertainment restrictions

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

Malaysia's anti-bribery laws prohibit gifts, travel expenses, meals or entertainment privileges if the intended purpose of such gifts is as a form of gratification to secure certain favours, advantages, services or benefits. 'Gratification' includes tangibles such as money, property, gifts and non-pecuniary intangibles such as office or employment, dignity, promises or undertakings.

The factual circumstances of each case are relevant in determining if the gift is a form of prohibited gratification. However, section 57 of the MACC Act renders inadmissible as evidence that the impugned gratification is customary in the profession, trade or on a social occasion.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitation or 'grease' payments are prohibited.

7 Payments through intermediaries or third parties

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

Section 22 of the MACC Act prohibits payments as gratification made through intermediaries or third parties to foreign public officials as an inducement or reward. Section 17 makes it an offence for any agent to offer or accept any gratification as an inducement or reward in relation to the principal's affairs or business.

An intermediary or third party will be liable under section 28 for an offence of bribing a foreign public official if he or she abets or is engaged in a criminal conspiracy to commit the offence. Section 107 of the Penal Code also makes abetment a criminal offence. Abetment is defined as instigating, engaging with one or more person or persons in any conspiracy and intentionally aiding by any act or illegal omission.

8 Individual and corporate liability

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

The term 'person' is used in the MACC Act and the Penal Code and therefore individuals may be prosecuted for corrupt practices.

Currently, there are no specific provisions in the MACC Act or the Penal Code empowering the prosecution of corporations. No 'deeming' provisions are available to impute or transfer the liability of a corporation on a director or employee for purposes of a criminal case.

9 Civil and criminal enforcement

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

Section 22 of the MACC Act is a new provision in criminal law. There have been no reported or published cases on section 22 known to us.

With regard to civil enforcement, the AMLA has been utilised to seize, freeze and forfeit assets of offenders involved in cheating and corrupt practices. No reported or published cases related to foreign bribery offences are known to us.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The relevant bodies involved are the MACC, the Royal Malaysia Police, the Central Bank's Financial Intelligence Unit and the Attorney-General's Chambers, which acts as the Public Prosecutor.

11 Leniency

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

With regard to formal mechanisms, there are three.

First, in the limited circumstance that the Public Prosecutor requires a co-accused to testify as a witness for the prosecution, section 63 of the MACC Act empowers the court to grant legal immunity to the said witness if he or she makes a true and full discovery of all things as to which he or she is lawfully examined on.

Second, disclosures by whistle-blowers are governed by the Whistleblower Protection Act 2010. Subject to strict conditions, whistle-blowers who disclose violations of Malaysian law are entitled to legal immunity.

Third, a representation may be made to the Public Prosecutor to prefer a less serious charge carrying a reduced penalty or to discontinue the prosecution based on agreed terms between the parties.

12 Dispute resolution

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

With regard to civil enforcement, agreements may be made between the law enforcement agency and party involved to resolve the dispute or to settle impugned transactions.

With regard to criminal enforcement, the Public Prosecutor is vested with absolute discretion not to prosecute or to discontinue a prosecution under article 145(3) of the Federal Constitution. A representation may be made to the Public Prosecutor not to prefer a charge. Once a prosecution is brought, section 172C of the Criminal Procedure Code allows for a formal plea bargaining process where a lesser penalty or a reduced charge may be agreed on in exchange for a guilty plea.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There have been no recently reported or published shifts in the patterns of enforcement known to us.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

There are no specific provisions in the MACC Act or the Penal Code empowering the prosecution of companies. Individuals of foreign companies and foreign public officials may be personally prosecuted for offences committed in Malaysia.

If the offence is committed outside Malaysia by a citizen or permanent resident of Malaysia, the offence may be dealt with as if it was committed in Malaysia under section 66 of the MACC Act. The extra-territorial offence may also be prosecuted in Malaysia under section 82 of the AMLA

if the offence under the act is against a Malaysian citizen or in respect of the Malaysian government's property.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Under section 24 of the MACC Act, a person who bribes a foreign public official is liable to imprisonment for a term not exceeding 20 years and a fine not less than five times the sum or value of the impugned gratification where such gratification is capable of being valued or 10,000 ringgit, whichever is the higher.

Under section 130 of the Companies Act 1965 (CA), it is an offence to be a director, manager or promoter of a company within a period of five years after a person's conviction (or release from imprisonment) for an offence involving fraud or dishonesty punishable with imprisonment of three months or more.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There have been no recently reported or published decisions or investigations involving foreign bribery known to us.

Financial record keeping

17 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Section 167 of the CA requires every company and its directors and managers to keep all accounting and other records that will sufficiently explain the transactions and financial position of the company for a period of seven years. These records include true and fair profit and loss accounts, balance sheets and any other related documents which may be conveniently and properly audited.

A similar requirement of seven years to keep sufficient records of a business's income or loss is imposed by section 82 of the Income Tax Act 1967.

Section 13 of the AMLA makes it mandatory for reporting institutions such as banks, insurance companies, gaming houses, moneylenders, and accounting and law firms to keep a record of domestic and foreign transactions exceeding 50,000 ringgit. Such records include documenting the identity and address of the parties involved, and the type, date and time of the transactions. These records must be retained for not less than six years from the date the transaction was completed or account closed.

There is also a requirement under section 319(3) of the Capital Markets and Services Act 2007 (CMSA) for a listed corporation and its directors to keep accounting records and other records that will sufficiently explain the transactions and financial position of the company and its related entities. These records must be retained for seven years.

18 Disclosure of violations or irregularities

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

If a company has been given, promised or offered a bribe or has solicited or received the same through its employees or agents, there is a duty to report details of the event to the MACC under section 25 of the MACC Act.

Section 174(8A) of the CA requires the auditor of a public company, in the course of the performance of his or her duties, to report to the Registrar of Companies any serious offence involving fraud or dishonesty that is being or has been committed by the officers of the company or against the company. Failure to do so is punishable with imprisonment of seven years or 250,000 ringgit or both upon conviction.

Similarly, under section 320 of the CMSA, an auditor of a listed corporation is immediately required to submit a report to the relevant authorities if in his or her opinion there has been a breach or non-performance of any rules of the stock exchange, securities laws or on any matter which may adversely affect the financial position of the listed corporation.

19 Prosecution under financial record keeping legislation**Are such laws used to prosecute domestic or foreign bribery?**

There have been no reported or published prosecutions involving bribery utilising record keeping laws (as a secondary form of liability) known to us.

20 Sanctions for accounting violations**What are the sanctions for violations of the accounting rules associated with the payment of bribes?**

See question 18.

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

Bribes may not be deducted from taxes.

Domestic bribery**22 Legal framework****Describe the individual elements of the law prohibiting bribery of a domestic public official.**

Section 21 of the MACC Act prohibits bribery of an officer of any public body. Any person who offers to a public official or, being an official, accepts any gratification as an inducement or a reward to perform or abstain from performing, or to aid in procuring or expediting the performance of any official act, or to show or forbear to show any favour or disfavour in his capacity as such officer, commits an offence.

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

Section 21 of the MACC Act covers both instances.

24 Public officials**How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?**

A public official means any person who is a member, an officer, an employee or a servant of a public body and includes a person receiving any remuneration from public funds. State-owned or state-controlled companies are public bodies.

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

Public officials may not participate in commercial activities except with the approval of their respective heads of department described in Regulation 5 of the Public Officers (Conduct and Discipline) Regulation 1993. Further, Regulation 4(2) prohibits a public official from subordinating his or her public duty to his or her private interest, or conduct himself or herself in any manner likely to cause reasonable suspicion that he or she has used his or her position for personal advantage.

Regulation 19 of the Public Officers Regulations (Appointment, Promotion and Termination) 2005 makes it mandatory that all public officials are to abide by the provisions of the government's General Orders, Service Circulars, Circular Letters and other rules issued by the government from time to time.

The Code of Ethics of the Prime Minister's Office dated 24 April 2000 requires that officers and staff of the Prime Minister's Office ensure that there is no conflict of interest in the performance of their official duties. There is also a requirement to obtain written permission before they are allowed to participate in any business or transaction.

The government's Service Circular No. 3/2002 on the ownership and declaration of assets by public officials makes it mandatory for public officials to declare his or her assets once every six years, when required by the government or when acquiring new properties. The Treasury's Instruction No. 197(3) also requires a declaration of interest in respect of any quotation or tender exercise to be taken.

The Prime Minister's Guidelines dated 8 March 2010 with regard to lobbying by government leaders or other persons on official matters outlines the parameters of support letters and other forms of communication. This is to deter undue influence on the decision-making process by public officials in procurement and licence or permit approvals.

Section 23 of the MACC Act prohibits any officer of a public body from using his or her position for any gratification, whether for himself or herself, his or her relative or associate. There is a presumption that an officer of a public body used his or her office or position for gratification when he or she makes any decision or takes any action in relation to any matter which he or she, or his or her relative or associate, is directly or indirectly interested in.

26 Travel and entertainment**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?**

See question 5.

Regulation 8 of the Public Officers (Conduct and Discipline) Regulation 1993, amended in 2002, prohibits a public official from giving or receiving either personally or through his or her spouse or any other person any gifts to or from any association, body or group of persons if it is in relation to the exercise of the official's duty and the value of the gift is not commensurate with the purpose of the gift. The official may receive the gift if in the circumstances he or she is unsure of the value or he or she is in a situation that would make it difficult for him or her to reject the gift in which case the official must report the event as soon as practicable.

Entertainment expenses may be received or given insofar as it does not influence the execution of the official's duty for any person and is not inconsistent with the official's duty to avoid a conflict of interest under regulation 4(2). Officers and staff of the Prime Minister's Office are, however, prohibited from accepting gifts and entertainment in relation to the performance of official duties even in the case where the same are given by family members.

The government's heads of department may seek a written explanation from public officials in the department if he or she is of the opinion that the official is living beyond his or her means or has assets that an official would not be reasonably expected to acquire or maintain.

In addition, the Treasury's Circular Letter No. 11 of 1995 provides guidelines and conditions for public officials regarding overseas trips for procurement purposes including trips sponsored by companies.

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

See question 26.

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

Private commercial bribery is prohibited by section 16 of the MACC Act.

29 Penalties and enforcement**What are the sanctions for individuals and companies violating the domestic bribery rules?**

Under section 21 of the MACC Act, a person who bribes a public official is liable to imprisonment for a term not exceeding 20 years and a fine not less than five times the sum or value of the impugned gratification where such gratification is capable of being valued or 10,000 ringgit, whichever is the higher.

Under section 130 of the CA it is an offence to be a director, manager or promoter of a company within a period of five years after a person's conviction (or release from imprisonment) for an offence involving fraud or dishonesty punishable with imprisonment of three months or more.

Update and trends

There have been four recent significant events.

- In November 2014, the Court of Appeal in *Latheefa Beebi Koya & Anor v Suruhanjaya Pencegahan Rasuah Malaysia & Ors* [2014] 7 MLJ 864 settled a vexed question whether the MACC could demand the recording of lawyers' statements in the course of accompanying their clients for investigations. The court held that the MACC had no such power. This is a ground-breaking decision on procedure upholding the role of lawyers and solicitor-client privilege.
- In a move to combat corruption in the corporate sector, the MACC has suggested that chief executive officers to be appointed to government-linked or government-owned corporations should first be vetted by the MACC to ensure they have a clean record; that the MACC be given prosecutorial powers independent from the Public Prosecutor; and that as a result of 'leakages' in the management of public funds by government officers short of corruption reported by the Auditor-General, a new law be enacted to deal with this form of misconduct. These proposals have yet to be adopted by the government.
- The government has proposed to amend the MACC Act by including a corporate liability provision that makes corporations liable for the corrupt practices of its employees subject to a due diligence defence. The drafting of the amendment is in its final stages.
- We have seen a far greater use by the police and the MACC of the AMLA provisions to seize, freeze and forfeit the bank accounts and assets of suspects involved in bribery. These actions are taken prior to prosecution to manage evidentiary and dissipation risks.

30 Facilitating payments

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

Domestic bribery laws have been enforced with respect to 'grease' payments.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Between 2013 and 2014, there have been a number of high-profile cases concerning corporations. Notable ones include:

- Idris M Shudud and Ishak Yusof, two seniors managers of Malaysia's state-owned oil corporation, Petroliaam Nasional Berhad or PETRONAS, were charged with bribery in the Sessions Court. Idris was charged with five counts of bribery amounting to 403,000 ringgit as an inducement to approve official PETRONAS documents. Ishak was charged with three counts of bribery amounting to 23,000 ringgit as an inducement to supply 125 lorryloads of liquid natural gas to a local company.
- The former chief executive officer of Koperasi Permodalan FELDA Quality Food Sdn Bhd (KPFQ), Datuk Sarchu Sawal, and a former director of KPFQ, Datuk Tan Han Kook, were charged with committing criminal breach of trust. Sarchu was charged with criminal breach of trust amounting to 17 million ringgit while Tan was charged with breach of trust amounting to 13 million ringgit. Their trials are ongoing.
- The conviction of the former chief executive officer of Malaysia's National Entrepreneur Development Corporation, Ahmadi @ Ahmad Zukni bin Johari and its secretary, Mohamad Aminuddin bin Md. Zain, was upheld by the Court of Appeal. Ahmadi was sentenced to five years' imprisonment, while Aminuddin was sentenced to four years' imprisonment for forging US\$5 billion worth of the Corporation's bond documents.
- For the first time, a prosecution was brought against a Forestry Department officer, Amir Sharifuddin bin Aliman, for refusing to comply with a notice to declare assets issued under section 36(3) of the MACC Act. Amir initially complied with the notice by declaring his assets amounting to about 3.5 million ringgit. On further investigation, the MACC found that Amir and his family's assets were worth 4.5 million ringgit. A second notice was issued requiring Amir to explain the discrepancy. He failed to comply and was charged as a result of this.
- The MACC, in cooperation with the Malaysian Maritime Enforcement Agency (MMEA), arrested seven MMEA officers for facilitating bribes in the sums of 1,000 ringgit to 771,000 ringgit by illegal fishing syndicates operated by Vietnamese fishermen. Four Vietnamese ships were seized with 1,096,000 ringgit in cash. Five officers were charged. One of them pleaded guilty and was sentenced to a day in jail and a fine of 200,000 ringgit. The rest claimed trial and their cases are pending in court.



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