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Anti-bribery

Countries, cultures deal with corruption in differing ways

By Tom Kirvan



Primerus members (left to right) Tomislav Šunjka of Serbia, Kengo Nishigaki of Japan, and Dominic Wai of Hong Kong are well-versed in anti-corruption and white-collar crime issues.

W

hen it comes to rooting out corruption, the Republic of Serbia has

much work to do, according to Transparency International, which ranked the landlocked nation in Southeast Europe “96th among 180 countries in its 2021 Corruption Perceptions Index report.”

The ranking came as no surprise to attorney Tomislav Šunjka, the founder and principal of ŠunjkaLaw, a business law firm located in Novi Sad, a city of nearly 300,000 in northern Serbia on the banks of the Danube River.

In 2013, according to Šunjka, the country rolled out a “National Strategy for Combating Corruption and the Action Plan” for the “realization of said Strategy” that concluded in 2018. A “detailed analysis of the execution of the National Strategy and Action Plan” was eye-opening, he said.

“The report is devastating,” Šunjka said in decidedly frank terms.

“The Action Plan was a set of measures and activities, both political and legal, which were to be implemented, adopted or amended within the envisaged period of five years,” Šunjka indicated. “According to the Agency’s official report: 62 percent of the measures and activities have not been implemented; for 12 percent of the measures, it cannot be determined if they have been implemented at all; and only 26 percent of the measures have been implemented.”

Šunjka, whose range of business clients cuts across the European and Asian continents, is recognized as an authority on anti-corruption and anti-bribery matters in the global marketplace. His efforts are grounded on a commitment to conduct business in accordance with the highest ethical standards, which he hopes will become the norm across Serbia.

“Special departments of the Prosecutor’s Office for fighting corruption, located in four cities across Serbia, started working in March 2018,” Šunjka related. “The main topics of their work are: the detection and prosecution of perpetrators of criminal acts in the field of economy and finance; proactive investigations in these areas, especially in the field of public procurement; and conducting financial investigations in the fight against corruption. The final goal of their work is the recovery of assets for victims of corruption. Special forensic departments in the fields of finance, stock exchange operations, foreign exchange operations, taxation, foreign trade, bookkeeping and similar were established within the framework of special prosecution offices, which should, as part of their expert work, help and assist prosecutors in the procedures they lead.”

Still, Šunjka said, the underlying perception of Serbia on a global scale is far from glowing.

“According to the United Nations Development Programme, there is an impression given of high levels of corruption in Serbia,” Šunjka said.

“The Council of Europe’s anti-corruption body, GRECO, says in its November 2020 Report that Serbia has implemented satisfactorily only two of its 13 recommendations made back in 2015; namely, those on the interaction of parliamentarians with lobbyists, and on strengthening the role of the Anti-Corruption Agency,” Šunjka noted. “Ten recommendations have been implemented only partially, and the recommendation on the adoption of a Code of Conduct for parliamentarians has not been implemented at all.”

The perception, not surprisingly, is far different when it comes to Japan, which boasts the third-largest economy in the world when measured by GDP (Gross Domestic Product).

Tokyo attorney Kengo Nishigaki, who founded the GI&T Law Office in 2020, said “we rarely see public officials seeking bribery.” And if a client of his does encounter a government official seeking an “unlawful benefit,” Nishigaki offers one piece of advice.

“My advice is usually very simple, ‘Just say no,’” he said candidly.

Japan, according to Nishigaki, is “one of the cleanest countries in the Asia Pacific,” ranking 19th on the Corruption Perception Index (CPI) of Transparency International, the global organization that monitors bribery and corruption prevalence in countries around the world.

“We do not encounter any bribery in daily lives,” Nishigaki said. “However, in certain areas such as health care, construction, and politics, we sometimes see bribery cases.”

The Penal Code of Japan, Nishigaki noted, “has a few provisions regarding bribery to public officials, which penalize only natural persons, not legal entities.” Japanese law, he added, does not penalize commercial bribery.

“Further, under Article 18 of the Unfair Competition Prevention Act, bribery to foreign officials is prohibited, where both natural persons and legal entities may be punished,” Nishigaki indicated. “The maximum amount of fine is 300,000,000 yen (approximately \$3 million in U.S. currency). In terms of its extra-territoriality, if all or part of the conduct is done in Japan, or it is conducted by a Japanese national, the Act will be applicable. Although this was legislated over 20 years ago, there have been only nine cases. Thus, the enforcement is not so active.”

Nishigaki, who earned his law degree from the University of Tokyo and his LL.M. from the New York University School of Law, spent 20 years of his legal career with Baker & McKenzie. From 2004-05, he worked at the firm’s Chicago office, focusing on matters related to compliance with the U.S. Foreign Corrupt Practices Act.

“I often advise them (clients) about how to avoid bribery ‘outside’ Japan, because most major Japanese companies have foreign operations especially in the APAC (Asia Pacific) region,” Nishigaki explained. “They are often asked to pay bribery when they obtain/renew a license, secure a government contract, go through government’s audit, import/export goods through foreign customs.”

The anti-bribery landscape is much the same in Hong Kong, according to Dominic

Wai, a partner with ONC Lawyers, a Primerus firm that was established in 1992.

“According to the Independent Commission Against Corruption (ICAC) in Hong Kong, the statutory body that enforces anti-bribery laws in Hong Kong, the corruption in both the public and private sectors . . . has been kept effectively in check,” said Wai, who formerly worked for the ICAC. “According to the ICAC Annual Survey findings, 98.4 percent of the people polled said they had not personally come across corruption in the past 12 months. Hong Kong also has a good ranking in the CPI of Transparency International, ranking at 12 out of 180 jurisdictions.”

Wai, a business litigator who focuses on regulatory and compliance matters, said that the anti-bribery laws in Hong Kong are “similar to that in the United States but have its own unique features and are more expansive in some areas.”

For instance, said Wai, under the U.S. Foreign Corrupt Practices Act (FCPA), “facilitation payments are allowed whereas under the Hong Kong Prevention of Bribery Ordinance, a payment to a government official is not allowed, even if it is for facilitation and routine, and the amount is small.”

The FCPA, Wai explained, is a U.S. federal law that prohibits American citizens and entities from bribing foreign government officials. It is enforced by the Department of Justice and the Securities and Exchange Commission.

Wai, who earned his law degree from City University of Hong Kong, said he cautions clients to be wary of any official who appears to be soliciting a bribe.

“The important thing is not to pay, as offering a payment to a government official is an offense even if the amount is petty,” said Wai. “I would advise the client to consider reporting the matter to the ICAC so that if there is really a rogue government official, the person could be apprehended and not affect the client’s dealings with the relevant government department or authorities.” 

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