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COMMERCIAL BRIBES: THE SWISS ANSWER

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1. Introduction

"Corruption in business is frequent, widespread and familiar" [1] and business in Switzerland is no exception to this general observation. Commercial bribery, which is one such form of corruption, is characterized by the secrecy involved, and thus the amounts of "questionable payments", the frequency with which they are made, and their net effects on business operations and society at large are unknown. Despite the lack of data, commercial bribery, unlike bribery of public officials, seems to be common in Switzerland.

Commercial bribery in Switzerland is governed by various articles of the Swiss Code of Obligations, the Swiss Penal Code, and the Federal Unfair Competition Act of 1943. Effective application of these laws has been hindered by the lack of incentives for those legally entitled to initiate judicial action. Of the available weapons, the general provisions of the Swiss Code of Obligations offer the greatest prospects for deterring commercial bribery.

This article explores the Swiss legal approach to commercial bribery, focusing on those instances where the bribe-giver seeks to enter into a contract with the principal of a bribed agent. An examination of Swiss law is particularly appropriate, because the frequent choice of Swiss law and/or jurisdiction to govern relationships among contracting parties gives Switzerland an important role in international financial transactions.

2. Definition and characteristics of bribery

Although no precise definitions [2] of bribery exist, commercial bribery appears to have three salient characteristics. First, the aim of the briber is to influence the principal, a prospective contractual partner, through his agent. In a "normal" contractual relationship, one party attempts to influence the other party by offering attractive products or competitive prices. Where bribery is involved, however, one party seeks to influence the prospective contractual

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partner indirectly by putting pressure on the prospective partner's agent.

The second characteristic of bribery is that the principal, as the ultimate "victim" of the scheme, is ignorant of the briber's actions. Thus, bribes are distinguished by the secrecy involved; if the principal knows of or consents to the briber's actions, these actions cannot be legally characterized as bribery. While French law, for example, acknowledges this distinction and clearly defines bribery in terms of the principal's ignorance of the transaction, Swiss law contains no such express requirement [3]. Instead, the courts and legal scholars have unanimously inferred the secrecy requirement, recognizing that the general purpose of the laws is to protect the principal from an agent's breach of duty.

It is noteworthy that the goal of promoting fair competition and good faith in business transactions is secondary to that of protecting the principal. This emphasis has important ramifications for the discovery and deterrence of commercial bribery. The principal is normally the only party who may seek judicial relief and will do so only if he has incurred substantial losses. As a result, bribe transactions which cause only minor losses to the principal but have serious consequences for overall market competition and the proper conduct of business may remain undetected and undeterred.

The Swiss focus on protecting the individual contrasts with the approach reflected, for example, in the German Law Against Unfair Competition [4]. This statute is directed towards maintaining fair market competition and is concerned with the societal impact of practices impeding fair competition. The sections of the German law dealing with bribery are therefore applicable regardless of whether the principal knows of or consents to the agent's actions.

The Swiss requirement that the principal be unaware of the bribe agreement is limited to instances of commercial bribery. Where public officials are involved, the applicable Swiss laws are concerned with protecting the State's integrity and its proper functioning. Thus, an official charged with bribery cannot assert as a defense a superior's knowledge of or consent to the bribe.

The third characteristic of commercial bribery is the remuneration paid to an unfaithful agent. The briber seeks to induce the agent to participate in the scheme by promising him an advantage. Swiss legal scholars [5] agree that even a relatively minor advantage (such as awarding a medal or publishing a flattering newspaper article) suffices to constitute a bribe.

To summarize, bribery may be defined as the act of secretly influencing an agent's principal in order to induce the principal to enter into a contract with the bribe-giver. Under this broad definition, the objectives sought and the gains received by the briber from the transaction, as well as the different techniques employed to carry out the scheme, are unimportant. Moreover, it is irrelevant if the briber fails to fulfill promises made to the agent; bribery exists as soon as the briber and agent agree, either expressly or implicitly, on the giving and receiving of a secret advantage for the purpose of enabling the

briber to influence the principal indirectly. Finally, bribes range from the trivial to the important and in theory they include any gift to an agent or official with whom one has a business relationship. Even "grease" or "facilitating payments" are legally regarded as bribes (*see* article 316 of the Swiss Penal Code). Thus far, however, the courts have been presented with clearcut instances of bribery and have not had to deal with borderline cases.

3. Legal regulations

The statutes discussed below are federal and are therefore applicable to the whole of Switzerland and not just to particular "cantons" (states) [6].

3.1. Bribery in business

Article 1 al. 2 litt. e, and article 13 litt. e of the Federal Unfair Competition Act of 1943 are the only statutory provisions expressly prohibiting commercial bribery. Article 1 defines unfair competition and cites bribery as an example, and article 13 states that bribery may be punished by fines or imprisonment. Other laws applicable to bribery are the more general provisions of the Swiss Code of Obligations and the Swiss Penal Code. Article 20 of the Swiss Code of Obligations governs contracts involving immoral or illegal agreements; article 24 of the same statute pertains to contracts entered into as a result of fundamental error; article 28 addresses the situation of a party induced to enter the contract by the other party's willful deception; and articles 321 litt. b, 364, and 398 pertain to breach of fiduciary duty by employees, agents and contractors. The relevant sections of the Swiss Penal Code are articles 148 and 159, covering swindling and dishonest management, respectively. Both offenses are punishable by jail sentences.

3.2. Bribery of public officials

Unlike commercial bribery, acts of bribery implicating public officials are governed solely by penal provisions. Articles 288, 315, and 316 of the Swiss Penal Code, which address public officials, prohibit the promise and/or actual giving or receipt of bribes or "facilitating payments". In the "grease" cases where "facilitating payments" are made, only the public official is subject to punishment [7]. Other statutory provisions specifically deal with the bribery of particular public officials and include sanctions such as fines and dismissal from office.

4. Territorial application of Swiss law

The territorial application of Swiss law is of significance because many bribery cases involve more than one country and because parties to a contract made in Switzerland may generally choose which law will govern their contract. The discussion below briefly surveys the rules on the territorial application of Swiss law, primarily as they relate to agreements between the briber and the agent. Subject to slight differences that will not be explored in this article, these rules are also generally applicable to contracts between the briber and the principal.

4.1. Unfair competition law

The provisions in this area are designed to protect competition in the Swiss market and thus apply only to acts of bribery affecting this market [8].

4.2. Civil statutory provisions

The Swiss civil provisions apply in clearcut situations such as where contracting parties choose Swiss law or where all the parties have a residence or business in Switzerland. Swiss law is not generally applicable in situations where the bribed agent resides outside the country or where the parties choose foreign law. Parties to a bribe agreement, however, may not choose a particular law to govern their contract merely in order to evade Swiss or foreign laws proscribing their actions. Where the parties' choice of law has been guided by such intentions and would therefore appear intolerable, a Swiss judge may employ the "ordre public" clause and ignore the parties' choice of law by applying the "natural" law of the contract. Although no judge has ever resorted to these measures in a bribery case, the general principles governing private international law do not preclude this course of action [9].

4.3. Penal law

Swiss penal law applies mainly to crimes executed or producing their results in Switzerland. Under certain circumstances, a party may be subject to Swiss law and jurisdiction even if the crime was perpetrated in another country [10]. If either the actor or the victim is Swiss, the actor may be prosecuted in Switzerland, provided that: he is extradited to Switzerland; the actor has not already been tried for the offense; and the questionable conduct is punishable in the foreign country where it occurred. Although these circumstances may be satisfied in the case of bribery of foreign officials by Swiss citizens or in the case of bribery of a Swiss agent by a foreign contract party, the Swiss penal code has never been extraterritorially applied in a bribery matter.

In addition to the possibility of extraterritorial application of Swiss law, the United States–Swiss Treaty on Mutual Assistance in Criminal Matters of 1973 provides for mutual assistance by the two countries in criminal investigations and proceedings [11]. Assistance includes, for example, ascertaining the whereabouts of persons, taking testimony from persons, and effecting the production of judicial and other documents (article 1 al. 4). Article 4 al. 1 states that:

> In executing a request, there shall be employed in the requested state only such compulsory measures as are provided in that state for investigation or proceedings in respect of offenses committed within its jurisdiction.

Bribery (of public officials) and fraud are listed among the offenses for which assistance is available in the form of the "compulsory measures" referred to above.

5. The incidence and prevention of bribery

The above survey of the Swiss bribery laws and their territorial application indicates that there are existing statutory provisions that may be used to deal with both commercial bribery and the bribery of public officials. Public corruption does not present a major problem. The incidence of bribery of public officials is low [12], largely because of the existence of small communities and the decentralization of political power in Switzerland. The opportunities for social interaction and close relationships among members of local communities appear to provide an effective means of influencing officials and may therefore obviate the need to resort to bribery.

The incidence of commercial bribery and the number of cases adjudicated under Swiss law are unknown. Although there are a few published judgments in civil law, either "cantonal" (state) or federal (Supreme Court or Tribunal fédéral), no cases have been decided under competition or penal law. The number of unpublished judgments is not known but is likely to be negligible. In addition, some cases are submited to arbitration and are therefore virtually guaranteed absolute secrecy.

The few published judgments and one recent unpublished Supreme Court civil judgment clearly condemn commercial bribery and indicate that the general legal principles examined in this article, especially relating to civil law remedies, are firmly established. The following sections examine the application of these legal principles to commercial bribery. Civil law is emphasized since it furnishes the most effective weapons against bribery.

6. Civil remedies

6.1. The bribe agreement

6.1.1. Legal status of bribe agreement

The agreement between briber and agent is null and void under Swiss law. The relevant statutory provision, article 20 of the Swiss Code of Obligations, states that: "A contract providing for an impossiblity, having illegal contents, or violating bonae mores, is null and void." The object of the agreement is considered immoral under Swiss law because it contravenes both the fiduciary duties of the agent and the bonae mores of commercial transactions [13]. Furthermore, the bribe agreement may be illegal as well, if it violates either the penal law (*see* subsection 7.1 *infra*) or competition rules (*see* subsection 7.2 *infra*).

6.1.2. Consequences of nullity

The entire agreement between briber and agent is considered void ab initio. This nullity may be raised ex officio by the courts regardless of the contracting parties' objectives, or may be raised by any interested third party, mainly the principal of the bribed agent.

Once an agreement fulfills the definition of a bribe, it is null and void irrespective of ensuing events. Since the nullity of immoral or illegal contracts is public policy, no action of any party, including the agent's principal, may serve to validate the bribery agreement. Furthermore, there are no statutes which limit the period within which a party may challenge the agreement between agent and briber, except perhaps for the exceptional situation where raising the issue of nullity would be considered contrary to bona fides. Thus, the validity of a bribe agreement also may be examined when a problem arises later, such as in litigation concerning subsequent contracts between the briber and the agent's principal.

There are no exceptions to the rules enumerated above. The contracting parties may not argue that bribery is a common and accepted practice in their business circles or that business mores differ in the foreign country where the bribe agreement applied. Up to the present time, Swiss judges have never accepted the defense of "when in Rome do as the Romans do" [14].

The effects of nullity on performance of the bribe agreement between the briber and the agent are as follows.

(a) If both the briber and the agent have failed to perform, neither can legally be compelled to do so. Under these circumstances, if both parties continue to refuse to perform their respective sides of the bargain, the bribe agreement produces no results at all.

(b) If the briber has already given the promised advantage to the agent, the briber cannot recover it if the agent refuses to perform. Article 66 of the Swiss

Code of Obligations provides that: "Recovery of something given with the intention of obtaining an unlawful or immoral result is precluded." Under article 66, the corrupted agent may keep the bribe without carrying out his part of the agreement and cannot be compelled to act. While it may seem unfair to favor one party when both have violated the civil law, this result may only be temporary, since the agent's principal may bring an action to recover the amount of the bribe. (*See* subsection 6.3.2 *infra.*)

(c) If the agent fully or partially performed before receiving the promised advantage, he may not bring an action to recover the amount due. Under these circumstances, the briber reaches his goals without fulfilling the contractual promise. This shocking result may be mitigated because, under Swiss law, the principal is permitted to rescind the subsequent contracts and/or sue the briber for damages. (*See* subsections 6.2.1 and 6.4 *infra.*)

(d) Since both parties participate in the immorality of the bribe agreement, no one party being more innocent than the other, neither can bring an action for damages caused by the contract's invalidity [15].

Rules on the consequences of nullity are intended to deter the relevant parties from entering into immoral or illegal contracts. Normally, their only practical effect is to compel the interested and informed parties to determine ways to avoid the results which may be unpalatable to them. In the area of bribery, the aforementioned rules often encourage the briber and agent to agree to simultaneous performance in order to avoid the risk of non-performance by either party.

6.2. Subsequent contracts between the agent's principal and the briber

The briber aims to indirectly induce the agent's principal to enter into contractual relations with him. In this subsection we examine what actions the deluded principal may take in order to avoid the consequences of the briber's illegal acts. We assume here that the relevant contracts in and of themselves fully conform to either private or public legislation and consequently would be valid if not concluded with the assistance of bribery.

6.2.1. Choosing not to perform subsequent contracts

In contrast to the bribe agreement, whose nullity is based on public policy, the subsequent contracts between principal and briber are not null and void per se. The principal is provided the option of choosing whether or not to perform the subsequent contracts. If the principal elects not to perform the contracts, the status quo ante must be re-established and all acts of execution must be recalled. The legal theories under which the principal may proceed depend on whether the subsequent contracts were concluded by the principal and the briber or by his agent and the briber.

6.2.1.1. Rescission of the contracts concluded by principal and the briber. Where subsequent contracts have been concluded by the principal and briber, the principal may choose to rescind the contracts based on two doctrines of Swiss law. The first is the doctrine of essential error and the second is the doctrine of willful deception.

The doctrine of essential error is included in the Swiss Code of Obligations at article 24 al. 4 and, in the relevant portion, states the following:

> An error is, in particular, deemed to be material in the following cases:
> ...
> 4. If the error related to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be a necessary basis of the contract.

Under article 24 al. 4, the principal would argue that at least two errors took place at the time the contract was signed. First, he thought the agent was faithful and disinterested in advising the principal to conclude the agreement. Second, he was unaware that the briber used an immoral and/or illegal payment to induce the principal to enter into the contract.

The principal would argue that those errors were "material" because they related to "certain facts... considered to be a necessary basis of the contract" in both an objective and subjective sense. Bribery is an essential fact in an objective sense because the act of corrupting an employee is prohibited by Swiss law on unfair competition. (*See* subsection 7.1 *infra.*) Proof of the subjective importance of the act of bribery will present no difficulty in most cases.

A principal wishing to rescind the contract or contracts with the briber also may resort to the doctrine of willful deception, found in article 28 of the Swiss Code of Obligations:

> If a party has been induced to enter into a contract by the willful deception of the other party, the contract shall not bind the deceived party even if the error so induced was not material (Art. 24).
> A willful deception committed by a third party shall invalidate the contract as regards the deceived party only if the other party, at the time of entering into the contract, knew or should have known of such deception.

Swiss courts have liberally interpreted this provision under a variety of factual circumstances. Given such a broad construction of article 28, commercial bribery clearly would fall under its rubric.

If the principal chooses to rescind the contracts under the doctrines of essential error or willful deception, he is not prohibited from suing for damages based on the losses suffered.

6.2.1.2. Subsequent contracts concluded by briber and agent for principal. The principal is not legally bound by subsequent contracts entered into between the

briber and the agent acting as the principal's representative. Underlying this rule is the argument that the principal was a victim of collusion between the agent and briber, because they both acted secretly to gain personal advantage at the principal's expense. It is irrelevant that the principal did or did not suffer losses as a result of the bribery. Collusion requires only that the agent and briber acted in their own interests and that the briber used the agent's breach of duty to consummate the contract.

It is important to note that in a case of collusion (in contrast to the situation where the contract was concluded by the principal and the briber), the principal may not bring an action for damages, since the contract is considered nonexistent.

6.2.2. Performance of the subsequent contracts

In some cases the principal may choose to perform the subsequent contracts with the briber, either because they suit him or because he has no reasonable choice. Where the contract has been concluded by the principal and the briber, the principal merely chooses not to rescind the contracts. Where the principal was "represented" by the corrupted agent in that the contract was signed by the agent and the briber, the principal may choose to ratify the contract under article 38 of the Swiss Code of Obligations, which states: "If one, without having been authorized, has entered into a contract acting as an agent, the person represented shall become an obligor or an obligee only if he ratifies the contract." The decision to perform the contracts does not deprive the principal of the possibility of bringing a claim for damages if the contracts' conditions are clearly unfavorable.

Where the principal could rescind contracts because of essential error (*see* subsection 6.2.1 *supra*), he could also base the claim for damages on the precontractual liability (*culpa in contrahendo*) of the briber. The rationale behind this doctrine is that by using bribery, the briber violated the general rules on bona fides in business relations. While the exact nature of this liability is debated in the literature, its application to the area of business corruption has been unanimously accepted [16].

In addition, a principal can sue for damages when he chooses to perform a contract voidable on the basis of willful deception. Article 31 al. 3 of the Code of Obligations provides that: "Ratification of a contract which, due to deception or threat, was voidable does not itself bar a claim for damages" (article 41 et seq.).

The amount of damages which the principal may claim is limited by a number of legal doctrines. In particular, the deluded principal must mitigate the damages as much as possible [17]. Furthermore, the corrupted agent must "transfer" the bribe to the principal. (*See* subsection 6.3.2 *infra*.) Since the costs of the bribe generally are included in the price of the subsequent contracts, transfer of the amount of the bribe from the agent to the principal

tends to reduce the principal's losses incurred from overcharging.

6.2.3. Time limitations in bringing actions

After discovering that a bribe has taken place, the principal must act rather quickly if he wants to rescind the subsequent contracts and/or claim for damages. In cases of essential error or willful deception, the principal must decide what he intends to do within a year of discovering the bribery. If the principal does not act within that time limitation, he is presumed to have chosen to perform [18].

There is no statute of limitations applying to the time within which the principal must discover the bribe. Some commentators argue that discovery should occur within ten years following the acts of bribery. The Tribunal fédéral has yet to address this issue. One could argue, however, that good faith would prevent a principal from rescinding a fully performed contract after a long period of time has elapsed [19].

Where the principal was committed to the contract by the corrupted agent, the law allows the briber the option of giving the principal a deadline within which to decide whether to perform or rescind the contract. Article 38 al. 2 of the Swiss Code of Obligations states that:

> The other party is entitled to require the alleged principal to elect, within a reasonable time, whether to ratify the contract, and such other party shall no longer be bound if the alleged principal fails to ratify within such time period.

Of course, this clause becomes relevant only after the principal discovers that a bribe has taken place.

6.3. Remedies toward the unfaithful agent [20]

6.3.1. Dismissal and termination of the agency contract

Accepting or even asking for a bribe violates the agent's duties toward the principal under the Swiss Code of Obligations. The exact nature of the contract between agent and principal, that is agency, work a.s.o., is irrelevant.

Article 321 litt. a of the Code of Obligations specifies the employee's duty of care and loyalty. It states that:

> The employee must carefully perform (art. 99) the work assigned to him, and loyally safeguard the employer's legitimate interests.
>
> ...
>
> During the employment relationship, the employee shall not perform work for third parties against compensation to the extent such work conflicts with his duty of loyalty....

The duty of an agent is delineated in article 418 litt. c of the Code of

Obligations, which provides: "The agent must safeguard the interests of his principal with the care of an ordinary merchant." Article 418 litt. e notes that: "The agent is not, however, deemed to have the authority to grant terms of payment, or to agree with the customer upon other alterations of the contract...."

The bribery entitles the principal to dismiss the employee or terminate the agency contract immediately. Article 337 of the Code of Obligations states:

> For valid reasons, the employer, as well as the employee, may at any time terminate the employment relationship without notice. A valid reason is considered to be, in particular, any circumstance under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship.

Similarly, article 418 litt. r of the Code specifies that:

> For valid reasons, either the principal or the agent may, without notice, immediately terminate the contract (articles 337, 418a, para. 2). The provisions regarding the employment contract are applicable accordingly.

The corrupted agent can raise no objection to the termination of the contract and can make no claim for damages because of it. If the principal suffers losses from the abrupt termination of the employment relationship, he may sue the unfaithful employee for damages under article 321 litt. e of the Code of Obligations [21].

6.3.2. Transfer of the bribe from agent to principal

The principal may bring an action against the agent for the amount of the bribe. If the bribe was not in cash, the principal may ask for the object given or its cash value. The rationale underlying this action is that the bribe was given to the agent solely as a result of his special relationship with the principal. Therefore, the principal should be the ultimate beneficiary of the advantage. The principal may seek this remedy apart from the dismissal of the employee or termination of the agency contract.

6.3.3. Action for damages

The agent's breach of duty may cause damages to the principal which are not alleviated by actions against the briber and performance or rescission of the subsequent contracts. (*See* subsections 6.2.1 and 6.2.2 *supra* and 6.4 *infra*.) These damages may give rise to an action for damages against the agent. The principal also may choose to sue the agent because he acted as an accomplice to the briber, an action which, pursuant to article 50 of the Swiss Code and Obligations, creates a joint liability between the agent and the briber.

6.4. Remedies against the briber and the briber's principal

If damages still exist after actions against the agent or on the contracts, the briber is liable for damages incurred by the principal provided that the principal proves the damages and there is a sufficient link between the bribery and the damages. Moreover, the briber is jointly liable with the agent when he induces the latter not only to breach his contractual duties but also to commit a crime. (*See* subsection 7.1 *infra.*) Finally, when the briber is the employee or agent of a final contracting party, his principal is jointly liable for damages resulting from the bribery where the bribery was illegal. This condition is fulfilled when the act of bribery constituted an act of willful deception.

The principal may choose not to act against the briber or the briber's principal, either because of lack of proof or nonexistence of an illegal act (in other words, where the bribery violates only contractual duties). It is important to emphasize, however, that the briber's employer, no matter how ignorant of the precise circumstances surrounding the bribe, may be sued and cannot avoid liability by purposely using an employee in a bribe transaction or by simply letting things happen.

6.5. Special problems arising when companies are involved [22]

This article has focused on single bribers, agents, and principals. Commercial bribery, however, nearly always occurs between business enterprises. This section analyzes many of the legal problems which arise when business enterprises engage in bribery. The analysis applies most particularly to the stock company, the most common form of business organization in Switzerland. Many of these remarks apply to other forms of business organizations as well.

6.5.1. Problems related to the bribe agreement

When a corporate employee or director asks for or accepts a bribe from a contracting party, the aforementioned rules on agents' duties apply (*see* subsection 6.3 *supra*) and the corrupted agent must transfer the bribe to the company. Moreover, when corporate managers engage in bribery, they expose themselves to suit by the company and, in some cases, by the shareholders, for damages arising from the bribe [23]. Entering into a bribery arrangement constitutes a breach of fiduciary duty to the company. Corporate funds are used for immoral and/or illegal purposes. The company is exposed to the risk of liability and rescission of the subsequent contracts. Since bribery agreements are null and void under the law and are considered immoral and/or illegal contracts, the company's managers cannot defend themselves by claiming that they took normal business risks by engaging in questionable payments.

When someone within the company receives a bribe, one must ask whether

the company knew that a bribe had taken place. In other words, one must determine whether the corrupted agent's knowledge of the bribe is equivalent to the company's approval of or acquiescence in the transaction. If the company knew that the payment took place, the transaction does not fall within the definition of bribery. (*See* section 2 *supra.*)

Determining whether the company knew of the payment is most difficult when the corrupted agent is a member of the top management of the company and consequently may represent it in business dealings with third parties. Each case must be determined in light of the relevant factual setting. Since bribery in such circumstances involves the agent in a clear conflict of interest between his duties toward the company and his personal interest in receiving and keeping the payment, there is some hesitancy in concluding that a manager or director embodies the company's knowledge and approval when taking bribes. An obvious exception, of course, is where one-man companies are involved. In this situation, the corruption of the company owner certainly is known by and approved by the company.

6.5.2. The subsequent contracts

The civil remedies applicable to subsequent contracts between the individual principal and individual briber (discussed in subsection 6.2 *supra*) are available where companies are involved either as briber, as the briber's principal, or as the corrupted party. In reality, however, it might be more difficult to succeed in applying these remedies where companies are involved because of problems in proving that the company neither knew of the bribe nor accepted it. (*See* subsection 6.5.1 *supra.*)

6.5.3. Prevention of corporate bribery

The prevention of corporate bribery is greatly complicated by the mere existence of a corporate structure with its division of corporate duties and responsibilities. This is all the more apparent when one considers that shareholder interests must be taken into account before selecting a mode of prevention. Moreover, the simple detection of bribery, as well as its prevention, is much more difficult in any large organization because of the great number of potential bribers and receivers and consequently the higher costs of discovery and prevention.

Presently, corporate law provides a potentially important institution to counteract these difficulties: the auditors. Swiss law does not obligate auditors to search for corruption. However, if the auditors discover that bribery payments have been made, they are required: (a) to make sure that such payments are correctly accounted for in the company books; (b) to create reserves in case bribing involves financial risks for the company, such as claims for damages or rescission of contracts; and (c) to inform the superiors of the involved persons and the chairman of the board and, in important cases, the

general assembly [24]. Auditors may be held liable if they fail to inform the appropriate parties of their discovery of the bribes and if the company, its shareholders, and/or creditors suffer losses from this breach of duty.

Although the duty of the auditors to inform corporate superiors of the existence of business corruption has the potential to foster the discovery and prevention of bribery, it generally has been ineffective in doing so. Since there is no obligation to look for questionable payments, bribes tend to remain undiscovered. Moreover, the relevant legal provision, article 729 al. 3 of the Swiss Code of Obligations, is rather vague and is rarely applied, particularly when the auditors are not qualified professionals [25].

In summary, it is apparent that the difficulties in the detection and prevention of corporate bribery could be greatly diminished by having auditors play the role already assigned by law and by devising structures within the corporation for more effective control, detection, and prevention of bribery. The latter set of "extralegal" measures has yet to develop in Switzerland, but could be an interesting consequence of the well-known ICC Code of Conduct (articles 6ss) [26].

7. Other remedies

7.1. Penal law

The agent's breach of duty toward the principal by accepting a bribe may constitute a crime under the Swiss Penal Code [27]. Depending on the circumstances, particularly the bribed person's status and the means used, accepting a bribe which causes damage to the principal may violate the provisions either on swindling or on dishonest management.

Despite the clear applicability of these provisions to the field of bribery, the author knows of no published cases convicting a party of accepting a bribe within a business setting. The explanations most frequently advanced to account for the lack of prosecutions are that: resorting to a criminal prosecution does not bring any special advantage to the deluded principal who may obtain satisfaction by civil remedies; and there is no general consensus strongly condemning corruption in business which would persuade a principal to file charges for the rather severe crimes of swindling and dishonest management.

7.2. Criminal sanctions of the Federal Unfair Competition Act

In addition to the general penal law of the Swiss Penal Code, corruption in business is considered a crime under article 13 litt. e of the Federal Unfair Competition Act. When the briber and the principal of the corrupted agent are

in competition with one another, the principal may file a charge against the briber. Concurrently, a charge may be filed either by other competitors or by associations whose aims are to defend the economic interests of their members [28]. The plaintiffs enumerated above may proceed even if they do not suffer damages personally, because the law not only addresses individual economic losses but also protects fair competition.

Despite the breadth of legal protection provided and the range of potential plaintiffs, no bribery cases have been decided by Swiss courts under the Federal Unfair Competition Act. The reasons underlying the lack of effectiveness of the penal laws discussed in the previous section apply to the Unfair Competition Act as well. Moreover, competitors who do not suffer clear damages and who may practice bribery themselves, are often not inclined to defend the goal of general fairness in business competition.

Article 13 litt. e cannot be applied ex officio. Consequently, if the ultimate goal of fairness in competition through a reduction of bribery is to be reached, either competitors must be made more conscious of the risks of engaging in bribery or the law should be amended to allow for the courts to raise the issue ex officio.

7.3. Civil remedies under the Federal Unfair Competition Act [29]

In addition to the criminal sanctions of article 13, the Federal Unfair Competition Act provides remedies of a civil nature to deter bribery. Where competitors' economic interests (clients, credit, business reputation) are damaged by the actions of a briber, they may go to court to enjoin the continuation of the bribery and other unfair competition, and to obtain a money judgment against the briber for the amount of damage. The competitors may also ask that the ensuing judgment(s) be published.

These actions are extremely rare, if they exist at all [30], because bribes are characterized by secrecy. Competitors often do not know that a bribe has taken place. Even in cases where they are aware of a bribe, they often cannot prove its existence in a court of law. Moreover, the deluded principal generally obtains more satisfactory results by choosing to rescind the subsequent contracts and/or by proceeding against the agent.

8. Tax consequences of bribery

The statutes considered, thus far, aim to prevent corruption and to provide severe, though until now ineffective, sanctions for violations. The same is not true for Swiss tax laws. The Swiss taxation system is only partially centralized and we will focus only on the rules applying to all of Switzerland. Identical rules exist in many "cantonal" jurisdictions as well.

The bribe constitutes a source of taxable income for its recipient [31], and may, under certain circumstances, be deductible as a business expense for the briber. Pursuant to a 1946 official circular published by the federal tax authorities [32], bribes are considered a deductible expense for the briber, irrespective of the civil or criminal rules they may violate. To benefit from the tax deduction, the briber must demonstrate that he paid the bribes and that they corresponded to commercial custom. The federal administration strictly examines the first condition but seems only slightly preoccupied with the second one, at least in the published decisions [33].

Since the federal statute refers only to business expenses and not to bribes, and since the interpretation was established by means of a circular representing an administrative decision, this rule can be altered without amending the statute. It is doubtful, however, that this established administrative decision will be changed in the near future. Consequently, the Swiss tax system probably will continue to give a privileged status to bribery.

9. Conclusion

The Swiss legal system has been characterized as having a "laissez faire" attitude toward business corruption. This article has demonstrated, however, that there is a potentially effective Swiss answer to commercial bribery.

Unfortunately, the Swiss approach toward bribery is presently not very effective. During the course of this article some of the more technical reasons for this ineffectiveness have been discussed. If one goes beyond the technicalities, however, it appears that the main problem is the lack of social consensus regarding the dangers of corruption in business life. As long as bribes are considered either commercial custom or a detestable but compulsory business expense, there will be neither an adequate number of plaintiffs who successfully pursue their claims nor sufficient criminal prosecutions to deter acts of bribery.

At the present time, the most important task is to inform both the involved parties and the public of the damages and costs of bribery in business transactions. This implies a vigorous and coherent effort to stamp out business corruption on a number of levels, both national and transnational.

Notes

[1] L.A. Sobel (ed.). Corruption in Business 1 (1977).

[2] For a discussion of different definitions of bribery, *see* A. Héritier, Les pots-de-vin 4–27 (1981).

[3] French Penal Code, Article 177. Paragraph 3 of this article provides for the punishment of:

[a]ny clerk, employee, or agent, whatever his form of remuneration, who either directly or through others, and without knowledge or consent of his employer, either solicits or accepts offers or promises, or solicits or receives gifts, considerations, commissions, discounts or premiums, in order to perform or abstain from performing any act within the scope of his employment.

The above English translation appears in the French Penal Code 75 (G. Mueller ed. 1960).

[4] Gesetz gegen den unlauteren Wettbewerb (Law Against Unfair Competition), article 12 (1909).

[5] *See, e.g.,* B. Von Büren, Kommentar zum Wettbewerbsgesetz 153 (1957).

[6] The text of the legal provisions is provided where necessary in section 6 of this article. The English translation is the unofficial translation of the Swiss–American Chamber of Commerce (Zürich).

[7] The definition of public officials is broad; where corruption is involved, public officials include judges, arbitrators, interpreters in court, and any official regardless of his rank or duties. *See* Swiss Penal Code, articles 110, 288 and 315.

[8] F. Vischer, Internationales Privatrecht 203 (1982).

[9] I. Schwander, Lois d'application immédiate (1975); F. Vischer, *The Antagonism Between Legal Security and the Search for Justice in the Field of Contracts,* Recueil des Cours de l'Académie de La Haye (1974) II at 52 et seq.

[10] Swiss Penal Code, articles 5 and 6.

[11] Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States–Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302. In recent cases based on this treaty, the Swiss courts, in accordance with the provisions of article 10, al. 2 and 3, ordered defendants to give information on bribe transactions and payments. These cases are published in the Recueil officiel des Arrêts du Tribunal fédéral [hereinafter cited as RO], 107, first part, (b), at 252, Société I v. Office fédéral de la police and at 258, H. v. Office fédéral de la police.

[12] According to statistics published by the Bureau fédéral des statistiques (Berne), the average annual number of convictions over the last twenty years was ten per year.

[13] For example, RO 95, II at 37, Hasler and Spirig v. Gerber (1970).

[14] It is conceivable that a party could prove, and not merely argue or state, that bribery is open and accepted in the relevant country; to date, there are no Swiss cases supporting this defense. One might add that if payment of an advantage is so open and ordinary, it should not be characterized as bribery since it fails to meet the central requirement of secrecy.

[15] *See* A. Héritier, Les pots-de-vin et le droit civil suisse, SAG (la Société anonyme suisse) 11 (1981).

[16] P. Engel, *Traité des obligations en droit suisse,* Neuchâtel (1973) at 238; E. Bucher, *Schweizerisches Obligationenrecht,* Allgemeiner Teil (1979) at 250 et seq.

[17] Von Tuhr & Peter, Allgemeiner Teil des schweizerischen Obligationenrechts, I (1979) at 112–114.

[18] Article 31 al. 1 of the Swiss Code of Obligations states:

If the party influenced by error, deception (art. 28), or threat (arts. 29, 30) fails, within one year to declare to the other party that he is not bound by the contract, or fails to demand restitution, then the contract is deemed to be ratified. Such period runs, in the event of error or deception, from the time of its discovery....

[19] *See* Gauch, Schluep & Tercier, Partie générale du droit des obligations. I (1978) at 98 (references).

[20] *See* M. Rehbinder, Droit suisse du travail (1979) at 50; RO 92 II at 184 Maag v. Konsumverein Frauenfeld; Gautschi, *Berner Kommentar*, zum Schweizerischen Privatrecht VI/2 (1960) at articles 398 *et seq.*; Oser & Schönenberger, *Zürcher Kommentar*, zum Schweizerischen Zivilgesetzbuch, V/1 (1936) at article 400 et seq. The mentioned rules apply to all agents whatever their specific role or status (*see* articles 394 *et seq.* of the Swiss Code of Obligations).

[21] Article 321 litt. e states:

The employee shall be liable for any damage he causes to the employer, whether willfully or negligently (Arts. 97–100, 323b, para. 2).

The degree of care (Art. 99) for which the employee is liable is determined by the individual employment relationship with due regard to the occupational hazards of the work, the educational level or professional skills required for the work, and by the employee's abilities and qualities which the employer knew or should have known. The same applies to all agents.

[22] *See* A. Héritier, *supra* note 2, at 175–187.

[23] Articles 754–760 of the Swiss Code of Obligations. On the problem of directors' and auditors' liability, see P. Forstmoser, Die aktienrechtliche Verantwortlichkeit (1978).

[24] Article 729 al. 3 of the Swiss Code of Obligations.

[25] A revision of corporate law is in progress.

[26] *See* Document 315 published by the International Chamber of Commerce in 1977; for a history and comments, *see* J.R. Stevenson & J.E. O'Brien, *ICC Report on Extortion and Bribery*, in Business Transactions, Corporate Conduct Overseas (PLI ed.) (1979) at 499 ss.

[27] G. Stratenwerth, *Schweizerisches Strafrecht*, Besonderer Teil, I, II at 240 et seq.

[28] B. von Buren, cited *supra* note 5 at 150 et seq.; A. Troller, Immaterialgüterrecht (1971) at 1096.

[29] *See* the authors cited *supra* note 28.

[30] There are no published cases. Many authors state that no court has decided such a case since 1943 (or even before).

[31] This income is only taxable in theory since it probably will never be declared. This is especially true where the receiver lives outside of Switzerland.

[32] The circular is published in Archives de droit fiscal 15 (1946/7) at 141 and translated into French in H. Masshardt & F. Gendre, Commentaire IDN (1973) at 142.

[33] Some have been published in Archives de droit fiscal 15 (1946/47) at 102 and 219. 20 (1958/9), at 102.

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