

## **Ace software goes to Oman**

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### **ABSTRACT**

The cultural and legal environments impact the daily operations of companies that engage in international business. What happens when Ace Software, an Alabama company, has a subsidiary in England that conducts business in the Middle East? What should employees do when they work in multiple countries for their multinational parent company? Whose business customs should be followed? Whose laws must they follow? This case provides a foundation to discuss these issues.

Keywords: Bribery Laws, Cultural Differences, Ethics, Global Business



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## INTRODUCTION

John Smith is a 32 year old software engineer and sales representative for Ace Software. Ace Software is a United States LLC that specializes in the creation of custom software. Ace has a subsidiary in London, England. That is where John is currently based. He is a UK citizen. He has worked for Ace for the past twelve months.

The Vice President of the Sales Division is Lee Anne Swanson, a career sales woman with the firm who has worked her way up. Lee Anne is based in the United States, at corporate headquarters in Huntsville, Alabama. She has a reputation for not suffering fools lightly and expects hard and fast results. For her, money talks. As part of their globalization strategy, Ace intends to establish business in the Middle East. Lee Ann has done her homework. She knows the area has demand for their software and resources to pay top dollar. This is an area where some United States' technology companies have had trouble. Lee Ann understands the issues with exporting technology directly from the United States. There are four main competitors Ace faces. They are based in China, Korea, India and Germany.

John reports to his European sales manager, Hamish, who knows the European market. Over the past three years, Hamish and the rest of his team have opened up Europe for Ace. Given his productivity, Hamish is an up and coming star in London. He understands the message from Huntsville; increase the number of international client's and bring in margin. John was hired specifically to help that goal given his credentials and because he has a personal interest in the Middle East. Currently, Ace has no business in any part of that region of the world.

Shortly after he was hired, Lee Anne sent Hamish the corporate manual on standard business practice and procedures for Huntsville. Hamish understood he was to follow Huntsville's standards. Having had a good deal of experience around the world, Hamish noted differences between Huntsville's policies and what other companies and countries suggested as "standard business practice."

Upon hire, John was given a copy of the manual as well. Although, based in London, John has been directly dealing with markets within the Middle East. John had a number of meetings with Mr. Mahmood, an official in the Trade Development division of the Oman Government. The deadline was approaching and John was ready to close the \$2 million dollar sale of logistic management software to the Oman government. He phoned Mr. Mahmood and then the unexpected happened.

Mr. Mahmood told John: "I really hope we can do something. In the interest of fairness I should let you know that we have another interested party who supplies software similar to that of Ace. Although I have to admit, they don't seem keen to move into the Oman market."

John was getting a little worried. Everyone at Ace knew about the potential of this deal to enter the Middle East markets. They had been discussing this for the previous few months. It would be a disaster if the sale fell through. Hamish was breathing down John's neck to close the deal.

The only thing running through John's mind was, "Ok I need to save this deal." So John turned the topic to a more social discussion with Mr. Mahmood. "So, I remember the last time I came over to Oman. You told me you were having trouble getting Iranian caviar. Is that still the case?"

Mr. Mahmood: “Yes, I just can’t get it anywhere here in Oman and you know my wife loves it.” Later that day, Lee Anne telephones Hamish in the UK. “How is John getting on with that Middle East deal?”

Hamish: “I think we have it, although John told me there is someone else Oman is interested in as well.” Lee Ann: “Well is there anything we can do to guarantee this?” Hamish thought for a moment. “Let me think about it.”

Lee Anne paused on the other end of the phone. “Ok... It would really be a shame if we don’t get it...and you do know it’s almost bonus time. Do what it takes Hamish. Sometimes greasing a few palms helps in these kind of circumstances.” Sensing the importance of this deal and the tone of Lee Anne’s voice, Hamish promises he will ensure the deal gets done.

Later that day with John, Hamish tells him that Lee Anne is concerned about losing the deal. John wonders if he should mention the caviar or not to Hamish. Mahmood did say they are having trouble getting caviar in Oman. With that John told Hamish who responded with: “Now that’s interesting. You know what John,” Hamish says with a wink...”I think you need to do whatever it takes to guarantee we get this contract in Oman.”

John knew that if he didn’t secure this contract his bonus might not be as large this year, or even worse, non-existent. That and Lee Anne was all about the results. He had the company American Express card. He knew the staff at Fortnum & Mason in London and knew he could get the caviar delivered to Mr. Mahmood. Iranian caviar was currently selling at about £675GBP for 100g. About \$10,000 worth of caviar should send the right message to Mr. Mahmood he thought.

Hesitating for a moment, he picked up the phone. After all, what did he have to lose?

### Discussion questions

1. Will John do anything wrong if he sends the caviar? Why or Why not?
2. Will John’s actions be immoral? Unethical? Illegal? Define these terms first. Why or why not?
3. Whose countries laws should John follow? Which country (ies) and why?
4. What are the ramifications of sending the caviar or not?
5. Will Lee Anne and / or Ace (US and UK) be in jeopardy if John sends the caviar? Why or why not?
6. If John sends the caviar will Lee Anne’s actions be immoral? Unethical? Illegal? Should John consider cultural differences in his efforts to secure the sale? Why or why not? If cultural differences are considered which differences should be considered?
7. What is Hamish’s role in all of this?
8. Do the respective parties’ geographical locations make a difference? Why or why not?
9. What would you do and why?

### Case Use and Target Audience

As competition between firms increase, more and more companies are seeking international clients. No matter where a company is based, or where an international customer is based, firms are increasingly facing decisions that involve some element of international law or culture. The line between a gift and a bribe is often a fine one.

This is a general application case that may be used as a standalone assignment at either undergraduate or graduate level. It is suitable for inclusion in a courses that cover international business, business law or ethics in business.

As an employee, one is often called to make judgment calls independent of any supervisor input. Having students address this scenario in a classroom environment, discussing theoretical concepts and intended behaviors, has previously proven beneficial to students.

This case allows students to have a wide discussion on ethical principles and to concentrate upon the concept of bribery as a standalone issue. This case invites, discussion on cultural differences in business practices. It may further be used as to guide discussion on import / export laws.

### **Learning Objectives**

To consider the differences between ethical, moral and legal obligations. To consider the concept and definition of bribery. To consider ethical, moral, legal and cultural differences in an international setting. To improve ethical decision making in the workplace. To understand the ramifications for the parties involved.

### **Trigger Questions for Discussion?**

What is the situation? Who are the personae dramatis in this case and what are the issues? (Board Plan 1). Define moral, legal, ethical (Board Plan 2). Will John do anything illegal if he sends the caviar? (Board Plan 3). Will any of Ace's employees be acting illegal? (Board Plan 4). How does the issue of sending caviar from England to Oman come into play? (Board Plan 5)

**Board Plan 1**

What is the situation?

<b>John Smith</b>	<b>Ace Software</b>
John is a sales representative International experience John is keen to impress and expand his client base.	Lee Anne Swanson is division head Swanson is results driven Hamish is a UK sales manager Hamish wishes to increase international customer base in the UK
<b>What can John do?</b>	<b>Potential Negatives</b>
Bring to the attention of HR / legal department.	If John doesn't close the deal Ace loses revenue, market access. If John doesn't close the deal he loses face. John's actions impact on his line manager. John's actions impact on division head.
<b>Unknowns</b>	
Does Ace have a company-wide policy on sending of gifts? Has this occurred before? Did Hamish engage in this activity when he was in John's position? What are the "accepted international business practices" in each country?	

**Board Plan 2**

<b>Definitions</b>	<b>Actions relating to definitions</b>	<b>Violation by John / Hamish/ Lee Anne</b>
Moral - standards of behavior relating to the principles of right and wrong. These are standards deemed reasonable by the majority in the society in which they originate.		
Ethical - conforming to accepted standards of conduct	Hamish / Lee Anne: "do what it takes..."	
Legal - of or relating to the law : based on the law : allowed by the law or by the rules in a game		
Law - a rule made by the government of a town, state, country, etc.		See below, FCTPA, Bribery Act 2010, UK

Integrity - the quality of being honest and fair	Hamish/ Lee Anne: application of pressure on John	Possible: Depends on student view of fairness
Gift - something that is given to another person or to a group or organization	Ordering and payment for caviar	
Payment - the act of giving money for something : the act of paying : something that is given to someone in exchange for something else : an amount of money that is paid for something	Ordering and payment for caviar	John: depends on view taken of Mr. Mahmood's role. That is, is this a facilitation payment?  No: not illegal if facilitation payment under FCPA.  Yes: if not facilitation. payment.
Bribery - the act or practice of giving or taking a <b>bribe</b>		
Bribe - money or favor given or promised in order to influence the judgment or conduct of a person in a position of trust :something that serves to induce or influence	Ordering and payment for caviar	Yes / No see discussion below (Board Plan #3)

A preliminary discussion on the concept of gift giving will assist. In what context are gifts usual given? How do we define a gift? When does a gift become something else? "Social relationships are often characterized by the exchange of gifts and hospitality as trust develops between the parties. In seeking to build relationships of trust, the exchange of gifts may be seen as an entirely appropriate act of social bonding." (Wood 1995, p. 11). This reciprocal gift and favor giving is more important in some Asian countries than in the West because of their cultural values (Hofstede 1991, p. 169)

Gift giving philosophy differs depending on the country. In Hong Kong, for example the tolerance is higher for gift giving than in Western Society. (Mohamad 2010). Whether gift giving moves into the realms of illegality is an interesting question and it differs depending on geographical location and legislative reach. There is a divergence in the treatment of bribery. It can be treated as a legal issue (Keegan and Green 1997) or an ethical issue (Donaldson 1996).

### **Black's Law Dictionary Definition of Bribe:**

"Any valuable thing given or promised, or any preferment, advantage, privilege, or emolument, given or promised corruptly and against the law, as an inducement to any person acting in an official or public capacity to violate or forbear from his duty, or to improperly influence his behavior in the performance of such duty. The term "bribe" signifies any money,

goods, right in action, property, thing of value, or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to Influence unlawfully the person to whom it is given, in his action, vote, or opinion, in any public or official capacity” <http://thelawdictionary.org/bribe/>

### Background on Bribery

Commencing in the 1970’s, following the Watergate scandal, the investigation and subsequent public response of International Bribery by US firms has gained traction (Longnecker, 1988). This study indicated that there was a lack of consensus concerning the morality of the payments and also in the rational of the participants. In a scenario presented, which involved the presentation of scenario in which a “consultation fee” was payable in exchange for assistance in obtaining a contract, 18.6% of participants indicated this was always acceptable. 32.5% indicated that it was sometime acceptable.

Transparency International lists the following as the top 10 most corrupt nations, based on the prevalence of bribery (in order): Cameroon, Nigeria, Indonesia, Azerbaijan, Uzbekistan, Honduras, Tanzania, Yugoslavia, Paraguay and Kenya. (Interestingly, the United States doesn't make the top 10 list of the least corrupt, which is topped by New Zealand, Denmark and Sweden.) In terms of countries most willing to pay bribes abroad, China tops the list-the United States comes in 10th (tied with Germany) out of 19 countries (Allen 2000).

Despite the US being the only nation to criminalize the extraterritorial payment of bribes by domestic companies (*Daehler 1995*) the United States still makes the list of those countries willing to pay bribes.

A survey of 100 people by the UK’s Supply Management magazine found that 20% of buyers had been offered an inducement to secure business. Kanter (2008), Chaudhuri (2008)

### Board Plan 3

Students should discuss the legality of John’s actions.

Action	If in USA	If in UK
Purchase and sending of caviar	Foreign Corrupt Practices Act 1977 and Omnibus Trade and Competiveness Act 1988	BA 2010
	Is it a facilitation payment?	Facilitation payments do not matter
	Is it a bribe?	Is it a bribe?

### 1977 Foreign Corrupt Practices Act as amended by the Omnibus Trade and Competitiveness Act of 1988

The FCPA makes it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. If John will lose the

sales contract then the hurdle of retaining business is passed. If he is making payment to obtain the fresh contract then the hurdle for obtaining business is clearly passed. The issue is the definition of government official. However, “the legislative history of the FCPA expressly excludes facilitating or grease payments from the bribery prohibition.” (*Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?* Roberts, Judith L. at page 497. The “Senate Report defined such payments only by listing the following examples: “Payments for expediting shipments through customs or by placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.” S. Rep. No. 114, 95<sup>th</sup> Cong, 1<sup>st</sup> Sess.10(1977).

However, the Act also includes an implied exception as it defines “foreign official” as excluding “any employee of a foreign government or any department, agency or instrumentality thereof whose duties are essentially ministerial or clerical.” (15. U.S.C. 78dd-1(b), -2(2) (1982). The key, therefore, is to focus upon the duties of the recipient. If John can show the duties of the government official are essentially ministerial then no unlawful act takes place. The amendments within the 1988 Act create an express exception for “any facilitating or expediting payment” to any foreign official or even political party, as long as the purpose of the payment is “to expedite or secure the performance of a routine governmental action.”

And so we need to look at Mr. Mahmood. As an official in the Trade development division of the Government one would opine that he has some form of official responsibility. The case is designed to allow students to argue both scenarios concerning his title.

## UK Position

On the 1<sup>st</sup> July 2011, the Bribery Act 2010 came into force within England and Wales. The aim of the Act was to criminalize the offering or receiving of bribes, the bribery of foreign officials and the failure to prevent a bribe being paid by an organization or company (Engle 2010).

Section 7 of that Act makes it an offence for an organization, if a person associated with that organization, bribes another person with the intention of retaining or obtaining business for the organization or to obtain or retain an advantage in the conduct of business for that organization.

Section 6 of the Act creates a stand-alone offence that relates to bribery of a public official. The key to committing the offence is the giving, offer or promise of financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions.

The UK Government has been clear in guidance published that the act is not intended to penalize or criminalize bona fide hospitality or promotional expenditure that is done in the normal course of business but rather that which is clearly affords an advantage above and beyond what one would normally expect.

What is of note is that the guidance indicates that a key feature of any intended prosecution will be the level of spend. Is it within reasonable bounds or excessive? Such normal spend would include reasonable accommodation and transport expenses to and from the airport for example, and would fall outside the scope of criminality.

In terms of the section 7 offence above, relating to corporate liability, the issue at hand is whether the organization, (defined at 7(5) as a body or partnership incorporated or formed in the

UK irrespective of where it carries on business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of formation or incorporation), is associated with the person making the bribe.

Effectively the Act therefore covers the following organizations: UK formed companies that carry on business elsewhere outside the UK; International companies, including those in the USA, that carry on business within the UK. This is deliberately far-reaching. However, the guidance indicates that in determining a prosecution the entire facts of the case will be looked at. A common sense approach must be applied.

The concept of association is likewise a broad definition. It is defined under section 8 as being a person who performs services for or on behalf of the Company. This covers employees, agents or subsidiaries. The underlying reasoning being to increase and improve a company's awareness of with whom it associates and contracts. The section creates a presumption that if the person is an employee then they ARE associated with the Company unless it is proven to the contrary.

What is of note, and sets the UK legislation apart from the US position set out above is that under this new legislation, facilitation payments are criminalized. No exceptions are provided. Research has indicated that facilitation payments have a detrimental effect (Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions).

The section 7 offence, however, carries a statutory defense. That of "adequate procedures." If a company can show it has proportionate procedures in place to combat the perceived risk of bribery then the defense, should in theory, succeed.

#### Board Plan 4

Students should consider the actions of senior management. If deemed a bribe is Ace Software and / or Senior Employees of Ace Software criminally liable? The concept explored by posing this question is the same. The US legal concept is that of the Doctrine of *respondeat superior*. A legal doctrine, most commonly used in tort, that holds an employer or principal legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency. [http://www.law.cornell.edu/wex/respondeat\\_superior](http://www.law.cornell.edu/wex/respondeat_superior)

Managers can be therefore be held liable for the actions of their employees. Prosecution hinges on a number of factors but the key element is knowledge based. The US deputy attorney general has set out advice to prosecutors concerning criminal conduct committed by or on behalf of corporations.

The reasoning for this guidance and the necessity to prosecute a corporation is trifold: 1. Assists law enforcement by allowing the discovery of other crime and allows for bringing those responsible to justice; 2. Increases public confidence by allowing government to address and force change in corporate culture. Thus companies are more likely to make immediate change and introduce remedial steps following an indictment and therefore change may be quick. Prosecuting company officers and employees will also change corporate culture.

The prosecution of companies for the actions of their employees encompasses a wide range of actions. For example, in *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "Partucci

was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA."

In *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated -- at least in part -- by an intent to benefit the corporation."

The US attorney general has advised that one of the key factors in relation to the decision to charge Corporations under the FCTPA is that of the actions of management. "A corporation is directed by management"

<http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>

Most large scale companies will have Compliance policies in place or in effect. However, with regards to bribery that may not be enough. Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents.

<http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>

What may come as a surprise is the existence of a Compliance program and the failure to follow it may actually be used evidential to support assertions about the ineffectiveness or involvement of management in any employee misconduct. In relation to the UK position please see the detailed discussion above and the potential commission of an offence under Section 7 of the Bribery Act 2010.

## Board Plan 5

Students should consider the Iranian dimension. The situation is as follows; John, a UK citizen, who works for a US subsidiary in London, England, has purchased Iranian caviar from a third party vendor in London to send to Oman. The following can be considered: the US / Iranian trade relationships; the UK / Iranian trade relationships; the Oman / Iranian trade relationships.

The comments below are to widen the discussion for students. As John has legally purchased the caviar (assuming that the vendor has in place the necessary licenses) the only real issue is can a citizen from Oman receive Iranian products?

Oman is politically and economically close to Iran. Formal trade has been conducted between the two countries. Post 2010, the two countries are reported to have signed pacts relating to joint military exercises and also discussions relating to investment in Iranian offshore natural gas field development. Oman remains one of the least critical nations of Iran's regime (Katzum 2011). The answer to the question posed above, is yes: Mr. Mahmood can receive the caviar and no illegal act is committed by John. However, knowing the view taken by the United States government and that of the UK government is it immoral? Unethical?

Looking at the position in the United States, the rules and regulations concerning exporting and importing of products to and from Iran from those on US soil are complicated and ever changing.

The Iranian Transactions Regulations, 31 CFR Part 560 (2011) (law.cornell.edu) define the concept of a US citizen or permanent resident for the purposes of engaging in business with Iran as any individual with U.S. citizenship or permanent residency wherever they live or work (including Iran) and U.S. companies around the world. It also includes individuals physically present in the United States, including those here on student visas. Passport nationality is irrelevant, even if you hold an Iranian one. Therefore, Lee Anne or Hamish would clearly be caught by this definition. In relation to John, if he were a permanent resident of the US (for example a Green Card holder) he may well fall fowl of US legislation.

Since 2010 there has been a prohibition on the importation into the US of goods and Service's are Iranian origin, save for those of under 100USD value. What students may also be unaware of is that the US Fish and Wildlife Service control the importing and exporting of caviar. The limit on carriage of the product to and from the US by air or sea is 125g per passenger for personal consumption. Amounts exceeding this, and not for personal consumption require the obtaining of a Convention on International Trade in Endangered Species (CITES) permit. Therefore if John decided to ship the caviar through the United States, for example, to add Ace Software branding to packaging material or include promotional material within the package, he would need to make disclosures to the US Fish and Wildlife Service.

In the UK, The European Union has also imposed sanctions on dealings with Iran. Like the Bribery Act 2010, they are wide and far-reaching and apply within the EU, to a person both inside and outside the EU who is national of a member state, to any company that is incorporated in an EU member state and to any person or business in respect of any business done in whole or in part of an EU member state.

John clearly is a UK citizen and therefore the legislation covers him. However, the legislation relates to exporting of goods and the importation of food products from Iran is not criminalized. Therefore, John is not breaching any UK legislation.

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