

December 5, 2019

Samsung Heavy Industries Agrees to Pay \$75 Million to DOJ and Brazilian Authorities to Resolve FCPA Charges

On November 22, 2019, the Department of Justice announced that it had reached a resolution with Samsung Heavy Industries Company Ltd. (“SHI”) relating to a scheme to pay millions of dollars in bribes to officials of *Petróleo Brasileiro S.A. (“Petrobras”)*, the Brazilian state-owned energy company, in order to cause Petrobras to charter one of SHI’s oil drillships.¹ SHI, a South Korea-based engineering and construction company, is a subsidiary of Samsung Group, the largest conglomerate in South Korea. SHI maintains offices throughout the world, including an office in Houston, Texas.²

According to the DOJ charging documents, from 2007 and continuing until 2013, SHI conspired with others to pay approximately \$20 million to certain Brazilian intermediaries as commissions, while knowing that some of the money would be paid as bribes to certain Petrobras officials.³ SHI has entered into a three-year deferred prosecution agreement with the DOJ, and admitted to all of the conduct described therein, pursuant to which it will pay 50 percent of the total penalties to the U.S. and the remaining 50 percent to the Brazilian authorities. In related proceedings in Brazil, SHI has entered into a memorandum of understanding and a complementary agreement for the negotiation of a leniency agreement with the Brazilian authorities.⁴ These agreements are typically confidential, and no information has been released by the authorities.

At the center of the bribery scheme was a contract between SHI and Pride International, Inc. (“Pride”), a Houston-based offshore oil drilling company.⁵ SHI and Pride entered into an option agreement for the purchase of one of SHI’s newly constructed oil drillships. Pride’s purchase of the ship was contingent on

¹ See Press Release, Dep’t of Justice, *Samsung Heavy Industries Company Ltd Agrees to Pay \$75 Million in Global Penalties to Resolve Foreign Bribery Case* (November 22, 2019) (hereinafter “DOJ Press Release”), available [here](#).

² The DOJ found that SHI’s conduct was covered under the FCPA as a foreign non-issuer acting in furtherance of a corrupt payment while in the territory of the United States, 15 U.S.C. §78dd-3(f)(1). See *U.S. v. Samsung Heavy Industries Co. Ltd.*, Criminal Information, No. 1:19-CR-328 (E.D. Va. Nov. 2, 2019) (hereinafter “Information”), ¶ 2, available [here](#).

³ See *id.* In 2015, a Brazilian judge sentenced Nestor Cervero, a former chief of Petrobras, to twelve years in prison for corruption and laundering money from bribes paid by SHI in exchange for two drillship contracts. See *Former Petrobras exec sentenced for Samsung drillship bribe*, REUTERS (Aug. 17, 2015), available [here](#).

⁴ See DOJ Press Release.

⁵ See *id.*; Press Release, SHI, *SHI Reaches Resolution with the U.S. Department of Justice* (Nov. 22, 2019) (hereinafter “SHI Press Release”), available [here](#).

Petrobras agreeing to charter it from Pride. By agreeing to these terms the parties incentivized SHI to bribe Petrobras so Pride would in turn exercise its option.⁶ Pride self-reported this matter to the DOJ and the SEC in 2015, after learning of an internal audit report at Petrobras into the negotiations of the chartering agreement and after conducting its own internal investigation.⁷ Both the DOJ and the SEC opened investigations into Pride,⁸ but both investigations were closed without any charges being filed.⁹

Background

SHI has admitted to the following conduct as part of its resolution with the DOJ.¹⁰ According to the DOJ, in 2006, SHI and a subsidiary of Pride began discussing potential projects in Brazil, including potential deals in which SHI would construct one or more oil drillships for Pride.¹¹ Pride is an offshore drilling company that secured contracts from oil companies to engage in offshore drilling. SHI and Pride negotiated the construction of an oil drillship with the aim of securing a drilling services contract from an oil company at a later point.¹² Ultimately, SHI and Pride entered into an agreement, which granted Pride the option to purchase a newly constructed offshore oil drillship from SHI if a contract could be secured with Petrobras to charter the drillship. SHI conducted its negotiations with Pride primarily out of its office in Houston, Texas.¹³

⁶ See *U.S. v. Samsung Heavy Industries Co. Ltd.*, Deferred Prosecution Agreement, No. 1:19-CR-328 (E.D. Va. Nov. 22, 2019) (hereinafter “DPA”), Attachment A, ¶ 16, available [here](#).

⁷ See EnSCO plc, Quarterly Report (Form 10-Q), at 22 (Oct. 29, 2015), available [here](#).

⁸ Pride has previously been prosecuted for violations of the FCPA. In 2010, Pride entered into a three-year deferred prosecution agreement with the DOJ based on a series of bribes paid to government officials in Venezuela, India and Mexico to gain favorable offshore rigging contracts and to avoid paying customs duties. Pride also entered into a civil settlement with the SEC, agreeing to pay \$23.5 million in disgorgement of profits and prejudgment interest. See Press Release, Dep’t of Justice, *Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties* (November 4, 2010), available [here](#).

⁹ See EnSCO plc, Current Report (Form 8-K) (Sept. 4, 2018), available [here](#).

¹⁰ See DPA at ¶¶ 1–2.

¹¹ See DPA, Attachment A, ¶ 14.

¹² Petrobras has sued SHI regarding the same facts as the DPA in state court in Texas, alleging fraud and violations of RICO. The case has been removed to federal court in the Southern District of Texas. See Original Petition, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 2019-16153 (234th Dist. Ct., Harris County, Tex. April 18, 2019) (hereinafter “Petrobras Petition”), ¶¶ 14–16, available [here](#).

¹³ See DPA, Attachment A, ¶¶ 15–16.

SHI engaged a lobbyist in Brazil with a history of facilitating contracts from Petrobras, to help ensure that Petrobras would enter into a contract with Pride.¹⁴ As part of his efforts to procure the contract from Petrobras, the lobbyist set up intermediary companies in order to make bribe payments to certain Petrobras officials.¹⁵ SHI agreed to pay \$20 million in total to the lobbyist, contingent on consummation of the deal with Pride.¹⁶ The DOJ cited e-mails showing SHI senior management's awareness of this scheme.¹⁷ In their email correspondence, the SHI senior managers discussed the arrangement with the Brazilian lobbyist to pay \$10 million to procure his services, and to pay the other \$10 million as bribes to two high level officials at Petrobras, the director of services and the international director.¹⁸ Both of these officials were responsible for approving the terms of the contract with Pride.

In December 2007, Petrobras and Pride entered into a letter of intent setting forth terms pursuant to which Petrobras would charter the optioned drillship in a long-term contract set to expire in 2016. Shortly thereafter, Pride exercised its option to purchase the drillship from SHI for \$636,040,000.¹⁹ SHI increased the price that it charged Pride by \$20 million to offset the \$20 million paid to the Brazilian lobbyist.²⁰ Subsequently, SHI wired \$10 million to its intermediaries via correspondent banks in the United States,²¹ who then paid \$10 million in bribes to the two Petrobras officials. To conceal the nature of these bribe payments, one of the Brazilian intermediaries entered into a "sham loan agreement" with a Swiss shell company controlled by a French businessperson.²²

The \$75,481,600 penalty reflects a 20-percent reduction off of the bottom of the U.S. Sentencing Guidelines fine range due to SHI's cooperation with the DOJ. The company did not receive voluntary disclosure credit, but it received credit for conducting a thorough internal investigation, making presentations to the DOJ, voluntarily making foreign-based employees available for interviews and producing relevant documents and translations of key foreign documents where needed. It would have received full credit for its cooperation, but, according to the Deferred Prosecution Agreement, it failed to meet "reasonable deadlines" imposed by the DOJ.²³ Neither the DOJ's Press Release nor the Deferred Prosecution Agreement shed light

¹⁴ See Petrobras Petition at ¶ 19.

¹⁵ See DPA, Attachment A, ¶ 22.

¹⁶ See *id.* at ¶ 20.

¹⁷ See *id.* at ¶ 25.

¹⁸ See *id.*

¹⁹ See *id.* at ¶ 26.

²⁰ See *id.* at ¶ 21.

²¹ See *id.* at ¶¶ 27–29.

²² See *id.* at ¶¶ 30–33.

²³ See DPA at ¶ 4(a)-(b).

on which deadlines SHI failed to meet, or in what way it caused a delay in reaching a resolution. The DOJ, in the Deferred Prosecution Agreement, noted approvingly enhancements SHI made to its compliance program, including the hiring of additional staff, improved whistleblower policies and procedures, and heightened due diligence controls over third party vendors.²⁴ SHI also committed to report to the DOJ during a three-year self-reporting period, but no monitor was imposed. The reporting requirements obligate the company to submit an initial report within one year, setting forth a description of remediation efforts and proposals to improve internal controls and ensure compliance with the FCPA. The company is also required to undertake at least two follow-up reviews and reports incorporating the DOJ's views on the company's prior reports.²⁵ Finally, SHI will pay the penalty to both Brazil and the United States split evenly; however, in the event the company does not pay Brazil any part of the \$37,740,800 within 12 months after the agreement is fully executed, SHI will be required to pay the full remaining amount to the United States on or before November 25, 2020.²⁶

Analysis

The SHI resolution is part of the continued fallout from Operation Lava Jato, which has been on-going for nearly five years, and demonstrates that the U.S. authorities are very much active in enforcing the FCPA against foreign companies that have a nexus to the United States. Further, the SHI resolution demonstrates the potential risks of option contracts that are dependent on favorable government actions.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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²⁴ See *id.* at ¶ 4.

²⁵ See *id.* at Attachment D.

²⁶ See *id.* at ¶ 7.

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