Federal corrupt-practices proceedings targeting a foreign consortium produced the largest settlement of its kind, showcased US laws' ever-increasing jurisdictional reach, and unveiled a Nigerian gas scheme worthy of a best-seller. **Matthew Feeley '99 was there.**

A guy toting an attaché case doesn't draw attention in Nigeria's capital of Abuja. The city center is dominated by business travelers, so a neatly packaged million-dollar kickback is virtually undetectable. On the flip side of that coin, a $500,000 payoff in equivalent Nigerian currency requires over 77 million in naira, which means stuffing an SUV with cash and leaving the beneficiary a key. Both bribes were part of a decade-long corporate scheme to buy off Nigerian government officials to obtain multi-billion dollar gas production contracts. And it might have worked, too, if a tainted exec didn't sing like Pavarotti once authorities closed in.

Take

Matt Feeley appreciates the dramatic tension of the tale. Especially so because he was counsel to one of the defendants in the proceedings, and one of the first American lawyers to sit with the client after a web of corruption began to unravel. Feeley's path from an upbringing in the suburbs of Detroit to litigation partner at Miami's Buchanan Ingersoll & Rooney is populated by plenty of advocacy milestones, but his role in responding to a six-year, joint Justice Department and SEC probe remains a small personal highlight inside a remarkable legal chronicle.

Feeley was still serving in a clerkship at New York's United States Court of International Trade when the worm turned for his future client back in 2001. What was arguably France's biggest legal investigation since, well, the Dreyfus affair concluded in part with four high-profile convictions, exposing evidence of illegal dealings by a state-owned oil company—Elf—during the presidency of the late François Mitterrand in the 1980s and 1990s.

As part of the Elf scandal inquiry, Georges Krammer, former director of French oil and gas service company Technip, flipped to become a witness for the state and avoid criminal prosecution. But Krammer didn't merely testify. He ran his mouth. With vigor.

In so doing, Krammer alleged that a four-firm consortium (TSKJ) consisting of Technip, then-Halliburton subsidiary KBR, and two other multinational engineering and construction companies conspired to make $182 million in corrupt payments to officials associated with Nigeria LNG (NLNG) between at least 1995 and 2004. The largest shareholder of NLNG at that time? The government-owned Nigerian National Petroleum Corporation, which, wait for it, awarded six successive LNG production facility construction contracts to TSKJ in the same span.

The risks of funneling that kind of cash to procure business were great—even under the

By Chad Konecky

ANASTASIA VASILAKIS

camouflage of two shell companies run by third parties. But the reward wasn't your run-of-the-mill building gig. It was a $6 billion engineering, procurement, and construction (EPC) opportunity. It was business some people wanted to obtain by any means necessary.

And when it all went bad, the offenders found themselves grappling with the long arm of the American legal system.

A Bonny Idea

A rugged, river-carved atoll at the edge of a reef in the Gulf of Guinea, Nigeria's Bonny Island was the ideal location for the nation's LNG infrastructure. Incorporated in 1989, NLNG broke ground on the plant site in 1996, reclaiming suitable acreage from dense mangrove forests that extend toward thickly wooded hills.

The bidding process for the contracts to build LNG production facilities there began in 1992. The stakes were high. The bid-winner would gain the inside track on future EPC contracts for a nation that owns one-third of Africa's proven gas reserves.

Liquefied natural gas is a remarkable concept: a shining example of corporate ingenuity in pursuit of higher profits. LNG is basically the same stuff that heats many American homes every winter, only in its liquid form rather than the vaporized version that flows into residential boilers from the gas company. Much like water becomes vapor in the form of steam at 212 degrees Fahrenheit, natural gas is a vapor at its standard temperature for household use, about 60 degrees. Water any cooler than boiling, even 211-degree water, remains a liquid. Likewise, when cooled enough—in the case of LNG to minus-260 degrees—natural gas becomes a liquid.

The cost benefits of the process are staggering. LNG takes up 1/600th the space of the equivalent amount of natural gas vapor. It's also about half as light as water, weighing less than four pounds per gallon. A typical LNG tanker carries enough liquefied natural gas to heat 21,000 New England homes for a year. Carrying a cargo of natural gas vapor, the same-sized vessel could transport enough to heat only 35 New England homes.

Shipping natural gas as LNG allows energy companies to affordably transport product for sale in countries like the US, where consumption is about to outdistance existing supply, from countries that house the planet's largest gas reserves, yet possess little need. The farther away the destination, the cheaper LNG gets as a method of transport relative to traditional gas pipelines.

The LNG production facilities in Nigeria were built to convert raw natural gas into LNG. In a fertile marketplace where governments control access and the cost of such entry with leasing, permitting, and contract awards, the temptation for some corporate entities to grease the wheels becomes too great.

TSKJ apparently did what senior executives believed necessary to secure the EPC contracts from Nigeria LNG. And in the final analysis, the four firms seem to have done so rather brazenly.

According to the SEC complaint, the joint venture partners formed a euphemistically named "cultural committee" comprising senior sales executives at each firm to craft and carry out the bribery scheme. The SEC's Division of Enforcement Director Robert Khuzami said the committee "openly discussed, approved, and memorialized" bribes.

The complaint further alleged that TSKJ, incorporated in Portugal, hired British lawyer Jeffrey Tessler and his Gibraltar-based company, Tri-Star Investments, Inc., paying $132 million over the course of a decade for "consulting" services. The consortium also engaged and paid more than $50 million to a Tokyo-based trading company. Both sham contracts were conduits for "offloading" or "downloading" the bribes, according to court documents.

Charges also alleged that top-level TSKJ corporate officers met with executive branch officeholders in the Nigerian government at critical junctures preceding the award of the EPC contracts, beginning in 1995. "Systematic and substantial" transfers of money were paid to a range of Nigerian government officials at varying levels, according to court documents, including the disbursement of $32.5 million beginning in March of 1999, just days after TSKJ was awarded a third EPC contract valued at $1.2 billion. The SEC's complaint added that internal controls at one of the consortium's firms failed to detect or prevent the bribery, and that company records were falsified in the wake of the scheme.

ANASTASIA VASILAKIS

Absent two vital puzzle pieces, the big guns of US government enforcement could never have concerned themselves with TSKJ and its backroom dealings half a world away. But just as in any good page-turner, **the bad guys made missteps.**

The DOJ's Principal Deputy Assistant Attorney General Mythili Raman of the Criminal Division characterized TSKJ's conduct as "a sophisticated, decade-long scheme to bribe a wide array of Nigerian government officials in order to win and retain billions of dollars in contracts."

Absent two vital puzzle pieces, the big guns of US government enforcement could never have concerned themselves with TSKJ and its backroom dealings half a world away. But just as in any good page-turner, the bad guys made missteps.

First, members of the joint venture routinely made use of the US mails and other US common carriers in holding meetings and carrying out all matters relating to the construction contracts. In addition, payments to Tessler's slush fund were routed through banks in New York.

Next, in August of 2001, about the time Feeley was completing his clerkship in Manhattan, Technip's American Depository Shares began trading on the New York Stock Exchange. Once it became an American issuer, the firm became subject to the Foreign Corrupt Practices Act (FCPA) and, eventually, a target of the SEC and DOJ. Similarly, the parent company of the consortium's Dutch firm had securities traded stateside since 1995 and, as an American company, KBR was automatically subject to the FCPA. The joint venture's Japanese firm, JGC Corporation, was in FCPA crosshairs because it allegedly co-conspired to commit an "act in furtherance of a bribe within US territory" via Manhattan banks.

The noose was about to tighten, and Matt Feeley would soon find himself serving a client feeling the squeeze.

Mum's the Word

Fresh off two-and-a-half years as a commercial litigation associate at Sidley & Austin in Chicago, Feeley joined the White & Case Miami office in that same capacity in 2004, right about the time TSKJ entities began responding in earnest to SEC and DOJ target letters. Before long, Feeley was seated across a conference table from executives of a foreign company who also happened to be his clients in a US corrupt-practices proceeding.

"It was really an odd situation because although we were their lawyers, they were looking at us as Americans coming in to review what they'd done and, perhaps, pass judgment on them," recalls Feeley. "In general, FCPA investigations can involve tremendous resistance to the notion that US law applies to a company that really feels like it has absolutely no reason to answer to the US government."

That resistance can manifest itself in the form of—to put it mildly—non-disclosure.

"It's not just that it can be a quasi-adversarial relationship when it shouldn't be," he continues. "It also has an element of them [a client] not wanting us to tell them what to do."

Even standard practices can be a hurdle. For example: The preservation of records. In the post-Enron era, litigation hold letters are a frontline multi-media evidence-protection tool in the US. To a subset of FCPA defendants, they are a completely foreign concept. Open resentment, lack of cooperation, and flat denials were certainly some of the issues at play for all of the TSKJ defendants and their US-based legal representation.

What's more, friction aside, lawyers like Feeley still need to advise on the issues of law.

"In the TSKJ case, at the same time we were navigating certain cultural barriers and conducting a factual investigation to try to figure out what had happened, we were also analyzing from a legal standpoint the reach of the FCPA," explains Feeley.

Ultimately, White & Case's client opted to settle. A key driver behind the decision was the FCPA's defined benefit relative to fines for cooperation and self-reporting. Convincing FCPA defendants that US courts' jurisdiction could apply in the circumstances, however, isn't always easy.

"It was really an untested area, but because so much is at stake, companies haven't really challenged the FCPA's reach," says Feeley (though he notes a pending case in Los Angeles, *US v. Noriega et al,* could be a game-changer). "It's expressly stated that if you cooperate and self-report, the relative lenience is significant.

"The alternative is the government's ace in the hole," he continues. "A violator, if convicted, would potentially no longer have access to US markets or government contracts. For most companies, it's not feasible to be excluded from contracting with the biggest contracting body in the world."

As the government's legal adversary in the case, Feeley, a former All-Ivy Honorable Mention linebacker at Dartmouth, acknowledges the tactical savvy both the SEC and DOJ have brought to FCPA enforcement.

"As a matter of resources and manpower, the DOJ and SEC really extend their reach with the lure of self-reporting, which makes the violator's private attorneys do the work for them and give the evidence to them on a silver platter," he says. "Meanwhile, the violator gets a defined benefit from that."

(continued on page 49)

The Myth of Choice

(continued from page 17)

around the country objected on the basis that the military refused to sign a pledge (which all other employers were required to sign) that they would not discriminate against students on the basis of race, sex, disability, religion, or sexual orientation. Because it discriminated against gays and lesbians under the "Don't ask, don't tell" policy (now repealed), the military refused to sign the pledge, and the law schools wanted to restrict their recruiting on campus. The schools sued, using an organization I helped create called the Forum for Academic and Institutional Rights (FAIR) as the plaintiff. We argued that the universities had a free speech right to exclude the discriminatory recruiters, even if they were part of the government. We also argued that it made no difference that the requirement to allow recruiters on campus came not as a direct command but as a condition of funding—a threat of a funding cutoff was coercive, too. Over several years, we fought the case all the way to the Supreme Court.

In the oral argument at the Supreme Court, the question of whether conditioning the funds amounted to compelled speech was front and center. Our attorney argued that cutting off millions of dollars to a university amounted to a punishment for exercising its speech rights. Chief Justice John Roberts was not convinced, saying that the statute "doesn't insist that you do anything. It says that, 'If you want our money, you have to let our recruiters on campus.'"

The Supreme Court eventually decided against us, but it sidestepped the question of whether the threat of a funding cutoff amounted to compulsion. It decided the case on different grounds, saying that the statute requiring universities to allow recruiters on campus was not about speech but behavior. This was a dubious distinction, and the Court still lacks a clear rule about when the government can condition government benefits on the recipients' giving up speech rights. The question of choice is still alive.

In these examples and many others, free choice is often the key issue in the debate. What is choice, who has the right to choose, and what power does choice have? Usually, if a person agrees to something—if a person makes a choice—she is considered to have accepted the responsibilities and to bear the moral burden of that choice. Except when she is not. Sometimes we respect the choices of individuals, and sometimes we do not. The law frequently fixates on the question of consent as the only controlling legal issue. At other times it dismisses consent as beside the point.

Choice is the elephant in the room, whether we are discussing money, sex, politics, or crime. Yet we don't recognize it, much less understand it.

The Myth of Choice *is available for preorder now at Amazon.com.*

On the Take

(continued from page 21)

The federal probe and proceedings targeting TSKJ endured seven years. All four entities elected to settle, consenting to a variety of criminal fines, civil financial disgorgement penalties, and different prosecution agreements. Tessler was one of multiple parties who were prosecuted individually and hit with massive penalties.

KBR played ball first, agreeing in February 2009 to pay a $402 million penalty and disgorge $177 million in profits. In June of last year, Technip consented to a $240 million criminal fine and a $98 million disgorgement penalty. A month later, TSKJ's Dutch entity, Snamprogetti Netherlands, paid a total of $365 million in fines and penalties. Japan's JGC Corporation was the last to fall, agreeing to pay a $218.8 million criminal penalty in April 2011.

According to the DOJ, the $1.5 billion in total fines imposed on the joint venture exceeded the consortium's profits in executing the NLNG contracts. And, there are clear indications that the settlement wasn't just an isolated home run swing by law enforcement. Though the FCPA has been on the books since 1977, legal actions under the statute by the Department of Justice and the Securities and Exchange Commission are at a historic high. Of the top ten FCPA settlements by corporate defendants in terms of dollar amounts, all of them have come since 2007.

The US is the bell cow in anti-corruption oversight, but international cooperation has spiked in recent years, making an increasing number of multinational corporations subject to cross-jurisdictional, anti-bribery investigations. The UK Anti-Bribery Act went into effect in April of this year and boasts some tenets that reach even further than the FCPA.

"In general, I think enforcement will grow exponentially," says Feeley, who joined his current firm in April 2007 and made partner in February of last year. "Here in the US, the DOJ has hired a number of prosecutors committed to FCPA work. The SEC recently restructured and part of that was setting up units committed solely to FCPA investigations and enforcement actions. If you look at the number of cases that have been brought over the last ten years, year-to-year, and the size of the fines, it's clearly a priority."

To wit, a January 2011 story in the *Wall Street Journal* detailed an ongoing SEC investigation into whether US banks and private-equity firms violated bribery laws in their dealings with sovereign-wealth funds, which are investment funds owned and generally operated by overseas governments. Such funds have invested in both private-equity managers and the biggest Wall Street firms over the past several years.

"There are definitely trends emerging," notes Feeley. "The government has made clear it's going to target specific undertakings. Oil and gas and the infrastructure around it are always an easy target because you have government permitting and so forth. More recently, they've looked at the pharmaceutical industry and the financial services industry."

Though more than half his current practice is general commercial litigation, Feeley owns a passion for international matters and, in particular, FCPA enforcement. As part of the TSKJ settlement, some defendants agreed to retain an independent compliance monitor to review the design and implementation of their internal FCPA compliance programs moving forward. Feeley points out that the compliance vein is a core piece of any law firm's FCPA practice in this new era of enforcement.

This type of prophylactic counsel involves drafting and updating corporate compliance programs, training personnel, and developing tools for internal oversight and for vetting and monitoring consultants, distributors, and agents relative to FCPA compliance.

"Any multinational company associated with the US needs to develop and implement a compliance program," says Feeley. "For US companies, we advise a

separate policy for each at-risk area of operation."

Another key component of FCPA practice involves mergers-and-acquisitions screening of corporate entities for sale to ensure the company is free of FCPA violations, lest the buyer assume potential liability. Sellers proactively self-screen to make companies more attractive to potential suitors. "There are lawyers who handle both ends of that business full-time," says Feeley.

Naturally, defending enforcement actions remains central to any litigation department's FCPA business: conducting an internal investigation to discover facts, issuing a report for the client, advising on a legal stance and, if the decision is to settle, negotiating with the government for resolution. In an age where the devil folks know is usually a negotiated settlement, Feeley believes the value of a robust compliance program can't be understated.

"The compliance component is so important," he says. "If a violation is uncovered and the government is interested in pursuing it, having a robust and appropriate compliance program in place will go a long way in helping you as you present your case for punishment."

TSKJ must instead live with having left itself defenseless.

Chad Konecky is a contributing writer to this magazine. His last Great Case was "Facing Down the Phalanx" in the Fall/Winter 2010 issue.

Scholar's Forum

(continued from page 39)

reserve they can draw on when times get tougher. Just as families save for retirement and insure against disasters, governments should "smooth" their revenues over time, giving up some government services when those services are less urgently needed to ensure that the bottom doesn't fall out when they are.

Unfortunately, studies find that saving, too, hasn't worked out well. States can't save for the same reason they borrow excessively: Savings means giving up benefits today in order to reduce the pain of tomorrow. Even if some officials do manage to put money aside in their "rainy day fund," future officials may raid the fund for their own purposes. As a result, it is unsurprising that empirical studies have shown existing rainy day funds to be largely ineffective at sheltering states from recessions.

We propose to remedy these problems by designing a set of federal incentives to encourage states to actually deposit significant sums in their rainy day funds (RDFs), and to leave the money there until a genuine fiscal emergency. Given the stakes for the national economy, and the collective action problem facing states, federal intervention is both merited and necessary. Moreover, the problem in the United States is one largely of the federal government's making. By devolving an increasing share of social insurance functions to states over the last two decades, Congress has rendered these programs increasingly vulnerable to the fiscal vicissitudes of the states—a vulnerability that the national government, with its indifference to exit pressures and vastly superior borrowing capability, does not share.

Surprisingly, despite the depressing repetition of budget crashes and the theoretical consensus in favor of rainy day funds, there is almost no scholarship in any discipline on how to design an RDF system that would actually work. One official at the Federal Reserve has written a brief conference paper proposing that states might set up a shared pool of emergency funds, and recently some European scholars have begun to think about how to encourage EU nations to reduce their need for future bailouts. These are good starting points, although ultimately both have serious flaws. Most significantly, since each state bears only some of the cost of depleting the residual fund, each has an incentive to over-rely on the pool. And, since each knows the others have that incentive, they all are likely to race to be the first to get their money out, a phenomenon known (aptly enough) as the common-pool problem.

Other scholars have examined which features of state RDFs make them slightly less useless than others. But as we have just noted, states have little incentive to adopt policies that would actually force themselves to save. Federal intervention is likely needed, yet there has never been any prior analysis of how federal intervention could facilitate state savings.

As a result, our effort here is in many ways preliminary, in that we hope that ours will be only the first of many efforts towards designing an efficacious RDF system. Because there is still much the scholarly community does not know about why RDFs fail, we cannot confidently claim that there is one perfect solution to the RDF problem. Instead, we start with first principles, attempting to diagnose more precisely the political failures that doom rainy day funds, and suggesting alternative sets of solutions for each possible failure.

The central diagnostic problem in designing a federally supported RDF program is that it is unclear whether the current state failures are attributable to individual voters, state officials, or both. As we noted, there are good reasons to think both groups are biased in favor of spending over savings. But there are also plausible theoretical arguments that either one might actually be willing to save. Economic theory suggests that state budget surpluses should increase home values, providing an immediate financial reward at least for homeowners in responsible states. Similarly, studies find that RDFs improve a jurisdiction's credit rating, lowering borrowing costs, and thereby freeing up extra funds for officials to spend in the short term.

Identifying the sites of the political failures is important because it allows for better design of federal policies encouraging savings. For instance, if officials are the sticking point, a federal policy that gave immediate political rewards to officials, such as unrestricted grant funds, might flip the state officials' incentives and trigger significant RDF utilization. On the other hand, if voters are the problem, giving grant funds to state officials would simply be wasteful; in that case, subsidies must be delivered to the voters, such as through a federal tax deduction set to the taxpayer's per-capita share of the state's annual amount saved.

It is also useful to understand why a particular failure happens. For example, we argue that the nature of present-bias allows for the design of psychologically informed policy tools that could flip bias against itself. Thus, we suggest letting states "save more tomorrow," as Richard Thaler and Cass Sunstein (in their book, *Nudge*) have proposed for individual savings towards retirement. "Present-biased" officials will discount both the future costs of savings as well as the rewards. That is, they are more willing to pay if they don't need to pay until later. For example, they may be willing to agree *now* to save *later*, since they likely believe someone else will be in office by the time savings have to begin. Similar kinds of tools can also work at the individual level. By offering incentives that appeal differently to impatient