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BRIBERY AND ANTI-CORRUPTION CLAUSES – WHAT SUPPLIERS NEED TO KNOW

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1. Introduction

As part of the growing trend for companies to impose ethical obligations on their supply chains it is becoming more and more common to see anti-bribery or anti-corruption clauses in sales and service contracts. Understanding not only how these clauses work but the rational behind them will help suppliers better understand how to manage the inclusion of such clauses in their contracts.

2. What are Bribery and Anti-Corruption Clauses?

Anti-bribery and anti-corruption clauses in sales contracts are clauses where the party buying a good or service requires the supplier to represent that it has not engaged in bribery or corrupt practice. In these clauses bribery and corrupt practice have functionally the same meaning: improperly paying money or another benefit to a public official in order to influence a decision or gain an advantage. These clauses sometimes, but not always, include precise definitions of bribery or corrupt practice, but they often rely on the common meaning of those words.

In addition to a general prohibition on engaging in bribery these clauses frequently also include a reference to specific anti-bribery legislation; usually either or both of the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act. Both these acts have extra-territorial application, meaning they apply outside their home jurisdictions. The FCPA not only applies to actions done in the US but to actions done by entities with a formal link to the US, such as US companies and companies listed in the U.S. The UK Bribery Act applies to acts committed anywhere in the world by a person or company that is incorporated in, or "carries on a business or part of a business in" the UK. Both acts are designed to stop corrupt payments to public officials and have a broad definition of what constitutes an offence. In addition to making corrupt payments an offence, the FCPA also imposes a requirement on companies to keep good books and records. Both acts impose liability on a company and its senior management even if they do not actually know about the improper payment but have allowed it to happen. Finally, both these acts can impose severe penalties, including large fines and even jail time, for violations and there are numerous examples of prosecutions under these acts.

3. The Rationale for inclusion of Bribery and Anti-Corruption Clauses in Sales Contracts

While it is generally accepted that bribery and other corrupt practices have a negative impact on the business environment, and on this basis alone there is an argument for the inclusion of this type of clause in most contracts, there are specific factors that are leading to the increased inclusion of such clauses in supply contracts.

Most obviously, given the broad reach and serious consequences of the FCPA and UK Bribery Act more and more companies are taking the risk they pose seriously. One of the potential defences under these acts is being able to show that the company has established a robust compliance system that

includes monitoring and prevention. Part of a compliance system is including anti-corruption clauses in contracts with suppliers, which is a main reason such clauses are becoming more and more common. In fact, the guidance the US government has provided on how to avoid issues under the FCPA, says it is a "red-flag" if a supplier refuses to accept an anti-corruption clause.

In addition to the risks companies face from anti-corruption laws, companies, especially large companies in North America and Europe, are coming under increased surveillance from regulators, shareholders and activists to ensure their behaviour meets minimum ethical standards. This surveillance, and especially the activist pressure, means that companies are graded on if they have anti bribery or anti-corruption clauses in their supply contracts.

Viewed in this light it can be seen that these clauses are not necessarily primarily intended to catch or stop the supplier from an unethical practice like bribery; in fact most business relationships are built on a foundation of trust between the parties and there is a general expectation that the counter-party to a contract will not engage in bribery. Rather these clauses are included in contracts to meet companies' compliance requirements. This means that the inclusion of this clause is not something the supplier will be able to compromise on, though they can be negotiated if necessary.

Suppliers Issues in Anti-Corruption Clauses

The above background is useful to understand the reasons companies include anti-corruption clauses in their contracts. In particular, the fact that pushing to exclude an anti-corruption clause has been identified as a "red flag" by US government guidance means suppliers need to be extremely careful in pushing back on such clauses. Even if the supplier has no link to the US or the UK and so those acts do not apply to it, pushing back on such clauses risks being seen as a red-flag by the company and, in any event, they are very unlikely to agree to delete such a clause.

That said a supplier does not have to simply accept the clause as presented by their counter-party. There is a wide variety in how such clauses are drafted and suppliers should ensure that they are comfortable with any clause they agree to. Issues to consider in an anti-corruption clause include the following:

- Who does it apply to, and is there a knowledge qualifier: there is quite a difference between a clause that covers any corrupt payment made by any person in a company, and one that only applies to corrupt payments done with the knowledge of senior management;
- Carve-outs for facilitation payments: many jurisdictions, particularly in the developing world, allow a company to make facilitation payments to government officials to perform their duties. An overly broad anti-corruption clause that covered all payments to government officials could be triggered by these payments, therefore the wording of the clause should exclude these types of payments. In this context it is interesting to note that the FCPA does not apply to such payments;
- Time Period: Often companies will present an anti-corruption clause that applies retro-actively. This is not reasonable; the companies are not at risk for acts that could have taken place before the business relationship started so there is no basis to impose a retro-active obligation on their suppliers; and
- Audit Rights: Some anti-corruption clauses will include a right for one party to audit the other. Though there can be an argument for such a clause in certain cases that are particularly high risk, in general such demands are seen as excessive.

Looked at in the broadest sense an anti-corruption clause is validly concerned with ensuring a counter-party does not undertake any illegal corrupt practice that put the company at risk of liability, but it should not provide an avenue to declare an unrelated breach of contract or provide unfettered access to the co-contractors books and records.

Compliance Systems

In addition to considering what can reasonable accepted and rejected in an anti-bribery or anti-corruption clause imposed by a customer, suppliers should also consider what internal steps they should take to protect their business from corruption and bribery.

In order to protect against legal liability for corruption and bribery, in addition to the risks set out above of application of the FCPA or the UK Bribery Act, suppliers need to consider any anti-corruption laws in their home jurisdiction or the jurisdictions in which they operate. For instance, in Japan, there are two key statutes relating to anti-bribery, the Unfair Competition Prevention Act (Act No 47 of 1993) (the UCPA) and the Penal Code (Act No 45 of 1907) (the Penal Code). Both these acts have an element of extra-territoriality and so can apply to Japanese companies even if they are operating outside Japan. Companies need to be clear on what anti-corruption laws apply to them and design their protection measures accordingly.

Though the details of the protection measures a company should consider will vary depending on their industry and the jurisdictions in which they operate, in general establishing an anti-corruption compliance programme is helpful in this context. The full details of a compliance program are outside the scope of this paper, but they generally include the following elements:

1. Training and Awareness: Regularly train employees on anti-corruption regulations and ethical standards;
2. Implementing Controls: Establish strong internal controls and monitoring and reporting mechanisms to detect and prevent potential violations, this can include imposing anti-corruption causes on the companies suppliers;
3. Due Diligence and Audits: Conduct due diligence and audits on third-party vendors and agents to ensure they adhere to anti-bribery standards and implement compliance programs to identify potential areas of risk.

Of course, it will not always be feasible to undertake all these steps, and not all of them will always be necessary, so a company's actual anti-bribery compliance program need to be considered carefully in light of applicable laws and the companies situation, risks and capacity.

4. **Conclusion**.

The proliferation of anti-bribery and anti-corruption clauses in sales and supply contracts in recent years is driven by specific legal risks, especially from certain laws that apply extra-territorially, and also from shareholder and activist pressure. This means suppliers cannot realistically expect to exclude such clauses, even if the laws in question do not apply to them. However, they can ensure the clause is drafted in such a way that it only applies to manageable risks related to bribery and corruption and it does not open them to unrelated or unnecessary risks of a breach of contracts. Further, taking the opportunity of having to think about these clauses and the issues they raise, companies can take the opportunity to develop their own anticorruption compliance programs in coordination with qualified legal advice.

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Matthew is a Canadian qualified lawyer with extensive mining experience across four continents. He has worked as a general counsel for two multi-billion-dollar mining projects, as well as in-house counsel for mining investors, outside counsel supporting investments in mining projects. He has been deeply involved in every aspect of mining projects, from start-up projects, investment decisions, project financing permitting and environmental compliance, construction contracts and issues and sales contracts.
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