Foreign Corrupt Practices Act ("FCPA")

For energy, mining, and resources companies, the cost of corruption—and getting caught—is real. Less than two months ago, Odebrecht S.A. was ordered by a U.S. federal judge to pay a fine exceeding US$2.6bn in connection with bribery and other illegal conduct relating to Brazil’s Operation Lava Jato, with US$93m going to the U.S., US$2.39bn to Brazil and US$116m to Switzerland. Earlier this year, Sociedad Química y Minera de Chile S.A., a Chilean chemicals and mining company, paid US$30m in civil and criminal penalties related to bribery charges. In 2010, a global freight-forwarding company and six oil-and-gas service companies paid a total of US$236.5m in criminal and civil penalties and disgorgement for bribing foreign officials.

Energy and mining companies, along with other resources companies, remain a major focus of bribery and corruption investigations worldwide. The United States Government wields a potent weapon against bribery and corruption in the form of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1, et seq. Congress enacted the law in 1977 on the heels of numerous scandals in which U.S. companies admitted to paying bribes to foreign officials who promised to favor their products, lower taxes, or otherwise exercise their governmental functions in return for compensation. The Act was meant to reestablish trust in the integrity of American business on the international stage. Recently, President Trump publicly claimed that the law is “horrible,” and that “the world is laughing at us [America]” for enforcing it, and some critics assert that it discourages U.S. investment in foreign countries. But Attorney General Jeff Sessions has committed to its continued enforcement by the Securities and Exchange Commission and the Department of Justice, so the FCPA is not going away anytime soon.

For individuals, the FCPA prohibits bribery of foreign government or political officials when the goal is to obtain or retain business, or to secure any improper business advantage. The bribe can be monetary or the provision of anything of value, either directly or through intermediaries. For companies, the Act requires the maintenance of accurate books and records, comprehensive compliance procedures, and internal accounting controls. The FCPA applies to American companies, foreign corporations trading on U.S. markets, Americans whether or not they are physically present in the U.S., and foreigners who violate the law if they are in the U.S. at the time.
Energy, mining, and resources companies are particularly susceptible to potential liability and enforcement actions under the FCPA for at least five reasons:

1. These companies tend to operate in high-risk locations governed by often-entrenched cultural norms at odds with FCPA-mandated compliance—for example, South American and African countries whose unstable national governments, local influences, and low standards of living encourage and even foster corruption.

2. Lucrative resource-extraction enterprises can result in tremendously profitable payoffs that weigh in favor of cutting corners and against strict compliance.

3. A company’s corporate leaders might advocate for FCPA compliance, but translating that compliance posture into “on-the-ground” compliance practices in foreign locations is often difficult.

4. Energy, mining, and resources companies often enter into complex transactions whose many parts (permitting, security, environmental regulations, and community relations) require cooperation and engagement by multiple parties and are challenging to control or oversee.

5. Finally, and perhaps most importantly, off-the-shelf risk-assessment programs and compliance controls may not fit a company’s specific risks of mining operations, and creating a plan that matches the vulnerabilities and obligations of the company can be difficult.

In order to minimize risks while ensuring FCPA compliance, companies need comprehensive compliance plans that are designed to tackle actual risks, and that demonstrably work in every location for every employee. Creating a compliance plan presents numerous challenges: what might seem like “immaterial” transactions might not be immaterial for compliance; there must be top-to-bottom commitment and tone throughout the organization that is reflected in the plan; the plan must account for affiliates and third-party relationships; and it must include strong whistleblower, monitoring, and auditing provisions. A plan that is merely a “paper tiger,” whose implementation amounts to little more than lip service, will not suffice. Therefore, compliance planning takes time, effort, money, and a thorough willingness to adhere to the law. But done properly, compliance planning will help to eliminate instances of bribery and corruption that expose energy, mining, and resources companies to enormous risk and financial penalties under the FCPA.

**Key considerations for parties in commercial disputes**

As more countries are taking bribery and corruption more seriously, international companies have been and will continue to see the issue arise in the context of commercial disputes. Parties in disputes governed by U.S. or UK law can argue in a commercial arbitration that a party who has procured, performed, or maintained a contract through bribery or fraud (which would include bid-rigging and collusion) is not entitled to bring claims to enforce contractual rights.
Thus, a party that finds itself accused of illegal conduct should expect its counterparty to use that illegal conduct as a defense in any contract dispute between the parties.

Separate and apart from the law of the contract, there is an argument that the Tribunal has the inherent obligation to evaluate any issues of illegal conduct and act in a manner that avoids supporting such illegal conduct. In other words, a Tribunal may find that it has the independent obligation to evaluate arguments and evidence relating to illegal conduct and refuse to enforce a contract in favor of a party involved in the illegal conduct, or risk implicitly endorsing the illegal conduct. The reported precedent supporting such an approach is relatively limited but the trend appears to favor this type of approach by Tribunals.

— There also is developing law in the United States and England that supports an argument that a party engaged in illegal conduct should not be entitled to enforce a contract claim. Some of the earlier law in this area was relatively absolute in its statements. More recent decisions appear to take a more measured approach, generally affirming the principle but considering additional factors that do not necessarily penalize a party that performed under a contract even if it was procured by illegal means.

These trends require parties in commercial disputes to consider a number of important issues when there is an issue of illegal conduct that may be implicated. Both parties:

— Should recognize that there will be additional time and cost associated with litigating the issue of illegal conduct. There is considerable risk that the commercial dispute will be overshadowed by the issue of illegal conduct and the parties will need to think strategically about how this will impact the resolution of the dispute.

— Face considerable risk of illegal conduct being exposed or adjudicated in a forum that is not their first choice. The party accused of illegal conduct will likely be forced to make sensitive disclosures and key witnesses may be subject to cross examination. The opposing party also faces risk however. In many cases, the party accused of illegal conduct will respond with an argument that its counterparty is equally culpable based on an unclean hands or similar argument.

— In a commercial arbitration likely will be unable to ensure that the facts developed during the arbitration will stay confidential. They should assume that law enforcement will gain access to them which could complicate criminal or other government investigations.

— Should recognize that a decision by a civil court or an Arbitral Tribunal with respect to illegal conduct may influence criminal or government investigations or other business relationships even if it does not bind anyone outside of the proceeding where it is rendered.

While every situation is different, the recent focus on investigating illegal conduct is likely to
influence parties in commercial disputes that may seem secondary or removed from the criminal or government investigation that is taking place. Parties accused of illegal conduct must consider whether to pursue commercial disputes that may impact a criminal or government investigation and opposing parties must think carefully about whether to raise illegal conduct as a defense and risk being accused of illegal conduct itself.

Resources:

— **Global bribery and corruption review 2016**: Our annual review of global developments in anti-bribery and corruption regulation and enforcement, with a look ahead to 2017 trends.

— **Steering the Course**: Is your AB&C compliance regime fit for purpose? Are you ahead of the game or trailing behind the pack? If the prosecutor comes knocking at your door do you have adequate procedures in place so that your company has a defense?

— Give your company’s compliance program a quick health check by taking our anonymous five minute [AB&C self-assessment test](#).

Read more: Anti-corruption and FCPA

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