



UNIC

Business Integrity Digest

Prohibited Practices
Contracts Clauses

December 2017

QUERY

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As a follow-up of the recent UNIC educational meeting, we obtained several queries to provide examples of anticorruption or prohibited practices clauses that UNIC members could introduce into agreements with their partners to prevent and manage corruption risks.

HERE WE GO!

INTRODUCTION

This provides brief guidance regarding entering the contracts with business posing a more than low corruption risk. This examines the requirement in several stages:

WHEN it is reasonable to require such provisions in a contract, and

TYPES of anticorruption commitments to be included in the contract.

WHEN

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As a general practice, the company would not be required to insert a prohibition of corruption into its contracts with **low risk business** as the administrative requirement to do so is likely to be unreasonable and disproportionate to the low risk.

At the same time, the company is likely to be able to require a prohibition, for example, where the company is appointing:

- suppliers to work on the company's standard purchase conditions;
- a sub-contractor with a large scope of work;
- an agent to act on its behalf in a transaction.

Please note that the company **may not have sufficient influence** to require a prohibition of corruption to be included, for example, in contracts with major customers. In these cases, the absence of such prohibition does not mean that the contract should not go ahead, but it should be regarded as a negative factor in the relevant risk assessment.

Therefore, in undertaking the risk assessment, the company should consider, taking into account all relevant factors, including the lack of a corruption prohibition in the contract, whether the risk of corruption in relation to the transaction is sufficiently low for it to be a reasonable business decision to continue.

TYPES

Simple anticorruption prohibition: The below requirement could be considered as a minimum requirement: *“The party will not participate in any corrupt conduct, including, without limitation, any bribery, extortion, fraud, cartels, abuse of power, embezzlement, money-laundering and other similar activities.”*

More comprehensive anticorruption provisions:

The company may choose, particularly in the case of **more complex** or **higher risk** transactions or business, to include more comprehensive anticorruption provisions. **These could include, for example, the following:**

- A definition of corruption to include bribery, extortion, fraud, cartels, abuse of power, embezzlement, money laundering, and any similar criminal activity.
- Agreement by the business that:
 - i. it will not participate in any corrupt practices in relation to the contract or project;
 - ii. it will ensure that its personnel, and subsidiary and related companies, do not participate in any corrupt practices;
 - iii. it will take reasonable steps to ensure that its agents, joint venture and consortium partners, sub-contractors, suppliers and consultants do not participate in any corrupt practices.

TYPES (2)

- Confirmation by the business that it, and its owners, directors and relevant managers, have not been investigated convicted or debarred for corruption.
- Confirmation by the business that all payments made in connection with the performance of the agreement will be properly and accurately recorded in its books and records, including amount, purpose and recipient, and maintained in accordance with their internal procedures along with supporting documentation.
- Agreement by the business to ensure that its relevant personnel receive an anticorruption training.
- Provisions allowing the company to audit the business in relation to the relevant transaction.
- Provisions allowing the company to undertake an investigation in the event of suspected corruption involving the business.
- Provisions allowing the company to terminate the contract with immediate effect in the event of any breach by the business of the anticorruption provisions.
- Agreement by the business to indemnify the company for any liability, all losses and expenses suffered by the company due to a breach by the business of the anticorruption provisions.

TYPES (3)

A provision passing on to the business any relevant anticorruption obligations assumed by the company in its other contracts in relation to the same project or transaction (e.g., sub-contractors, suppliers, agents and consultants.

For example, *“If [Party] subcontracts any of the services to a subcontractor, subagent, or any other third party, [Party] will notify, in writing, the subcontractors of the Anti-bribery Provisions and obtain a written certification of compliance with them. Each Party represents that it and its subcontractors under this agreement have adequate policies, procedures and controls in place to ensure services under this agreement are in compliance with the Anti-bribery Provisions, including at a minimum, policies and procedures relating to: [____]”.*

SAMPLE FOR A COMMERCIAL CONTRACT

Prohibited Practices

1.1. Each Party agrees that, at all times during the term of this Agreement, it shall not, and shall ensure that no officer, director, authorised employee, affiliate, agent or representative of the relevant Party shall be involved with any Prohibited Practice in connection with this Agreement or any matters covered hereunder. Each Party shall cooperate in good faith with the other Party and its representatives in determining whether a Prohibited Practice has occurred and shall respond promptly and in reasonable detail to any such notice from the other Party and shall furnish documentary support for such response upon such other Party's request.

1.2. For the purposes of this Clause "Prohibited Practices" are one or more of the following actions:

1.2.1. a "coercive practice" which means impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

1.2.2. a "collusive practice" which means an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;

1.2.3. a "corrupt practice" which means the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party;

1.2.4. a "fraudulent practice" which means any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation; and

1.2.5. a "theft" which means the misappropriation of property belonging to another party.

SAMPLE FOR AN EMPLOYMENT CONTRACT

Non-Competition, Anticorruption

1. The Employee agrees that for the entire term of this Contract, the Employee shall not:

- directly or indirectly (whether as director, employee, consultant, contractor, advisor or otherwise) engage in competition with the Employer, or own any interest in, perform any services for, participate in or be connected with any business or organization which, in the sole judgment of the Employer, engages in any competition with the Employer; or*
- directly or indirectly advise or recommend to any other person or entity that they employ or solicit for employment any employee of the Employer.*
- directly or indirectly participate in any corrupt conduct, including, without limitation, any bribery, extortion, fraud, abuse of power embezzlement, money-laundering and other similar activities.*

2. The Parties agree that the provisions of this Article are essential conditions of working discipline of the Employer and any violations of these provisions are treated as essential violations of Employee's obligations under this Contract (gross misconduct) and also working discipline of the Employer.

IMPLEMENTATION CHECKLIST

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In the next forthcoming business integrity digests, we will address how the company should identify its counterparty business risk, which categories of business pose more than a low risk of corruption to the company. The UNIC Experts Group has already launched its activity.

Meanwhile, the following rules could be helpful:

- ✓ Identify any categories of business, which will be required to work under the **company's standard conditions of contract** (e.g. suppliers and sub-contractors over which the company has bargaining power).
- ✓ Identify any categories of business in respect of which it is likely that **the company will need to work under the business's conditions of contract** (e.g. clients, large suppliers with a greater bargaining power than the company does).
- In relation to the mentioned business:
 - a) identify any categories of business in respect of which it is likely to be unreasonable to require the insertion of a prohibition of corruption into its contracts.
 - b) identify any categories of business in respect of which it is likely to be reasonable to require the insertion of a prohibition of corruption into its contracts.

IMPLEMENTATION CHECKLIST (2)

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- The company should develop the actual anticorruption contract wording which it will use. The company should update its standard contract documents to include these anticorruption provisions.
- The company should document these procedures.
- The company should appoint a manager(s) responsible for implementation of these procedures. In particular:
 - i. to ensure that the company's standard wording is being used where appropriate;
 - ii. to ensure where the company's standard anticorruption wording is not being used, that: where reasonable, an appropriate anticorruption prohibition is included or where not reasonable, the lack of such a provision is a negative factor in the company's risk assessment on that business or transaction.
- Different managers may be appointed to oversee different categories of business. For example, a procurement manager may manage the appointment of suppliers, a project manager may oversee the appointment of sub-contractors, and a sales manager may oversee the entering into a contract with a client.

GOOD PRACTICES

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We encourage you to check the following recourses to find your inspiration:

- [ICC Anti-Corruption Clauses](#)
- [Examples of anti-corruption clauses in cooperation agreements](#) from www.u4.no
- [Prohibited Practices Guidelines for EBRD Operations](#)
- [Get Your Company New Anti-Corruption Clauses for Free](#) from Compliance Periscope



UNIC plans to share best practices with UNIC members on regular basis. Please subscribe [here](#). Our newsletters are free of charge and you can unsubscribe at any time.

If you would like further information on any of the matters discussed in this Business Integrity Newsletter, please contact us at info@unic.org.ua

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