CORRUPTION PREVENTION

Research article
https://doi.org/10.71559/ACSAR.1.1.2026.30

Anti-corruption clauses in business contracts

N.Shakel
PhD, LL.M, Associate Professor
E-mail: nadzeya@spplaw.by
https://orcid.org/0000-0002-8100-8332

SP&P, Minsk, Republic of Belarus

Abstract

The increasingly widespread use of anti-corruption clauses in business contracts makes it necessary to analyze such activities and the related issues, since this topic is not given sufficient attention in legal science. The paper discusses approaches adopted in practical activities, analyzes regulations, and examines legal sources and certain statistical data. The complex reasons why companies include anti-corruption clauses in their contracts are being studied. An analysis of the principle of good faith in civil relations was conducted and the expectations that the parties place on anti-corruption clauses were discussed. As a result, it has been established that there is no single approach to formulating anti-corruption clauses, and that the methods of "integrating" them into the parties' contractual documentation also differ (a separate clause in the contract, an appendix to the contract, a supplementary agreement to the contract, or a separate contract is used). At the same time, it has been determined that including anti-corruption clauses in contracts is good business practice, which should be implemented on the basis of an analysis of the other party's behavior (due diligence) and adapted to the specific conditions of the interaction. Specific examples demonstrate certain problems associated with overly broad or ambiguous wording of anti-corruption clauses. Cross-border agreements highlight the need to specify prohibited actions in detail, ensure adequate translation, and take local regulations into account. Particular attention should be paid to the legal consequences of violating such provisions, as there is a risk, among other things, of their improper use for the formal filing of claims for termination of the contract.

Keywords: corruption, clause, contract, anti-corruption clause, bona fide, business

How to cite: Shakel, N. (2026). Anti-corruption clauses in business contracts. *Anti-Corruption Studies and Research*, *1*(1), 95-104. https://doi.org/10.71559/ACSAR.1.1.2026.30

1. Introduction

Anti-corruption clauses, when applied correctly, should lead to clarity and precision in the relationship between the parties with regard to how their relationship should be structured and what actions are unacceptable. However, at present, the inclusion of relevant conditions in business contracts raises certain problems, which necessitates scientific research and analysis.

It should be noted that there are a number of studies in legal literature concerning anti-corruption clauses. J. R. Boles studied the substance, usage and goals of anti-corruption clauses, discussing liability risks and due diligence issues, together with offering a number of strategies of their application and legislative reforms [1, p. 814]. A. Mahmoudi discussed the role anti-corruption clauses in the petroleum sector [2]. S. Lamba analysed the importance of such clauses taking into account the existence and legal significance of the UK Bribery Act 2010 [3].

However, in legal literature, especially concerning contract law, the issue of using anti-corruption clauses is practically not studied. Monographic publications mainly analyze contract law and discuss the "basic" terms of contracts do not focus on issues related to combating corruption in the business sphere and appropriate contract terms (see Burrows, A. (2020) [4], Chen-Wishart (2012) [5]). Thus, this article discusses anti-corruption clauses of the business contracts, exploring legal issues related to them.

2. Presumption of good faith and anti-corruption clauses

The importance of the absence of corruption in the private sector cannot be overstated. Transparency and honesty in business relations contribute to the creation of an atmosphere of trust, emphasizing the integrity of participants in business transactions.

It should be noted that the presumption of good faith on the part of participants in civil transactions is enshrined in the legislation of various states as the basis for relevant relations.

For example, Belarusian legislation has the following rule: the good faith and reasonableness of participants in civil legal relations is presumed, unless otherwise established (the principle of good faith and reasonableness of participants in civil legal relations) (Article 2 of the Civil Code of the Republic of Belarus).

The principle of good faith, which is closely tied to moral standards, originates from Roman law, and today the use of the term bona fides in business relations implies that parties would honor their commitments and keep their word [6].

Business organisations believe that their business market participants (partners, suppliers, clients, etc) will be fair in implementing their contractual obligations and free of corruption, as the opposite may entail not only liability, but also significant reputational risks [7, p. 13].

In some jurisdictions, however, no general duty of good faith exists. For example, under English law the parties "need not disclose important matters about the transaction to each other", and there's no liability for such omission; however contract parties should not make false statements to induce the other party's consent to the contract [5, p. 202].

This means that parties are inclined to enter into the contract important representations, which can cover expected behaviour.

At the same time, what is considered normal behavior in one country may be perceived very differently in another. For example, the rules for giving gifts, including at international business meetings, vary significantly and depend on the ethical "code" of the country.

One of the studies examined which situations are most likely to present a risk of corruption when the company operates abroad. Most respondents stated that the highest risk is posed by the use of third parties, such as subcontractors or agents [8, p. 30].

There is no doubt that local consultants, agents, contractors, and other persons with whom the organization enters into relationships have certain connections. The question is whether the activities of such persons are transparent and accountable. Among other things, they must exclude so-called facilitation payments, as they are considered bribery too.

Available statistics from previous studies show the amount of such situations. E.g. in the French national survey of 2022 it was discovered that 16 % of the respondent companies stated that they had been confronted with one or more requests for facilitation payments in their activities abroad, and as a consequence amongst them:

- 84 % initiated an internal investigation,
- 64 % took disciplinary action,
- 60 % had been confronted with a case of bribery or influence peddling,
- 36 % filed a complaint or referred the case to prosecuting authorities [9].

Thus, not all requests for facilitation payments lead to liability. At the same time, the abodementioned study did not address the question of how the discovery of requests for facilitation payments after the conclusion (or possibly even after the performance) of the contract affected the contract, especially if it contained an anti-corruption clause.

When entering new markets, it can be difficult for economic entities to assess the extent to which their counterparties are susceptible to corruption schemes. In this regard, investors and other participants in international economic relations are often interested in taking additional measures to define the framework for proper conduct.

However, the problem of combating corruption does not concern exclusively international business relations. Similarly, all of the above circumstances and risks must be taken into account when conducting activities within the state.

The absence of corruption largely creates a level playing field, as companies do not resort to circumventing or dishonest practices to achieve their goals in a particular market. There is also no doubt that honest business practices contribute to sustainable economic development and a favorable investment climate in the country. In this regard, emphasizing the importance of proper conduct appears to be important for business communication.

It should be noted that, as part of generally accepted business practices, participants in business transactions often include provisions that are important to them in their contracts in addition to the "basic" contractual terms, which inform the counterparty about what actions are permissible and what actions are not considered proper conduct. Thus, taking into account the above reasons related to the need to take measures to ensure fair business relations, it is reasonable and beyond doubt that a significant number of business contracts currently contain anti-corruption clauses.

A contract is usually perceived as a legally binding agreement between two or more parties creating rights and duties, as parties promise to perform (or not to perform) a particular action or series of action. Thus, any clause of the contract has (or at least intends to have) legal consequences. In this regard, the inclusion of anti-corruption clauses in a contract must be carried out taking into account the overall logic of such a document and using terminology consistent with it. In this regard, any templates (the even from the most authoritative and reliable sources) that are implemented in the business contract "as is" are not workable. This fully applies to the "anti-corruption" terms of the contract: the parties must always understand why and for what purpose they are including certain terms, as well as what specific consequences will result from failure to comply with the relevant terms.

3. Legal instruments that form the basis for the application of anti-corruption clauses

Foreign Corrupt Practices Act (FCPA) is described as a pioneering statute and the first law in the world governing domestic business conduct with foreign government officials in foreign market [10]. FCPA, in its effort to fight with transnational corporate corruption, criminalized the payment of bribes irrespective of where the bribe actually took place [11, p. 259].

Another significant document is the Bribery Act, which was enacted by the U.K in 2010. One of its provisions that has broad extraterritorial effect (covering any entity that conducts "part of a business" in the U.K.) stipulates created a new type of corporate liability in the failure of a commercial organization to prevent bribery by persons associated with it [1, p. 814]. Bribery Act 2010 Guidance encourages commercial companies to ensure that all their counterparts, i.e. contractors, adopt anti-corruption measures, using anti-bribery terms and conditions [12, para 39]. Putting it in simple terms, as the Bribery Act 2010 covers private-sector transactions and applies globally, including anti-bribery provisions in contracts forms a crucial part of defence under the Bribery Act 2010, even though it does not automatically guarantee compliance – and thus appropriate contractual provisions should complement, not replace, thorough due diligence procedures [3].

Anti-corruption conventions also emphasize that states should combat corruption with the involvement of the private sector.

It is widely known that FCPA and its ideas where the source of inspiration in drafting the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) (1997), the Council of Europe Criminal Law Convention on Corruption (1999), and the United Nations Convention against Corruption (signed in 2003, came into force in 2005).

This instruments acknowledge that bribes can be paid directly or indirectly, through intermediaries, and prohibit such actions.

The logic behind these instruments is the following. International business usually do not have sufficient connections, language skills, or knowledge about the country in which they plan to conduct or expand their business, making it difficult to offer bribes. Therefore, in some cases, a local "consultant" or 'contractor' is hired to act on behalf of the company in the local market, using bribes to achieve certain goals (preferential treatment in the selection of land plots, special terms of transactions, "turning a blind eye" to violations of environmental legislation, etc.).

As existing cases show, in some instances the sums paid to such individuals were enormous, and no reporting was required. For example, in one incident telecommunications company was fined for payments (hundreds of thousands of dollars) to the agent in a West African country to the agent that claimed to have close ties to the President, and such payments were never properly documented [13, p. 110].

In order to facilitate the conclusion of contracts with anti-corruption clauses, a number of institutions developed their own clauses. For instance, International Chamber of Commerce proposed using the clause developed by it as a voluntary contractual provision for the parties. It states that the inclusion of the clause reassures both parties about the integrity of their counterpart, and includes clear and actionable avenues for redress where there are allegations of breach, creating a transparent framework for ethical business conduct [14].

Such examples of anti-corruption clauses from authoritative sources may be used by parties to any agreements.

4. Use of anti-corruption clauses: examples and problems

As can be seen from the above information, the inclusion of anti-corruption clauses in agreements between private companies is not mandatory in most countries. International instruments also do not require their inclusion.

It is quite common to believe that businesses that require interaction with public officials are those most likely to generate high risks of corruption, in particular in the issuing of public contracts, public land allocations, licenses and concessions and in customs clearance [15]. However, corruption can have equally serious consequences in relations between private companies.

As J.R.Boles notes, companies have begun inserting anti-corruption provisions into their contracts with business partners seeking protection from potential corrupt conduct by these business partners and attempting to shift risk of criminal penalties, administrative fines and damage claims to the corrupt actor [1].

The development of relevant practices has led to such clauses becoming mandatory in a number of countries for certain areas.

For instance, Commission for the Prevention of Corruption of Slovenia explains this in a following way: "Anti-Corruption Clause stipulates that any contract is considered null and thus generates no legal effect if bribery of a public-sector representative has occurred during the course of its conclusion, performance of supervision… Public sector bodies and organisations are required to forewarn the persons with whom they enter into contract about the nullity of the contract in the event of bribery by including the Anti-Corruption Clause cited above into any contract for the procurement of goods, services or contractors when its value exceeds EUR 10,000 (excluding VAT).[16]

The practice shows that such reservations may be directly included in the text of the agreement, or they may be referred to in the text of the contract [14]. A possible option for implementing anti-corruption provisions in a contract may be not only to include them in the main text, but also to enclose an annex to a contract, which shall describe the ethics provisions of the company, and this annex shall be an integral part of the contract to be signed together with the contract [7, p. 108]. There are also situations where the parties conclude a separate anti-corruption agreement.

An analysis of the practice of formulating relevant clauses shows that they are often drafted mechanically, without taking into account the regulations in force in a particular country or the specifics of interaction. Also problematic is the situation where such clauses are drafted by lawyers who do not have expertise in criminal law.

For example, in our legal practice we needed to review a contract to be concluded between two organizations with a view to receive educational services. Our client was given, among other documents, anti-corruption agreement as a condition of cooperation, in which the parties were referred to as the “Supplier” and the “Enterprise” (this word was used in a meaning “a large scale industrial organization).” It is obvious that these terms were not relevant for the relations between the parties, as there was definitely no “enterprise”. An attempt to amend the agreement, including renaming the parties, caused problems, as it turned out that the party that presented the draft agreement had not drafted it itself and did not understand what was important in it and what could be changed: it had been drafted by a large law firm and was used “as is.”

Another problem is the attempt to make such agreements comprehensive. In this case, the question arises as to how realistic it is for the other party to the agreement to comply with the requirements, or whether they sign the agreement knowing full well that it is impossible to fulfill. Let us give an example. In one case, the anti-corruption agreement required the other party to ensure that neither it nor any persons associated with it participated in corruption. This covered not only employees, but also “any other persons.” Thus, it was impossible to identify more or less unambiguously the persons affected by this provision.

In addition, according to the requirements of the anti-corruption agreement, none of the counterparty's employees or their family members were allowed to be government officials. The counterparty faced the following difficulty: “family members” is a broad category, and it had dozens of employees. As a result, the question arose about the need to monitor each employee with regard to the places of work of all their relatives who could be considered family members. The feasibility of implementing this measure can be safely considered minimal.

It should be noted that, as with all other anti-corruption measures, the application of anti-corruption clauses should not be based on the principle of one-size-fits-all. Each counterparty, contractor, individual entrepreneur, and other person with whom the company interacts has its own specific characteristics and different risks of involvement in corrupt practices, and this should be taken into account.

Of course, anti-corruption clause will not help in case the contract is illegal as such. For example, S. Graw gives the following examples: P. made a donation hoping that the charity will secure him a knighthood, however the contract of purchasing a title is improper and illegal of the public policy grounds. Another example is payment to the members of parliament as a fee for pressuring the government to purchase certain land, because such contract will also be treated as a nullity (case *Wilkinson v Osbourne,* 1915) [17].

The inclusion of an anti-corruption clause in a contract often entails recognition and explicit indication that acts of corruption will constitute grounds for declaring the agreement invalid. It is interesting to note that sometime such provision is expressly reiterated in the Code of conduct, where you can find the following or similar wording: contracts should include specific clauses certifying that the parter complies with anti-corruption laws and regulations and providing that the contract will be terminated if these laws or regulations are breached.

This in itself can be a good preventive measure, as participants in business relationships will be less inclined to risk the enforceability of the contract as a whole. As is rightly noted «Corruption can be prosecuted after the fact, but first and foremost, it requires prevention». [18]

However, if such a clause is overly broad, abstract, or covers a significant range of undefined persons or actions (as in the examples above), it poses a risk to the contract itself, as it may be invoked as grounds for terminating business relations and rescinding the contract in cases where other grounds would not apply. This may undermine the stability and predictability of civil law relations.

It should be noted that, in practice, anti-corruption clauses are the result of the “creativity” of large companies that have a significant legal staff or are able to engage external legal advisors to prepare documentation reflecting their commitment to anti-corruption principles. In addition to a code of ethics, such activities often include the development of basic provisions for contractual terms.

Furthermore, when entering into contractual relationships with small companies and individual entrepreneurs, large companies include appropriate clauses, encouraging them to behave in a law-abiding manner. As a result, small organizations accept the relevant rules of the game and, in some cases, include these clauses in their own contracts in the future.

In our opinion, anti-corruption clauses should also be included by fully applying a risk-based approach. Regarding this approach, the Good Practice Guidelines on Conducting Third-Party Due Diligence (PACI) states: «the level of corruption risk determines how much scrutiny is required to be able to defend before a judge or a prosecutor that the organization is confident it is dealing with a *bona fide* third party. The higher the risk, the broader and deeper the third-party due diligence should be» [19, p. 7].

This approach should be taken into account when structuring business contracts in terms of the parties' anti-corruption obligations. The higher the risk of misconduct, the more detailed and clear the parties' obligations should be reflected in the contract.

It is worth accepting the advice (within the framework of procedure due diligence) to create a general portfolio review of the existing third parties, using a list of key risk factors (to identify those who may cause high risk), and develop appropriate mitigating plans in the context of existing contractual relations [19, p. 7]. This may, in particular, lead to the need to amend and supplement existing agreements.

The contract signed as a result of corrupt practices may also have negative consequences. For example, the Criminal Code of Morocco provides for the confiscation of any articles or material obtained as a result of the bribery (i.e., the proceeds of crime), which may include the income attributable to any contract obtained through corruption, and not just the value of the bribe paid [20, p. 49].

Thus, agreements between parties must take into account the possibility that the counterparty may be involved in corruption in one way or another. The consequences of such improper conduct may also affect the party that acted honestly and in good faith (and expected the same from the counterparty).

5. Conclusions

Fighting corruption is not only a task for the public sector. Private companies and businesses interacting with each other must also adhere to ethical behavior and prevent corruption.

From a theoretical point of view, anti-corruption clauses represent a mechanism through which companies demonstrate their commitment to fighting corruption. The methods of "integrating" them into the parties' contractual documentation are different (a separate clause in the contract, an appendix to the contract, a supplementary agreement to the contract, or a separate contract is used). Despite their apparent simplicity, anti-corruption clauses can be misapplied and fail to achieve their objectives.

When drafting and including such conditions in the contract, it is necessary to:

- take into account local specifics, including provisions of local criminal law
- bring the terminology of the clause into line with other terms of the contract
- assess and regulate what actions may constitute grounds for termination of the contract (and exclude situations of unfair use of the provisions of the contract to withdraw from the contract without grounds)
- include requirements for contracts and anti-corruption clauses in them in the company's anti-corruption policy documents
- work with people involved in negotiating and signing contracts to ensure that they understand the relevant terms and conditions (especially when developed by external consultants) and can communicate the need to comply with them to the counterparty.

Funding: not applicable.

Data Availability Statement: not applicable.

Conflicts of Interest: The author declares no conflict of interest.

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