

Global Compact Network Canada

THE MIDDLE EAST

Chapter Ten of Designing an Anti-Corruption Compliance Program:
A Guide for Canadian Businesses

Paul Greven

Chief Counsel Canada, JLL



Global Compact
Network Canada



Corruption in the Middle East – Recent Developments

Paul Greven, Chief Counsel for Canada, JLL

I. INTRODUCTION

Corruption remains a concern for companies operating or planning to operate in the Middle East and North Africa (“MENA”). A recent Corruption Perceptions Index¹ published by Transparency International (“TI”), a non-governmental organization that scrutinizes global corruption, specified that five Arab countries are among the most corrupt countries on the index – namely Somalia, Sudan, Libya, Iraq and Syria.

Corruption in MENA falls under two primary categories: political and defence. Political corruption is one of the main challenges in the region. It has been argued that the leading cause of the 2011 Syrian protests, which later ignited the flames of civil war, was the Assad regime’s systemic corruption. In addition, some would also claim that defence corruption has helped fuel the rise of extremist groups such as the Islamic State by enabling harmful weapons to get in their hands.

With respect to corporations conducting business in MENA, corruption often comes through third-party facilitators, sometimes regarded as useful or even necessary to get one’s “foot in the door” when guiding business activities. These “middlemen”, or facilitators, create significant risk and can expose a multinational’s supply chain, so navigating them requires additional due diligence.

II. CORRUPTION CONCERNS FOR COMPANIES OPERATING IN MENA

Businesses need to be mindful that the most common form of corruption in MENA is bribery, widely known as backhanders or kickbacks. Nepotism and the use of middlemen imbued with *wasta* (which roughly translates from Arabic as “connections, influence or favouritism”) to do business are common. Bribes are typically paid to agents/ facilitators to secure business (e.g., to win important contracts) or to speed up processes (e.g., to obtain mandatory work permits necessary to mobilize staff and consultants). These bribes are typically referred to as “facilitation payments”.² While they are common practice in many jurisdictions, they are deemed forbidden transactions under the CFPOA (described below).

Part of the unique challenge surrounding facilitation payments is that they encompass a historical and traditional way of doing business in MENA. Often, there is a lack of understanding about the difference between a gift and a bribe, which further blurs the line between what is acceptable and what constitutes a crime.

¹ The index rankings are based on a survey of perceptions among experts, politicians and business people.

² For example, in recent articles published by *The Economist* and Ernst & Young.

III. TWO MIDDLE EAST CASE STUDIES – A COMPARISON

For the purposes of this chapter, we will examine two nations: the Kingdom of Saudi Arabia (“KSA”) and the United Arab Emirates (“UAE”) to outline how each has attempted in recent years to address the damaging effects of corruption.

Kingdom of Saudi Arabia – Background

Saudi Arabia, the birthplace of Islam, lies between the Red Sea and the Arabian Gulf. It contains the world’s largest continuous sand desert, referred to as the Empty Quarter, and is the largest country in the Middle East.

Saudi Arabia was founded in 1932 by Abd Al-Aziz bin Abd al-Rahman Al Saud (“Ibn Saud”) after a 30-year campaign to unify most of the Arabian Peninsula. One of his male descendants, King Salman, rules the country today, as required by the country’s 1992 Basic Law.

From 2005 to 2015, Salman’s predecessor, King Abdallah, had incrementally modernized the Kingdom – driven by personal ideology and political pragmatism – through a series of economic and social initiatives. King Abdallah’s primary advancements included expanding employment and social opportunities for women, attracting foreign investment and increasing the role of the private sector in the economy. The KSA has an oil-based economy with strong government controls over major economic activities. It possesses about 16% of the world’s petroleum reserves, ranks as the largest exporter of petroleum and plays a leading role in the Organization of the Petroleum Exporting Countries (“OPEC”). The petroleum sector in the KSA accounts for roughly 80% of budget revenues, 45% of gross domestic product (GDP) and 90% of export earnings. In recent years, the KSA has been encouraging the growth of the private sector in order to diversify its economy and to employ more Saudi nationals. Diversification efforts are focusing on alternative forms of power generation, telecommunications, natural gas exploration and petrochemical sectors.

United Arab Emirates – Background

The UAE borders the Gulf of Oman and the Arabian Gulf, between the Sultanate of Oman and the KSA. In the early 1970s, seven of the former Trucial States (Abu Dhabi, Ajman, Fujairah, Sharjah, Dubai, Umm al-Quwain and later Ras al-Khaimah) merged to form the UAE. The UAE’s per capita GDP is on par with those of leading Western European nations. Its high oil revenues and its moderate foreign policy stance have allowed the UAE to play a vital role in the affairs of the region. Oil and global finance have driven the UAE’s economy for the past three decades. It is the second-largest MENA economy after the KSA and the 30th-largest globally with the 18th-highest GDP-per-capita rate. Dependence on oil, a large expatriate workforce and growing inflation pressures are significant long-term challenges.

Recently, the UAE’s strategic plan has been focused on economic diversification and creating more job opportunities for nationals through improved education and increased private sector employment.

To date, the UAE’s efforts have been largely successful. According to the U.K.’s Department for International Trade, non-oil sectors now contribute about 70% of the UAE’s GDP. The World Economic Forum pays particular credit to the UAE’s excellent macroeconomic environment, highly developed infrastructure, strong institutions and the fact that the Emirati economy is significantly more diversified than other Gulf Cooperation Council (“GCC”) nations. One can look at the successful examples of Dubai’s Emirates airline³ and Abu Dhabi’s twofour54 media zone⁴ as reflections of this diversity.

³ Currently the fourth-largest airline in the world in terms of international passengers carried.

⁴ A tax-free media zone that has recently been involved in the production of some of Hollywood’s biggest blockbusters, including the Star Wars and Fast and Furious franchises.

IV. THE KSA AND THE UAE – CORRUPTION RATINGS

The KSA ranked 66th out of 177 countries on TI's Corruption Perceptions Index in 2012.⁵

Over the past few decades, some members of the Saudi government have been accused of taking financial advantage of their royal status and displaying high-handed behaviour. On the other hand, the UAE has generally been regarded as the least corrupt nation in MENA. In particular, TI ranked the UAE 25th out of 175 countries on the perceptions list – the highest ranking for a MENA-based country.

The UAE also scored highly on the World Economic Forum's Global Competitiveness Index, which measures the ease of doing business in a country. In September 2014, the country ranked 12th globally, also earning the highest position in MENA.

Before we turn to summarizing some positive steps that the two countries have recently taken to fight corruption, it is helpful to summarize the legislative environment in both countries as well as the corruption cases that have drawn attention in recent years.

V. LEGAL ENVIRONMENT

The KSA

The KSA's efforts to eliminate corruption from the public sector are primarily based on the Combating Bribery Law ("CBL"), enacted in 1992, and the Civil Service Law, which criminalize various forms of corruption, including active and passive bribery and abuses of functions. In particular, the CBL penalizes the offering of any promise or gift to a public official to perform or cease to perform or neglect any service. The CBL applies to individuals, including public officials, and local organizations based in the KSA. Foreign companies doing business in Saudi Arabia are also subject to the CBL with respect to their in-country actions.

⁵ The TI report does not measure actual corruption, but perceptions of corruption. It is based on expert opinion from a range of non-governmental organizations, think tanks and research firms, including *The Economist's* Intelligence Unit and the World Bank. The index score reflects the general state of corruption as faced by ordinary people and businesses in a country.

The penalties set out in the CBL for individual violators, including public officials and principals of companies, vary depending on the offence and may include up to 10 years' imprisonment and fines of up to SR1 million (or 1 million Saudi riyals, the equivalent of US\$266,642).

The UAE

In the UAE, crimes encompassing corruption and bribery are penalized under existing UAE law. Both the federal Penal Code and the Human Resources Law contain anti-bribery provisions – in particular, the Penal Code criminalizes active and passive bribery, embezzlement and abuses of functions. Also, Article No. 234 of the Federal Law No. 3 in 1987 and its amendments state that those who give or take bribes would be punishable for jail terms up to a maximum of 10 years.

Foreign Laws

Companies operating in MENA also need to be aware of the far-reaching powers of certain British, U.S. and Canadian laws operating throughout the world. The U.S. authorities continue to make use of the *Foreign Corrupt Practices Act* ("FCPA") of 1977, which has resulted in a number of high-profile prosecutions and financial settlements for companies that have operated fraudulently in the Middle East. In addition, the U.K.'s *Bribery Act*, which came into force in July 2011 in response to the BAE Systems plc bribery scandal (as outlined below) in the KSA, was meant to renew the tarnished reputation of British business abroad. *The Bribery Act* applies to both non-U.K. companies operating in the United Kingdom and to U.K. companies working overseas. One commitment is to end the above-described facilitation payments made to foreign government officials in the course of routine business. Finally, Canada's *Corruption of Foreign Public Officials Act* ("CFPOA") of 1999, which brought Canada within scope of the 1997 *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*, makes, among other things, attempts by Canadian persons (both individuals and corporations) and other parties to bribe foreign officials a criminal offence under Canadian law.

VI. SIGNIFICANT CORRUPTION CASES IN THE PAST FEW YEARS

The KSA

Some recent cases involving corruption in the KSA have captured considerable international attention. The Al-Yamamah Affair, for example, involved alleged bribery over weapons sales in the Gulf. This case saw a Serious Fraud Office (“SFO”) investigation into alleged bribery by BAE Systems plc, a British multinational defence and security company, to secure the £43 billion Al-Yamamah fighter planes contract (which encompassed, among other things, the sale of fighter planes, specialized naval vessels and various infrastructure works). The international outcry following this case prompted the U.K. to overhaul its overseas bribery laws in 2010.

Another noteworthy example concerns an alleged bribery scandal by GPT Special Project Management, an Airbus Group subsidiary that sold communications equipment via the Ministry of Defence to the Saudi National Guard. There was a long-running inquiry probing allegations that GPT bribed Saudi military officials with luxury cars and made unexplained payments to bank accounts in the Cayman Islands.

Moreover, on December 30, 2014, KPMG, a global professional services company, reached a £7 million settlement with the Dutch authorities. KPMG allegedly helped its client, Ballast Nedam, a Dutch construction company, disguise suspicious payments. Ballast Nedam was accused of making a number of questionable payments between 1996 and 2003 to foreign agents in order to obtain business in the KSA.

A final example involves Alstom, a rail transport and power company. It was reported that Alstom SA executives won several billions of dollars’ worth of business in the KSA and other countries by making at least US\$49 million in illegal payments through the use of two middlemen, Mr. Paris and Quiet Man. According to the *Wall Street Journal*, Alstom and its subsidiaries’ schemes lasted for more than a decade, into at least 2011.

Alstom pleaded guilty to those charges in December of 2015 and agreed to pay US\$772 million to end the investigation. This represents the largest criminal penalty paid to the U.S. Justice Department under the FCPA.

In light of the above, the KSA has taken serious steps to address corruption challenges (see below).

The UAE

Up until 2008, the economy of the Emirate of Dubai had been growing at a breakneck pace. The main engine had been the real estate sector, after foreigners were allowed to buy freehold property starting in 2002.

When the global financial crisis of 2008 hit, it threw a wrench into the works of Dubai’s economy, as a liquidity shortage and weak confidence slowed growth in the realty sector. Since then, most of the alleged corruption cases have been linked to this sector, involving several high-profile bribery cases that have nabbed former executives of major firms who were suspected of embezzling hundreds of millions of dollars.

A prominent example stems from 2009, in which seven men appeared in court in two separate trials against former business executives from Sama Dubai, a property developer belonging to Dubai Holding, an investment holding company, and an executive from Damac Properties, a private residential developer. Bribes in the case of the Sama Dubai executives amounted to US\$2.28 million. The other case involves two former sales executives at the government-controlled property developer Nakheel, famous for its palm island projects located off the shores of Dubai. In the Nakheel case, bribes totalled approximately US\$1.4 million.

In addition, a former chief executive with Deyaar, a Dubai real estate developer, who was charged with earning DH20 million (UAE dirhams) by misusing his powers in a bidding process, was jailed for 10 years in 2008. He was found guilty of approving bids from a company called Thermo in exchange for the vast amount money.

Recent examples of corruption, however, are not limited to the real estate sector. In October 2014, Glaxo Smith Kline (“GSK”), Britain’s largest pharmaceuticals group, was looking into the possibility of corruption in the UAE following accusations of improper payments set out in a whistleblower’s email sent to its top management. In the email (supposedly from a GSK sales manager based in the Gulf region), the writer claimed that the British company made direct facilitation payments to health care professionals, hospitals, clinics and pharmacies to secure business. At the time of this writing, the outcome of the investigation was still not clear.

Historically, the traditional approach in many of these countries was usually to turn a blind eye. But by enforcing corruption laws, the UAE believes the quality of its business environment will be strengthened. To its credit, the Dubai authorities are forcefully attacking the problem. Despite any negative publicity, the emirate is committed to a transparent playing field and to helping strengthen its reputation as a regional business hub operating under global best standards.

VII. RECENT POSITIVE STEPS TAKEN TO COMBAT CORRUPTION IN THE KSA AND THE UAE

In the KSA, given the above examples and public discontent over the growth of corruption in government agencies, the Saudi authorities responded by establishing the National Anti-Corruption Commission, or *Nazaha*, in March 2011 (approved by then Saudi King Abdullah). *Nazaha* is an Arabic word meaning “integrity”.

Nazaha, which reports directly to the King, has received the necessary powers by a royal order to police all of the governmental sectors of the KSA, with no exceptions, and is designed to stamp out any and all financial and administrative corruption.

Another example of the increased focus on fighting corruption in the KSA: in May 2012, the Saudi Board of Grievances⁶ jailed seven men for up to five years

each and fined them up to US\$186,000 each for their role in bribery that permitted the building of residential neighbourhoods in flood-prone areas.

The KSA’s recent efforts to fight corruption in the government has led to an improvement in its TI Corruption Perceptions Index, from 66th out of 176 countries in 2012 to 48th out of 168 countries in 2015.

In the UAE, a recently implemented Dubai law on corruption, with the power to hand out sentences of up to 20 years, was approved by ruler Sheikh Mohammed bin Rashid Al Maktoum in late 2009: Law No. 37 of 2009 on the Procedures for the Recovery of Illegally Obtained Public and Private Funds (Financial Fraud Law). The aim of this law is to impose tougher sentences on any person convicted of improperly obtaining public funds and/or illicit monies in the Emirate of Dubai.

Moreover, the UAE government is working to fulfill its commitments to tackle corruption with the announcement in 2015 of a new anti-corruption unit. The unit’s tasks include investigating financial irregularities, identifying gaps in legislation and internal audit regulations, and proposing ways to address those gaps.

VIII. KEY AREAS OF RISK AND SUGGESTED STRATEGIES FOR COMPANIES TO CONSIDER

Our purpose in this chapter was to provide an overview of corruption concerns for companies that operate or intend to operate in the Middle East and North Africa, with a particular focus on the KSA and the UAE.

In order to avoid or at least minimize the potential risk of corruption allegations, which can have devastating effects on a business’s operations, goodwill and stock price, it is key for all companies to be on guard when operating in the region.

⁶ Established in 1982 as an independent administrative judicial committee that reports directly to the King of the KSA.

As such, it is recommended that businesses operating in MENA, therefore, must think strategically and take the following proactive steps to mitigate corruption risks:

- Critically review and update existing anti-corruption and anti-money laundering compliance programs, which should emphasize senior management's commitment to corruption-free business dealings;
- Carefully vet and conduct due diligence on local partners in a culturally sensitive manner (ideally, in order to both understand and maximize due-diligence efforts while at the same time minimizing the risk of potentially jeopardizing any existing business relationships);
- Incorporate anti-corruption compliance into legal agreements with local partners, insisting that they adopt the same commitment to compliance as they have in place with the key client/partner (e.g., they will not make any facilitation payments on behalf of the company);
- Establish record-keeping and transparency requirements with local partners, including training, written compliance and audit powers;
- Ensure that compensation for third-party agents is proportional to the value of services provided and consistent with the fair market rates for said services; and
- Conduct regular training and interaction with all employees to make sure they are aware of the issues and the consequences for failing to comply with company policies and applicable legislation.

It is particularly important for companies operating in MENA to be on the alert for the following three high-risk areas:

Agents and Intermediaries

As in many other parts of the world, agents are often used to act on an organization's behalf. While this was once widespread, with agents often selected following a chance meeting with little or no screening, the practice is now changing. Many organizations are cutting back on the number of agents they use. Some companies use agents only in countries where they are legally obliged to have them. Elsewhere, their own sales force works to negotiate contracts, licenses and permits.

Gifts and Hospitality

These are routinely offered and expected, but if excessive, they can place companies in a vulnerable position. Most large organizations have a gifts and hospitality policy – this should be followed even when operating in MENA. Care should be taken to ensure that this is done diplomatically and respectfully to avoid causing offence.

Facilitation Payments

Although facilitation payments have never been legal under U.K. law, and are not legal under the CFPOA, they *are* still permitted under the FCPA. In areas such as the Middle East, they are often demanded. Low wages for many in the region contribute to the problem, with poorly remunerated government officials demanding payment to supplement their income. The terminology itself is criticized for sanitizing what is plainly a bribe.

To summarize, an effective compliance program is not static, but instead is dynamic, self-critical, and marked by continuous improvement and updating. Understanding the environment where one is operating and addressing the risks proactively will enable companies to understand where and how those risks exist.

As past enforcement actions have shown, solely having a compliance program in place may not eliminate threats completely. To mitigate these risks, companies should implement compliance programs and policies that effectively address bribery laws. It's important for companies to monitor their dealings with government officials, and provide comprehensive anti-bribery training and guidance regarding the applicable laws and regulations of those countries in which companies operate.

A cornerstone for any anti-corruption compliance program requires implementing both a code of conduct and a clear anti-corruption policy supported by specific procedures. These documents help define a company's rules and set the tone for ethical conduct.

IX. CONCLUSION

Implementing a robust ethical and compliance culture will always place a company in a position of strength in both local and international markets. This is particularly important for those companies operating in MENA. With the exception of those initiatives listed above, there have been very few efforts to institutionalize anti-corruption practices – even though doing so is vital to preventing corruption. Countries need anti-corruption commissions that are independent, non-politicized and have substantial resources.

When doing business in MENA, it is critical to be attuned to the invisible hand of *wasta*. *Wasta* remains a challenge when doing business in the Arab world, but by recognizing and addressing the issue through in-depth due diligence, rather than accepting it as an unavoidable risk of conducting business in the region, one can mitigate the problems associated with this unique cultural phenomenon.