

Corporate Breakout Session - A Re-Cap

Posted on July 19, 2011 by [Lindsay Griffiths](#)

During our 2011 Annual Meeting in Lisbon, we had specialty group breakout sessions - and lucky for you, our corporate session was recorded! The group had a roundtable discussion dedicated to the topic of "Anti-Corruption Laws and Navigating Client Businesses in Foreign Territories," which was moderated by [Alishan Naqvee](#) of [LexCounsel Lawyers](#) in India.

Alishan began with some slides to aid the discussion, saying that there is an organization in Japan called [Control Risks](#), who conducted a survey of about 50 companies in Brazil, France, Germany, Hong Kong, the Netherlands, the UK and the US. All of them said that corruption is a major cost for international business, and at the same time, an increasing number of companies in the world, while they are not absolutely aware of the anti-corruption laws in their jurisdictions, most of their business is governed by them, even when doing business in other jurisdictions.

However, corruption brings a very different dimension in cross-border investments, because the country from where the investee is investing and the country where the investment is being made may be governed by separate parameters and laws. These could be domestic, but at the same time, there could be laws from the country where the investment is being made.

Alishan then showed a graphic that illustrated the percentage of companies who believe they have lost business because a competitor has paid a bribe. This could be competitors bribing a government official, or corporate corruption.

	<u>In the last 12 months</u>		<u>In the last 5 years</u>	
	<u>2006</u>	<u>2002</u>	<u>2006</u>	<u>2002</u>
Hong Kong	66	56	76	60
Netherlands	26	24	46	40
US	20	18	44	32
Brazil	42	N/A	38	N/A
Germany	28	24	36	36
France	32	N/A	34	N/A
UK	22	16	26	26

Alishan said that Transparency International conducts a survey of corruption each year, and ranks the countries across the world. The lesser the number, the lesser the corruption. The graphic that he showed noted that most of the Scandinavian nations are ranked 1-10, most of the developed nations are within the first 30 (developed in terms of the UN's development index), and developing countries, where most of the investment goes, go from 62 - 116. The countries on the left hand side of the graphic are investing in the countries on the right hand side most often, and that is where the questions come in about extraterritorial jurisdiction.

Developed Countries	Ranking	Developing Countries	Ranking
Scandinavian Nations	Range (1 to 10)	African Countries	Range (62 to 147)
Australia	8	Brazil	69
Germany	15	China	78
Japan	17	India	87
United Kingdom	20	Sri Lanka	91
United States	22	Mexico	98
France	25	Indonesia	110
UAE	28	Vietnam	116

Major Global Legislation

Alishan went on to talk about some of the major global legislation against corruption, adding that there are a number of countries with their own anti-corruption laws.

- Foreign Corrupt Practices Act, 1977 (FCPA) - United States: Alishan commented that everyone in the room has had some experience with this when dealing with their clients.
- UK Bribery Act - United Kingdom: Alishan said this is a hotly debated topic right now and invited the ILN's London member, Fladgate, to comment further during the discussion.
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business (OECD Convention): This was ratified by a number of countries.
- UN Convention Against Corruption (UNCC): This has 140 members.

Key Differences

Alishan commented on some of the key differences between the FCPA and UK Bribery Act, noting that he had done his research through Google, as he's not licensed to practice in the US or UK.

- The UK Bribery Act provides a strict liability, wherein, under the FCPA, you may have some defense if you have taken measures to avoid corrupt practices by your overseas subsidiaries or invested companies.
- Giving or receiving bribes, including commercial bribes and the giving of bribes to foreign officials is prohibited under the UK Bribery Act.
- The UK Bribery Act also prescribes heavier fines and jail terms, and...
- There is no exclusion of facilitation payments, unlike the FCPA. These are commonly known as "file moving" charges, which is a customary payment. The US FCPA does permit it, but the UK Bribery Act is not known to permit it as of now.

The Problems

The problems relate mostly to extraterritorial jurisdiction. Both the UK Bribery Act and the FCPA have extraterritorial jurisdiction, which means that if a company in the US or UK invests, for example, in India, and the Indian entity indulges in some of the practices, then the company in the UK or US may be liable to corrupt practices.

However, what is not taken into account are local customs. Again, in India, they have a tradition of giving gifts at Diwali and it's perfectly fine for someone to give Alishan a gift that is not considered to be trying to influence his decision to make an assessment in the gift giver's favor, or to turn any business in favor of that particular person. However, this is not an exception under the UK Bribery Act or the FCPA. Alishan listed a few other countries that have similar customs:

- India (Diwali)
- China (Chinese New Year (Guanxi))
- Indonesia (Common during first business meeting; signing of contract; most festivals)
- Japan (Ochugen/Oseibo)

So Alishan said that the issues for consideration during the discussion would be:

- Should anti-corruption laws be given extra-territorial jurisdiction?
- Whether exemption or permission for a practice under domestic anti-corruption law (in Country A) would be a defense for Company B against anti-corruption prosecution in the country of Company B?

Alishan said that in India, they have their own corruption laws, and under those laws, the Diwali gifts are not considered wrong. So if a company indulges in those practices in India, and that company can't be prosecuted under Indian law, should they be able to be prosecuted under the UK Bribery Act or the US FCPA?

Coming back to the observations from Control Risks, the companies that they surveyed feel that despite the legislation, the level of corruption will either remain the same, or it will increase. Additionally, there are some innovative measures that companies are taking to circumvent anti-bribery legislation, such as using commercial agents or joint venture partners. This may not be accepted, strictly speaking, but at the same time, they can qualify the test of "taking measures against such practices" in foreign jurisdictions.

Alishan offered a list of discussion points for the group and said he would give them a snapshot of India's situation:

- Should anti-corruption laws be given extra-territorial jurisdiction?
- Whether businesses from countries with more stringent anti-corruption laws would face competitive disadvantage in foreign territories?
- Whether local customs and practices be recognized by anti-corruption laws?
- Any other issues attendees deem relevant for consideration.
- Snapshot of anti-corruption laws in each local jurisdiction and any interesting features; and
- Any client/professional experiences, observations, or instances to aid the discussion.

I'll go into more depth on these discussion points as they were examined during the session and as they refer to the individual jurisdictions in later posts.