

AGENTS & INTERMEDIARIES

- BEING ALERT TO THE PITFALLS AND AVOIDING THEM

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WHAT IS AN 'INTERMEDIARY'?

There is no settled or internationally recognised definition of 'intermediary' and yet the overwhelming majority of high profile corruption cases, whether 'domestic' or 'foreign' bribery, will feature one or more (or sometimes, indeed, layer upon layer) such individuals or entities.

For present purposes, however, it can be said that what we have in mind is a person who acts as a 'connect', contact or conduit between two or more parties in a business, or intended business, transaction. 'Intermediary' is a useful catch-all, but it encompasses not just agents and consultants, but also sales representatives, suppliers, distributors, professional service providers (such as accountants and lawyers), subsidiaries and even joint venture partners.

It must be stressed, at the outset, that there are many proper and lawful roles that are filled by intermediaries. In cross-border transactions, even a large company might find it hard to justify establishing an office or deploying its own staff in every jurisdiction in which it does business. Having a local agent or representative is, therefore, often a more cost effective and efficient option. Similarly, there are a range of specialist activities, ranging from legal/financial advice to market analysis and after-sales service, where intermediaries are called for and are entirely legitimate. Indeed, there are also some States where a pre-requisite for doing business is to engage a locally-based agent.¹

THE CORRUPTION RISK

Certain intermediaries will behave illegitimately, with the most compelling area of risk being that of 'foreign bribery'; in other words, the bribing of a foreign public official, usually in order to obtain or retain business or a business advantage (such as a permit or licence). On occasion, of course, an intermediary might seek or accept a bribe of his own volition, without the principal having any inkling that anything is untoward.

That is rare, though. More often, even if an agent or representative is party to a corrupt transaction of his own accord, it will be the case that the principal has failed to put in place any adequate oversight or supervision, or has turned a blind eye (particularly in circumstances where the principal stands to benefit, for instance, by the award of a contract) from the intermediary's wrongdoing. In addition, there will, of course, be instances where the principal has initiated bribery using an intermediary as a 'middleman' in order to distance himself from the transaction and to make detection more difficult. Of course, it may be the position that the same intermediary is being used by the principal both for lawful and unlawful purposes.

TYPES OF CORRUPT BEHAVIOUR BY INTERMEDIARIES

It is generally accepted that there are essentially three broad forms or 'typologies' of corruption by intermediaries.² These may be categorised thus:

- i. An intermediary who is, or is made up of, members of a foreign politician's/public official's family (or friends/associates of the politician or public official). The intermediary being used as a conduit for the bribe.
- ii. An intermediary who provides no legitimate or identifiable service. The 'consultancy' fee being used to bribe one or more officials.

¹ This does, however, pose certain corruption risks; particularly if all local agents have close links with government or public officials. The risk is exacerbated where a State insists on actually nominating the agent. This should be treated as a 'red flag'.

² For a detailed analysis, with reference to a range of foreign bribery prosecutions drawn from a number of different jurisdictions, see 'Typologies on the Role of Intermediaries in International Business Transactions', OECD Report, October 2009, Paris: <http://www.oecd.org/daf/anti-bribery/43879503.pdf>

- iii. An intermediary who performs genuine business-related activities for the principal, but also engages in corrupt practice on the principal's behalf. In addition, this form of middleman might also use legitimate activities for an unlawful end (e.g. by getting access to information that would be otherwise unavailable).

In addition, it should be noted that two or more of the above forms might be used in tandem and that the overall picture might be made even more oblique by the use of multiple or 'layered' intermediaries.

HOW SHOULD A COMPANY AND ITS MANAGEMENT PROTECT AGAINST THE RISK OF BRIBERY BY INTERMEDIARIES?

- i. A compliance programme, including an anti-corruption strategy and a corporate code of conduct with explicit 'no bribery' provisions, is, of course, a prerequisite. But the key is meaningful implementation. Measures that exist simply on paper are no measures at all.
- ii. Appropriate decision-making (at the right level) when engaging an intermediary, coupled with thorough due diligence that identifies and addresses 'red flags'.
- iii. Drawing up a contract for the intermediary that safeguards the principal and does utmost to reduce the risk of bribery taking place (by, inter alia, setting out required tasks in detail, giving the principal the right to claim back all fees in the event of bribery, placing the intermediary under a duty to co-operate with an investigation, even after the contract has finished, and providing for stringent record-keeping and regular review by the principal).
- iv. Agreeing appropriate levels of remuneration that includes staged payments for specific pieces of work.
- v. Ongoing monitoring by continuing due diligence and compliance checks during the course of the contract.

THE 'RED FLAGS'

From high profile cases, such as Siemens³ and Lesotho⁴, and other cases, and from the work of a range of NGOs, one may distil 'red flags' that provide a useful mechanism for indicating 'situations' where a high risk of corruption exists. These are situations where an intermediary:

- > Requests payment in cash or to a numbered account or the account of a third party;
- > Requests payment in a country other than the intermediary's country of residence or the territory of the sales activity, and especially if it is a country with little banking transparency;
- > Requests payment in advance or partial-payment immediately prior to a procurement decision;
- > Requests reimbursement for extraordinary, ill-defined or last minute expenses;
- > Has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts;
- > Refuses to disclose owners, partners or principals;
- > Uses shell or holding companies that obscure ownership without credible explanation;
- > Is specifically requested by a customer;
- > Is recommended by an employee with enthusiasm out of proportion to the agent's qualifications;
- > Has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking;

³ US District Court: District of Columbia: 1:08-cv-02167

⁴ See, inter alia, R v Sole; R v Sole & others; R v Acres International Ltd (High Court of Lesotho, unreported, 2001-2)

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- › Has little or no expertise in the industry in which she seeks to represent the company;
- › Is insolvent or has significant financial difficulties;
- › Is ignorant of or indifferent to the local laws and regulations governing the region in question and the intermediary's proposed activities in particular;
- › Identifies a business reference who declines to respond to questions or who provides an evasive response;
- › Is the subject of credible rumours or media reports of inappropriate payments.⁵

THE AMICUS APPROACH

Putting in place preventive measures and ensuring effective implementation

At Amicus Legal Consultants, as a City-based legal and law enforcement consultancy, we have continually cautioned against rushing ahead with the development of new corporate accountability and governance policies and procedures addressing the risks posed by intermediaries of all kinds without first rigorously assessing them, along with existing measures, to avoid unnecessary outlay and to ensure a 'fit for purpose' framework that enjoys the fully engagement of management and staff alike.

As spelt out above, effective implementation is, in any event, the key. To assist organisations in achieving this, we adopt a twin-track that gathers authentic insight from across the organisation and from 'trusted' intermediaries that the organisation has already engaged. In looking at risk and exposure, we aim to 'testing uncertainty safely'!

The 'Solve' methodologies

The first step in that twin-track is *Solve:Interactive*. It is a debriefing tool and full methodology that has been specifically developed to enable the challenges and the solutions to them to be identified from within the organisation, rather than from the outside. Some of the regular uses to which it is put include:

- › Testing internal systems;
- › Creating new, or assessing, existing policies and procedures;
- › Risk assessment and risk management;
- › Assessing organisational responses following a critical incident;
- › Identification of good practices and lessons to be learnt in the wake of a critical incident;
- › Conducting a scoping/needs assessment exercises.

Now, let us take the situation where, for instance, a new policy or procedure has actually been put in place; for instance, a new review mechanism to monitor the performance and behaviour of an intermediary during the course of a contract.



An immediate question is: Can the new measures be realistically tested?

Significantly, we have found that using an immersive exercise approach, which allows for testing in a 'safe' and consequence-free, yet all too realistic, environment is the answer.

⁵ This is a list owes much to TRACE International, an NGO that specialises in working with companies and intermediaries to reduce the risks of corruption in international business transactions.

Solve:Immersive is the Amicus multimedia immersive approach that provides this capability. To achieve this, specifically developed software, coupled with facilitators and subject matter experts are deployed to enable those within the organisation to 'live' a bespoke and true to life intermediary-based contract-driven 'event'.

Participants will make real time decisions and work to the new mechanism as they carry out roles and responsibilities identical to those they undertake in their daily work life, but those decisions, and the processes underlying them, will be challenged and critically analysed in regular debriefing sessions, with every outcome recorded, tracked and audited. By the end of an exercise, each participant will have lived through the 'event', learnt a great deal and, typically, achieved a much higher level of reasoned decision-making and risk management, and been part of a considerably enhanced co-ordination effort. Most importantly, though, the new mechanism will have been fully applied, tested and challenged. Time and again, our clients assure us that *Solve: Immersive* is a totally unforgettable, and an incredibly valuable, experience!

SOLVE METHODOLOGY AT A GLANCE:	
Our <i>Solve</i> methodology is comprised of two parts, <i>Solve:Interactive</i> and <i>Solve:Immersive</i> .	
	
A pre- or debriefing tool	A multimedia immersive exercise
The element of anonymity breaks through typical constraints to provide true insight	Real-life 'scenarios' that require participants to make real time decisions
Facilitates a dialogue and challenge in order to identify issues and provide solutions	Tests and provides practical training on procedures of all types, decision-making at every level and risk assessment/management
Fully evidenced solutions are arrived at from within an organisation, not imposed upon it	Sustainable learning outcomes in a 'safe' environment.

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