



THE IMPORTANCE OF COMPLIANCE WITH INTERNATIONAL ANTI BRIBERY LAWS



By Nigel Margetson

Executive Summary

- Increased emphasis observed internationally on Anti-Bribery and Corruption, in Legislation and Prosecution;
- More formal approach towards compliance required by companies and individuals;
- What are we talking about? UK Bribery Act, Foreign Corrupt Practices Act, OECD Convention etc.
- What may happen if your company does not act now to comply?
- What do you need to do to comply?
- What will the future bring...?

IABLCC

IABLCC is a consultancy, advising companies on:

- How to ensure compliance with International Anti-Bribery and Corruption legislation;
- Develop and Prepare customised Anti-Bribery and Corruption Management System(s);
- Provide training for personnel in Anti-Bribery and Corruption Compliance;
- Perform Compliance Audits on projects, Joint Ventures, (prospective) Partners, Suppliers and Subcontractors;
- Provide certification of compliance (own organisation) and validation (business partners).

What is Bribery and Corruption?

Bribery:

the giving or offering of a bribe.

Bribe:

a sum of money or other inducement offered or given to dishonestly persuade (someone) to act in one's favour.

Corruption:

Dishonest or fraudulent conduct by those in power, typically involving bribery.

Corruption includes any illegitimate use of office, and may include a range of different types of crime. Bribery is limited to the giving or acceptance of payment or other illegitimate advantages.

Anti bribery and Corruption (ABC) clauses in contracts (1/6)

Logic Marine Construction 2 contract (October 2004)

Clause 33.3:

“Both the CONTRACTOR and the COMPANY agree that they will not, directly or indirectly, receive from, or give or offer to give to any member of the COMPANY GROUP or CONTRACTOR GROUP, or to other contractors or suppliers, or to government officials or any other persons anything of material value which would be regarded as an improper inducement to any party. Any breach of this obligation shall constitute a material breach of the CONTRACT.”

ABC Clauses in Contracts (2/6)

Example from a recent North Sea contract:

“33.2. *The CONTRACTOR shall:*

(...)

*(d) have and shall maintain in place throughout the term of this agreement its own policies and procedures, including **adequate procedures** under the Bribery Act 2010, to ensure compliance with the RELEVANT REQUIREMENTS (...) and will **enforce** them where appropriate; [emphasis added by IABLCC]*

(...)

33.3 *The CONTRACTOR shall ensure that any person associated with the CONTRACTOR who is performing services or providing equipment, labour or material in connection with the WORK does so only on the basis of a written contract **which imposes on and secures from such person terms equivalent to those imposed on the CONTRACTOR in this Clause 33** (“RELEVANT TERMS”). The CONTRACTOR **shall be responsible for the observance and performance by such persons** of the RELEVANT TERMS, and shall be directly liable to the COMPANY for any breach by such persons of any of the RELEVANT TERMS.”*

ABC clauses in contracts (3/6)

This clause has the following consequences for the Contractor:

- The Contractor, whether or not it is a UK company, must **comply** with the UK Bribery Act 2010;
- The Contractor must have compliance **procedures** in place in accordance with the UK Bribery Act 2010;
- The Contractor must **enforce** the procedures;
- The Contractor must **impose** the obligations of the UK Bribery Act 2010 on its subcontractors and suppliers.
- The Contractor must ensure that **its Subcontractors enforce** the procedures.
- **RESULT**: (see next slide).

ABC Clauses in contracts (4/6)

- **RESULT:** UK Bribery Act 2010 become a major UK export product and is going to have a big impact on the future of contracting.
- NOTE that the Contractor can be audited by the Company to check if the procedures are in place and are in fact being applied. In the event that the procedures are not in place and are not being applied, there will be a breach of contract that can lead to termination of the Contract and damages.
- Many North Sea Contracts do not limit themselves to requiring the Contractor to comply with the UK Bribery Act 2010. See the following clause from a recent North Sea contract:

ABC clauses in contracts (5/6)

*“(....) As a matter of corporate policy, **COMPANY expressly prohibits payment of bribes** (...) for the purpose of obtaining (...) any improper advantage (....) , if and to the extent that to do so is or would be in violation of (...) any **anti-bribery or anti-money laundering laws applicable to COMPANY or to CONTRACTOR, or to their respective parent companies**, including, without limitation, **the UK Bribery Act 2010**, the UK Anti-Terrorism, Crime and Security Act 2001, the **U.S. Foreign Corrupt Practices Act and successor legislation**, legislation implementing the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions or the United Nations Convention Against Corruption, and/or the anti-corruption or anti-money laundering laws of the COUNTRY OF OPERATIONS.**”*

This type of clause is usually seen when there is any kind of connection with the USA

ABC clauses in contracts (6/6)

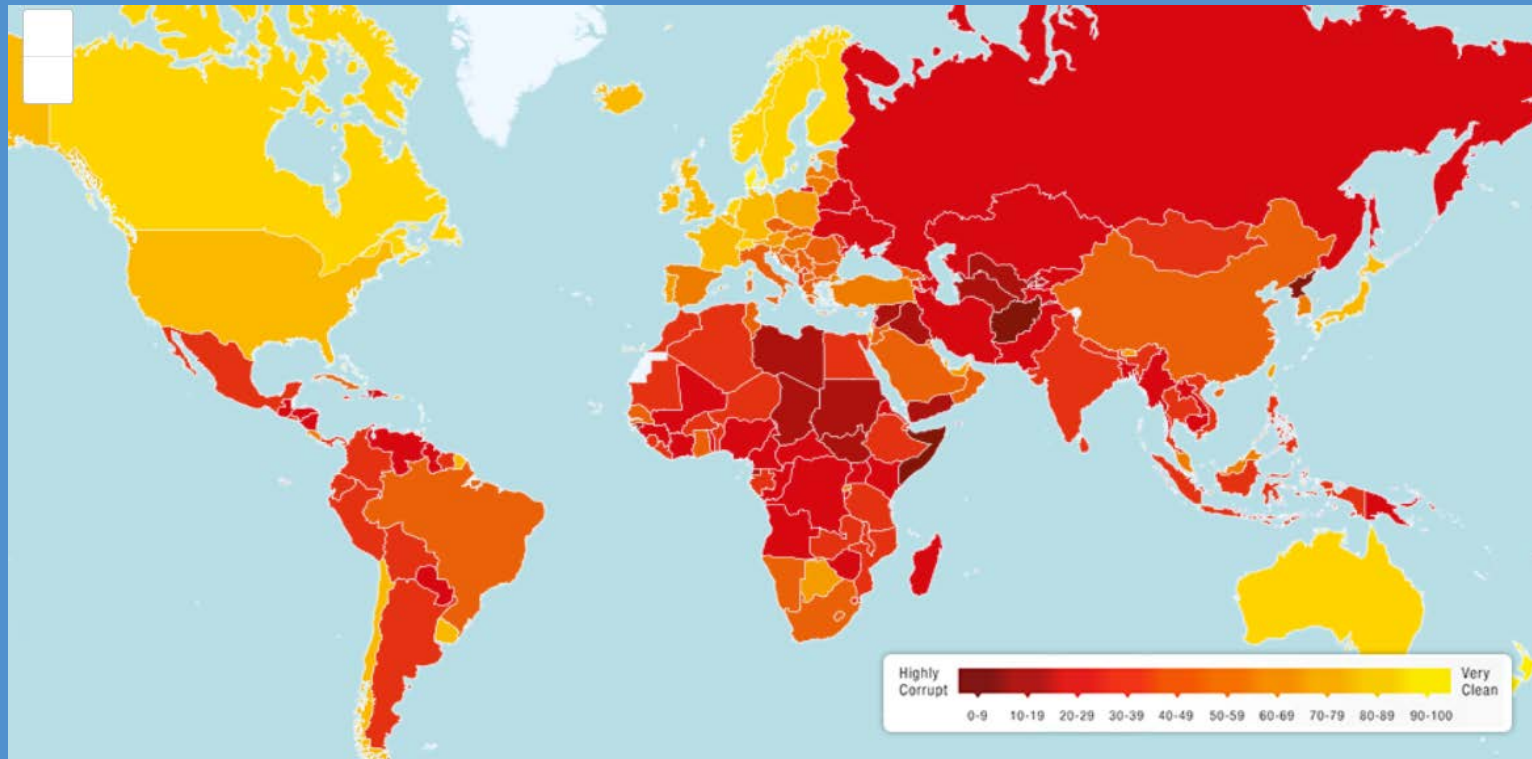
Interim Conclusion: In recent years ABC compliance has become a hot issue in international contracting.

Reasons for this focus on ABC laws (resulting in e.g. the UKBA 2010) are :

- Globalisation and the emergence of new markets with increased corruption risks and
- The global recession in 2008/2009 leading to economic crime, fraud and a number of corporate scandals (sub-prime mortgage crisis, collapse of Lehman Brother and other banking disasters etc)

So: how bad is the bribery and corruption problem now?

Perception of Corruption



Transparency International Index 2013:

A large part of the world, which includes many oil and gas producing countries is red. Corruption is therefore perceived as a problem in a large part of the world.

Anti Bribery Laws

Many countries have specific Anti Bribery Statutes. E.g.:

- Brazil
 - China
 - Ireland
 - Italy
 - Russia
 - UK (Bribery Act 2010 and various 19th and 20th century laws) (UKBA)
 - USA (Foreign Corrupt Practices Act 1977) (FCPA)
- Etc.

The Netherlands does not have a specific Statute, but Dutch Criminal Code (“DCC”) does contain the criminal offence of bribery a civil servant (art. 177, 177a and 178 DCC).

These articles were introduced into the DCC to comply with the OECD convention (1997).

FCPA (1/4)

(Foreign Corrupt Practices Act)



Even though many countries have had anti-bribery laws for many years, often these laws were not effectively enforced and were therefore not very effective.

In the last 37 years the most effective piece of ABC has been the US Foreign Corrupt Practices Act (FCPA).

The FCPA has impacted a great many companies that trade abroad.

An understanding of the FCPA is essential to understanding ABC compliance. Let us therefore look at the background and effects of the FCPA.

The FCPA (2/4)



Mid 1970's: US research brought a great deal of fraud to light.

The FCPA came in force in the USA in 1977.

The FCPA addresses the problem of international corruption in two ways:

- 1) It prohibits the bribing of foreign officials.
- 2) So called “issuers of securities” are obliged to keep proper books and records.



The FCPA (3/4)

Jurisdiction of the FCPA

The bribery provisions of the FCPA apply to:

- 1) All US residents and nationals and all US companies; and
- 2) To any relevant improper payments where a related action took place in the US, including the sending of emails, faxes, banking transactions or other communications, however short lived.

The accounting provisions of the FCPA primarily apply to the issuers of securities in the US.

Some even argue that the FCPA will apply to foreign companies that **engage in U.S. dollar transactions** that pass through a U.S. correspondent bank account in an otherwise wholly foreign transaction. If this would be so, the FCPA would have a very long reach indeed.

The FCPA (4/4)



US concern about the disadvantaging of US Companies

1988: US commences negotiations in the Organisation for Economic Cooperation and Development (OECD).

In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The OECD convention obliged the OECD members to implement legislation to prohibit bribery of foreign officials.

OECD Convention Signatories

 Argentina	 Germany	 Norway
 Australia	 Greece	 Poland
 Austria	 Hungary	 Portugal
 Belgium	 Iceland	 Russia
 Brazil	 Ireland	 Slovak Republic
 Bulgaria	 Israel	 Slovenia
 Canada	 Italy	 South Africa
 Chile	 Japan	 Spain
 Colombia	 Korea	 Sweden
 Czech Republic	 Latvia	 Switzerland
 Denmark	 Luxembourg	 Turkey
 Estonia	 Mexico	 United Kingdom
 Finland	 Netherlands	 United States
 France	 New Zealand	

All these countries have or should have laws prohibiting the corruption of foreign officials

FCPA 106 Investigations in 45 countries

FCPA top 10 enforcement actions



	Company	Fine / settlement and year	Summary of Offence
1	Siemens (Germany):	\$800 million in 2008.	(Widespread paying of bribes to foreign government officials to obtain business)
2	KBR / Halliburton (USA):	\$579 million in 2009.	(Bribes to Nigerian officials for an LNG project)
3	BAE (UK):	\$400 million in 2010.	Defence contractor who paid “marketing fees” via offshore companies it set up to obtain contracts
4	Total S.A. (France)	\$398 million in 2013.	Payments to Iranian officials to obtain oil and gas contracts
5	Alcoa (U.S.)	\$384 million in 2014	Corrupt payments to Bahraini royal family via London consultant to remain supplier of a Bahraini Aluminium plant
6	Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy):	\$365 million in 2010.	Paying of bribes through London and Japanese based intermediaries to obtain Nigerian LNG plant contracts
7	Technip S.A. (France):	\$338 million in 2010.	Bribes to Nigerian officials to obtain LNG plant construction contracts
8	JGC Corporation (Japan)	\$218.8 million in 2011.	Nigerian LNG plant bribes
9	Daimler AG (Germany):	\$185 million in 2010.	Corrupt payments to Russian government officials to secure contracts to sell cars
10	Weatherford International (Switzerland):	\$152.6 million in 2013.	Bribes for foreign officials to obtain contracts in the Middle East and Africa

UPDATE 2-SBM Offshore says agents may have bribed officials in Africa

Wed Apr 02 12:18:27 UTC 2014

*** Shares jump more than 5 percent in Amsterdam trading**

*** Brazil still seen as biggest risk to SBM Offshore shares (Adds detail, reaction, background)**

By Anthony Deutsch

AMSTERDAM, April 2 (Reuters) - Dutch oil and gas services company SBM Offshore NV said a two-year internal investigation had found evidence that agents in Angola and Equatorial Guinea may have bribed government officials. But the company said it found no evidence of such practices in Brazil, where it does much of its business, and shares in SBM Offshore jumped more than 5 percent on Wednesday.

An example of a Dutch FCPA case: SBM Offshore



On 6 August 2014, SBM published the following statement on its website :

(...) SBM Offshore voluntarily reported in April 2012 an internal investigation into potentially improper sales practices involving third parties to the relevant authorities, and has since been in dialogue with these authorities.

*SBM Offshore is discussing a potential settlement of the issues arising from the investigation. While these discussions are ongoing, it is sufficiently clear that a resolution of the issues will have a financial component, and consequently **SBM Offshore has recorded a non-recurring charge of US\$240 million in the first half of 2014, reflecting the information currently available to the Company ()***

Interim conclusion

To date, anti bribery and corruption law enforcement has been driven by the US Department of Justice and the US Securities Exchange Commission by enforcing the FCPA. Considering the relatively limited global application of the FCPA, many Contractors have not yet been confronted with serious anti bribery compliance obligations.

The UK Bribery Act 2010 (UKBA) could have a far broader application than the FCPA, particularly considering the importance of English law in offshore contracting.

What does the UKBA say?

The UK Bribery Act 2010 (UKBA)

The UKBA contains the following offences:

- 1) The Offence of bribing a different person (section 1 offence);
- 2) Offences relating to being bribed (section 2 offence);
- 3) Bribery of foreign public officials (section 6 offence);
- 4) A relevant commercial person “C” is guilty of a bribery offence if a person “A” associated to C bribes another person to obtain a commercial advantage for C. (**Section 7 offence**) It is however a defence for C to prove that C had in place “adequate procedures designed to prevent persons associated with C from undertaking such conduct”

NOTE: Probably the reason why a separate offence of bribing a foreign official was created, was to show compliance with the OECD convention

Jurisdiction of the UKBA 2010

UK courts will have jurisdiction over the following offences:

1) For the offences of bribing, being bribed and bribing of foreign officials when the offences are **committed in the UK**; and

2) When the above offences have been committed outside the UK by a person with **a close connection with the UK** by virtue of being a British national or a person who ordinarily resides in the UK.

3) The UK courts also have jurisdiction for section 7 offences when the person paying the bribe (“A”) **has no close connection to the UK**, regardless of the question whether or not the offence took place in the UK. This means that **provided that the organisation “C” is incorporated or formed in the UK, or if that organisation carries on business in the UK then UK Courts will have jurisdiction for section 7 offences**.

“Adequate procedures”

As we have seen, it is a defence for a company C that gets involved in a bribery incident via its associate A to prove that it has in place

*“**adequate procedures** designed to prevent persons associated with C from undertaking such conduct [of A]”*

What are adequate procedures?

Factors:

- * size of the organization,
- * the industry the organisation works in,
- * level of risk of bribery,
- * Place where business is carried on
- * Etc.

Conclusion: There is therefore not a standard set of procedures that applies to all companies.

The Six Principles

The basis for drafting procedures:

- 1) Proportionate procedures;
- 2) Top level commitment;
- 3) Risk assessment;
- 4) Due diligence;
- 5) Communication (including training);
- 6) Monitoring and review;

What do these principles mean for an ABC management system?

Principle 1: Proportionate Procedures (1/1)

The principle

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to

- a) the bribery risks it faces and
- b) to the nature, scale and complexity of the commercial organisation's activities.

Principle 2: Top level commitment (1/2)

The principle

The top-level management of a commercial organisation are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 2: Top level commitment (2/2)

The purpose of this principle is to

- a) encourage the involvement of top-level management in the determination of bribery prevention procedures.
- b) encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Principle 3: Risk assessment (1/2)

The principle

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is

- periodic;
- informed and
- documented;

Principle 3: Risk assessment (2/2)

Examples of different types of risk

- i) **Country risk**
- ii) **Sectorial risk**
- iii) **Transaction risk**
- iv) **Business opportunity risk**
- v) **Business partnership risk, E.g.:**

- * the use of intermediaries in transactions with foreign public officials;
- * consortia or joint venture partners;
- * relationships with politically exposed persons or “PEPs”

PEP: someone who has been entrusted with a prominent public function, or an individual who is closely related to such a person, where the proposed business relationship involves, or is linked to, a prominent public official.

Principle 4: Due diligence (1/2)

The principle

In order to mitigate the risk of bribery, the organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation.

The paramount importance of due diligence:

Due diligence is a very important element of bribery risk mitigation. That is why it is a Principle in its own right.

Principle 4: Due diligence (2/2)

How is due diligence done?

1. KYC-questionnaires (Know Your Customer)
2. The information obtained in this way can then be verified through research (e.g. on the internet) and the following up of references, etc.

If many references or details need to be verified, this type of due diligence **can be (very) time consuming**.

3. An organisation may also wish to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees. Such due diligence is unlikely to be needed in relation to lower risk posts.

Principle 5: Communication (including training) (1/1)

The principle

The organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Principle 6: Monitoring and review (1/2)

The principle

The organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Principle 6: Monitoring and review (2/2)

Monitoring and review systems can include:

- Staff surveys and questionnaires;
- Feedback from training;
- Investigations into and lessons learned from (perceived) incidents of bribery;
- Investigations into and lessons learned from the “speak up procedures”
- Verification by an external party of the effectiveness of anti-bribery procedures.

CONCLUSIONS regarding UKBA & OECD Implementation



- ABC is here to stay. In the coming years anti-bribery and corruption compliance will become one of the major points of contracting (e.g. HSE twenty years ago).
- Depending on how big an organisation is, getting an initial ABC management system in place will be more or less time consuming.
- Having an ABC management system in place on paper is one thing. Implementing, monitoring and improving it is an ongoing process that will require resources.
- An important part of an ABC management system is communication with and training of employees. Again, this will require time and resources.

Case Study: Joint Venture (1/4)

Facts:

C is a medium sized offshore contracting company that is interested in tendering for projects in an emerging economy with vast offshore oil and gas reserves.

F is a local onshore construction company.

C proposes to enter into a joint venture with F to be able to bid for EPCI contracts together.

It is proposed that C and F would have an equal holding in the joint venture company ('CF').

Case Study Joint Venture (2/4)

The risk of bribery:

C identifies the necessary interaction between CF and local public officials and the local state owned operator as a source of significant risks of bribery.

What can C do?

Case Study: Joint Venture (3/4)

C could include in JV agreement that:

1. Both C and F are equally represented on the board of CF.
2. C could insist that CF put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures could include:
 - * gifts and hospitality
 - * agreed decision making rules
 - * procurement
 - * engagement of third parties, including due diligence requirements
 - * conduct of relations with public officials

(See next slide)

Case Study: Joint Venture (4/4)

3. C could insist on training for staff in high risk positions
4. C could insist on proper record keeping and accounting.
5. C could require the establishment of an audit committee with at least one representative of each of C and F that has the power to view accounts and certain expenditure and prepare regular reports.
6. Both C and F should sign binding commitments to comply with all applicable bribery laws in relation to the operation of CF, with a breach by either C or F being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

Case Study: Due Diligence of agents (1/4)

The facts

“C” is a medium to large sized offshore contractor that has an opportunity to enter an emerging market in a foreign country with large oil and gas reserves by way of an EPCI contract with the state owned operator in that country.

Local convention requires any foreign commercial organisations to operate through a local agent.

Case Study: Due Diligence of agents (2/4)

The risk of bribery:

C is concerned to appoint a reputable agent and to ensure that the risk of bribery being used to develop its business in the market is minimised.

What can C do?

Case Study: Due Diligence of agents (3/4)

C could consider any or a combination of the following:

- i) Compiling a suitable questionnaire for potential agents.
- ii) Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- iii) Making enquiries with the relevant local authorities to verify the information received in response to the questionnaire.
- iv) Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.

Case Study: Due Diligence of agents (4/4)

- v. Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- vi. Being alert to key commercial questions such as:
 - * Is the agent really required?
 - * Does the agent have the required expertise?
 - * Are they interacting with or closely connected to public officials?
 - * Is what you are proposing to pay reasonable and commercial?
 - * Renewing due diligence enquiries on a periodic basis if an agent is appointed.

Case Study: Facilitation payments (1/3)

The facts

C: is a medium sized offshore contractor that has won an offshore installation project in a foreign emerging economy (FEE).

The risk of bribery

C's risk assessment has identified facilitation payments as a significant problem in securing reliable importation of vessels, equipment and other items required for the project into FEE. These facilitation payments sometimes take the form of inspection fees required before FEE's inspectors will allow vessels, equipment or other items to be imported into FEE.

What can C do?

Case Study: Facilitation payments (2/3)

1. C can seek advice on the law of FEE relating to certificates of inspection and related fees. This will allow C to differentiate between properly payable fees and disguised requests for facilitation payments.
2. C can build realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow, where feasible, for resisting and testing demands for facilitation payments.

Case Study: Facilitation payments (3/3)

3. C can train its staff about resisting demands for facilitation payments by:
 - * questioning of legitimacy of demands
 - * requesting receipts and identification details of the official making the demand
 - * requesting to consult with superior officials
 - * trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official

Overall Conclusions (1/2)

1. ABC rules cannot be ignored. They are here to stay.
2. Just as the Americans experienced when the FCPA was implemented, Contractors who comply with ABC rules can be expected to be put at a disadvantage when compared to Contractors who do not comply and bend the rules / cut corners.
3. Not complying with ABC rules is not an option: Bribery and corruption are criminal offences and contractors that do not comply will be severely fined, with possible prison sentences for persons involved.

Overall Conclusions (2/2)

4. Moreover, the harm to the reputation of the Contractor that is caught in a corruption scandal can be unrepairable.
5. In the long run, ABC rules will lead to :
 - i. A level playing field, i.e. equal chances to win a tender for everybody;
 - ii. Prevention of wasted time and money for tenders where the contracts have already been won by bribes.

What will the future bring?

- a) Will ABC compliance become as big an aspect in contracting as e.g. HSE compliance now is?
- b) Will a time come when tenders will allow a line cost item for the impact of ABC compliance?

The End