

## *UK Bribery Law 2011 – The Real Impact of India*

Most UK companies, especially large FT 100, and some SMEs are at this time rushing to their advisors as the new Bribery Act comes into effect on 1 July 2011. Companies must ensure adequate measures are in place proportionate to the Bribery risk they face in India depending on their size, nature of business and the scale of bribery and corruption considered prevalent in Indian public and private sectors.

Financial loss and the prosecution of UK-based individuals (management) and possible imprisonment are significant risks. In any incident of Bribery by “associated persons” in India, financial loss might be contained and even criminal prosecution thwarted by ‘insufficient evidence’ or ‘prosecutorial discretion’.

However, the real risk and impact of a Bribery incident, led by the inevitable ‘trial by tabloid Indian and British media’, is reputational.

***This Brief outlines on pages 1-4 some culture driven realities and soft risks faced by UK/Western companies in resisting Bribery in India and suggests an approach for mitigation.***

## INDIA, BRIBERY & UK COMPANIES

### *Vulnerable Sectors*

Companies particularly at risk will be those engaged in or wishing to enter, sectors such as *Infrastructure (Power, Highways, Railways & Urban Transportation, Airports, Water/Waste), Defence/ Aerospace, Telecom, Oil & Gas, Mining* - or any sector that involves the Indian Government agencies and public bodies and companies.

### *Understanding the Real Situation in India*

Internal anti-bribery procedures, processes and systems are crucial as a basic tool. However, the key to India success lies in ‘touch and feel’ rather than desktop risk assessment and soft due-diligence. To achieve some mitigation from the unauthorized actions of local employees, agents and other partners and get to the *real* picture, it necessary to sift through layers of mist, where internal processes shed no light.

A culture of Bribery is far too embedded and tempting for local employees and partners . . .

Questions that loom: who is one *really* dealing with, what is *really* happening in locally partnered (or not) projects and transactions and are there *really* no undisclosed financial promises and payments to officials in play? Posing questions to local “associated persons” - and often, local advisors - is easy enough, but answers will usually be either too squeaky clean or confused non-answers!

### *Recognition of Bribery-Related Soft Risks*

Genuine recognition in the corporate mind that local culture-driven “soft manipulation” is alive and well in India, is the first crucial step in resisting Bribery. In most cases regular Legal and Financial Due Diligence will yield perfect positive results – and yet little discovered. A culture of Bribery is far too embedded and tempting for local ‘partners’ and employees, and it is not considered essential to ‘burden’ their foreign western partners/employers with detail.

Some companies with existing local operations and Indian employees consider themselves already “well equipped” . . . this smacks of a lack of will to fully understand local issues . . .

### *Indian Reality*

Any doubts whether fairly significant ‘adequate measures’ are needed for India will be quickly dispelled by a quick scan of news-flow surrounding the latest bribery/ corruption scandals: the estimated \$30+ Billion ‘2G allocation’ and the Commonwealth Games related ‘scams’. These rage on among several others - with the highest levels of the political, judicial (supreme court) and investigative/ law enforcement spectrum in India engaged, and top political and business leaders embroiled or implicated.

## Considerations include:

- **KEY DRIVERS OF BRIBERY RISK IN INDIA**

Two key drivers of the Bribery threat to UK companies in, or newly entering, India are (a) a culture-based tendency for Manipulation by the Indian side (partners, agents, senior employees, local advisors, bureaucrats/ government officials, and (b) an established layered culture of Corruption and Bribery.

In the average Indian mind-set certain practices are natural, necessary and ought to be acceptable . . .

- **INADEQUACY OF ROUTINE LEGAL & FINANCIAL DUE DILIGENCE**

Partner selection, or transaction/project-wise bribery risk assessment, will often stop with formal due diligence. A 'documents' based and 'tick the box' exercise is essential but easily manipulated by many local companies to conceal from the Western partner their real controllers and their true reputation, any ruthless past behavior, personal attitude to governance, pre-disposition to creeping re-negotiations, political affiliations with politicians/bureaucrats and a culture-driven propensity for making 'undisclosed promises'.

Soft due diligence is a potent tool to reduce the Bribery Risk. . .

- **REAL ACCESS TO CUSTOMERS/ STAKEHOLDERS**

Western partners are unlikely, while making capital and technology commitments, to be allowed *real* contact and interface with state customers/ stakeholders. This culture of 'exclusion' and 'complete local dependency' breeds the risks of undisclosed promises and Bribery - by nature subtle, hidden, least expected by the Western side and often disclosure timed by local partners when project capital and resources are already committed.

- **BLIND SPOTS: SENIOR EMPLOYEES**

Some senior-most employees – CEO, CFO levels – when locally recruited without proper soft diligence or on-going oversight, can, depending on their community affiliations, pose a grave 'under the radar' risk. Often they act as instruments of financial bleed, doctoring of information flow to UK management and tempted into collusion with local agents/ partners in committing Bribery offences.

- **TRIAL BY LOCAL MEDIA**

May be the first that a UK management hears of a Bribe gone wrong on their behest and which involved actual financial payments or promises by local "associated" senior employees, agents and partners. This may very quickly spill over into the UK/ Home country press depending on the trigger:

Tabloid journalism is the reality in India . . . and a brazen tool of manipulation . . .

disgruntled promisee(s); tactical move by competitor; re-negotiating pressure tactic by agent or local partner; third parties wanting to oust and muscle out incumbent 'agent' or 'partner'.

- **REPUTATIONAL RISK – THE REAL SLEDGE-HAMMER**

It may be that good legal advice and tactics thwart a S.7 UK Bribery Act 2011 prosecution. However, the reputational risk in India and the UK is unlikely to be easily contained. In India it is likely to lead to exclusion from project/ tender participation and evoke excessive activist attention to future innocent business efforts and possible public interest litigation.

## Perspectives on Response to the Bribery Risk:

- ***RECOGNITION***

Genuine recognition, in the first place, by the Western corporate mind, of the prevalence of peculiar local culture-driven soft risks and practices - will prove a leap forward in the battle to prevent Bribery in India by local "associated persons".

*Many Western corporate minds fail to recognize that things are different 'out there' . . .*

- ***RISK ASSESSMENT & DUE DILIGENCE – THAT WORKS***

Recognition will help scope an effective Bribery Risk Assessment effort, using the crucial tool of soft due diligence in combination with regular legal and financial due diligence. Corporate and business confidence will balloon if some early success is experienced in resisting local manipulation and correctly judging the real risks in engaging with "associated persons". Benefits will be immediately experienced in the roll out of entry/market, partner selection, and commercial/legal strategies.

- ***REAL INDEPENDENCE LOCALLY***

Achieving real independence from 'local partners/ agents' and developing a mechanism for seeking independent insights is a challenge, and requires diplomacy, discreet effort and reliable relationship building. However, any level of success in attaining this objective is a giant step forward in securing the holy grail in India: profitable business success in a high growth market without unexpected loss and reputational nightmares!

*Too many Western managers worry about 'culturally insensitivity' in asserting local business independence from Indian partners . . .*

- **ASSESS REAL NEEDS**

Two common anxieties of UK/ Western companies looking to dip their feet in India are: (1) Must have 'local partner', and (2) Must have local national as CEO. On the latter: depending on sector and circumstances, a local Indian CEO will import particular political affiliations, leaning towards deal making with specific groups and, will lack proper knowledge of the company's politics and products. This may prove counter-productive and actually encourage Bribery. A western insider company veteran from the home company may better manage the Bribery risk. Secondly, a hard look will reveal whether an "agent or partner" is *really* needed, and if not then, associated soft risks are reduced. Foreign companies can participate 100% in most sectors, and indeed many technocrats prefer direct dealings. This is easily achievable by recruiting the right "own team" locally - thus also ring-fencing the oversight required to monitor the Bribery risk.

An automatic assumption that a 'partner' or local Indian CEO is needed - may prove misconceived and speculative . . . and feed the Bribery Risk

- **ONGOING MONITORING/ REVIEW**

A discreet early warning and soft detection mechanism, in addition to usual governance procedures and systems, will help ward off discreetly any residual culture-based temptations in long-established local partners, agents and senior employees to import practices that the Indian mind is convinced are " natural, necessary and *ought*" to be acceptable.

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