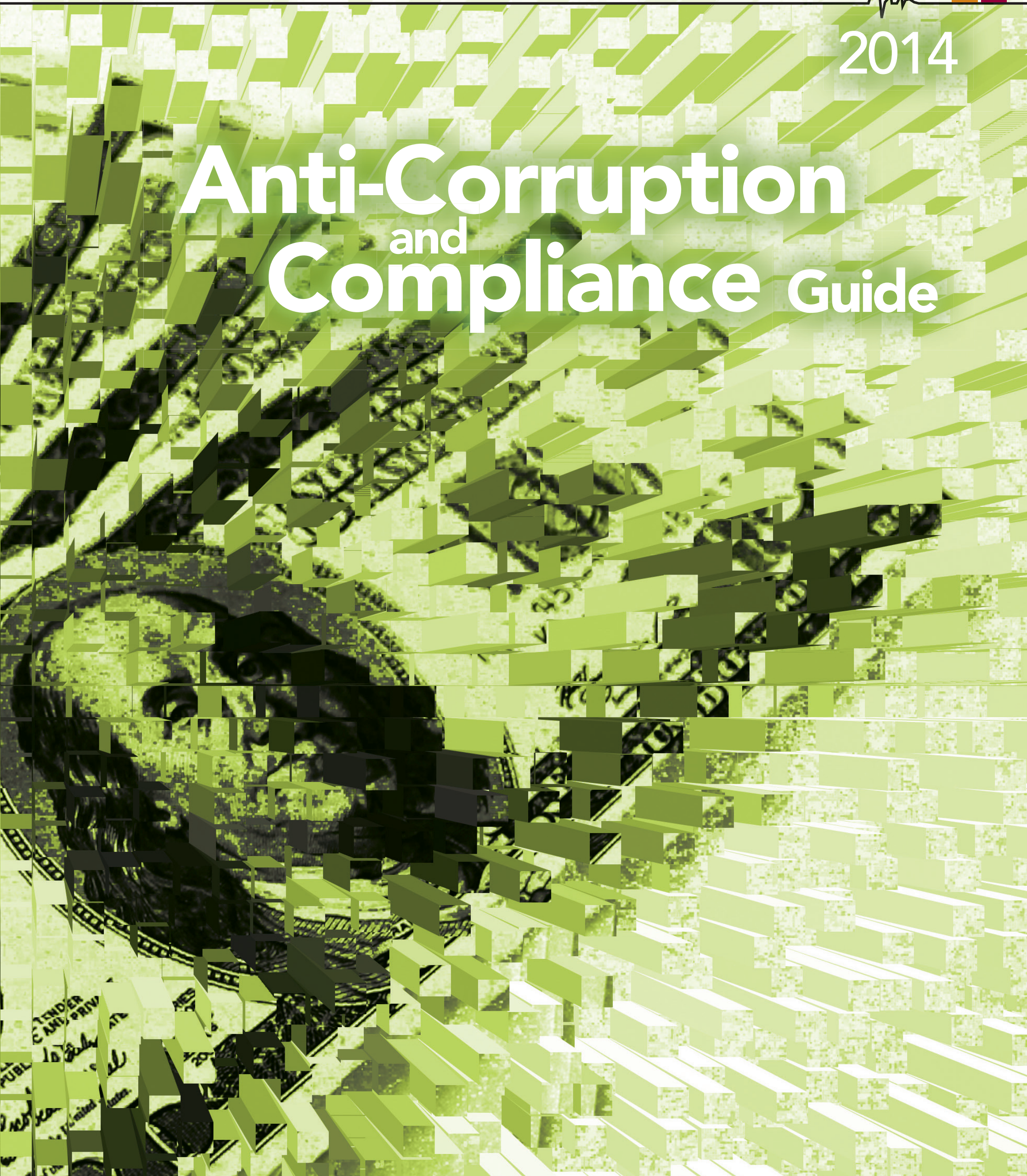
Part of the Leaders series published with *Mining Journal*

Mining Journal

2014

Anti-Corruption and Compliance Guide



in association with

holman fenwick willan hfw

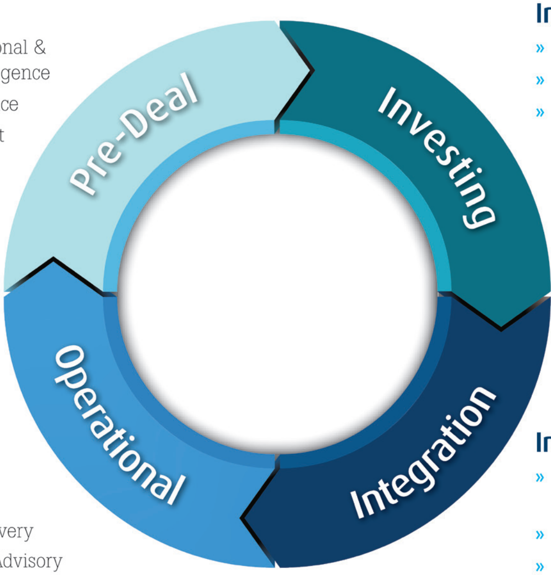
Kroll®

Kroll – When you need to know.

Kroll has been helping clients make high-risk, high-value decisions throughout the world for 40 years.

Pre-Deal
- Commercial, Operational & Reputational Due Diligence
- Competitor Intelligence
- Market Entry Support

Investing
- Investigative Due Diligence
- Risk & Compliance Solutions
- Corporate Contest Advisory



Operational
- Fraud & Internal Investigations
- Asset Tracing & Recovery
- Litigation & Dispute Advisory

Integration
- Process & Internal Controls Assessment
- Compliance Monitoring
- Fraud Prevention Training

+44 207 029 5000 I KrollUK@Kroll.com I www.kroll.com

Kroll®

Published and distributed by:
Aspermont Media, 4th Floor, 120 Old Broad Street
London, EC2N 1AR, United Kingdom
Tel: +44 (0)20 7216 6060 • Fax: + 44 (0)20 7216 6050

Edited and compiled by: Richard Roberts
Account manager: Owen Raw-Rees
Designed and typeset by: Tim Peters
Cover design: Tim Peters
Printed and bound by: Stephens & George, Merthyr Tydfil, UK

Aspermont Media
Information for Industry

Contents

4… **Introduction**
Richard Roberts introduces the guide and its contributors.

5… **Risk mitigation:** Kroll
Assessing corruption risk:
Corruption investigations have been big news for the past 10 years. In 2007, when Baker Hughes, the oil field service company, pled guilty and paid a fine of US$44 million to settle Foreign Corrupt Practices Act (FCPA) charges brought by the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC), it was a shock. Today, it might be seen as getting off lightly – it does not even make the top 10 cases by size of fine.

17… **Law:** Holman Fenwick Willan
A rapidly evolving legal landscape:
Anti-bribery and anti-corruption is an increasingly important issue in the mining and extractive industries. This chapter focuses on the key recent developments in international anti-corruption laws and assesses their implications for mining companies. We then look at corporate governance and compliance strategies to help manage the risks, and at the types of insurance coverage available. And we examine what exposures remain.

31… **Contributor biographies**
Short biographies about the companies and people who contributed to and wrote the articles within the guide.

Houston, we may have a problem

An introduction by *Mining Journal*

Four years ago, as Tommy Helsby tells it, he was speaking to empty halls about mining's looming corruption-risk problem. The prosecution rate and scale of punitive fines seen in other industries has not been evident in mining yet, though it's estimated the Bahrain bribery scandal may have cost Alcoa close to US$800 million.

"People are now paying a lot more money and time on trying to manage the risk," says Helsby, a respected risk and compliance adviser with one of the top global firms working in this field, Kroll. "There is something going on."

That something is likely to be a widening, more urgent response to the threat of bribery prosecution. As well, known cases could be "the tip of the iceberg of active investigations in mining".

"Obtaining contracts, licences and permits is 'the key nexus for corruption'"

Mining obviously has a lot in common with industries in which successful prosecutions, and significant damage to corporate reputations and treasuries, have jumped.

Obtaining contracts, licences and permits is "the key nexus for corruption", according to Helsby.

Coupled with the threats from the unknown is the fast-changing international legal picture and rising pressures from established judicial and regulatory bodies.

According to Holman Fenwick Willan's Anthony Woolich and Nick Hutton, there has been a significant rise in the severity of anti-corruption laws and enforcement in recent years.

"Anti-bribery and anti-corruption is an increasingly important issue in the mining and extractive industries," Woolich says.

Helsby, Woolich and Hutton are among the authors delivering timely and highly important material in this inaugural *Mining Journal* Leaders Series Anti-corruption and Compliance guide.

Their insights, knowledge and experience are surely very welcome in these times of uncertainty and change.

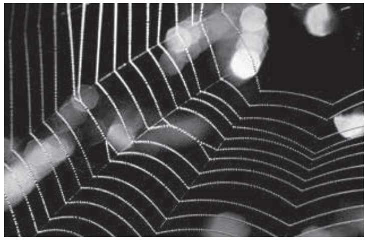
Richard Roberts
Editor-in-chief

Assessing corruption risk

Kroll

Tommy Helsby, Chairman, Kroll

Corruption investigations have been big news for the past 10 years. In 2007, when Baker Hughes, the oil field service company, pled guilty and paid a fine of US$44 million to settle Foreign Corrupt Practices Act (FCPA) charges brought by the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC), it was a shock. Today, it might be seen as getting off lightly – it does not even make the top 10 cases by size of fine.



"The Transparency International Corruption Perceptions Index, which ranks countries by perceived prevalence of bribery, reveals a striking match between poor national ranking and rich deposits of ores"

But if you look at the list of biggest fines, mining companies are under-represented: Alcoa is the exception (its bauxite mining operation was involved).

The dominant sector is oil and oil field services; telecoms and capital goods manufacturers are also well represented.

It seems as if the mining industry is more honest – or getting away with it.

Four years ago, I spoke at the Mines and Money conference in London on corruption risk to a near-empty hall. I thought then that the industry had its head in the sand, and that there would be a series of prosecutions in the year to come that would make management start paying more attention to the issue. I was wrong about the prosecutions; but people are now spending a lot more time and money on trying to manage the risk. So what's going on?

The mining industry is clearly vulnerable. Most of the circumstances that made the oil and oil field service sector the big target apply equally to mining. Companies need to get exploration licences from governments (and some licences are clearly better than others). Contracts may involve joint ventures with state-owned companies. Exploitation of discoveries requires more licences and permits from government agencies. Development usually means large capital investments, often using local contractors. Obtaining contracts, licences and permits is the key nexus for corruption.

Geography is also an issue. Natural resources have generally been exhausted in

Kroll may have had involvement with certain cases referred to in this article. Except where specifically indicated, all discussion relates to information freely available in the public domain.

highly-developed countries. New finds are usually in emerging markets, a long way away from head office scrutiny and in environments where regulation is lax and government officials badly paid. The Transparency International Corruption Perceptions Index, which ranks countries by perceived prevalence of bribery, reveals a striking match between poor national ranking and rich deposits of ores. If you take British Geophysical Survey Statistics for top mineral-producing countries and compare them with the Index, six of the nine top copper-producing nations fall in the bottom half of the index; for gold, five of the top seven; nickel, three of the top five. And so on. And not surprisingly, exciting new finds are more likely on the road less travelled, countries which are best represented in the bottom half of the Index, such as the Democratic Republic of the Congo (162), Indonesia (111), Zambia (99), Mexico (89) and Kazakhstan (120).

Given this match between motive and opportunity, it is very likely that some mining companies are paying bribes. They seem to be getting away with it, at least judging by corruption prosecutions. But the risks are clearly growing.

"What drives prosecutions is as much focus and resources as legislation: when prosecution agencies are motivated to pursue corruption, and are given the manpower, budget and political support, they usually get results"

The index reveals a striking match between poor national ranking and rich deposits of ores. The DRC is one such nation *Photo: Enough Project*

The FCPA is now nearly 40 years old but it has been joined by many other statutes around the world, a result of pressure from the OECD to bring national laws up to the standard set by the US legislation. The UK Bribery Act goes further than the FCPA, criminalising the overseas payment of bribes to non-government recipients. Other new laws are also increasing the exposure. For example, the Extractive Industries Transparency Initiative is successfully pushing for legislation to require the disclosure of all payments made to governments by natural resource companies. As financial data becomes more visible, improper payments become more and more difficult to disguise.

The real risk, however, is not from legislation: it's from prosecution. In the first 30 years of the FCPA's existence, prosecutions averaged one a year and fines were modest. Since 2007, the annual average has been 13 corporations charged; in 2013, penalties averaged $80 million for each company. The UK's Serious Fraud Office achieved three bribery convictions against corporations in the year before the Bribery Act came into force. What drives prosecutions is as much focus and resources as legislation: when prosecution agencies are motivated to pursue corruption, and are given the manpower, budget and political support, they usually get results.

No prosecutor thinks they are prosecuting all of the wrong-doing. So what is their basis for selection – and when will they turn their attention to bribery in the mining industry?

Obviously, there is no explicit policy of focusing on only particular sectors. From informal conversations with prosecutors in several countries, there is no implicit or even unconscious bias: if they see a good case, they will go for it. The reality is most probably very practical: one case leads to another.

One thing can lead to another

Involvement with a bribery case in one industry gives the prosecution agency an understanding of the sector and its practices that makes spotting and pursuing another case that much easier. Investigating corruption is not usually straightforward: you have to understand enough about contracts, licences or permits to judge whether consulting fees or commissions are reasonable business expenses or bribes in disguise. With limited resources to devote to cases that are typically large and lengthy, with a well-resourced target and no equally well-resourced "victim" to help, prosecutors will go for cases that show the maximum chance of success; sector understanding becomes a natural part of that assessment.

A parallel process goes on within the sector itself. An unhappy competitor or a disgruntled employee is more likely to blow the whistle in the direction of a corruption prosecutor if bribery prosecutions are seen as an industry risk. As that risk becomes institutionalised within the sector, the company itself is often the whistle-blower, as self-reporting becomes key to mitigating the damage. Of course, consciousness of the issue as a very serious risk encourages more senior management focus on effective compliance, which ultimately does mean that industry practices improve – the oil industry is certainly investing significantly in compliance – and the problems, and prosecutorial focus, wanes. Then, naturally, the focus moves on to new sectors.

Before I was predicting bribery cases in the mining industry, I had had the same thought about the pharmaceutical sector: the largest customer for pharmaceuticals, and for medical devices and equipment, is invariably governments, even in the US; pricing is often opaque; and emerging markets are a growth area. This time I was right. One case in the medical devices area led on to a series of others, with a number of corporate settlements and individual convictions; and now there are very public investigations going on in pharmaceuticals. So is it going to be the mining industry's turn soon? Three recent high-profile cases suggest that mining may indeed become a new focus. Each is still current, in part or as a whole, so the final outcome is yet to be determined. But collectively they do offer a very clear

“Between criminal and civil fines, and customer recompense, Alcoa’s involvement is costing more than $800m”

guide to prosecution thinking.

The first I mentioned above, the Alcoa case which involved selling bauxite to an intermediary who then resold at a marked-up price to a Bahraini customer over a 20-year period, and allegedly used part of the proceeds to bribe officials at the government-owned company. In January 2014, Alcoa settled US SEC and DoJ actions by a guilty plea from a 60%-owned Australian affiliate to one FCPA charge, with a fine to the DoJ of $223 million and to the SEC of $161 million. Alcoa had settled civil litigation with the customer involved in October 2012 by paying $85 million in cash and giving discounts on future sales valued at $360 million. The case is ongoing with respect to other parties, although one former executive has pled guilty to receiving illegal payments.

The other two cases both involve the award of licences. In April 2013, a French businessman was arrested for, and later pled guilty to, trying to destroy records of contracts and transactions between his Swiss employer and the wife of the prime minister of Equatorial Guinea after a criminal investigation into whether a mining company paid bribes to win lucrative mining rights in the Republic of Guinea. In March 2014, a Ukrainian businessman was arrested in Vienna on US FCPA charges relating to licences for a titanium ore (ilmenite) mine in Andhra Pradesh, India. The indictment alleges that, from 2006 to 2010, bribes were offered and, in some cases, paid to Indian government officials for the approval of licences for the project.

Affording insights

What insights do these cases offer?

- First, the investigations clearly went back several years before the indictments, and the transactions under investigation go back even further; this probably is the tip of the iceberg of active investigations in the mining sector.
- Second, the US is continuing to lead the way on anti-corruption efforts, even when the connections to the US are not immediately obvious (Australian, Swiss and Ukrainian companies involved with deals in the Middle East, Africa and India, respectively).
- Third, the alleged offence may occur at any stage, from exploration to production.
- Fourth, actions by an associate company, such as a part-owned business, can create risks for a parent if the degree of control is significant. Experience in the oil sector shows that acquisitions also create risk for the parent, even if management is changed.
- Fifth, the costs can be very significant: between criminal and civil fines, and customer recompense, Alcoa’s involvement is costing more than $800 million.

So, people in the mining industry are right to be paying attention now. But the best response to the risks is not so clear, particularly for small and medium-sized players, when even the largest companies are struggling to catch up. Compliance has become a major cost, both financial and operational, in many sectors, particularly financial services. But it is obvious that failing to invest in compliance is liable to be the more expensive option: legislation (and prosecutorial policies) make it clear that the best defence that a company and its senior management can present in the event of wrong-doing emerging is the genuine efforts made to prevent it.

So what can you do to prevent corruption? What can you do to find out if you have a problem? How should you prepare to respond if you get the bad news? We give some best-practice thoughts on each question in the succeeding sections.

Managing corruption risks

Kevin Braine, Managing Director, Kroll

In a packed conference room, 30-odd chief compliance officers work silently on a role-playing exercise: to report to the board of a fictional company on the potential bribery and corruption risks of a planned investment in a mining project in an imaginary country. The location in question is extremely unstable politically; the infrastructure to support the project will need to be built from scratch; work and construction permits provide one of the main sources of income for the heavily under-resourced regional bureaucracy; and the local government insists that a domestic company of their choice take a large stake in the venture. Worse still, the hypothetical main shareholder of the proposed local partner is a prominent local businessman related to a senior minister who, say media reports, was charged with assault and sexual harassment during a recent trip to the US.

Risk professionals from the financial services industry grimace; general counsels working for global engineering firms frown and scratch their heads. At the back of the room, though, two chief compliance officers for mining companies laugh. One calls out “welcome to our world”, while the other comments that the scenario was too easy: it forgot to include rampant piracy and an outbreak of Ebola. For them, operating long-term assets in remote locations with political instability, endemic disease and a weak rule of law tends to be the norm. With the exception of sites in the US, Canada and Australia, most significant mining projects are in jurisdictions often kindly described as “challenging”. The mining sector has to be able to manage corruption and bribery risks when operating in such countries where politics and business can be so closely intertwined as to be indistinguishable. After all, you won’t find viable manganese reserves in Switzerland.

Despite operating in particularly complex environments, mining companies are subject to the same national and international anti-bribery and anti-corruption legislation as the rest of the corporate world. Their main tools in managing this exposure are also those typically deployed by other industries:

- Tone from the top to demonstrate that corruption will not be tolerated by leadership teams.
- Thorough market-entry risk assessments.
- Codes of conduct and anti-bribery policies for staff and commercial counterparties.
- Formal anti-corruption training for front-line staff and key third parties.
- Clear whistle-blowing procedures and regular audits of higher-risk functions.
- Risk-based, proportional due diligence on key commercial partners and third parties.

Anti-corruption requires a broad view: A Kroll case study

Managing corporate compliance works best when efforts take a 360° view rather than concentrating too closely on areas of particular concern. A large mining group was exposed to high risks of corruption in two of its subsidiaries. Its initial reaction was to focus narrowly on these. It implemented targeted policies within the entities in question and approached Kroll to assess the group's business reputation, but only in the relevant jurisdictions. This strategy failed rapidly and completely, in no small part because resentful employees of the targeted entities felt unjustly suspected and discriminated against.

To turn the situation around, Kroll's advice was to broaden the scope of these efforts in order to consider the whole group's anti-corruption compliance – a task which the company entrusted to us. This effort began by obtaining a complete, detailed view of the situation through contracting an international law firm to assess the legal framework of the client and its various subsidiaries worldwide, its exposure to corruption risk, and existing compliance policies. The latter were benchmarked against the ethics and compliance procedures and policies of the sector's top players.

Based on this review, Kroll conducted several on-site audits at the group's headquarters and at several key subsidiaries. These involved the examination of all branches and departments potentially exposed to bribery and fraud risks, including operations, finance, purchase and procurement, sales force, logistics, and human resources. We also worked with IT to understand how the company's systems could be used to strengthen controls in some corruption hot spots.

The first result of this work was a measure of the gaps between the requirements of compliance with the strictest regulations worldwide, the group's existing policies and procedures, and their real application on the ground. Interviewing numerous stakeholders also allowed Kroll to fine tune its understanding of the group's culture, operational challenges, and specific local difficulties. With this insight, Kroll designed bespoke compliance policies and processes for the company and helped the client to implement them. It remains active as an external auditor of compliance.

While these are often effective, the key to a successful anti-corruption program remains, as always, a real understanding of the environment in which your company operates.

A 50-page, carefully worded anti-bribery policy document is unlikely to prove effective among the workforce of a remote site in a country where the literacy rate is below 30%. Likewise, enforcing a draconian gifts and entertainment policy in a country where the greater risk is that your local and expatriate staff will regularly be subjected to low-level extortion (sometime by local law enforcement officers) is perhaps not the best allocation of compliance resources.

Whatever the local conditions, though, an effective allocation of those resources invariably involves oversight of third parties. For mining companies, as for many corporates, their use remains the highest bribery and corruption risk, in particular when it comes to the commercial agents and intermediaries often needed to secure contracts and permits in-country. Embedding an effective compliance culture and effectively monitoring the activities of hundreds of these partners is typically a greater challenge than the high-profile transactions which normally receive close board attention. Such third parties that may be involved in a wide variety of high-risk tasks for mining companies such as:

"A 50-page, carefully worded anti-bribery policy document is unlikely to prove effective among the workforce of a remote site in a country where the literacy rate is below 30%"

- Securing work and construction permits on their behalf;
- Managing CSR funds to secure goodwill among local communities;
- Handling travel and visas for expatriate staff; or
- Handling customs clearance for critical equipment required on site.

Local third parties are typically vulnerable to pressure from domestic government officials to pay bribes and may find it hard to resist. Mining companies, though, have to find adequate and cost effective ways and procedures to prevent such bribery and corruption taking place. This need not be complex. A former colleague working in Nigeria's Cross River States once explained to me that, when his company's private ambulance ferried injured colleagues from the firm's production site to its in-house medical facilities, the ambulance crew was under strict instructions not to turn on their sirens. If they did, they were much more likely to be stopped by local law enforcement who, knowing they were in a hurry, would be more confident of their chances of extracting a quick gratuity to help them on their way.

On the case

Such creativity is now essential, and a daily part of the mining compliance officer's job. Recent Serious Fraud Office and Department of Justice investigations targeting players in the mining sector; the introduction of deferred prosecution agreements in the UK; the Dodd-Frank act which provides a strong financial incentive – up to 30% of any resultant fines collected – to whistle-blowers; and the very real risk of punitive fines – all of these mean corruption and bribery risks are now, more than ever, a key area of concern for the industry.

Detecting corruption risk

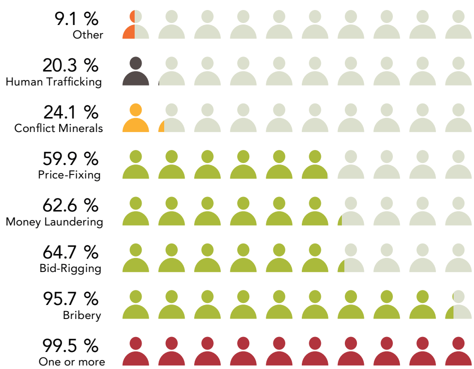
Stefano Demichelis, Associate Managing Director, Kroll

Amid the various ways for companies to stay alert to corruption by managers or employees, whistle-blower hotlines, outsider tips, and compliance processes all have their place but are often passive. A more active avenue for businesses, including those in the mining industry, is to sift intelligently through what the company has close at hand for the signs which bribery frequently leaves behind.

For corruption, such criminal residue is typically not fingerprints swirls or DNA strands but data patterns. Although powerful Big Data tools are increasingly part of an analyst's arsenal, the search begins with often low-tech efforts to identify key information that may help indicate potential signs of corruption. Bribery is personal. At its simplest, it involves giving one or a few government officials inducements in order to misuse their offices. The first thing to determine is, therefore, who are the best people to bribe. For example, if you are starting a copper mine in a developing country of dubious repute, the people responsible for granting the necessary licences are obvious candidates.

A process based on experience and creativity can then show how these key individuals might do business and receive money. It is sometimes possible, for example,

"For corruption, such criminal residue is typically not fingerprints swirls or DNA strands but data patterns"



Exactly what types of misconduct does your company label "corruption" that the chief compliance officer is responsible for policing?

to find mobile phone numbers and other contact details for members of government tender committees online. As for payments, brown paper envelopes show a distinct lack of originality. Determine if these key players, their close family members or their immediate circle of subordinates own an interest in any closely held companies, especially ones which provide services – where audit trails are easier to fake than for material goods. Also look for possible intermediaries, and not just agents: when working on a FCPA investigation case, Kroll found suspicious payments to a Gaddafi-associated charity.

Things company information might yield

With a better idea of whom and how to bribe in order to set up the new copper mine, various types of data analysis can throw up any number of red flags.

The most basic is simply to follow the money. Although it may seem too brazen to get away with, esoteric purchases without an obvious business purpose still appear on corporate credit cards. These include cut diamonds, expensive jewellery, and fashion goods – Louis Vuitton and Gucci are favourites in Southeast Asia. Private education is expensive, even for corrupt officials, and we've uncovered unusual payments of school fees more than once. Company travel agencies can also often give more details of the specific individuals for whom flights were purchased than credit cards do. First-class trips to Paris or Florida stand out in a list of economy flights taking executives from near the copper mine to the company's national HQ. A little digging can show if the beneficiaries of any largesse were key government officials or their families.

More common – given that audits usually turn up overly obvious malfeasance – are schemes which hide in plain sight. This frequently involves using a company associated with a key official, however loosely, as a supplier. In reviewing suppliers for signs of corrupt payments, also look for firms, especially new ones with little relevant reputation, receiving unusually large contracts. If any are supplying the mine, dig further into their ownership and activities: companies exist for a purpose, but not always a business one.

More advanced data tools also have their place. One often overlooked is geolocation. This might involve mapping the geographic positions of all suppliers companies and noting the size of payments to each. Typically, most will be in one or more clusters. Any geographic outliers, especially ones that receive large contracts, are worth examining further. If they turn out to have associations with key government officials, corruption may be taking place. Geolocation can also flag up suspicious disparities between the ostensible place of delivery of goods and services and the country of the suppliers' bank account: services for our developing world copper mine provided by one or more local firms, but paid for by funds wired to an offshore banking haven half a world away, are worth checking out.

Still more complex analysis is also available. Comparing all company payments against expected averages, for example, can reveal anomalous spending patterns that may have an illicit cause – such as repeated payments of amounts just under compliance triggers. Similarly, analysis of even unstructured data, such as email sentiment analysis, can turn up interesting information.

A pair of caveats

Whatever the specific technique, those sifting data for indications of corruption have to keep two things firmly in mind. First, the techniques of those giving and receiving bribes are always evolving. Few, if any, of those involved communicate directly by email anymore. For a while, some did so as anonymous avatars in online games such as Second Life but, now that tools exist to monitor chat in such venues, they will likely move on. They may come up with other digitally-based techniques – such as shared online email accounts where communication is exchanged using draft emails that are never actually sent, thereby leaving no trace on servers – or even revert to handwritten notes using apparently innocuous terms as codes. Therefore, look in different ways, old and new, for signs of trouble.

> "The techniques described here, and all of those which Kroll uses, are designed to minimise false positives"

The other, crucial thing to remember is that data analytics alone is very unlikely to reveal a smoking gun. The techniques described here, and all of those which Kroll uses, are designed to minimise false positives. Nevertheless, some suspicious activity inevitably turns out to be innocuous. The best expert advice available on particular technical issues for our copper mine may have had to come from a specific individual who can afford to live in an upscale urban area far from the operation and happens to be a cousin of the minister of resources – the mine is, after all, in a small country and few families can afford a good education. That expert may also prefer to bank in the Netherlands or the Caymans for his own reasons and be legally allowed to do so.

With these caveats in mind, an intelligent analysis of existing corporate data can uncover signs of trouble invisible on the surface. Investigating these may lead to the discovery and elimination of corrupt activity or, at the very least, signal to those considering engaging in bribery that doing so will not be easy.

Investigating corruption risk

Zoë Newman, Managing Director, Kroll

So you've received an allegation. A foreign subsidiary may be paying bribes to secure prime mineral concessions or a member of your global sales team may be too close to a major government-held purchaser. What do you do? There is no single right answer, but there is a best approach. Despite the emotional impulse to do something, methodically applying Hercule Poirot's little grey cells in order to shape an appropriate response for each situation will get you much further in the long run than rushing in wielding Dirty Harry's Magnum.

Look before you leap

Rather than jumping straight into action, after hearing of possible wrongdoing, management should conduct a considered Initial Assessment of the allegation. This should look at two areas in particular:

The source: All claims of corruption are serious but, on examination, not all are credible. Internal allegations can often be quickly and reliably assessed by checking easily available data from various functions for red flags. This may be harder for claims coming from external sources but, in assessing customer or supplier allegations, executives should also consider the motives behind them. The nature of the source can also do much to shape the speed and type of reaction. Allegations received internally give more time for investigation; media reports may require that an immediate public relations element be part of any overall response; and regulatory notifications bring obvious legal issues.

The nature of the allegation: From the start, those dealing with the matter need to establish how serious it might become. A wise first step is to consider the regulatory, financial, legal and personnel impacts if the reports of corruption are completely accurate. In such a worst-case scenario, companies need to know what their legal liabilities and regulatory requirements might be, as well as the likely impact on other key stakeholders, such as suppliers, customers, and advisers. This analysis will also help clarify the speed with which other parties, in particular regulators or customers, need to be informed of the potential malfeasance, and therefore the time available for the firm to get a clearer idea of all the facts.

Structuring the investigation

The results of the initial assessment should shape how the internal investigation is conducted in, broadly speaking, two ways. The more obvious is that the response to the allegation should match its possible seriousness: if the matter really boils down to possible compliance peccadillos with little likely impact even if true, then relatively few resources need be deployed; if the initial assessment sparks visions of record DoJ and SEC settlements, the opposite is the case.

Equally important, in setting up the investigation, management should consider how best to establish the facts needed to determine the extent of the problem, in a way which will minimise damage to the company if the allegations are proven.

There is no single best executive position to tap as leader of the investigation, although general counsels or compliance officers often fill the role. Whoever takes on the responsibility, though, must have sufficient independence and weight in the organisation to be able to act unfettered. The other key element in choosing the head of the investigation team is the possible need for legal privilege. If consideration of the worst case suggests that it might be valuable for the results to have such protection, it would be wise to have the investigation – and sometimes even the initial assessment – led by the general counsel or, depending on the circumstances, external legal advisers.

The investigation also needs to have a team appropriate for the job. Considerations here include the ability to access and interpret the information necessary to establish the facts. This could involve anything from expertise in computer forensic tools and accounting systems to a deep cultural understanding of the country where events took place if different from that of head office. These skills may be available in house, but bringing in outside experts should be an option.

"From the very start, though, management needs to consider how to tell possibly bad results to the outside world"

Finally, any investigation should not only find out what happened but also determine how to avoid a recurrence. Creating a plan for the latter brings compliance benefits and can help reduce regulatory fines arising from the current issue.

Get ready to report

Investigations rarely follow a straightforward path so management should, from time to time, review the situation. Information uncovered along the way may provide the reassurance needed to close down the inquiry or lead the company to expand it. Obvious improvements to anti-corruption processes also do not need to wait for a final investigative report.

From the very start, though, management needs to consider how to tell possibly bad results to the outside world, a process which should accelerate as the investigation brings greater clarity. If something serious has occurred, a multi-pronged strategy that addresses all relevant stakeholders is essential.

In the worst case, for example, the company will need to consider a voluntary disclosure to relevant authorities which, in major corruption cases, may involve officials from several jurisdictions. Such disclosures almost invariably lead to some penalties but how the disclosure is made, the nature of the investigation and the extent of steps taken to prevent further corrupt practices may lessen these.

In such circumstances, businesses also need to look at whether other stakeholders, or even competitors, were negatively affected, what they may need to be told, and whether compensation should be offered. The latter may be a legal requirements or simply advisable in order to restore an essential relationship, such as with a key supplier who may have been harmed.

Finally, corruption is big news and the reputation of those involved will suffer. A PR strategy to start repairing the damage may benefit from releasing information learned in the investigation. An effective response to an allegation of corruption, then, is not a matter of responding as quickly as possible, but of thinking through the issues methodically from the start so that the investigation finds the truth and minimises any resultant damage.

A rapidly evolving legal landscape

Holman Fenwick Willan LLP

This article was written by Anthony Woolich, Nick Hutton, Graham Denny, Orla Isaacson, Gabriella Martin and Charlotte Muzabazi

Anti-bribery and anti-corruption is an increasingly important issue in the mining and extractive industries. This chapter focuses on the key recent developments in international anti-corruption laws and assesses their implications for mining companies. We then look at corporate governance and compliance strategies to help manage the risks, and at the types of insurance coverage available. And we examine what exposures remain.

Key developments in international anti-corruption laws

Over recent years there has been a significant increase in the severity of anti-corruption laws and enforcement. The UK Bribery Act 2010 (the Bribery Act) exemplifies this increasing pressure and has been part of a growing trend extending the stringency and scope of anti-corruption enforcement globally.

The Bribery Act entered into force on 1 July 2011, introducing a range of new measures. One of the key provisions addresses the bribing of a foreign public official. The prohibition of this activity is common across all jurisdictions with anti-bribery legislation.

One of the most important developments in the Bribery Act was the introduction of a new offence for a company's failure to prevent bribery. This makes it an offence for a commercial organisation carrying on business in the UK to fail to prevent 'associated persons', including employees, agents, contractors and others providing services to it, from engaging in corrupt activities on its behalf. It is a strict liability offence which means that there is no need to show an intent to bribe on the part of the company. A company is at risk for conduct which it did not sanction and which may have been beyond its control.

Under French law, a similar offence exists where a company fails to prevent bribery by 'associated persons', including their subsidiaries.

The provisions under the US Foreign Corrupt Practices Act (the FCPA) are not as pervasive. For example, the FPCA does not prohibit business-to-business bribery. However, under the FCPA, a parent company which holds a majority share in a subsidiary, is strictly liable for the failure of that subsidiary to comply with FCPA accounting provisions.

Facilitation payments

The treatment of facilitation payments also varies between jurisdictions. Such payments involve a government official being given money or goods to perform (or to expedite the performance of) an existing duty.

Under UK, French and German law there is no exemption for facilitation payments. However, such payments are currently permitted in the US, Canada and Australia. In these latter jurisdictions, care must be taken to distinguish between lawful facilitation payments and unlawful 'small bribes'. In practice, this can be difficult to do.

US and Australian laws require facilitation payments to be recorded. Strict penalties are placed on companies which fail to comply with these accounting provisions.

"Important amendments to the Canadian anti-corruption laws mean that the current exemption for facilitation payments is being phased out"

Important amendments to the Canadian anti-corruption laws mean that the current exemption for facilitation payments is being phased out. Any company which could have a connection to Canada should prepare for the prohibition coming into effect.

Whilst facilitation payments are generally prohibited under the Bribery Act, a defence is available where such payments are expressly permitted under the receiving jurisdiction's written laws. Local custom is not sufficient. A defence is also available for bona fide hospitality and promotional expenditure which is proportionate and reasonable.

Scope

The extra-territorial reach of anti-corruption laws is also a growing concern for companies. Each jurisdiction applies its anti-corruption laws to its own citizens, residents and domestic companies, including conduct within and outside its territory. The Bribery Act covers offences committed by a person with a 'close connection to the UK'. This extends to include a British overseas citizens and individuals ordinarily resident in the UK.

The US anti-corruption regime is equally far reaching, with the provisions of the FCPA being enforced in cases with little obvious domestic proximity. Indeed, the FCPA only applies to the corruption of foreign public officials and many prosecutions under the FCPA have been brought against non-US companies. It has been argued to be a *de facto* protectionist measure for the US Government.

Sanctions

Sanctions for the breach of anti-corruption provisions vary depending on jurisdiction. Most commonly they are dealt with through criminal liability and fines which are imposed on companies, directors and individuals. Sanctions can also include asset confiscation, licence revocations or even the prohibition of a company from bidding for future concessions.

US penalties are set at a maximum of 20 years imprisonment and/or fines of up to US$5 million for individuals and US$25 million for companies. In the UK, the fines on conviction of an offence under the Bribery Act are potentially unlimited.

Individuals cannot be indemnified by their employer and many of these risks cannot be insured against.

A significant penalty under UK, French and Canadian law is the confiscation of the proceeds of the corrupt act. These provisions target the proceeds received by the company or individual as a result of the bribery. For example, under the UK Proceeds of Crime Act 2002 all revenues from a contract procured by a bribe can be confiscated, not merely the profit.

In addition to these penalties, directors in the UK can be disqualified. These penalties can have a serious financial and reputational impact on the company and on individuals. The stakes under anti-corruption laws are therefore extremely high for those involved.

"Mining companies must be aware of the anti-corruption regimes of the states in which they operate"

Defences

While the Bribery Act is strict, it does provide for some important defences. A significant defence exists in relation to the failure to prevent bribery by an associated person if a company can show that it had in place 'adequate procedures' designed to ensure that associated persons did not engage in bribery.

To benefit from this defence companies must ensure that the procedures are appropriate, thorough and up-to-date. Risk assessment is key to this, particularly for companies operating in industries classified as high risk, such as mining, and operating in countries that are vulnerable to corruption.

Australian law allows the defence of having a 'corporate culture' which is compliant with the anti-corruption legislation where an agent is concerned. In contrast, under Canadian law companies have an active obligation to take reasonable steps to stop their representatives from being party to an offence.

Anti-corruption in mining states

Mining companies must be aware of the anti-corruption regimes of the states in which they operate. Many key mining jurisdictions have anti-corruption laws which prohibit the bribery of domestic officials and will hold companies liable for the corrupt conduct. The following case studies illustrate the dangers of these anti-corruption enforcement regimes and the web of litigation that can result.

BSG Resources

In 2010, BSG Resources (BSGR) was awarded a 25-year mining concession in Guinea after its confiscation from Rio Tinto. BSGR then sold the majority stake to Vale for US$2.5 billion. In April 2014, the Guinean government cancelled the licence after an inquiry found BSGR guilty of corruption, alleging that it had offered millions of dollars and shares to Mamadie Touré, the wife of a former Guinean president, to help it to acquire the concession. It was also claimed that the former Guinean mining minister was paid US$200 million for facilitating the grant of the licence.

Despite Guinea not having anti-corruption legislation, BSGR lost its mining rights and has been barred from tendering for the mining concession again. It faced no other sanctions in Guinea apart from the confiscation of the asset and reputational damage.

However, the consequences of the inquiry are ongoing. BSGR is currently engaged in arbitration to prevent Guinea from selling the mining rights. Vale is seeking to sue BSGR for its lost stake in the mining rights. Rio Tinto is suing both Vale and BSGR under US law for compensation and damages.

In addition, former BSGR lobbyist in Guinea, Frederic Cilins, was subject to investigation after being recorded offering US$6 million to Ms Touré to destroy evidence. Mr Cilins pleaded guilty to obstruction of justice and was sentenced to two years imprisonment with a US$75,000 fine.

Alcoa

In one of the largest US anti-corruption settlements of its kind, the US based Alcoa Inc (Alcoa) agreed to pay a US$384 million penalty to resolve charges of bribing officials of state controlled Aluminium Bahrain BSC (Alba).

Between 1989 and 2009, Alba was one of the largest customers of Alcoa's Australian mining subsidiary. Despite the red flags, the subsidiary retained a consultant to assist in negotiations for the supply of minerals to Alba and Bahraini government officials. Alba brought the proceedings in the US against Alcoa. The consultants had paid bribes to officials through funds generated from commissions they were paid and price mark-ups between the purchase price paid and the sale price to Alba.

The corrupt conduct occurred in Bahrain and the offence was committed by an Australian company. Alcoa was not found to have known about, or acquiesced in, the conduct. Despite this, Alcoa was pursued for violation of the FCPA as the ultimate beneficiary of the conduct. The US SEC found that Alcoa had failed to conduct due diligence or seek to determine whether there was a legitimate business purpose for the consultant and had failed to ensure that the FCPA's accounting provisions were complied with by its subsidiary.

As a result of these events, Alcoa was required to pay US$175 million in disgorgement of ill-gotten gains and US$209 million in criminal fines.

In response to these fines, US regulators advised that it is 'critical that companies assess their supply chains and determine that their business relationships have legitimate purposes'.

Developments in Extractive Industries Transparency Initiative (EITI)

The EITI runs alongside the EU's Transparency and Accounting Directive (the Directives) and has recently been subject to review. The philosophy behind the

EITI is that companies should disclose what they pay to Governments to ensure transparency and accountability in extractive industries, and to ensure that mining states' resources are not squandered.

The EITI was introduced in 2002 to enhance good governance. Its adoption is discretionary and its provisions must be incorporated into the national laws of participant states. Under the EITI, material payments made to and received by governments are published in an EITI report. There is no defined *de minimis* figure, the criteria for materiality are being developed by multi-stakeholder groups.

In 2013, the EITI broadened its scope considerably to include, in addition to revenue information, details about production volumes, the names of licence holders and information about state-owned oil and gas companies. In line with EU Directives and US Dodd-Frank Act, EITI countries will also now need to disclose payment information by project.

"Mining companies must be aware of the anti-corruption regimes of the states in which they operate"

Presently there are 29 EITI compliant countries and 17 candidate countries. The UK, Germany, France and Australia have expressed their intention to implement the EITI. Mining companies incorporated in these countries need to be aware of this development as they may soon be required to comply with the additional obligations under this initiative.

EU mandatory disclosure requirements

In June 2013, proposals to make amendments to the EU Directives on transparency requirements were approved.

Under the new rules, listed and large unlisted EU-incorporated companies will have to disclose payments made to governments of €100,000 or more. Compliance will likely require the investment of significant commercial and administrative resources. Member States must adopt the provisions by July 2015.

Implications for mining companies

In view of these regulatory developments, there are a number of key steps that companies should take.

Mining is classified as one of the highest-risk sectors for corruption, a zero-tolerance approach is therefore required. A culture of compliance needs to start from the top of the organisation. Corrupt business is bad business.

Companies need to ensure that appropriate due diligence is undertaken on all new agents, suppliers, contractors, employees and other entities that the company is dealing with. Appropriate due diligence will also be necessary for subsidiaries and any entities a company is seeking to acquire, to ensure that they too have appropriate anti-corruption policies in place. To afford any real protection, it is vital that these are documented through a full paper trail.

Companies will also need to ensure that employees are properly trained and aware of their obligations. In particular, they need to know what they must do to comply with anti-corruption policies, and when they should seek advice or guidance (red flags). For this reason, it is important to have access to appropriate policies and procedures, giving clear guidance on difficult areas such as facilitation payments, hospitality and whistle blowing.

These measures need to be supported by risk assessments and monitoring on an ongoing basis.

In view of the extended EITI and EU disclosure requirements, companies also need to maintain an appropriate level of reporting. This can add a significant burden on tax and accounting staff. Companies will need to allocate resources and establish mechanisms in order to gather this required data.

In addition, companies should carefully consider anti-bribery clauses in their contracts and ensure that appropriate warranties and restrictions are negotiated. Companies should also review the wording of confidentiality clauses in their contracts: clauses will need to be drafted to ensure that any confidentiality commitments are subject to statutory disclosure obligations which cannot be derogated from.

Compliance strategies

Establishing a successful compliance strategy is of great importance to companies protecting themselves from the risks of resource development and potential licence and retention issues. A successful compliance strategy is a continuing process, to be reviewed regularly. A compliance strategy cannot be viewed in isolation.

International regulation has had a huge influence on the development of compliance strategies and will continue to do so. As regulations change, better run companies will adapt their compliance strategies accordingly. The United Nations (UN), the Organisation of Economic Co-operation and Development (OECD) and the International Corporate Governance Network (ICGN) are all international organisations that publish guidelines to help provide a structure to a company's corporate governance strategy. The European Commission has also released its own action plan for corporate governance, which includes proposals to improve corporate governance reports, increase disclosures and introduce further initiatives for the development of corporate governance. In addition to the international and European guidelines, national guidelines are also issued to assist domestic companies in establishing their own corporate governance codes. The UK governance code is regularly updated to reflect developments in the corporate governance sphere.

The EITI initiative and the Bribery Act have also been drivers of change in the compliance area. The Bribery Act, although UK specific, has a very wide jurisdictional reach and companies will see the gradual export of UK standards down the contracting and sub-contracting chain. Increasing co-operation between prosecuting authorities, particularly in the UK and the USA, has also influenced the development of compliance strategies. This increased co-operation has seen a crackdown on corrupt payments and other criminal activities.

In addition, efforts to reduce climate change have transformed the compliance strategies of the aviation industry. Their impact is also extending to the shipping industry, and it will not be long before it reaches the extractive industries. So called "climate change governance" has almost become a separate system in its own right.

Hallmarks of good corporate governance

Greater awareness of the problems faced by companies, if a good corporate governance structure is not in place, has forced companies to confront the deficiencies in their own compliance strategies to avoid negative and unfair publicity. This is of particular relevance to the mining industry, where reports of unrest at mine sites and environmental degradation has provoked public outcry at the actions of mining companies.

The hallmark of a good corporate governance strategy is that it will examine risk around the edges of the company's operations so that the long-term success of the company is ensured. A good corporate governance strategy should maintain sound risk management and internal control systems. Companies with good corporate governance perform better in terms of shareholder returns in the longer term than those companies with deficient corporate governance. Good corporate governance needs to be driven from the board level downwards, throughout a company's operations: it should not be developed by risk managers and pushed upwards.

The UK corporate governance code considers that a successful compliance strategy addresses the following key areas: leadership, effectiveness, accountability, remuneration and relations with shareholders. In respect of each of these key areas, the principles of transparency, accountability, fairness and responsibility are emphasised. Fundamentally, good corporate governance is achieved through adequate disclosure that encourages trust and confidence in the company and the management systems in place.

Of particular importance to mining companies is a corporate governance strategy that addresses human rights and development, as mining companies often operate in developing countries where abuses of human rights are unfortunately common. The UN has published principles of business and human rights that provide helpful guidance to companies as to what should be addressed as part of a good corporate governance strategy. A corporate governance code that includes a structure that deals with business ethics, human rights and development provides a solid foundation for companies to operate from.

Due diligence and compliance

It is crucially important for a mining company to undertake a detailed due diligence investigation into the operations of a target entity, as inadequate due diligence investigations could trigger a multitude of issues for the acquiring company. In particular, adequate due diligence will establish the risks that a company may face on resource development and potential liabilities and licence retention issues. The due diligence process is supported by the indemnities and warranties in the acquisition agreement, which also helps to balance the risk that the buyer and seller respectively undertake.

Assessment of risk

The OECD has published a useful report on due diligence guidance for responsible supply chains of minerals from conflict affected and high risk areas. It is important for companies to establish whether a mine is located in a high risk area. Risk can be assessed through an analysis of the circumstances of the proposed acquisition, in addition to an evaluation of the international and domestic law, the recommendations of international organisations for a company's business conduct, government backed tools and a company's internal policies and systems. Failure to assess risk adequately can lead to reputational damage, legal liability and the potential to harm people.

Technical and commercial due diligence

Primarily, it goes without saying that companies should undertake due diligence to ensure that the mine has sufficient coal or mineral reserves and that the quality of the coal or mineral is satisfactory. Companies need to obtain geological surveys in addition to a qualified person report to confirm this. A full examination of the mine will determine what equipment, machinery and infrastructure are already in place.

The important driver in technical and commercial due diligence is the location of the mine. This will determine to what extent companies can get power and water supplied to it. Companies will need to check, particularly when they are buying out a group, whether the supply contracts automatically continue or whether a re-negotiation is required. Assuming you have got sufficient water and power to run the mine, there is then the question of transporting the mined commodity to the exporting port. This can be particularly problematic where a mine has been in operation for many years, and may have changed hands several times in group reorganisations. If the mined commodity is to be transported by railway to the exporting port, companies may have the right to use the railway, which is typically provided by a third party, but not necessarily so. Companies will also need to establish that they can export their mined commodity, and do not have to wait behind more favoured mine users at the port. The agreements for the operation of the railway and for the operation of the port need to be carefully examined to make sure that the new buyer continues to enjoy the same rights of use as the seller. If the company needs to negotiate new access arrangements or power supply contracts, the company must always be aware of the issue of bribery and facilitation payments in certain countries.

Financial

Companies will need to investigate the financials of the seller relating to the mine. This will involve obtaining copies of the seller's accounts, including management accounts. The buyer will need to assess the key financial parameters of the mine operation. A general cost analysis should be undertaken to evaluate the mine's annual production capacity, mining requirements, sales, FOB average selling price, production cost of sales, stripping ratio, net debt, operating profit, operating margin and EBITDA and so on. The buyer also should analyse the capital expenditure, debts, creditors and financial projections of the seller in addition to looking at its work obligations.

Companies should also obtain all financial documentation and derivatives, financial assurance and bonds (in respect of rehabilitation, environmental and rail/port take or pay), guarantees and security documents. The buyer must raise any discrepancies in the accounts or documents with the seller at pre-contract stage.

Legal

It is just as important that companies undertake a legal and commercial due diligence. This involves obtaining copies of all mining tenements, concessions, licences and permits, in addition to corporate matters including: due incorporation, constitution, share rights and board minutes. Companies will need to check whether consents are required for the transaction, whether there are pre-emption rights and where the root of title is. Rights of pre-emption and options that might affect the purchase will be crucially important to the buyer.

It is also important that companies analyse the seller's material contracts, insurance policies and lease agreements to ensure that there is no ongoing litigation, disputes or liabilities outstanding under the contracts. In particular, the buyer must ensure that the seller has all the requisite environmental licences – for example, waste water disposal – as failure to obtain adequate environment licenses can lead to delays and fines. It can also lead to adverse publicity for the mining company, as environmental issues are a global concern.

Local legal and social engagement

The importance of the local community, and due diligence on the local community, has become increasingly important to mining companies. As corporations have grown and the extractive industry has expanded, civil society groups have become more aware of mining companies' business.

Companies need to be certain of access to the land and this goes to a detailed investigation into the root of title and the necessary permits and consents required for the continued operation of the mine. Claims by indigenous people need to be considered not only from the legal point of view but from the social responsibility angle too. This is particularly relevant in areas of conflict and high risk. Companies must ensure that the acquisition of a mine does not facilitate, contribute to, profit from or assist with any form of degrading or inhuman treatment, torture, or any form of compulsory labour. To help prevent this from occurring, companies should employ competent local advisers to guide companies through the whole process, including establishing native root of title and ensuring regulatory compliance. It is important that companies also do their due diligence on the local advisers to be employed – making sure that the local advisers are legitimate and have come to the deal with clean hands is crucial.

It is our experience that in certain countries, typically those following a civil code rather than a common law legal system, the law can be imprecise and quite often some provisions of the law conflict with other provisions. For example, the forestry law might prevent the stripping of the top soil, which the mining law and the concessions and the permits may all allow. Furthermore, where there are different levels of government, particularly in developing countries, companies can find themselves embroiled in disputes between the different levels on who can grant particular permits. This can lead to uncertainty about whether a mine has the right operating permits to continue on a sale. This sort of issue tends to arise around a change of control and there is increased sensitivity to avoiding any form of inducement.

Compliance advice to companies

UK companies must be aware of the implications of the Bribery Act in terms of investment in extractive industry projects around the world, but also more widely the question of compliance with EU, US and Australian financial sanctions. Understanding the risks and challenges involved, implementing a comprehensive compliance strategy, keeping abreast of changes in regulation, and obtaining adequate insurance and reinsurance cover, will help to protect a company from the increasing risks mining companies face.

“Insurance is an important tool in the risk manager’s armoury

Insurance coverage

Insurance is an important tool in the risk manager’s armoury, which together with a company’s internal compliance procedures forms part of a risk management programme aimed at minimising not just the risk of claims, investigations and fines, but also their financial consequences.

Increased globalisation of industry, particularly in industrial sectors operating in emerging markets such as the mining sector, has significantly increased the issues risk managers need to consider when formulating a risk management programme. For example, when focussing on insurance architecture (the structure of a company’s insurances), the imperative must be not only on contract certainty but also contract quality to ensure the insurances respond as intended, providing the cover required in the geographical locations the business operates in.

Pre-claims/investigations insurance considerations

The complexities caused by cross-border business operations to global insurance programmes can require sophisticated solutions to ensure that the different regulatory jurisdictions and laws are taken into account. A failure to have the correct local insurances in place can lead to draconian consequences on companies and their directors and officers.

Creating an effective risk management programme requires a host of internal guidelines and policies to ensure that a company and its directors stay on the right side of the law. From an insurance perspective, procedures are needed across all the business units to ensure that if investigations or claims (or circumstances) arise, they can be notified to insurers within the terms and conditions of the relevant insurance policies. In formulating such procedures the following should be considered:

1. What and when matters are required to be notified. This will depend upon the different triggers in the insurance policies, for example whether circumstances are required to be notified or just claims. Also, in what time frame – immediately, as soon as practicable, or within a set time limit?
2. Quick flow of information is required as well as an ability to capture evidence quickly, not only for notification purposes but also to support the insurance claim and, where necessary, to ensure preventative action can be taken to limit liability.
3. Claims protocols should be agreed with insurance brokers to ensure that there is clarity on the reporting lines in the event of a claim or investigation. How conflicts are managed will need to be considered. Investigations and claims could involve the company and multiple directors.
4. In relation to directors and officers insurance, those that are covered by the insurance should be informed of the scope of cover and who they report to in order to notify circumstances or claims. The cover may provide emergency contact numbers for directors to obtain urgent legal advice. A protocol will be needed so that insureds understand the situations in which such advice can be sought.

Insurance cover

When focusing on anti-corruption and ways of mitigating financial loss or the consequences of investigations and/or claims, there are three main insurances: errors and omissions (E&O) insurance; directors and officers (D&O) insurance and crime insurance. Whilst a number of other insurance products are important from a compliance perspective, such as cyber insurance, we focus hereon these three key insurance products.

1. E&O insurance, in its basic form, provides cover for third party claims and the legal expenses associated with defending such claims. In addition, cover for investigation costs which indemnify or pay for the legal advice/representation

received by the company during formal investigations is usually included.
2. D&O insurance provides cover to directors and officers of companies for third-party liabilities and the associated legal defence costs. It also provides cover for legal expenses incurred on formal investigations involving directors and/or officers.
3. Crime insurance, unlike E&O and D&O insurance, are first party insurance policies indemnifying the company where it has suffered a loss at the hands of an employee's or third party's dishonesty or fraud.

Each of these insurances has its own nuances.

E&O insurance

When considering the scope of cover, there are a number of issues to be aware of:
1. Investigation costs. Historically, investigation costs were sub-limited, although this is becoming less common. Investigations, particularly across jurisdictions, can be expensive, so careful consideration should be given to the limits of cover. Just as important are the triggers for this cover. Typically, insurance policies only indemnify legal costs incurred in relation to a "formal" investigation, as opposed to "informal" investigations. At what point the right to an indemnity is triggered can be a grey area. Consideration needs to be given to the formulation of the investigation costs cover to ensure that it is understood at what point legal costs are indemnified.
2. Mitigation costs cover. This is not a cover automatically provided in E&O policies. This extension provides a company with an indemnity for reasonable fees, costs and expenses incurred as a direct result of action taken to prevent, limit or mitigate a company's exposure to damages. Without such cover an E&O policy will not necessarily indemnify the legal costs incurred in undertaking such preventative action.
3. Contractual liability. Insuring clauses in E&O policies usually require the claim to be for a civil liability for the policy to respond. What constitutes a civil liability is usually defined within the policy. It does not include contractual liability and there are specific exclusions for this, for example, excluding "loss resulting from any claim or for legal liability assumed by the Assured under the specific terms, conditions or warranties of any contract, unless such liability would nevertheless have attached by law in the absence of such term, condition or warranty." Usually, third party claims allege breaches of concurrent duties in tort as well as contract. In such cases, an E&O policy would respond; however, where the claim is purely contractual in nature it is unlikely that the policy will not respond.
4. Restitution/unjust enrichment. E&O insurance indemnifies the company for compensatory liabilities owed to a third party. Claims for restitution or unjust enrichment are not considered to be compensatory claims but rather claims for a return of monies to which the company was not entitled in the first place. Restitu-

tion and unjust enrichment claims are normally excluded under E&O policies.

5. Fines and penalties. These are usually excluded from cover on the basis of public policy and common law. For those businesses that operate in multiple jurisdictions and are at the mercy of different legal systems, we have seen insurance wordings broadening to allow the indemnification of fines and penalties to the extent they are "permitted by law". This leaves open the possibility of receiving an indemnity in respect of a fine or penalty where a jurisdiction's legal system permits this.

D&O Insurance

D&O insurance, in its basic form, provides an indemnity to the company in situations where the company is permitted to indemnify directors or officers for legal representation or advice costs. In addition, where the company is not permitted to indemnify a director or officer for such costs, the policy provides an indemnity for such legal advice/representation costs.

We have seen an increasing trend of greater regulation and co-operation between regulators, whether nationally or internationally, and a drive for transparency in business operations as well as directors'/employees' conduct. D&O insurance is therefore becoming increasingly important:

1. Insuring clauses often require a claim or investigation to arise from a wrongful act by a director or officer. What constitutes a wrongful act will be defined in the policy and can differ between policies. This can have a significant effect on the scope of cover.
2. Aggregate limit. D&O limits are written on an aggregate limit basis and so the limits reduce the more calls there are on the policy during the policy period. It is therefore extremely important to ensure that the right specialist legal advice is obtained at the outset to make the best use of the available limit.
3. Definition of directors and officers. The larger the group of insureds, the greater the risk of the policy limits eroding. This definition can vary between jurisdictions. For example, in Argentina an officer is translated as a "functionary" and this can result in a large selection of employees potentially being covered who were not intended to be. Other coverage issues to be considered are whether senior executives or non-executive directors should have ring-fenced limits of cover.
4. Professional services exclusion. This exclusion is usually drafted broadly in D&O policies incorporating language to ensure the cover excludes claims "arising from or attributable to or in connection with" the performance or failure to perform professional services "by or on behalf of" any director or officer. This exclusion frequently causes difficulties for those directors or officers implicated in corruption or bribery where it could be argued that the paying of the bribe was done "in connection with" the performance of his employment or services. In such cases, it is unlikely that the D&O policy would provide cover.

5. Dishonesty/fraud. D&O policies contain dishonesty and fraud exclusions and it is usual for these to provide defence costs cover up to a final determination of dishonesty or fraud. It is important to ensure this is the case and that the exclusion does not take effect earlier, for instance on a determination of fraud or dishonesty, as this affects the scope of the cover significantly.
6. Consideration also should be given to the scope of the extradition cover available.

Crime insurance

The level of cover available from crime policies varies depending upon the insured's requirements. In addition to employee dishonesty, it is possible to extend cover to include loss suffered from forged instruments, computer and telephonic misuse, physical loss of property and extortion. The policies can also cover acts of third parties as well as collusion between employees and third parties. Issues to be aware of in relation to crime policies, include:

1. Loss. Cover is usually provided for direct financial loss which is normally defined in the policies. It will usually include: direct financial loss to the company; claims preparation costs; legal fees and costs associated with the verification and reconstitution or removal of electronic data.
2. Improper financial gain or intent to cause loss. It is often a condition that the act which has caused the loss must be committed with the intent either to make an improper financial gain or cause loss to the company.
3. Proof of loss. Policies usually require the insured to provide insurers with a Proof of Loss setting out: all the facts leading to the loss, the amount of the loss and the supporting documentation in order to prove the loss suffered. The requirement and time limits (often 6 months) for providing the Proof of Loss are usually drafted as a condition precedent in the policy. Confusion can occur as to when exactly time starts to run and the exact date on which the Proof of Loss is due. This should always be agreed with insurers as early as possible in the claim process and extensions sought well in advance if more time is needed.

Building an effective risk management programme to limit risk to companies and directors is not straightforward. The issues discussed above are but a few of the insurance matters that fall for consideration. It does help to explain the increasing prominence and responsibilities placed on risk managers and general counsel in companies. In addition, it explains the increasing reliance on external legal counsel to help guide companies on risk management issues, including insurance architecture development and stress testing, as well as providing specialist defence and advisory services in the event of investigations and/or litigation.

For further information, please contact Anthony Woolich, Partner, on +44 (0)20 7264 8033 or anthony.woolich@hfw.com; Nick Hutton, Partner, on +44 (0)20 7264 8254 or nick.hutton@hfw.com; or Graham Denny, Partner, on +44 (0)20 7264 8387 or graham.denny@hfw.com.

Holman Fenwick Willan

Holman Fenwick Willan is an international law firm advising on all matters connected with the international mining industry. Our lawyers act for mining companies, investment banks, traders, power generators, insurers (including captives), shipowners and charterers. We advise all stakeholders in the mining sector on the specific legal requirements arising in relation to anti-corruption, anti-bribery and compliance, as well as more broadly on issues ranging from risk management, insurance and reinsurance, projects, joint ventures, M&A, capital markets, service engagement, regulation, dispute resolution, corporate governance, logistics and political risks.
Website: www.hfw.com

Anthony Woolich

Partner

Anthony focuses on regulatory matters, including anti-bribery/anti-corruption, competition/anti-trust and international trade sanctions. He leads HFW's team on UK Bribery Act matters, and is HFW's own anti-bribery officer. His experience includes advising a multinational on an investigation by the World Bank into the award and performance of an infrastructure contract, as well as advising various companies on anti-bribery policies and procedures.

Nick Hutton

Partner

Nick specialises in transactional, corporate and commercial law with particular reference to the mining, energy, insurance and transport industries. His practice spans a range of areas, including national and international mergers and acquisitions; joint ventures; regulation (both international and UK); capital markets (issues of debt and equity); and restructuring.

Graham Denny

Partner

Graham specialises in insurance law and national and international dispute resolution. His insurance expertise includes advising on: management liability/directors' & officers' insurance; property damage/business interruption; and corporate liability. He has recently been quoted in the Institute of Risk Manager's "High-Growth Markets Risk Report 2014".

holman fenwick willan hfw

Kroll

Kroll is the leading global provider of risk solutions. It helps its clients prevent, respond to and remediate risk, leveraging its 40 years of expertise in screening, investigations & intelligence, analytics, and data management. Headquartered in New York with 55 offices across 26 countries, Kroll has a multidisciplinary team of nearly 2,300 employees.

Website: www.kroll.com

Tommy Helsby

Chairman

Since joining Kroll in 1981, Tommy Helsby has been at the heart of the firm's growth from a single office in New York to more than 55 offices around the world. He plays a strategic role both for the firm and in advising many of its key clients, in dispute work, corporate transactions, reputation management and compliance consulting.

Kevin Braine

Managing Director and Head of the Compliance practice for EMEA

Kevin is responsible for the expansion of Kroll's compliance services throughout the region. He has extensive experience assisting clients in areas such as pre-transaction due diligence and third party agent screening.

Zoë Newman

Managing Director, Kroll's investigations practice

Zoë Newman has specific expertise in financial investigations involving fraud, corruption and regulatory breaches including FCPA and the UK Bribery Act. Since joining Kroll in 2000, Zoë has conducted numerous cross border investigations around the world.

Stefano Demichelis

Associate Managing Director, SE Asia Investigations practice

Stefano advises and works with clients on the prevention, detection and investigation of frauds. Stefano has also created fraud detection tests and established data mining techniques to facilitate and conduct fraud investigations at various organisations.

Kroll®

Aspermont Media, 120 Old Broad Street, London EC2N 1AR UK Tel: +44 (0)20 7216 6060

Aspermont Media Information for Industry