

# ICC ANTI-CORRUPTION CLAUSE



## Highlights

- Clause to be included in contracts whereby parties commit to complying with ICC Rules on Combating Corruption or commit to put in place and maintain a corporate anti-corruption compliance programme
- Helps preserve trust between parties and prevents corruption in both the negotiation and performance of contracts



International Chamber of Commerce

*The world business organization*

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# Foreword

by **Jean-Guy Carrier, ICC Secretary General**

The International Chamber of Commerce has prepared over the years a large number of model contracts and clauses. These documents reflect best international corporate practice in transactional work, facilitate business negotiations and improve the drafting of the numerous contractual documents companies are processing.

At the same time, ICC has been concerned about the devastating effects on business of corruptive practices. It has become clear that corruption constitutes an obstacle to the creation of the level playing field all corporations want to see materialize, and runs counter to international public order.

Therefore, ICC in 1977 issued the ICC Rules on Combating Corruption (the ‘Rules’), thereby becoming the first international organization to issue rules condemning all forms of corruption and urging companies to put into place preventive measures to ban corruption from their transactions.

The voluntary ICC Rules were regularly revised to reflect best corporate practice and to mirror the provisions of key international anti-bribery instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).

To consolidate the progress made by the business world in its corporate practice, the ICC Rules were rewritten in 2011. The 2011 edition of the Rules contains three parts: Part I states the Rules proper, Part II deals with policies that enterprises should enact to support compliance with the Rules, and Part III lists the suggested elements of an effective corporate compliance programme. The 2011 Rules are designed to be applied by enterprises of any size, whether large, medium or small.

The International Chamber of Commerce considers that its mission does not stop at prescribing voluntary anti-corruption norms, but also includes urging companies to incorporate in their agreements, in full or by reference, anti-corruption provisions either in the form of the core ICC anti-corruption standards, listed in Part I of the 2011 Rules or by the adoption of a corporate compliance programme, as recommended by Article 10 of the 2011 Rules.

The present ICC Anti-corruption Clause will help business people and their advisors to make such essential reference, with the aim of creating trust and preventing their contractual relationships from being affected by corruptive practice.



**Jean-Guy Carrier**

## Introductory Note on the Application and the General Purpose and Structure of the Clause

This ICC Anti-corruption Clause (the 'Clause'), is intended to apply to any contract that incorporates it either by reference or in full. While parties to a contract are encouraged to incorporate the Clause into their contract by its full name, it is anticipated that any reference in the contract to the 'Clause' or related variations shall, in the absence of evidence to the contrary, be deemed to be a reference to the ICC Anti-corruption Clause.

The general aim of the Clause is to provide parties with a contractual provision that will reassure them about the integrity of their counterparts during the pre-contractual period as well as during the term of the contract and even thereafter.

Three options are possible: either a short text with the technique of incorporation by reference of Part I of the ICC Rules on Combating Corruption 2011 (Option I) or the incorporation of the full text of the same Part I of the ICC Rules on Combating Corruption 2011 in their contract (Option II), or a reference to a corporate compliance programme, as described in Article 10 of the ICC Rules on Combating Corruption (Option III).

Where Options I and II have been chosen, if a party fails materially or on several repeated occasions to comply with the anti-corruption provisions incorporated in the contract, the non-complying party will be given the opportunity to remedy the non-compliance. Such party will also have the opportunity to invoke as a defence that it has put into place adequate anti-corruption preventive measures. In the absence of the non-complying party taking remedial action, or if remedial action is not possible and no defence is effectively invoked, the other party may suspend or terminate the contract, at its discretion.

Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with the Clause.

# ICC Anti-corruption Clause

## A. Option I: Incorporation by reference of Part I of the ICC Rules on Combating Corruption 2011

### Paragraph 1

Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from doing so.

### Paragraph 2

The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other third parties, subject to their control or determining influence, will comply with Part I of the ICC Rules on Combating Corruption 2011, which is hereby incorporated by reference into the Contract, as if written out in the Contract in full.

### Paragraph 3

If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

### Paragraph 4

Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause.

## B. Option II: Incorporation in full of Part I of the ICC Rules on Combating Corruption 2011

### Paragraph 1

Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from doing so.

### Paragraph 2

The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other third parties, subject to their control or determining influence, will comply with the following provisions:

#### Paragraph 2.1

Parties will prohibit the following practices at all times and in any form, in relation with a public official at the international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of a Party, whether these practices are engaged in directly or indirectly, including through third parties:

a) **Bribery** is the offering, promising, giving, authorizing or accepting of any undue pecuniary or other advantage to, by or for any of the persons listed above or for anyone else in order to obtain or retain a business or other improper advantage, e.g. in connection with public or private procurement contract awards, regulatory permits, taxation, customs, judicial and legislative proceedings.

Bribery often includes:

- (i) kicking back a portion of a contract payment to government or party officials or to employees of the other contracting Party, their close relatives, friends or business partners or
- (ii) using intermediaries such as agents, subcontractors, consultants or other third parties, to channel payments to government or party officials, or to employees of the other contracting Party, their relatives, friends or business partners.

b) **Extortion or Solicitation** is the demanding of a bribe, whether or not coupled with a threat if the demand is refused. Each Party will oppose any attempt of Extortion or Solicitation and is encouraged to report such attempts through available formal or informal reporting mechanisms, unless such reporting is deemed to be counter-productive under the circumstances.

c) **Trading in Influence** is the offering or Solicitation of an undue advantage in order to exert an improper, real, or supposed influence with a view of obtaining from a public official an undue advantage for the original instigator of the act or for any other person.

d) **Laundering the proceeds of the Corrupt Practices mentioned above** is the concealing or disguising the illicit origin, source, location, disposition, movement or ownership of property, knowing that such property is the proceeds of crime.

“Corruption” or “Corrupt Practice(s)”, as used in this ICC Anti-corruption Clause, shall include Bribery, Extortion or Solicitation, Trading in Influence and Laundering the proceeds of these practices.



## Paragraph 2.2

With respect to third parties, subject to the control or determining influence of a Party, including but not limited to agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries, acting on the Party's behalf in connection with marketing or sales, the negotiation of contracts, the obtaining of licenses, permits or other authorizations, or any actions that benefit the Party or as subcontractors in the supply chain, Parties should instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a conduit for any corrupt practice; hire them only to the extent appropriate for the regular conduct of the Party's business; and not pay them more than an appropriate remuneration for their legitimate services.

## Paragraph 3

If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of Paragraphs 2.1 and 2.2 above, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action or if such remedial action is not possible, it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend or terminate the Contract, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

## Paragraph 4

Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause.

## **C. Option III: Reference to a corporate anti-corruption compliance programme, as described in Article 10 in the 2011 Rules**

### Paragraph 1

Each Party has put into place, at the date of the entering into force of the Contract, or undertakes to put into place soon thereafter, a corporate anti-corruption compliance programme, as described in Article 10 of the 2011 ICC Rules on Combating Corruption, adapted to its particular circumstances and capable of detecting Corruption and of promoting a culture of integrity in its organization.

Each Party will maintain and implement such programme at least throughout the lifetime of the Contract and will on a regular basis inform the other Party about the implementation of its programme through statements prepared by a qualified corporate representative, appointed by it and whose name will have been communicated to the other Party.

## Paragraph 2

If a Party brings evidence that the other Party's qualified corporate representative statement contains material deficiencies, undermining the other Party's program efficiency, it will notify the other Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

## Paragraph 3

Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause 2012.

# Commentary on the ICC Anti-corruption Clause

## Options I and II

### Paragraph 1: Non-corruption undertaking covering the pre-contractual period

#### **1. The ICC Anti-corruption Clause aims at creating trust between Parties**

Integrity is a key factor in bringing about a business environment that gives best value for money and rewards skill and competitiveness. Best results are achieved in business transactions when predictability and trust prevail between Parties. Combating bribery and other corrupt practices is also vital for protecting shareholders, taxpayers and other entities indirectly affected by business transactions.

While there is a need to ensure that corrupt practices do not bear fruit, there is also a need to maintain trust in the binding nature of the contractual undertakings (*pacta sunt servanda*), as it is a core component of successful business life. There must, therefore, be a balance between the efforts to fight corruption and the treatment of corruption as a breach of a Contract justifying its termination.

Integrity must prevail throughout the life-cycle of a business transaction, from its negotiation to its performance and resulting remuneration. Very often a contractual transaction involves a multitude of Parties with a substantial number of personnel. Corrupt practices may not exist throughout an entire organization, and they may not be instigated by, or otherwise be attributable to, the management holding the principal responsibility for the negotiation or performance of the Contract.

When preparing their Contract, Parties want to make sure that during the negotiations leading to the Contract and during the drafting of the Contract (the pre-contractual period), no bribe, gift or other undue advantage has been granted or promised (or that no indication in this sense has been given for the future) in relation to the Contract by a Party to a public official at the international, national or local level, a political party, party official or candidate to political office or to a director, officer or employee of the other Party, either directly or indirectly through one of the Party's subcontractors, agents or other third party, subject to its control or determining influence.

Each Party also wants to ascertain that the other Party has put in place reasonable preventive measures to avoid that one of the other Party's subcontractors, agents, or other third parties engages in corrupt practices.

In sum, the Clause is written with the aim of achieving a balance between the interest of Parties to avoid corruption and their need to ensure the attainment of the objectives of the Contract. The Clause builds on the doctrine of good faith, the presumption of innocence, good cooperation between Parties and the idea that many illicit practices can be remedied without bringing the contractual relationship to an end.

#### **2. Which are the Corrupt Practices covered by Paragraph 1?**

The wording of Paragraph 1 mirrors that used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).

The corrupt practices covered by Paragraph 1 include: (i) 'active' as well as 'passive' corruption (also referred to at times as 'Extortion' or 'Solicitation'); (ii) Bribery as well as trading in influence; (iii) Corruption of public officials, as well as private-to-private corruption; (iv) Corruption in the national and local as well as in the international sphere; (v) Corruption with or without the use of intermediaries; (vi) Bribery with money or through any other form of undue advantage; and (vii) Bribery with or without laundered money.

### **3. Is Paragraph 1 referring to even the smallest undue advantages?**

ICC recommends enterprises not to make ‘facilitation payments’ (i.e. unofficial, improper, small payments made to a low-level official to secure or expedite the performance of a routine or necessary action to which the payer is legally entitled), unless their employees are confronted with exigent circumstances, such as duress or when the health, security or safety of their employees are at risk.

On the issue of gifts and hospitality offered to e.g., actual or potential commercial partners, ICC recommends that enterprises establish procedures to ensure that they (i) comply with the law; (ii) are reasonable and bona fide; (iii) do not affect (or appear to affect) the recipient’s independence of judgment towards the giver; (iv) are not contrary to the known provisions of the recipient’s code of conduct and (v) are offered or received neither too frequently nor at an inappropriate time.

### **4. Which ‘reasonable preventive measures’ have to be taken by the Parties with respect to their intermediaries?**

A Party is not required to prevent by all means any of its subcontractors, agents or other third parties, subject to its control or determining influence, to commit any form of corrupt practice.

Each Party shall, however, based on a periodical assessment of the risks it faces, put into place an effective corporate compliance programme, adapted to its particular circumstances; exercise, on the basis of a structured risk management approach, appropriate due diligence in the selection of subcontractors, agents or other third parties, subject to its control or determining influence; and train its directors, officers and employees accordingly.

### **5. To which circumstances is the undertaking of Paragraph 1 applicable?**

Having regard to the fast evolution of the law and practice in the field of business integrity, the undertaking of Paragraph 1 should be concerned with only the very Contract itself and not other contracts concluded between the same Parties, or any other contracts.

## **Paragraph 2: Non-corruption undertaking covering the period after execution of the Contract (contractual and post-contractual periods)**

### **1. The term of the Parties’ non-corruption undertaking**

Parties agree, during the period following the entering into force of the Contract and after the term of the Contract, not to commit corrupt practices in connection with the Contract.

They will have to ensure that no phase of the performance of the Contract, such as obtaining the relevant licenses or official authorizations, the passing of operational tests, or inspections of goods or sites will be obtained through illicit means. They also undertake to take reasonable measures to prevent their subcontractors, agents and other third parties to do the same during such period. The Parties’ non-corruption undertaking survives the term of the Contract.

### **2. Paragraph 2 contains a provision for incorporation either by reference or in full**

In order to memorialize their mutual non-corruption undertaking, Parties decide to incorporate the text of Part I of the ICC Rules on Combating Corruption 2011 in their Contract. They can choose either to make this incorporation by reference or in full. In the former case, they will opt for the text under Option I, in the latter for the text under Option II.

For the sake of convenience, the text of Part I of the ICC Rules on Combating Corruption 2011 is attached hereto as Annex I.

### **3. The nature of the Parties' undertaking**

The Parties' undertaking is absolute, while their undertaking in relation to their subcontractors, agents or other third parties, subject to their control or determining influence, is limited to the taking of 'reasonable measures' in order to prevent the latter from engaging in corrupt practices.

This will include as a minimum: instructing subcontractors, agents and other third parties neither to engage nor to tolerate that they engage in any corrupt practice; not using them as a conduit for any corrupt practice; hiring them only to the extent appropriate for the regular conduct of the Party's business and not paying them more than an appropriate remuneration for their legitimate services.

## **Paragraph 3: Non-compliance, remedial action and sanctions**

### **1. Non-compliance with Part I of the ICC Rules**

If a Party becomes aware that the other Party has committed material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the other Party accordingly.

A Party invoking corruption must bring evidence that corruption is at stake. Evidence is often difficult to find, as is the disclosure of it to the other Party without losing it or causing damage for the further use of it. Therefore the requirement to bring evidence does not necessarily mean that corroborative evidence should be produced or that all evidence be disclosed to the other Party in every case. Evidence should, however, be sufficient to prove that suspicions of corruption are not invoked in a vexatious or otherwise unjustified manner.

The Clause includes no formal requirements as to how the Parties should make a notification of suspected breach under Part I of the Rules, but typically the mechanism applicable generally to contractual communications between the Parties, will apply to this notification as well. Thus, a Contract containing a requirement that any notification will be made in writing will cover notices on suspected corruption as well.

### **2. Possible remedial action**

In order to ensure to the highest degree possible the continuity of a Contract, the allegedly non-complying Party will be allowed to remedy the situation to the extent possible. Necessary remedial action might include providing cooperation in evidentiary action in conducting an examination or calling for an external audit of the incident, issuing warnings, reorganizing work, terminating sub-contracts or contracts of employment with persons or employees involved in corruption, or correcting the detrimental economic effect on the other Party of any proven non-compliance by, for example, adjusting the amount of the price of the Contract. The nature and quantity of the remedial measures required of the Party subject to allegation will depend on the circumstances of the case in question, e.g., on the gravity of the infringement and on the conclusiveness of the evidence provided. In some situations, a remedy may consist of simply providing counter-evidence regarding non-existence of any breach. The allegedly non-complying Party will as soon as possible inform the other Party about the measures it has taken to remedy the situation.

It is recognized, however, that not every infringement of the anti-corruption provisions can be remedied, but it is expected from the allegedly non-complying Party that it will do its utmost to repair the situation to the best of its abilities.

### **3. Invoking the defence of adequate anti-corruption preventive measures**

Where a remedy is not or cannot be taken, the Party allegedly in breach may invoke a defence by proving that it had, by the time the evidence of breach had arisen, put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. Such adequate anti-corruption prevention measures should (i) reflect the ICC Rules on Combating Corruption 2011, (ii) be based on the results of a periodically conducted assessment of the risks faced in the Party's business environment, and (iii) be adapted to the Party's particular circumstances.

For the sake of convenience, the text of Article 10 of the ICC Rules on Combating Corruption 2011 is attached hereto as Annex II.

### **4. Evidence of non-compliance**

Producing evidence of an infringement of the anti-corruption provisions, laid down in Part I of the ICC Rules on Combating Corruption 2011, will not be an easy task, as corruption very rarely occurs in the open.

One of the few means to produce such evidence will be to provide the conclusions of an audit of the accounting books and financial records of the allegedly non-complying Party. Witness statements (as a result of a whistleblowing mechanism or otherwise) may sometimes be used. Applicable criminal law should be taken into account when considering the involvement of law enforcement bodies.

### **5. Audit right**

The reference in the Clause to a contractually-provided audit right does not, however, imply that an audit right can be easily obtained in all circumstances nor that such audit right will be suitable for all situations. Although some Contracts give one or more Parties the right to conduct an audit on the other Party (-ies), the reference in this Clause to an audit right does not mean that ICC advocates giving Parties an extensive audit right as a recommended business practice.

Parties will have to determine if their commercial relationship allows for an audit right, and if the circumstances surrounding the negotiation, execution and future implementation of the Contract warrant the need for such audit right.

### **6. Sanctions**

If the Party allegedly infringing the provisions of Part I of the ICC Rules on Combating Corruption 2011, does not remedy the situation within a reasonable period of time or if no such remedy is possible, and no defence of adequate anti-corruption preventive measures is effectively invoked, the other Party will have the right, at its discretion, to suspend the Contract or terminate it, it being understood that the amounts contractually due at the time of suspension or termination will remain payable, as far as permitted by applicable law.

When the other Party exercises its right of suspension or termination, it bears the full burden of proof that a breach or breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011 has taken place.

Applicable law may determine whether the Party may be held accountable for a breach or breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011.

Bringing a large or long-term Contract to an end due to an infringement might be disproportionate. This should also be borne in mind when Paragraph 3 of the Clause is applied.

## Paragraph 4: Dispute resolution

Parties refer all disputes related to the contractual consequences of any alleged non-compliance with the Clause to the entity provided for in the dispute resolution provisions of the Contract, such as an arbitral tribunal. However, the non-compliance may be the subject of parallel criminal proceedings which may result in criminal sanctions or other civil law consequences than contractual, in particular liability in tort.

## Option III

### Paragraph 1: Corporate compliance programmes

#### **1. Corporate compliance programmes, as described in Article 10 of the ICC Rules**

Many companies have put into place a corporate compliance programme with the aim of preventing their business activity from being affected by corruptive practices. Such programmes can have different forms and content and will need to be adapted to each company's particular circumstances in order to be effective. They also should make it possible to detect Corruption and should aim at promoting a culture of integrity in the organization. Article 10 of the ICC Rules on Combating Corruption 2011 provides an extensive, non-comprehensive list of measures, which may be included in such programme. Each company will select from this list the measures it deems necessary or adequate for organizing its own anti-corruption prevention system.

#### **2. Putting into place a corporate compliance programme**

When the Parties enter a Contract, it helps reinforce trust between them to know that their counterpart has put into place - or is going to put into place soon - a corporate compliance programme. Parties will commit to maintain their compliance programme and to implement its provisions at least during the term of the Contract, thus maintaining during that period of time an atmosphere of trust between the Parties.

#### **3. Designation of a qualified corporate representative**

In order to evidence the effectiveness of the programme and the continuity of its implementation, each Party will designate among its personnel a qualified corporate representative, whose name will be notified to the other Party. These qualified corporate representatives will issue, at regular intervals, statements on the continued existence and implementation its company's programme.

### Paragraph 2: Deficiencies in a qualified corporate representative's statement, remedial action and sanctions

#### **1. Deficiencies in a qualified corporate representative's statement**

If a Party becomes aware that the other Party's qualified corporate representative's statement contains material deficiencies, undermining the efficiency of that Party's programme, it will notify the latter Party accordingly. A statement will be considered deficient if it contains materially untrue, false or incomplete declarations.

A Party invoking a deficiency in a qualified corporate representative's statement must bring evidence that either the statements are missing or that the statement contains materially untrue, false or incomplete declarations.













