

## Anti-corruption clause in agricultural contracts in Ukraine

### Introduction

1. Practical goals of the anti-corruption clause
2. Ways for implementing the anti-corruption clause
3. Definition of the anti-corruption clause
4. Should an anti-corruption clause be included in the contracts?
5. What to pay attention to

B

Until 2014, anti-corruption clauses could be found mainly in international contracts of Ukrainian agricultural companies with large grain traders, suppliers, logistics companies, financial institutions of American or British origin.

With the adoption of the Law “On Prevention of Corruption” in 2014, anti-corruption clauses began to be actively applied in Ukrainian contracts as well. Essentially, this is how the state has engaged private businesses in the fight against corruption. Anti-corruption clauses in contracts in such conditions cease to be a formality and can both protect the company from risks and prevent their occurrence.

Anti-corruption clauses in agricultural contracts (both international and Ukrainian) not only protect the company from corruption risks but also impose certain obligations and responsibilities on the agricultural enterprise. The effective use of the anti-corruption clause in an agricultural contract is based on a reasonable balance of the potential benefits and potential consequences of the commitments made.

To achieve such a balance, it is important to clearly understand the goal, implementation methods, definition points, and consequences of including anti-corruption clauses in contracts.

### 1. Practical goals of the anti-corruption clause

The state, being unable to achieve certain international political goals (in this case – anti-corruption and bribery), shifts responsibility for achieving them to private business. In this way, the commercially vague goal is transformed into very real goals:

- compliance of the company's activities with the requirements of anti-corruption legislation. For example, American and British companies must have and enforce anti-bribery policies. Ukrainian state-owned companies and companies that actively cooperate with the state budget should also develop and implement anti-corruption programs. Such companies should include anti-corruption clauses in their contracts as part of their mandatory programs and policies;
- compliance with the requirements of the counterparty. For example, in agrarian contracts with grain traders or large suppliers operating under the US Foreign Corrupt Practices Act or the UK Bribery Act, an anti-corruption clause is an obligatory condition. The same applies to concluding contracts with Ukrainian state-owned companies or in the process of public procurement;
- the possibility of terminating the contract if its terms are the result of commercial bribery or other types of corruption violation;
- creating standards of conduct in relations between counterparties that they can't violate without being subject to contractual sanctions;
- the possibility to quickly withdraw from toxic commercial relations if the counterparty is involved in a corruption scandal.

## 2. Ways for implementing the anti-corruption clause

Usually, the anti-corruption clause is implemented in several ways:

- conducting an audit of the counterparty on the compliance of its activities with the principles of anti-corruption policy;
- unilateral termination of the contract and claim for damages;
- appeal to law enforcement agencies if any of the supporting statements of the counterparty are known to be untrue;
- appeal to judicial or arbitration institutions for compensation for damages caused by the termination of the contract based on an anti-corruption clause.

## 3. Definition of the anti-corruption clause

There are no clear requirements for the content of the anti-corruption clause in the contracts. Existing practice should be taken into account when defining or analyzing the anti-corruption clause in the contract. The source of this practice may be an anti-corruption sample clause issued by the International Chamber of Commerce in 2012.

Usually, when defining or analyzing anti-corruption clauses, the following should be noted:

- an anti-corruption clause consists of supporting statements about the circumstances that existed before, a covenant (obligations to take

certain actions or refrain from them in the future), and guarantees about the circumstances that determine the current status of the parties.

For example: "Each party declares in favor of the other party that at the time of entry into force of the Contract, the party, its representatives, officers or employees did not offer, promise, provide, authorize to provide, organize the provision or accept Illegal benefits or advantages (or hint at the possibility of doing so in the future) in any way related to the Contract (supporting statement). None of the owners or beneficiaries of the party is a public officer and has intentions to become a public officer during the term of this contract (guarantee). The Parties shall take reasonable steps to prevent the above actions by the above persons, as well as subcontractors, representatives and any third parties under the control or determining influence of the party (covenant)";

- the anti-corruption clause must clearly define the terms used (public officer, illegal benefit, commercial bribery, gift, etc.). For example: "Illegal benefits – cash, cash equivalents, services, goods or other property, advantages, privileges, intangible assets, any other benefits of an intangible or non-monetary nature that are promised, offered, provided or received without legal grounds for inciting a person to commit inappropriate actions or refraining from committing appropriate actions";
- the anti-corruption clause should contain statements, commitments (covenants), and guarantees relating to the anti-corruption and bribery issues.

For example: the counterparty's guarantee of its representatives' authority confirmation or the absence of the sanctions against beneficiaries or representatives should not be included in the anti-corruption clause. This is the subject of a separate section of the contract containing general statements, covenants, and guarantees;

- the anti-corruption clause may include the right of a party to audit the other party for compliance with anti-corruption policies and legislation;
- the anti-corruption clause should include the right of the party to terminate the contract and claim damages in case the other party violates this clause.

#### **4. Should an anti-corruption clause be included in the contracts?**

Any company that wants to enter into anti-corruption provisions or obligations in the contract must understand in advance the goal that it really intends to achieve. An anti-corruption clause should not be included in the contract solely on a "just in case" basis. Such a clause should be designed and included in the contract in case of the real risk of the commercial transaction and be proportionate to the company's goal. Otherwise, the anti-corruption clause will overburden relations between counterparties.

It is also important that the anti-corruption clause corresponds not only to the intention but also to the parties' actual readiness to

implement it. For example, if a Ukrainian company is not ready to terminate a contract in the event of commercial bribery of its employee, it makes no sense to include an anti-corruption clause in the contract.

The possibility of implementing an anti-corruption clause must also be realistically assessed. For example, in Ukraine, the fact that a person has committed a corruption crime can be established only by a court. Given the dynamics of trade relations, the expectation of the investigation's completion and the verdict of the court simply doesn't correspond to the realities of business.

This situation can create the illusion that the anti-corruption clause can't be implemented at all. However, in disputes resolved under the law of England, for example, the practice of recent years shows the possibility of termination of the contract without establishing the fact of corruption by national law enforcement agencies.

Agricultural companies in Ukraine that sign international contracts with anti-corruption clauses need to assess the full scope and possible consequences of such provisions. In this context, it is important to ensure that the parties have a common understanding of the specific expectations of such a clause. Ideally, the implementation protocol should be agreed in advance in the contract (in the text of the anti-corruption clause) to avoid future misunderstandings.

This is important in light of the arbitral decisions of European courts in recent years, which have begun to implement anti-corruption clauses in commercial contracts. The anti-corruption clause is no longer a formal necessity and can be the basis for real consequences.

## 5. What to pay attention to

First of all, it should be borne in mind that when concluding a contract with an American or British company, the inclusion of an anti-corruption clause is inevitable. The same situation arises when concluding contracts with Ukrainian companies that have developed and approved anti-corruption programs.

Usually, anti-corruption clauses in contracts with such counterparties are extremely overloaded with supporting statements, guarantees, and commitments. They may also contain strict and often unenforceable requirements for auditing compliance with anti-corruption rules. Very often in the legal analysis of the contract, these clauses are ignored. But given the trends in arbitration and litigation, this is a misguided approach and can have purely commercial consequences.

Analyzing the anti-corruption clause in the contract, first of all, it is worth paying attention to:

- the content of the statements, commitments, and guarantees. The Company may only confirm or warrant such circumstances as it may

reasonably know. The same applies to commitments – the company can only take actions that are under its control. For example, in Ukrainian realities, it is impossible to guarantee that law enforcement agencies will not open a criminal case on suspicion of committing a corruption crime by company employees. These circumstances do not depend on the will of the company. When declaring no convictions for corruption offenses or the absence of criminal proceedings against an authorized employee of a company, it should be understood that the source of such information is usually the statement of the employee. Such information can't be promptly legally verified (for example, in Ukraine, individuals do not have access to the Unified Register of Pre-trial Investigations);

- the rights of the counterparty to conduct an audit of the company for compliance with anti-corruption legislation. Such an audit may, for example, require the provision of information that includes the personal data of employees. Then the company will be forced to either violate the terms of the contract or violate the law on personal data protection;
- consequences of violating the anti-corruption clause. In the world of contractual practice, it is considered incorrect to include fines as the consequences of the anti-corruption clause violations. The main consequences of such a violation are the right to unilateral termination of the contract and compensation for damages resulting from such termination;

Generally, the inclusion of the anti-corruption clauses is becoming more common in international trade transactions. Unreasonable refusal to include such clauses in international contracts may adversely affect the reputation of a Ukrainian agricultural company. At the same time, it is worth paying close and professional attention to anti-corruption clauses in contracts. Otherwise, the anti-corruption clause in the contract may lead to obligations for the Ukrainian company that can't be fulfilled, or the fulfillment of which is beyond the control of such a company causing losses in the trade transaction.