Legal Cases for Training

The cases presented below were used in a training Session on Third Party Commissions conducted by HFW law firm at MACN London Members Meeting 2018.

MACN
Maritime Anti-Corruption Network

Case A

In this case a large shipping company has a range of concerns about the implications of the Bribery Act for a foreign company operating in the UK.

One of the key issues was the appointment and payment of agents. This is a particularly high risk relationship because, as with brokers, agents may provide services to both the ship owner and the charterer. Paying the commission to agents is therefore an area which is vulnerable to allegations of bribery. For example, commissions to agents may be inflated in return for services like introducing parties to each other. These benefits are not always obtained legitimately and can be the result of agents themselves engaging in corrupt activities with other parties.

To add to these problems the company's agents are often responsible for operations such as paying port disbursements and other fees. As already mentioned, this can be dangerous territory and owners and charterers need to be aware of the risks of incurring liability as a result of a bribe being paid by an agent for their benefit.

Case B

Another international shipping company has concerns about public officials and port employees demanding increased commissions for preferential treatment.

Third parties may use times of severe commercial pressure and urgency to offer questionable benefits in return for higher commission. This makes resisting the urge to pay them all the more difficult.

Case C: Boris Berezovsky v Edmiston

This case involved Boris Berezovsky, the Russian billionaire who famously died in mysterious circumstances after falling out with Vladimir Putin.

Berezovsky commissioned the Luerssen shipyard in Germany to build him a luxury super-yacht named the DARIUS. Berezovsky was obliged to make regular payments or Luerssen would terminate the contract but he ran out of funds while the yacht was still under construction. He therefore engaged a ship broker, Edmiston and Co, to arrange the sale of the yacht on his behalf.
No express agreement was ever made as to the rate of commission payable for Edmiston's brokerage services.

A dispute then arose between Edmiston and Berezovsky when the yacht sold for just €240m to the Al Futtaim family from the UAE. Edmiston had previously stated that a sale price of €300m was 'definitely achievable'.

In light of the disappointing sale price Berezovsky contested the amount of commission that was due and argued that he should pay a low rate to reflect the sale price. The High Court initially awarded Edmiston commission of 3% as a reasonable rate for the services it rendered. It reasoned that the low sale price was as much a detriment to Edmiston as it was to Berezovsky and should therefore be set at the usual rate for such a transaction.

However this was reduced on appeal to 2.5%. In establishing this figure the Court of Appeal highlighted that the court must pay close attention to any statements made by parties at the material time – i.e. when parties are discussing the provision of brokerage services. It referred to discussions between the parties in which Edmiston had said he would have been happy with a commission of 2.5%.

Case D: Shagang Shipping Company v HNA Group Company

Although this case did not involve the UK Bribery Act 2010 it did involve accusations of bribery under Chinese law in the form of payments used to induce entry into a charterparty.

In this case HFW represented the Claimant, Shagang Shipping Company (**Shagang**) against HNA Group Company in the Court of Appeal.

Grand China Shipping Company (**Grand China**) chartered a vessel from Shagang for a period of 82-86 months. The charterparty was guaranteed by HNA. After just four months Grand China defaulted on its payments under the charterparty. Shagang made a demand for the payment to HNA as Grand China's guarantor. However, HNA also refused to pay and the charterparty was terminated by Shagang on the basis of Grand China's breach.

It later emerged that Shagang's General Manager had given RMB 300,000 to an employee at Shagang and asked him to use it to induce Grand China to enter into the charterparty. The employee had been at college with the son of Mr Jia Hongxiang – the CEO of Grand China and General Manager at HNA. The money was passed from the employee to Mr Jia's son and in return he convinced his father to enter into the charterparty.

After investigations by the Public Security Bureau (**PSB**) for Haikou the payment was found to be a bribe. The precise nature of the charges against the men involved remain unclear but they were reported to have confessed while in custody. One of the accused men was sentenced to one month in prison.
However, in the UK, the Court of Appeal could find no evidence of bribery by the accused men. The court concluded that their claims of having been tortured by the PSB into making these confessions could not be disproved on the information available. The court encouraged further investigation by the Chinese authorities.

Nonetheless, the case revealed several procedural failures by Grand China and HNA. In entering into the charterparty they had failed to conduct the usual procedural safeguards. Grand China had lifted the requirement for board approval of the transaction and the charterparty had not been submitted to HNA for legal and financial review. Nor had either party been aware of the potential risks posed by the proximity of employees at Shagang and Grand China.

Case E: Serious Fraud Office v XYZ Ltd

In this case XYZ was a UK SME engaged in exporting products to Asian markets. XYZ was acquired by a US company in 2000.

Between 2004 and 2012 several employees at XYZ and their agents bribed a large number of clients in order to win further orders for the company. Net profits from the relevant contracts reached over £2.5 million. XYZ had used agents in Asian jurisdictions to approach third parties that it was thought would be able to influence the award of contracts to XYZ. Commission was paid to these third parties in return for brokering new contracts with XYZ.

Due to growing concerns about the way in which contracts were being secured, XYZ's parent company implemented a new global compliance program. This prompted a self-report to the SFO outlining the affected contracts.

The SFO made its own investigation while XYZ instructed a law firm to uncover further details on the wrongdoing and to expand the search into earlier contracts. In total 74 contracts were investigated with 28 found to have been implicated.

On the basis of the irregularities surrounding these contracts, but taking into account XYZ's cooperation, the SFO decided to seek a deferred prosecution agreement with XYZ for bribery.
Significantly the SFO could not find evidence of any illegality in the agreements between the agents and the people they were instructed to influence. However, the SFO did convince the court that there was criminality in the payments that XYZ made to its agents and that XYZ had failed to prevent its employees from engaging in bribery. This was decided following the discovery of a number of shell companies in which large sums had been held without any apparent commercial purpose.
The payments made to XYZ's agents were described variously as 'fixed commission', 'special commission' and 'additional commission'. In the context of the case the court agreed with the SFO that these terms were merely euphemisms for bribes.

Case F: Serious Fraud Office v Standard Bank plc

Standard Bank offered to provide financing to the Government of Tanzania. In return for the loan Standard Bank quoted a commission of 1.4% of the gross proceeds of the financing. However, the Tanzanian Government was reluctant and negotiations failed to progress.

In order to move the deal forward Standard Bank enlisted the services of an intermediary company called Enterprise Growth Market Advisors (EGMA). Two of the three directors of this organisation were the Commissioner of the Tanzania Revenue Authority and the CEO of the Tanzanian Capital Markets and Securities Authority. Both were therefore influential members of the Government of Tanzania.
Standard Bank agreed to pay EGMA a commission of 1% of the funds raised in return for brokering the deal, thus bringing the total commission for the funding to 2.4%. The financing was agreed with the Government of Tanzania and a total of $600 million was raised.

No evidence could be found that EGMA had provided services of any value to the conduct of the financing. The commission of $6 million for brokering the deal was paid to EGMA by Standard Bank as agreed. The directors of EGMA almost immediately withdrew this money in cash.
Soon after the withdrawals were made a witness raised the alarm and they were reported to Standard Bank's head office. They immediately instructed a law firm to investigate the matter on their behalf. Shortly after the first investigation report was produced both the SFO and the Serious and Organised Crime Agency were informed.

Despite operating in a high risk jurisdiction Standard Bank had failed to conduct any due diligence on EGMA or to ensure that the commission which it paid was a reasonable amount in return for an actual service.

Case G: Serious Fraud Office v Rolls-Royce plc

The SFO's Rolls-Royce investigation spanned a dozen countries and approximately 23 years of wrongdoing. Some 70 SFO investigators were involved in uncovering bribery and corruption that were widespread and reached all the way up to the company's senior management. There were also anti-corruption investigations into Rolls-Royce in other countries, for example, China.

Bribes were paid in the form of commissions to third parties despite Rolls Royce having imposed strict rules in place to prevent this. Rolls-Royce required all commissions worth more than 5% of the contract price or worth more than £150,000 to be personally authorised by the Chief Executive.
Employees used various methods to subvert these limits. This included splitting larger commissions into several smaller ones which could pass unreported. Alternatively employees simply refused to report the payments. This was facilitated by Rolls-Royce's opaque management reporting structure and the relative autonomy of regional offices.

Rolls-Royce's chief executive for the majority of the relevant period, Sir John Rose, was also brought under suspicion. Under his leadership anti-bribery practices were flouted even as new and supposedly ever more stringent compliance policies were implemented.

Due to Rolls-Royce's cooperation with the SFO, the investigation resulted in a Deferred Prosecution Agreement. This spared Rolls-Royce from prosecution so long as they adhered to new compliance measures for up to five years and paid a global settlement of £671 million in fines. Settlements were reached with the US Department of Justice and Brazilian Authorities as well as the SFO.

Many have criticised the decision not to prosecute Rolls-Royce for such blatant breaches. It has been suggested that this leniency was due to the company's political connections and its provision of equipment to the UK Government. However the SFO has defended its decision on the grounds that Rolls-Royce cooperated fully with its investigation and even waived privilege over the 30 million documents it provided to the SFO.

Case H: Fictional Scenario

ShippingCo is a ship owner. It owns an ageing container ship which is in a state of disrepair. ShippingCo is having cash flow problems and needs someone to charter the vessel as soon as possible so that it doesn't default on its debts. Unfortunately it is struggling to find a charterer willing to pay the required amount.
ShippingCo contacts a broker, CrookedCo, and discusses opportunities for chartering the container ship. During the conversation ShippingCo makes it clear that CrookedCo will be very well remunerated if it finds a charterer who is willing to pay the amount that ShippingCo is trying to charter the vessel for. No amount is specified but ShippingCo is desperate and indicates that it will be unusually high.

CrookedCo contacts an old colleague at a large charterer, NaiveCo, and convinces him to get NaiveCo to charter the vessel. Privately they agree to share the commission paid by ShippingCo between them.
NaiveCo has limited due diligence procedures in place and does not monitor the activities of its employees closely. NaiveCo enters into a charterparty with ShippingCo for 60 months. There is no mention of the commission to be paid to the broker in the charterparty.

ShippingCo is delighted that the container ship has been chartered. It makes the payments on its debts and pays commission at 8% to CrookedCo in return for getting it such a good deal.
After 10 months the container ship suffers numerous malfunctions and has to undergo expensive repairs. NaiveCo's central management realise that they have been ripped off and instructs a law firm to begin an investigation.

The situation is reported to the SFO and NaiveCo is found to have breached the Bribery Act 2010. NaiveCo is hit with large fines and required to comply with a stringent compliance procedure for the next 5 years.

Case I: Petrobras

The investigation, dubbed Operation Car Wash, began in March 2014, investigating allegations that Petrobras executives had accepted over $2bn in bribes from a cartel of construction and engineering firms in return for awarding them contracts at inflated prices.

The cartel of firms dealt with Petrobras under a secret agreement for over 10 years, under which the cartel would nominate one of its members to be awarded each Petrobras contract - for refineries, oil rigs, and other multimillion-dollar projects. Petrobras executives were bribed to go along with the arrangement.
Brazil's largest construction conglomerate Odebrecht is one of the firms that has admitted that it bribed officials in Brazil and elsewhere in South America to win contracts. Former CEO Marcelo Odebrecht was found guilty of paying more than £21m in commissions to Petrobras officials, civil servants and government ministers in exchange for contracts and influence. He is serving a 19-year prison sentence, and, along with 76 other Odebrecht officials, is cooperating with the investigators as part of a plea deal.

By December 2017, over 300 people had been implicated and approximately 180 convictions had been made for crimes ranging from corruption, abuse of the international financial system and drug trafficking to money laundering.

In April 2017, Petrobras was ordered to pay fines totalling $2.6bn to authorities in Brazil, Switzerland, and the US after admitting to paying officials in twelve countries approximately $788m in bribes. It has reached plea deals with other South American countries.
The investigation expanded and eventually reached former president Luiz Inacio Lula da Silva. In July 2017, Lula was found guilty of the first of five charges against him – that he had been given a beachfront apartment by engineering firm OAS in return for his help in winning contracts with Petrobras. He was sentenced to 12 years in prison.

In January 2018, Petrobras reached a $2.95bn settlement in a US class action corruption lawsuit – the largest such payout in the US by a foreign entity.

Case J: Keppel O&M

Another company embroiled in the fallout from the Petrobras case is Keppel Offshore & Marine (**Keppel**). Keppel is a Singaporean-based shipbuilder that specialises in the construction of offshore oil rigs.
Keppel implemented a bribery scheme which lasted over a decade and earned it 13 contracts with Petrobras and another Brazilian oil company called Sete Brasil (**Sete**). These contracts were worth approximately $351m.

Keppel operated by instructing an agent in Brazil, Mr Zwi Skornicki, whom Keppel referred to as a 'consultant'. Mr Skornicki was paid in commissions for his services in facilitating interactions between Keppel, Brazilian politicians, and executives at Petrobras and Sete. In turn Skornicki arranged for commissions of 1% of the total contract price of oil rig construction contracts to be paid on to these parties. In one of these transactions, with Sete Brasil, the commission of 1% of the contract price amounted to $14m. This was to be split, with two thirds going to the Brazilian Workers' Party and the remainder being divided between Petrobras and Sete executives.

Despite initial denial and following the arrest of Mr Skornicki, Keppel eventually acknowledged that 'certain transactions... may be suspicious'. Keppel was investigated by US authorities and given a fine of $422m, far more than it actually earned on the corrupt contracts.
US authorities noted that illicit payments were deliberately concealed by structuring them as commissions to Keppel's agents.

The company has now undergone extensive remedial measures as part of its Deferred Prosecution Agreement. This has included disciplinary action and financial sanctions against several employees. Keppel's CEO now emphasises that the company fully supports 'rigorous anti-corruption training and robust compliance and governance regimes'.